The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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N O T I C E

In the Matter of Donna Seegars Givens

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on March 12, 2014 beginning at 2:30 p.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Thomas E. Hite, Jr., Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

February 10, 2014

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

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N O T I C E

In the Matter of Robert A. Gamble

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The Committee on Character and Fitness has now scheduled a hearing in this regard on March 12, 2014 beginning at 1:00 p.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Thomas E. Hite, Jr., Chairman
Committee on Character and Fitness
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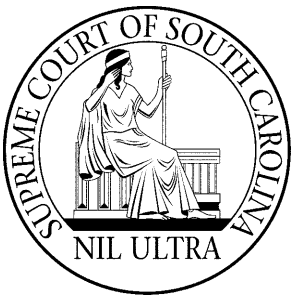

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6
February 12, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Anderson, Appellant.

Appellate Case No. 2012-210188

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5196
Heard September 10, 2013 – Filed February 12, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia, for Respondent.

WILLIAMS, J.: James Anderson was convicted of first-degree burglary. On appeal, Anderson argues the trial court erred by qualifying a crime scene investigator as an expert in fingerprint analysis. In addition, Anderson claims the trial court erred in refusing to strike the investigator's testimony or, in the alternative, to grant a mistrial based on the State's failure to disclose fingerprint evidence favorable to him prior to trial. We affirm.

FACTS/PROCEDURAL HISTORY

During the week of July 4, 2009, Christian Vickery, Allen Smith, and Joseph Emming were vacationing with their families at the Blue Water Resort hotel in Myrtle Beach, South Carolina. On the night of July 8, 2009, their hotel suite was burglarized. Anderson was subsequently arrested for the crime and charged with first-degree burglary.

At trial, all three victims testified. Emming stated he was lying on the couch in the living room when he saw an African-American male pass through the kitchen into the living room. When Emming got off the couch, the perpetrator ran out the door. Emming unequivocally identified Anderson as the person he saw in the hotel suite during the burglary. Vickery testified that she and Smith were sleeping in one of the bedrooms when the burglary occurred. Shortly after falling asleep, Vickery awakened and noticed her bedroom door and window were open, despite the door and window being closed when she went to sleep. Vickery stated she saw a black male outside the door to the suite. Smith testified Vickery awoke him and told him someone had been in their bedroom. He then reached down to put on his shorts, but his shorts and wallet were missing. Smith stated he never saw the perpetrator.

To connect Anderson to the crime, the State proffered Brad McClelland as an expert witness regarding fingerprint analysis and comparison. McClelland stated he was currently employed with the Federal Bureau of Prisons. However, at the time of the burglary, he worked as a crime scene investigator for the Myrtle Beach Police Department (MBPD). In support of his qualification as an expert, McClelland testified he had completed the following training: twelve hours of continuing education courses in forensic science and law; forty hours of training in basic fingerprint analysis with the South Carolina Law Enforcement Division (SLED); forty hours of private training in advanced palm print analysis in North Carolina; and an additional four-hour advanced fingerprint class administered by SLED in Columbia. He testified he became a certified Automated Fingerprint Identification System[1] (AFIS) examiner by passing a test administered by SLED in

[1] Law enforcement fingerprints every person who is arrested in this state. *State v. Anderson*, 386 S.C. 120, 130, 687 S.E.2d 35, 40 (2009). SLED then receives and maintains these known prints on the arrestee's ten-print card in the condition in which it arrives. *Id.* The AFIS database stores all of the digital fingerprint images of every ten-print card in South Carolina. *Id.* When a latent fingerprint is found at a crime scene, law enforcement can analyze this print by running it through AFIS

Columbia. McClelland explained his AFIS certification was based on a proficiency test that required comparing ten-print cards of known prints to unknown prints until he accurately matched all of the cards. Since becoming a certified AFIS examiner, McClelland had viewed 300 to 500 unknown fingerprints and correctly matched forty to fifty of those unknown prints.

Anderson objected to McClelland's qualification as an expert, arguing he lacked adequate experience and disputing whether McClelland had the "proper schooling" to make him an expert in fingerprint analysis. Upon further examination by the trial court, McClelland testified that the subject of the classes he took was fingerprint comparison identification. He confirmed he had not previously been qualified by a court as an expert in fingerprint identification. McClelland had previously been asked to provide expert testimony; however, those cases never went to trial. Ultimately, the trial court qualified McClelland as an expert witness. In making this determination, the trial court found the sufficiency of McClelland's education and validity of his conclusions were matters for the jury after proper instructions on the role of expert testimony in the case.

After the State's proffer of McClelland's testimony and the trial court's ruling, McClelland testified before the jury. According to McClelland, he responded to the scene of the burglary and lifted fingerprints from the inside of the windowsill. McClelland stated he ran the best print through AFIS, requested a list of thirty known prints with similar characteristics, and was ultimately able to find a known print identical to the fingerprint left on the windowsill.

On cross-examination, McClelland was questioned about obtaining fingerprints from the windowsill and submitting a print through the AFIS identification process. McClelland testified that AFIS does not return actual fingerprint matches. According to McClelland, the examiner requests anywhere between ten and fifty responses. AFIS then returns a list of fingerprints that are similar to the unknown fingerprint, and the examiner must then physically review each potential matching print and compare it with the latent print from the crime scene.

McClelland testified that in the instant case, he analyzed the subject fingerprint points,[2] entered the points into AFIS, and at his request, the system returned thirty

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to determine whether the recovered print matches any prints in the AFIS database. *Id.* at 130, 687 S.E.2d at 39.

fingerprints that contained similar points to the subject fingerprint. McClelland stated he did not analyze all thirty prints because the second print he examined contained eleven matching points. In his opinion, the matched print was identical to the subject print, and the probability the print belonged to someone other than the person he identified was zero.

According to McClelland, the MBPD required all matched prints be verified by another examiner. In this case, Officer Ioni examined and verified the match. On redirect, McClelland testified he was confident the print he lifted from the crime scene matched the known print generated on AFIS. Marilyn Sanders, AFIS coordinator and SLED fingerprint examiner, subsequently confirmed that the known print in AFIS belonged to Anderson.

In light of McClelland's testimony, Anderson argued outside the jury's presence that "[he] never received any information that there were thirty hits from the AFIS computer, nor did [he] receive the fingerprints of those thirty individuals to look and compare and to determine how close some of the other individuals were on there." Anderson further argued that while the summary of results and the matched print were provided to him, the twenty-nine unmatched prints were not provided to him. In response, the State argued it produced everything in its possession, including a printed AFIS screenshot listing the identification numbers from the thirty fingerprint results. Upon query from the trial court, the State clarified it never printed nor produced the thirty individual results, only the summary of results. The State also acknowledged that only law enforcement officers could view and compare the fingerprint results on AFIS, and accordingly, Anderson could not have obtained the print outs of the other identified prints on his own.

The trial court framed Anderson's argument as a claim that Anderson was entitled to the twenty-nine identified but unmatched prints to do his own analysis to determine whether those prints were exculpatory. The trial court noted that to grant relief for a discovery violation, Anderson would have to show there is a probability that exculpatory evidence, if produced, would have brought about a different result at trial. The trial court found there was no proof of the existence of exculpatory evidence and the State complied with the rules of criminal procedure by giving Anderson the AFIS results screenshot and the matched print result. The

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[2] McClelland testified the term "points" includes the ridge endings, bifurcations, dots, and other minute details of each fingerprint.

trial court then denied Anderson's motion to exclude the fingerprint analysis evidence.

Upon completion of the State's case, Anderson renewed his motion to strike McClelland's fingerprint testimony. Anderson argued he was prejudiced by the omission of the documents because McClelland admitted he stopped reviewing the thirty fingerprint results after the second print contained eleven matching points. According to Anderson, one or more of the other potential matching fingerprints could have contained more matching points and, therefore, were potentially exculpatory. In the alternative, Anderson made a motion for a new trial. The State responded that no discovery violation occurred because it provided the printout summary of the thirty fingerprints and Anderson could have requested these printouts. The trial court agreed and denied Anderson's motions.

Anderson testified in his own defense. He stated he frequently went to the Blue Water Hotel to visit friends. Anderson believed he had been there hundreds of times, and he thought he had been in the same room shortly before the fingerprint was found. At the conclusion of Anderson's case, Anderson renewed his motions and the trial court denied the same.

After both closing arguments, the trial court charged the jury as follows:

> The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, has become [an] expert in some art, science, profession or calling may state an opinion as to the relevant and material matter in which the witness claims to be an expert, and may also state the reasons for the opinion. You should consider any expert opinion received in this case and, like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness' testimony is to be given no greater weight than that of other witnesses

> simply because the witness is an expert. Further, you are not required to accept an expert's opinion, even though it is not contradicted.

After deliberations, the jury found Anderson guilty of first-degree burglary. The trial court sentenced Anderson to twenty-five years' imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law. *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 608 (Ct. App. 2012). "'The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion.'" *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "'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.'" *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

LAW/ANALYSIS

First, Anderson argues the trial court erred by qualifying McClelland as an expert in fingerprint analysis because McClelland lacked the requisite knowledge, skill, experience, training, and education to form an opinion and testify accordingly. We disagree.

The qualification of a witness as an expert and the subsequent admission of that witness's opinion testimony are matters within the sound discretion of the trial court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." *State v. Goode*, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991). Absent an abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. *State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999).

Rule 702 of the South Carolina Rules of Evidence, entitled "Testimony by Experts," provides:

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

We hold the trial court properly qualified McClelland as an expert in fingerprint analysis pursuant to Rule 702. McClelland's experience as a crime scene investigator as well as his education and training demonstrate McClelland had acquired by "study or practical experience" the requisite knowledge to testify as an expert on the subject of fingerprint analysis and comparison. Through his experience and study, McClelland was better qualified than the jury to form an opinion on these topics. *See State v. Robinson*, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012) ("To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.") (internal quotation marks omitted); *see also Goode*, 305 S.C. at 178, 406 S.E.2d at 393 (finding police officer qualified to testify as an expert on accident impact issue when officer received twelve weeks of training at highway department academy, spent one week in "on the road" training with police force, and had four to five months experience as a state trooper at time of the accident).

Second, Anderson argues the trial court erred by either refusing to strike the testimony concerning fingerprint analysis, or, in the alternative, refusing to declare a mistrial based upon the State's failure to provide individual printouts of all thirty fingerprints as required by *Brady v. Maryland*.[3] We disagree.

The *Brady* disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. *Hyman v. State*, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676

[3] 373 U.S. 83 (1963).

(1963). Materiality of evidence is based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *Hyman*, 397 S.C. at 45, 723 S.E.2d at 380. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *Id.* at 45-46, 723 S.E.2d at 380. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Thus, an individual asserting a *Brady* violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching. *Kyles v. Whitley*, 514 U.S. 419, 419 (1995).

In our opinion, *Brady* does not require the State to turn over the unmatched prints to Anderson. In response to Anderson's discovery request, the State provided the AFIS results screenshot, which showed AFIS had produced thirty responses to McClelland's query. Anderson makes no showing that if he obtained the individual printouts of the unmatched fingerprints, they would constitute exculpatory or favorable impeachment evidence. Because the exculpatory value of the unmatched prints was entirely speculative, we find it does not fall within the rule enunciated by *Brady*. *See Agurs*, 427 U.S. at 109-10 (holding the mere possibility that an item of undisclosed information may have been helpful to the defense in its own investigation is insufficient to establish constitutional materiality under *Brady).* Accordingly, we hold the trial court did not err in this respect.

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

FEW, C.J., concurs.

KONDUROS, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood), Appellant/Respondent,

v.

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, and C. Edward Creagh, M.D., Respondents/Appellants.

Appellate Case No. 2012-212956

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5197
Heard January 9, 2014 – Filed February 12, 2014

AFFIRMED AS MODIFIED

Chad A. McGowan, Ashley W. Creech, and Jordan C. Calloway, all of McGowan, Hood & Felder, LLC, of Rock Hill; and Whitney B. Harrison, of McGowan, Hood & Felder, LLC, of Columbia, for Appellant/Respondent.

Andrew F. Lindemann, of Davidson & Lindemann, P.A., of Columbia; and H. Spencer King, of The Ward Law Firm, P.A., of Spartanburg, for Respondent/Appellant C. Edward Creagh, M.D. William U. Gunn and Joshua T. Thompson, both of Holcombe Bomar, of Spartanburg, for Respondent/Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center.

LOCKEMY, J.: In this medical malpractice action, Gladys Sims, as the guardian and conservator of Kristy L. Orlowski, (Orlowski) appeals the circuit court's grant of summary judgment, arguing the court erred in estopping Orlowski from pursuing a medical negligence claim against Dr. C. Edward Creagh and Amisub of South Carolina, d/b/a Piedmont Medical Center (the Hospital). Dr. Creagh and the Hospital cross-appeal, arguing the circuit court erred in denying their motions for summary judgment because (1) Orlowski's claim was barred by the statute of limitations, and (2) the tolling provisions of section 15-3-40 of the South Carolina Code (2005) are not applicable. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

In 2003, Orlowski received prenatal care from Dr. R. Norman Taylor, III, and his practice, Rock Hill Gynecological & Obstetrical Associates, P.A. (RH GYNOB). On September 12, 2003, Orlowski suffered an eclamptic seizure. Following the seizure, she remained at the Hospital from September 12, 2003, until November 24, 2003.

On November 25, 2003, Orlowski was re-admitted to the Hospital by Dr. Creagh, who diagnosed her with a left pleural effusion. She was discharged on November 27, 2003. On November 29, 2003, Orlowski was re-admitted to the Hospital for persistent vomiting. An MRI revealed a hydro-pneumothorax in Orlowski's left lung. Her condition continued to decline, and on December 3, 2003, she suffered a cardiopulmonary arrest. Orlowski was transferred to Carolinas Medical Center where she remained through March 29, 2004.

Orlowski alleges she has been mentally incompetent since September 12, 2003, the date of the eclamptic seizure. On March 5, 2004, Orlowski's husband, Christopher T. Orlowski, was appointed as her guardian and conservator. Orlowski's mother, Gladys Sims, is her current guardian and conservator.

On August 24, 2006, Orlowski, through Sims, filed a medical malpractice action (the Taylor lawsuit) against Dr. Taylor and RH GYNOB. In the Taylor lawsuit, Orlowski alleged that as a direct and proximate result of Dr. Taylor's and RH GYNOB's medical negligence, she "suffered severe, debilitating, and permanent neurological deficits." Specifically, Orlowski claimed Dr. Taylor and RH GYNOB breached their duty of care by negligently failing to: (1) diagnose preeclampsia; (2) refer her to a specialist for further evaluation; and (3) supervise medical personnel

and staff in her treatment. Orlowski claimed past, present, and future injuries and damages, including: (1) chronic pain and suffering; (2) substantial medical expenses; (3) disfigurement; (4) mental anguish; (5) loss of enjoyment of life; (6) loss of income and related benefits; (7) need for full time medical and nursing care; (8) permanent restrictions and impairments that make it impractical for her to care for even her most basic of personal needs; and (9) other damages as may be identified during the course of this litigation.

The Taylor lawsuit was tried in April 2009. During the trial, Orlowski presented expert medical testimony from Drs. Stephen Pliskow and Barry Schifrin, who opined, to a reasonable degree of medical certainty, that Orlowski's medical problems were caused by the September 12, 2003 eclamptic seizure which could have been avoided had Dr. Taylor hospitalized Orlowski on September 11, 2003. Orlowski's experts testified her damages were a direct and proximate result of Dr. Taylor's negligence occurring on or before September 12, 2003. The jury returned a defense verdict in the Taylor lawsuit; however, Orlowski received $300,000 as a result of a high-low settlement agreement.

Orlowski, through Sims, commenced the present action against Dr. Creagh and the Hospital (collectively, the Respondents) on November 24, 2009. Orlowski alleged the medical negligence of the Respondents occurring between November and December 2003 caused her to suffer "severe debilitating injuries which have resulted in her incompetent state due to the hypotensive episode and hypoxic condition which has caused physical suffering, severe physical, cognitive and emotional pain and distress, and has ultimately caused [her] permanent and severely disabled physical and mental state."

Orlowski claimed Dr. Creagh breached his duty of care by negligently failing to: (1) detect her deteriorating condition; (2) diagnose and treat her pulmonary deterioration; (3) diagnose and treat her for acute respiratory distress syndrome (ARDS); (4) transfer her to more qualified physicians; (5) order, review, or evaluate testing during her treatment; and (6) order the correct treatment and medication. Additionally, Orlowski claimed the Hospital breached its duty of care by negligently failing to: (1) ensure she was properly monitored during her stay; (2) have in place proper policies, procedures, and protocols for the management and discharge of patients; (3) notify proper medical personnel during her declining health; (4) diagnose and treat her ARDS, pneumonia, and empyema of her left lung which resulted in her cardiopulmonary arrest and hypoxic injuries; (5) properly train nurses and staff; (6) monitor and respond to her worsening symptoms; (7) properly and timely notify the appropriate physicians of her deteriorating

condition; (8) have appropriate policies and procedures to ensure that patients with conditions similar to hers are treated appropriately; (9) insure that proper diagnostic procedures were conducted; and (10) intervene on her behalf rather than discharging her. Orlowski sought damages against the Respondents for the same injuries and damages claimed in the Taylor lawsuit.

The Respondents filed motions for summary judgment asserting Orlowski's suit was barred by the statute of limitations for medical malpractice actions pursuant to section 15-3-545(A) of the South Carolina Code (2005). They further argued Orlowski's suit was barred by collateral estoppel based upon the adjudication of the Taylor lawsuit. The motions were heard by the circuit court on July 18, 2012. Thereafter, in August 2012, the circuit court granted summary judgment on the estoppel defense but denied summary judgment on the statute of limitations defense. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

LAW/ANALYSIS

I. Orlowski's Appeal

Orlowski argues the circuit court erred in estopping her from pursuing her medical negligence claims against the Respondents.

A. Collateral Estoppel

Under South Carolina law, "[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action,

regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

In its order, the circuit court found Orlowski was collaterally estopped from pursuing her negligence claims against the Respondents because her "presentation of evidence on liability and damages in the [Taylor lawsuit] was premised on the assumption that all of [her] injuries, damages, expenses . . . were directly and proximately caused by the negligence of Dr. Taylor and [RH GYNOB]." The court found it was "clear that [Orlowski] sought to prove that Dr. Taylor's negligence was entirely responsible for all of [Orlowski]'s injuries and damages." The court noted that at the hearing Orlowski acknowledged that the Respondents could have been joined as parties, yet she "sought to lay all blame for [her] condition and resulting damages upon Dr. Taylor and [RH GYNOB], to the exclusion of . . . [the Respondents]."

The circuit court relied on *Graham v. State Farm Fire & Casualty Insurance Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982), in granting the Respondents' summary judgment motions. In *Graham*, the plaintiff's automobile was destroyed by fire while parked in the garage of his residence. 277 S.C. at 390, 287 S.E.2d at 495. The plaintiff first sued his auto insurance company for insurance proceeds. *Id.* The auto insurer defended on the basis that the fire was deliberately set and the jury ruled in favor of the insurer. *Id.* at 390, 287 S.E.2d at 495-96. The plaintiff then brought a subsequent suit under his homeowner's policy for breach of contract. *Id.* at 390, 287 S.E.2d at 496. In that action the circuit court granted summary judgment for the homeowner's insurer and ruled that the insured was collaterally estopped by the prior judgment from bringing the second lawsuit. *Id.* The supreme court affirmed, finding "[i]t appears from the transcript of record that the appellant has had his day in court." *Id.* at 391, 287 S.E.2d at 496. The court found the sole issue in both actions was the origin of the fire and that issue was adjudicated in the first action. *Id.*

The *Graham* court cited favorably to *Jenkins v. Atlantic Coast Line Railroad Co.*, 89 S.C. 408, 71 S.E. 1010 (1911), in which the plaintiff was injured in a train accident. The plaintiff brought suit against the railroad company which owned the tracks where the accident occurred. 89 S.C. at 408, 71 S.E. at 1011. The case was tried on the merits, and judgment was entered in favor of the railroad company. *Id.*

The plaintiff then brought a second suit against another railroad company that owned and operated the train at the time of the accident. *Id.* The supreme court barred the second suit, holding:

> [T]he true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not res judicata, or technical estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies. *It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity*.

Id. at 408, 71 S.E. at 1012 (emphasis added).

Here, the circuit court concluded that the "wholesome principle" described in *Graham* and *Jenkins* was equally applicable in the present case. The court ruled Orlowski had "had her day in court" and made the decision to assert that only Dr. Taylor and RH GYNOB had caused all of her injuries and damages. As a result, the court found Orlowski was precluded from arguing the Respondents were liable for the same injuries and damages.

On appeal, Orlowski argues her assertion of negligence claims against Dr. Taylor and RH GYNOB does not preclude her from asserting that the Respondents' actions were also proximate causes of her damages. She contends Dr. Taylor, RH GYNOB, Dr. Creagh, and the Hospital can all be proximate causes of her permanent damages. Orlowski further argues she cannot be collaterally estopped from asserting negligence claims against the Respondents because the issue of their negligence was not actually litigated in the Taylor lawsuit. According to Orlowski, her claims against the Respondents are not an attempt to re-litigate *the* cause of her injuries, but are an attempt to determine whether the treatment she received from the Respondents was *a* cause of her injuries.

The Respondents assert that in the Taylor lawsuit, Orlowski argued she was totally and permanently disabled as a result of negligence attributable solely to Dr. Taylor

and RH GYNOB. They maintain Orlowski did not place any blame on the Respondents nor did she argue any medical negligence occurred after she was re-admitted to the Hospital on November 25, 2003. The Respondents note the injuries and damages Orlowski asserted in the Taylor lawsuit are the identical injuries and damages she asserts in the present suit. Therefore, they argue, Orlowski is barred by collateral estoppel from re-litigating issues decided in the Taylor lawsuit.

We agree with Orlowski. Orlowski's negligence claims against the Respondents were not "actually litigated" during the Taylor lawsuit. Additionally, we disagree with the Respondents' assertion that Orlowski claimed in the Taylor lawsuit that Dr. Taylor and RH GYNOB were the *only* causes of her injuries and damages. We are mindful that while the alleged negligence of the Respondents was never raised in the Taylor lawsuit, Orlowski's own expert, Dr. Pliskow, testified:

> Q: Within a reasonable degree of medical certainty were all of [Orlowski]'s problems; medical problems, were they caused by the eclamptic episode on September 12th?
>
> A: Yes they were.

While this testimony supports a finding that Dr. Taylor was a proximate cause of Orlowski's injuries, it does not foreclose a claim that a different medical provider was also a proximate cause of her injuries. A review of the complaints filed in both suits reveals a distinction between the deviations in the standard of care claimed against Dr. Taylor and RH GYNOB and those claimed against the Respondents. In the present suit, Orlowski is suing for a separate negligence which she contends contributed to the worsening of her condition. This negligence was not litigated in the Taylor lawsuit.

The Respondents also assert Orlowski could have joined the Respondents as parties to the Taylor lawsuit, but chose only to claim that Dr. Taylor and RH GYNOB were the cause of her injures. In its order, the circuit court noted:

> [B]y the time of trial in [Orlowski]'s action against Dr. Taylor in April, 2009, [Orlowski] and her counsel were fully apprised through discovery of the entire extensive medical record in this case, including every aspect of these Defendants['] involvement in [Orlowski]'s treatment and care. This includes every act which

> [Orlowski] now claims to be negligent treatment and care causing [Orlowski]'s injuries and damages.

We find Orlowski was not required to join the Respondents in the Taylor lawsuit. Pursuant to Rule 20(a), SCRCP, a party may choose to join multiple parties as defendants but joinder is not required. *See* Rule 20(a), SCRCP ("[a]ll persons *may* be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.") (emphasis added).

In sum, the issue in the Taylor lawsuit was whether Dr. Taylor and RH GYNOB caused Orlowski's injuries and damages. The issue in the present suit is whether the Respondents caused Orlowski's injuries and damages. Because these are two different issues, the circuit court erred in finding Orlowski was collaterally estopped from pursuing her claims against the Respondents.

B. Judicial Estoppel

Orlowski asserts it is unclear whether the circuit court applied the doctrine of collateral estoppel or judicial estoppel in granting summary judgment. Therefore, she addresses both doctrines in her brief. Although the circuit court discussed the principles of both collateral and judicial estoppel during the summary judgment motions hearing, the court only addressed collateral estoppel in its order. The Respondents argue that whether or not judicial estoppel was the basis for the circuit court's ruling, it is also an additional sustaining ground for the grant of summary judgment. Therefore, we address it below.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). In *Cothran*, our supreme court held that the following elements are necessary for the doctrine of judicial estoppel to apply:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in

> maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

357 S.C. at 215-16, 592 S.E.2d at 632.

We find Orlowski asserted inconsistent claims in the Taylor lawsuit and the present suit against the Respondents. In the Taylor lawsuit, Orlowski claimed Dr. Taylor and RH GYNOB caused her injuries and damages; however, in the present suit, she claims the Respondents caused her injuries and damages. While the positions asserted by Orlowski are inconsistent, there is no evidence they were intentionally asserted to mislead the court. Accordingly, Orlowski's claims against the Respondents are not barred by judicial estoppel.

C. Additional Sustaining Ground

As an additional sustaining ground, the Respondents argue Orlowski's medical malpractice claims are barred pursuant to the three-year statute of limitations for medical malpractice actions contained in section 15-3-545 of the South Carolina Code (2005). Additionally, they contend disability tolling for "insane" persons under section 15-3-40 of the South Carolina Code (2005) does not apply to medical malpractice claims.

1. Appealability and Preservation

In *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), our supreme court discussed the law governing additional sustaining grounds. The court explained that "in raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." *Id.* at 417, 526 S.E.2d at 722.

Orlowski argues the Respondents are asking this court to deviate from precedent refusing consideration of denied summary judgment motions by claiming that their statute of limitations argument represents an additional sustaining ground. Orlowski contends the Respondents are precluded from raising additional sustaining grounds because they did not prevail in the circuit court on the statute of limitations issue. We disagree.

The Respondents raised two grounds for summary judgment: (1) estoppel and (2) expiration of the statute of limitations. The circuit court granted summary judgment as to estoppel, and therefore, the Respondents prevailed in the lower court. Although the circuit court denied the statute of limitations defense, the Respondents are not precluded from raising this defense as an additional sustaining ground. We note "[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record." Rule 220(c), SCACR. Further, "the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) (emphasis in original).

Orlowski also contends the Respondents' statute of limitations argument is not preserved for review because their arguments on appeal are different than those argued to the circuit court. We disagree. A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On*, 338 S.C. at 419, 526 S.E. 2d at 723. Thus, this court can, at our discretion, review the Respondents' statute of limitations argument, and if we find it is proper and fair to do so, rely on it to affirm the lower court's judgment. *See id.*

2. Statute of Limitations

Orlowski alleges the injuries and damages she suffered as a result of the medical negligence of the Respondents occurred in November 2003. She commenced the present action against the Respondents in November 2009.

Section 15-3-545(A) establishes the statute of limitations for medical malpractice actions. Specifically, section 15-3-545(A) provides that a medical malpractice action

> must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, *or as tolled by this section.*

S.C. Code Ann. § 15-3-545(A) (2005) (emphasis added). The only tolling provision in section 15-3-545 is found in subsection D, which provides limited tolling applicable only to minors. *See* S.C. Code Ann. § 15-3-545(D) (2005).

Orlowski asserts that although she did not file suit against the Respondents until six years after the alleged negligent treatment, she is excused from the three-year statute of limitations because she has been mentally incompetent since September 2003. Specifically, Orlowski maintains section 15-3-40 applies to extend her limitations period from three to eight years because she qualifies as an "insane" person. Section 15-3-40 provides:

> If a person entitled to bring an action . . . under Chapter 78 of this title . . . is at the time the cause of action accrued either:
>
> (1) within the age of eighteen years; or
>
> (2) insane;
>
> the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended:
>
> > (a) more than five years by any such disability, except infancy; nor
> >
> > (b) in any case longer than one year after the disability ceases.

S.C. Code Ann. § 15-3-40 (2005).

The Respondents argue Orlowski's action is barred by application of the statute of limitations provided in section 15-3-545(A) because section 15-3-40 is inapplicable to toll the limitations period on her claims. We agree with the Respondents.

In *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993), our supreme court held

> [s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors. Inclusion of the phrase '*or as tolled by this section*' in subsection (A) clearly indicates that the *only* tolling of [section] 15-3-545(A) intended by the legislature is that contained in subsection (D).

Thus, the supreme court held tolling for minors was the only tolling of the medical malpractice statute of limitations. Consequently, because Orlowski filed her medical negligence action against the Respondents more than three years after the alleged negligence, the present suit is barred by the statute of limitations. We further note Orlowski was aware of the Respondents' alleged negligence when she filed suit against Dr. Taylor in August 2006. However, she did not file suit against the Respondents until November 2009. Thus, even if the commencement date of the statute of limitations was August 2006, Orlowski still failed to file suit within the statute of limitations. Additionally, if section 15-3-40 did apply to medical malpractice actions it would be in conflict with the six-year statute of repose set forth in section 15-3-545(A).

As an alternative ground, the Respondents assert that assuming section 15-3-40 applied, Orlowski's disability ended, and the three-year statute of limitations commenced, in March 2004 when a conservator was appointed. Thus, Orlowski was required to file suit before March 2007, which she failed to do. While the Respondents cite persuasive authority from Georgia, North Carolina, and New Hampshire supporting their position that the appointment of a conservator affects the viability of a person's insanity for tolling purposes, we need not address this issue as *Langley* is controlling in this case. We also note we are hesitant to adopt a rule that has not previously been adopted by our courts.

II. The Respondents' Appeal

The Respondents argue the circuit court erred in denying their motions for summary judgment because Orlowski's negligence claim was barred by the statute of limitations and the tolling provisions of section 15-3-40 are not applicable. According to the Respondents, they filed cross-appeals in order to preserve the statute of limitations issue for consideration by this court as an additional sustaining ground. Dr. Creagh notes in his brief that he "fully recognizes and accepts that an order denying summary judgment is not ordinarily appealable." However, he states he "has presented this additional sustaining ground by way of a cross-appeal out of an abundance of caution."

We decline to address the Respondents' statute of limitations arguments as cross-appeals because orders denying summary judgment are not appealable. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) ("[T]he denial of a motion for summary judgment is not appealable, even after final judgment."). As stated previously, these issues are also raised as additional sustaining grounds in Orlowski's appeal and are addressed above.

CONCLUSION

The circuit court erred in finding Orlowski was collaterally estopped from filing the present suit against the Respondents. However, we affirm the circuit court's grant of summary judgment based upon the expiration of the statute of limitations.

AFFIRMED AS MODIFIED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Palmer and Julia Gorman, Appellants.

Appellate Case No. 2011-203707

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5198
Heard October 9, 2013 – Filed February 12, 2014

AFFIRMED IN PART, REVERSED IN PART

Appellate Defenders Robert M. Pachak, of Columbia, for Appellant Robert Palmer, and Susan Barber Hackett, of Columbia, for Appellant Julia Gorman.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

FEW, C.J.: Robert Palmer and Julia Gorman were convicted in a joint trial of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct toward a child, in connection with the death of Gorman's seventeen-month old grandson. The State proved conclusively that the child died from blunt force head trauma while in the exclusive custody of Palmer and

Gorman. Palmer and Gorman contend, however, the trial court erred in denying their directed verdict motions because the State's evidence was insufficient to prove (1) which defendant inflicted the child's injuries, and (2) that either of them aided or abetted the other.[1] We affirm their convictions for homicide by child abuse and unlawful conduct toward a child. However, we find insufficient evidence of aiding and abetting, and therefore, we reverse those convictions. We affirm all other issues pursuant to Rule 220(b), SCACR.

I. Standard of Review

Our task on appeal is to determine whether the trial court committed an error of law in denying Palmer and Gorman's motions for a directed verdict. *See State v. Cope*, 405 S.C. 317, 334, 748 S.E.2d 194, 203 (2013) ("In criminal cases, the appellate court sits solely to review errors of law."); *State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013) (stating "the appellate court sits to review errors of law only"). Our supreme court recently summarized the standard we employ in reviewing a trial court's decision to deny a motion for a directed verdict:

> In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. During trial, when ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.
>
> On appeal, when reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state. *See State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127

[1] We consolidated their appeals pursuant to Rule 214, SCACR.

> (2000) (finding that when ruling on cases in which the state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state has presented . . . substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. *Cf. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 ("The trial judge is required to submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'") (emphasis removed) (citation omitted).

State v. Hepburn, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 17, 28-29) (some citations and internal quotation marks omitted).

II. Facts and Procedural History

On July 2, 2008, the child's mother—Gorman's daughter—left the child in Palmer and Gorman's custody under a temporary guardianship.[2] On the evening of July 14, 2008, Gorman made a 911 call from her home reporting the child had "shortness of breath." A member of the Horry County Fire and Rescue team testified that when he arrived at Gorman and Palmer's home, the child was seizing and in "a pretty grave condition." A doctor who treated the child at Conway Medical Center testified the child showed signs of "severe neurological injury," the cause of which "would have to be tremendous force to the skull." A CT scan of the child's head revealed skull fractures and swelling of the brain, which the doctor indicated "raise[d] the concern of child abuse." Due to the severity of the injuries, the child was flown to the Medical University of South Carolina (MUSC), where he was kept on life support for two days. His parents decided to cease support, and the child died July 16, 2008.

[2] The child's mother left town to visit her husband, the child's father, who was stationed out-of-state on military duty.

A forensic pathologist performed an autopsy on the child and found skull fractures on both sides of the child's head. She concluded the child died from blunt force head trauma, and the manner of death was homicide.

A. Palmer's and Gorman's Statements to Police

On July 18, 2008, Palmer and Gorman gave statements to the police. Palmer told police he did not know what happened to the child and denied hurting him. Similarly, Gorman told police she did not know how the injury occurred, but neither she nor Palmer hurt the child.

When asked whether the child's injuries could have been caused by being shaken, Gorman denied ever shaking the child. However, after the police continued to question her, she admitted she may have shaken the child and demonstrated how she shook him. She stated she did not think she shook him hard and denied shaking him the day he went to the hospital.

Palmer and Gorman both gave police a timeline of what occurred the day of July 14. According to Gorman's statement, she checked on the child at approximately 5:30 a.m. before she left for work and found him sleeping. According to Palmer's statement, he woke the child at 9:30 a.m., fed him breakfast and lunch, then laid the child down for a nap at 3:30 p.m. Gorman confirmed this, stating Palmer called and told her that he fed the child in the morning and again around noon. Gorman and Palmer both stated Palmer was alone with the child all day while Gorman was at work.

Gorman arrived home between 4:00 and 4:30 p.m. Gorman claimed she checked on the child as soon as she got home, and, similarly, Palmer stated he and Gorman walked to the "edge of the door" and "peeked in" the child's room to check on him. Gorman stated the child "was breathing fine, everything was fine." She also told police that "a little bit later," she and Palmer checked on him again and "still everything was fine." Palmer's statement, however, does not mention that they checked on the child a second time. Instead, he claims they went outside to talk "for a little bit" and then Gorman prepared dinner, which they ate around 6:00 p.m.

Gorman told police that after dinner, Palmer took the dog outside while she went to wake the child. Palmer did not mention walking the dog, but only that after dinner, Gorman went to check on the child. According to Gorman, when she entered the

child's room, she heard him making "really strange noises" and noticed he was "slack looking," with saliva coming from his mouth. She claimed she picked him up and "leaned him over [her] arm because [she] didn't know if he was choking or if he was going to throw up." She called out to Palmer that something was wrong. Palmer came to her and discovered the child was having a seizure. Gorman called 911 while Palmer held the child.

B. Medical Evidence

At trial, the State introduced medical experts who testified to the extent of the child's injuries. Dr. Donna Roberts, a neuro-radiologist with MUSC, testified the child had skull fractures on both sides of his head, which resulted from severe trauma that occurred the day the child arrived at the hospital. She testified it "required severe force to create [the skull fractures]," and likened it to falling from a three-story window or being involved in a car accident. She stated the fractures could not have been caused by merely shaking the child. She also testified a person with these injuries "would be immediately severely symptomatic" and display a loss of consciousness, alteration in breathing, seizures, and foaming at the mouth.

The State also called Dr. Ann Abel, the director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, who testified that she spoke with Gorman and Palmer at MUSC to gain more information about the child. She claimed they both denied that any injury or accident occurred the day the child went to the hospital. Medical evidence, however, indicated the injuries must have occurred sometime that day. Dr. Abel testified that, in her medical opinion, the head injury occurred no more than three hours before the child arrived at the hospital.

Dr. Abel further testified the child suffered "massive" blows to both sides of the head that could have been inflicted in "less than a minute." She stated that a person observing the injuries take place "would perceive that this was a tremendous force" inflicted upon the child. However, she also testified that a person who did not see the force applied may not appreciate that something had happened to the child. She explained a person may be unable to discern whether the child was sleeping or unconscious if the person was not aware the head trauma had occurred.

Three of the State's witnesses testified they noticed bruises on the child while he was in the hospital, and Gorman could not account for them in her testimony. Dr. Abel testified the child had multiple bruises in places that were atypical for "normal childhood falling." Similarly, one of the nurses who treated the child in the emergency room testified she saw bruises on the child's body that "you wouldn't [typically] see." Additionally, a Department of Social Services employee investigating the case observed dark bruises on the child at the hospital, and when she asked Gorman how the bruising occurred, she responded the child "liked to pinch himself." However, the child's mother testified that, to her knowledge, the child had never intentionally hurt or pinched himself. Regarding whether the bruises were recently inflicted, Dr. Jody Hutson, the child's primary care physician, testified that when he saw the child on July 1 for ant bites and allergies and again on July 8 to administer vaccinations, the child had no bruises or any other injuries that would cause him to suspect child abuse. Furthermore, Palmer's parents testified that when the child came to their house to swim on July 13—the day before his injuries occurred—they did not notice any bruises on him.

C. Gorman's Trial Testimony

All of the evidence described above was presented by the State in its case in chief. Both Palmer and Gorman presented evidence at trial, although Palmer did not testify. Under the waiver rule recognized by this court in *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996), and recently confirmed by our supreme court in *Hepburn*, this court properly considers evidence presented by defendants unless an exception to the waiver rule applies. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 29-30 n.15, 32 (providing that when a defendant presents evidence, "the 'waiver doctrine' requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the [State's] case-in-chief" (citation omitted)); *Harry*, 321 S.C. at 277, 468 S.E.2d at 79 (stating "when the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone"). Neither Palmer nor Gorman argue any exception applies, and we find none applies.

Gorman testified at trial to a timeline of events that occurred on July 14, parts of which contradicted her statement to police. A time card introduced in evidence showed she clocked out from work at 3:45 p.m. Gorman testified she drove home immediately after leaving work, which took around forty-five minutes. When she arrived home at approximately 4:40 p.m., she "walked to the [child's] bedroom

door" and saw the child was asleep. Although Gorman and Palmer's statements to police do not indicate that Gorman left the house after checking on the child, Gorman introduced a check she signed made payable to a grocery store that was dated July 14 and had a time stamp of 3:52 p.m. Gorman explained she had forgotten to tell the police she went to the grocery store after checking on the child. Gorman claimed, however, that it was impossible for her to clock out of work at 3:45 p.m. and be at the grocery store by 3:52 p.m. She stated, though, it was "fair to say that maybe [she] cashed th[e] check at 4:52 p.m.," and the time stamp was off by one hour. While she was at the grocery store, Palmer stayed at home with the child.

According to Gorman's testimony, when she returned from the store, she did not check on the child again but instead began cooking dinner. She told the jury that when she and Palmer finished eating, she walked to the child's bedroom to wake him. When asked where Palmer was when she went to wake the child, Gorman testified that "at one point he took the dog outside to use the bathroom" but stated "he could have been already back inside the house." She went on to testify that when she discovered the child was injured and called out to Palmer, he arrived in the child's room in "seconds."

Gorman testified at trial she had never shaken the child. When asked why she demonstrated to police how she shook the child, she responded she "was just so tired and drawn out" that she "just reacted."

D. Directed Verdict Motions, Verdict, and Sentence

Palmer and Gorman both moved for directed verdicts on all charges, which the trial court denied. The jury found both Gorman and Palmer guilty of all charges. The court sentenced them each to ten years for unlawful conduct toward a child, twenty years for aiding and abetting, and thirty-five years in prison for homicide by child abuse, all to run concurrently.

III. Palmer's and Gorman's Directed Verdict Motions

Palmer and Gorman both assert the trial court erred in denying their directed verdict motions because the State did not present substantial circumstantial evidence to prove identity—whether it was Palmer or Gorman who inflicted the injuries that caused the child's death. They also assert the State did not prove that

Palmer or Gorman aided and abetted the other in committing homicide by child abuse.

A. Homicide by Child Abuse

Subsection 16-3-85(A)(1) of the South Carolina Code (2003) provides that a person is guilty of homicide by child abuse when he or she "causes the death of a child . . . while committing child abuse." "Child abuse" is defined as "an act or omission by any person which causes harm to the child's physical health or welfare," S.C. Code Ann. § 16-3-85(B)(1) (2003), and "harm" occurs when a person "inflicts or allows to be inflicted upon the child physical injury." § 16-3-85(B)(2)(a).

The State conclusively established by direct medical evidence that the child's fatal injuries were the result of child abuse. This evidence consisted of the following trial testimony: (1) the child died from intentionally inflicted blunt force trauma to the head; (2) the child suffered two skull fractures caused by "massive" blows to each side of the head, and exhibited multiple dark bruises that were atypical for "normal childhood falling"; and (3) the force used to inflict the skull fractures was comparable to falling from a three-story window or being involved in a car accident.

The State also conclusively established by direct evidence that the child's injuries occurred sometime on July 14. Both of the State's medical experts testified the injuries occurred that day. In fact, Dr. Abel testified the head injuries occurred within three hours before the child was taken to the hospital.

The State relies entirely on circumstantial evidence, however, to prove who inflicted the injuries that killed the child. Because the child was in the exclusive custody of Palmer or Gorman, or both, during the time in which his injuries occurred, the jury could reasonably infer that either Palmer or Gorman, or both Palmer and Gorman, inflicted the child's injuries.

1. Evidence of Gorman's Guilt

We find the trial court correctly denied Gorman's motion for a directed verdict because there is substantial circumstantial evidence that she inflicted at least one of the child's injuries—specifically, while she was alone in his bedroom after dinner.

Dr. Robert's testimony established the child would be "immediately severely symptomatic" after receiving the injuries and incapable of normal functioning, i.e., eating, walking, or playing. According to Gorman's statement to police, she observed nothing abnormal about the child when she left for work at 5:30 a.m. Similarly, Palmer told police the child functioned normally during the day—he ate breakfast and lunch and played. When Gorman returned home from work between 4:00 and 4:30 p.m., she claimed the child "was breathing fine, everything was fine," and when she checked on him again "a little bit later" with Palmer, "still everything was fine." Although she contradicted herself on this point at trial, Gorman's statement suggests Palmer was not alone with the child after she returned from work. Gorman entered the child's room to wake him around 6:00 p.m. that evening, and at 6:06 p.m., Gorman called 911 to report the child's symptoms. From this evidence, the jury could have "fairly and logically deduced" that Gorman inflicted the fatal injuries. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 29 ("The trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (quoting *Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127)).

2. Evidence of Palmer's Guilt

We find the trial court also correctly denied Palmer's motion for a directed verdict because there is substantial circumstantial evidence that Palmer inflicted at least one of the child's injuries. There are two scenarios under the evidence that reasonably tend to prove Palmer's guilt. First, the evidence supports that Palmer injured the child while Gorman was at work. Palmer had the child in his care the entire day of July 14. Though Gorman stated the child was sleeping "and breathing fine" when she returned from work, Dr. Abel testified a person may be unable to differentiate a sleeping child from one who is unconscious. Thus, the child's injuries might not have been noticeable to her at this time, particularly given Gorman's testimony that she did not actually enter the child's room or go close enough to carefully observe the child.

As to the second scenario, Palmer could have injured the child while Gorman was at the grocery store. The time stamp on Gorman's check established that she went to the grocery store that evening, and according to her trial testimony, Palmer stayed at home with the child. She testified that when she returned from the store,

she did not check on the child. From this evidence, the jury could have "fairly and logically deduced" that Palmer inflicted the fatal injuries. *See id.*

3. Other Circumstances of Guilt

The State also presented evidence at trial from which it argued the jury could infer "why someone would kill a seventeen-month old child." While this evidence is insufficient by itself to prove Palmer or Gorman's guilt, the evidence must be considered in combination with all the evidence to determine whether there is substantial circumstantial evidence of guilt. *See State v. Frazier*, 386 S.C. 526, 532, 533, 689 S.E.2d 610, 613, 614 (2010) (viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); *State v. Cherry*, 361 S.C. 588, 595, 606 S.E.2d 475, 478 (2004) (finding the circumstantial evidence, when combined, was "sufficient for the jury to infer [guilt]"). Because the State relied on the evidence at trial, we summarize it here.

This evidence relates primarily to Gorman, and includes (1) evidence that Gorman was often frustrated and annoyed with the child's behavior because, as Gorman testified, he "crie[d] every day, [was] cranky every day, whine[d] every day;"[3] (2) evidence that Gorman disliked the child, shown through comments she made to others; (3) testimony that Gorman and Palmer were "stressed about money" and concerned about how the child would affect their financial problems; (4) Gorman's testimony that she did not have a good relationship with the child's mother; (5) Gorman's testimony that she had never met the child before the child's mother left him with Gorman; and (6) Gorman's admission to shaking the child on a previous occasion.

As to Palmer, the State showed he was only thirty years old, unemployed, and experiencing financial difficulty at the time the child came to live with them. Palmer's father testified Palmer had a five-year old son who lived with Palmer's father and mother most of the time because he "didn't think that [Palmer] had any time for [the child]." Palmer's mother testified she and her husband "basically raise[d]" Palmer's son. Based on this evidence, the State theorized Palmer did not

[3] Gorman told Dr. Abel the child was "clingy and whiny and want[ed] to be held all the time." Similarly, a paramedic testified Gorman told her that "she's raised several children in her lifetime and never seen such a bad one."

want to take on the responsibility of caring for a child, particularly one that was not his own.

4. Palmer's and Gorman's Statements

In Palmer's and Gorman's statements to police, they both deny causing the child's injuries and deny any knowledge of the other doing so. From the medical evidence and testimony presented at trial, however, it is not possible that both of these statements are true. While we are careful not to consider the falsity of a defendant's statement as positive evidence of the defendant's guilt, we find the impossibility that both statements are true is a circumstance the jury was entitled to consider in determining the guilt of both parties. Likewise, it is evidence the trial court and this court may properly consider in determining whether there is substantial circumstantial evidence of each defendant's guilt.

5. Concerns Related to Proving the Identity of the Principal

Because these cases were tried jointly, we necessarily merged the evidence presented as to Palmer and Gorman into one discussion. This necessity highlights the difficultly of the question presented by this appeal—whether the evidence the State presented as to each defendant eliminates the possibility that the other defendant inflicted all of the injuries that killed the child. The essence of Palmer and Gorman's argument on appeal is the evidence does not eliminate that possibility. We agree it does not. However, we find the State presented substantial circumstantial evidence of each defendant's guilt on the charge of homicide by child abuse.

This court "sits solely to review errors of law," *Cope*, 405 S.C. at 334, 748 S.E.2d at 203, and therefore we must confine *our* decision to whether the trial court correctly made *its* decision. As the supreme court stated in *Hepburn*, "we are called by our standard of review to consider the evidence as it stood" when the trial court made the ruling that is now on appeal.[4] Shearouse Adv. Sh. No. 52 at 42. In

[4] We recognize the supreme court made this statement to indicate it was not considering evidence presented after the State rested its case in chief. However, the reasoning of the court applies here. The statement indicates a reviewing court must identify a point in time where its review is focused for the purposes of

denying the defendants' directed verdict motions, the trial court considered the evidence as it stood at that time in regard to each individual defendant, and determined whether that evidence was sufficient to support each charge against each defendant. The possibility that the jury may later reach verdicts that are inconsistent between the defendants was outside the trial court's power to consider, as that would require the court to weigh the strength of the case against one defendant in considering the sufficiency of the evidence against the other. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 28 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." (quoting *Cherry*, 361 S.C. at 593, 606 S.E.2d at 477-78)); *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (stating our case law prohibits "inconsistent verdicts when multiple offenses are submitted to the jury, not when the jury returns disparate results for co-defendants"). As the trial court was required to do, we independently analyze the evidence against each defendant. Because that independent review of the evidence as to each defendant reveals "substantial evidence which reasonably tends to prove the guilt of the accused, [and] from which his guilt may be fairly and logically deduced," *Hepburn*, Shearouse Adv. Sh. No. 52 at 29, we affirm the trial court's denial of each defendant's motion for a directed verdict for homicide by child abuse.[5]

B. Unlawful Conduct Toward a Child

We also find the evidence discussed above as to Palmer and Gorman supports the trial court's refusal to grant their directed verdict motions on the charge of unlawful conduct towards a child. *See* S.C. Code Ann. § 63-5-70(A)(2) (2010) (making it

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determining error. In this case, the relevant point in time is when the trial court ruled on the directed verdict motion at the close of all evidence. We must analyze whether the trial court erred based on the evidence that was before it at that time, not retrospectively after the jury returned a verdict based on that evidence.

[5] The dissent relies on *Hepburn* as to the sufficiency of the evidence in this case. While we rely on *Hepburn* as to our standard of review, we find it distinguishable on the facts. In *Hepburn*, the supreme court found the State did not present sufficient evidence that Hepburn inflicted the child's injuries, stating, "Every State witness placed [Hepburn] asleep at the time the victim sustained the fatal injuries." *Id.* at 40. Based on this, the court concluded no inference could be drawn "that *Appellant* harmed the victim." *Id.*

unlawful for a child's guardian to "do or cause . . . any bodily harm to the child so that the life or health of the child is endangered").

C. Aiding and Abetting Homicide by Child Abuse

Under subsection 16-3-85(A)(2) of the South Carolina Code (2003), a person is guilty of aiding and abetting homicide by child abuse when he or she "knowingly aids and abets another person to commit child abuse or neglect . . . [that] results in the death of a child." "Aid and abet" is defined as to "[h]elp, assist, or facilitate the commission of a crime," which can be rendered by "words, acts, encouragement, support, or presence, actual or constructive." *State v. Smith*, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004) (quoting *Black's Law Dictionary* 68 (6th ed. 1990)). "To be guilty as an aider or abettor, the participant must have knowledge of the principal's criminal conduct." *State v. Zeigler*, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct. App. 2005). Thus, "[m]ere presence at the scene is not sufficient to establish guilt as an aider or abettor." *State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (citation omitted).

While the State's evidence conclusively proved the child died from child abuse, we find the State presented no direct evidence and insubstantial circumstantial evidence that either Palmer or Gorman knowingly undertook any action to aid or abet that abuse. Therefore, the trial court erred in denying Palmer's and Gorman's motions for a directed verdict on aiding and abetting. *See State v. Lewis*, 403 S.C. 345, 355-57, 743 S.E.2d 124, 129-30 (Ct. App. 2013) (reversing denial of directed verdict motion when evidence was insufficient to prove the defendant knowingly undertook an overt act to aid and abet his codefendant in committing homicide by child abuse).

The State contends *State v. Smith* controls and requires us to affirm. The supreme court's discussion of *Smith* in *Hepburn*, however, defeats the State's argument. *See Hepburn*, Shearouse Adv. Sh. No. 52 at 40-42. As it relates to aiding and abetting, the key facts in *Smith* were that the defendants were never separated during the time the medical evidence proved the injuries occurred, and "the medical testimony indicated that the victim['s] . . . symptoms would have been severe and immediate, and importantly, obvious to both Smith and the victim's mother very soon after the injuries were inflicted." *Hepburn*, Shearouse Adv. Sh. No. 52 at 41 (quoting and citing *Smith*, 359 S.C. at 491-92, 597 S.E.2d at 894). Here, Palmer and Gorman were separated for periods of time in which the injury could have occurred, and Dr.

Abel testified the injuries may not have been apparent to someone who did not see them inflicted. Thus, we find this case distinguishable from *Smith*.

IV. Other Issues on Appeal

As to all other issues on appeal, we affirm pursuant to Rule 220(b), SCACR, and the following authorities:

Regarding Palmer's argument that the State violated its agreement with him, we find it is not a "proffer agreement." *See United States v. Gillion*, 704 F.3d 284, 292 (4th Cir. 2012) (defining a "proffer agreement" as an agreement "intended to protect the defendant against the use of his or her statements," particularly when "the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement"). Regardless of this finding, we affirm on the basis that Palmer failed to demonstrate how enforcement of the agreement would affect him.

Turning to the issues raised by Gorman on appeal, we find the following:

(1) We find Gorman did not preserve for our review her argument that any statements she gave before being advised of her constitutional rights are inadmissible under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The record reflects Gorman objected only to the voluntariness of her statement at the *Jackson v. Denno*[6] hearing and renewed this initial objection at trial. Because Gorman did not allege a *Miranda* violation before or during trial, she cannot do so now. *See State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (stating an issue not raised to and ruled upon by the trial court is not preserved).

(2) Gorman asserts that any statements given after she waived her *Miranda* rights are tainted by the initial violation—being subjected to custodial interrogation without first being given her *Miranda* warnings—and are thus inadmissible. *See State v. Peele*, 298 S.C. 63, 65, 378 S.E.2d 254, 255 (1989) (requiring police to advise suspects of their *Miranda* rights before initiating "custodial interrogation"); *State v. Lynch*, 375 S.C. 628, 633, 654 S.E.2d 292, 295 (Ct. App. 2007) (stating the State may not use statements gained from custodial interrogation in violation of

[6] 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

Miranda). We find, however, the police did not interrogate Gorman before giving her *Miranda* rights and thus no *Miranda* violation occurred. *See Lynch*, 375 S.C. at 633, 654 S.E.2d at 295 (stating *Miranda* rights attach only when the suspect is subjected to custodial interrogation); *State v. Kennedy*, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (defining interrogation as "express questioning, or its functional equivalent," consisting of words or actions by police that "are reasonably likely to elicit an incriminating response"); *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 913 (1989) (holding defendant's statements to police were not the product of interrogation and were thus admissible).

(3) Gorman asserts her statement is inadmissible because it was not voluntarily given. *See Franklin*, 299 S.C. at 137, 382 S.E.2d at 913 ("The test of admissibility of a statement is voluntariness."). In finding the statement was voluntary, the trial court evaluated the totality of the circumstances and made the requisite findings. *See State v. Dye*, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009) (stating voluntariness of a statement is determined by examining the totality of circumstances surrounding the statement, including "background, experience, conduct of the accused, age, length of custody, . . . [and] threats of violence"). We affirm because each of these findings is supported by the record. *See State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (requiring appellate courts to review a ruling concerning voluntariness under an "any evidence" standard).

V. Conclusion

We affirm the trial court's refusal to grant Palmer's and Gorman's directed verdict motions on the charges of homicide by child abuse and unlawful conduct toward a child, but reverse as to aiding and abetting homicide by child abuse. We affirm any other issues on appeal.

AFFIRMED IN PART, REVERSED IN PART.

KONDUROS, J., concurs.

PIEPER, J., concurring in part and dissenting in part.

I concur in the majority's decision to reverse Gorman and Palmer's convictions for aiding and abetting homicide by child abuse, as there was insufficient evidence that they were acting together or assisting one another. I also would find there was

insufficient evidence of the codefendants' guilt for homicide by child abuse and unlawful conduct toward a child because the State did not present any direct or substantial circumstantial evidence to reasonably prove which codefendant harmed the child. *See State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) ("The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes."). The evidence establishes that Gorman and Palmer each had time alone with the child during the timeframe of the abuse, and therefore, the State has only demonstrated that each defendant had an opportunity to injure the child. Utilizing the analysis of the supreme court in *State v. Hepburn*, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 38-40) and *State v. Lewis*, 403 S.C. 345, 352-56, 743 S.E.2d 124, 128-29 (Ct. App. 2013), I would find the only inference that can be fairly and logically deduced from the evidence is that one of the two codefendants inflicted the child's injuries. *See Hepburn*, Op. No. 27336 (S.C. Sup. Ct. filed Dec. 11, 2013) (Shearouse Adv. Sh. No. 52 at 40) ("While undoubtedly present at the scene, the only inference that can be drawn from the State's case is that one of the two [codefendants] inflicted the victim's injuries, but not that *Appellant* harmed the victim. Thus, we reverse the trial court's refusal to direct a verdict of acquittal because the State did not put forward sufficient direct or substantial circumstantial evidence of Appellant's guilt." (emphasis in original)); *Lewis*, 403 S.C. at 354-56, 743 S.E.2d at 129 (reversing the defendant's conviction when the State failed to offer any direct evidence or substantial circumstantial evidence of the defendant's guilt and the defendant's involvement amounted to mere presence at the scene). Accordingly, I would find the trial court erred by denying the defendants' directed verdict motions, and I would reverse the convictions for homicide by child abuse and unlawful conduct toward a child.