OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9

March 5, 2007
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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eldeco, Inc., Appellant,

v.

Charleston County School District, Mt. Pleasant Mechanical, Inc. and Beers Skanska, Inc. n/k/a Skanska USA Building, Inc., Defendants,

Of Whom Charleston County School District and Beers Skanska, Inc. n/k/a Skanska USA Building, Inc. are Respondents.

Appeal from Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26280
Heard January 31, 2007 – Filed March 5, 2007

AFFIRMED

Frank M. Cisa, of Cisa & Dodds, of Mt. Pleasant, for Appellant.

C. Mitchell Brown, of Columbia, Ryan A. Earhart, of Charleston, and Christopher J. Blake, of Raleigh, all of Nelson Mullins Riley

& Scarborough, for Respondent Beers Skanska, Inc. n/k/a Skanska USA Building, Inc.

H. Brewton Hagood, of Rosen Rosen & Hagood, of Charleston for Respondent Charleston County School District.

CHIEF JUSTICE TOAL: This appeal arises out of a contract dispute between Appellant Eldeco, Inc. ("Eldeco") and Respondents Charleston County School District ("CCSD") and Skanska USA Building, Inc. ("Skanska")[1]. Eldeco alleged that Skanska breached the parties' contract by failing to award certain electrical work in a new school building to Eldeco. Eldeco also alleged that CCSD intentionally interfered in the contractual relationship between Eldeco and Skanska. The trial court found in favor of Skanska and CCSD. Eldeco appeals and we affirm.

FACTUAL / PROCEDURAL BACKGROUND

CCSD began construction of a new high school building ("the Project") in Mt. Pleasant, South Carolina in 2002. Skanska was the general contractor for the Project and hired Eldeco as an electrical subcontractor. At the time the parties entered into their respective contracts, the Project called for the construction of the school building as specified in the contract documents, which included an unfinished area for vocational training.

After construction of the Project began, CCSD decided to complete the vocational training area ("Culinary Arts Upfit") and add additional classroom space on either side of the school building ("Classroom Additions"). CCSD asked Skanska to provide a pricing estimate for the Culinary Arts Upfit and the Classroom Additions. As part of the pricing estimate, Skanska asked Eldeco to provide an estimate for the electrical work required for the

[1] Skanska USA Building, Inc. was formerly known as Beers Skanska, Inc.

Culinary Arts Upfit and the Classroom Additions. Eldeco submitted an estimate of $442,000.00.

Following the school board's approval for the additional work, CCSD formally requested pricing from Skanska. Skanska submitted its formal pricing quote which included Eldeco's official price for the Classroom Additions electrical work in the amount of $881,855.94. CCSD objected to the adjusted price, and Eldeco eventually lowered the price to $720,000.00. Eldeco also submitted a pricing quote for the Culinary Arts Upfit electrical work of $248,311.76. At the request of CCSD, Skanska obtained pricing from another electrical contractor. Mt. Pleasant Mechanical submitted a price for the Classroom Additions in the amount of $348,812.00 and for the Culinary Arts Upfit in the amount of $229,340.00. Upon instructions from CCSD, Skanska subcontracted with Mt. Pleasant Mechanical to perform the additional electrical work.

Eldeco filed suit against Mt. Pleasant Mechanical,[2] Skanska, and CCSD. Eldeco sought recovery against Skanska for breach of contract on the basis of Skanska's failure to award Eldeco the electrical work in the Classroom Additions and the Culinary Arts Upfit.[3] Eldeco sought recovery against CCSD for tortious interference with contractual relations and intentional interference with prospective contractual relations. As grounds for these claims, Eldeco alleged that CCSD interfered with Eldeco's contract with Skanska by instructing Skanska to hire Mt. Pleasant Mechanical, Inc. for the additional electrical work.

A jury trial began in April 2005. At the conclusion of Eldeco's case, the trial judge directed a verdict in favor of CCSD. At the conclusion of all evidence, the trial judge denied Skanska's motion for directed verdict. At

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[2] Mt. Pleasant Mechanical, Inc. is not involved in this appeal. The company filed for bankruptcy protection and thus, the pending action was stayed.

[3] Eldeco also sought recovery against Skanska for violation of the Unfair Trade Practices Act. However, the trial court granted Skanska's motion for Summary Judgment, and that ruling is not implicated in this appeal.

that point, the parties agreed to dismiss the jury and allow the trial court to determine whether the term "Work" as defined in the contract documents included the Classroom Additions and Culinary Arts Upfit. According to their agreement, if the trial judge determined that the Classroom Additions and Culinary Arts Upfit were within the definition of "Work," the trial court would award damages to Eldeco in the amount of $120,270.00. However, if the additional work fell outside of the definition, no damages would be awarded.

The trial court ultimately concluded that the definition of "Work" did not include the Classroom Additions and Culinary Arts Upfit. Accordingly, no damages were awarded. Eldeco appealed, and this Court certified the case from the court of appeals pursuant to Rule 204(b), SCACR. Eldeco raises the following issues for review:

I. Did the trial court err in finding the Classroom Additions and Culinary Arts Upfit were not included in the definition of "Work" as provided in the contract documents?

II. Did the trial court err in directing a verdict in favor of CCSD as to Eldeco's tort causes of action?

LAW / ANALYSIS

I. Eldeco's Claim Against Skanska

Eldeco argues the trial court erred in finding the Classroom Additions and Culinary Arts Upfit were not included in the definition of "Work" as provided in the contract documents. We disagree.

A cause of action for breach of contract seeking money damages is an action at law. *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.*, 310 S.C. 232, 235, 423 S.E.2d 114, 116 (1992). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which

reasonably supports the judge's findings." *Townes Assoc. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

The contract between CCSD and Skanska provided:

> 1.1.3 THE WORK
> The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.
>
> 1.1.4 THE PROJECT
> The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by other Contractors and by the Owner's own forces including persons or entities under separate contracts not administered by the Construction Manager.
>
> 6.1.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION WITH OWN FORCES AND TO AWARD OTHER CONTRACTS
> The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, which include persons or entities under separate contracts not administered by the Construction Manager. The Owner further reserves the right to award other contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar. . . .

The subcontract between Skanska and Eldeco provided:

> Article 1: Subcontractor, as an independent contractor employed by Contractor, agrees to provide and to furnish all labor, materials, scaffolding, equipment, systems, machinery, tools, apparatus, transportation, shop drawings, samples and submittals necessary to provide, furnish and complete the following Work, all to be performed in connection with the above-described Project, and in accordance with the following:
>
> Article 2: The Contract Documents for this Subcontract consist of this Agreement and any exhibits or attachments hereto, the Agreement between the Owner and Contractor for the above referenced Project, all conditions to the Agreement between the Owner and Contractor (General, Supplementary and any other Coditions), all Drawings, Specifications, and Contract Documents referenced in that Agreement, along with Addenda and modifications to that Agreement.
>
> With respect to its Work, Subcontractor agrees to be bound to the Contractor by all of the terms of the agreement between the Contractor and the Owner (except for the payment provisions) and the Contract documents thereto, and assumes toward the Contractor and the Owner all the obligations and responsibilities that the Contractor by those instruments assumes toward the Owner.

In its order, the trial court found that the Classroom Additions and the Culinary Arts Upfit were not included in the definition of the "Work" as provided in Article 1 of Skanksa's subcontract with Eldeco or the definition of the "Work" as described in Paragraph 1.1.3 of Skanksa's contract with CCSD because the additional work was outside the scope of the contract documents.

Eldeco argues that the trial court's finding was unreasonable because the definition of "Work" included changes to the work pursuant to a "Change

Order" or a "Construction Change Directive."[4] According to Eldeco, the Classroom Additions and the Culinary Arts Upfit were merely changes in the Work that should have occurred under a Change Order or Construction Change Directive. In support of this contention, Eldeco focuses on the fact that it had performed some 109 Change Orders during the course of construction of the Project, and that the process used for the Classroom Additions and Culinary Arts Upfit was identical to the process used for the other Change Orders. Additionally, Eldeco contends that it was entitled to do all electrical work on the Project which was initiated through a Change Order or Construction Change Directive and administered by the Construction Manager.

Contrarily, Skanska contends that the trial court's decision was reasonable in light of the evidence presented at trial. First, Skanska contended that the contract documents delineated only the work that Skanska was required to complete and, in fact, did not provide a right or obligation for Skanska to perform work like the Classroom Additions and Culinary Arts Upfit which exceeded the scope of Skanska's original contract as general contractor. Second, Skanska argued that Paragraph 6.1.1 of their contract with CCSD specifically reserved the right of CCSD to use other contractors for the completion of the Project. Finally, Skanska presented several witnesses who testified that the additional work was outside the scope of the contract.

We find that the record contains sufficient evidence upon which the trial court could have found that the Classroom Additions and Culinary Arts Upfit were not included in the definition of "Work." Article 1 of the subcontract between Skanska and Eldeco clearly defines the scope of Work

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[4] Both a Change Order and a Construction Change Directive are defined in Article 7 of the contract between Skanska and CCSD. Essentially, a Change Order is a written instrument which authorizes changes in the Work and is used when all parties are in agreement as to the terms of the changes in the Work. A Construction Change Directive is a written instrument similar to a Change Order, however, this document is used in the absence of total agreement on the terms of the Change Order.

according to the listed specifications, which do not include the Classroom Additions or the Culinary Arts Upfit as modified. Bolstering the testimony of its witnesses, Skanska introduced Exhibits 22-24 which indicated that Skanska and CCSD utilized supplementary contracts, and not Change Orders, for the additional work. Moreover, because the general contract between Skanska and CCSD provided that any agreement between the contractor and subcontractor was subject to the provisions of the general contract, Eldeco's subcontract with Skanska could not have expanded Eldeco's rights as to the Work on the Project. As Skanska demonstrated, this additional work was outside the scope of the general contract between Skanska and CCSD.

Accordingly, the trial court did not err in finding the Classroom Additions and Culinary Arts Upfit were outside the scope of the definition of "Work" as provided in the contract documents.

II. Eldeco's Claims Against CCSD

Eldeco argues the trial court erred in directing a verdict in favor of CCSD as to Eldeco's causes of action for tortious interference with contractual relations and intentional interference with prospective contractual relations because CCSD was entitled immunity under the South Carolina Tort Claims Act ("Tort Claims Act"). We agree that the trial court erroneously applied the Tort Claims Act. However, we affirm the trial court's ruling because Eldeco's claims fail as a matter of law.

A. Immunity Based on an "Intent to Harm"

Eldeco contends that the trial court erred by finding that S.C. Code Ann. § 15-78-60(17) (2005) provided immunity to CCSD for the claims of tortious interference with contractual relations and intentional interference with prospective contractual relations. We agree.

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation,* 336 S.C. 373,

386, 520 S.E.2d 142, 148 (1999). This Court will reverse only where there is no evidence to support the trial court's ruling or where the ruling was controlled by an error of law. *Id*.

To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). To establish a cause of action for intentional interference with prospective contractual relations, a plaintiff must show: 1) intentional interference with prospective contractual relations; 2) for an improper purpose or by improper methods; and 3) resulting in injury. *Crandall Corp. v. Navistar Int'l Transp. Corp.,* 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990).

The Tort Claims Act provides that "the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." S.C. Code Ann. §15-78-40 (2005). The provision containing the exceptions to the waiver of immunity provides in relevant part, "[a] governmental entity is not liable for a loss resulting from . . . employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. §15-78-60 (17).

During the discussion of CCSD's directed verdict motion, the trial court found that "intentional procurement" and "intentional interference" necessarily involves an "intent to harm." Eldeco asserted that it did not have to prove an "intent to harm" to succeed on the merits of its claims against CCSD. At the conclusion of arguments on the motion, the trial court directed a verdict in favor of CCSD, primarily based on §15-78-60 (17).

We hold that this was error. None of the elements required for either cause of action, as clearly shown above, include "intent to harm." Although it is true that harm may result from an intentional interference with existing

or prospective contractual relations, it is not necessary that the interfering party intend such harm. Instead, it is only necessary that they intend to interfere with either an existing contract or intend to interfere with a prospective contract.[5]

Accordingly, the trial court erred in directing a verdict in favor of CCSD based on the "intent to harm" exception to the waiver of immunity provided in the Tort Claims Act.

B. The Merits of Eldeco's Claims Against CCSD

CCSD argues as an additional sustaining ground that Eldeco's claims against CCSD fail as a matter of law. CCSD argues that the claims against CCSD are inextricably tied to the disposition of Eldeco's claim against Skanska. We agree.

An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. *Kinard*, 315 S.C. at 240, 433 S.E.2d at 837. Where there is no breach of the contract, there can be no recovery. *First Union Mortg. Corp. v. Thomas,* 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994). Furthermore, an essential element to the cause of action for intentional

[5] The concept of "intent to harm" is analogous to the concept of "malicious intent," which courts have previously interjected into the analyses of claims for intentional interference with contractual relations and intentional interference with prospective contractual relations. However, consideration of these concepts in this context is often an error, due in large part to the historical use of the term "malicious" to describe the idea that the intent must generally be improper in some way. Therefore, as modern courts have addressed these causes of action, the distorted notion of "malicious intent" has been removed, and the elements of these torts have been clarified as specifically requiring the intent to interfere for an improper purpose rather than a motive generally grounded in some sort of spite or ill-will towards the plaintiff. *See* 2 Dan B. Dobbs, *The Law of Torts* § 446 (2001 & Supp. 2006); *and* Prosser and Keeton, *The Law of Torts* §§ 129-130 (5th ed. 1984).

interference with prospective contractual relations requires that the interference be for an improper purpose or by improper methods. "Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." *Southern Contracting, Inc. v. H.C. Brown Constr. Co.,* 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994).

Because we affirm the trial court's finding that the contract documents did not include the Classroom Additions and Culinary Arts Upfit in the definition of Work, we find that Skanska did not breach its contract with Eldeco. Eldeco did not have any contractual rights to perform the additional work on the Project. In the absence of a breach of a contract, Eldeco cannot prove the required elements of its cause of action for tortious interference with contractual relations. Additionally, we find that the contract between Skanska and CCSD preserved CCSD's right to conduct other Work on the Project with its own or other forces. Therefore, CCSD acted in pursuit of its own contractual rights, and Eldeco cannot prevail on its claim against CCSD for intentional interference with prospective contractual relations.

Accordingly, we affirm the trial court's ruling in favor of CCSD based on the failure of Eldeco's claims as a matter of law.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Christopher Thomas, Appellant.

Appeal From Aiken County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 26281
Heard January 30, 2007 – Filed March 5, 2007

REVERSED AND REMANDED

Appellate Defender Aileen P. Clare, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

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

PER CURIAM: Christopher Thomas (appellant) pled guilty to distribution of crack cocaine within a prohibited proximity of a school. Appellant was sentenced to the minimum term of ten years as provided by S.C. Code Ann. § 44-53-445 (2002). He now seeks a new sentencing hearing, claiming the

circuit court judge erroneously declared that he had no power to suspend appellant's sentence because a minimum sentence was provided by statute. We reverse and remand.

FACTS

Appellant was indicted for distribution of crack cocaine and distribution within one-half mile of a school. The State dropped the distribution charge, and appellant pled guilty to the proximity charge. After appellant was advised of his rights and the court accepted the guilty plea, appellant was sentenced to a ten year prison term, the minimum provided by S.C. Code Ann. § 44-53-445(B)(2).

Six days later, after timely notice, appellant appeared before the court seeking reconsideration of his sentence. Family members testified on appellant's behalf, and appellant asked the court to consider suspending the sentence. The judge refused, stating that because a minimum and maximum sentencing range was prescribed by § 44-53-445(B)(2), he was powerless to suspend any portion of the minimum sentence.

ISSUE

Did the trial court abuse its discretion by refusing to reconsider appellant's sentence on the grounds that it had no authority to suspend a minimum sentence?

ANALYSIS

The general power to suspend sentences derives from S.C. Code Ann. § 24-21-410 (1989).[1] This power does not extend to offenses where the

[1] "After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose

legislature has specifically mandated that no part of a sentence may be suspended. State v. Johnson, 343 S.C. 693, 541 S.E.2d 855 (Ct. App. 2001); State v. Taub, 336 S.C. 310, 519 S.E.2d 797 (Ct. App. 1999); and State v. Tisdale, 321 S.C. 153, 467 S.E.2d 270 (Ct. App. 1996).

The criminal statute violated in this case, § 44-53-445, requires the person found guilty "must be fined not less than ten thousand dollars and imprisoned not less than ten nor more than fifteen years." S.C. Code Ann. § 44-53-445(B)(2). However, unlike the statutes analyzed in Johnson, Taub, and Tisdale, § 44-53-445 contains no provision prohibiting the suspension of a sentence imposed pursuant to the statute.

Appellant argues that because § 44-53-445 does not specifically prohibit suspension of a sentence for distribution within proximity of a school, the circuit judge had the authority under § 24-21-410 to suspend the minimum sentence. We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. Howell v. U.S. Fidelity and Guar. Ins. Co., 370 S.C. 505, 636 S.E.2d 626 (2006). However, statutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). Penal statutes are to be construed strictly against the State and in favor of the defendant. State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002).

In numerous penal statutes, the legislature has included specific provisions to prohibit suspension, in whole or in part, of sentences to fines or imprisonment.[2] Here, the omission of any such provision in the proximity

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a fine and also place the defendant on probation. Probation is a form of clemency."

[2] S.C. Code Ann. §§ 16-1-120 (increased sentences for repeat offenders); 16-3-625 (resisting arrest with a deadly weapon); 16-3-655 (criminal sexual conduct with a minor); 16-11-330 (robbery with a deadly weapon); 16-11-700 (dumping litter on private or public property); 16-15-395 (1st degree

statute, § 44-53-445, indicates the legislature did not intend to limit the general authority to suspend sentences.

The State contends that because the proximity statute is part of the same statutory scheme as §§ 44-53-370, -375, and -440,[3] the legislature also intended to preclude suspension of sentences imposed pursuant to § 44-53-445. We disagree. The legislature expressly included these limiting provisions in similar drug offense statutes and chose not to limit the authority to suspend sentences in § 44-53-445. *See* Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (discussing the canon "expressio unius est exclusio alterius," or "to express or include one thing implies the exclusion of another," and holding that the enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded).

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sexual exploitation of a minor); 16-15-405 (2nd degree sexual exploitation of a minor); 16-15-415 (promoting prostitution of a minor); 16-23-490 (possession of firearm or knife during commission of violent crime); 16-25-20 (criminal domestic violence); 16-25-65 (criminal domestic violence of high and aggravated nature); 17-25-125 (unlawful taking/receipt of property and malicious injury to property); 23-3-470 (failure to register as sex offender); 23-3-475 (registering as sex offender with false information); 44-41-36 (unlawful abortion on minor); 44-53-370 (Class A drug offenses); 44-53-375 (possession, manufacturing, and trafficking of certain controlled substances); 44-53-440 (distribution of certain controlled substances to persons under 18); 50-1-85 (use of firearm/archery in a criminally negligent manner while hunting); 50-1-125 (wildlife trafficking); 50-5-1105 (exceeding wildlife catch limits); 50-21-112 (driving watercraft while intoxicated); 50-21-113 (driving watercraft while intoxicated resulting in property damage or great bodily injury); 56-1-460 (driving automobile while license suspended or revoked); 56-5-2940 (DUI or DUAC); 56-5-2947 (child endangerment when violating driving statutes); and 56-5-6540 (seat belt violation).

[3] These three statutes deal with offenses involving the distribution, possession, and trafficking of controlled substances. All three statutes specifically prohibit suspension of sentences.

Finally, the State argues that § 44-53-445 is a specific statute that prevails over § 24-21-410, a general statute. *See* Taub, *supra*, and Johnson, *supra*. While we agree that § 44-53-445 provides the sentencing parameters for distribution of crack cocaine within proximity of a school, the statute does not contain any provision regarding suspension of a sentence. Thus, this case is distinguishable from Taub, Johnson, and Tisdale because no prohibition against suspending sentences imposed pursuant to § 44-53-445 conflicts with the general authority provided by § 24-21-410.

CONCLUSION

Accordingly, the trial court's erroneous ruling that it had no authority to suspend the sentence provided by § 44-53-445(B)(2) mandates vacation of the sentence imposed. We therefore reverse and remand for resentencing.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Lee Ard, Respondent,

v.

William D. Catoe,
Commissioner, South Carolina
Department of Corrections, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Lexington County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26282
Submitted September 20, 2006 – Filed March 5, 2007

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, all of Columbia, for Petitioner.

William N. Nettles, of Sanders & Nettles, of Columbia, and Christopher Seeds, of New York, for Respondent.

JUSTICE WALLER: We granted the State's petition for a writ of certiorari to review the grant of post-conviction relief (PCR) to respondent, Joseph Lee Ard, who was sentenced to death for killing his pregnant girlfriend, Madalyn Coffey, and their unborn son. We affirm the PCR court's grant of a new trial based on ineffective assistance of trial counsel.

FACTS

On April 23, 1993, at approximately 5:30 a.m., Coffey died from a single gunshot wound to her forehead. She was 17 years old and 35 weeks pregnant at the time; the viable fetus died from a lack of oxygen. There were no eyewitnesses to the shooting. Respondent was tried for two counts of murder.

During the guilt phase of trial, the State presented over 20 witnesses. Witnesses for the State testified they heard respondent threaten to kill Coffey and that he told Coffey he wished she and the baby were dead. Respondent's friend, Jay Johns, testified that he was with respondent and Coffey in the trailer just before the shooting, but had gone outside "to get a beer" when he heard "a pop." Johns went back inside the trailer; when Johns asked respondent what happened, he said "I think I killed her." Johns called 911, and respondent fled the scene.[1]

SLED agent Joseph Powell testified for the State as an expert in gunshot residue analysis. Two types of samples, alcohol swabs and scanning electron microscope (SEMS) tabs, had been taken from Coffey's hands. Powell stated that he first "ran the swabs … to see if we could find any amount, any elevated elements of materials. The elements we are looking for are materials call[ed] barium, antimony and lead." Powell explained that

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[1] Johns also testified that he told respondent he was going to call the police and asked respondent what he should tell them. According to Johns, respondent replied: "Tell them I did it and they will have to catch me." On cross-examination, however, trial counsel referred to Johns' written statement given to police on the date of the incident which did not include the phrase "they will have to catch me."

these are the three elements which are found in gun primer residue. Powell testified that after the initial test on the swabs was complete, "[t]he values were not sufficient for a positive cause that there was gunshot residue, but there was **an indication**." (Emphasis added).

Therefore, Powell ran the SEMS test to see if there were "any actual physical particles that would have been found from gunshot residue." Powell stated that there were "several particles which were **very interesting**, but there was not any **or enough** material for us to be able to call gunshot residue; thus, [Coffey] ha[d] no gunshot residue on her hands." (Emphasis added). The following colloquy then occurred:

> Q. When you say no gunshot residue on her hands, can you rule out her having pulled the trigger on that gun?
>
> A. There is no gunshot residue on her hands. If she had fired the weapon, the material that would have come from this gun would have had to have been removed before the test would have been administered.

Trial counsel did not cross-examine Powell.[2]

Former SLED Agent Michael Avery also testified regarding gunshot residue. Avery stated that he was Powell's supervisor when the samples in

[2] However, when Powell was recalled by the State in reply, respondent's counsel did cross-examine him about how most of the gunshot residue would have been expelled through the end of the barrel of the gun. Trial counsel also questioned Powell regarding the fact that samples from Coffey's hands might not have been taken until after the body was moved to the hospital for the autopsy and that moving the body around might cause removal of the residue.

this case were tested.[3] Avery stated he reviewed Powell's examination and confirmed Powell's conclusions. In addition, the State elicited the following testimony:

> Q. As a matter of fact, the defense has since hired you to review that?
>
> A. Yes, sir.
>
> Q. Again. And you still confirm Joe Powell's conclusions?
>
> A. Yes, sir, the conclusion of the test results, which was no gunshot residue.

The defense at the guilt phase put up over 10 witnesses. Several defense witnesses testified that respondent was excited about becoming a father and respondent and Coffey acted like they loved each other.[4] There was also testimony respondent did not threaten or abuse Coffey and that he was planning on getting a ring for, and marrying, Coffey.

Respondent took the stand in his own defense and testified Coffey's killing was an accident. He explained that he and Coffey were in a motel bathroom while Johns and his girlfriend were fighting in the motel room. Coffey was upset and crying because respondent had been spending time in Atlanta with another woman. When Johns and respondent went to leave the motel room, Coffey asked if she could go with respondent; he agreed. Johns, respondent, and Coffey then left the motel room and drove to Johns' trailer. Respondent testified that Coffey sat on the couch while he kneeled on the floor. When respondent told Coffey he was going to Atlanta the next day and

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[3] The gunshot residue analysis was performed by Powell in 1993. Avery left SLED in 1995. Prior to the April 1996 trial, respondent's counsel hired Avery as a consultant to re-examine the analysis which had been done by Powell and reviewed by Avery.

[4] These matters were also testified to on cross-examination by some of the State's witnesses.

she could not go with him, respondent stated that Coffey "got real upset." Respondent testified that Coffey had his gun in her hand and told him she did not love him. When respondent denied he was going to Atlanta to be with the other woman named Maurer, Coffey said "You're lying. You just want to go down there and screw Maurer some more. You don't love me or the baby. We might as well be dead." Respondent testified that she then pulled the hammer back on the pistol, cocking the gun.[5] According to respondent, he tried to lean forward to grab the gun, Coffey "turned real quick" and when he grabbed the cylinder gap of the gun, "it went off."

Coffey fell over. Respondent tried to pick her up, got "stuff and blood" on his hands, "freaked out" and fled to Atlanta. After three days of taking pills, sleeping, and crying,[6] respondent returned to Columbia with the gun, and his parents took him to an attorney. As they were making arrangements in the attorney's office to turn respondent in to the Lexington County Sheriff's Department, he "blacked out" and woke up in the hospital.

In the State's closing argument, the State argued that respondent killed his victims with malice. Specifically, the State argued to the jury that the gunshot residue tests were important, and because there was no residue on Coffey's hands, respondent's accident defense did not hold up:

> …Why are these so important? Because if there is no gunshot residue on her hands, as Joe Powell told you, then her hand wasn't on that gun when it went off. Her hand wasn't near that gun when it went off. Her hands were somewhere aside from on this gun.

[5] The State's firearms expert testified that the gun, a Charter Arms .44 caliber double action revolver, required only three to three and one quarter pounds of pressure on the trigger to cause the gun to fire when the gun was cocked.

[6] One of the State's witnesses on cross-examination corroborated that when she saw respondent during this time in Atlanta, he was upset or sleeping. One of respondent's witnesses, Jerry Logue, testified that while respondent was staying at his apartment these days in Atlanta, he was upset, crying, did not eat, and spent most of the time sleeping.

That's why they are so important. They can't attack Joe Powell. They can't attack him because their own expert, Mike Avery, was hired by the defense to review Mr. Powell's work.

[Objections by defense, which were overruled.]

…He found no fault with Joe Powell's findings, that those findings were correct.

Now, if the findings are correct, if the findings from these are correct, then the only thing they can do is attack the way it's collected. If they can't attack the results, they have got to attack the way it's collected.[7]

…

Why is it so important that these tests be discounted? Because if they can't discount Joe Powell, if they can't discount those tests, then they can't get past the fact that there is no residue and then everything else they have raised is absolutely irrelevant, everything.… They have got to – got to – discount the value of those tests.

…No gunshot residue. None. What does that tell y'all? What does that tell y'all?

In addition to murder, the trial court charged the jury on involuntary manslaughter and accident. After one hour of jury deliberations, the jury requested a "definition of" involuntary manslaughter and murder; the trial court recharged the jury on those two offenses. After another 45 minutes of deliberation, the jury found respondent guilty of the murder of Coffey and the unborn child. After a lengthy sentencing phase with numerous witnesses for both sides, the jury returned a recommendation of death.

[7] Throughout the guilt phase, the defense consistently challenged, both on cross-examination of State witnesses and through defense witnesses, the manner in which evidence was collected and the processing of the crime scene.

Respondent appealed, raising four issues related only to the sentencing phase. This Court affirmed the death sentence.[8] State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) (Moore, J., concurring in separate opinion in result only; Gregory, A.J., concurring in majority opinion in result only).

Respondent filed for PCR. The PCR court found that trial counsel had failed to adequately investigate and challenge the State's gunshot residue evidence and therefore granted respondent a new trial based on ineffective assistance of counsel.[9]

ISSUE

Did the PCR court err in finding ineffective assistance of counsel based on trial counsel's failure to adequately investigate and challenge the State's gunshot residue evidence?

DISCUSSION

The State argues the PCR court erred in finding ineffective assistance of trial counsel. Specifically, the State argues trial counsel were not deficient because they reasonably investigated the gunshot residue evidence by hiring former SLED agent Avery as a gunshot residue expert and reasonably relying

[8] Ard was the first South Carolina case where feticide was used to support the death penalty. This Court held that the Legislature intended to include a viable fetus as a "person" or "child" as those terms are used in S.C. Code Ann. §§ 16-3-20(C)(a)(9) & (10), the aggravating circumstances of murdering "two or more persons" and "murder of a child eleven years of age or under."

[9] In addition, the PCR court granted respondent a new sentencing trial based on appellate counsel's failure to raise on direct appeal an issue involving the trial court's dismissal of a juror during the sentencing phase. Because we affirm the PCR court's grant of a new trial to determine guilt, we need not address the State's remaining issue related to sentencing. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

on Avery's advice. The State further argues that even assuming deficiency, there is no prejudice. We disagree.

We find the PCR court's factual findings regarding deficiency and prejudice are well supported by the evidence presented at the PCR hearing. A review of the relevant evidence is in order.

After filing for PCR, respondent deposed Powell, the SLED gunshot residue expert, in October 2001; Powell testified for the State at the PCR hearing in April 2004. At both the deposition and the hearing, Powell stated that his testimony at trial was based on the SLED protocol **in use at that time**. Based on this protocol, he accurately reported a finding of negative for gunshot residue. Powell explained that SLED's standard at the time was to report a positive conclusion of gunshot residue **only** if perfectly round gunshot residue particles were detected, which specifically meant spherical particles containing barium, antimony and lead. However, he further explained that as time went on, there were concerns that when non-round particles with the three required elements were found, or perfectly round lead particles were found, these findings should not be reported as a negative finding, but rather as "inconclusive."

Regarding the instant case, he stated that if the analysis was conducted under the modern protocol, his conclusion would be that two particles on Coffey's right back hand were inconclusive for gunshot residue. Powell explained that an "inconclusive" finding meant it was not consistent with the person firing the gun, **but could be consistent with the person handling the weapon**.[10]

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[10] At his deposition, Powell specifically stated the following with regard to Coffey's gunshot residue tests:

> If this person had handled the gun, grabbed it in some way, done [sic] something to knock it away this could be consistent with it. I have seen this happen where people have handled weapons. I've seen chunky [i.e., non-round] particles and I've seen – this is well within the realm of possibility.

Even more significant, however, was Powell's testimony that had respondent's counsel cross-examined him at trial regarding his statement that "several particles … were very interesting," he would have testified that although the evidence from Coffey's hands did not meet SLED's threshold for positively identifying it as gunshot residue, the evidence could have been associated with gunshot residue.[11] Furthermore, Powell stated that if defense counsel had met with him prior to trial to discuss the test results, he would have explained what he found "interesting" about them. In other words, if counsel had asked, **either prior to trial or at trial**, Powell would have explained that the evidence from Coffey's hands, which revealed at least two particles with the three required elements, was consistent with gunshot residue and could have come from her handling a weapon.

Trial counsel Jack Duncan and Elizabeth Fullwood both testified at the PCR hearing. Both attorneys testified there was an extreme delay in receiving the requested discovery materials from the solicitor's office.[12] These discovery materials included the gunshot residue test results analyzed by Powell and dated October 1993. They did not receive the underlying "raw data" for the gunshot residue tests until March 1, 1996 after making a specific

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During his direct examination at the PCR hearing, Powell stated that under the "current protocol," the results would permit a finding of "may be consistent with gunshot residue."

[11] Powell specifically stated at the PCR hearing that if counsel had questioned him about the "interesting" particles, he would have testified as follows: "'The report is reading as no gunshot residue detected, and that is my position, but there are some things here which if – can they come from a gun? Yes. But they may not be from a gun.'" Likewise, at the deposition, Powell stated that because there were two (non-round) particles found on Coffey with the required three elements, this "absolutely" indicated – even in 1996, the time of trial – that a weapon was involved. Regarding those two particles, Powell stated "[t]hat is absolutely something which I do not find without usually a weapon."

[12] Although counsel had filed discovery motions in March 1994, Duncan and Fullwood testified they received 1200 pages of documents on February 2, 1996. When trial counsel received this discovery was approximately when they first were informed the trial would be in April 1996. Counsel moved for a continuance in March 1996, but the trial court denied the motion.

additional request for the data. Duncan testified that receiving the "no gunshot residue" finding in February 1996 created "a big hole in [the] theory of the case" which was accident. Likewise, Fullwood testified that respondent had a "good defense" to the guilt phase until the gunshot residue tests undermined the accident defense; Fullwood and Duncan both stated that they could not explain why Coffey did not have gunshot residue on her hands. According to Duncan, the prosecution "exploited" this "hole" to argue in closing that respondent's version of events could not have happened.

As to retaining Avery, Powell's former SLED supervisor, as a defense expert, Fullwood testified Avery was hired "[t]o see if he could help us understand and explain the results of the gunshot residue tests SLED had conducted."[13] Duncan testified that after Avery told them there was nothing "useful," i.e., "nothing for [counsel] to question," in the gunshot residue tests, they tried to develop theories as to why Coffey did not have gunshot residue on her hands, such as the way this evidence was collected and preserved. Counsel did not request that Avery independently re-test the gunshot residue evidence.

Duncan further testified that counsel did not cross-examine the State's witnesses related to the gunshot residue test results because they "didn't want to draw any more attention to it" since they "had no response to what they had to say." When Duncan was asked about Powell's deposition testimony which showed Powell would have testified in a manner favorable to the defense if counsel had asked him certain questions, Duncan acknowledged that "the answers would have helped [the defense] immensely."

Finally, respondent presented his own gunshot residue expert at the PCR hearing, Robert White. In contrast to Powell, White **positively** identified several particles of gunshot residue from Coffey's tests. In White's opinion, as long as a particle contains the three required elements (barium, antimony, and lead) and is round-ish in shape (as opposed to crystalline, or

[13] When asked if Avery was counsel's first choice for a gunshot residue expert, Fullwood responded, "Well the thing was that there wasn't – We were under such time constraints there was no such thing as trying to make a choice about anything."

spiky), then the particle constitutes unique gunshot residue. In addition, White found several particles "characteristic of gunshot residue," which he defined as "other particles of lead, barium and antimony in combinations of two or alone." White testified a person could get unique and characteristic particles from picking up a gun, firing a gun, or being close to a gun going off.

The PCR court ruled that trial counsel's failure to adequately evaluate and challenge the State's gunshot residue testimony was deficient performance that resulted in prejudice to respondent. As to deficiency, the PCR court concluded trial counsel failed to: (1) "aggressively re-examine" the gunshot residue reports; (2) "read the documents, evaluate them, and pursue the necessary next steps, such as consulting an appropriate," i.e., "an independent expert;" and (3) "investigate the possibility of retesting the samples." As to prejudice, the PCR court found that the "extent to which the jurors credited Powell's testimony … was critical to the outcome of the case." Moreover, the PCR court noted that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case…. Because of the solicitor's critical reliance on the absence of gunshot residue evidence, there is little question that the tenor of the jury deliberations would have been different, but for counsel's mistakes." Finally, the PCR court stated it was not "confident that a jury, adequately informed, would have convicted [respondent] of murder."

The State first argues the PCR court erred because respondent has not proved trial counsel was deficient. The State contends that counsel reviewed SLED's gunshot residue report and consulted with an expert. According to the State, because the expert reported he was satisfied with the report, counsel then reasonably focused their strategy on attacking the way the evidence was collected. In addition, the State maintains there could be no prejudice. We disagree.

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. E.g., Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. Webb v. State,

281 S.C. 237, 314 S.E.2d 839 (1984). The Court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. E.g., Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, supra; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Furthermore, when a defendant's conviction is challenged, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. at 695.

Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986); see also Strickland v. Washington, 466 U.S. at 691. When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland v. Washington, 466 U.S. at 690. Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987) (emphasis in original).

The American Bar Association (ABA) has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case: "Counsel at every stage have an obligation to conduct thorough **and independent** investigations relating to the issues of both guilt and

penalty." *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L. Rev. 913, 1015 (2003) (emphasis added) (hereinafter "*ABA Guidelines*").[14] With respect to forensic evidence, the ABA directs the following: "With the assistance of appropriate experts, counsel should [] aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." Id. at 1020.

In our opinion, the PCR court correctly found ineffective assistance of counsel. We find respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence. Furthermore, the evidence at the PCR hearing establishes that if they had made an appropriate challenge, it would have had a significant impact on the guilt phase of this case.

First, we note that the testimony from both trial counsel at the PCR hearing indicates how crucial the gunshot residue evidence was to respondent's defense. They had not expected the results to come back negative, and those negative results considerably undermined respondent's account of the incident. While counsel did seek out an expert, counsel nevertheless was deficient for retaining Avery, Powell's former SLED supervisor, as their expert. Although Avery was no longer working for SLED in 1996 when he was retained as a defense expert, the PCR court correctly found that Avery was not **an independent** expert because he had

[14] In Strickland, the United States Supreme Court explained that "[p]revailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining" whether counsel's performance is reasonable. Strickland v. Washington, 466 U.S. at 688. More recently, the Supreme Court again clearly enunciated that the reasonableness of counsel's conduct may be measured by the ABA's guidelines for capital defense. Wiggins v. Smith, 539 U.S. 510, 524 (2003). Additionally, "[t]he ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984." Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003).

reviewed the gunshot residue report in his role as Powell's supervisor.[15] In order for Avery to question Powell's findings he would have implicitly had to have cast doubt on his own oversight of that very same analysis. Although there is no evidence that Avery did, in fact, render a biased opinion to defense counsel, we agree with the PCR court that it was unreasonable for counsel to choose Avery as their only expert on the critical gunshot residue analysis. See Strickland v. Washington, 466 U.S. at 690 ("counsel's function … is to make the adversarial testing process work in the particular case"); *ABA Guidelines*, supra (recommending independent investigation as well as an "aggressive re-examin[ation]" of all of the State's forensic evidence).

Furthermore, we note that the State – during both Avery's testimony and its closing argument – emphasized for the jury the fact that Avery had been hired by the defense and nonetheless had confirmed Powell's conclusions.[16]

Additionally, counsel did not discuss the gunshot residue analysis at all with Powell during their pretrial investigation. Powell testified at PCR that he would have explained to defense counsel why he believed some of the particles were "interesting;" this discussion would have given counsel an opportunity to prepare an effective cross-examination which would have resulted in Powell testifying that the evidence was not inconsistent with Coffey handling the gun. In our opinion, counsel were unreasonable in not exploring the gunshot residue evidence with Powell prior to trial. Troedel v. Wainwright, supra (counsel has the duty to interview potential witnesses and

[15] We reject the dissent's suggestion that we are holding it was a lack of time which caused counsel's unreasonable decision regarding the retention of Avery as respondent's gunshot residue expert. Indeed, we agree with the dissent that counsel "expeditiously" retained an expert. We disagree, however, with the dissent's view that this expert must be presumed to be an appropriate one. Given his previous involvement in the case while employed with SLED, any presumption about his objectivity is untenable.

[16] The Deputy Solicitor specifically argued in closing that the defense could not attack Powell's testimony "because their own expert, Mike Avery, was hired by the defense to review Mr. Powell's work…. He found no fault with Joe Powell's findings…."

to make an independent investigation of the facts and circumstances of the case); see also *ABA Guidelines*, 31 Hofstra L. Rev. at 1019 ("counsel should seek out and interview potential witnesses").

Even at trial, however, Powell's testimony clearly alluded to some uncertainty in the evidence. Powell testified there were "several particles which were **very interesting**, but there was not any **or enough** material for us to be able to call gunshot residue; thus, [Coffey] ha[d] no gunshot residue on her hands." (Emphasis added). Counsel should have cross-examined Powell as to what he meant by "very interesting" and not "enough material." Had counsel asked these questions, Powell would have filled the "hole" in the defense which they thought was created (but actually was not) by Powell's ultimate conclusion of "no gunshot residue." Accordingly, we find that counsel's decision to not cross-examine Powell on the gunshot residue evidence was not an objectively reasonable strategy. See Ingle v. State, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002) (counsel must articulate an objectively reasonable strategy to avoid a finding of ineffectiveness).

Moreover, the State's heavy reliance in closing argument on the lack of gunshot residue further supports how critical it would have been if counsel had elicited testimony from Powell that the evidence indeed was consistent with Coffey handling a gun. The Deputy Solicitor argued:

> if there is no gunshot residue on her hands, as Joe Powell told you, then her hand wasn't on that gun when it went off. Her hand wasn't near that gun when it went off…. if they can't discount Joe Powell, if they can't discount those tests, then they can't get past the fact that there is no residue and then everything else they have raised is absolutely irrelevant, everything…. They have got to – got to – discount the value of those tests.

Respondent clearly showed that counsel could have established that while there was a scientific finding of "no gunshot residue," there nevertheless was evidence consistent with (but not conclusive of) Coffey handling the gun. Had counsel elicited this testimony from Powell, the State would not have been able to attack the defense theory as convincingly as it did.

The State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice. We note that the jury apparently did not believe this to be an open-and-shut case of murder because after deliberating for an hour, the jury asked for further clarification from the trial court on the definitions of murder and involuntary manslaughter. It is also worth noting that because the jury did have the option of involuntary manslaughter, it could have accepted respondent's account and yet still found him criminally responsible for the victims' deaths.[17]

Finally, we disagree with the dissent's suggestion that the PCR court found ineffective assistance of counsel based on respondent's introduction at the PCR proceedings of an expert who conclusively found gunshot residue. The PCR court's findings are based almost exclusively **on Powell's testimony** as to what information he would have provided to counsel if only they had asked – either prior to trial or on cross-examination. Neither this Court, nor the PCR court, has handed respondent a "second chance" because he has, many years after conviction, found a favorable expert. Instead, the PCR court properly focused on the evidence that counsel failed to appropriately examine the State's forensics evidence and failed to obtain the

[17] The trial court instructed the jury that involuntary manslaughter is the "unlawful killing of another without malice, express or implied, by some act or omission constituting criminal negligence. Criminal negligence is the reckless disregard of the safety of others." The trial court further instructed the jury that if there was a reasonable doubt as to whether respondent was guilty of murder or manslaughter, then the jury must "give him the benefit of the doubt and find him guilty of manslaughter." During the guilt phase, there was much testimony about drug use and drug dealing by respondent and his acquaintances. There was also testimony about how respondent carried a gun and that the gun was on the floor of the trailer before Coffey was shot. Considering this evidence, we find the jury could have believed respondent's account and yet could have also decided that respondent recklessly disregarded the safety of his pregnant girlfriend and unborn son, therefore allowing the jury to return a verdict of involuntary manslaughter.

assistance of **an appropriate** expert. Likewise, it is the evidence available at the time of trial which we, too, rely upon to uphold the PCR court's grant of relief.

In sum, we hold counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase. There is ample probative evidence to support the PCR court's factual findings of deficient performance compelling us to affirm. Webb v. State, supra (if there is any evidence of probative value to support the PCR court's factual findings, the Court will uphold the findings). Moreover, the PCR court correctly found prejudice. In our opinion, without counsel's errors, there is a reasonable probability the jury would have had a reasonable doubt as to whether respondent was guilty of murder. See Strickland v. Washington, 466 U.S. at 695.

Accordingly, the PCR court's rulings that trial counsel was ineffective and respondent is entitled to a new trial are **AFFIRMED.**

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

CHIEF JUSTICE TOAL: I respectfully dissent. I would reverse the decision of the PCR court. In my opinion, Ard's trial counsel adequately investigated the issue of gunshot residue on the victim's hands and their failure to cross-examine the State's gunshot residue expert was neither deficient nor prejudicial to Ard.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) the performance of counsel was deficient and, (2) but for the errors of counsel, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). According to the majority, Ard's two trial counsel were deficient in failing to pursue the State's gunshot residue expert witness vigorously enough with respect to his conclusion that the victim had no gunshot residue on her hands. The majority also finds Ard's counsel failed to adequately perform their own investigation into the gunshot residue results. The facts, in my opinion, are to the contrary.

In preparation for trial, Ard's counsel did, in fact, hire their own gunshot residue expert to review the gunshot residue test results furnished by the State. Counsel did not ultimately produce this expert as a witness at trial because, upon review of the test results, the expert then indicated to trial counsel that he concurred with the State's expert's conclusion. Instead, at trial, the State called the expert originally obtained by Ard to testify that he had agreed with the State's own expert's findings. In my opinion, Ard's trial counsel appropriately countered this testimony with a cross-examination which called into question the accuracy of the gunshot residue test results. Specifically, counsel elicited testimony from the expert suggesting that the process of fingerprinting the victim would have "interfered" with the gunshot residue test results if done prior to trace evidence collection. Simply stated, Ard's trial counsel sufficiently dealt with the adverse evidence. The fact that Ard's counsel could not force their own qualified expert to tailor his opinion to fit their theory of the case, in my view, is an insufficient basis on which to conclude that these counsel were deficient.

The majority bases its conclusion in part on the PCR court's finding that the expert retained by Ard's counsel was not "independent" because of his prior involvement with the gunshot residue analysis during his

employment with SLED. In my opinion, this is rank speculation, not supported by any evidence of bias in the record. Without more, this assumption does not support the majority's conclusion that selection of this expert by counsel was unreasonable.

Moreover, in the face of unfavorable gunshot residue results, counsel for Ard independently investigated the facts and circumstances of the case by performing their own thorough investigation of the crime scene and hiring experts in both engineering and crime scene investigation in order to corroborate Ard's account of the gun's accidental discharge. Counsel also developed their theory on the accuracy of the gunshot residue results by interviewing three witnesses regarding the handling of the victim's body at the scene. In light of these independent investigations, the fact that counsel did not conduct pre-trial questioning of the State's expert on the results of the gunshot residue analysis, in my opinion, does not fall below an objective standard of reasonableness. *See Simpson v. Moore,* 367 S.C. 587, 627 S.E.2d 701 (2006) ("A decision 'not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'")

Additionally, the record shows a thorough factual explanation by the State's expert who testified that there were not enough indicator particles to conclude there was gunshot residue on the victim's hand. Again, in my view the fact that Ard's trial counsel could not force the State's gunshot residue expert to change his opinion is an insufficient basis on which to conclude that these counsel were deficient. Moreover, the fact that eight years later, PCR counsel were finally able to retain an expert who reached a conclusion favorable to Ard's case (i.e. that the victim's hands contained traces of gunshot residue) does not imply that trial counsel were deficient for failing to find such an expert at the time of the trial.[18] To hold otherwise declares open

[18] The record shows that trial counsel received the State's gunshot residue results on February 2, 1996, and the underlying raw data on March 1, 1996. The majority implies that the time between February 2, 1996, and April 15, 1996, when the trial was scheduled to begin, was insufficient for trial counsel to retain a qualified gunshot residue expert. However, those in the legal

season on the criminal justice system by giving a "second chance" to any convicted criminal who is patient enough to seek out an "expert" who will one day provide him with the opinion testimony he desires.[19]

Furthermore, even if these trial counsel were deficient, Ard failed to demonstrate that the deficiency prejudiced his case. The State presented twenty witnesses to show that Ard killed the victim with malice. Although

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profession are well aware that trial preparation does not occur in a perfect world. In my view, we must presume Ard's trial counsel operated appropriately and expeditiously in retaining their expert because there is no evidence that the expert, a former supervisor in SLED's trace evidence department, was biased or otherwise unqualified to perform an accurate evaluation of the State's results on such "short notice."

[19] Additionally, I note that in support of their conclusion that trial counsel were deficient, the majority cites extensively to American Bar Association (ABA) guidelines on the prevailing norms of practice. The majority justifies their reliance on ABA guidelines by pointing to an endorsement of ABA standards in *Strickland v. Washington*. In my opinion, however, the *Strickland* court makes it clear that the ABA standards, although helpful, are "only guides" for assessing reasonableness. 466 U.S. at 688. In fact, the *Strickland* court cautions:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89. This Court has never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina. Therefore, in my view, "reasonableness" in the instant case is best assessed in the broader context suggested by *Strickland*.

the State emphasized the lack of gunshot residue in its closing argument, in my opinion, the State presented other overwhelming evidence from which a jury could find Ard guilty of murder.

Although not addressed by the majority because of their findings on ineffectiveness of trial counsel, Ard also claimed that appellate counsel was ineffective for failing to directly appeal the dismissal of a juror during the sentencing phase. The juror's qualifications came under scrutiny after the second day of the sentencing phase when the juror's wife approached the trial judge complaining that her husband's jury duty was causing hardship for the family because of his inability to work. The juror's wife also commented that her husband's religious beliefs would not permit him to vote for the death penalty. When asked by the trial court during an in camera conference about his ability to be a fair juror, the juror responded that although he believed he could render a fair verdict under normal circumstances, the fact that his wife had raised doubts in the parties' minds as to his ability to be fair made him feel "targeted" regardless of his ultimate decision. When further questioned about his ability to vote for the death penalty, the juror stated, "I don't think I can be fair at this point." Despite multiple reassurances from the court that this matter would remain private and that the juror would not be accountable to anyone for his vote, the juror reiterated his concerns that his decision "would be a threat" to him and concluded that he could no longer cast a fair vote. The trial court released him from the jury.

In my view, Ard did not show that the failure of appellate counsel to directly appeal the dismissal of the juror amounted to ineffective assistance of counsel. In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). Although Ard supported his argument that counsel was deficient with testimony from appellate counsel acknowledging that he erred in not raising the juror's dismissal on appeal, Ard did not satisfy his burden of proof with a showing of how the juror's dismissal prejudiced his case. In my view, there was nothing prejudicial about the dismissal of a juror who stated that he would feel "targeted" as to his decision and ultimately admitted that he did not believe he could cast a fair vote. Therefore, in my opinion, the

PCR court incorrectly determined that the failure to directly appeal the trial court's dismissal of a juror amounted to ineffective assistance of counsel.

For the foregoing reasons, I would hold that the actions of neither trial counsel nor appellate counsel resulted in prejudice against Ard. Accordingly, I would reverse the PCR court's finding of ineffective assistance of counsel based on the failure of trial counsel to adequately investigate and challenge the gunshot residue. I would also reverse the PCR court's finding of ineffective assistance of counsel based on the failure of appellate counsel to raise the issue of the trial court's dismissal of a juror on direct appeal.

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Isiah Porter, **Appellant,**

v.

Labor Depot, Employer, and Capital City Insurance Co., Carrier, **Respondents.**

Appeal From Richland County
Reginald Lloyd, Circuit Court Judge

Opinion No. 4212
Heard February 21, 2007 – Filed March 5, 2007

AFFIRMED

E. Ros Huff, Jr., of Irmo, for Appellant.

Grady L. Beard, of Columbia, for Respondents.

ANDERSON, J.: In this workers' compensation action, the Appellate Panel of the South Carolina Workers' Compensation Commission (SCWCC) found Claimant Isiah Porter (Porter) and Labor Depot did not have an employer-employee relationship. Accordingly, the Appellate Panel did not

have jurisdiction to award benefits. The circuit court affirmed the Decision and Order of the Appellate Panel. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Porter was injured on August 4, 2002, when he fell approximately twenty to thirty feet while allegedly working as a Labor Depot employee on the Strom Thurmond Fitness Center construction site in Columbia, South Carolina. Emergency Medical Services (EMS) transported Porter to Richland Memorial Hospital where he was diagnosed with a dislocated hip and multiple fractures. Subsequently, Porter underwent surgery on his hip and cervical spine to repair his injuries. As of his workers' compensation hearing date, Porter had not reached maximum medical improvement.

The Richland Memorial Hospital emergency room and consultation reports noted Porter was positive for ethyl alcohol (ETOH) on the day of the accident. Porter admitted to emergency room personnel he had been drinking earlier that day. He disclosed he usually drank about one and one half pints of liquor and one to two quarts of beer per day. Porter's own testimony at the hearing confirmed he had a life-long history of drinking alcohol. He drank every day prior to August 4, 2002. Additionally, Porter's medical history revealed reports of alcohol abuse on four previous occasions: September 7, 1993; November 27, 1997; March 8, 2002; and May 7, 2002.

Porter was single and fifty-one years old at the time of the August 4, 2002 accident. He attended school through the seventh grade, studied automobile painting and body work with Job Corps, and was employed primarily in janitorial and laborer jobs. Porter has not worked in any capacity following the accident.

Labor Depot denied Porter's claim for workers' compensation benefits, maintaining he was not a Labor Depot employee.[1] Porter testified he

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[1] Labor Depot asserted intoxication, among other affirmative defenses, in the event the Appellate Panel determined an employer-employee relationship existed. In concluding that no such relationship existed, the Panel was

completed an employment application and worked for Labor Depot for approximately six months prior to the accident. His duties included cleaning up around the landfill and on construction sites. He earned $300-$350 weekly. On the day of the accident, a Sunday, Porter went to work at 3:00 p.m. and had been on the job for approximately forty-five minutes when the accident occurred. He did not know the name of his supervisor or the name of the construction company on the job site that day, nor did he produce any documentation by way of check stubs or income tax returns as evidence of his employment with Labor Depot. Robert Brown, allegedly a co-worker employed by Labor Depot, testified he worked with Porter on August 4, 2002 and witnessed the accident. Brown did not present any additional evidence, other than his testimony, that he and Porter were employees of Labor Depot. In addition, South Carolina Employment Security Commission (SCESC) records from 2002 showed no evidence of any employment relationship between Porter and Labor Depot.

A Form 12A, Employer's First Report of Injury, dated October 30, 2002, was filed electronically with the SCWCC on Labor Depot's behalf. An undated, handwritten First Report of Injury or Illness was prepared by Capital City Insurance (Carrier). Porter filed a Form 50 requesting a hearing on January 29, 2004 and an Amended Form 50 on August 2, 2004. The hearing before the single commissioner on September 21, 2004, resulted in the following dispositive finding:

> Claimant failed to meet his burden of proving, by the greater weight of evidence, that he was an employee of defendant, Labor Depot. Therefore, I find that the South Carolina Workers' Compensation Commission does not have jurisdiction to decide the matter. This Finding is based on the testimony of the witnesses, including the claimant, the exhibits, or lack thereof, presented by each party, and the discretion of the Hearing

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without jurisdiction to determine whether intoxication was the proximate cause of the accident. Accordingly, the intoxication defense is not before this court for review.

Commissioner as the fact finder in this case to properly weigh the evidence and judge witness credibility.

The Decision and Order of the Appellate Panel sustained and adopted the single commissioner's Order in its entirety. On appeal, the circuit court issued a Form 4 Order stating: "Decision of the Commission is affirmed."

ISSUES

(1) Did the circuit court err as a matter of law in issuing a form order without making findings of fact or conclusions of law for review by the appellate court?

(2) Did the circuit court err as a matter of law in affirming the Appellate Panel's Decision and Order that Porter was not an employee of Labor Depot?

STANDARD OF REVIEW

Judicial review of a Workers' Compensation decision is governed by the substantial evidence rule of the Administrative Procedures Act. Baxter v. Martin Bros., Inc., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006); Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). However, if the factual issue before the Commission involves a jurisdictional question, this court's review is governed by the preponderance of evidence standard. Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002); Vines v. Champion Bldg. Prods., 315 S.C. 13, 431 S.E.2d 585 (1993); Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998). Consequently, our review is not bound by the Commission's findings of fact on jurisdiction. Id. A reviewing court has both the power and duty to review the entire record, find jurisdictional facts without regard to conclusions of the Commission on the issue, and decide the jurisdictional question in accord with the preponderance of evidence. Canady v. Charleston County Sch. Dist., 265 S.C. 21, 25, 216 S.E.2d 755, 757 (1975); see also Kirksey v.

Assurance Tire Co., 314 S.C. 43, 443 S.E.2d 803 (1994) (holding this court can find facts in accordance with the preponderance of evidence when determining a jurisdictional question in a Workers' Compensation case); Sanders v. Litchfield Country Club, 297 S.C. 339, 377 S.E.2d 111 (Ct. App. 1989) (deciding where a jurisdictional issue is raised, this court must review record and make its own determination whether the preponderance of evidence supports the Commission's factual findings bearing on that issue).

The existence of the employer-employee relationship is a jurisdictional question. Nelson, 349 S.C. at 594, 564 S.E.2d at 112; South Carolina Workers' Compensation Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995); Edens v. Bellini, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004); see also Lake, 330 S.C. at 247, 498 S.E.2d at 653 (holding existence of employer-employee relationship is jurisdictional question; injured worker's employment status, as it affects jurisdiction, is matter of law for decision by court and includes findings of fact that relate to jurisdiction).

The question of subject matter jurisdiction is a question of law. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Roper Hosp. v. Clemons, 326 S.C. 534, 484 S.E.2d 598 (Ct. App. 1997)). On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(5) (Act No. 387, 2006 S.C. Acts 387, eff. July 1, 2006); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The appellant bears the burden of showing that the circuit court's decision is against the preponderance of evidence. Gray, 339 S.C. at 182, 528 S.E.2d at 440 (citing Lake, 330 S.C. at 246, 498 S.E.2d at 653).

LAW/ANALYSIS

I. Circuit Judge's Form Order

Porter contends the circuit court erred in failing to make specific findings of fact and conclusions of law on the issue of whether an employer-

employee relationship between Porter and Labor Depot existed. We disagree.

Advancing his contention, Porter relies on Bowen v. Lee Process Sys. Co., 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000), wherein this court remanded the trial court's grant of summary judgment for an order more specifically identifying the grounds for its ruling. In Bowen, we were unable to discern from the trial court's decision "whether the court found Defendants owed no duty to [Plaintiff], whether they owed a duty to [Plaintiff] and breached it, or whether they were negligent, but not grossly negligent." Bowen, 342 S C. at 240, 536 S.E.2d at 90. In order to review the issue adequately, we required the trial court to articulate its rationale and legal analysis more precisely. Similarly, in B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 271, 603 S.E.2d 629, 631-32 (Ct. App. 2004), we instructed:

> On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order outlining its rationale, we simply cannot perform our designated function.

However, not all situations require a detailed order, and the trial court's form order may be sufficient if the appellate court can ascertain the basis for the trial court's ruling from the record on appeal. Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002). "[T]here is no blanket requirement that the trial court set forth a separate explanation on all of its rulings." Id. at 312, 578 S.E.2d at 26; see also Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) cert. dismissed as improvidently granted 354 S.C. 57, 579 S.E.2d 605 (2003) (holding a form order stating only that the appellant's post-trial motions for JNOV and new trial were denied was, together with the record of the proceedings, adequate to enable appellate review).

It is well settled that "[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C., 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998). Furthermore, courts reviewing the decisions of administrative agencies may look to written documents as well as records of proceedings as sufficient formats for final decisions. Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 34, 606 S.E.2d 209, 212 (Ct. App. 2004).

Here, the circuit court placed its imprimatur on the Appellate Panel's findings of fact and conclusions of law by affirming the Panel's decision. Accordingly, the Appellate Panel's findings of fact and conclusions of law, as incorporated by reference to the single commissioner's order, became those of the circuit court. The order encapsulated the single commissioner's ruling:

FINDINGS OF FACT

> The undersigned has carefully considered and reviewed all of the evidence presented by both parties in this claim, including the Claimant's testimony and the APA Submissions. From this evidence it is found as a fact that:
>
> 1. The claimant was not an employee of The Labor Depot, and the South Carolina Workers' Compensation Commission, therefore, lacks jurisdiction over this alleged claim.
>
> 2. The claimant alleges that he injured his back, neck, right shoulder, and right hip in a work-related accident, when he fell approximately 20 feet at a job site on August 4, 2002. This Finding is based on the Form 50 dated August 2, 2004.
>
> 3. The South Carolina Employment Security Commission records from 2002 show no entry for any employment relationship between claimant and defendant, The Labor Depot.

In fact, they show claimant did not receive any wages during this time. This Finding is based on defendant's APA's # 38-48.

4. Claimant could not name his supervisor or the construction company for which he allegedly performed the work. Claimant also failed to remember when he first began his employment with defendant, The Labor Depot. This Finding is based on the testimony of the claimant.

5. Although claimant stated that he had been paid by check, he produced no check stubs, tax records or other evidence of his employment. This Finding is based on the claimant's testimony as well as the exhibits or lack thereof submitted by claimant.

6. Claimant failed to meet his burden of proving, by the greater weight of the evidence, that he was an employee of defendant, The Labor Depot. Therefore, I find that the South Carolina Workers' Compensation Commission does not have jurisdiction to decide the matter. This Finding is based on the testimony of the witnesses, including the claimant, the exhibits or lack thereof, presented by each party, and the discretion of the Hearing Commissioner as the fact finder in this case to properly weigh the evidence and judge witness credibility.

7. Even if claimant were The Labor Depot's employee, it should be noted that medical records contradict claimant's testimony that he did not drink any alcohol on August 4, 2002; and also contradict claimant's testimony about his drinking habits generally. Therefore, I find that claimant was not credible (e.g., claimant testified at the time of the accident that he only drank on weekends; however, notes from EMS and the Emergency Room both state that he was positive for ETOH, and claimant told various health care providers that he drank everyday). This Finding is based on the claimant's testimony as well as the medical evidence in the record of the case.

> 8. Because I find that claimant did not prove that he was an employee of The Labor Depot, I do not reach the issue of whether claimant was intoxicated and whether that intoxication was the proximate cause of the accident. This Finding is based on the testimony of the witnesses, including the claimant, and the discretion of the Hearing Commissioner as the fact finder in this case to properly weigh the evidence and rule in the case.
>
> 9. Claimant's request for benefits under the Act is denied. This Finding is based upon all evidence in this case.
>
> CONCLUSIONS OF LAW
>
> Based on the foregoing Findings of Fact and is [sic] provided in the South Carolina Code of Law § 42-17-40, as determination of this Commissioner that:
>
> 1. Under § 42-1-130, the claimant was not a covered employee at the time in question; therefore, the SCWCC has no jurisdiction over this alleged claim.
>
> 2. Under § 42-1-130, § 42-1-160, § 42-9-10 and § 42-15-60, the claimant has failed to carry the burden of proving that he was an employee of the Labor Depot, and that he is entitled to benefits under the South Carolina Workers' Compensation Act for an accident sustained in the course of his employment with The Labor Depot on August 4, 2002. The claimant's claim for benefits . . . is, therefore, denied.

The single commissioner's detailed findings were sufficient to allow the reviewing court to determine whether those findings were supported by the evidence and whether the law was properly applied to those findings. The Appellate Panel's Decision and Order, together with the record of the proceedings, adequately enabled the reviewing court to perform its designated duty. We find no error with regard to the format of the circuit court's order.

II. Existence of Employer-Employee Relationship

Porter argues the greater weight of the evidence proves he had an employer-employee relationship with Labor Depot. We disagree.

Coverage under the South Carolina Workers' Compensation Act depends on the existence of an employment relationship. Edens v. Bellini, 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004) (citing Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002); McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947); Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003)); see also Gray v. Club Group, Ltd., 339 S.C. 173, 184, 528 S.E.2d 435, 441 (Ct. App. 2000) ("Before provisions of the Workers' Compensation Act can apply, an employer-employee relationship must exist; this is an initial fact to be established."). Workers' compensation awards are authorized only if an employer-employee relationship exists at the time of the injury. Nelson, 349 S.C. at 594, 564 S.E.2d at 112 (citing Dawkins v. Jordan, 341 S.C. 434, 534 S.E.2d 700 (2000)).

Section 42-1-130 of the South Carolina Code of Laws defines "employee" as

> every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, but excludes a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer;

S.C. Code Ann. § 42-1-130 (Supp. 2006).

Workers' compensation statutes are construed liberally in favor of coverage, and South Carolina's policy is to resolve jurisdictional doubts in

favor of the inclusion of employees within workers' compensation coverage. Nelson v. Yellow Cab Co., 343 S.C. 102, 538 S.E.2d 276 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E.2d 110 (2002) (citing Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992); O'Briant v. Daniel Constr. Co., 279 S.C. 254, 305 S.E.2d 241 (1983); Horton v. Baruch, 217 S.C. 48, 59 S.E.2d 545 (1950); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984)).

The fundamental test of the employment relationship is the right of the employer to control the details of the employee's work. Nelson, 343 S.C. at 110, 538 S.E.2d at 280 (citing Gray, 339 S.C. at 184-85, 528 S.E.2d at 441). "It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969); Gray, 339 S.C. at 184-85, 528 S.E.2d at 441. "There are four elements which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment." Fuller v. Blanchard, 358 S.C. 536, 542-43, 595 S.E.2d 831, 834 (Ct. App. 2004) (quoting Nelson, 349 S.C. at 594, 564 S.E.2d at 113.

While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel. See Dawkins v. Jordan, 341 S.C. 434, 441, 534 S.E.2d 700, 704 (2000) (citing Ford v. Allied Chem. Corp., 252 S.C. 561, 167 S.E.2d 564 (1969)).

In support of his argument that the greater weight of evidence supports an employer-employee relationship, Porter offered his own testimony. He averred he completed an employment application, worked for Labor Depot for approximately six months prior to his accident, and received paychecks from Labor Depot in the amount of $300-$350 weekly. Porter claims he reported to work on Sunday, August 4, 2002 at 3:00 o'clock in the afternoon and was instructed by the "boss man" to dismantle scaffolding at the Strom

Thurmond Fitness Center construction site. About forty-five minutes after he had been on the site, he fell and sustained injuries. Porter submits that Labor Depot had the right of control over his employment because the "boss man" directed his work activities and Labor Depot told him when and where to work.

Porter's testimony lacks credibility. He professed to be employed with Labor Depot for approximately six months prior to August 4, 2002. Yet SCESC records showed no evidence of that employment. Moreover, SCESC records indicated Porter drew unemployment compensation from November, 2001, until June 9, 2002. In response to questioning about how he obtained unemployment compensation and worked for Labor Depot at the same time, Porter responded:

> A: At that time of year you isn't employed every month. Sometimes they don't send you out every morning, every day. You don't get out every day. You know you get about one day a week or something like that.
>
> Q: I appreciate that, Mr. Porter, but according to these records you were filing for and pursuing unemployment from July of 2001 until June of 2002.
>
> A: Yeah.
>
> Q: My question to you is if you were working for my client during that period of time how were you filing for unemployment every single week?
>
> A: I wasn't making no money. I would probably get out about one day a week.

In addition, Porter's testimony concerning his alcohol consumption, both on the day of the accident and in general, conflicted with medical evidence provided in EMS reports, emergency room records, and prior

medical histories. Significantly, Porter did not even recall previous injuries that apparently led to his disclosure of alcohol abuse to medical personnel.

Porter did not remember the name of the "boss man" who supervised the work site on the day of the accident, nor could he name the construction company involved in the project. Robert Brown testified he worked for Labor Depot along with Porter on August 4, 2002, and witnessed the accident. However, like Porter, Brown was unable to provide the name of the supervisor or the construction company. Neither Porter nor Brown offered any documentary evidence of employment with Labor Depot in the form of wage receipts, check stubs, copies of completed applications, W-2 forms, or copies of income tax returns. Concomitantly, we note the absence of personnel records and testimony from Labor Depot that Porter could have subpoenaed to support his position.

Porter invests the Form 12A Employer's First Report of Injury tendered on Labor Depot's behalf with more significance than it merits, suggesting that, as a declaration against interest, it was sufficient to establish an employment relationship between Porter and Labor Depot. Porter urges the Form 12A would not have been filed had he not been employed by Labor Depot.[2] Regulation 67-411 of the South Carolina Code Ann. (2006) requires, in pertinent part, that:

> A. Each employer shall keep a record of all injuries, fatal or otherwise, received by its employees in the course of their employment. . . .
>
> B. Employer's Responsibilities

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[2] Two Form 12As appear in the record. One Form 12A is handwritten, undated, and apparently prepared by the Carrier. The second Form 12A, dated October 30, 2002 was submitted electronically by the Carrier, apparently through Southeastern Claims Services. At the September 2004 hearing, the single commissioner opined: "I think it's clear that an insurance company filled this [Form 12A] out and not the employer."

(1) The employer shall make a record of all work-related injuries reported by its employees on the Form 12A and retain the record for a period of two years.

S.C. Code Ann. Regs. 67-411 (2006).

To infer, as Porter urges, that the filed Form 12A represents Labor Depot's record keeping of an employee's injuries strains credulity. On September 26, 2002, the SCWCC Claims Director notified the Carrier that a workers' compensation claim had been filed against its insured, Labor Depot. The Form 12A in the record on appeal, dated October 30, 2002, was filed by the Carrier, apparently in response to the Claims Director's request for the completed form. There is no evidence that anyone reported Porter's injury directly to Labor Depot. There is evidence, however, that a letter of representation from Porter's former counsel accompanied the Claims Director's request for the Form 12A. Dated September 12, 2002, that letter to the SCWCC, establishing a claim on Porter's behalf, contained all of the data needed to complete the Form 12A. The more tenable view of what the Form 12A represents in this case is that it was the Carrier's response to the SCWCC's notice of a filed claim rather than a representation of Labor Depot's record keeping of an employee's injury.

While we are mindful that jurisdictional doubts are generally to be resolved in favor of coverage, more than doubt taints Porter's claim that he was employed by Labor Depot. Considering the evidentiary record as a whole, including our own view of the testimony, medical reports, and exhibits or lack thereof, we conclude Porter failed to demonstrate by a preponderance of evidence that an employer-employee relationship with Labor Depot existed.

CONCLUSION

We discern no error as a matter of law in the circuit court's form order affirming the decision of the Appellate Panel. In addition, we hold Porter failed to prove by the preponderance of evidence that an employment relationship existed. Lucidly, as a matter of law, Porter's claim does not fall

within the jurisdiction of the South Carolina Worker's Compensation Commission.

Accordingly, the decision of the circuit court is

AFFIRMED.

KITTREDGE and SHORT, JJ., concur.