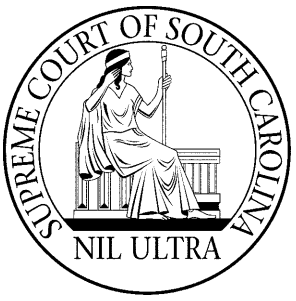

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 9, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jeffrey Eugene Davie, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26608
Submitted November 19, 2008 – Filed March 9, 2009

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, of Columbia, for Respondent.

JUSTICE BEATTY: In this post-conviction relief (PCR) case, the Court granted a writ of certiorari to review the PCR judge's denial of relief to Jeffrey Eugene Davie (Petitioner) for his plea of guilty which resulted in a sentence of twenty-seven years in prison. Petitioner primarily contends the PCR judge erred in ruling that plea counsel was not ineffective for failing to communicate a fifteen-year plea offer made by the State. We reverse the PCR judge's order, vacate Petitioner's sentence, and remand for re-sentencing.

FACTUAL/PROCEDURAL HISTORY

Pursuant to a plea agreement, Petitioner pled guilty in November 2000 to trafficking crack cocaine, third offense; distribution of crack cocaine, third offense; distribution of crack cocaine within proximity of a public park; conspiracy to violate the South Carolina drug laws; unlawful conduct toward a child; failure to stop for a blue light; driving under suspension, third offense; and child endangerment. In exchange for Petitioner's "straight up" plea, the State agreed to dismiss additional charges. At the plea hearing, the State stipulated that the dismissal of the other charges would preclude the State from seeking a sentence of life without the possibility of parole for Petitioner.[1] The judge sentenced Petitioner to an aggregate of twenty-seven years' imprisonment. Petitioner did not directly appeal his plea or sentence.

On April 12, 2001, Petitioner filed a PCR application. In his application, Petitioner moved for the PCR court to vacate his guilty plea and sentence on the ground the State reneged on a twenty-five-year sentencing cap. In an amended application, Petitioner raised several subject matter jurisdiction challenges to the charges for which he pled guilty. Additionally, Petitioner alleged he was denied effective assistance of counsel on the ground his plea counsel failed to properly advise him of the sentencing enhancements for his prior drug offenses.

[1] The Solicitor made a brief reference to another plea offer, stating "the original plea offer in this matter has not been accepted by the due date of September 11th of this year, and so we told the defendant we were ready to go to trial."

In an amended application dated July 31, 2002, Petitioner's PCR counsel reiterated Petitioner's prior claims but also alleged that plea counsel had failed to inform Petitioner of a written plea agreement in which the State offered a fifteen-year sentence in exchange for Petitioner's plea to all of the pending charges.

At the PCR hearing, Petitioner testified that two years after he pled guilty he discovered the State initially extended a plea offer of fifteen years. Because plea counsel never communicated this offer to him, Petitioner claimed ineffective assistance of counsel. Petitioner stated he would have accepted the fifteen-year deal had he been aware of it prior to the plea proceeding.

Plea counsel testified he was not aware of the State's offered plea agreement for a fifteen-year sentence until after the offer had expired. Counsel explained he was in the process of relocating his office at the time the State mailed its written plea offer. As part of the office relocation, counsel stated he acquired a new post office box. Had he been aware of the offer, counsel claimed he would have communicated it to Petitioner. Counsel believed Petitioner would have accepted the plea offer had it been communicated to him. Counsel further testified that the only subsequent offer was the one Petitioner accepted at his plea hearing, wherein Petitioner pled "straight up" to the eight charges in return for the State dropping the remaining three charges and seeking a sentence of life without parole.

At the conclusion of the PCR hearing, Petitioner's counsel argued that plea counsel's failure to communicate the plea offer to Petitioner constituted ineffective assistance of counsel. In terms of relief, counsel requested the PCR court remand the case for a re-sentencing hearing with the directive that the new sentence could not exceed the twenty-seven-year sentence that was previously imposed.

The judge denied Petitioner's request for relief, finding "no proof of ineffective assistance of counsel regarding the unfortunate circumstances, which caused a plea offer to lapse prior to [Petitioner's] consideration of the same." The judge stated it was "unfortunate" that

Petitioner did not have the opportunity to consider the fifteen-year plea offer. However, the judge noted the offer was not available to Petitioner at the time of his guilty plea. Additionally, the judge found Petitioner knowingly and voluntarily pled guilty given he was fully advised of the rights he was waiving by pleading guilty and he understood the underlying charges of his guilty plea. The judge also concluded Petitioner ultimately benefited from the State's agreement by avoiding a sentence of life without parole.[2]

The Court granted the Petitioner's request for a writ of certiorari to review the PCR judge's decision.

DISCUSSION

Petitioner contends his plea counsel was ineffective in failing to communicate the State's initial fifteen-year plea offer to him. Because he would have accepted the offer, Petitioner asserts he was prejudiced by counsel's deficient performance. We agree.

Standard of Review

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). This Court has held that a defendant has the right to effective assistance of counsel during the plea bargaining process. Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe,

[2] The PCR judge granted Petitioner relief with respect to his five-year sentence for child endangerment, finding it exceeded the one and one-half year statutorily mandated maximum. Although Petitioner asserts in his brief that the PCR judge properly granted him relief on this issue, the State has not challenged the PCR judge's finding. Accordingly, we have confined our analysis to Petitioner's first issue.

372 S.C. 318, 331, 642 S.E.2d 590, 596, cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases- i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58 (1985)). "The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Id. at 138, 631 S.E.2d at 261. "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith, 369 S.C. at 138, 631 S.E.2d at 261. This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber, 371 S.C. at 558-59, 640 S.E.2d at 886.

To prevail on his claim of ineffective assistance of counsel, Petitioner was required to prove that 1) plea counsel's failure to communicate the State's initial, fifteen-year plea offer constituted deficient performance, and 2) he was prejudiced by this deficient performance, i.e., there is a reasonable probability that but for counsel's deficient performance, he would have accepted the original plea offer.

Deficient Performance

Although our appellate courts have not directly addressed the question of whether counsel's failure to communicate a plea offer to his or her client constitutes deficient performance, other cases of deficient performance in the context of plea bargaining would appear to support Petitioner's position. See, e.g., Sprouse v. State, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) (finding defendant was entitled to post-conviction relief where the State failed to honor the plea agreement it made with defendant and trial counsel failed to ensure that the State adhered to the original plea agreement); Thompson v. State, 340 S.C. 112, 116-17, 531 S.E.2d 294, 296-97 (2000) (concluding defendant established a claim for ineffective assistance of counsel where trial counsel failed to object when the solicitor recommended the maximum sentence in violation of the plea agreement); Jordan v. State, 297 S.C. 52, 53-54, 374 S.E.2d 683, 684-85 (1988) (holding trial counsel rendered ineffective assistance of counsel in failing to withdraw guilty plea after State reneged on plea, and reasoning that counsel's conduct in not protecting defendant's right to enforce the plea agreement with the solicitor's office fell below "prevailing professional norms").

Because our appellate courts have not specifically ruled on this issue, we are guided by the decisions of other state and federal jurisdictions. As we view these cases, we believe an adoption of a rule that counsel's failure to convey a plea offer constitutes deficient performance would be consistent with the majority of other state and federal jurisdictions. The theory underlying these decisions is that such conduct constitutes unreasonable performance under the prevailing professional standards established by the American Bar Association or state-specific ethical rules of conduct. Pursuant to these professional standards, counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State. See United States v. Rodriguez, 929 F.2d 747, 752-53 (1st Cir. 1991); Pham v. United States, 317 F.3d 178, 182 (2d Cir. 2003); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); Barentine v. United States, 728 F.Supp. 1241, 1251 (W.D.N.C.), aff'd, 908 F.2d 968 (4th Cir. 1990); Griffin v. United

States, 330 F.3d 733, 737 (6th Cir. 2003); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986); United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991); see also Rasmussen v. State, 658 S.W.2d 867, 867-68 (Ark. 1983); Cottle v. State, 733 So. 2d 963, 964-65 (Fla. 1999); Lloyd v. State, 373 S.E.2d 1, 3 (Ga. 1988); People v. Whitfield, 239 N.E.2d 850, 852 (Ill. 1968); Lyles v. State, 382 N.E.2d 991, 993-94 (Ind. Ct. App. 1978); Williams v. State, 605 A.2d 103, 108 (Md. 1992); People v. Alexander, 518 N.Y.S.2d 872, 879 (N.Y. App. Div. 1987); State v. Simmons, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); Jiminez v. State, 144 P.3d 903, 906 (Okla. Crim. App. 2006); Commonwealth v. Copeland, 554 A.2d 54, 60-61 (Pa. Super. Ct. 1988); Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994); Hanzelka v. State, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984); State v. James, 739 P.2d 1161, 1166-67 (Wash. Ct. App. 1987); Becton v. Hun, 516 S.E.2d 762, 766-67 (W. Va. 1999); State v. Ludwig, 369 N.W.2d 722, 726-27 (Wis. 1985); see generally Gregory G. Sarno, Annotation, Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A.L.R. 4th 660 (1981 & Supp. 2008) (discussing state and federal decisions determining the adequacy, competency, or effectiveness of defense counsel's representation of a criminal accused in connection with plea bargaining and negotiating).

Turning to the facts of the instant case, we find that plea counsel's failure to convey the State's initial plea offer to Petitioner constituted deficient performance. Although counsel's failure to do so could be construed as excusable neglect if one believes that the State's written offer was truly lost in the process of counsel's office relocation, we do not believe that such neglect would negate the deficient performance. Even if counsel is given the benefit of the doubt that he was not aware of the plea offer until after the expiration date, we find counsel was deficient in not objecting at the plea hearing. During the plea hearing, the solicitor informed the circuit court judge that "[t]he original plea offer in this matter has not been accepted by the due date of September 11th of this year, and so we told the defendant we were ready to go to trial." In view of the solicitor's statement, it was incumbent upon plea counsel to object or in some way indicate to the

court that he had no knowledge of the original plea offer. Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence. Because counsel failed to make any attempt to protect Petitioner's interests regarding this significantly lower sentence, we conclude counsel's performance fell below the prevailing professional norms and, thus, constituted deficient performance.

Prejudice

Given our finding that plea counsel's failure to communicate the State's initial plea offer constituted deficient performance, the question becomes whether Petitioner was prejudiced by this deficient performance. We believe this is the most difficult question of the analysis because a definitive method of evaluating the prejudice prong does not appear to exist in our state or other jurisdictions. Although most state courts follow the traditional, two-part Strickland test, differences appear to arise in what type of evidence must be presented to establish prejudice.

Some state courts have not required the defendant to present additional evidence. Instead, the courts have essentially presumed prejudice merely based on the fact that plea counsel failed to communicate a plea offer. These courts have reasoned that counsel's failure to communicate a plea offer, whatever the terms, was inherently prejudicial because the deficient conduct prevented the defendant from making an informed decision. See, e.g., State v. Simmons, 309 S.E.2d 493, 498 (N.C. Ct. App. 1983) (concluding defendant was "clearly prejudiced by his attorney's failure to inform him of the [plea bargain] offer"); Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994) ("There is no doubt that the prejudice suffered by defendant was the direct result of failure on the part of defense counsel to discuss the plea bargain offer with his client and his failure to respond timely to the State's offer."); State v. James, 739 P.2d 1161, 1167 (Wash. Ct. App. 1987) ("If we were presented with a finding, supported by substantial evidence, that in fact [counsel] failed to convey the plea negotiation to

his clients, we would have no hesitation in concluding they were denied effective assistance of counsel on this error alone.").

Other state courts have found prejudice based on the defendant's self-serving statements that he would have accepted the plea offer had he been made aware of it. See, e.g., People v. Culpepper, 567 N.Y.S.2d 327, 328 (N.Y. App. Div. 1990) (finding no prejudice where defendant did not say that "he would have accepted the alleged plea offer if it had been transmitted").

In contrast, other courts have utilized a burden of proof that is seemingly higher and requires objective evidence to show prejudice. In these cases, the defendant must show not only that he would have accepted the offer, but also that he would have received a lesser sentence than that which he received or acted differently had he been aware of the plea offer. See, e.g., Cottle v. State, 733 So. 2d 963, 967 (Fla. 1999) ("[C]ourts in this state have recognized claims arising out of counsel's failure to inform a defendant of a plea offer, and have required a claimant to show that: (1) counsel failed to communicate a plea offer . . ., (2) defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the State's plea offer would have resulted in a lesser sentence."); Williams v. State, 605 A.2d 103, 110 (Md. 1992) (holding evidence of prejudice was "ample" where the inference was supported by "objective evidence" that the outcome would have been different had petitioner accepted the State's plea offer); Commonwealth v. Copeland, 554 A.2d 54, 61 (Pa. Super. Ct. 1988) (vacating defendant's sentence and remanding for an evidentiary hearing during which defendant would have the burden of proving that: (1) an offer for a plea was made; (2) trial counsel failed to inform him of such offer; (3) trial counsel had no reasonable basis for failing to inform him of the plea offer; and (4) he was prejudiced thereby); cf. State v. Lopez, 743 N.W.2d 351, 358 (Neb. 2008) (defendant failed to establish that she was prejudiced by counsel's failure to communicate offer of plea agreement where defendant's claims were contradicted by evidence introduced by the State and defense counsel).

Finally, some jurisdictions have declined to adopt a definitive rule and, instead, advocated a case-by-case analysis looking strictly at the facts of each case. See, e.g., Lloyd v. State, 373 S.E.2d 1, 3 (Ga. 1988) (finding defendant was not prejudiced by counsel's deficient performance, and stating "[w]e prefer to examine the facts of each case and grant relief where there is at least an inference from the evidence that the defendant would have accepted the offer as made or something similar"); Hanzelka v. State, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984) ("This Court has concluded further that counsel's deficient performance prejudiced Hanzelka in that under the terms of the plea bargain he would not have served any time in jail.").

We find a case-by-case approach is most consistent with our prior decisions and effectively achieves the ultimate goal of assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer. Because presumed prejudice is reserved to very limited situations, we hold that a defendant must show actual prejudice. See Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) ("Absent [three narrow circumstances of presumed prejudice identified in United States v. Cronic, 466 U.S. 648 (1984)], defendants must show actual prejudice under Strickland.").

However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry--prejudice--is shown by demonstrating through objective evidence . . . [the existence of] a reasonable probability that, but for counsel's

advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); see also Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.").

Applying these principles to the facts of the instant case, we conclude that Petitioner has proven he was prejudiced by plea counsel's deficient performance. Initially, we conclude that the difference in the sentence Petitioner received and the plea offer is proof of prejudice. We reach this conclusion for several reasons. First, the solicitor and plea counsel both acknowledged that the State originally offered a fifteen-year sentence in exchange for Petitioner's guilty plea. Secondly, plea counsel admitted that he failed to communicate this offer to Petitioner. Thirdly, both plea counsel and Petitioner testified that had this offer been communicated Petitioner would have accepted the plea agreement. Finally, had Petitioner accepted the original offer, he would have received a significantly lower sentence than the twenty-seven-year sentence that was imposed.

Remedy

In light of our holding that Petitioner has established ineffective assistance of counsel, the final issue to be resolved is the relief to which Petitioner is entitled. Notably, Petitioner has not set forth a specific request for relief in his brief. However, a review of his PCR applications and the PCR hearing indicates that Petitioner appears to seek relief in the form of a new sentencing hearing. As will be discussed, we agree that a re-sentencing hearing is the appropriate form of relief.

In formulating the appropriate relief, we are guided by general constitutional principles. Confronted with the issue presented in the instant case, the Kentucky Court of Appeals explained:

Remedies for ineffective assistance of counsel "'should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir. 1988), cert. denied, 502 U.S. 1050, 112 S. Ct. 915, 116 L.Ed.2d 815 (1992) (quoting United States v. Morrison, 449 U.S. 361, 354, 101 S. Ct. 665, 66 L.Ed.2d 564 (1981)) . . . "Indeed, the only way to neutralize the constitutional deprivation suffered by [a defendant] would seem to be to provide [the defendant] with an opportunity to consider the [Commonwealth's initial] plea offer with the effective assistance of counsel." Turner, 858 F.2d at 1208.

The United States Supreme Court has expressed that specific performance of a plea agreement is an allowable remedy where one has been denied constitutionally-guaranteed effective assistance of counsel. Id. (Citations omitted). On the other hand, specific performance is not warranted where it might unnecessarily infringe on the state's competing interests. Id. at 1208-09. In some circumstances, the state may withdraw its original plea proposal, yet, in order to effectively do so the state must show the "withdrawal is free of a reasonable apprehension of vindictiveness." Id. at 1208. (Citation omitted).

It has been clearly established that when a criminal defendant successfully achieves relief, either through a direct or collateral attack to the conviction, he "may not be subjected to greater punishment for exercising that right." Id. at 1208 (Citing Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed.2d 628 (1974)). The rebuttable presumption of vindictiveness is valid where there is a "realistic likelihood" of prosecutorial retaliation. In ascertaining the existence of a realistic likelihood, the "courts should focus on 'the nature of the right asserted' and 'the timing of the prosecutor's action.'" Turner, 858

F.2d at 1208 (quoting United States v. Goodwin, 457 U.S. 368, 381-82, 102 S. Ct. 2485, 73 L.Ed.2d 74 (1982)).

Osborne v. Commonwealth, 992 S.W.2d 860, 865 (Ky. Ct. App. 1998).

Because there is no evidence in the record that Petitioner expressed a desire to proceed to trial rather than plead guilty, we find a remand for a new trial is not the appropriate remedy. See United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994) ("Several courts have recognized that where the ineffective assistance occurred before trial, as in cases where the harm consisted in defense counsel's failure to communicate a plea offer to defendant, . . . [granting a] subsequent fair trial does not remedy this deprivation.") (citation omitted).

Furthermore, given Petitioner was never apprised of the plea offer, we do not believe that specific performance would be the appropriate remedy in that Petitioner did not detrimentally rely on the offer. Cf. Custodio v. State, 373 S.C. 4, 13, 644 S.E.2d 36, 40 (2007) (finding counsel rendered ineffective assistance in failing to have plea agreement enforced and concluding the appropriate remedy was specific performance of the plea agreement because defendant detrimentally relied on the promised plea agreement); Sprouse v. State, 355 S.C. 335, 340, 585 S.E.2d 278, 281 (2003) (holding counsel was ineffective in failing to ensure that the State adhered to the original plea agreement and remanding for specific performance of the plea agreement given it would grant "the parties nothing more and nothing less than the benefit for which they originally bargained"). Accordingly, we hold that the appropriate remedy is a new sentencing hearing.

Given that we cannot compel the State to reinstate or the circuit court judge to accept the original, fifteen-year plea offer, we remand the case for a new sentencing hearing with the limitation that Petitioner's sentence should not exceed the original sentence of twenty-seven years' imprisonment. See Commonwealth v. Copeland, 554 A.2d 54, 61 (Pa. Super. Ct. 1988) ("We cannot compel the Commonwealth to reinstate its plea bargain offer; nor can we dictate

what sentence may be imposed if appellant pleads guilty without so advantageous an offer as he had before, or if he goes to trial and is again convicted.").

The State and the circuit court judge should take into consideration the prior fifteen-year plea offer. See Harris v. State, 974 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 2008) (concluding that, if on remand, counsel is found to have been ineffective in failing to properly advise defendant prior to revocation then there should be a "good faith resumption of plea negotiations"); Lyles v. State, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978) (holding counsel was ineffective in failing to convey State's plea bargain offer and remanding "with instructions to conduct a guilty plea hearing, assuming, as equity indicates under the limited facts of this case, the State's offer continues"); Becton v. Hun, 516 S.E.2d 762, 768 (W.Va. 1999) (finding counsel was ineffective in failing to convey State's plea offer and remanding for a new sentencing hearing, but recognizing that the trial court would not be bound by the State's original sentencing recommendation).

CONCLUSION

Based on the foregoing, we find that counsel was deficient in failing to communicate the State's fifteen-year plea offer to Petitioner. Given that both Petitioner and plea counsel testified Petitioner would have accepted the fifteen-year offer, an offer that was twelve years less than what Petitioner received, we conclude Petitioner has proven that he was prejudiced by counsel's deficient performance. Accordingly, we vacate Petitioner's sentence and remand for a re-sentencing hearing. In re-sentencing Petitioner, the circuit court judge shall take into consideration the State's prior fifteen-year plea offer. We further direct that any sentence Petitioner receives should not exceed the original twenty-seven-year sentence.

REVERSED AND REMANDED.

WALLER and KITTREDGE, JJ., concur. TOAL, C.J., concurring in result. PLEICONES, J. not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Holman, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Bamberg County
Doyet A. Early, III, PCR Judge

Opinion No. 26609
Submitted January 22, 2009 – Filed March 9, 2009

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Salley W. Elliott; Assistant Attorney General Lance S. Boozer, of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted Holman's petition to review an order denying post-conviction relief (PCR) and now reverse, finding trial counsel deficient for failing to object to the introduction of wholly irrelevant and prejudicial evidence. Accordingly, we grant PCR relief in the form of a new trial.

Petitioner was charged with multiple offenses arising from a shooting incident at Voorhees College in Bamberg County, South Carolina, on the evening of January 21, 2000, which spilled over into the early morning hours of the following day. Petitioner was alleged to be the shooter. Because Petitioner was seventeen at the time, he was further charged with possession of a pistol under the age of twenty-one. A week following the January 21st shooting incident, a search of Petitioner's residence yielded a pistol. The handgun seized from Petitioner's residence was in no manner connected to the shooting incident at Voorhees College. Moreover, Petitioner was not charged with underage possession of the pistol seized from his residence. We are troubled by the State's effort to admit the unrelated firearm in evidence. More troubling is Petitioner's trial counsel's failure to object to the admission of the unrelated pistol.

We hold that the failure to object to this clearly inadmissible evidence was ineffective assistance of counsel. We reject the suggestion that the failure to object to the unrelated pistol can be justified as a valid trial strategy. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Substantial, and easily avoidable, prejudice resulted from Petitioner's failure to challenge the admission of the firearm unconnected to the charged offenses. *State v. McConnell*, 290 S.C. 278, 280, 350 S.E.2d 179, 180 (1986) (holding the admission of bullets and a pistol unconnected to the crime was erroneous and prejudicial).

The admission of this irrelevant and prejudicial evidence undermines confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642

S.E.2d 590, 596 (2007) ("[The prejudice prong is satisfied when] there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.") (internal citations omitted); *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740-41 (2004) ("In order to prove counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial."). As both the deficient performance and prejudice prongs are satisfied, we hold trial counsel was ineffective. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Therefore, we reverse the denial of PCR and grant the requested relief of a new trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Temple, Petitioner,

v.

Tec-Fab, Inc., and Andrew Lytle, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26610
Heard January 21, 2009 – Filed March 9, 2009

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William Thomas Moody, of McKeown Law Firm, of York, for Petitioner.

J. Cameron Halford, of Halford & Niemiec Law Firm, of Ft. Mill, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in Temple v. Tec-Fab, Inc, 370 S.C. 383, 635 S.E.2d 541 (Ct. App. 2006). The issue on certiorari is whether the Court of Appeals erred in reversing an award of treble damages for a violation of the Payment

of Wages Act. We affirm in part, reverse in part, and remand to the trial court.

FACTS

Temple was employed at Tec-Fab, Inc., a metal fabrication company in York County, for a salary of $5000 per month. In December 2000, Temple purchased a 15% ownership interest in the company from Tec-Fab's president and sole shareholder, Richard Lytle. Temple became corporate vice-president and ran the company on a daily basis; his salary was increased to $6000 per month. Temple remained employed by Tec-Fab until February 2003, at which time he was fired by Lytle. The letter of termination advised Temple he would receive back pay upon receipt of money from Accutron, a Tec-Fab customer, in one month.

Temple filed a complaint in April 2003, alleging Tec-Fab failed to pay his monthly wages for the months of September, October, November, and half of December 2002, as well as February 2003, thereby owing him back wages. The complaint sought treble damages under the Payment of Wages Act. S.C. Code Ann. §§ 41-10-10 to -110 (1986 & Supp. 2005).

Tec-Fab and Lytle answered and counterclaimed, alleging Temple 1) had failed to remit to it $15,000 in payments he had received from Accutron, 2) had failed to return a truck owned by Tec-Fab, and 3) had kept $5114 in proceeds from the sale of scrap metal which was owed to Tec-Fab. At trial, Temple admitted he had kept some of the proceeds from the sale of scrap metal, such that the master ruled Tec-Fab was entitled to a set-off of $5114 against the back-wages owed. Based on Lytle's testimony that he told Temple subsequent to his firing that he could keep the Tec-Fab truck if he assumed the liability on it (which was $20,568.30), the circuit court found there was no conversion of the vehicle nor any set-off required.

The trial court further ruled Temple was entitled to the gross amount of his back wages, totaling $27,500.00, which was then reduced by the $5114

scrap metal proceeds.[1] The master's order goes on to state that the gross sum of $22,385.75 "**will be trebled as required by statute**, giving a total award of wages to Plaintiff of $67,157.25." (emphasis supplied). Temple was also awarded $7069.50 in costs and attorneys fees.

The Court of Appeals reversed the award of treble damages, finding the circuit court committed an error of law in concluding the statute mandated trebling. It further held, after a review of the record on appeal, that there was a bona fide dispute over the wages in question. It therefore modified Temple's award to $22,385.75 (Temple's gross unpaid wages less the $5,114.25 withheld in company proceeds).

ISSUE

The sole issue on certiorari is whether the Court of Appeals erred in reversing the award of treble damages to Temple?

DISCUSSION

In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law. The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

The Court of Appeals held the circuit court's ruling was controlled by an error of law, inasmuch as the trial court held the statute **required** the imposition of treble damages. We agree.

S.C. Code Ann. § 41-10-80(c) states, "[i]n case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the

[1] The master ordered the record re-opened to ascertain the amount of scrap metal proceeds retained by Temple unless he consented to the amount of $5114, as stated by Tec-Fab; Temple consented. This was an amended order; the original order indicated Temple was entitled to net, rather than gross wages.

full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow." The language of § 41-10-80(c) is discretionary and **not mandatory.** In Rice v. Multimedia, Inc., 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995), we held that "[t]he imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh." The Court went on to note:

> [T]here are some wage disputes when the issue may involve a valid close question of law or fact which should properly be decided by the courts. We do not believe the legislature intended to deter the litigation of reasonable good faith wage disputes; we do believe the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute.

Id. at 99, 456 S.E.2d at 384. A finding that an employee is entitled to recover unpaid wages is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages. O'Neal v. Intermedical Hosp. of South Carolina, 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003). Accord Futch v. McAlister, 335 S.C. 598, 518 S.E.2d 591 (1999) (employee was not entitled to treble damages under Payment of Wages Act in light of bona fide dispute as to whether employer owed any wages based on employee's alleged disloyalty).

Although we agree with the Court of Appeals' ruling that the trial judge's award of treble damages was controlled by an error of law, we find it was for the trial court to determine, in the first instance, whether there existed a bona fide dispute such that treble damages were not warranted. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (Court of Appeals should not address an issue which was not explicitly ruled on below). Accordingly, to the extent the Court of Appeals ruled on this question, its opinion is reversed and the matter is remanded to the trial court for further consideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[2]

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

[2] The parties assert that the Court of Appeals also reversed the award of attorneys fees and costs; we find no language to this effect in the Court of Appeals' opinion. The trial court is directed to address this issue on remand and may award attorneys fees and costs in its discretion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas D. Jordan, Petitioner,

v.

Kelly Company, Inc., Employer, and Zenith Insurance Company, Carrier, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26611
Heard January 6, 2009 – Filed March 9, 2009

AFFIRMED

David James Canty, of Myrtle Beach, and James L. Hills, of Hills & Hills, of Myrtle Beach, for Petitioner.

Christian Stegmaier and Peter H. Dworjanyn, both of Collins & Lacy, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: In this workers' compensation case, the single commissioner found Petitioner's injury compensable and awarded benefits, but the full commission reversed. The circuit court reversed the full commission and reinstated the single commissioner's decision awarding benefits. The court of appeals reversed the circuit court, finding that substantial evidence in the record supported the full commission's decision. *Jordan v. Kelly Co. Inc.*, Op. No. 2007-UP-010 (S.C. Ct. App. filed January 11, 2007). We granted a writ of certiorari to review the court of appeals' decision. We affirm

FACTUAL/PROCEDURAL BACKGROUND

Petitioner Thomas Jordan was employed as a driver by Respondent Kelly Company, Inc., a hauling company specializing in transporting heavy equipment. On January 11, 2003, following the completion of a long haul route from Virginia to Texas, Petitioner suffered a heart attack. Petitioner filed a claim for workers' compensation benefits and alleged that the heart attack was proximately caused by unusual and extraordinary duties during this haul.

At the hearing, Petitioner testified that on Wednesday, January 8, 2003, Kelly Company sent him to pick up a large piece of equipment in Virginia and transport it to Texas by Friday, January 10, 2003. Because the equipment had not been loaded, Petitioner departed seven hours past schedule, leaving him only two hours of travel time on Wednesday.[1] Additionally, Petitioner testified that the required permits were not ready for him when he left Virginia and he therefore had to drive without the permits until he could pick up copies at a truck stop. On Thursday, Petitioner drove from North Carolina to Alabama, and on Friday he drove from Alabama to Louisiana. Petitioner informed a dispatcher that he would not be able to deliver the equipment to Texas by the Friday deadline, but the dispatcher informed Petitioner that the deadline was extended to 12:00 p.m. Saturday.

[1] Petitioner testified that drivers are only allowed to transport heavy equipment during daylight hours.

When Petitioner arrived in Texas on Saturday morning, he was unable to take the exit that his permit required him to take because the exit was under construction. As a result, he had to deviate from his route through downtown Houston. Petitioner made the delivery at 11:57.

Petitioner testified that he began experiencing symptoms associated with a heart attack during the haul and on Saturday night. He further testified that the haul was extremely stressful because he was forced to leave Virginia and travel without the required permits and to drive illegally through downtown Houston without a special permit or police escort.

The single commissioner found that Petitioner's heart attack was precipitated by unusual and extraordinary conditions of his employment on the trip. The full commission reversed and found that Petitioner was performing his job duties as a long haul driver in the ordinary and usual manner. The circuit court reversed the full commission's decision and reinstated the award of benefits. The court of appeals reversed the circuit court and held that that substantial evidence in the record supported the full commission's decision denying benefits.

We granted Petitioner's request for a writ of certiorari to review the court of appeals' decision, and Petitioner presents the following issue for review:

> Did the court of appeals err in finding substantial evidence in the record exists to support the full commission's findings?

STANDARD OF REVIEW

In workers' compensation cases, the full commission is the ultimate fact finder. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This Court must affirm the findings of fact made by the full commission if they are supported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency

reached. *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

LAW/ANALYSIS

Petitioner argues that the court of appeals erred in holding that substantial evidence in the record exists to support the full commission's findings. We disagree.

A claimant may recover workers' compensation benefits if he sustains an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (2006). The general rule is that a heart attack is compensable as a worker's compensation accident if it is induced by unexpected strain or overexertion in the performance of the duties of a claimant's employment or by unusual and extraordinary conditions of employment. *Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 464, 405 S.E.2d 407, 409 (1991).

In our view, the court of appeals correctly held that substantial evidence in the record supported the full commission's finding that Petitioner was not performing his job duties under unusual or extraordinary conditions of his employment. Although Petitioner testified that the haul was extremely stressful, Petitioner's boss and co-worker testified that the Kelly Company did not impose deadlines and that it was not unusual for employees to deviate from their routes due to construction. Petitioner admitted that he had left without permits on prior deliveries and that when this would happen, he would pick up a faxed copy of the permits at the nearest truck stop. Furthermore, evidence in the record showed that Petitioner smoked cigarettes, had abused alcohol, suffered from high blood pressure, and had a family history of heart disease.

Although the record contains conflicting evidence, this Court is not in a position to weigh the evidence presented in workers' compensation hearing. *See Shealy*, 341 S.C. at 455, 535 S.E.2d at 442 (holding that the final

determination of witness credibility and the weight to be accorded evidence is reserved to the full commission, and it is not the task of an appellate court to weigh the evidence as found by the full commission). Accordingly, we hold that substantial evidence in the record supports the full commission's finding that Petitioner's heart attack was not induced by unexpected strain or overexertion in the performance of the duties of his employment or by unusual and extraordinary conditions of employment.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision denying benefits.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RRR, Inc. d/b/a Maximum Resort Rentals, Respondent,

v.

Thomas M. Toggas and Katherine Toggas, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26612
Submitted March 4, 2009 – Filed March 9, 2009

AFFIRMED

David B. Marvel, of Robertson & Hollingsworth, of Charleston, for Petitioners.

Otto W. Ferrene, Jr., of Ferrene & Associates, of Hilton Head Island, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in RRR, Inc. v. Toggas, 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008). We grant the petition as to the question of whether the Court of Appeals erred in upholding the award of punitive damages, dispense with further briefing, and affirm. The petition for a writ of certiorari is denied as to petitioners' remaining questions.

The Court of Appeals affirmed the trial judge's award of punitive damages after a consideration of the factors listed in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), holding there was no error of law amounting to an abuse of the trial judge's discretion.

The Court of Appeals erred by not considering the guideposts discussed in BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). However, after conducting a de novo review and canvassing the facts, we conclude the punitive damages award was reasonable pursuant to Gore. See also Phillip Morris USA v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (mandating appellate courts conduct a de novo review of the trial judge's application of the Gore guideposts). We therefore affirm the decision of the Court of Appeals upholding the punitive damages award.

AFFIRMED.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Deborah W. Spence, Individually, and on behalf of the Estate of Floyd W. Spence,	Petitioner,
v.	
Kenneth B. Wingate, Sweeny Wingate & Barrow, P.A., and Robert P. Wilkins, Jr.,	Defendants,
of whom Kenneth B. Wingate and Sweeny Wingate & Barrow, P.A. are	Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26613
Submitted March 4, 2009 – Filed March 9, 2009

REVERSED AND REMANDED

A. Camden Lewis, and Brady R. Thomas, of Lewis & Babcock, LLP, of Columbia, for Petitioner.

Pope D. Johnson, III, of Johnson & Barnette, LLP, of Columbia, for Respondents.

PER CURIAM: Petitioner filed a legal malpractice action against respondents. The trial judge granted respondents' motion for summary judgment on the issue of whether respondents owed petitioner a fiduciary duty with respect to a congressional life insurance policy issued to petitioner's late husband. The Court of Appeals affirmed, holding the issue was not preserved for review. Spence v. Wingate, 378 S.C. 486, 663 S.E.2d 70 (Ct. App. 2008). We grant the petition for a writ of certiorari, dispense with further briefing, reverse the Court of Appeals' opinion, and remand the matter to the Court of Appeals for a ruling on the merits of petitioner's arguments.

At the hearing on respondents' motion for summary judgment, respondents argued they were entitled to summary judgment because there existed no attorney-client relationship between respondents and petitioner; therefore, respondents owed no duty to petitioner. Petitioner countered that she was a former client of respondents, and maintained respondents owed her a fiduciary duty based on the relationship. The trial judge granted summary judgment, finding respondents "owed no duty or obligation" to petitioner.

The Court of Appeals held the issue was not preserved for review because petitioner failed to file a Rule 59(e), SCRCP, motion to alter or amend the judgment. The Court of Appeals found the argument was not preserved because the trial judge did not mention petitioner's alternative theory of liability that, as a former client of respondents, she had a continuing fiduciary relationship with respondents.

We hold the Court of Appeals erred in finding the issue was not

preserved for appeal. The trial judge's order granted respondents' motion for summary judgment on *precisely* the grounds argued by respondents at the summary judgment hearing. While that order did not restate the ground on which petitioner opposed the motion – a duty based on the existence of a prior attorney-client relationship – the order explicitly addresses that argument by ruling respondents "owed no duty or obligation" to petitioner. This ruling is sufficient to preserve petitioner's argument that respondents owed a duty to petitioner, and petitioner was not required to file a Rule 59(e) motion to alter or amend in order to preserve the issue for appeal. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that, if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review).

Accordingly, we hold the Court of Appeals erred in finding the issue was not preserved for review, and we remand the matter to the Court of Appeals for a ruling on the merits.

REVERSED AND REMANDED.

WALLER, ACTING CHIEF JUSTICE, BEATTY, and KITTREDGE, JJ., concur; TOAL, C.J., and PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael T. Jordan, Respondent.

Opinion No. 26614
Submitted February 6, 2009 – Filed March 9, 2009

DISBARRED

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

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction provided for in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent entered into a contract with his friend and business associate, Complainant. In the contract, respondent agreed to purchase a residential lot from Complainant and Complainant agreed to finance the purchase. There was no written contract memorializing the terms of the parties' agreement.

Respondent prepared all of the documents to complete the conveyance of the property, including the deed, the mortgage, and the note. In preparing these documents, respondent was acting in a representative capacity for Complainant.

Complainant knew respondent was an attorney with experience in residential real estate transactions. As a result, she did not consult with or obtain her own counsel for the sale of her property to respondent.

Respondent failed to disclose to Complainant that it was a conflict of interest for him to engage in a transaction with a client. He did not obtain Complainant's written waiver of or consent to the conflict and he did not advise Complainant to seek the advice of independent counsel prior to entering into the transaction.

Respondent conducted a closing in which he delivered two checks to Complainant as the agreed-upon down payment. At the closing, respondent instructed Complainant to sign two sets of documents, one naming himself as grantee and one naming his LLC as grantee.

Respondent did not file the deed or the mortgage after the closing. He did not deliver the note to Complainant.

When Complainant attempted to negotiate the down payment checks, they were returned for insufficient funds. At respondent's request, Complainant attempted to negotiate the checks a second time. Again, the checks were returned for insufficient funds.

Two months after the closing, respondent applied for a loan to purchase another residential property. He attempted to use the lot he purchased from Complainant as collateral. The loan officer informed respondent that the deed conveying the lot to him was not recorded. At that time, respondent recorded the deed, but not the mortgage.

Respondent paid Complainant only five of the twelve scheduled payments in the year following the closing. He did not pay the balance in full which was due at the end of the year.

Six months after the balance in full was due, respondent brought his payments current, but did not pay off the balance. Ultimately, Complainant hired a lawyer. Respondent then sold the lot and paid her in full from the proceeds.

Respondent agrees the terms of the transaction with Complainant were not fair and reasonable to Complainant because respondent's personal financial situation rendered him unable to pay as agreed.

Matter II

On December 21, 2007, respondent signed a plea agreement in which he pled to an information charging him with one count of wire fraud.[1] The plea agreement was accepted by the United States District Court on January 22, 2008. The wire fraud to which respondent pled guilty involved unauthorized transfers of client funds from respondent's trust accounts for respondent's personal benefit from

[1] On August 7, 2007. the Court placed respondent on interim suspension. In the Matter of Jordan, 374 S.C. 350, 650 S.E.2d 58 (2007).

2003 to 2007. The total amount of funds respondent fraudulently obtained from his trust accounts was $2,325,404.18.

The unauthorized transfers from respondent's trust accounts resulted in a series of checks being presented on insufficient funds which were reported to the Commission on Lawyer Conduct by respondent's bank as required by Rule 1.15(h), RLDE.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.7 (lawyer shall not represent client if representation involves a conflict of interest unless specified conditions are met); Rule 1.8 (lawyer shall not knowingly acquire possessory interest adverse to client unless specified conditions are met); Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of crime or moral turpitude or serious crime), Rule 7(a)(5) (it shall be ground for discipline for lawyer to

engage in conduct tending to pollute administration of justice, bring courts or legal profession into disrepute, or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law. Further, before he may file a Petition for Reinstatement, respondent must make restitution to all clients, banks, the Lawyers' Fund for Client Protection, and any other entities which have been harmed as a result of his misconduct in connection with this matter. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

In re: Amendment to Rule 402, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402, SCACR, is hereby amended as follows:

Footnote 1 shall state:

> This fee is currently eight dollars and thirty cents ($8.30) and should be paid by check payable to "ACT."

This amendment shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Pleicones, J., not participating

Columbia, South Carolina

March 6, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christal Orange Moore and Rodney B. Stroud, individually and as Personal Representatives of the Estate of Brandon L. Stroud, Appellants,

v.

The Barony House Restaurant, LLC, VanBuren W. High, Terry L. Kunkle, Charles Cannington d/b/a Town & Country Golf Carts, Carolina Auction Co., Inc., Textron Inc. d/b/a E-Z-Go Golf Cars, Joseph Wayne Thornley, and Garrett's Discount Golf Cars, LLC, Defendants,

Of Whom Textron, Inc. d/b/a E-Z-Go Golf Cars is Respondent.

Appeal From Berkeley County
Roger M. Young, Circuit Court Judge

Opinion No. 4480
Heard November 6, 2008 – Filed January 12, 2009
Withdrawn, Substituted, and Refiled March 3, 2009

AFFIRMED

Carl E. Pierce, II, and Joseph C. Wilson, IV, of Charleston, for Appellants.

Ian S. Ford, of Charleston, and Richard B. North, Jr., of Atlanta, Georgia, for Respondent.

KONDUROS, J: Christal Moore and Rodney Stroud (Appellants), as representatives of the estate of Brandon Stroud (Stroud), appeal the circuit court's grant of summary judgment in favor of Textron, Inc. (Textron) on claims of strict liability and negligence related to the manufacturing and selling of certain golf cars. We affirm.

FACTS

Dr. Terry Kunkle hosted a Christmas party in December 2004 in Berkeley County, South Carolina. Guests at the party were to have drinks and hors d'oeuvres at the residence on one part of the property, and then adjourn to dinner in a barn located across a public road, Highway 311, on another part of the property. Stroud was working for VanBuren High, who co-hosted and catered the event. Part of Stroud's responsibilities included ferrying guests from the residence to the barn via golf car. Toward that end, Kunkle and High had procured two golf cars. One was equipped with lights, and the other was not.

Daniel Causey, another staffperson for the event, testified Stroud attempted to cross the road at about 8:30 p.m. in a golf car that was not equipped with lights. According to the accident report, Stroud attempted to cut a "dogleg" from the driveway on one side of the road to the drive on the opposite side of the road approximately 180 feet down the highway. An SUV driven by Joseph Thornley was approaching from the right. Thornley testified he did not see Stroud until it was too late to brake, turn, or otherwise react before impact. Tragically, Stroud died at the hospital later that night as a result of his injuries.

Appellants brought suit against the various parties responsible for the party, as well as the manufacturer and the distributor of the golf car Stroud was driving. With respect to Textron, Appellants alleged causes of action for strict liability based on Textron's used Fleet golf cars being unreasonably dangerous in light of their forseeable use and based on inadequate warnings. Appellants also alleged negligence based on a failure to warn.

The golf car in this case was manufactured by Textron in 1999 and sold to a golf course in California. In 2004, Textron re-sold the car to Garrett's Discount Golf Cars, Inc., who in turn sold the car to Carolina Auction, Inc. Carolina Auction provided the golf car to Kunkle and High.

Kevin Hollerman, vice-president of sales for Textron, testified Fleet golf cars were generally designed for golf course use. Approximately seventy percent of Textron's customers leased the new Fleet golf cars as opposed to purchasing them. He further testified that when the leased golf cars were returned to Textron upon expiration of the lease, the golf cars were generally purchased by distributors for sale to the public, primarily for uses other than on golf courses.

Hollerman testified he did not know if owner's manuals were provided to distributors upon resale of the golf cars as the cars were often picked up directly from the course by the purchasing distributor. Gerald Powell, a Textron employee, testified prior to the 1990s Fleet golf cars were affixed with a dashboard label stating: "CAR IS RESTRICTED TO TWO OCCUPANTS AND OPERATION ONLY ON A GOLF COURSE BY AUTHORIZED PERSONS." In the early 1990s Textron changed the dashboard label to read: "FOR GOLF COURSE AND NON-HIGHWAY USE ONLY, AND TO BE OPERATED ONLY BY AUTHORIZED DRIVERS IN DESIGNATED AREAS."

The evidence at trial showed golf cars generally are not required under the law or any recognized safety standards to be equipped with lights or reflectors, and the operation of a golf car on a public road at night is prohibited by South Carolina law. S.C. Code Ann. § 56-3-115 (2006).

Additionally, testimony was presented that Textron offered after-market lighting kits that can be added to its golf cars.

The trial court granted summary judgment in Textron's favor with respect to strict liability and negligence. This appeal followed.

STANDARD OF REVIEW

The appellate court "reviews the grant of a summary judgment motion under the same standard as the trial court pursuant to Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Sloan v. Dep't of Transp., 379 S.C. 160, 167, 666 S.E.2d 236, 239 (2008). All evidence, and inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Rife v. Hitachi Constr. Mach. Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

LAW/ANALYSIS

I. Strict Liability[1]

Appellants argue the circuit court erred in granting summary judgment in favor of Textron because they presented evidence the used golf car was defective and unreasonably dangerous as sold because Textron could foresee purchasers may misuse the golf car. We disagree.

In order to establish a products liability claim, a plaintiff must show (1) injury by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product

[1] Issues I, II, IV, and V are all related to the circuit court's conclusion Textron was entitled to judgment as a matter of law with regard to Appellants' strict liability claims.

was in essentially the same condition as when it left the hands of the defendant. Rife v. Hitachi Constr. Mach. Ltd., 363 S.C. 209, 215, 609 S.E.2d 565, 568 (Ct. App. 2005). See S.C. Code Ann. § 15-73-10 (2005) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property . . . .").

In this instance, Appellants do not argue the golf car was defective in that it was not functioning as intended. Rather Appellants contend the golf car was defective and unreasonably dangerous to the user because Textron marketed the used Fleet golf cars for operation on public roads without affixing lights and reflective devices or without providing adequate warnings. We disagree.

While the mandatory addition of lights and reflectors to golf cars would no doubt add an increased element of safety, products are not defective simply because they do not have all the optional safety features that could be included. Our supreme court has said: "Most any product can be made more safe. . . . [A] bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous." Marchant v. Mitchell Distrib. Co., 270 S.C. 29, 35-36, 240 S.E.2d 511, 513 (1977). Likewise, the failure to equip the golf cars with lights and reflective equipment does not create the inference the golf car was defective and unreasonably dangerous.

Appellants also contend the golf car was defective and unreasonably dangerous because Textron failed to provide adequate warnings regarding operation at night and on public roads. We disagree.

"A product may be deemed defective, although faultlessly made, if it is unreasonably dangerous to place the product in the hands of the user without a suitable warning." Anderson v. Green Bull, Inc., 322 S.C. 268, 273, 471 S.E.2d 708, 712 (Ct. App. 1996) (Cureton, J., concurring) (citing Marchant v. Lorain Div. of Koehring, 272 S.C. 243, 247, 251 S.E.2d 189, 192 (1979)). However, a product is not defective for failure to warn of an open and obvious danger. Id. (Cureton, J., concurring) (citing Dema v. Shore Enters.,

312 S.C. 528, 530, 435 S.E.2d 875, 876 (Ct. App. 1993)). "[A] seller is not required to warn of dangers or potential dangers that are generally known and recognized. It follows, then, that a product cannot be deemed either defective or unreasonably dangerous if a danger associated with the product is one that the product's users generally recognize." Id. at 271-72, 471 S.E.2d at 710 (citations omitted).

We agree with the circuit court's conclusion the operation of an unlighted golf car on a public highway at night presents an open and obvious risk. The risks associated with this activity seem apparent, particularly in light of other dangers found by our court to be well-known. See id. at 271, 471 S.E.2d at 712 (Cureton, J., concurring) ("It is common knowledge that an aluminum ladder will conduct electricity."); Dema, 312 S.C. at 530-31, 435 S.E.2d at 876 (finding danger of operating recreational water vehicle in proximity to swimmers was a matter of common sense precluding necessity of warning). Furthermore, Appellants' expert conceded the danger posed should have been obvious. Consequently, the golf car was not rendered unreasonably dangerous by Textron's failure to warn against nighttime operation on public roads.

II. Negligence[2]

In this case, Appellants claim Textron was negligent in failing to adequately warn of the dangers of nighttime operation of the golf car on public roads. We disagree.

To prove a negligence claim, a plaintiff must demonstrate (1) a duty of care owed by the defendant; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. Platt v. CSX Transp., Inc., 379 S.C. 249, 258, 665 S.E.2d 631, 635 (Ct. App. 2008). "The court must determine, as a matter of law, whether the law recognizes a particular duty." Id.

[2] This section addresses Appellants' Issue III.

As previously discussed, there is no duty to warn of dangers that are open and obvious. Anderson, 322 S.C. at 271-72, 471 S.E.2d at 710. Although questions of negligence are often for the jury, when the risk complained of is open and obvious to consumers, there is no duty to warn of that risk as a matter of law. See Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994) (stating negligence is mixed question of law and fact with existence and scope of duty being questions of law and breach of duty being a question for the jury).

Furthermore, we believe Stroud's negligence in driving the golf car would prohibit a recovery under a negligence theory as a matter of law. See Haley ex rel. Haley v. Brown, 370 S.C. 240, 244 n.6, 634 S.E.2d 62, 64 n.6 (Ct. App. 2006) ("Although we agree comparative negligence normally presents a jury question, where, after consideration of all the relevant factors, the only reasonable inference is that the plaintiff's negligence exceeded fifty percent, it becomes a matter of law for the trial court."). Therefore, we cannot conclude any genuine issue of material fact exists warranting the denial of summary judgment in Textron's favor.

CONCLUSION

Because we believe the risk of operating an unlighted golf car at night on a public highway was open and obvious, as a matter of law, the car was not defective or unreasonably dangerous. Furthermore, because the risk was open and obvious, Textron had no duty to warn against the hazards of the conduct that lead to Stroud's accident. Therefore, the ruling of the circuit court is

AFFIRMED.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey Harbit, Thomas L. Harbit, Plaintiffs,

of whom

Jeffrey Harbit is Appellant,

v.

City of Charleston, City of Charleston Planning Department, Respondents.

Appeal from Charleston County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4511
Heard January 21, 2009 - Filed February 25, 2009

AFFIRMED

Thomas R. Goldstein, of North Charleston, for Appellant.

Timothy Alan Domin, of Charleston, for Respondents.

GEATHERS, J.: In this appeal, Jeffrey Harbit (Harbit) argues that the circuit court improperly granted summary judgment in favor of the City of Charleston (the City) on several claims stemming from the City's refusal to rezone Harbit's single family residential property for limited commercial use. We affirm.

FACTS

Harbit is the owner of property located at 7 Wesley Drive, which is within the City's limits. The property is on the corner of Wesley Drive and Stocker Drive. The house at 7 Wesley Drive faces Wesley Drive with a rear entrance and driveway accessible only from Stocker Drive. Wesley Drive is a five-lane thoroughfare, connecting Folly Road to Highways 17 and 61. Stocker Drive is a purely residential street, which may be accessed from the heavier-traveled Wesley Drive.

At all times pertinent to this appeal, this property has been zoned for single family residential purposes. Harbit purchased this property in 2003 for $180,000 from Truett Nettles (Nettles). Prior to selling the property to Harbit, Nettles attempted to rezone the property for limited commercial use as an attorney's office, but the City denied his request. Harbit was aware of the City's denial of Nettles' request for rezoning when he purchased the property from Nettles in 2003.

In 2005, Harbit applied for rezoning of the Wesley Drive property based on its location within the Savannah Highway Overlay Zone (the Zone). The Zone was created as a result of a comprehensive study of land surrounding the Ashley River Bridge in Charleston.[1] Based on this study, the City developed the "Ashley Bridge District" plan, which identified the need to maintain residential communities in the Zone, despite increased

[1] City of Charleston Zoning Ordinance § 54-202(e) (1996) states: "Savannah Highway SH Overlay Zone. The SH Overlay Zone is intended to allow office and neighborhood service uses in addition to the uses allowed in the base zoning district. Existing structures in the SH zone that are used for a non-residential use shall retain their residential appearance. . . . Parking shall be restricted to the side or rear of the principal buildings and buffering from adjoining residential lots shall be required."

commercialization. While highlighting the need to maintain residential uses in the Zone, the plan allows certain properties along Savannah Highway and Wesley Drive to be used for limited commercial purposes, including professional office use. Under the Ashley Bridge District plan, the other properties on Harbit's side of Wesley Drive within the Zone have been rezoned for limited commercial use.

On June 15, 2005, the City of Charleston Planning Commission (the Planning Commission) reviewed Harbit's application, at which time Harbit's counsel presented Harbit's position for rezoning the Wesley Drive property. The Planning Commission, however, voted to recommend denying Harbit's rezoning application, finding the request was in contradiction to the Ashley Bridge District plan and the overall neighborhood sentiment to retain the residential use of the structures within the area. On September 27, 2005, Charleston City Council (City Council) received the Planning Commission's recommendation and held a public hearing to address local zoning issues, including Harbit's application. Harbit's counsel was present for the City Council meeting. City Council denied Harbit's request, citing a concern over increased commercialization, loss of residential use, and the special location of the property at the entrance of a residential neighborhood, particularly its frontage on a purely residential street.

After City Council's denial of his application, Harbit appealed the zoning decision to the circuit court and asserted additional grounds for relief, including a request for a writ of mandamus and causes of action for due process and equal protection violations. The City filed a motion for summary judgment on all claims, which the circuit court granted. In its order, the circuit court found a writ of mandamus was inappropriate because zoning is not a ministerial act and thus cannot be mandated by the court.[2] In dismissing Harbit's claims for procedural and substantive due process, the circuit court found Harbit was provided with sufficient notice to satisfy his procedural due process rights, and because he had no prior property interest in commercial zoning, his substantive due process rights were not violated. Regarding Harbit's equal protection claim, the circuit court found City Council had a rational basis for denying Harbit's application such that Harbit

[2] Harbit does not appeal the circuit court's decision on this issue.

was afforded equal protection of the law. It is from this order that Harbit now appeals.

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008).

ISSUE ON APPEAL

Do genuine issues of material fact exist on Harbit's claims such that the circuit court erred in granting summary judgment to the City as a matter of law?

LAW/ANALYSIS

A. "Fairly Debatable" Standard in Zoning Decisions

Harbit asserts that viewing the evidence in his favor, City Council's refusal to rezone Harbit's property is so unreasonable that this Court should invalidate City Council's decision. We disagree.

Rezoning is a legislative matter. Lenardis v. City of Greenville, 316 S.C. 471, 471, 450 S.E.2d 597, 597 (Ct. App. 1994). The legislative body's decision in zoning matters is presumptively valid, and the property owner has the burden of proving to the contrary. Rushing v. City of Greenville, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975). The authority of a municipality to enact zoning ordinances that restrict the use of privately owned property is founded in the municipality's police power. Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 530-31 (1965). The governing bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens. Id. As in this case, the determinative question is whether the city council's refusal to change the zoning of the owner's property is so unreasonable as to impair or destroy the owner's constitutional rights. Rushing, 265 S.C. at 288, 217 S.E.2d at 799. We cannot insinuate our judgment into a review of the city council's decision but must leave that decision undisturbed if the propriety of that decision is even "fairly debatable." Knowles v. City of Aiken, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991).

Additionally, there is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and when the planning commission and the city council of a municipality have acted after reviewing all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or in clear abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the court's function to pass upon the wisdom or expediency of municipal ordinances or regulations. Id.

We find that City Council's decision is "fairly debatable" because the City proffered several reasonable grounds for the denial of Harbit's rezoning application. First, the Planning Commission and City Council concluded that rezoning Harbit's property would not be in the community's best interests because the City has a vested interest in preserving the area's residential

character and in minimizing commercialization. As stated in the Ashley Bridge District Plan, one of the major concerns in this area was increased commercialization due to rezoning. Further, both the Planning Commission and City Council cited concerns of neighborhood residents who feared loss of residential use in the area and the possibility that continued rezoning would create a domino effect. While all of the residents' concerns might not be well-founded, City Council's response to public opposition does not rise to the level of a constitutional violation.[3] Additionally, City Council specifically cited the unique location of Harbit's property as opposed to other properties on Wesley Drive that were zoned for limited commercial use, noting that two of its sides are situated on the interior of the neighborhood. Moreover, because it is a corner lot, the property effectively serves as a buffer between the heavier-traveled Wesley Drive and the purely residential Stocker Drive. See Hampton v. Richland County, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App. 1987) (finding the city council's refusal to rezone property from an office and industrial classification to a general commercial classification was "fairly debatable" because the property lay between commercial and residential properties thus creating a buffer between the two zones).

While other similarly situated properties on Wesley Drive are zoned for limited commercial use, the record does not indicate that Harbit was the subject of purposeful, invidious discrimination. See Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 825 (4th Cir. 1995) (internal citations omitted) ("If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the

[3] In a similar case, Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F.3d 322 (4th Cir. 2005), the Fourth Circuit Court of Appeals acknowledged the propriety of denying a building permit for a high-rise project, despite the developers' compliance with all zoning regulations. In affirming the district court's grant of summary judgment on the developers' claims for a violation of due process and equal protection, the Fourth Circuit Court of Appeals determined the city council's denial of the application in response to public opposition did not rise to the level of a constitutional violation because "matters of zoning are inherently political, and [] it is a zoning official's responsibility to mediate disputes between developers[] and local residents." Sunrise, 420 F.3d at 329.

authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim."). For instance, there are other properties on Harbit's side of Wesley Drive that are currently zoned residential, and with the exception of one property cornering on Savannah Highway and Wesley Drive, all of the properties on the other side of Wesley Drive are zoned residential. The properties on his side of Wesley Drive that are zoned for limited commercial use are distinguishable in that they either also front on Savannah Highway or are not accessed by a purely residential street.

Based on the evidence in the record, the City properly denied Harbit's rezoning application in an effort to hold the line on commercial development in the area and protect its residential nature. We will not invalidate City Council's decision as its propriety is at least "fairly debatable" based on the facts and is not "so unreasonable as to impair or destroy constitutional rights." See Knowles, 305 S.C. at 224, 407 S.E.2d at 642. As such, it is not this Court's function to pass upon the wisdom or expediency of City Council's decision. See Bob Jones Univ., Inc., 243 S.C. at 360, 133 S.E.2d at 847.

B. Due Process

Harbit contends the circuit court erred in dismissing his procedural and substantive due process claims. We disagree.

1. Procedural Due Process

Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. U.S. Const. amends. V and XIV, §1; Mathews v. Eldridge, 424 U.S. 319, 331 (1976). The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review. U.S. Const. amends. V and XIV, §1; S.C. Const. art. 1, § 22; Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). Further, due process is flexible and calls for such procedural protections as the particular situation demands.

Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).

We are of the opinion that Harbit received due process, both procedural and substantive, thus entitling the City to judgment as a matter of law. First, Harbit was afforded procedural due process because he was provided with notice of both public hearings as evidenced by the rezoning application that he completed and signed.[4] He also had a meaningful opportunity to be heard as he was allowed to present his arguments at both the Planning Commission and City Council levels. While Harbit chose not to be present, his attorney represented Harbit's interests by presenting exhibits and arguing Harbit's position for rezoning his property in both instances.

Further, Harbit has received three levels of review, in each of which he was allowed to present his position.[5] The existence of review is an indication of the presence of procedural due process, rather than its absence. See Sunrise, 420 F.3d at 328 (finding district court properly granted city's motion for summary judgment on developers' claims for due process violations after city denied building permit as developers received four levels of state review which was "an indication of the existence of procedural due process, rather than its absence"). Because Harbit was provided with both predeprivation and postdeprivation remedies, his procedural due process rights were not violated.

2. Substantive Due Process

In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property

[4] The rezoning application that Harbit signed states, "The Planning Commission will hold **a public hearing** and make a recommendation to City Council for approval, approval with conditions, disapproval or deferral of the rezoning. . . . After the Planning Commission makes its recommendation, the application will be forwarded to City Council where **another public hearing** will be held approximately one month later." (emphasis added).

[5] The Planning Commission's recommendation was reviewed by City Council, whose decision was then reviewed by the circuit court, and is now before this Court.

interest rooted in state law. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency. Sunrise, 420 F.3d at 328. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property. Bear Enters. v. County of Greenville, 319 S.C. 137, 141, 459 S.E.2d 883, 886 (Ct. App. 1995). In reviewing a substantive due process challenge to a zoning ordinance, we must determine whether the ordinance bears a reasonable relationship to any legitimate government interest. See Sunset, 357 S.C. at 430, 593 S.E.2d at 470 (stating that the standard of review for all substantive due process challenges to state statutes, including municipal ordinances, is whether the statute bears a reasonable relationship to any legitimate interest of government).

The City did not violate Harbit's substantive due process rights when it denied his rezoning application. First, Harbit did not have a prior property interest in commercial zoning. While Harbit may have purchased the property with the expectation that City Council would grant his application, this alone is insufficient to establish a violation of his constitutional rights. See Rush, 246 S.C. at 280-81, 143 S.E.2d at 533 (citing to 62 C.J.S., Municipal Corporations, § 227(11)) ("Although it is an element in the situation which is entitled to fair and careful consideration, mere disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions ordinarily does not warrant relaxation in his favor . . . ."); Hampton, 292 S.C. at 503-04, 357 S.E.2d at 465 (holding a property owner is not entitled to have his property zoned for its most profitable use).

Furthermore, Harbit was aware at the time of purchasing 7 Wesley Drive that the prior owner's application had been denied based on the same zoning restrictions and that his efforts might likely share the same fate. See id. at 281, 143 S.E.2d at 533 (internal citation omitted) (in denying the plaintiff's variance request, the supreme court found that the plaintiff who purchased property after a zoning restriction was in effect must have contemplated potential hardships, financial or otherwise, resulting from the existing conditions at the time of purchase). Because the City's decision was reasonably founded and rationally related to its stated interests of preserving

the area's residential character in the face of continuing commercialization, whether it be strictly commercial or limited commercial use, the City's actions did not rise to the level of being arbitrary or capricious and thus did not violate Harbit's substantive due process rights.

C. Equal Protection

Harbit also asserts the circuit court erred in dismissing his equal protection claim. We disagree.

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; see S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."). This clause requires that "the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose." Sylvia Dev. Corp., 48 F.3d at 818. It does not prohibit different treatment of people in different circumstances under the law. Town of Iva ex rel. Zoning Adminsitrator v. Holley, 374 S.C. 537, 541, 649 S.E.2d 108, 110 (Ct. App. 2007). Instead, "'the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Id. In a case such as this, the rational basis standard, rather than strict scrutiny, applies because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage. Sunset Cay, 357 S.C. at 428-29, 593 S.E.2d at 469.

Further, one seeking to show discriminatory enforcement in violation of the Equal Protection Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced. See State v. Solomon, 245 S.C. 550, 574, 141 S.E.2d 818, 831 (1965). "[E]ven assuming [a governmental entity] is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a

constitutional equal protection violation." Denene, Inc. v. City of Charleston, 359 S.C. 85, 96, 596 S.E.2d 917, 922 (2004).

The City had a rational basis to deny Harbit's application, despite the fact that other properties on Wesley Drive were zoned for limited commercial use. As the circuit court notes in its order, Harbit's property is the only one of those properties which has frontage on Stocker Drive. Further, unlike the other properties, Harbit's property effectively serves as a buffer between the purely residential Stocker Drive and the heavier-traveled Wesley Drive. In contrast to Harbit's property, the other corner property on his side of Wesley Drive that is zoned for limited commercial use has frontage on Savannah Highway and abuts other commercial property. Consequently, because the record does not indicate that Harbit was the subject of purposeful, invidious discrimination, the circuit court did not err in granting summary judgment on his equal protection claim. See Sylvia Dev. Corp., 48 F.3d at 825 (internal citations omitted) ("While an equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals, a showing of such disparate treatment, even if the product of erroneous or illegal state action, is not enough by itself to state a constitutional claim."). Consequently, the circuit court appropriately granted summary judgment on Harbit's claims stemming from the denial of his rezoning application.

CONCLUSION

Based on the foregoing, the circuit court did not err in granting the City's motion for summary judgment.

Accordingly, the circuit court's order is

AFFIRMED.

WILLIAMS AND PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Janet C. Robarge, an individual, and Parker Sewer and Fire Subdistrict, a corporation, Appellants,

v.

The City of Greenville, Knox H. White, Lillian Brock Flemming, C. Diane Smock, Michelle R. Shain, Debra M. Sofield, Chandra E. Dillard, and J. David Sudduth, Respondents.

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 4512
Heard December 3, 2008 – Filed February 27, 2008

AFFIRMED

Robert Mills Ariail, Jr., of Greenville, for Appellants.

Ronald W. McKinney, of Greenville, for Respondents.

GEATHERS, J.: Appellants, Janet Robarge (Robarge) and the Parker Sewer and Fire Subdistrict, formerly known as the Parker Water and Sewer Subdistrict (the District), brought this declaratory judgment action challenging the validity of a requirement for the execution of an annexation covenant as a condition for receiving water service from the Greenville Commission of Public Works (Greenville Water System).[1] Appellants sought a declaratory judgment that the condition violates an agreement that requires the Greenville Water System to provide water service to the District's properties. The circuit court denied Appellants' summary judgment motion and granted the City's summary judgment motion. Appellants now seek review of these rulings. We affirm.

FACTS/PROCEDURAL HISTORY

The District is a special purpose district in Greenville County that was originally authorized to operate water and sewer systems in its service area. See Act No. 1087, § 3, 1934 S.C. Acts 1997, 2000; Act No. 443, § 6, 1929 S.C. Acts 864, 866. In 1961, the General Assembly enacted legislation authorizing special purpose districts in Greenville County to sell their water distribution systems to the City of Greenville. Act No. 559, 1961 S.C. Acts 1114. Notably, the Act authorized special purpose districts to impose terms and conditions on the sale, including covenants to supply water to district properties. Act No. 559, § 2, 1961 Acts 1114-15. In 1971, the District entered into an agreement with the City and the Greenville Water System for the sale of the District's water distribution system. It is undisputed that the

[1] Appellants named the City of Greenville (City) and the members of Greenville's City Council as defendants. The Greenville Water System is a municipal entity separately constituted from Greenville's City Council.

Greenville Water System actually provided water service to the District's properties both before and after the execution of the 1971 agreement.

In 2002, the Greenville Water System adopted a policy requiring owners of real property within a one-mile radius of the City to execute a covenant consenting to annexation as a condition of receiving any new connection (tap) to the water system's lines.[2] The annexation covenant requirement does not apply to new accounts relating to an existing tap or to owner-occupied residential property.

After the Greenville Water System adopted the annexation policy, Robarge sought a new tap to the water system for a strip shopping mall within the District's service area. The Greenville Water System refused to allow the new tap because Robarge would not sign an annexation covenant. Likewise, the Greenville Water System denied water service to the District for a sewer pump station within the District's service area because the District's representatives refused to sign an annexation covenant.

Appellants brought a declaratory judgment action against the City and the members of City Council, seeking a declaration that the annexation covenant requirement violated the 1971 agreement for the sale of the District's water distribution system. Appellants argued that the 1971 agreement required the Greenville Water System to provide water service to the District's properties and did not authorize the imposition of an annexation covenant requirement as a condition for receiving service. Appellants also argued that the annexation covenant requirement violated provisions of the agreement that require equal treatment of customers located outside the city limits.

The circuit court concluded that the 1971 agreement implicitly authorized the imposition of the annexation covenant requirement on requests

[2] The covenant authorizes annexation of the subject property whenever it otherwise qualifies for annexation under state law, subject to City Council's approval.

for new taps. The circuit court also concluded that the annexation covenant requirement did not run afoul of the equal treatment provisions of the 1971 agreement or of the Equal Protection clauses of the United States Constitution and the South Carolina Constitution. Based on these conclusions, the circuit court granted the City's summary judgment motion and denied Appellants' summary judgment motion. This appeal followed.

ISSUES ON APPEAL

1. Does the 1971 agreement authorize the imposition of the annexation covenant requirement on requests for new taps to the water system?

2. Does the annexation covenant requirement unlawfully discriminate between different classes of owners of District properties?

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the trial court under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998). To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

I. Contractual Authorization to Impose Conditions on Water Service

Appellants assert that the 1971 agreement imposed an unconditional obligation on the Greenville Water System to provide water service to properties located in the District. Appellants argue that the annexation covenant requirement places a condition on the provision of water service that was not authorized by the agreement. We disagree.

"The construction of a clear and unambiguous contract is a question of law for the court." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (internal citations omitted). "The purpose of all rules of contract construction is to ascertain the intention of the parties[,] and that intention must be gathered from the entire agreement and not from any one particular phrase . . . ." Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997).

The 1971 agreement as a whole imposes on the Greenville Water System an obligation to provide water service to those taps that were in existence at the time of the agreement's execution. However, as to taps added after the date of the agreement, the Greenville Water System's obligation to provide water service is conditional. Paragraph IX of the agreement provides, in pertinent part, as follows:

> [F]rom the date of this agreement and thereafter any additions, changes, or modifications of the water system within the District shall be subject to the prevailing rules, regulations, policies and approval of the Commission.

This language authorizes the Greenville Water System to impose

reasonable conditions on the provision of water service for any additions made to the water system after the date of the agreement. Similarly, paragraph VI(c) specifically subjects new water lines to the "then prevailing Commission policy" concerning the acceptance of new lines:

> The Commission shall have no duty or obligation to install water lines in undeveloped areas or prospective subdivisions in the District, but . . . if such lines are installed therein by private developers in accordance with the specifications, policies, rules, and regulations of the Commission, such lines will be accepted in accordance with the then prevailing Commission policy concerning such.

Therefore, contrary to Appellants' assertion, this agreement is distinguishable from the agreement in Touchberry v. City of Florence, 295 S.C. 47, 367 S.E.2d 149 (1988). In Touchberry, the South Carolina Supreme Court held that a property owner who had applied to receive water service from the City of Florence was a third-party beneficiary of a franchise agreement between the Florence County Council and the City of Florence. Id. at 48-49, 367 S.E.2d at 150. The agreement granted the City of Florence the exclusive right to provide water service in a municipal service area (MSA) in which the plaintiff's property was located. The agreement required the City of Florence to provide water service in the MSA whenever individually requested, conditioned only upon it being physically and economically feasible to do so. It was uncontested that it was feasible for the City to provide the service to the plaintiff. Therefore, the Court reversed the circuit court's finding that the plaintiff's property had to be annexed in order to receive service under the City's agreement with Florence County Council. Id. at 48-49, 367 S.E.2d at 149-50.

In a later opinion, Sloan v. City of Conway, 347 S.C. 324, 555 S.E.2d 684 (2001), the Court expounded on its analysis in Touchberry and noted that there is nothing in the Touchberry opinion holding generally that a city cannot require annexation as a contractual condition for water service. Sloan,

347 S.C. at 333, 555 S.E.2d at 688. The Court explained that, in Touchberry, the City of Florence could not require annexation as a condition for providing water service because the customers were already entitled to municipal water service as third-party beneficiaries of the agreement between the City and the service authority in the disputed area. Id. at 332, 555 S.E.2d at 688.

Here, the unconditional obligation to provide water service applies only to those taps in existence at the time of the agreement's execution. As to any additions made to the system after the agreement's execution, the agreement expressly conditions the obligation to provide service based on the prevailing rules, regulations, policies, and approval of the Greenville Water System. A new tap qualifies as an addition to the water system even if it is connected to a water line that was in existence at the time of the agreement's execution. See Merriam-Webster's Collegiate Dictionary 14 (11th ed. 2003) (defining "addition" as "a part added (as to a building or residential section)"). When the Greenville Water System adopted the annexation policy in 2002, that policy became part of the prevailing policies to which future additions to the water system would be subjected. Therefore, the 1971 agreement authorizes the imposition of the annexation covenant requirement on new tap requests submitted after the requirement's adoption.

II. Unlawful Discrimination

Appellants also argue that the annexation covenant requirement unlawfully discriminates between owners of District properties within the one-mile radius of the City and owners of District properties outside of the one-mile radius. We disagree.

Paragraphs VI(d), VII, and IX of the agreement require the Greenville Water System to treat District customers the same as customers in other areas outside the City. Further, paragraph VI(d) arguably requires equal treatment of all customers within the District with regard to the rates charged for water

service. However, nothing in the agreement prohibits different classifications within the District's service area for purposes of rules or policies other than ratemaking.

Additionally, the Equal Protection clauses of the United States Constitution and the South Carolina Constitution allow for disparate treatment of different classes as long as the classification is a reasonable one and is rationally related to a legitimate purpose. See Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 480, 636 S.E.2d 598, 613 (2006); State v. Solomon, 245 S.C. 550, 572, 141 S.E.2d 818, 830 (1965); Town of Iva ex rel. Zoning Adm'r v. Holley, 374 S.C. 537, 541, 649 S.E.2d 108, 110-11 (Ct. App. 2007). The City's use of a one-mile radius as a determining factor for potential annexation is rationally related to the City's goal of managed growth. Therefore, the annexation covenant requirement does not unlawfully discriminate between different classes of owners of District properties.

CONCLUSION

The circuit court properly granted summary judgment to the City. There is no genuine issue as to any material fact, and the Greenville Water System is entitled to judgment as a matter of law concerning the application of the provisions of the 1971 agreement to the annexation covenant requirement.

Accordingly, the circuit court's order is

AFFIRMED.

WILLIAMS, J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bessie C. Pringle and Burdy Pringle, Appellants,

v.

SLR, Inc. of Summerton, d/b/a Knights Inn, Respondent.

Appeal From Clarendon County
George C. James, Circuit Court Judge

Opinion No. 4513
Heard January 6, 2009 – Filed February 27, 2009

AFFIRMED

John Eagle Miles, Michael McKinney Jordan, both of Sumter, for Appellants.

Marvin E. McMillan, Jr., of Sumter, for Respondent.

THOMAS, J.: In this negligence action, plaintiffs Bessie and Burdy Pringle appeal the grant of summary judgment to SLR, Inc. of Summerton, d/b/a Knights Inn. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 18, 2004, Bessie Pringle went with her husband Burdy Pringle and their ten-year-old granddaughter to the Knights Inn restaurant in Summerton for Sunday lunch, as they had done almost every Sunday for several years. When the Pringles arrived at the restaurant, the hostess seated them. The Pringles served themselves from the buffet and returned to the table to eat their meal. After Burdy left the table to pay, the chair in which Bessie was sitting suddenly collapsed as she reached for her pocketbook on the table, causing her to fall to the floor. Subsequently, she was transported from the restaurant to the hospital by ambulance. As a result of the accident, Bessie suffered a meniscus tear to her knee, which required surgery. Shortly after the accident, Knights Inn discarded the chair.

On February 9, 2005, the Pringles jointly filed a lawsuit against Knights Inn. Bessie sued for negligence, and Burdy brought a claim for loss of consortium.

In her deposition, Bessie testified that she did not notice anything wrong with the chair before it collapsed and that the chair was not "rickety," "wobbly," or otherwise unstable. She did not see the chair after she fell and could not testify as to how it broke; however, she maintained the legs of the chair had broken. In addition, Bessie had never experienced any problems with chairs during previous visits to the Knights Inn and had no direct knowledge of any other patrons who had experienced problems with the chairs at the restaurant. Bessie claimed, however, a Knights Inn employee approached her a few weeks after the incident and told her that an elderly woman fell and hurt herself at the restaurant when a chair collapsed. During her deposition, after viewing three photographs of different chairs provided

by Knights Inn's attorney, Bessie testified the chair in which she was sitting when she fell appeared to look like the chairs in the photographs.[1]

Burdy also testified in his deposition that there was no indication of any problem with the chairs at their table and that he was not directly aware of any problems with chairs at Knights Inn. Burdy identified one of the chairs in the photographs as the same type of chair that collapsed under Bessie. According to Burdy, the chair was in two separate pieces after it collapsed and the right-side legs of the chair were completely loose and broken from the base of the seat. Burdy also claimed Bhupen Patel, the owner and manager of the restaurant, asked him to pass the chair to him immediately following the incident.

The Pringles named Angus McDuffie as an expert witness in the case. McDuffie has no degrees or specialized training; however, he has been in the furniture business for forty years, selling both commercial and residential furniture and repairing broken furniture. In his deposition, McDuffie testified about the difference between residential and commercial chairs, explaining the two types are different in construction. According to McDuffie, the legs on commercial chairs cannot be removed from the structure of the chair because the leg system "is an integral part of the seating system" where the legs are mounted directly into the seat itself, creating one single unit. In contrast, McDuffie testified residential chairs have separate leg and seat units that operate independently of one another and the legs are attached to a rail on the bottom of a seat rather than into the seat itself; thus, all of the stress on the seat is absorbed at the point where the legs attach. McDuffie opined that commercial chairs are different from residential chairs in their ability to withstand greater frequency of use and that residential chairs are not substantial enough for use in a commercial setting.

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[1] The photographs were not included in the record on appeal; however, it appears from counsel’s remarks during the deposition that the only difference among the chairs depicted in the photographs was that one of them had white paint on the back and the other two were of a solid wood color.

After viewing the photographs of the chairs, McDuffie stated the chairs in the pictures were residential chairs unfit for use in a commercial setting. According to McDuffie, the chairs could not sustain "heavy general use without causing some type of failure of the back or leg support system." McDuffie explained that over time and frequency of use, such chairs would show signs of wear, indicated by wobbliness, weakness, loss of parts, squeaking, and screws coming out. Furthermore, McDuffie indicated an inadequate chair would show signs of being shaky and loose and a chair without such signs would not indicate wear from frequency of use. Without inspecting the subject chair, McDuffie could not give an opinion as to whether it collapsed because of frequency of use or sudden failure.

McDuffie also indicated commercial and residential chairs would appear the same to the untrained eye and purchasers would not know a chair was for residential use unless the seller informed them. McDuffie indicated some residential chairs are stamped with a notice that the chair is for residential use; however, he had no opinion as to whether the manufacturer of the chair involved in Bessie's fall told the buyer the chairs were for residential use only. He also stated he had not examined the particular chair involved in the incident and therefore could not state whether it contained such a stamp.

Patel testified in deposition that maintenance is performed at Knights Inn on Saturdays. He further noted there are three types of chairs at the Knights Inn. Some of the chairs came with the restaurant when he bought it, and others he purchased later. Patel could not say whether or not the subject chair was one he purchased. Patel also testified that after the subject chair collapsed, the legs were separated from the chair, and he immediately removed it. He never saw the chair again, and it never occurred to him to save the chair in anticipation of a lawsuit. Patel also confirmed the subject chair was the same as the chairs depicted in the photographs, which encompassed all three types of chairs at the Knights Inn. According to Patel, the chairs at the Knights Inn all have screws connecting the legs to rails at the base of the seat. Patel admitted another incident occurred prior to Bessie's fall when a chair broke at the Knights Inn; however, he claimed the person sitting in the chair was extremely heavy and did not fall. He also

acknowledged the subject chair was the only other chair he had taken out of use.

Following discovery, Knights Inn made a motion for summary judgment, arguing the Pringles failed to offer evidence creating a genuine issue of material fact regarding its negligence. The Pringles contended summary judgment was inappropriate because the evidence showed the chairs used by the restaurant were not fit for commercial use. Additionally, the Pringles made a motion for sanctions against Knights Inn for spoliation of evidence, arguing: (1) summary judgment was inappropriate because Knights Inn disposed of the subject chair; and (2) the Pringles were entitled to an inference that the subject chair would have been adverse to the position of Knights Inn.

The trial court granted summary judgment on both causes of action, concluding the Pringles failed to offer any evidence that Knights Inn knew the subject chair was defective or in a dangerous condition. Furthermore, the court found there was no evidence showing either that Knights Inn knew the subject chair was for residential use only or that the use of residential chairs instead of commercial chairs would constitute negligence.

Additionally, the trial court ruled there was no evidence of spoliation that would defeat summary judgment. Though the trial court noted an inference may be drawn that the lost or destroyed chair would have been adverse to Knights Inn's case, it concluded there was already evidence the subject chair was defective and summary judgment was still appropriate because the Pringles failed to offer evidence Knights Inn knew or should have known the chair was defective. This appeal followed.

ISSUES

Was the grant of summary judgment to Knights Inn proper in view of (1) evidence presented by the Pringles that the chair in question was of residential rather than commercial quality, and (2) the fact that the chair was not available for their inspection during this lawsuit?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the circuit court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

DISCUSSION

I. Creation of an unreasonably dangerous condition

The Pringles first argue the grant of summary judgment was error because the trial court focused solely on whether Patel knew or should have known of the unsafe condition allegedly created by the chair in which Bessie was sitting when she fell. Citing Cook v. Food Lion, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997), the Pringles argue the court should have considered the principle that, in a premises liability case, if the defendant created the allegedly dangerous condition, it is not necessary for the plaintiff to show the defendant had prior actual or constructive notice of the dangerous condition. Cook, 328 S.C. at 327-28, 491 S.E.2d 691-92. We disagree.

To recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff "must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it." Anderson v Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988).

In Cook, the plaintiff claimed a wrinkled mat placed by the defendant's employees on the floor for its customers caused her to fall and suffer injury. During the trial, she proffered testimony from several of the defendant's employees that the floor mats used in the store had a tendency to wrinkle, had to be straightened, and caused people to trip and stumble on several occasions. Ultimately, this Court held the trial judge erred in directing a verdict for the defendant because the tendency of the mats to wrinkle created a dangerous condition and the defendant was aware of the tendency even though it may not have been aware the particular mat in question was in fact wrinkled immediately before the plaintiff fell on it. Cook, 328 S.C. at 329, 491 S.E.2d at 692. The showing that a defendant created a condition that led to a plaintiff's injury is not, however, sufficient to survive a summary judgment motion unless there is evidence that in creating the condition, the defendant acted negligently. See Shain v. Leiserv, Inc., 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct. App. 1997) (stating the evidence required to show a condition created by the defendant was indeed hazardous must show the defendant was negligent either in the choice of materials used to create the condition or in the manner of their application).

Applying these principles to the present case, we agree with the trial court that the Pringles did not present evidence sufficient to create a genuine issue of material fact that Knights Inn was negligent in placing residential quality chairs in the restaurant. Although McDuffie opined that residential chairs like the ones used in the restaurant are not substantial enough for use in a commercial setting because they cannot sustain heavy general use, he never stated that a residential chair in and of itself is a dangerous condition. Moreover, although McDuffie stated residential chairs "could not withstand heavy general use," he explained that this was because, over time, they would begin to show signs of wear, such as being wobbly or weak with loss of parts or screws coming out. Bessie's own testimony that the chair in which she was sitting when she fell was not unstable supports the trial court's finding that there was no evidence that Knights Inn knew or should have known that the chair was in danger of collapse or other failure.

II. Spoliation

The Pringles also argue they are entitled to an inference that, because the chair in question was lost or destroyed by Knights Inn, it would have been adverse to Knights Inn's case. We disagree.

In Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990), the supreme court upheld a jury charge that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." As an initial matter, however, the party seeking the inference "must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." Kevin Eberle, Spoliation in South Carolina, S.C. Law., Sept. 2007, 26, 32. Here, in view of the evidence already presented, the chair in question would not have provided any additional information indicating that its use at the restaurant would have constituted negligence on the part of Knights Inn. Bessie's own testimony established there was no indication the chair was wobbly, weak, unstable, or otherwise defective immediately prior to its collapse. Furthermore, although the Pringles suggested the chair may have been stamped with a disclaimer indicating it was for residential use, they failed to provide any evidence that such a stamp was in fact on the chair. Although McDuffie testified that some residential chairs include a stamped disclaimer, it was undisputed that any chair, whether or not it was classified as a residential chair or stamped as such, would show signs of wear before collapsing and that there was no indication that any such signs were apparent in the chair in question. We therefore hold that any inference that a jury could make from the absence of the chair would not change the fact that there was no indication the chair was dangerous or unfit for use.

CONCLUSION

We agree with the trial court that the Pringles did not present a genuine issue of material fact as to whether the use of a residential chair in a

commercial establishment, without more, constitutes evidence of negligence on the part of the owner of the establishment. To hold otherwise would be directly at odds with the applicable standard of care that "[a] merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in a reasonably safe condition." Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). We also uphold the trial court's determination that, because there was no evidence that Knights Inn knew or should have known the chair would collapse, the doctrine of spoliation did not preclude the grant of summary judgment.

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jhune Harris, Appellant.

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

Opinion No. 4514
Submitted February 3, 2009 – Filed March 4, 2009

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of the South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, Office of the Attorney General, of Columbia;

and Solicitor Warren Blair Giese, of Columbia, for Respondent.

WILLIAMS, J.: In this criminal case, Jhune Harris (Harris) argues the trial court erred in refusing to charge the jury on the law of self-defense and accident. Harris also contends the trial court improperly refused to grant a mistrial. We affirm.

FACTS

Leopold Pierre (Pierre) was at the residence of Angela Gilmore (Gilmore) helping her children clean an upstairs bedroom in anticipation of a family reunion. While Pierre was helping the children, Gilmore was in the kitchen cooking. Harris, a former boyfriend of Gilmore, walked to the back door of the house and asked if he could come inside. Gilmore informed Harris she had company and perhaps he should return at a different time. Harris responded he had watermelon for the children.

Based on Harris's representation, Gilmore allowed him to enter the house so he could bring the watermelon inside. Harris entered the house without a watermelon and immediately asked Gilmore to call Pierre downstairs. In response, Gilmore unsuccessfully asked Harris to leave her house.

Harris went upstairs several times and confronted Pierre and at least once asked Pierre to go outside and settle the matter like men. Pierre did not comply with Harris's requests. Shortly after this exchange, Pierre came downstairs to retrieve a broom. Harris told Pierre he wanted to talk to him. Pierre refused to speak with Harris and returned upstairs. Harris continued to call Pierre to come downstairs. Eventually Pierre complied and proceeded down the stairs.

As Pierre reached the bottom step or the second to the last step, Harris pulled a gun from his jacket pocket and shot Pierre twice, resulting in his death. Harris next turned his gun toward Gilmore and chased her through her

home. During the chase, Gilmore took hold of her son, and they both fell to the floor. Subsequently, Harris shot Gilmore while she was lying underneath her son. Gilmore survived the incident.

Consequently, Harris was charged with murder and assault and battery with intent to kill (ABWIK). At trial, Harris employed a combination of self-defense and accident to justify the shootings. Specifically, Harris testified he saw something "flicker from the back where [Pierre] had his hand," and Pierre lunged at him as Pierre made his way down the stairs.

With respect to Gilmore's injury, Harris stated that after he shot Pierre, he was backing up and tripped, which caused the gun to accidently discharge. The trial court charged the jury with the law of self-defense and accident. Harris took exception to the given charges and submitted specific requests. The trial court denied these requests.

Following the trial, the jury returned verdicts of guilty for both counts. The trial judge sentenced Harris to forty years for the murder charge and twenty years for the ABWIK charge, with the sentences to run concurrently. This appeal followed.

STANDARD OF REVIEW

Generally, the conduct of a criminal trial is left largely to the sound discretion of the trial court, and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). As such, an appellate court sits to review errors of law only, and we are bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48-49, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

On appeal, Harris argues the trial court improperly refused to: (1) charge the jury on the law of self-defense as requested; (2) charge the jury on the law of accident as requested; (3) grant a mistrial when the State allegedly

elicited improper character evidence testimony; and (4) grant a mistrial based on the solicitor's improper closing statements.

I. Jury charge

Initially, Harris argues the trial court erred in refusing to charge the law of self-defense and accident as requested. We disagree.

The law to be charged to the jury must be determined by the evidence presented at trial. State v. Patterson, 367 S.C. 219, 231-32, 625 S.E.2d 239, 245-46 (Ct. App. 2006). In South Carolina, a trial court is required to charge only the current and correct law of this state. Id. A jury charge is correct if it contains the correct definition of the law when read as a whole. Id. On review, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. Id. To warrant reversal, a trial court's refusal to give a requested jury charge must be erroneous as well as prejudicial to the defendant. Id. Failure to give a requested jury instruction is not prejudicial error where the instructions given afford the proper test for determining issues. Id.

If the charge as a whole is reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Id. A trial court's jury charge that is substantially correct and covers the law does not require reversal. Id. In charging self-defense, the trial court must consider the facts and circumstances of the case at bar in order to fashion an appropriate charge. State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000).

Harris submitted the following specific request:

> If a defendant is in imminent danger or if defendant's belief that he is in imminent danger of death or receiving bodily harm is reasonable, he need not wait until actual attack or injury or until force is used by the aggressor before exercising the right to use deadly force in self-defense. In other words, defendant need not wait until the assailant "gets the

> drop on him" in order to be entitled to use force in self-defense.

The trial court refused to include the "gets the drop on him" language. This language originally arose in State v. Rash, 182 S.C. 42, 50, 188 S.E.2d 435, 438 (1936) ("[The defendant] doesn't have to wait until his assailant gets the drop on him, he has a right to act under the law of self-preservation and prevent his assailant getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him."). This language has been interpreted to mean a defendant does not have to wait until actually fired upon to use force to defend his life. State v. Nichols, 325 S.C. 111, 117-18, 481 S.E.2d 118, 121-22 (1997); see also Starnes, 340 S.C. at 322, 531 S.E.2d at 913 (holding that once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act).

With respect to this issue, the trial court charged the jury as follows:

> You may consider the deceased's conduct[,] actions and general demeanor immediately before the incident as bearing on the deceased's temper and state of mind at the time of the fatal encounter[,] and **the defendant does not have to show that he was actually in danger.** It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. **The defendant has the right to act on appearances even though the defendant's beliefs may have been mistaken.**

(emphasis added).

The trial court's instructions made it clear Harris did not have to wait until he was actually under attack in order to employ force to defend his life.

The trial court informed the jury that Harris had a right to act on appearances even if those appearances may have been erroneous. The simple fact that the trial court refused to use the "[gets] the drop on him" language does not render the charge improper. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) ("The substance of the law must be charged to the jury, not particular verbiage.").

Next Harris contends the trial court erred in refusing to charge the jury on the law of accident as requested. We disagree.

Harris submitted the following charge:

> I charge you that where the shooting of a human being is the result of accident or mischance, no criminal responsibility attaches. If it is shown that the shooting was accidental, that it was done while the defendant was engaged in a lawful activity, and was not the result of criminal negligence, the shooting will be excused. A person is legally entitled to arm himself in self-defense, to meet a potential threat, created by the person who was shot or another. If you find that the shooting was caused by accident, then you must find the defendant not guilty. . . . The burden of proof is not upon the defendant to show that the shooting was accidental, but the burden of proof is upon the State to prove beyond a reasonable doubt that it was intentional.

The trial court charged the law of accident as follows:

> Now ladies and gentlemen, the defense has also raised the defense of accident. An act may be excused on the ground of accident if it is shown that the act was unintentional; that the defendant was acting lawfully and that due care was used by the defendant in the handling of the weapon. . . . [I]f a

> person is lawfully armed in self-defense and the gun accidently discharges, the defense of accident would apply. The burden is on the [S]tate to prove beyond a reasonable doubt that the act was not an accident but was caused by the negligence or carelessness on the part of the defendant in the handling of the dangerous instrumentality or by unlawful activity by the defendant.

In South Carolina, the defense of accident requires showing the harm caused was unintentional, the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994).

The trial court set out the elements required to satisfy the defense of accident and stated the burden was on the State to prove the act was not an accident. The simple fact that the trial court refused to employ the language suggested by Harris does not render the charge ineffective. Burkhart, 350 S.C. at 261, 565 S.E.2d at 303 ("The substance of the law must be charged to the jury, not particular verbiage.").

Additionally, the requested charge and the charge given to the jury are identical in substance. The requested charge and the given charge state: (1) if the defense of accident applies then the act giving rise to that defense is excused; (2) in order for the defense of accident to apply, it must be shown the shooting was accidental while the defendant was engaged in a lawful activity and not be the result of negligence; (3) an individual may be lawfully armed and if the gun accidently discharges the defense of accident would apply; and (4) the burden rests on the State to prove beyond a reasonable doubt the act was not an accident. The suggested charge and the given charge differ only in the language employed, while the substances of both are identical; thus, it was not error to refuse to give the requested charge.[1] See

[1] Our decision is expressly limited in determining whether the given charges conform to law of South Carolina as it relates to self-defense and accident. We express no opinion on the propriety of the trial court's decision to give these charges under the facts presented.

State v. Clary, 222 S.C. 549, 552, 73 S.E.2d 681, 682 (1952) (holding no error in refusing to charge the precise language requested by the defendant when the jury is correctly instructed in accord with the requested charge).

II. Mistrial

Harris next argues the trial court improperly failed to grant a mistrial (1) when the State allegedly elicited improper character evidence testimony and (2) based on the solicitor's improper closing statements. We disagree.

The decision to grant or deny a mistrial is within the sound discretion of the trial court. State v. Stanley, 365 S.C. 24, 33-34, 615 S.E.2d 455, 460 (Ct. App. 2005). The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Id. The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court. Id. A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Id. The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way. Id.

Initially, Harris contends the trial court should have declared a mistrial because the State elicited improper character evidence testimony from a witness. We disagree.

The testimony in question focuses on one of Gilmore's children who testified at trial. During cross-examination of this witness, Harris asked numerous questions relating to the positive relationship the two enjoyed prior to the shooting. The following excerpt demonstrates Harris's attempt to convey to the jury the constructive relationship he enjoyed with Gilmore and her children.

> Q: I started off asking you some questions about [the] relationship [you had] with [Harris] and . . . you

agree that for some six or seven years it was like a family, correct?

A: Yes.

Q: Y'all lived together?

A: Yes.

Q: [Harris] as well as your mom bought you clothes?

A: Yes.

Q: Took you on trips to New York and Texas and Atlanta?

A: Yes.

Q: Had a great time on the holidays and on birthdays?

A: Yes.

Q: There were a lot of gifts that were not only given by your mom to you and your brothers and sisters but also by [Harris] correct?

A: Yes.

Q: He was very generous to you, wasn't he?

A: Yes.

Q: And y'all were close together?

A: Yes.

Q: You did a lot of activities together?

A: Yes.

. . .

Q: Did y'all go to church together?

A: Yes.

Q: And without going specifically but y'all went to the beach and went to the fair, movies, those kinds of activities together, activities that a family would generally get involved in right?

A: Yes.

Q: And [Harris] would come to your school, correct?

A: Yes.

Q: And your school related activities?

A: Yes.

. . .

Q: And [Harris] had a big, he had a lot of interest in you, not only, when I say you, I'm talking about your sisters and your brothers, too?

A: Yes.

Q: He did a lot of that and your mom was working and he would come and do all of these things at school

with all of you when your mom wasn't there sometimes, correct?

A: Yes.

Following this discourse and during re-direct examination of the witness the State posed the following question, "Let me just ask you about going to church with him . . . . [Harris] hit you, didn't he?" Harris immediately objected and subsequently moved for a mistrial. Rather than grant the mistrial motion, the trial court gave the jury a curative instruction. Specifically, the trial court stated, "An objection was raised as to any hitting or spanking of the young man that was on the witness stand or the other children. I sustained the objection and I ask that you disregard the question that was raised by [the State]."

It is well known "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005). In the present case, the trial court's curative instruction explained to the jury they were not allowed to consider the question in their deliberations. The trial court specifically instructed the jury to disregard the question. Thus, any alleged error was cured.

Additionally, the record reveals the witness did not answer the question asked by the State. The State asked the witness whether Harris ever struck him, and before the witness could respond, Harris objected. As noted above, a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Stanley, 365 at 33-34, 615 S.E.2d at 460. Under the facts presented, we fail to see how Harris suffered any prejudice in light of the fact the witness did not answer the question.

Keeping in mind a mistrial should be granted only when absolutely necessary and the curative instruction cured any alleged error the trial court made, we find the trial court did not commit reversible error in denying the motion for a mistrial.

Harris's final argument on appeal is the trial court erroneously failed to grant a mistrial when, in the closing argument, the State made an improper comment in violation of the Golden Rule Argument.

In its closing argument, the State stated:

> [Harris] had to fire twice and [Harris is] not sure when he shot Pierre which hand he had the gun in but when he shot accidentally he said, well, I'm right handed. I had it in here. I think he had it in his coat pocket. So as he's got him, got [Harris] running down the stairs. He gets his gun out, ran and shoots twice. . . . Now, they can't get around this and if y'all believe this, don't leave this jury room, don't leave this jury box and he charges you and just let him go right now. Just let him go.

The Golden Rule Argument is one that suggests to the jurors they put themselves in the shoes of one of the parties. State v. Rice, 375 S.C. 302, 334, 652 S.E.2d 409, 425 (Ct. App. 2007). In the criminal arena, such an argument is generally improper because it asks the jurors to place themselves in the victim's place. Id. Such an argument tends to destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice, thereby encouraging the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. Id.

A trial court is vested with broad discretion in dealing with the range and propriety of a closing argument. Id. at 315-16, 652 S.E.2d at 415. An appellate court will not disturb a trial court's ruling regarding a closing argument unless the trial court commits an abuse of discretion. Id. This Court must review the argument in the context of the entire record. Id. The relevant question is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. Once the trial court has allowed the argument to stand, the defendant has the burden of proving the argument denied him or her a fair determination of guilt or innocence. Id. Improper comments during closing arguments do not

require reversal if the appellant fails to prove he or she did not receive a fair trial because of the alleged improper argument. Id. To warrant reversal, the appellant bears the burden to prove both abuse of discretion and resulting prejudice. Id.

In support of his position, Harris cites State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). This case concerned an appeal from a death sentence for rape. White, 246 S.C. at 504, 144 S.E.2d at 481. The question on appeal was whether the trial court erred in refusing to sustain an objection following a portion of an argument made by the State to the jury. Id. The State made the following comments:

> If a snake would bite you or one of your children, would you let him go and bite again? Gentlemen, from the testimony from the stand, I have got a lot more respect for a snake than that brute. How would you like to see him coming in your bedroom or your daughter's bedroom with this butcher knife? I don't know whether you have got daughters or not, I believe one or two of you are not married. But everybody has got a mother. Not everybody, but most everybody has got a sister, daughters. Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do? How, if this young lady was your sister, how would you feel? How, if she was your wife, how would you feel? How, if she was your daughter, God only knows, how would you feel? Gentlemen, she is all of that to somebody. She is a daughter, she is a sister, she is a wife. And but for the grace of God that could be your sister, your daughter or your wife. And under those circumstances, gentlemen, what would you do under the testimony you heard from that stand? Mercy to him that shows mercy. Mercy turns her back on the unmerciful.

Id. at 504-05, 144 S.E.2d at 481-82.

The South Carolina Supreme Court held the argument by the State, which asked the jurors to imagine their mothers, wives, sisters, and daughters in the place of the victim, was reversible error and ordered a new trial. Id. at 507, 144 S.E.2d at 483.

In the present case, reviewing the closing argument in the context of the entire record, the State did not make a Golden Rule Argument. Simply put, the State did not ask or suggest to the jury that they place themselves in the shoes of the victims. Moreover, the comments made by the State in this case do not rise to the level of those in White. As such, the trial court did not commit reversible error in denying the motion for mistrial.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.[2]

HUFF and KONDUROS, JJ., concur.

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