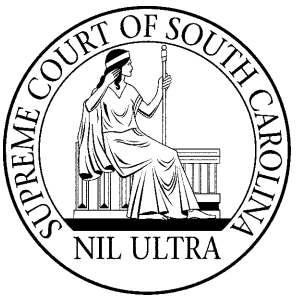

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 28, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2012-UP-210-Progressive Church of Our Lord Jesus Christ, Inc. by the Board of Bishops v. Elder Roscoe Black et al.
(Lee, Judge S. Bryan Doby)

2012-UP-211-Travelers Insurance Company v. The South Carolina Second Injury Fund
(Greenville, Judge Robin B. Stilwell)

2012-UP-212-Mark S. Kinsey v. Leecia B. Kinsey
(Lexington, Judge Richard W. Chewning, III)

2012-UP-213-State v. Lennon Colleton
(Colleton, Judge Perry M. Buckner)

2012-UP-214-State v. George Salisbury
(Berkeley, Judge Kristi Lea Harrington)

2012-UP-215-State v. Mark Urban
(Horry, Judge William H. Seals, Jr.)

2012-UP-216-Charles Williams v. SCDPPPS
(Administrative Law Court Judge Carolyn C. Matthews)

PETITIONS FOR REHEARING

4876-Crosby v. Prysmian	Pending
4892-Sullivan v. Hawker Beechcraft	Pending
4920-State v. R. Taylor	Pending
4926-Dinkins v. Lowe's Home	Pending
4929-Kelley v. Snyder	Pending
4930-Jervey v. Martint Envir.	Pending
4934-State v. R. Galimore	Pending
4937-Solley v. Naval Federal Credit	Pending
4939-Cranford v. Hutchinson Const.	Pending

4940-York County and Nazareth v. SCDHEC	Pending
4942-State v. J. Robinson	Pending
4943-Magnolia North v. Heritage Comm.	Pending
4944-Consumer Adv. V. SCDI	Pending
4947-Ferguson Fire v. Preferred Fire	Pending
4949-Crossland v. Crossland	Pending
4950-Flexon v. PHC	Pending
4956-State v. Fripp	Pending
2011-UP-558-State v. T. Williams	Pending
2012-UP-025-Barnes v. Charter 1 Realty	Pending
2012-UP-028-State v. McFadden	Pending
2012-UP-031-Cramer v. SCDC	Pending
2012-UP-047-State v. N. McGee	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-061-Singleton v. City of Georgetown	Pending
2012-UP-067-Duker v. Stamper	Pending
2012-UP-075-State v. J. Nash	Pending
2012-UP-076-McGowin v. McGowin	Pending
2012-UP-078-Tahaei v. Smith	Pending
2012-UP-081-Hueble v. SCDNR	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. M. Salley	Pending

2012-UP-098-State v. A. Massey Pending

2012-UP-099-State v. J. Wilson Pending

2012-UP-107-Parker v. Abdullah Pending

2012-UP-133-Holbert v. SCSB T C Pending

2012-UP-132-State v. G. Duvall Pending

2012-UP-134-Coen v. Crowley Pending

2012-UP-145-Redmond v. E-Z Out Bail Pending

2012-UP-152-State v. K. Epting Pending

2012-UP-153-McCall v. Sandvik, Inc. Pending

2012-UP-165-South v. South Pending

2012-UP-169-State v. J. McKelvey Pending

2012-UP-200-Kemp v. Kemp Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4529-State v. J. Tapp Pending

4592-Weston v. Kim's Dollar Store Pending

4617-Poch v. Bayshore Pending

4635-State v. C. Liverman Pending

4637-Shirley's Iron Works v. City of Union Pending

4659-Nationwide Mut. V. Rhoden Pending

4670-SCDC v. B. Cartrette Pending

4675-Middleton v. Eubank Pending

4685-Wachovia Bank v. Coffey, A	Pending
4687-State v. Taylor, S.	Pending
4700-Wallace v. Day	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4711-Jennings v. Jennings	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4732-Fletcher v. MUSC	Pending
4742-State v. Theodore Wills	Pending
4747-State v. Gibson	Pending
4750-Cullen v. McNeal	Pending
4752-Farmer v. Florence Cty.	Pending
4753-Ware v. Ware	Pending
4760-State v. Geer	Pending
4761-Coake v. Burt	Pending
4764-Walterboro Hospital v. Meacher	Pending
4765-State v. D. Burgess	Pending
4766-State v. T. Bryant	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4785-State v. W. Smith	Pending
4787-State v. K. Provet	Pending

4790-Holly Woods Assoc. v. Hiller	Pending
4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4805-Limehouse v. Hulsey	Pending
4800-State v. Wallace	Pending
4808-Biggins v. Burdette	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending
4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending

4858-Pittman v. Pittman	Pending
4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending
4880-Gordon v. Busbee	Pending
4887-West v. Morehead	Pending
4889-Team IA v. Lucas	Pending
4890-Potter v. Spartanburg School	Pending
4894-State v. A. Jackson	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4912-State v. Elwell	Pending

4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Lewin v. Lewin	Pending
4921-Roof v. Steele	Pending
4927-State v. J. Johnson	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-504-Paul v. SCDOT	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-547-In the interest of Joelle T.	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-006-State v. Gallman	Pending
2011-UP-017-Dority v. Westvaco	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-039-Chevrolet v. Azalea Motors	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-059-State v. R. Campbell	Pending
2011-UP-076-Johnson v. Town of Iva	Pending

2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-095-State v. E. Gamble	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-112-Myles v. Main-Waters Enter.	Pending
2011-UP-115-State v. B. Johnson	Pending
2011-UP-121-In the matter of Simmons	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-130-SCDMV v. Brown	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending

2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-328-Davison v. Scaffe	Pending

2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-398-Peek v. SCE&G	Pending
2011-UP-438-Carroll v. Johnson	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-James v. State	Pending
2011-UP-471-State v. T. McCoy	Pending
2011-UP-480-R. James v. State	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-483-Deans v. SCDC	Pending

2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending
2011-UP-514-SCDSS v. Sarah W.	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-565-Potter v. Spartanburg School District	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. D. Coward	Pending
2011-UP-590-Ravenell v. Meyer	Pending

The Supreme Court of South Carolina

RE: Mandatory Lawyer Mentoring Program

O R D E R

By order dated December 2, 2008, the Court adopted the Lawyer Mentoring Second Pilot Program, which was recommended by the Chief Justice's Commission on the Profession. The pilot lawyer mentoring program was administered initially by the South Carolina Bar. The administration of the pilot lawyer mentoring program was subsequently transferred to the Commission on Continuing Legal Education and Specialization, which currently administers the program.

Based on the success of the pilot programs, this Court has determined that it is appropriate to establish a permanent mandatory lawyer mentoring program to be administered by the Commission on Continuing Legal Education and Specialization. Accordingly, the South Carolina

Appellate Court Rules are hereby amended to add Rule 425 as shown in the enclosure to this order. This amendment shall be effective April 1, 2012.

This order does not affect lawyers who are subject to the Lawyer Mentoring Second Pilot Program. Instead, those lawyers must comply with the completion, waiver or deferment requirements of the Lawyer Mentoring Second Pilot Program.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
March 22, 2012

RULE 425
MANDATORY LAWYER MENTORING PROGRAM

(a) Mentoring Program. Following successful lawyer mentoring pilot programs, this rule has been promulgated by the Supreme Court of South Carolina to establish a mandatory lawyer mentoring program. The program shall be administered by the Commission on Continuing Legal Education and Specialization (Commission).

(b) Qualifying Lawyer Defined. A qualifying lawyer is any lawyer admitted under Rule 402, SCACR, on or after April 1, 2012, if that lawyer (1) is a resident of the State of South Carolina or practices law in an office located in South Carolina on more than a temporary basis; and (2) has not previously practiced law actively in another jurisdiction for more than two years.

(c) Mandatory Participation and Completion. The mentoring program is mandatory for all qualifying lawyers. Unless participation is deferred or waived under Section (d) below, qualifying lawyers admitted in South Carolina from January 1 through June 30 must complete the mentoring program not later than December 31 of the following calendar year. Unless participation is deferred or waived under Section (d) below, qualifying lawyers admitted in South Carolina from July 1 through December 31 must complete the mentoring program not later than one year after June 30th of the year following their admission.

(d) Deferment or Waiver of Participation Based on Special Circumstances.

(1) A qualifying lawyer who is employed as a non-permanent, full-time clerk to a state or federal judge during the first year of admission to the South Carolina Bar may elect to fulfill the requirements of the mentoring program either during the clerkship by participating in an approved program, or immediately following the clerkship. If the lawyer elects the latter option, the lawyer shall provide written notice to

the Commission not later than thirty days after completion of the clerkship.

(2) A qualifying lawyer who is not engaged in the representation of clients nor any other form of the active practice of law may request a waiver of this requirement by certifying that he or she is not engaged in the active practice of law in South Carolina and does not intend to do so for a period of at least two years. If within the first two years of admission to the South Carolina Bar, the new lawyer later begins to actively practice law in South Carolina, he or she must notify the Commission in writing within thirty days and participate in and complete the mentoring program in a timely manner as provided in Section (c) above.

(3) A qualifying lawyer who begins the mentoring program, but, prior to the completion of the program, moves his or her residency out of the state and no longer practices regularly in the state, is not required to complete the mentoring program. The new lawyer must, however, provide notice to the Commission of his or her move from the state as the basis for not completing the program. The new lawyer shall not be subject to the sanctions as provided in Section (l) below for the failure to complete the program in this circumstance. If that lawyer subsequently returns to South Carolina prior to having been engaged in the active practice of law as a member of another bar for at least two years, he or she shall notify the Commission in writing within thirty days of the lawyer's return to South Carolina. Such lawyer shall complete the mentoring program in a timely manner as provided in Section (c) above.

(4) A qualifying lawyer who is enrolled in a further graduate program during the first year of admission to the South Carolina Bar must participate in the mentoring program after the completion of his or her graduate program provided that he or she completes the program within two years after admission to the South Carolina Bar. The new lawyer is required to provide written notice to the Commission within thirty days after completion of the graduate program.

(e) Application. Within thirty days of admission under Rule 402, SCACR, new lawyers must complete and submit a New Lawyer Application to the Commission. This form must be submitted even if the lawyer is not a qualified lawyer as defined by Section (b) above. Further, this form shall be used to request any deferment or waiver of participation in the program as provided in Section (d) above.

(f) Purpose of Program. The purpose of the mentoring program is to provide assistance to the new lawyer in the following respects:

(1) The mentor should assist the new lawyer in developing an understanding of how law is practiced in a manner consistent with the duties, responsibilities, and expectations that accompany membership in the legal profession. The mentor should provide guidance or introduce the new lawyers to others who can provide guidance as to proper law practice management, including the handling of funds, even if the new lawyer is not currently in a setting that requires the use of those practices. Guidance should be given not only as to a lawyer's ethical duties, but also as to the development of a higher sense of professionalism based upon internalized principles of appropriate behavior consistent with the ideals of the profession.

(2) The mentor should assist the new lawyer in developing specific professional skills and habits necessary to gain and maintain competency in the law throughout his or her career and should assist the new lawyer in developing a network of other persons from whom the new lawyer may seek personal or professional advice or counsel when appropriate or necessary throughout the lawyer's career. While a strong mentoring relationship (particularly if the mentor and new lawyer are in the same firm or office) may also include specific advice to or training of a new lawyer regarding substantive aspects of the law, such substantive legal training should not be required of a mentor in this program.

(3) The mentor should assist the new lawyer in identifying and developing specific professional skills and habits necessary to create and maintain professional relationships based upon mutual respect between the lawyer and client; the lawyer and other parties and their

counsel; the lawyer and the court, including its staff; the lawyer and others working in his or her office, including both lawyers and staff; and the lawyer and the public. The mentor should assist the new lawyer in understanding the appropriate boundaries between advocacy and overzealous or uncivil behavior and in developing appropriate methods of responding to inappropriate behavior by others.

(4) The mentor should introduce the new lawyer to others in the lawyer's local or regional legal community and encourage the new lawyer to become an active part of that community.

(g) Structure of the Program.

(1) Generally; Uniform Mentoring Plan. Mentoring shall be made available through either individual or group mentoring. Unless a different mentoring plan is approved under Section (h) below, each qualifying new lawyer is required to complete the mentoring tasks set forth in the Uniform Mentoring Plan prepared by the Commission, which has been approved by the Supreme Court. The uniform plan may include a recommended schedule for completing the tasks, but the actual order and timing of completion of the tasks shall be within the discretion of the participants, provided that the full plan is completed as required in Section (c) above. In addition to completing the specific required tasks, it should be expected that, in an individual mentoring arrangement, the mentor and new lawyer will consult throughout the year-long mentoring period as either may deem necessary or appropriate.

The mentor and new lawyer may choose the method of communication that best suits their needs. However, if a mentor and new lawyer do not otherwise have regular in-person contact, they should schedule at least some periodic in-person discussions throughout the mentoring period. Each person should be cognizant of demands on the other's schedule and attempt to find a mutually acceptable time for these meetings. If there is a recurrent failure by either party to make time available for this purpose, or if other difficulties arise which cannot be resolved by the parties and which threaten the timely and effective completion of the mentoring program, the parties to the relationship (or either of

them) should advise the Commission of the situation and request the assistance of the Commission in resolving the matter.

Using the Uniform Mentoring Plan as a guide, the mentor and new lawyer must jointly draft an individualized mentoring plan for the coming twelve months. The individual mentoring plan shall be submitted to the Commission for approval within thirty days of the start of the mentoring term. The mentor and new lawyer are required to meet the nine objectives in the Uniform Mentoring Plan through a series of action steps over the course of a year-long mentoring relationship.

(2) Individual Mentoring. Most new lawyers will have an individual mentor approved by the Commission. Preference should be given to the appointment of a mentor selected by the new lawyer, who may be, but is not required to be, a lawyer working in the same firm or office as the new lawyer.

If a new lawyer does not select a qualified mentor, then one of the following options will apply:

> **(A)** if the new lawyer is employed and another lawyer in the same firm or office could serve as a mentor, the Commission shall contact the firm or office and seek the voluntary agreement of a qualified lawyer in the firm or office to serve as the new lawyer's mentor;
>
> **(B)** if the new lawyer wishes to have an individual mentor and either no mentor is obtained under Subsection (A) above or the new lawyer is not employed in a firm or office able to supply a mentor, then the Commission shall seek to recruit a qualified individual mentor from among the members of the South Carolina Bar. In this event, a reasonable effort should be made to designate a mentor from the same or a nearby geographic area with experience in a practice setting similar to that of the new lawyer; or

(C) the new lawyer shall be assigned to participate in group mentoring.

(3) Group Mentoring. The Commission has developed a program of group mentoring for those new lawyers not assigned an individual mentor. A group mentoring program should have some element of live contact with members of the mentoring group, but it may be a combination of live contact and electronic or other forms of distance mentoring as may be deemed sufficient by the Commission. The preferred ratio of new lawyers to mentors in a group mentoring program shall be no greater than 3 to 1.

(h) Certification of Internal Programs. A law firm or office (including, but not limited to, governmental agencies, corporate legal departments, state and local prosecutors, and public defenders) which has an internal mentoring program in place that it believes achieves all of the purposes of this program may apply to the Commission to have its mentoring plan certified as compliant with the mentoring obligation under the program. The application for certification shall include a detailed description of the internal program and a detailed showing of how each of the purposes of this program will be achieved under the internal program. If a program is certified, completion of that program by a qualifying new lawyer shall be deemed to satisfy the mentoring requirement. The new lawyer and the lawyer responsible for the certified program shall be required to file a statement for each new lawyer verifying that the new lawyer has completed all requirements of the program within thirty days of completion of the program, as provided in Section (c) above. If the duration of the internal program extends beyond a period of one year, the nine objectives, as found in the Uniform Mentoring Plan, must be met within the first twelve months of the internal mentoring program. Once certified, a program shall remain certified unless it is altered or unless certification is removed after notice by the Commission. A law firm or office desiring to alter its internal program shall submit such request to the Commission. Internal programs certified under the second pilot mentoring program remain certified, subject to the conditions herein.

(i) General Qualifications of Mentors. Mentors must be active members of the South Carolina Bar or persons who have taken retired or inactive status within the preceding two years. Mentors must have at least five years'

experience in the active practice of law. It is preferable that mentors have experience with the court system, although it is understood that not all mentors will have litigation experience. A lawyer without such litigation experience may nevertheless be an appropriate mentor if that lawyer has otherwise developed an understanding of appropriate behavior in a lawyer's relationship with the court.

Mentors should display, through their own conduct, an understanding of and commitment to ethical responsibilities and the prevailing expectations with regard to a lawyer's appropriate professional behavior. A mentor must have a good reputation for professional behavior. Further, a mentor must not, in any jurisdiction, have been publicly reprimanded within the past 10 years, or have been suspended or disbarred from the practice of law for misconduct at any time; and must not be a respondent in a pending disciplinary proceeding in which a formal charge or its equivalent has been filed under the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, or the rules of another jurisdiction.

Mentors should be able to assist the new lawyer in developing a style of lawyering that is compatible both with professional expectations and with the personality of the new lawyer.

(j) Appointment of Mentors; Education and Support of Mentors. A lawyer may serve as a mentor for purposes of this program only if first approved by the Commission. The prospective mentor must submit an application to the Commission in an approved form certifying that the lawyer meets the qualifications specified in Section (i) above.

Upon determining that a mentor applicant meets the threshold qualifications, the Commission may conduct such further investigation of a prospective mentor's qualifications and reputation for professional behavior as it may deem appropriate. The Commission has authority to appoint qualified lawyers as mentors or, in its discretion, to decline to appoint an applicant to serve as a mentor under this program.

An appointment shall qualify a lawyer to serve as a mentor in this program for five years, unless earlier removed as a mentor. A lawyer may be

appointed to multiple consecutive terms as a qualified mentor. If at any time a lawyer appointed as a mentor is publicly reprimanded, suspended, disbarred in any jurisdiction, or becomes a respondent in a formal disciplinary proceeding, the lawyer shall be removed immediately as an approved mentor. If the lawyer is serving as a mentor at the time that his or her name is removed from the list of approved mentors, the Commission shall immediately appoint a new mentor for the lawyer being mentored.

A lawyer appointed as a mentor is not required to attend a training session, but will be provided access to materials gathered or prepared by the Commission that will assist the mentor in carrying out his or her responsibilities. The Commission will provide at least annually a voluntary mentor orientation program that will qualify for ethics MCLE credit. Mentors are encouraged to contact other mentors to discuss issues, the most effective approaches to be used in working with new lawyers, the most effective means of resolving problems that are encountered in the relationship, or other concerns that arise during the mentoring relationship.

(k) Migration of a Mentor or a New Lawyer. From time to time, either a mentor or a new lawyer may change jobs during the mentoring year. It is expected that, whenever possible, the mentoring relationship, once established, will be maintained despite such a move. When maintenance of the relationship is not possible because one of the parties to the relationship has moved to a distant location or because of other extraordinary circumstances, the mentor or new lawyer should notify the Commission, and that office may assign a substitute mentor or take such other measures as are appropriate.

(l) Addressing Situations in Which a Mentor is in a Position of Authority Regarding the New Lawyer. If a mentor participates in or has responsibility for any performance evaluations of the new lawyer being mentored, the mentor and new lawyer should set forth clearly at the outset of the relationship how information learned by the mentor during the mentoring relationship might be used in that evaluation process. If the role of the mentor as a supervisor or evaluator may conflict with the new lawyer's need for advice in some situations, the mentor should assist the new lawyer in making contacts with other lawyers who could provide advice in those situations.

(m) Certification of Completion; Sanctions for Failure to Complete.

(1) A qualifying lawyer must complete the mentoring program in a timely manner, as provided in Section (c) above. Not later than thirty days after completion of the program, the new lawyer must file with the Commission a document signed by the mentor certifying such completion. If the new lawyer has not completed all requirements of the mentoring program by that time or is otherwise unable to obtain a certificate from the mentor, the new lawyer shall provide a detailed response to the Commission explaining the reasons, including hardship reasons, for noncompliance. The Commission, in its discretion, may grant such additional time as the Commission deems appropriate to file the certificate of completion.

(2) A willful failure to complete the program in a timely manner shall be a ground for discipline under Rule 7 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, and may subject the lawyer to sanctions under that rule. If a qualifying lawyer fails to complete the program, the Commission may refer the matter to the Office of Disciplinary Counsel.

(n) Limitation on Advice Regarding Legal Issues.

(1) In fulfilling his or her responsibilities as a mentor, a mentor may provide general advice and guidance to the new lawyer on typical matters of practical concern to the new lawyer. However, it is not the purpose of the mentoring program to provide case-specific legal advice to the new lawyer. To this end, except as provided in Subsection (2) below, a mentor is expressly prohibited from giving case-specific legal advice to the new lawyer. Moreover, the mentor may not serve as co-counsel with the new lawyer, unless full disclosure is made, the client consents, and the relevant provisions of the South Carolina Rules of Professional Conduct are satisfied.

(2) Notwithstanding Subsection (1) above, when a mentor is associated with the same law firm or office as the new lawyer, the mentoring relationship does not preclude the mentor from assisting the new lawyer in resolving a specific substantive or procedural legal issue.

The extent to which such advice or supervision occurs should be determined by the policies of the law firm or office.

(3) When a mentor is not associated with the same firm or office as the new lawyer, the mentor should instruct the new lawyer at the outset of the relationship about the duty of the new lawyer not to share with the mentor confidential information about any representation. If a new lawyer needs advice about a particular situation, the mentor may discuss with the new lawyer the general area of law at issue, without reference to the facts of a specific matter, and may direct the new lawyer to resources that may assist the new lawyer in finding the necessary information. By virtue of acting as a mentor, the mentor does not undertake to represent the client of the new lawyer or assume any responsibility for the quality or timeliness of the work on a matter being handled by the new lawyer. The lawyer being mentored remains solely responsible for the client's matter. If a mentor does consult with the new lawyer about a specific legal matter, however, both the mentor and the new lawyer must keep in mind that the same professional duties apply as would apply whenever two lawyers not in the same firm consult about a matter.

(o) Satisfaction of Mandatory Continuing Legal Education (MCLE) Requirements. During any MCLE compliance reporting period in which a lawyer completes a full year as a mentor for one or more new lawyers, the mentor shall be deemed to have completed 4.00 hours of CLE credit, of which 2.00 hours shall constitute ethics CLE credit. The mentor shall not receive additional CLE credit for mentoring more than one lawyer in the same reporting period.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anthony H., Respondent,

v.

Matthew G. and April B., Defendants,

Of whom Matthew G. is the Appellant.

In the interest of a minor child under the age of 18.

Appeal From Sumter County
Angela R. Taylor, Family Court Judge

Opinion No. 4955
Heard March 1, 2012 – Filed March 16, 2012

VACATED

Charles E. Carpenter Jr. and Carmen V. Ganjehsani, both of Columbia; and Harry C. Wilson Jr., of Sumter, for Appellant.

Richard T. Jones, of Sumter, for Respondent.

T.D. Williams IV, of Sumter, Guardian ad Litem.

KONDUROS, J.: Matthew G. (Father) appeals the order of the South Carolina family court terminating his parental rights (TPR) to his minor child (Child) and granting Anthony H.'s (Stepfather) petition to adopt Child. Father argues the family court lacked jurisdiction to hear the child custody dispute because Georgia still had exclusive, continuing jurisdiction under the Parental Kidnapping Prevention Act (PKPA) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). We agree and vacate the family court's order.

FACTS

Father and April B. (Mother) are the biological parents of Child. After Child's birth in Georgia, Father filed a petition for legitimation[1] with the Georgia superior court. On February 11, 2004, the Georgia superior court granted Father's petition but awarded Mother full legal and physical custody of Child. The Georgia superior court allowed Father supervised visitation with Child on a weekly basis and ordered him to participate in biweekly drug tests for one year. The order also provided for unsupervised biweekly visitation after the one-year period, provided Father remained drug free.

Mother married Stepfather in Sumter County, South Carolina, in 2005, and shortly thereafter, Mother and Child moved there. Mother subsequently filed a motion to modify visitation in Georgia, which the Georgia superior court stayed until Father completed a drug rehabilitation program. On August 7, 2008, the Georgia superior court issued a temporary order suspending Father's scheduled visitation with Child and providing "[a]ny visitation shall be at the sole discretion of [Mother]."

On January 8, 2009, Stepfather filed a complaint for adoption and termination of Father's parental rights in South Carolina. Father answered,

[1] Section 19-7-22(a) of the Georgia Code (2009) requires that a father of a child born out of wedlock must file a petition for legitimation of the child in order to protect his legal rights as the biological father.

contesting South Carolina's jurisdiction to terminate his parental rights. Father also filed a motion for contempt in Georgia on February 17, 2010, seeking modification of the previous child custody decree. The Georgia superior court dismissed his motion on September 30, 2010, finding it lacked personal jurisdiction over Mother because Father failed to properly serve her, and stating it could not modify a child custody determination through a contempt action. Father filed a separate action in Georgia for modification of Child's custody on October 10, 2010, arguing Mother had failed to comply with the child custody decree.[2]

On September 14, 2010, Father filed a motion to dismiss with the South Carolina family court, arguing Georgia had jurisdiction because the Georgia courts had a pending action involving Child's custody. After a hearing on October 11, 2010, the family court denied the motion. The next day, the family court held the TPR and adoption hearing, during which Father participated fully in his defense and testified he has lived in Macon County, Georgia, since 1999. After the hearing, the family court issued an order finding it had jurisdiction to hear this case because Stepfather, Mother, and Child had been residents of South Carolina since 2005 and the pending Georgia action did not concern the modification of custody. In its order, the family court ordered the termination of Father's parental rights and granted Stepfather's petition to adopt Child. Father filed a Rule 59(e), SCRCP, motion, which the family court denied. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence." Brookshire v. Blackwell, 384 S.C. 333, 337, 682 S.E.2d 295, 297 (Ct. App. 2009). On appeal from the family court, "this [c]ourt reviews factual and legal issues de novo." Simmons v. Simmons, 392

[2] According to Father's counsel at oral arguments, this action is still pending in Georgia.

S.C. 412, 414, 709 S.E.2d 666, 667 (2011); see also Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011).

LAW/ANALYSIS

Father appeals the family court's order terminating his parental rights and granting Stepfather's adoption petition. Father argues the family court lacked jurisdiction to issue such an order because Georgia had exclusive, continuing jurisdiction over child custody. We agree.

The PKPA and the UCCJEA govern subject matter jurisdiction in interstate child custody disputes. Clay v. Burckle, 369 S.C. 651, 656, 633 S.E.2d 173, 176 (Ct. App. 2006). See also 28 U.S.C.A. § 1738A (2006); Ga. Code Ann. § 19-9-40 (2001); S.C. Code Ann. § 63-15-300 (2010). "The PKPA is primarily concerned with when full faith and credit should be given to another [s]tate's custody determination." Doe v. Baby Girl, 376 S.C. 267, 278, 657 S.E.2d 455, 461 (2008). The UCCJEA's primary purpose is to provide uniformity of the law with respect to child custody decrees between courts in different states. S.C. Code Ann. § 63-15-390 (2010).

Initially, we find the PKPA and the UCCJEA are applicable to this action. In order for an adoption action to proceed, the legal parents either consent to the adoption, relinquish their parental rights, or have their parental rights terminated. S.C. Code Ann. § 63-9-310(A)-(B) (2010). Thus, a common sense reading of section 63-9-310 supports our finding that TPR and adoption actions are two separate and distinct actions. See also Brookshire, 384 S.C. at 338 n.7, 682 S.E.2d at 297 n.7 (finding a "nonconsensual adoption action . . . requir[es] a bifurcated proceeding since an adoption may not proceed . . . without first obtaining a termination of parental rights"). Even though this case is an adoption action, it first concerns the termination of Father's parental rights. Accordingly, we find the PKPA and UCCJEA are applicable to this case because both the PKPA and UCCJEA apply to TPR

actions. 28 U.S.C.A. § 1738A(e) (2006); Ga. Code Ann. § 19-9-41(4) (2001); S.C. Code Ann. § 63-15-302(4) (2010).

Having determined the PKPA and the UCCJEA apply to this case, we must now decide whether Georgia had jurisdiction to issue the initial child custody decree and maintains exclusive, continuing jurisdiction. According to the PKPA, three criteria must exist for a court to retain continuing jurisdiction: "1) that the original custody determination was entered consistently with the provisions of the PKPA; 2) that the court maintain jurisdiction under its own state law . . . ; and 3) that the state remains the residence of the child or of any contestant." Clay, 369 S.C. at 656, 633 S.E.2d at 176 (quotation marks omitted); see also 28 U.S.C.A. § 1738A(d) (2006).

As a threshold matter, we find Stepfather bears the burden of proving Georgia no longer has jurisdiction over this matter. Generally, the plaintiff has the burden of proving that the trial court has jurisdiction to hear the case. Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996). The burden of proof shifts to the defendant if he alleges the court lacks jurisdiction. Espinal v. Blackmon, 298 S.C. 544, 547-48, 381 S.E.2d 921, 923 (Ct. App. 1989). However, for South Carolina cases involving jurisdictional questions under the UCCJEA, if the defendant provides evidence to the court of an existing out-of-state order, the plaintiff assumes the burden of proving the new state has jurisdiction to issue the initial child custody order and the issuing state has lost or declined to exercise its jurisdiction. In making this determination, South Carolina aligns itself with other states that have ruled in the same way. See § 63-15-390 ("In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."); see also Delgado v. Combs, No. A11A1948, 2012 WL 639120, at *5 (Ga. Ct. App. Feb. 29, 2012) ("[B]ecause, under the UCCJEA, a new state may not modify an out-of-state child custody order unless it properly finds that the issuing state has been divested of jurisdiction (or declined to exercise it), the parent petitioning the new state to assume jurisdiction bears the burden of proving, not only that the new state would

have jurisdiction to enter an initial child custody order, but that the issuing state has lost or declined to exercise jurisdiction as well." (citing Brandt v. Brandt, 268 P.3d 406, 413 (Colo. 2012)). Accordingly, Stepfather now bears the burden of proving that Georgia no longer has jurisdiction to hear this matter.

With regard to the PKPA, we first find Georgia had jurisdiction to issue the initial child custody decree in 2004. The PKPA provides that a court has jurisdiction to make an initial child custody decree if the court has jurisdiction under its own law pursuant to the UCCJEA and it meets one of the four bases for jurisdiction set forth by the PKPA. 28 U.S.C.A. § 1738A(c) (2006). One basis for jurisdiction was that the state is the child's home state at the commencement of the proceeding. 28 U.S.C.A. § 1738A(c)(2)(A) (2006); accord Ga. Code Ann. § 19-9-61(a)(1) (2001); S.C. Code Ann. § 63-15-330(A)(1) (2010). Here, Georgia had jurisdiction to issue the initial child custody decree in 2004 because Georgia was Child's and parents' home state six months prior to the initial proceeding. Therefore, South Carolina must give full faith and credit to the Georgia custody decree because it was rendered in accordance with the PKPA. See Russell v. Cox, 383 S.C. 215, 219, 678 S.E.2d 460, 462-63 (Ct. App. 2009) (stating South Carolina has always given deference "to the jurisdiction of the state that initially rules on a custody matter" (quotation marks omitted)).

Second, we must determine whether Georgia continues to have exclusive, continuing jurisdiction under its own law, which is governed by the state's version of the UCCJEA. See Brookshire, 384 S.C. at 340, 682 S.E.2d at 299 ("[T]he PKPA incorporates a state law inquiry by mandating that the first state must still have jurisdiction under its own law . . . [,which] necessarily results in the application of the issuing state's version of the . . . UCCJEA . . . ." (internal citation omitted)). According to the UCCJEA, Georgia has exclusive, continuing jurisdiction over a child custody determination until:

> (1) [A Georgia court] determines that neither the child nor the child's parents or any person acting as a

> parent has a significant connection with [Georgia] and that substantial evidence is no longer available in [Georgia] concerning the child's care, protection, training, and personal relationships; or
>
> (2) [A Georgia court] or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presently resides in [Georgia].

Ga. Code Ann. § 19-9-62(a) (2001). In this case, no evidence in the record shows Georgia has made any determination that Child or Child's parents no longer have a significant connection to Georgia and that substantial evidence of Child's care no longer exists in Georgia. Finally, Father continues to reside in Georgia. Accordingly, we conclude Georgia has exclusive, continuing jurisdiction.

Turning to our final inquiry, we must determine whether South Carolina may modify Georgia's decree even though Georgia has exclusive, continuing jurisdiction. Generally, a state may modify a child custody decree of another state under the PKPA if the state has jurisdiction to make such a child custody decree under its own law and the other court no longer has jurisdiction or has declined to exercise such jurisdiction. 28 U.S.C.A. § 1738A(f) (2006). The UCCJEA permits a state to modify a child custody determination made by a court of another state when the modifying state has jurisdiction to make an initial child custody determination and:

> (1) [T]he court of the other state determines it no longer has exclusive, continuing jurisdiction . . . or that a court of [the modifying state] would be a more convenient forum . . . ; or
>
> (2) a court of [the modifying state] or a court of the other state determines that the child, the child's

> parents, and any person acting as a parent do not presently reside in the other state.

S.C. Code Ann. § 63-15-334 (2010); accord Ga. Code Ann. § 19-9-63 (2001). However, subsection A of section 63-15-340 of the South Carolina Code (2010) requires South Carolina family courts to stay any child custody proceeding if another state's court has jurisdiction over the proceeding and the proceeding is pending in that court. Furthermore, subsection B of section 63-15-340 requires our family courts to dismiss any proceeding relating to child custody if the other state court having jurisdiction determines, after communicating with South Carolina courts, that South Carolina is not the more convenient forum.

We find South Carolina cannot exercise concurrent jurisdiction in this matter because Georgia has continuing jurisdiction and the record contains no evidence Georgia declined to exercise its jurisdiction or determined that South Carolina was a more convenient forum. Moreover, we find a common sense reading of section 63-15-340 encourages state family courts to communicate with each other concerning child custody decrees and to determine together the most appropriate jurisdiction to consider the modification of the child custody decree. Had the Georgia and South Carolina courts engaged in this communication in the present case, they could have resolved the question of jurisdiction before ruling on the merits. Because they did not, and because we find our family court improperly assumed jurisdiction, we must vacate the order.

CONCLUSION

Based on the foregoing, we vacate the family court's order terminating Father's parental rights and granting Stepfather's petition for adoption.

VACATED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Diamon D. Fripp, Appellant.

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

Opinion No. 4956
Heard February 15, 2012 – Filed March 21, 2012

REVERSED AND REMANDED

Robert M. Pachak, of Columbia and Jared Sullivan Newman, of Port Royal, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M.

Coombs, Jr., all of Columbia; and Solicitor I. McDuffie Stone, III, of Beaufort, for Respondent.

KONDUROS, J.: Diamon Fripp appeals his conviction for trafficking in cocaine. He maintains the trial court erred in admitting a statement he made to police and evidence of money and stones discovered during the search incident to his arrest for evading arrest. He also argues the trial court erred in charging the jury on both actual possession of drugs and constructive possession. We reverse and remand.

FACTS

Beaufort County Sheriff's officer Sergeant Scott Rodriguez received a call to investigate a disturbance involving a male in a blue shirt in the parking lot of the Studio Seven Nightclub around 2 a.m. on January 1, 2009. Sergeant Rodriguez testified he observed a male in a blue shirt near the entrance to the club and saw the club's owner gesture toward the man in the blue shirt. Sergeant Rodriguez called to the man, Fripp, asking if he could talk to him. Fripp walked in the opposite direction of Sergeant Rodriguez, weaving through vehicles in the parking lot. Sergeant Rodriguez then called to Fripp: "Stop. Sheriff's Office" or "Sheriff's Office. Stop." According to Sergeant Rodriguez, Fripp continued moving away from him and disappeared behind a black pick-up truck and was out of sight for approximately ten seconds. Fripp reappeared and then began walking in Sergeant Rodriguez's direction "as though he was going to pass by" him. Sergeant Rodriguez could not see Fripp's hands and drew his weapon and ordered Fripp to the ground. Fripp refused and stated "No, it's cold. No, you got nothing on me. I have no drugs." Sergeant Rodriguez was able to handcuff Fripp, and he searched him finding approximately $600 of crumpled bills in different denominations and some stones in his pockets. When the stones were placed on the trunk of the patrol vehicle, Fripp attempted to gather the stones into his mouth. Fripp was placed in the back of a second patrol vehicle that had arrived on the scene. Another officer searched the area behind the black pick-up truck and found a baggie containing a white powdery substance that subsequently tested

positive for cocaine. Sergeant Rodriguez showed the baggy to Fripp and said, "You're getting charged with this." Fripp then stated, "I don't know anything about that cocaine."

At trial, Fripp sought to suppress evidence of the statement he made regarding cocaine arguing the statements were made without him having received Miranda[1] warnings. He also sought to suppress the money and stones discovered during the search, contending that because the resisting arrest charge had been dismissed in magistrate's court, any evidence found incident to his arrest on the charge was the result an unlawful search. The trial court denied the motions. Also, over Fripp's objection the trial court charged the jury on both actual and constructive possession of cocaine. Fripp argued the evidence the State presented only supported a theory of actual possession. Fripp was convicted and sentenced to twelve years' imprisonment. This appeal followed.

LAW/ANALYSIS

Fripp contends the trial court erred in charging constructive possession to the jury when the facts presented by the State could not have supported such an instruction. We agree.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Id. "The law to be charged to the jury must be determined by the evidence presented at trial." State v. Harris, 382 S.C. 107, 113, 674 S.E.2d 532, 535 (Ct. App. 2009); see also Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues.").

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

"Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996) (citation omitted).

The facts of this case present no basis for a jury charge of constructive possession. Ballenger is the most instructive case regarding the distinction between actual and constructive possession. In Ballenger, police received complaints that a male fitting Ballenger's description was selling drugs on a particular street corner in a high crime area. Id. at 197, 470 S.E.2d at 852. When police arrived, they saw Ballenger, who fit the description provided, and observed him in what appeared to be a drug transaction. Id. at 197, 470 S.E.2d at 853. When the authorities approached, they observed him put something in his pocket and run away. Id. He eventually fell after scaling a fence and was apprehended when he became entangled in barbed wire. Id. at 198, 470 S.E.2d at 853. Crack rocks were found wrapped in newspaper about five feet from where he had fallen. Id. It appears the jury was charged as to both actual and constructive possession. Id. at 199-200, 470 S.E.2d at 854. On appeal, Ballenger argued no evidence supported either theory and the court of appeals agreed.[2] The South Carolina Supreme Court reversed the court of appeals finding the record contained sufficient evidence of actual possession to submit the case to the jury and upheld Ballenger's conviction. Ballenger, 322 S.C. at 200, 470 S.E.2d at 854. The court noted the State's case "hinged on proving actual possession" and specifically commented on the constructive possession theory in a footnote. Id. at 199-200, 470 S.E.2d at 854. "Apparently Ballenger focused his argument to the [c]ourt of [a]ppeals on lack of constructive possession, although that court addressed both types of possession in its opinion. However, the constructive possession theory is not applicable here, a fact which the solicitor admitted at trial." Id. at 200 n.3, 470 S.E.2d at 854 n.3.

---

[2] See State v. Ballenger, 317 S.C. 364, 454 S.E.2d 355 (Ct. App. 1995) (discussing the lack of proof as to Ballenger's actual or constructive possession of drugs) rev'd, 322 S.C. 196, 470 S.E.2d 851 (1996)).

The facts in this case are similar to those in Ballenger in that the contraband was discovered in a public area over which Fripp had no dominion or control. The State's theory, as in Ballenger, was that Fripp had actual possession of the drugs and tossed them when he disappeared behind the black pick-up truck. Such a scenario means the constructive possession theory is not applicable and the giving of the constructive possession charge was erroneous.

However, in order to warrant reversal of Fripp's conviction, the giving of the instruction must have also been prejudicial.[3] "Prejudice to the appellant's case is a prerequisite to reversal of a verdict due to an erroneous jury charge." State v. Lee-Grigg, 374 S.C. 388, 415, 649 S.E.2d 41, 55 (Ct. App. 2007). "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." Berberich v. Jack, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011). "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." Cole, 378 S.C. at 404, 663 S.E.2d at 33. "No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Lee-Grigg, 374 S.C. at 414, 649 S.E.2d at 55.

In this case, the evidence upon which the State could rely in proving actual possession is entirely circumstantial. Sergeant Rodriguez did not testify he observed Fripp in a drug transaction, saw him put anything in his pocket, or witnessed him drop anything while he was in the parking lot. The dearth of direct evidence as to actual possession leaves us unable to discern on what basis the jury may have reached its verdict. The jury charge as to constructive possession was irrelevant and inapplicable, had the potential to confuse the jury, and may well have affected the outcome of the trial. Therefore, we conclude Fripp's conviction should be reversed and his case remanded for a new trial.

---

[3] Any prejudice in the giving of the constructive possession charge does not appear to have been raised as an issue in Ballenger.

Because the determination of this issue is dispositive, we decline to address Fripp's arguments as to the admission of his statement to Sergeant Rodriguez while in the rear of the patrol car and the admission of the cash and rocks found during the search incident to his arrest for evading arrest. See Whiteside v. Cherokee Cnty. Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (the appellate court need not address remaining issues when previous issue is dispositive of appeal).

Based on all of the foregoing, Fripp's conviction is

REVERSED AND REMANDED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jimmy Paul McKerley, Appellant.

Appeal from Abbeville County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4957
Heard January 11, 2012 – Filed March 28, 2012

REVERSED AND REMANDED

Chief Appellate Defender Robert M. Dudek, of Columbia, and Public Defender E. Charles Grose, Jr., of Greenwood, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christina J. Catoe, all of

Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

FEW, C.J.: Jimmy Paul McKerley appeals his convictions for criminal sexual conduct with a minor in the first degree and lewd act upon a child under sixteen. McKerley's primary argument is that the trial court erred in permitting an expert in forensic interviewing to give testimony that bolstered the credibility of the victim. We agree. We reverse McKerley's convictions and remand for a new trial.

I. Facts and Procedural History

McKerley was tried for sexually abusing his daughter, who was seven years old at the time of the alleged incidents. The victim testified in detail as to the sexual abuse she claimed McKerley committed. The State's next witness was Heather Smith, who testified regarding two interviews she conducted with the victim. The trial court qualified Smith as an expert in forensic interviewing and child abuse assessment. Smith described generally what forensic interviewers do and the specific procedures they follow in an investigation into possible child sexual abuse. She then explained what she did in this case and the conclusions she reached regarding the alleged abuse by McKerley. McKerley objected to numerous statements within Smith's testimony, arguing the statements should be excluded because they commented on the credibility of what the victim stated in the interviews and improperly bolstered her testimony at trial.

The jury found McKerley guilty. The trial court sentenced him to twenty-five years in prison for the criminal sexual conduct conviction and fifteen years concurrent for the lewd act conviction.

II. State v. Jennings

McKerley argues on appeal that the trial court erred in admitting any of Smith's testimony. In one particular statement, Smith improperly testified "both interviews that I conducted with her, I found them to be compelling for

sexual abuse." In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), our supreme court held a virtually identical statement by a forensic interviewer—each child "'provide[d] a compelling disclosure of abuse by [appellant]'"—was inadmissible for the same reason argued by McKerley. 394 S.C. at 480, 716 S.E.2d at 94 (quoting the forensic interviewer). The State argues Jennings is distinguishable from this case because the offending statement in Jennings was contained in a written report, whereas the statement here was introduced as live testimony. We find Jennings controlling and hold the trial court erred in admitting this portion of Smith's testimony.

However, the State argues this case is distinguishable from Jennings in an additional manner—the other evidence of guilt in this case is overwhelming and therefore the error was harmless. To address the State's harmless error argument, we are required to consider the remainder of McKerley's objections to Smith's testimony, in the context of the other proof of McKerley's guilt. See 394 S.C. at 482, 716 S.E.2d at 96 (Kittredge, J., concurring) (stating the determination of harmless error is "necessarily context dependent").

III. Forensic Interviewer's Testimony

The assessment of witness credibility is within the exclusive province of the jury. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding it is improper "pitting" to ask a witness "to comment on the truthfulness . . . of an adverse witness"); State v. Sapps, 295 S.C. 484, 485-86, 369 S.E.2d 145, 145-46 (1988) (holding it was improper for solicitor to "ask[] appellant if each of the other three witnesses was lying"). Similarly, witnesses may not improperly bolster the testimony of other witnesses. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility"). In Jennings, Justice Pleicones stated: "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." 394 S.C. at 480, 716 S.E.2d at 94; see also State v. Hill,

394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) ("The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter.").

These principles are incorporated into Rule 608(a) of the South Carolina Rules of Evidence. The rule provides that opinion evidence regarding credibility "may refer only to character for truthfulness or untruthfulness," and "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Even a witness permitted to give an opinion under Rule 608(a) must restrict the opinion to "character for truthfulness," and may not testify whether the witness believes a specific statement or account given by another witness. See 1 Kenneth S. Broun et al., McCormick on Evidence § 43, at 205 (6th ed. 2006) (stating in relation to Rule 608(a), FRE, "the opinion must relate to the prior witness's character trait for []truthfulness, not the question of whether the witness's specific trial testimony was truthful"). Thus, to the extent Smith's testimony included comments on the credibility of the victim's account of the alleged sexual assault, the trial court erred in admitting it.

Smith never testified directly that she believed what the victim stated in her interviews or in her testimony. McKerley argues, however, that there is no way to interpret Smith's testimony other than as her opinion that the victim was telling the truth. We agree. This is the premise of the supreme court's decision in Jennings. As Justice Pleicones stated: "There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." 394 S.C. at 480, 716 S.E.2d at 94; see also 394 S.C. at 483, 716 S.E.2d at 96 (Kittredge, J., concurring) (referring to the forensic interviewer's statement in the reports as "patently inadmissible evidence"). Smith's testimony in this case describing what forensic interviewers do demonstrates that virtually all of her testimony indicates she believed the victim was truthful, and thus is inadmissible for the same reason identified by the court in Jennings. Smith explained:

> We want to be able to, . . . after assessing [the child's] behavior and what they are stating in an interview, look at that along with the other information that we may have had at the beginning of the interview and give an opinion as to whether we think something happened . . . .

Smith's "opinion as to whether [she thinks] something happened" is nothing other than her inadmissible opinion as to whether the victim was telling the truth.

In addition to testifying "I found [both interviews with the victim] to be compelling for sexual abuse," Smith testified as follows:

- "we are looking for accuracy of information" given by the victim;
- "we are going to . . . make sure that what the child is telling us is based on something they would have experienced on their own body or that they would have seen or heard, the sensory information";
- "those statements have a level of detail that . . . they would be able to tell [only] if something were to have happened";
- "we are also looking at . . . are there other possible reasons, are there other possible explanations";
- "we are looking to see if[] [this] could . . . be explained in another way";
- "we are looking to be sure it adds up";
- "we are looking to see if what they tell us throughout the interview is the same from the beginning to the end";
- "we are also looking at their behavior and the way they are expressing themselves in the interview . . . their behavior and their language";

- in forming her "opinion as to whether . . . something happened," she considered whether the victim's statements were "consistent with the other information" she has on the case;[1] and
- in forming her "opinion as to whether . . . something happened," she considered "does this child appear to be giving statements that are similar to, in my experience, in my training and what I have learned, similar to what other children with the same experience may have had."

Finally, in response to a question asking her to "explain what a compelling finding would be," she stated:

> The compelling findings are the things that we look at, that we talked about looking at earlier in terms of how the disclosure comes about in the interview with me; whether it is detailed, does it have consistency, does it have the sensory level of detail that a child typically wouldn't have, or only would have if something had happened to them.

In this particular case, none of this testimony has any relevance except insofar as it informs the jury Smith believes the story told by the victim. As Justice Pleicones explained in Jennings, "[t]here is no other way to interpret the language used in [Smith's testimony] other than to mean [she] believed the [victim was] being truthful." 394 S.C. at 480, 716 S.E.2d at 94. As Justice Kittredge stated in his concurring opinion, Smith's testimony is "patently inadmissible evidence." 394 S.C. at 483, 716 S.E.2d at 96.

[1] This statement is similar to another statement found inadmissible in Jennings—that each of the children provided details consistent with the background information received from their mother, the police report, and the other children. 394 S.C. at 480, 716 S.E.2d at 94.

IV. Harmless Error

We disagree with the State's argument that the error in allowing Smith to testify was harmless. "To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct. App. 2009) (quoting Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011); see also State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result."). In light of Smith's extensive inadmissible testimony bolstering the credibility of the victim, considered in the context of the other testimony and evidence of McKerley's guilt, we cannot say the erroneous admission of Smith's testimony did not contribute to the jury's decision.

V. Other Issues

McKerley raises several other issues on appeal. In light of our decision to reverse and remand based on Smith's testimony, we do not address those issues. See State v. Boswell, 391 S.C. 592, 606 n.12, 707 S.E.2d 265, 272 n.12 (2011) (declining to address other issues when decision on prior issue was dispositive of appeal).

VI. Conclusion

For the reasons explained, McKerley's conviction is **REVERSED,** and the case is **REMANDED** for a new trial.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Daniel J. Jenkins, Appellant.

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4958
Heard December 6, 2011 – Filed March 28, 2012

REMANDED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia;

and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

FEW, C.J.: Daniel Jenkins appeals his conviction for criminal sexual conduct in the first degree. Jenkins argues the trial court erred in denying his motion to suppress DNA test results because the affidavit offered in support of the search warrant for samples of his DNA did not meet the constitutional and statutory requirements for issuance of the warrant. We agree. We remand the case to the trial court for a factual determination of whether the inevitable discovery doctrine precludes application of the exclusionary rule in this case.

I. Facts and Procedural History

The victim testified that on the evening of April 5, 2006, she came home from work, drank several beers, ordered a pizza, and fell asleep on her couch. She awoke approximately two hours later to a knock at the door. The victim recognized the man at her door as "Black," a man she sometimes saw at a neighborhood grocery store called Jabbers. Black frequently hung around outside Jabbers, and she occasionally said hello to him.

According to the victim, she answered the door, and Black asked if she wanted to get a beer with him. After the victim declined, Black asked her to put away her two dogs. She put away the dogs, and Black entered her house. The two of them sat on the victim's couch while Black smoked a cigarette, using a glass candle holder as an ashtray. Black then demanded she show him her genitals or else he would kill her. A struggle ensued in which Black hit the victim in the head and face multiple times with the candle holder, removed her pants and underwear, and raped her. Black told the victim "don't tell anyone or I will kill you," and left.

The victim explained that because she could not find her cordless phone, she ran down the street looking for help. Near Jabbers, the victim encountered a woman who asked her what happened. At that moment, Black approached the victim, took her by the arm, and guided her to a hose so she

could wash blood off of her face. Black then handed the victim her cordless phone. She ran home and called 911.

When the police arrived at the victim's house, she described the incident and gave them the name "Black." Within thirty minutes, police located Jenkins in an abandoned building across the street from Jabbers. The police brought the victim to the store parking lot, where she identified Jenkins as the man who raped her. After the victim identified Jenkins, she underwent a rape examination. The nurse who performed the examination observed a large amount of fluid in the victim's vagina, and she took evidence swabs of the victim's vagina and other parts of her body.

The next day, the police sought a search warrant for samples of Jenkins' blood and hair. A detective who responded to the victim's 911 call prepared the affidavit in support of the warrant. In the affidavit, the detective wrote only the following:

> On 4-5-06 at approx. 2230hrs while at [victim's address], the subject Daniel Jerome Jenkins (BM, dob 6-17-60) did enter the victim's residence and threatened to kill her if she did not comply with his demands to perform oral sex on her. The victim attempted to fight the subject, however he overpowered her by striking her in and about her face using a glass candle holder. The subject then penetrated the victim's vagina with his tongue and penis. The DNA samples of blood, head hair, and pubic hair will be retrieved from the subject by a trained medical personnel in a medical facility. This collection of these sample [sic] will be conducted in a noninvasive manner.

The detective did not supplement the affidavit with oral testimony. The magistrate read the affidavit and signed the warrant. The police executed the warrant, obtaining blood and hair samples from Jenkins.

SLED analyzed Jenkins' samples and the swabs taken from the victim. A SLED forensic DNA analyst found semen on several swabs, including the vaginal swab. The analyst developed a DNA profile from the vaginal swab and compared it to a DNA profile developed from Jenkins' samples. The profiles matched, with a one-in-8.6 quintillion[1] chance the semen came from an unrelated person.

At trial, the victim testified in the detail set out above that Jenkins raped her. Later in the trial, the State called the DNA analyst to testify to the results of the DNA comparison. After the trial court found the warrant was valid and denied Jenkins' motion to suppress, the witness testified to the results of the comparison and its degree of certainty.

The jury found Jenkins guilty. Because he had prior convictions for criminal sexual conduct in the first degree and carjacking, both "most serious offense[s]" under section 17-25-45(C)(1) of the South Carolina Code (Supp. 2011), the trial court imposed a mandatory sentence of life in prison with no possibility of parole. See S.C. Code Ann. § 17-25-45(A)(1)(a) (Supp. 2011).

II. The Validity of the Search Warrant

A search warrant allowing the government to obtain evidence from a suspect's body is a search and seizure under the Fourth Amendment and, therefore, must comply with constitutional and statutory requirements. State v. Baccus, 367 S.C. 41, 53, 625 S.E.2d 216, 222 (2006). To secure a warrant for the acquisition of such evidence, the State must establish the following elements: (1) probable cause to believe the suspect committed the crime; (2) a clear indication that relevant evidence will be found; and (3) the method used to secure it is safe and reliable. 367 S.C. at 53-54, 625 S.E.2d at 223 (quoting In re Snyder, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992) (per curiam)); see also S.C. Code Ann. § 17-13-140 (2003). The magistrate must

[1] The number representing one quintillion is a one followed by eighteen zeros. Webster's New World College Dictionary 1178 (4th ed. 2008).

also consider the seriousness of the crime and the importance of the evidence to the investigation, weighing "'the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures.'" Baccus, 367 S.C. at 54, 625 S.E.2d at 223 (quoting Snyder, 308 S.C. at 195, 417 S.E.2d at 574).

We find the affidavit, which was the only information presented to the magistrate in support of the warrant application, does not meet the requirements of Baccus. See State v. Arnold, 319 S.C. 256, 259, 460 S.E.2d 403, 405 (Ct. App. 1995) (per curiam) (stating a court reviewing the validity of a warrant may consider only information presented to the magistrate who issued the warrant). In particular, we find the affidavit does not demonstrate that the police had probable cause to believe that Jenkins raped the victim or that Jenkins' DNA was relevant to the investigation. Therefore, we hold the trial court erred in finding the warrant was valid.

A. Probable Cause that Jenkins Committed the Crime

A probable cause determination requires a magistrate to "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before her, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place.'" State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495-96 (2009) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). On review, our duty is to ensure that the magistrate had a substantial basis for concluding probable cause existed. 387 S.C. at 212, 692 S.E.2d at 495; see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) (stating a reviewing court should give great deference to a magistrate's determination of probable cause). Considering the totality of the circumstances, we find the affidavit in this case did not provide the magistrate a substantial basis for concluding there was probable cause that Jenkins committed the crime.

First, the affidavit must set forth facts as to why the police believe the suspect whose DNA is sought is the person who committed the crime. See State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding an affidavit defective because it "sets forth no facts as to why police believed Smith" committed the robbery). Applying that requirement in Baccus, our supreme court found the affidavit defective and therefore found there was an insufficient basis for a finding of probable cause. 367 S.C. at 52, 625 S.E.2d at 222. The court stated: "This affidavit fails to set forth any facts as to why police believed Appellant committed the crime. The language in the affidavit lacks [specificity] and contains conclusory statements. Given the totality of the circumstances, we conclude the issuing magistrate did not have a substantial basis to find probable cause." Id. Similarly, the affidavit in this case lacks specificity and contains nothing more than conclusory statements. "The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter." 367 S.C. at 50-51, 625 S.E.2d at 221 (citing Franks v. Delaware, 438 U.S. 154, 165 (1978)). The affidavit in this case fails to meet the requirement of showing why the police believed Jenkins committed the crime.

Second, the affidavit does not set forth the source of the facts alleged in it. In Smith, the defendant sought to suppress a knife seized from his hotel room that was allegedly used in a robbery. 301 S.C. at 372, 392 S.E.2d at 183. The affidavit supporting the search warrant stated that the defendant committed the robbery, he had been staying in the hotel room, "and there is every reason to believe the weapon and clothes used in the robbery will be located in the room." Id. The affidavit also stated "[t]his information was confirmed in person by Sgt. Sherman . . . ." Id. Our supreme court found the affidavit "defective on its face," in part because "[a]lthough the record reveals that police relied upon information from an informant, there is no indication that this fact was made known to the magistrate . . . ." 301 S.C. at 373, 392 S.E.2d at 183. Similarly, the affidavit in this case is defective because it contains no indication as to where the detective obtained the information.

Nevertheless, the State argues that because this case involves a sex crime, the magistrate could reasonably have inferred the victim was the source of the information. We disagree. The law does not allow the State to justify a bodily intrusion on the possibility that a magistrate made a correct inference as to the source of the information in the affidavit. Rather, "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." Smith, 301 S.C. at 373, 392 S.E.2d at 183. Moreover, the complete absence of a source for any of the information makes a variety of scenarios possible. For example, the detective could have pieced together the information from other officers, the victim's neighbors, or even an anonymous tip. This is precisely what the law forbids a magistrate from doing. The magistrate's "action cannot be a mere ratification of the bare conclusions of others." Id. (quoting Gates, 462 U.S. at 239).

Third, the affidavit does not contain even a conclusory assertion that the information or its source is reliable. See Gates, 462 U.S. at 238 (stating the circumstances a magistrate must consider include the "veracity" of the persons supplying the information on which the warrant is based). "Without any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime . . . ." State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990) (citation and quotation marks omitted).

Viewing these deficiencies together and considering the totality of the circumstances, we find the police did not provide the magistrate a substantial basis on which to find probable cause to believe Jenkins committed this crime.

B. Clear Indication that Jenkins' Samples Are Relevant

The information presented to a magistrate to obtain a warrant for bodily intrusion must contain "a clear indication that relevant evidence will be

found." Baccus, 367 S.C. at 53-54, 625 S.E.2d at 223. The trial court stated: "Clearly DNA or genetic material is . . . evidence relevant to the question of the suspect's guilt on the crime of criminal sexual conduct in the first degree." However, this statement is true only if the police have DNA from the victim or the crime scene to which they can compare the suspect's DNA. Accordingly, to show that a suspect's DNA is relevant under the second element of Baccus, the State must show there is other DNA evidence in the case to which it can be compared, or in some other manner clearly indicate the relevance of the DNA sought.

The affidavit in this case does not contain any indication as to whether the police had other DNA evidence to which Jenkins' DNA profile could be compared.[2] Cf. State v. Chisholm, 395 S.C. 259, 266-68, 717 S.E.2d 614, 617-18 (Ct. App. 2011) (affirming an order requiring defendant to provide a DNA sample where the State presented evidence to the magistrate that the victim's clothing contained the DNA of an unidentified male); State v. Sanders, 388 S.C. 292, 298, 696 S.E.2d 592, 595 (Ct. App. 2009) (finding the second Baccus element met because the State showed it could compare defendant's blood sample to blood found on a victim's shirt); State v. Simmons, 384 S.C. 145, 176, 682 S.E.2d 19, 35-36 (Ct. App. 2009) (affirming an order requiring defendant to provide a palm print because it could be compared to a palm print lifted from the car he was accused of stealing). Thus, the affidavit failed to clearly indicate the relevance of Jenkins' DNA.

III. Whether the Trial Court's Error Was Harmless

The State argues any error in admitting the DNA comparison results was harmless in light of other evidence of Jenkins' guilt. "To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct. App. 2009) (quoting Taylor v. State,

[2] The detective who prepared the affidavit admitted that when she prepared it, she did not know the results of the victim's rape examination.

312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011); see also Baccus, 367 S.C. at 55, 625 S.E.2d at 223 ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result."). In Baccus, the supreme court found the trial court's error in admitting the DNA to be harmless. 367 S.C. at 56, 625 S.E.2d at 224. As the court indicated, however, the other evidence in the case conclusively proved the defendant guilty.

> The State presented the testimony of [the victim's friend] who overheard Appellant tell the victim he was going to kill her and who overheard a pop and clicking sound. Additionally, the State presented evidence that Appellant's fingerprints matched fingerprints on the window sill of the broken window in the victim's bedroom. Also, [a DNA analyst] testified the blood sample collected from Appellant on the night of his arrest matched the blood found on the swabs and cuttings from the door, blind, and sheet in the victim's house. Therefore, the blood evidence drawn pursuant to the court order which should have been excluded was cumulative.

367 S.C. at 55, 625 S.E.2d at 223-24.

In Baccus, the DNA match to the defendant would have been in evidence regardless of the trial court's ruling on the motion to suppress. The admissible DNA evidence, combined with the friend's testimony she heard a gunshot immediately after she heard the defendant tell the victim he was going to kill her, "conclusively" proved the defendant guilty and left no rational conclusion but that he was guilty of murder. 367 S.C. at 55-56, 625 S.E.2d at 224. Without the DNA in this case, on the other hand, the State would have been forced to rely heavily on the credibility of the victim. Jenkins' fingerprint in the victim's home proved he was there, the presence of

fluids in her body proved someone had sex with her, and the facial injuries proved someone violently assaulted her. However, removing the DNA leaves only the victim's credibility to prove two key facts necessary for a conviction: that Jenkins was the person who had sex with her,[3] and that the sex was not consensual. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011) (stating "[b]ecause the [victim]'s credibility was the most critical determination of this case, we find the admission of the written reports was not harmless"), reh'g denied, (Oct. 19, 2011); 394 S.C. at 482, 716 S.E.2d at 96 (Kittredge, J., concurring) (stating "it may be a rare occurrence for the State to prove harmless error . . . in these circumstances").[4] We cannot find beyond a reasonable doubt that the DNA comparison results in this case, which the DNA analyst testified had a one-in-8.6 quintillion likelihood of error, did not contribute to or affect the verdict.[5]

---

[3] The State suggests that Jenkins argued the sex was consensual and thus conceded he had sex with the victim. We disagree. Jenkins' counsel cross-examined witnesses to elicit evidence that many of the victim's injuries were consistent with consensual sex, argued this evidence to the jury, argued that "all [the DNA] can do is tell you they had sex," and further argued several points supporting an inference the sex was consensual. We do not believe this rises to a concession. Rather, counsel is entitled to argue to the jury that the State has failed to prove an essential element of the crime—the sex was not consensual—without conceding the occurrence of sex.

[4] Our finding that the error was not harmless is based on our analysis of the facts of this individual case, not based on any categorical rule. See Jennings, 394 S.C. at 482, 716 S.E.2d at 95-96 (Kittredge, J., concurring), and 394 S.C. at 483, 716 S.E.2d at 96 (Toal, C.J., dissenting) (collectively overruling Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), to the extent Jolly imposes a categorical or per se rule regarding harmless error).

[5] We acknowledge the DNA evidence does not bear directly on the question of whether the sex was consensual. However, the DNA corroborated the victim's testimony that it was Jenkins who had sex with her. Because the DNA bolstered her credibility on this important point, we cannot say the

IV. Inevitable Discovery of Jenkins' DNA

As an additional sustaining ground, the State argues that even if the search was illegal because of the defective affidavit, the DNA evidence was admissible under the inevitable discovery doctrine. The inevitable discovery doctrine is an exception to the exclusionary rule which requires the State to establish by a preponderance of the evidence that the same evidence seized unlawfully would have been discovered inevitably by lawful means. See State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010), cert. granted, (Dec. 15, 2011); see also Nix v. Williams, 467 U.S. 431, 447 (1984) (holding evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police"). When the doctrine applies, the evidence will not be suppressed despite the fact it was obtained pursuant to an illegal search. Brown, 389 S.C. at 483, 698 S.E.2d at 816.

The State first argues that because probable cause did in fact exist, the inevitable discovery doctrine applies. We disagree. While the police could have presented evidence to the magistrate sufficient to establish probable cause, that does not satisfy the requirement that the State prove it would inevitably have discovered Jenkins' DNA. As the Fourth Circuit has stated: "The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment." United States v. Allen, 159 F.3d 832, 842 (4th Cir. 1998).[6]

DNA did not contribute to her credibility as to whether the sex was consensual.

[6] Allen involved a situation where the police never sought a warrant in the first place. See 159 F.3d at 834-37. The difference between that situation and this case, where the police obtained a defective warrant, is immaterial as to the inevitable discovery doctrine. In both situations, allowing the doctrine to excuse the requirement of a valid warrant simply because the State can

The State also argues that discovery of Jenkins' DNA was inevitable because the State DNA Identification Record Database Act required that Jenkins' DNA be tested for inclusion in the State DNA database. See S.C. Code Ann. § 23-3-610 (2007) (establishing State DNA database); § 23-3-620(A) (Supp. 2011) (providing a person arrested for a felony must provide a DNA sample); § 23-3-620(B) (Supp. 2011) (providing a prisoner may not be released until he provides a DNA sample); § 23-3-640 (2007) (requiring all DNA samples taken pursuant to the Act be submitted to SLED for testing and secure storage); § 23-3-650(A) (Supp. 2011) (permitting SLED to make samples available to local law enforcement and solicitor's offices "in furtherance of an official investigation of a criminal offense"). The State contends on appeal that Jenkins was tested pursuant to the Act because of his prior conviction and imprisonment for criminal sexual conduct, and his DNA profile is included in the State DNA database. However, because the trial court ruled the search was legal, the State never had an opportunity to present evidence to prove its contention.

The purpose of the exclusionary rule "'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" State v. Sachs, 264 S.C. 541, 560-61, 216 S.E.2d 501, 511 (1975) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). However, the exclusionary rule was not designed to apply to every violation of the Fourth Amendment. See Weston, 329 S.C. at 293, 494 S.E.2d at 804 ("Suppression is appropriate in only a few situations . . ."); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued." (citing Sachs, 264 S.C. at 556, 216 S.E.2d at 509)). In Sachs, our supreme court observed "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where deterrence is clearly subserved." 264 S.C. at 566, 216 S.E.2d at 514. When the State has met its burden of proving it inevitably would have discovered the evidence, the "deterrence" purpose of the exclusionary rule is not "clearly subserved,"

---

later establish that probable cause existed would render the Fourth Amendment meaningless.

id., and "'there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.'" State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (quoting Nix, 467 U.S. at 447). Therefore, the inevitable discovery doctrine represents an important policy determination that the "harsh medicine" of excluding probative evidence should be avoided when doing so does not advance the objectives of the exclusionary rule by deterring violation of constitutional rights. See James v. Illinois, 493 U.S. 307, 312 (1990) (noting the basis of exceptions to the exclusionary rule includes "the likelihood that admissibility of such evidence would encourage police misconduct").

In this particular case, we find it appropriate to remand to the trial court for an evidentiary hearing as to whether the inevitable discovery doctrine applies. The issue is presented to us on appeal from the trial court's denial of Jenkins' suppression motion on the basis that the search was legal. Therefore, the State did not need to present evidence in support of the inevitable discovery doctrine to proceed with the trial. While it would have been possible for the State to make a record on this issue, doing so would have been impractical. As our supreme court has explained: "It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments . . . . It also could violate the principle that a court usually should refrain from deciding unnecessary questions." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Given the important policy considerations behind the exclusionary rule and the inevitable discovery doctrine, we believe the determination of whether the illegally seized evidence of Jenkins' DNA must be suppressed should not be made by this court on a blank record. Rather, the determination should be made first by the trial court after an evidentiary hearing.[7] If the trial court determines on remand that the inevitable discovery

[7] The appellate courts of South Carolina have addressed the inevitable discovery doctrine in only three published decisions. In two of the cases, the factual record before the appellate court was sufficient to enable the court to determine whether the State met its burden of proof. Compare Spears, 393 S.C. at 481, 713 S.E.2d at 332 (reviewing the trial court's ruling that the State met its burden of proving inevitable discovery), and State v. McCord, 349

doctrine applies, the conviction must be affirmed. If the trial court determines the doctrine does not apply, the illegally seized evidence must be suppressed, and Jenkins must receive a new trial.

V. Conclusion

We find the trial court erred in finding the search warrant for samples of Jenkins' DNA was valid. The case is **REMANDED** for an evidentiary hearing on the applicability of the inevitable discovery doctrine and a determination of whether the illegally seized evidence should have been suppressed.

THOMAS and KONDUROS, JJ., concur.

S.C. 477, 485 n.2, 562 S.E.2d 689, 693 n.2 (Ct. App. 2002) (noting the police would have inevitably discovered defendant's blood because they had a search warrant for a sample of it), with Brown, 389 S.C. at 483-84, 698 S.E.2d at 817 (noting standard procedures would allow for inventory search and thus discovery of the drugs, but finding the State did not present evidence it would have followed such a procedure).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sandra C. Smith, Respondent,

v.

Tracy E. Widener, Stacy E. Currie, Ronald Widener, The Estate of James Donald Epting, CitiStreet, LLC, and Karen S. Erickson, Defendants,

of whom

Tracy E. Widener, Stacy E. Currie and The Estate of James Donald Epting are the Appellants.

Appeal From Richland County
G. Thomas Cooper, Circuit Court Judge

Opinion No. 4959
Heard June 7, 2011 – Filed March 28, 2012

REVERSED AND REMANDED

Amy Lohr Gaffney and John S. Nichols, both of Columbia, for Appellants.

Karl Stephen Brehmer, of Columbia, for Respondent.

FEW, C.J.: In this appeal we hold that when a plaintiff seeks actual and punitive damages arising out of the same injury, the two types of damages are part of the same claim for purposes of determining whether a nonsettling defendant is entitled to a setoff to account for funds paid to the plaintiff by a settling defendant. We reverse the circuit court's order to the contrary.

I. Facts and Procedural History

In March 1985, James Donald Epting designated his wife, Sandra Smith, to be the beneficiary on his South Carolina Deferred Compensation Program account. In December 1990, Epting and Smith divorced. However, Epting did not remove Smith as his designated beneficiary. When Epting died in October 2006, the account held $75,410.38. Epting's daughters, Tracy Widener and Stacy Currie, were named personal representatives of Epting's estate. After discovering that Smith remained the designated beneficiary on the account, Widener and Currie asked Smith to sign a document to waive her beneficiary rights. Smith admitted to signing a document, but denied that the document she signed was a waiver of her beneficiary rights. For convenience, we refer to this document as the waiver form.

Smith also signed another form, this one seeking to enforce her beneficiary rights. We refer to this form as the beneficiary distribution form. The beneficiary distribution form listed LPL Financial Corporation, a brokerage firm where Smith already had an account, as the recipient of the funds she expected to receive from Epting's account. Smith sent the beneficiary distribution form designating LPL to CitiStreet, LLC. CitiStreet was the employee benefits provider for the deferred compensation program, and controlled the funds from Epting's account. The beneficiary distribution

form requested that CitiStreet transfer the $75,410.38 into Smith's account at LPL. At approximately the same time Smith sent the beneficiary distribution form, Widener and Currie sent the waiver form to CitiStreet.

CitiStreet processed Smith's beneficiary distribution form first, and placed $75,410.38 in Smith's account with LPL. Smith immediately withdrew $40,000.00. When CitiStreet received the waiver form from Widener and Currie, it issued a stop payment order while it reviewed the competing claims. CitiStreet eventually concluded the waiver form was valid. CitiStreet then contacted LPL, which in turn contacted Smith requesting the $40,000.00 be returned. Smith claimed her signature on the waiver form was forged and refused to return the money. CitiStreet sent the remaining $35,410.38 to Widener and Currie as personal representatives of Epting's estate.

Smith filed a lawsuit against Widener, Currie, Epting's estate, CitiStreet, and others. She asserted causes of action for civil conspiracy, conversion, slander, and fraud against Widener and Currie, and civil conspiracy, conversion, slander, and negligence against CitiStreet. At the beginning of trial, Smith settled with CitiStreet for $35,410.38. At the conclusion of the trial, the jury found in favor of Smith on her conversion cause of action against Widener and Currie in the same amount–$35,410.38. Widener and Currie made a motion asking that the damages awarded be set off by the amount of the settlement between CitiStreet and Smith. The trial court denied the motion. Widener and Currie appeal claiming the trial court erred in denying the setoff.

II. Applicable Law

"[T]here can be only one satisfaction for an injury or wrong." Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998) (internal quotation marks omitted). A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15-38-50(1) (2005). Therefore, before entering judgment on a jury verdict, the

court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. Hawkins, 330 S.C. at 113, 498 S.E.2d at 406-07. When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999). Under this circumstance, "[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off." 335 S.C. at 113, 515 S.E. 2d at 272; see also Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008).

In this case, Smith's claim against CitiStreet was for the same injury for which she sought damages from Widener and Currie. The essence of all Smith's claims was that the actions of the defendants denied her the right to the remaining $35,410.38 after she withdrew the initial $40,000.00. While Smith stated that claim in various causes of action, some of which overlapped between Widener and Currie and CitiStreet and some of which did not, the injury Smith alleged she suffered as a result of the tortious conduct of all defendants was the same. Therefore, the trial court was required to grant the request for a setoff.

Smith argues, however, that the settlement with CitiStreet was for punitive damages only, and thus there was no right to a setoff. We disagree. Smith's claim for punitive damages against CitiStreet was not a separate claim arising out of a separate injury as she argues. Punitive damages are a different type of damages from actual or nominal damages. However, when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury. Our courts have long recognized that punitive damages serve to compensate a plaintiff and vindicate his rights arising out of a wrong suffered or injury sustained. Our supreme court recently summarized this history in O'Neill v. Smith, 388 S.C. 246, 252, 695 S.E.2d 531, 534 (2010), stating:

> Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in

> vindication of a private right which has been willfully invaded; and indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others. . . . Punitive damages have now come, however, to be generally, though not universally, regarded, not only as punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state.

388 S.C. at 252, 695 S.E.2d at 534 (quoting Clark v. Cantrell, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000) (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 573, 106 S.E.2d 258, 261 (1958))).

Therefore, a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1).

In Ellis, this court held that when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law. 335 S.C. at 112-13, 515 S.E.2d at 271-72. Likewise, when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law. See Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407 (holding that Georgia and South Carolina wrongful death actions involve different injuries and therefore are separate claims with no right of setoff). On the other hand, when a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the two claims.[1] Here, the settlement is for the same injury as a

[1] This is what the circuit court did in Rutland v. S.C. Dep't of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011). This court affirmed the Rutland trial court's determination that the settlement was

matter of law. Therefore, the right to setoff arises as an operation of law, and the circuit court must award a setoff.

The dissent argues there are facts in the record supporting the circuit court's determination that the settlement with CitiStreet was for punitive damages only. As we have discussed, however, our ruling is based on the point of law that actual and punitive damages are part of the same claim for one injury. Therefore, the facts discussed in the dissent are not pertinent to the analysis of whether Widener and Currie were entitled to a setoff. In any event, the facts in the record do not support the circuit court's determination. First, Smith's position that she negotiated a settlement with CitiStreet for punitive damages in the exact same amount as her actual damages claim is not credible. Second, Smith's position that she had a settlement agreement with CitiStreet which called for the parties to allocate the proceeds of the settlement completely to punitive damages is not supported by the record. In fact, at the hearing on the motion for a setoff, counsel for CitiStreet specifically denied an agreement as to how the funds would be allocated, insisting instead that the agreement called for Smith "to allocate it however you would like to."

---

not properly allocated between the different claims of wrongful death and survival because there was no evidence of conscious pain and suffering. 390 S.C. at 85-86, 700 S.E.2d at 455. In this respect, Rutland conflicts with Ellis. In Ellis, the court of appeals stated that wrongful death and survival are the same claim for the same injury. 335 S.C. at 112-13, 515 S.E.2d at 272. The conflict between Rutland and Ellis is resolved by reference to Bennett v. Spartanburg Railway, Gas & Electric Co., 97 S.C. 27, 81 S.E. 189 (1914), in which the supreme court held that wrongful death and survival actions are different claims for different injuries. 97 S.C. at 29-30, 81 S.E. at 189-90. The court stated: "Necessarily, therefore, there must be separate verdicts and separate judgments, and hence there should be separate actions." 97 S.C. at 31, 81 S.E. at 190. The conflict does not affect the rule for which we cite Ellis.

III. Conclusion

We hold that Widener and Currie were entitled to a setoff for the amount of Smith's settlement with CitiStreet. We reverse and remand the case to the circuit court to enter judgment in accordance with this opinion, and to conduct other proceedings as may be necessary to reach a final judgment.

REVERSED AND REMANDED.

PIEPER, J., concurs.

LOCKEMY, J., dissenting in a separate opinion.

Lockemy, J.: I respectfully dissent. While I do not dispute the law cited by the majority that the right to a setoff automatically applies where the proceeds are for the same injury, I agree with the conclusion of the trial court that no portion of the settlement paid by CitiStreet accounted for the $35,410.38 actual damage claim submitted to the jury against Widener and Currie. The majority seems to combine the word "injury" with the word "claim." Smith claimed **actual** and **punitive** damages against Widener and Currie, as well as CitiStreet, for her injury due to conversion. She also separately claimed actual damages against CitiStreet alone for her injury due to negligence.

The premise set out by the majority describing the claims in this case does not reflect my reading of the complaint and record. The majority asserts that "Smith's claims against CitiStreet were for the same injury for which she sought damages from Widener and Currie." This overlooks the separate negligence claim Smith asserted against CitiStreet for its instructions to LPL. As the record reflects, LPL threatened legal action against Smith for the return of the money it advanced, and Smith sued CitiStreet for protection as well as a hold harmless assurance. Thus, Smith sought damages from CitiStreet that she did not seek from Widener and Currie. Moreover, the

punitive damages Smith sought against the parties were not tied to each other. The conduct of each was different and the potential punitive liability of each differed tremendously. Nothing prevented a jury from awarding punitive damages against CitiStreet and not against Widener and Currie. In fact, in all likelihood a net worth statement would undoubtedly show significantly deeper pockets by CitiStreet than Widener and Currie. CitiStreet obviously had a lot more at risk if a jury deliberated on the ability to pay element in deciding whether to award punitive damages and against what party.

Having stated my position on the procedural premise facing the parties, let us examine the law. Interestingly, the majority seems to assert counter balancing positions. O'Neill, according to the majority, stands for the proposition that "a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1)." I respectfully do not agree that this case stands for that proposition. Be that as it may, the majority subsequently asserts that Smith's claim that her settlement with CitiStreet was to be allocated to punitive damages was not credible nor supported by the record. Although this places direct aim at the points delineated below, it does seem superfluous if we accept that actual and punitive damages are the same. However, since the majority feels the need to engage in a credibility assessment of Smith's claim as well as a legal analysis of the similarity of actual and punitive damages, I will address my dissent to each.

I do not feel the law treats actual and punitive damages the same. The simple explanation that actual damages compensate for a loss but punitive damages punish the wrongdoer and deter others from the same conduct exudes truth in the difference far beyond the ability of the most complex legal text. O'Neill simply adds another public policy purpose in allowing the award of punitive damages which is to vindicate the private rights of an injured plaintiff. O'Neill focused on punitive damages and insurance coverage and not on the relationship between punitive and actual damages. The O'Neill court held "it does not violate South Carolina's public policy to allow a plaintiff to seek punitive damages after signing a covenant not to

execute against the personal assets of an at-fault defendant." 388 S.C. at 255-56, 695 S.E.2d at 536.

Furthermore, a higher standard of proof is required for punitive damages than actual damages. Here, CitiStreet faced the possibility of a verdict against it for actual and punitive damages. Admittedly, Widener and Currie faced the same possibility. However, nothing prevented the jury, upon sufficient evidence, from awarding actual damages against CitiStreet as well as Widener and Currie, but punitive damages only against CitiStreet. Indeed, even after CitiStreet was removed from the case, the trial court determined that sufficient evidence was presented to send the issue of damages as to Widener and Currie to the jury. The jury did not award punitive damages against Widener and Currie, but what if CitiStreet had still been in the case and the jury decided to render a punitive damage verdict against it? Would that mean that Widener and Currie would have been entitled to a setoff relieving them of paying all of their assessed actual damages?

Before I address the issue of Smith's credibility, an interesting dilemma demands attention. CitiStreet realized it faced financial and publicity dangers that it wanted to avoid, and therefore, it desired to settle Smith's claim. In fact, CitiStreet agreed to give money to Smith and told her attorney "to allocate it however you would like to." Obviously, CitiStreet desired to get out of this case. If as the majority suggests, the settlement money is to be applied to a setoff, what incentive did Smith have in settling with CitiStreet? Why would one let out the deepest pockets in a case with a high probability of recovery? CitiStreet, and similar defendants in the future, remain without an avenue of rescue upon strict adherence to the majority decision. Plaintiffs will be hesitant to let out the deep pocket party if by doing so it cannot allocate the settlement for its benefit. The evidence in this case is very strong that Smith was due actual damages from someone. Why settle with CitiStreet to get only what you feel confident you will get anyway? CitiStreet agreed to pay Smith and let her allocate it any way she wished as long as it could get out of the case. This procedure has occurred in countless civil cases over many years.

I believe the majority walks on the edge of fact-finding by asserting that Smith's claim that the settlement from CitiStreet was to be allocated towards punitive damages was not credible. Although I hesitate to make credibility determinations at the appellate level of the judicial process as the majority does, I agree with the majority that we should examine the record to see if there is evidence to support the trial court's determination that this was not a setoff situation, but one involving damages for a different claim. This court outlined this procedure in Rutland when it stated "a motion for set-off is addressed to the discretion of the court and this discretion should not be arbitrarily or capriciously exercised." 390 S.C. at 83, 700 S.E.2d at 454. After the verdict against them, Widener and Currie made a motion for setoff and thus the issue presented itself to the trial court for evaluation utilizing Rutland. The trial court found that CitiStreet agreed to allocate the settlement proceeds for punitive damages, and, on at least two occasions, made findings that the money was paid by CitiStreet for punitive damages. The trial court also found that Smith had a "viable claim that could have potentially resulted in a punitive damage award against CitiStreet, LLC."[2]

The following evidence supports the trial court's denial of the motion for setoff:

1. It is undisputed that Smith sued CitiStreet for the same causes of action it asserted against the other defendants with the addition of a negligence claim. This negligence claim was based on CitiStreet's action to stop payment on the transfer to LPL after Smith had already withdrawn $40,000.00. This resulted in LPL threatening to sue Smith

[2] The trial court did enter a third order upon the request of CitiStreet clarifying that it was not making an affirmative finding that CitiStreet engaged in "egregious conduct which would warrant a finding of punitive damages." As in all settlements, the trial court was not making a finding that either party was responsible but only that there was evidence for a jury to decide. To make sure its third order was not misinterpreted the court clarified that "[t]he remainder of the Court's order . . . remains in full force and effect." The fact that the trial court entered three post-trial orders further indicates the full consideration the trial court gave to this issue.

for the return of the money. Thus, in Smith's view, CitiStreet had not only converted her money but had damaged her credit and placed her in jeopardy of a lawsuit.

2. Smith sought actual and punitive damages against all defendants, including CitiStreet, on the conversion cause of action.

3. On the day of trial, Smith and CitiStreet announced they had reached a settlement of their case. Smith, through her attorney, stated to the Court that the settlement was for $35,410.38 and that the proceeds would be allocated "toward the plaintiff's punitive damage claim." A second part of the settlement was that CitiStreet would hold Smith harmless against any claim made against her by LPL for the return of the $40,000.00.[3] Thus, the money was to be allocated for punitive damages for conversion and the hold harmless agreement was to satisfy actual damages for negligence.

4. The trial judge inquired of the attorney for CitiStreet if he agreed with the terms of the settlement regarding punitive damages and the hold harmless agreement. CitiStreet's attorney replied, "[t]hat's correct, Your Honor."

5. During this colloquy between the court, Smith, and CitiStreet, it is significant that the attorney for Widener and Currie was present and did not object to the settlement or its terms. The court approved the settlement and CitiStreet was released from the case.

6. Because the court approved the settlement, CitiStreet, the defendant with the deepest pockets, did not have to face a jury with claims seeking actual and punitive damages. CitiStreet received what it wanted – it was out of the case.

---

[3] Documents in the record indicate LPL did in fact make a claim against Smith, which pursuant to the settlement, CitiStreet paid. This was another issue that did not involve Widener or Currie.

7. The jury, in deciding the remaining issues before it, determined Widener and Currie converted money belonging to Smith and rendered a verdict in her favor for $35,410.38.[4] The jury decided not to assess punitive damages against Widener and Currie.

8. During the course of events leading up to this case and separate from the trial of the matter at issue here, the record indicates CitiStreet paid Widener and Currie the full sum of $75,410.38 that in essence a jury determined was not due them. Another effort by CitiStreet to not proceed to a jury but to settle issues in this case outside of a courtroom. Thus, even if Widener and Currie pay Smith what the jury ordered, they will still have $40,000.00 from CitiStreet.

9. The trial court held an extensive post-trial hearing in this matter pursuant to Widener and Currie's motion to designate CitiStreet and Smith's settlement as a setoff. It permitted each side to state its position

[4] The majority seems to feel that this amount is key evidence in its holding that the record does not support the trial court's decision. In other words, that Smith's assertion of a punitive damage settlement is not credible. Indeed, the jury verdict is exactly the same amount CitiStreet paid to settle with Smith and represents the amount owed to Smith to completely pay in full her claim as beneficiary. However, the record does not contain any evidence as to why this amount was chosen by the parties for settlement. Maybe it was an effort at poetic justice by the wronged Smith who had to go through so many legal hoops to get what was rightfully hers. Maybe it was the full extent that CitiStreet was willing to pay after already setting aside an additional $75,410.38 for Widener and Currie and having a looming obligation to LPL pending. Maybe it was a figure that resulted from negotiations back and forth between the parties. Based on the record, one can only make suppositions. Making decisions based on appearances does not remove the decision from the realm of conjecture. It is precarious for a court to become too involved with the reasons behind settlement negotiations. In most cases, this is better left to the parties with court involvement only coming afterward to ensure the parties agree as to terms and that the terms meet basic fairness.

and considered the applicability of section 15-38-50 to the facts and events of this case. At this hearing, counsel for CitiStreet acknowledged that he did not object to Smith allocating the proceeds of the settlement to punitive damages. In fact, counsel asserted that he "didn't care how he allocated it. We were just going to pay him, they can allocate it how they like." He even stated that during negotiations CitiStreet had proposed the wording of the settlement to be, "pursuant to your request, Plaintiff, we agree that you can allocate it to punitive damages." CitiStreet was concerned not that money was allocated toward punitive damages or that Smith had a viable claim for such, but that the record reflect that CitiStreet was dismissed from the case. To protect itself, CitiStreet requested and was granted language that clarified that it had not admitted to engaging in punitive conduct.

10. The trial court decided after considering the evidence, the arguments, the law, and the equities, that: "The record is clear that CitiStreet, LLC satisfied a potential unasserted actual damage claim against the Plaintiff by accepting responsibility for any unasserted subrogation claim by [LPL] and further extinguished any punitive exposure it may have had under the other causes of action by agreeing to pay Plaintiff [$35,410.38] toward a punitive damage award." After finding that this claim was separate from the claim presented to the jury against Widener and Currie, the court concluded the denial of the motion by stating, "[t]he Plaintiff had a viable claim that could have potentially resulted in a punitive damage award against CitiStreet, LLC (the settling party)." Furthermore, the trial court found that the "non-settling parties have presented no evidence the allocation was fraudulent, invalid or an unreasonable apportionment."

For the foregoing reasons, I disagree with the majority holding that the actual and punitive damages claims in this case are the same. Further, I disagree that the evidence did not support the trial court's decision after a Rutland analysis that Smith's settlement with CitiStreet was properly allocated toward her punitive damages claim. Thus, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Justin O'Toole Lucey and
Justin O'Toole Lucey, P.A., Appellants,

v.

Amy Meyer, Respondent.

And Lorcan Lucey, GMAC
Mortgage Corporation,
Citimortgage, Inc., and
John Doe Finance, Third Party Defendants.

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

Opinion No. 4960
Heard January 26, 2012 - Filed March 28, 2012

REVERSED

Cherie Blackburn, of Charleston, for Appellants.

Nancy Bloodgood and Lucy C. Sanders, both of North Charleston, for Respondent.

LOCKEMY, J.: In this civil action involving an employment contract, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A. (Firm) (collectively Appellants) appeal the trial court's denial of their motion to compel arbitration. Appellants contend the trial court erred in: (1) finding the Federal Arbitration Act (FAA) did not apply because the relationship between Firm and Amy Meyer did not involve interstate commerce; (2) finding the arbitration clause was unconscionable; (3) striking the entire arbitration clause when it was more appropriate to sever the alleged unconscionable portion and compel arbitration; and (4) finding the South Carolina Arbitration Act (SCAA) applicable to the contract. We reverse.

FACTS

Meyer began practicing law in 2002 and is licensed to practice law only in South Carolina. Prior to joining Firm, Meyer was employed as an Assistant Solicitor for the Ninth Circuit, specializing in white collar crime, but had no civil trial experience. She also practiced public accounting for 6 years as a certified public accountant before going to work with the Solicitor's Office. In January 2006, Firm hired Meyer as an associate attorney.

In June of 2006, Meyer and Firm executed an employment agreement (2006 agreement). Explaining the purpose of the 2006 agreement, the beginning paragraph stated:

> As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalese, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

The 2006 agreement contained an arbitration clause in the middle of the second page in regular type which stated:

> Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

A base salary and bonus structure for contingency cases along with other benefits were also included in the 2006 agreement. The paragraph preceding the signature line stated:

> Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

Under "Subsequent Modifications," the 2006 agreement listed additional benefits to Meyer, including an increased bonus of fifteen percent on a case referred to as the Harper case and a graduated trial bonus on cases which Meyer shared the work with Lucey in getting ready for trial.

The 2006 agreement specifically referenced certain cases that Meyer would be working on, including the Cusack, Harper, Shoshan, Hanson, and Turner cases. Appellants allege each of these cases involved interstate commerce. They state Shoshan was an employment lawsuit against a non-South Carolina resident car parts manufacturing subsidiary of a German company which had a North Charleston factory. Turner was a partnership/employment lawsuit involving a dental student who had been marketed a dental practice by a Georgia professional practice referral service and who obtained a loan from a Georgia bank. Harper involved a treating doctor who resided in and was deposed in Florida. Firm's primary liability expert for the Harper case resided in and was deposed in Georgia, while another of Firm's experts for the case resided in and was deposed in

California. Appellants also allege that most of this out-of-state work was handled by Meyer.

In May of 2007, Firm and Meyer amended the 2006 agreement (2007 amendment) to address Meyer's salary bonus for work on a complex construction defect case (the Ocean Club case) involving a construction project on the Isle of Palms near Charleston, SC. After being provided a draft of the 2007 amendment for review, Meyer crossed out and initialed certain language to which she objected and then signed the document. Appellants stated Meyer was not spearheading the Ocean Club case.

Firm's primary client in the Ocean Club case was the Ocean Club Horizontal Property Regime, which was composed of homeowners located in various states. On February 2, 2009, Meyer prepared a summary of the travel expenses incurred in connection with the case, showing repeated travel outside of South Carolina. Further, documentation was presented showing many out-of-state depositions in which Meyer participated. During Meyer's work for this case, Firm made intermittent payments toward her salary bonuses. On July 20, 2009, the Ocean Club case was settled, and on July 22, 2009, Meyer's employment was terminated.

In July of 2009, Meyer began making demands for vacation, 401K money, and bonus money allegedly due under the Ocean Club case. In response, Firm filed an arbitration proceeding on October 22 with National Arbitration and Mediation, Inc. (NAM). Meyer did not respond to the NAM arbitration filing and sent a draft complaint to Appellants on October 30, 2009. On November 2, 2009, Appellants filed a complaint, a motion for a temporary restraining order and preliminary injunction, and a motion to compel arbitration. Appellants state they filed the complaint in an effort to prevent the filing of the draft complaint from Meyer, because the draft complaint contained confidential information about Firm's clients and disregarded the binding arbitration clause contained in the 2006 agreement. On November 30, 2009, Meyer filed an answer, counterclaims, and third party complaint. Meyer asked for an award of $1.7 million for the value of her time on the Ocean Club case.

After a hearing on December 9, 2009, the trial court denied the motion to compel arbitration. The trial court made the following conclusions: (1) the arbitration clause did not meet the requirements of SCUAA; (2) the employment contract did not involve commerce within the meaning of the FAA; (3) the arbitration clause at issue was further void on equitable grounds; and (4) there were differences in compelling arbitration in real estate development and construction cases under the FAA and compelling arbitration for personal service contracts.

Appellants filed a Rule 59(a) motion asking the trial court to reconsider the following: (1) the determination that the FAA did not apply, because the trial court improperly focused on Meyer's activities, rather than the activities of the Firm; (2) the delegation to Meyer's counsel of the ruling on the issue of whether the arbitration clause was unconscionable; and (3) the failure to recognize or evaluate the factors which render arbitration clauses reasonable and conscionable, especially as between sophisticated parties. However, during the hearing on the motion for reconsideration, Appellants failed to pursue their second argument regarding improper delegation. The trial court issued a Form 4 denial of the Appellants' 59(a) motion for reconsideration, and this appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in its determination the employment contract between the parties did not involve interstate commerce within the meaning of the FAA such that the FAA does not apply?

2. Did the trial court err in its determination that the arbitration clause at issue is unconscionable, thus it is invalid and not enforceable?

3. Did the trial court err in failing to sever the "limitation of live witnesses" portion of the arbitration clause and then enforce the remainder?

4. Did the trial court err in its determination that the SCUAA applies to the agreement between the parties and that the employment agreement is not in compliance with such act?

STANDARD OF REVIEW

"'Arbitrability determinations are subject to de novo review.'" Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "'Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.'" Id. (quoting Simpson, 373 S.C. at 22, 644 S.E.2d at 667).

LAW/ANALYSIS

I. Timeliness of Appellants' Notice of Appeal

As a threshold procedural matter, we will address Meyer's argument that Appellants' Rule 59(a) motion for reconsideration was an insufficient and improper way to request review of a trial court's denial of a motion to compel arbitration. Thus, Meyer contends this is an untimely appeal because the improper motion did not toll the time for appeal from the arbitration order. We disagree.

Appellants' motion stated they are requesting reconsideration pursuant to Rule 59(a), SCRCP. Rule 59(a) states:

> Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

The grounds for Appellants' motion are stated as follows: (1) the trial court incorrectly focused on Meyer's activities, rather than the activities of the Firm when determining whether the FAA applied; (2) the trial court delegated the ruling on the issue of whether the arbitration clause was unconscionable to Meyer's counsel; and (3) the trial court failed to recognize or evaluate the factors which render arbitration clauses reasonable and unconscionable, especially as between sophisticated parties. The Appellants then filed a memorandum in support of their motion for reconsideration which expands upon their three grounds.

"'A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.'" Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. "Rule 7(b)(1), SCRCP requires that motions 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" Camp, 386 S.C. at 575, 689 S.E.2d at 636. "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.'" Id. (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir. 1996)). "'By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.'" Id. (quoting Calderon v. Kansas Dep't of Soc. & Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir. 1999)). However, when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical application does not serve the purpose of Rule 7(b)(1), SCRCP. Id. at 575-76, 689 S.E.2d at 636-37.

When the trial court is able to discern the relief requested, "[i]t is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" Richland Cnty. v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)); see

Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) (holding it was proper to treat plaintiff's written motion as a Rule 59(e) motion to the extent the motion addressed the trial court's evidentiary rulings, which the plaintiff challenged in her briefly stated oral motion at the end of the trial, even though it was erroneously captioned as a motion for new trial).

At the hearing for reconsideration, Meyer raised her contention that the Appellants filed their motion improperly pursuant to Rule 59(a), instead of Rule 59(e). The court responded:

> I'm not trying to be smart with you, but if I made a mistake I'll correct it irrespective of whether it's 59(a) or 59(e). Okay? So base your argument on that, okay. That's my concern if whether I made a mistake and that's what the motion for reconsideration -- generally, it's for the Courts to correct themselves. And I have done that on, I won't say several occasions, but I have corrected myself on some motions. . . . So don't give up any of your arguments for appellate, okay?

Addressing Meyer again at the end of the hearing, the trial court stated:

> All right. I'm giving you an opportunity to give me any facts you want to give me that you didn't give me last time. That's what I'm giving you ten days for. Okay? . . . I'm not going to consider any new issues. I'll be happy to receive any facts that you want to present to me on those issues.

The trial court explained that despite the rule cited in the motion, it understood the motion to be one for reconsideration of the issues, and it would address the motion as such. The grounds, with the exception of the second ground that Appellants dropped, were issues brought up in the initial hearing.

Acknowledging the flexibility of the particularity requirement, we find the court fairly addressed the motion as a Rule 59(e) motion for reconsideration. Any potential prejudice to Meyer was relieved by permitting ten days after the hearing to file any other arguments that she felt applicable. For the foregoing reasons, we hold the filing of the captioned Rule 59(a) motion for reconsideration tolled the time period to file a notice of appeal, and therefore, Appellants' notice of appeal was timely.

II. Interstate Commerce within the definition of the FAA

Appellants argue the trial court erred in finding the employment contract with Meyer did not involve interstate commerce. Specifically, they contend interstate commerce is broadly construed for purposes of the FAA; thus, because the employment contract's named cases required out-of-state travel and work from Meyer, the contract involved interstate commerce. We agree.

"Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008) (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). The FAA provides: "A written provision in any [] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2009). "The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.'" Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995)); see also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."). "'Because the statute provides for the enforcement of

arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce.'" Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (quoting Citizens Bank, 539 U.S. at 56).

"In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." Id. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.")). "Our courts consistently look to the essential character of the contract when applying the FAA." Id. at 96, 592 S.E.2d at 52 (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved").

Our supreme court and this court have ruled on several cases which are applicable to our determination of whether the contract at bar involves interstate commerce. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce involved in a construction contract where a builder was domiciled in South Carolina, but under the contract, was assigned rights to a Delaware creditor); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding interstate commerce was involved in a contract requiring removal of water and sludge from property in South Carolina to a facility in North Carolina); Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993) (stating that a contract between a nursing home and patient did not involve interstate commerce, despite the fact that the nursing home was a division of a Delaware partnership, marketed its services to persons residing outside of the state, and purchased the majority of its supplies and equipment from out-of-state; the Court reasoned that the performance of the contract, the provision of patient-resident services in South Carolina, did not require any activities in interstate commerce); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and

manufactured solely within the State of South Carolina."); Blanton v. Stathos, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because "the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce").

In Thornton v. Trident Med. Ctr., L.L.C., James Thornton entered into a recruiting agreement with Trident Medical Center. 357 S.C. 91, 93, 592 S.E.2d 50, 51 (Ct. App. 2003). The agreement required Thornton to relocate his medical practice from Michigan to Charleston, SC, for a total of at least four years and included the additional terms: (1) a net collectable revenue guarantee which provided Thornton with a guaranteed income for twenty-four months; (2) a signing bonus; (3) a relocation agreement for payment of moving expenses; and (4) an agreement providing that Thornton was being recruited into the existing practice of SCCA. Id. An arbitration clause was included in the contract. Id. Thornton left Charleston before the contracted four years and filed a declaratory judgment seeking a determination that the arbitration clause was unenforceable. Id. at 94, 592 S.E.2d at 51. In finding the contract involved interstate commerce such that the FAA applied, this court decided the "subject matter of the contract clearly [extended] beyond Thornton's obligation to provide medical services in South Carolina." Id. at 97, 592 S.E.2d at 53. This court found the recruiting agreement was primarily to induce Thornton to move from Michigan to South Carolina. Id. at 97-98, 592 S.E.2d at 53. Additionally, the agreement included reimbursement for Thornton's relocation expenses and prevented Thornton from practicing in any other state other than South Carolina for four years. Id. Thus, "the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines," and "[t]he express purpose [] was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." Id. at 98, 592 S.E.2d at 53.

In contrast, our supreme court found the agreement in Timms v. Greene did not involve interstate commerce. 310 S.C. 469, 473, 427 S.E.2d 642, 644 (1993). The Timms contract was between a nursing home and one of the

nursing home's residents and included an arbitration clause. Id. at 470-71, 427 S.E.2d at 643. In support of its decision, the supreme court found the only evidence raised to show interstate commerce was that the nursing home: (1) was a division of National HealthCorp, L.P., a Delaware Limited Partnership; (2) marketed its services to persons residing outside this State; (3) hired employees from outside the State; (4) purchased a majority of its goods, equipment and supplies outside the state for use at the home; and (5) contemplated payment in part by Medicare or Medicaid. Id. at 473, 427 S.E.2d at 644. The court stated although the listed factors could show the nursing home's involvement in interstate commerce, their relationship to the agreement between the nursing home and the resident was "insufficient to form the basis of the contract between the parties." Id.

Towles v. United Healthcare Corp. is also relevant to our analysis here. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). United Healthcare Corporation (United) was a national company headquartered in Minnesota. Id. at 33, 524 S.E.2d at 841. United hired Winfield Towles as a medical director in South Carolina and required him to sign a Code of Conduct and Employment Handbook, which included an arbitration clause. Id. at 33-34, 524 S.E.2d at 841-42. This court noted Towles' responsibilities included helping to establish medical policy, overseeing utilization review and quality management for plan participants, attending out-of-state conferences, participating in telephone conferences with United's corporate medical affairs staff in Minnesota, and reviewing claims from out-of-state providers and specialty providers located in North Carolina and Georgia. Id. at 36, 524 S.E.2d at 843. Furthermore, Towles participated in sales presentations in South Carolina and Georgia and worked with officials from national companies in resolving questions of utilization review and medical necessity for PHP participants. Id. Towles also reviewed proposals for services from out-of-state medical and ancillary service providers. Id. This court found those activities provided "sufficient evidence of interstate commerce to invoke the FAA." Id.

In the case at bar, the trial court found this situation to be most similar to Timms because "an attorney is providing legal services for a South Carolina law firm doing business in South Carolina." The trial court then stated that even if the facts are as the Appellants state them to be, they fail to

rise to the level of involving or affecting interstate commerce because domicile of the parties to the litigation, activities outside the state of South Carolina incident to the completion of a transaction, and receipt of insurance proceeds do not render a transaction as "involving" or "affecting" interstate commerce within the purview of the FAA. In the hearing for the motion to reconsider, the trial court stated:

> My concern was that we were simply looking at an employment contract between two attorneys here in Charleston, South Carolina, and I did not feel like you could expand it by saying that she's working on cases that were involving [out-of-state] information or interstate commerce. That's the reason basically I ruled the way I ruled.

This court finds Towles, instead of Timms, is most applicable to the case at bar.[1] In using Towles analysis, this court holds the employment contract at bar does involve interstate commerce. We note Firm is a law firm based solely in South Carolina, and Meyer is only admitted to practice law in the state of South Carolina. While Firm is not a national employer as United

[1] Equal Emp't Opportunity Comm. v. Rinella & Rinella is also persuasive in our analysis, although not controlling. 401 F. Supp. 175 (N.D. Ill. 1975). Rinella was a Title VII action; however, its discussion on how a local law firm dealing primarily in divorces affects interstate commerce is instructive. Id. at 181-82 ("Notwithstanding the defendants' divorce orientation, they admit that their practice encompasses other types of business, i.e., corporate, probate and real estate. They further admit that various attorneys travel out of state on firm business. Samuel Rinella, for instance, travelled to London, England and to Arizona, and Richard Rinella travelled to Washington, D.C. The firm's long distance phone bill in calendar year 1974 was $1,277.01; its out-of-state travel expenses amounted to approximately $2,000 for the same year. The firm also purchased both office intercommunication equipment from an out-of-state company for $8,400, and law and reference books from out-of-state publishers billed at approximately $2,500. These various factors establish that Rinella & Rinella indeed affects interstate commerce and, accordingly, is subject to the proscriptions of Title VII.").

was, Firm handles business with many out-of-state clients, similar to United. We think it is important factually that this is not a situation where Meyer simply worked in South Carolina on cases that involved out-of-state clients and businesses. Meyer travelled extensively to conduct legal work and billed hours for her out-of-state work and travel. Pre-bill worksheets for the Ocean Club case reflect travels to Atlanta, Georgia; Sarasota and Daytona Beach, Florida; Charlotte, North Carolina; Minneapolis, Minnesota; and Knoxville and Kingsport, Tennessee. Additionally, Meyer is requesting $1.7 million for the value of her time on the Ocean Club case, implicating the number of hours she spent on this case which involved out of state work. Further, Appellants allege the other cases listed in the 2006 employment agreement involved interstate commerce. Unlike the Ocean Club case, there is not substantial documentation regarding out-of-state traveling or work Meyer may have done in those cases. Considering the liberal application of the Commerce Clause, and recognizing the FAA is to be construed to full extent of the Commerce Clause, we find Meyer's out-of-state activities rose to the level of "involving interstate commerce," thus, triggering the FAA. For the foregoing reasons, we reverse the trial court and find the FAA does apply to the parties' employment contract.

III. Unconscionability

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. Towles, 338 S.C. at 37, 524 S.E.2d at 843-44. "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (quoting S.C. Code Ann. § 15-48-10(a) (2005)). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005).

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." Simpson, 373 S.C. at 24, 644 S.E.2d at 668 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001)). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no

reasonable person would make them and no fair and honest person would accept them." Id. at 24-25, 644 S.E.2d at 668 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

"In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Simpson, 373 S.C. at 25, 644 S.E.2d at 668; see Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999). Our supreme court has adopted the Fourth Circuit's view, and "[i]t is under this general rubric that [this court determines] whether a contract provision is unconscionable due to both an absence of meaningful choice **and** oppressive, one-sided terms." Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (emphasis added).

1. Absence of meaningful choice

Appellants argue the trial court erred in finding there was an absence of meaningful choice because Meyer had been working for Firm for six months before receiving the 2006 employment agreement and she essentially had to agree to it or else "jeopardize her existing job." We agree.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669; see Carlson v. General Motors Corp., 883 F.2d 287, 295-96 (4th Cir. 1989). "In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (quoting Carlson, 883 F.2d at 293, 295); see also Holler v. Holler, 364 S.C.

256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.").

"[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Simpson, 373 S.C. at 26-27, 644 S.E.2d at 669 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The finding of an adhesion contract is not per se unconscionable, however it is the beginning point to the analysis. Id. at 27, 644 S.E.2d at 669.

We hold Meyer had a meaningful choice involving the 2006 agreement. Meyer argues her lack of civil experience put her at a disadvantage as it relates to the relative sophistication of the parties. However, we find her substantial work as an assistant solicitor in addition to her time at law school permitted Meyer to have enough sophistication that any disadvantage would be minimal in this situation. In concluding the 2006 agreement, Firm stated:

> Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

The 2006 agreement, as shown above, allowed Meyer as much time as she needed to understand and accept the conditions. In addition, the 2006 agreement stated a meeting could be set up if there was a need to discuss the terms, allowing for negotiation of the terms. Because of this apparent opportunity for negotiation, this was not an adhesion contract. It did not force Meyer to "take-it-or-leave-it." Rather, it indicated Meyer had some bargaining power, while perhaps not as much as the Firm. We also note Meyer felt comfortable striking out language to which she objected in the 2007 amendment; again, supporting her ability to negotiate these contracts. Further, this was not a lengthy contract at three pages. The arbitration clause

is on the second page, and it is not "buried" within the short contract; thus, there does not appear to be any element of surprise.

While Meyer argues that because the employment climate for law firms was difficult, she felt she was forced to agree to the contract, we do not find that is a valid reason for holding there was an absence of meaningful choice. It is unfortunate the employment or economic climate may have been difficult at that particular time, but the external environment did not extinguish Meyer's meaningful choice of whether to sign the contract or not. Further, we recognize Lucey and the Firm did not contribute to the negative economic climate; therefore, we cannot use that as a factor against them in this case. For the foregoing reasons, we hold the trial court erred in finding there was an absence of meaningful choice.

2. Oppressive and one-sided terms

Appellants argue the terms of the arbitration clause are not unduly harsh because its sole limitation is the presentment of live witnesses and there is no other limitation of evidence or testimony. We agree.

As stated previously, this prong of the test sets forth that we are to review the terms to see if no reasonable person would make them and no fair and honest person would accept them. Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668.

"Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays." Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003). The benefits received by arbitrating come with certain limitations on discovery. See Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007) (stating that if parties conducted little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," thus, prejudice will likely not exist, and the law would favor arbitration; however, if the parties conducted significant discovery, then the party seeking arbitration took "advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration); In re Cotton Yarn Antitrust Litig., 505 F.3d

274, 286 (4th Cir. 2007) (stating "while discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the 'procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration' that is inherent in every agreement to arbitrate and "[b]ecause limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement").

The arbitration clause in the 2006 agreement provides:

> Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

While the arbitration clause here does limit discovery by allowing the parties to be the only witnesses called in person, this cannot, standing alone, be a reason to invalidate an arbitration agreement. Appellants are correct in stating that the arbitration restriction applies equally to both parties, and the clause places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings. We find the arbitration clause is not one-sided, nor is it oppressive to Meyer. Because a finding of unconscionability requires an absence of meaningful choice as well as oppressive, one-sided terms, we reverse the trial court.

IV. Severability

Appellants contend that even if the provision limiting live witnesses is substantively unconscionable, the trial court should have severed that portion of the arbitration clause and compelled arbitration. Because we find the arbitration clause is not unconscionable, we need not review this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

V. Applicability of the SCUAA

Appellants contend that because the FAA applies to the employment contract at issue, it preempts the SCUAA and there is no need to meet the requirements of the state statutes. In addition to the FAA's preemption of the SCUAA, the SCUAA itself provides that it does not apply to arbitration agreements between employers and employees unless the agreement states that the SCUAA shall apply.

Because all parties agree the arbitration clause did not meet the SCUAA notice requirements,[2] and the trial court ruled it did not meet SCUAA requirements, there is no controversy for this court to rule upon. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (stating "[a]n appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy").

CONCLUSION

Based on the foregoing reasons, the trial court's denial of Appellants' motion to compel is

REVERSED.

HUFF and PIEPER, JJ., concur.

[2] Appellants acknowledge the arbitration clause did not meet SCUAA's notice requirements, but argued that was irrelevant because SCUAA was inapplicable altogether.