The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

O R D E R

The South Carolina Bar has furnished the attached list of lawyers who have failed to pay their license fees for 2014. Pursuant to Rule 419(d)(1), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificate of admission to practice law to the Clerk of this Court by April 15, 2014.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

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 14, 2014

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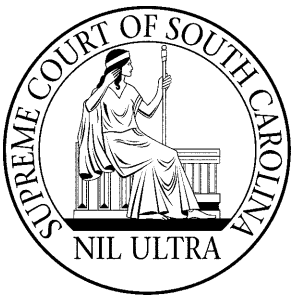

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 19, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Estate of Charles Galen Rider, a/k/a C.G. Rider.

Carolyn S. Rider, Petitioner,

v.

Estate of Charles Galen Rider, Thomas M. Grady, Personal Representative, Respondent,

and

Deborah Rider McClure, Ginger C. Rider, Christian James McClure and Austin Patrick McClure, Respondents.

Appellate Case No. 2011-197686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27367
Heard October 15, 2013 – Filed March 19, 2014

REVERSED

William C. Cleveland, III and Laurel R.S. Blair, both of Womble Carlyle Sandridge & Rice, of Charleston; and Terry A. Finger, of Finger & Fraser, of Hilton Head Island, for Petitioner.

Douglas Whitsett MacNeille, of Ruth & MacNeille, of Hilton Head Island; and Daphne A. Burns, of Edmond, OK. Stephen Edward Carter, of Hilton Head Island, and Kelly McPherson Jolley, of McNair Law Firm, of Hilton Head Island, all for Respondents.

JUSTICE BEATTY: This Court granted a petition for a writ of certiorari to review the decision of the Court of Appeals in *Rider v. Estate of Rider*, 394 S.C. 84, 713 S.E.2d 643 (Ct. App. 2011), which applied the common law of agency to hold that certain financial assets were part of the decedent's probate estate. The decedent had directed his bank to transfer specified assets in his investment account to a new account for his spouse, but died before all of the assets were credited to her account. At issue in this case of first impression is whether South Carolina's Uniform Commercial Code ("UCC") or the common law of agency controls the transfer. We reverse.

I. FACTS

Charles Galen Rider ("Husband") executed an Investment Agency Agreement / Discretionary Account ("Account Agreement") with First Union National Bank of North Carolina ("First Union"), a predecessor of Wachovia Bank, N.A. ("Wachovia"), on September 27, 1993. The Account Agreement authorized First Union "to open and maintain an Agency Account" for Husband and "to hold therein, as [his] Agent, all cash, stocks, bonds, securities and other property . . . subject to" Husband's current and future written instructions. The Account Agreement stated First Union was "to provide investment review and management of the Account, taking such action as [the bank], in [its] discretion, deem[s] best . . . as though [the bank] were the owner of such property." This discretionary authority permitted First Union to buy, sell, and exercise certain rights regarding the securities in accordance with the overall investment objective selected by

Husband. The terms of the Account Agreement called for its termination upon the bank acquiring actual knowledge of Husband's death, but that Husband's death "shall not affect the validity of any prior actions."

On June 8, 2005, Husband called Ruth DiLella in the Capital Management Group of what was then Wachovia[1] and informed her that he had met with his estate attorney, who had advised him to transfer some assets to his spouse, Carolyn S. Rider ("Wife"). Husband was suffering from terminal cancer and reportedly wanted Wife to have sufficient funds to maintain her standard of living during the inevitable time that probate would be going on. Husband instructed DiLella to move $2 million in securities from his account at Wachovia and place them in a new account in Wife's name. DiLella told Husband that Wachovia would send him a list of specific securities to transfer, along with a signature page for him to sign to approve the transfer. The same day, DiLella e-mailed a list of assets totaling $2 million to Wachovia's trust department, along with Husband's instruction, so it could prepare a letter and asset listing for the client's approval.

On June 17, 2005, Husband signed the letter and returned it to the attention of Wachovia's trust administrator. The letter provided: "Please accept this letter as my authority and direction to transfer the assets listed on the following page to a new agency account to be opened for my wife, Carolyn Sue Rider." A total of $2 million in assets were listed, which included specific securities and a small sum of cash.

In response, Wachovia made a series of four transfers from June to October 2005. On June 21, 2005, four days after Husband's signing of the June 17th directive, Wachovia made the first transfer of $733,228.00 in securities (stocks) to Wife's account. On July 8, 2005, Wachovia transferred $39,672.00 in securities (stocks). That afternoon, Husband passed away in Charlotte, North Carolina, and Husband's daughter, respondent Deborah Rider McClure, notified Wachovia the same day. The next business day, Monday, July 11, 2005, Wachovia transferred $935,032.64 in securities (mutual funds) to Wife's account, and on October 20, 2005, Wachovia made a fourth and final transfer of $304,182.46 in securities (mutual funds). The total amount transferred to Wife's account was $2,012,115.00, the excess being due to the appreciation in the value of the securities.

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[1] First Union merged into Wachovia, which was then subsequently acquired by Wells Fargo.

In 2006, Thomas M. Grady, as personal representative of Husband's estate ("PR"), instituted this declaratory judgment action in the probate court for Beaufort County asking the court to determine either (1) that the securities transferred pursuant to Husband's June 17, 2005 letter to Wachovia were completed transfers on June 17, 2005 and, thus, were not includible in Husband's probate estate; or (2) that the securities transferred after Husband's death on July 8, 2005 were incomplete transfers and were includible in Husband's probate estate. The PR did not take a position, but sought guidance as to whether the UCC or the law of agency under the South Carolina common law controlled the outcome.

In its order, the probate court stated much of the argument in this case centered on whether the UCC's provision on Investment Securities applies to the securities transfer directed by Husband on June 17, 2005. The probate court stated Wife argued the UCC applies, Husband's June 17, 2005 directive was an "entitlement order" under the applicable definition in the UCC found in S.C. Code Ann. § 36-8-102, the transfer was effectuated on June 17, 2005, and it was unaffected by Husband's death before completion of the transfers. In contrast, Husband's two daughters from his prior marriage, Deborah Rider McClure and Ginger C. McClure, and his two grandsons, Christian McClure and Austin McClure (collectively, "the McClure Respondents") argued, *inter alia*, that the UCC did not apply and, even if it did, it did not supplant the law of agency that governed the parties' Account Agreement. Either way, Wachovia's authority to make the transfers ended when it acquired actual knowledge of Husband's death and the disputed assets belonged to Husband's probate estate.

The probate court found the UCC controlled this securities transaction, that Husband's June 17, 2005 directive was an "entitlement order," and Wachovia was a "securities intermediary." However, it determined an entitlement order's "effective date" is a distinguishable concept from when an entitlement order is "effectuated." The probate court agreed with Wife that Husband's entitlement order was "effective" upon its issuance to Wachovia on June 17, 2005, but reasoned it still had to be carried out by Wachovia, the securities intermediary, to be "effectuated," and the UCC did not supplant the laws of property or agency, nor did it vitiate the terms of the Account Agreement.

The probate court noted Wachovia received actual notice of Husband's death on Friday, July 8th, that the second transfer of $39,672.00 was posted to Wife's

account that day, and that the third transfer of $935,032.64 was posted to Wife's account the next business day, Monday, July 11th. The court stated the credible testimony at trial persuaded it that Wachovia took the necessary actions to effectuate the second and third transfers before it knew of Husband's death. The court observed, "In the commercial context of the transactions, it would be unreasonable to conclude otherwise."[2]

The probate court concluded the first three transfers, totaling $1,707,932.64, which were posted to Wife's account on June 21, July 8, and July 11, 2005, respectively, were carried out and effectuated before Husband's death and are not part of his probate estate. However, the securities posted to Wife's account on October 20, 2005 in the amount of $304,082.46 belonged to Husband's probate estate because it was not effectuated until after Husband's death, when Wachovia's authority to act had already terminated.

Wife appealed to the circuit court, which affirmed in an order adopting the probate court's factual findings and legal conclusions. Wife appealed to the Court of Appeals, which found both the third and fourth transfers properly belonged to Husband's probate estate because they occurred after the bank had actual knowledge of Husband's death, but that no error was preserved regarding the third transfer because the McClure Respondents did not cross-appeal, so it too affirmed. *Rider v. Estate of Rider*, 394 S.C. 84, 713 S.E.2d 643 (Ct. App. 2011). The Court of Appeals also distinguished the "effective date" of Husband's entitlement order from the date it was "effectuated" and found the latter determinative of the question of ownership. This Court granted Wife's petition for a writ of certiorari to review the decision of the Court of Appeals.

II. STANDARD OF REVIEW

"An appellate court's determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity." *Holcombe-Burdette v. Bank of Am.*, 371 S.C. 648, 654, 640 S.E.2d 480, 483 (Ct. App. 2006). This case began as an action for a declaratory

[2] The probate court stated the testimony from Wachovia's employees indicated the different transfer dates were due to the nature of the assets being transferred, as stocks were processed more quickly than other types of securities, although some of the transfers did take longer than the "norm."

judgment in the probate court, which can be legal or equitable. *See Estate of Gill ex rel. Grant v. Clemson Univ. Found.*, 397 S.C. 419, 425, 725 S.E.2d 516, 519-20 (Ct. App. 2012) ("Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." (citation omitted)).

All parties in this matter agree that an action to determine whether or not certain funds belong to the probate estate, which involves consideration of the applicability of the UCC statutes and the laws of agency to Husband's contract with the bank and his written directive, presents a matter of law, as opposed to equity, for the court. *See generally Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008) (finding where the declaratory judgment action involved the interpretation of a contract and statutes, it was an action at law).

"When a probate court proceeding is an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005). "Questions of law, however, may be decided with no particular deference to the lower court." *Id.* at 350, 618 S.E.2d at 886.

III. LAW/ANALAYSIS

Wife contends the UCC addresses the subject matter at issue in this appeal, arguing only where the UCC is incomplete does the common law provide the applicable rule. *See* S.C. Code Ann. § 36-1-103 (2003) ("Unless displaced by the particular provisions of this act [Title 36, the UCC], the principles of law and equity, including . . . the law relative to capacity to contract, principal and agent, estoppel, fraud, . . . or other validating or invalidating cause shall supplement its provisions."); *Hitachi Elec. Devices (USA), Inc. v. Platinum Techns., Inc.*, 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005) ("Only where the U.C.C. is incomplete does the common law provide applicable rules.").

Chapter 8 of our state's UCC governs "Investment Securities." S.C. Code Ann. § 36-8-101 (2003). It is based on the state's adoption of the revised Article 8 contained in the model Uniform Commercial Code prepared by the American Law Institute in collaboration with the National Conference of Commissioners on Uniform State Laws. Its primary purposes are to provide uniformity in the securities industry and to provide an accurate description of the realities of the

securities markets, and secondarily to enhance the value-adding factors of liquidity and certainty in securities transactions. S.C. Code Ann. §§ 36-8-101 to -511 cmt. at 82 (2003 & Supp. 2013) (S.C. Reporter's Introductory Comment to the 2000 Revision). Part 5 of Chapter 8, entitled "Security Entitlements," specifically governs the "indirect holding system," whereby purchasers of securities deal with intermediaries who hold securities for others, as compared to the traditional system whereby purchasers deal directly with the issuers of those securities. *See* cmt. at 83. It is noted in the Introductory Comment that these provisions "supplant a pastiche of common law rules and agreed practices." *Id.*

In the current matter, Wachovia held certain financial assets (securities) for Husband and managed those assets, subject to his oversight, pursuant to the Account Agreement, by which the bank acted as Husband's agent. This relationship thus implicates the indirect holding system set forth in Part 5 as well as general UCC provisions. Under the terms of the UCC, Husband was an "entitlement holder" with a "security entitlement" to the "financial assets" in a "securities account" maintained and managed by Wachovia for Husband's benefit in its capacity as a "securities intermediary." These and related terms are statutorily defined.

A "financial asset" includes "a security" or a share or other interest in property "which is, or is of a type, dealt in or traded on financial markets[.]" S.C. Code Ann. § 36-8-102(a)(9) (2003). A "securities account" is "an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset." *Id.* § 36-8-501(a).

Wachovia is a "securities intermediary," which is defined to include "a bank . . . that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity." *Id.* § 36-8-102(a)(14)(ii).

Husband was the "entitlement holder," which the UCC defines as follows: "A person identified in the records of a security intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of Section 36-8-501(b)(2) or (3), that person is the entitlement holder." *Id.* § 36-8-102(a)(7).

A "security entitlement" consists of "the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 [of Title 36]." *Id.* § 36-8-102(a)(17). Section 36-8-501(b) of the UCC provides a person generally acquires a security entitlement if a securities intermediary does any of the following three things: "(1) indicates by book entry that a financial asset has been credited to the person's securities account; (2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or (3) becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account." *Id.* § 36-8-501(b).

Husband, as the entitlement holder, retained the right to direct Wachovia to make changes in his account by issuing an "entitlement order," i.e., "a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement." *Id.* § 36-8-102(a)(8).

Wachovia was statutorily required to respond to an appropriate entitlement order. *See id.* § 36-8-506 ("A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder."); *id.* § 36-8-507(a) ("A securities intermediary *shall comply* with an entitlement order if [1] the entitlement order is *originated by the appropriate person,* [2] the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and [3] the securities intermediary has had *reasonable opportunity to comply* with the entitlement order." (emphasis added)).

An "appropriate person" with respect to an entitlement order is the entitlement holder. *Id.* § 36-8-107(a)(3). However, if the person "is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent" is an appropriate person to initiate an entitlement order. *Id.* § 36-8-107(a)(4).

The UCC further provides that "[e]ffectiveness of an . . . entitlement order is determined as of the date the . . . entitlement order *is made*, and an . . . entitlement order *does not become ineffective by reason of any later change in circumstances.*" *Id.* § 36-8-107(e) (emphasis added). Subsection (e) clarifies the protection from liability of securities intermediaries who rely on appropriate persons, and "[t]his protection reflects the policy of revised Article 8 to enhance liquidity and finality

in securities transactions." *Id.* § 36-8-107 cmt. at 143 (S.C. Reporter's Comment to 2000 Revision).

In the Court of Appeals, the court first reviewed the terms of the Account Agreement and found the "prior actions" clause therein refers to both Husband's and Wachovia's conduct and that the plain language of the agreement showed Wachovia's authority ended upon actual knowledge of Husband's death. *Rider v. Estate of Rider*, 394 S.C. 84, 91, 713 S.E.2d 643, 646-47 (Ct. App. 2011). The court stated the determination whether the securities in the fourth transfer were part of Husband's estate was, therefore, determined by whether Husband's and Wachovia's conduct was sufficient to complete the transfers before Wachovia learned of Husband's death. *Id.* at 91, 713 S.E.2d at 647.

Wife argued the general agency rule that an agent lacks authority to act for a principal after a principal's death, relied upon by the McClure Respondents, does not apply to this situation because Husband's June 17, 2005 directive was an effective entitlement order under Article 8 of the UCC. *Id.* Wife contended (1) an effective entitlement order transfers the right to financial assets the date it is made and, (2) even if it does not, an entitlement order *remains effective* pursuant to the UCC provision above, which displaces the agency rule under the common law, so that actions taken to comply with the entitlement order may be completed regardless of later changes in circumstances. *Id.* at 91-92, 713 S.E.2d at 647.

The Court of Appeals rejected both of Wife's contentions and determined "the probate court properly found the [securities in] the fourth transfer are part of [Husband's] estate." *Id.* at 93, 713 S.E.2d at 648. In reaching this conclusion, the Court of Appeals stated the UCC applied, but nevertheless found the UCC's rule as to the effective date of an entitlement order contained in section 36-8-107(e) of the UCC did not fully address the subject, so it did not displace the relevant agency rule. *Id.* at 93-95, 713 S.E.2d at 648-49.

Applying the common law of agency, the Court of Appeals reasoned that an entitlement order does not complete a transfer of financial assets at the time it is made, so like other orders to agents, it is an instruction to act in the manner the principal desires, and the request is terminated by the principal's death, citing *Carver v. Morrow*, 213 S.C. 199, 204, 48 S.E.2d 814, 817 (1948) (stating as a general rule, an "agency terminates upon the death of the principal") and C.J.S. *Agency* § 122 (2003) ("The fact that the agent has performed, as authorized, one or several acts of that which was contemplated as a single transaction does not

operate to preserve or keep alive the power until the completion of the transaction."). *Id.* at 93-94, 713 S.E.2d at 648.

The court distinguished the effective date of the entitlement order from the date it was completed by Wachovia, which it defined as when the assets were credited to Wife's account, and it found the fourth transfer at issue was completed by Wachovia in October 2005, citing S.C. Code Ann. § 36-8-501(b)(1) (providing a book entry by the securities intermediary to a person's account establishes a security entitlement).[3] *Id.* at 94, 713 S.E.2d at 648. As a result, the court held the securities in the fourth transfer, having been credited after the bank's knowledge of Husband's death, are properly part of Husband's probate estate because the bank's authority under the Account Agreement had ended. *Id.* at 96, 713 S.E.2d at 649.

Several jurisdictions have observed there is a dearth of authority addressing the unique problems arising under Article 8 of the UCC. *See, e.g., Meadow Homes Dev. Corp. v. Bowens*, 211 P.3d 743, 745 (Colo. App. 2009) (stating the "appeal raises issues of first impression under Revised UCC Article 8 (Investment Securities)" that had not previously been considered in the jurisdiction and that "have received surprisingly little attention elsewhere"); *Watson v. Sears*, 766 N.E.2d 784, 788 (Ind. Ct. App. 2002) ("Unfortunately, there is no discernible case law anywhere under revised Article 8 of the U.C.C. (Title 8 in Maryland) —and very little commentary—dealing with the question of the effect of an entitlement order that is authorized by only one of the entitlement holders on a joint account.").

As one legal commentator has opined, a significant body of case law has not developed for the indirect holding system, and the reported cases generally have applied whatever principles were necessary to protect an innocent investor, so they did not create well-reasoned legal doctrines to resolve the competing policies unique to the indirect holding system. Russell A. Hakes, *UCC Article 8: Will the Indirect Holding of Securities Survive the Light of Day?*, 35 Loy. L.A. L. Rev. 661, 678 (2002). "The drafters [of UCC Article 8] had the benefit of effectively starting

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[3] The Court of Appeals held no issue was preserved as to the third transfer as the McClure Respondents did not cross-appeal. *Rider*, 394 S.C. at 93, 713 S.E.2d at 647. We agree. It further held Wife did not preserve the issue of whether the transfers were completed or incomplete gifts. *Id.* at 96-97, 713 S.E.2d at 649-50. We need not reach the latter question as we decide the case on other grounds.

with a clean slate." *Id.* "Troubling precedents could be overruled by the adoption of contrary concepts that matched the perceptions of those most familiar with the operation of the system--securities professionals." *Id.* "The interest and experience of securities professionals were essential to an Article 8 that could successfully govern the indirect holding system." *Id.*

"The securities industry did not want to use principles of bailment, agency, or trust law to describe the basic operations of the indirect holding system, even though agency law governs much in the relationship between the securities industry and its customers." *Id.* at 678-79. "One important goal in revising Article 8 was to simplify transfer rules for the indirect holding system." *Id.* at 679. Moreover, "[t]he drafters also caution courts not to use 'mechanical jurisprudence' but to interpret the definitions based upon the suitability of applying Article 8's substantive rules." *Id.* at 681 (citation omitted).

We agree with the Court of Appeals that the UCC does not invalidate all general principles of agency, but, as noted by the commentator above, those principles must be viewed in light of the unique nature of the indirect holding system. The UCC provisions were created to provide a uniform method of resolving issues in order to promote liquidity and finality, to be supplemented by (not thwarted by) the rules of agency and other applicable laws. *See* S.C. Code Ann. §§ 36-8-101 to -511 cmt. at 82 (2003 & Supp. 2013) (S.C. Reporter's Introductory Comment to the 2000 Revision) (observing the provisions in Part 5 of the UCC governing Investment Securities "supplant a pastiche of common law rules and agreed practices"); *see also Psak, Graziano, Piasecki & Whitelaw v. Fleet Nat'l Bank*, 915 A.2d 42, 45 (N.J. Super. Ct. App. Div. 2007) ("Indeed, the UCC displaces the common-law where reliance on the common law would thwart the purposes of the UCC." (citing *Sebastian v. D & S Express, Inc.*, 61 F. Supp. 2d 386, 391 (D. N.J. 1999)).

In relying upon agency law to mandate that both Husband's execution of the entitlement order and full compliance by the securities intermediary exist prior to Husband's death, the Court of Appeals has created an additional requirement that does not exist under the UCC and that thwarts the purpose of the language in section 36-8-107(e) establishing a uniform effective date for entitlement orders, regardless of subsequent events. Moreover, it also overlooks the fact that under UCC section 36-8-501(b), the making of a "book entry" is but one of several means by which Wife can acquire an interest in the securities.

Once Husband issued the entitlement order and was the appropriate person, Wachovia was obligated by the UCC and the parties' Account Agreement to obey his directive. Wachovia had set up a new investment account in Wife's name and commenced the transfer of securities within a few days of Husband's request, so at that point, Wife already had a recognizable interest, even though Wachovia had not posted all of the securities to her account. The Court of Appeals, in focusing solely on the date of the "book entry," which it took to mean the date the securities were credited or posted to Wife's account, seemed to view this as the exclusive means for obtaining an interest in the securities. However, a security entitlement is created if a securities intermediary does *any* of the following three things:

> (1) indicates by book entry that a financial asset has been credited to the person's securities account;
>
> (2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or
>
> (3) becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account.

S.C. Code Ann. § 36-8-501(b).

In this case, while the Court of Appeals relied on book entry under subsection (b)(1), we agree with Wife that under subsection (b)(3), Wachovia had a legal obligation to credit the securities to Wife's account.[4] As noted in the Official Comment to § 8-501 of the Uniform Act:

> Paragraph (3) of subsection (b) sets out a residual test, *to avoid any implication that the failure of an intermediary to make the appropriate entries* to credit a position to a customer's securities account *would prevent the customer from acquiring the rights* of an entitlement holder under Part 5. As is the case with the paragraph (2)

[4] At oral argument, the parties agreed the UCC does not define the term "book entry," so the drafters intended it to have a broad meaning. In addition, although not necessary to our disposition, we believe the transfer in this case also falls within the ambits of subsection (b)(2), as Wachovia received and accepted financial assets for credit to Wife's securities account.

> test, the paragraph (3) test *would not be needed for the ordinary cases*, since they are covered by paragraph (1).

Unif. Commercial Code, Official Comment to § 8-501, 2C U.L.A. 579, 581 (2005) (emphasis added).

Wachovia's failure to more quickly make the last posting to Wife's account clearly is not the ordinary case, and it falls squarely within the parameters of the residual provision in section 36-8-501(b)(3). Although the Court of Appeals treats the transfers as separate, unrelated events subject to termination under general agency law, we conclude Husband's execution of an entitlement order directing Wachovia to transfer certain specified securities to Wife is a singular act that falls squarely within the "prior act" language of the parties' agreement. Further, Wachovia's obligation to comply with Husband's entitlement order is supported by the UCC provisions examined above and comports with Article 8's goals of liquidity and finality in securities transactions. Consequently, we hold the disputed assets in this case properly belong to Wife and are not includible in Husband's probate estate.

IV. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

TOAL, C.J., KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Walker, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-211267

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Doyet A. Early, III, Circuit Court Judge

Opinion No. 27368
Heard February 20, 2014 – Filed March 19, 2014

REVERSED

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

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mary S. Williams, all of Columbia, for Respondent.

JUSTICE HEARN: The circuit court granted post-conviction relief (PCR) to petitioner on the ground his counsel rendered ineffective assistance because she failed to investigate a potential alibi witness, and the court of appeals reversed, holding that while counsel's representation was deficient, petitioner was not prejudiced thereby. We granted certiorari to review the court of appeals' decision and reverse.

FACTUAL/PROCEDURAL BACKGROUND

During the afternoon or early evening of Saturday, March 2, 2002, the victim stopped at a gas station in Denmark, South Carolina and when she went to leave, her car would not start. A man agreed to help her and ultimately replaced a part in her car. Because she did not have money on her person with which to repay him, she had him follow her home. There, according to Victim, he blindfolded her and drove her to his home where over the course of the night he sexually assaulted her. The following morning around 5:00 a.m. he blindfolded her again and drove her back to her home.

Law enforcement obtained a video surveillance tape from the gas station and Victim identified her assailant on the video. Officers returned to the gas station where an employee identified the assailant as the petitioner, Joseph Walker. Walker was detained and interviewed by law enforcement in a videotaped interrogation. He admitted going to the gas station on March 2 but denied providing assistance to anyone there with car trouble. He also denied any knowledge of the crime or Victim. He stated that after leaving the BP station, he spent the afternoon and evening at a friend's home and then returned to his girlfriend's, Robina Reed's, home around 9:30 or 10:00 p.m. for the remainder of the night.

Walker was arrested, charged, and tried for the crimes. The jury found him guilty of criminal sexual conduct in the first degree and kidnapping, and the court sentenced him to 24 years' imprisonment on each charge to be served concurrently.

Walker subsequently petitioned for PCR, alleging his trial counsel was ineffective in failing to conduct an adequate investigation. At the hearing, Walker's trial counsel acknowledged that she viewed the videotaped interview of Walker. She also admitted her notes contained the name "Robina Reed" as a

person to interview but that she never interviewed Reed. She testified that her investigator spoke with or tried to speak with Reed, but she never followed up with her investigator.

Reed testified at the hearing that she was never contacted about Walker's case until she heard from his PCR counsel. She stated that in March of 2002, she was in a romantic relationship with Walker, but he disappeared near the end of that month when, as she later discovered when contacted about Walker's PCR action, he was arrested. While she vacillated in her testimony and was unable to provide details about specific days and times she was with Walker, she was ultimately asked: "Prior to the last time that [you] saw Mr. Walker did y'all spend every weekend together?" and she responded: "Yea, we spend [sic] every weekend together."

The court granted Walker PCR, finding his trial counsel was ineffective in failing to interview Reed. The court also found Reed was credible, counsel was deficient in failing to interview her as an alibi witness, and Walker was prejudiced because Reed's alibi testimony created the reasonable probability of a different outcome at trial had she testified.

The court of appeals reversed the grant of PCR, holding that while trial counsel's failure to interview Reed was deficient performance, it did not prejudice Walker. *Walker v. State*, 397 S.C. 226, 235–39, 723 S.E.2d 610, 615–17 (Ct. App. 2012). In reversing, the court relied on this Court's decision in *Glover v. State,* 318 S.C. 496, 458 S.E.2d 538 (1995), that a failure to interview an alibi witness is only prejudicial where the witness's testimony, if true, would actually establish an alibi defense by making it physically impossible for the defendant to have committed the crime. *Id.* at 237–39, 723 S.E.2d at 616–17. The court of appeals concluded Reed's testimony did not establish an alibi because "it leaves open the possibility that Walker is guilty." *Id.* at 239, 723 S.E.2d at 617. Walker petitioned for certiorari and this Court granted the petition.

STANDARD OF REVIEW

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice. *Id.* To satisfy the first prong, a defendant must show counsel's performance "fell

below an objective standard of reasonableness." *Franklin v. Catoe*, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001). "To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Id.* at 571, 552 S.E.2d at 723.

The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). The PCR court's findings on matters of credibility are given great deference by this Court. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

LAW/ANALYSIS

Walker contends the court of appeals erred in holding he was not prejudiced by trial counsel's failure to interview Reed. Because we believe the court of appeals read *Glover* too broadly to apply to the alibi testimony here and also failed to adhere to the limited standard of review which appellate courts have over findings of the PCR court, we agree.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991).

Here, in reversing the PCR court, the court of appeals relied on this Court's language in *Glover* that "since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all" and its holding that a PCR petitioner is not prejudiced by his counsel's failure to interview a potential alibi witness who cannot present testimony that meets the legal definition of an alibi. *Glover*, 318 S.C. at 498, 458 S.E.2d at 540. In *Glover*, the petitioner was convicted of crimes that occurred in Williamsburg County and sought PCR on the basis his trial counsel failed to contact alibi witnesses who would have testified that he was in Florida at 8:00 a.m. on the day the crimes were

committed. *Id.* at 497, 458 S.E.2d at 539. The Court found that because the crimes occurred at 8:30 p.m. and the drive between the petitioner's location in Florida and Williamsburg County was only approximately six and a half hours, the fact he was allegedly in Florida that morning did not make it physically impossible for him to have committed the crimes. *Id.* at 498, 318 S.C. at 540. Therefore, the Court held the alibi witnesses were not sufficient to create an alibi defense and the petitioner was not prejudiced by his counsel's failure to interview them. *Id.*

The court of appeals found Reed's testimony did not qualify as an alibi because "her testimony does not account for Walker's whereabouts on March 2, 2002, such that it was physically impossible that he committed the crimes." Therefore, the court concluded that under *Glover*, Walker could not establish the prejudice prong. Given our limited scope of review over findings of the PCR court, this was error. Moreover, the court of appeals misapprehended the applicability of *Glover* to this case.

The PCR court found Reed credible and after a series of questions concerning whether she spent the weekend of March 2, 2002, with Walker, she settled on a final answer that prior to Walker's arrest, she and Walker spent every weekend together. That testimony provides evidence supporting the PCR court's conclusion that Reed offered alibi testimony that reasonably could have resulted in a different outcome at trial. If true and construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults. In other words, unlike *Glover* where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime. While we acknowledge, as did the PCR court, that Reed's testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her. Questions concerning the weight and believability of Reed's testimony were solely within the province of the PCR court, and through the narrow lens which we must view its findings, they are clearly supported by the record. Accordingly, we are constrained to affirm the PCR court's decision.

CONCLUSION

We hold the court of appeals erred in finding Walker was not prejudiced by his trial counsel's failure to interview Reed as a potential alibi witness.

Accordingly, we reverse the court of appeal's decision and affirm the PCR court's grant of relief.[1]

PLEICONES, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

[1] Because our resolution of this issue is dispositive, we need not reach the other issues raised by Walker. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Neal Beckman, Employee, Appellant,

v.

Sysco Columbia, LLC, Employer, and Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2013-000005

Appeal From The Workers' Compensation Commission

Opinion No. 5205
Heard February 20, 2014 – Filed March 19, 2014

REVERSED AND REMANDED

Frederick W. Riesen, Jr., of Riesen Law Firm, LLP, of N. Charleston, and Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, for Appellant.

Joseph Hubert Wood, III, and Kathryn Fiehrer Walton, both of Wood Law Group, LLC, of Charleston, for Respondents.

SHORT, J.: In this appeal from the Workers' Compensation Commission (Commission), Neal Beckman argues the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) erred in finding he was limited to a disability award for his back as a scheduled member because the evidence showed

he should have been awarded disability under the loss of earning capacity statute. We reverse and remand.

FACTS

Beckman, a delivery driver, was injured on March 25, 2010, while loading a hand truck for his employer, Sysco Columbia, LLC (Sysco). Beckman alleged in his Workers' Compensation Form 50 that he pulled muscles in his back, injuring his back, buttocks, both legs, and right foot. Sysco admitted Beckman's back injury, but denied his other injuries. Following the accident, Sysco provided Beckman with authorized medical care and treatment, primarily with Dr. Timothy Zgleszewski. Beckman also underwent an independent medical evaluation with Dr. Scott Boyd.

On March 8, 2012, Sysco filed a Form 21 seeking to terminate temporary compensation and have an award made for permanent disability compensation. Sysco asserted Beckman reached a level of maximum medical improvement on May 2, 2011, per a note by Dr. Zgleszewski, or alternatively, by February 27, 2012, per a note by Dr. Boyd.

During the hearing before the single commissioner, Sysco asserted Beckman was entitled to permanent disability pursuant to section 42-9-30(21) of the South Carolina Code. Beckman asserted any permanency award should be based on a loss of earnings under section 42-9-20.[1] In her order, the single commissioner found Beckman "sustained a 35% permanent loss of use of the spine (encompassing [Beckman's] entire spine and including any alleged radiculitis) pursuant to § 42-9-30(21)." The single commissioner further found Beckman's treating physician assigned a 15% combined impairment rating for Beckman's back and sacroiliac joint (SI joint), and the independent medical examiner assigned an 8% impairment rating. However, the single commissioner also found the greater weight of the evidence showed only Beckman's back was affected by the March 25, 2010 admitted injury by accident. The commissioner ordered Sysco to pay a lump sum payment to Beckman representing compensation for 35% permanent

[1] The parties stipulated to an average weekly wage of $1,062.94, with a resulting compensation rate of $689.71.

loss of use to the back pursuant to § 42-9-30(21), with Sysco being entitled to take credit for all temporary disability compensation paid to Beckman for the period after February 27, 2012.

Beckman filed a Form 30 notice of appeal. After a hearing, the Appellate Panel issued an order affirming the decision of the single commissioner in full. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 482, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2013). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

LAW/ANALYSIS

Beckman argues the Appellate Panel erred in finding he was limited to a disability award for his back as a scheduled member because the evidence showed he should have been awarded disability under the loss of earning capacity statute in section 42-9-20 of the South Carolina Code. We agree.

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant." *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). In a workers'

compensation case, the extent of impairment "need not be shown with mathematical precision." *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985). However, an award "may not rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis." *Id.*

Dr. Zgleszewski assigned a 10% medical impairment to Beckman's back and spine, and a 5% medical impairment to his SI joint, for a combined 15% impairment rating. Dr. Zgleszewski also stated Beckman would need two to three SI joint injections over the following two years. Dr. Boyd assigned Beckman with an impairment rating of 8%. The Appellate Panel's order adopted the single commissioner's finding that Beckman's treating physician assigned a 15% combined impairment rating for Beckman's back and SI joint. The Appellate Panel also adopted the single commissioner's finding that the greater weight of the evidence showed only Beckman's back was affected by the March 25, 2010 admitted injury by accident. Furthermore, the Appellate Panel agreed with the single commissioner's finding that there was no objective evidence of radiculopathy, and Dr. Zgleszewski diagnosed radiculitis based on Beckman's subjective complaints.

Beckman argues the Appellate Panel erred in applying the "two body-part rule" set forth in *Singleton v. Young Lumber Co.*, 236 S.C. 454, 114 S.E.2d 837 (1960). In *Singleton*, Singleton suffered a sole injury to a scheduled member, his leg, and no other condition was claimed to have contributed to his disability. *Id.* at 471, 114 S.E.2d at 845. Singleton argued the injury to his leg was so disabling that he should be found totally disabled. *Id.* at 468, 114 S.E.2d at 844. The court held that because the injury was confined to a scheduled member, compensation must be determined under the scheduled injury statute as provided by the legislature. *Id.* at 473, 114 S.E.2d at 846. Thus, an impairment involving only a scheduled member is compensated under the scheduled injury statute and not the general disability statute. *Id.* The court stated that "[t]o obtain compensation in addition to that scheduled for the injured member, [Singleton] must show that some other part of his body is affected." *Id.* at 471, 114 S.E.2d at 845.

In *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 106-07, 580 S.E.2d 100, 103 (2003) (citation omitted), our supreme court summarized its holding in *Singleton*:

> *Singleton* stands for the exclusive rule that a claimant with one scheduled injury is limited to the recovery under § 42-9-30 alone. The case also stands for the rule that an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional injuries beyond a lone scheduled injury. This principle recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together."

Similarly, in *Simmons v. City of Charleston*, 349 S.C. 64, 76, 562 S.E.2d 476, 482 (Ct. App. 2002), this court held that if substantial evidence is presented that a claimant suffers additional complications to another part of the body, other than the scheduled member, the claimant is entitled to proceed under the general disability statute. "The policy behind allowing a claimant to proceed under the general disability § 42-9-10 and § 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." *Id.* (quoting *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994)). "All that is required is that the injury to a scheduled member also affect another body part." *Id.*

Beckman asserts that although the primary injury was to his back, he also injured his SI joint, and he suffered radiculopathy in his left leg caused by the back injury. He argues that because the evidence shows his injury is not limited to his back, he is entitled to proceed under the loss of earnings capacity statute found in section 42-9-20 of the South Carolina Code. Section 42-9-20 provides:

> Except as otherwise provided in § 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly

> wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

S.C. Code Ann. § 42-9-20 (1976). Thus, he asserts the Appellate Panel erred in only addressing his disability under the medical model found in section 42-9-30(21) of the South Carolina Code. S.C. Code Ann. § 42-9-30(21) (Supp. 2013).

Beckman cites to *Gilliam v. Woodside Mills*, 319 S.C. 385, 461 S.E.2d 818 (1995), as addressing virtually the same issue as in this case. In *Gilliam*, the employer asserted this court erred in holding as a matter of law that the hip is not part of the leg. *Id.* at 387, 461 S.E.2d at 819. The employer contended the only question presented to the court was whether there was substantial evidence to support the Appellate Panel's finding that Gilliam's injury was confined to her leg. *Id.* Our supreme court disagreed with the employer, noting that on appeal from the Appellate Panel, this court may reverse where the decision is affected by an error of law.[2] *Id.* The supreme court stated this court joined several jurisdictions that have held as a matter of law that the hip socket is part of the pelvis and not part of the leg for workers' compensation purposes, and the court did not find error with this view. *Id.* Beckman, therefore, argues *Gilliam* supports his argument that the SI Joint, which is located in the pelvis, is not a part of the back for workers' compensation purposes.

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[2] The employer further contended the determination whether the hip is part of the leg is a question of fact instead of a question of law. *Id.* The supreme court found there was no dispute that Gilliam suffered an injury to her hip, resulting in a hip replacement. *Id.* Thus, the supreme court found this court correctly ruled, given the undisputed facts in this case, that it was a matter of law whether the hip socket is part of the pelvis or part of the leg. *Id.*

Sysco cites to *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006), in support of its position that Beckman's disability for his SI joint is compensated based on his loss of use of his back. In *Sanders*, the Appellate Panel awarded Sanders compensation under section 42-9-30(19) for an injury to his back due to permanent loss of use of his lumbar spine and SI joint. *Id.* at 290, 638 S.E.2d at 69. The employer argued the circuit court erred in affirming an award of benefits for his back based upon impairment to the lumbar spine and SI joint, which are not scheduled for compensation under section 42-9-30. *Id.* at 289-90, 638 S.E.2d at 69. This court found no reversible error, noting a review of the Appellate Panel's order and the record reflected Sanders' injury and subsequent disability was clearly to his back. *Id.* at 290, 638 S.E.2d at 69. Thus, the court did not specifically hold as a matter of law that the SI joint is a part of the back for workers' compensation purposes.

Regardless of whether the SI joint is a part of the back for workers' compensation purposes, we find there is evidence in the record that Beckman suffered from radiculopathy as a result of his back injury. Although Dr. Zgleszewski's notes from June 7, 2010, state Beckman's "EMG/NCS does not have a radiculopathy in either leg," the note continues that "EMG/NCS can be an imperfect diagnostic tool for determining radiculopathy." In fact, Dr. Zgleszewski's notes from June 7, 2010, and July 9, 2010, state a diagnosis of radiculitis. Dr. Zgleszewski's notes from June 7 and July 9 provide Beckman complained of pain that radiated to his left buttock and left hip. Dr. Zgleszewski noted during his physical examinations of Beckman: "There is tightness noted in the left piriformis muscle(s) today. There is tenderness over the bilateral PSIS's. There is a positive Fortin Finger test bilaterally[.] Neural tension signs are positive in the left leg in the seated slumped position." Dr. Zgleszewski's notes from November 10, 2010, state Beckman was still suffering from pain that radiated to his left buttock and left hip. His physical examination noted: "There is tightness noted in the left piriformis muscle(s) today. Neural tension signs are positive in the left leg in the seated slumped position. . . . There is tenderness over the left Greater Trochanter." Dr. Zgleszewski's notes from March 21, 2011, and May 2, 2011, again provide Beckman continued to suffer pain that radiated to his left buttock and left thigh and down to his left foot. He also noted the pain radiated to his left hip. Dr. Zgleszewski further noted during his physical examinations: "There is tenderness over the left greater trochanter"; "There is tightness noted in the left piriformis and Gluteals muscle(s) today"; and "Neural tension signs are positive in the left leg in the seated slumped position." Dr. Zgleszewski's statement to the Commission, dated September 2,

2011, states Beckman suffered from "sacroiliitis; lumbar disc injury & radiculopathy." Furthermore, Dr. Boyd's notes from Beckman's independent medical evaluation on February 27, 2012, state Beckman suffered pain that radiated down into his left leg, and he had numbness around his foot.

Therefore, we find the Appellate Panel's order was clearly erroneous in view of the substantial evidence in the record that Beckman suffered from radiculopathy as a result of his back injury. As a result, Beckman is entitled to proceed under the loss of earnings capacity statute found in section 42-9-20 of the South Carolina Code.

CONCLUSION

Accordingly, we reverse the Appellate Panel and remand the case to the Commission to address Beckman's eligibility for an award under section 42-9-20 of the South Carolina Code because substantial evidence shows his injury is not confined to a scheduled member.

REVERSED AND REMANDED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie D. Watson, Appellant,

v.

Nancy Carol Underwood, individually and as putative trustee of the Willie D. Watson Trust; John H. Watson, individually and as putative trustee of the Willie D. Watson Trust; and Future and Potential Heirs for Willie D. Watson, Respondents.

Appellate Case No. 2012-211966

Appeal From Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5206
Heard October 8, 2013 – Filed March 19, 2014

AFFIRMED

Edward S. McCallum, III, of Law Offices of Edward S. McCallum, III, of Greenwood, and Thomas Jefferson Goodwyn, Jr., of Goodwyn Law Firm, LLC, of Columbia, for Appellant.

B. Michael Brackett, of Moses & Brackett, PC, of Columbia, for Respondents.

KONDUROS, J.: Willie D. Watson appeals the circuit court's grant of partial summary judgment finding her daughter, Nancy Carole Underwood, as Watson's attorney-in-fact, had the authority to create and fund an irrevocable trust with Watson's assets. We affirm.

FACTS/PROCEDURAL HISTORY

Watson and John Calvin Watson were married for sixty-two years and had three children: Underwood, John H. Watson, and Sherry Long. On October 4, 2006, Watson[1] filed a complaint with the sheriff's department that Long had been harassing her for years and on September 28, 2006, began to yell at her and call her names. She further reported that Long had assaulted her in the past by throwing objects at her. Watson told her attorney, Richard T. Townsend, she did not wish to leave her husband or Long anything in her will. Watson told Townsend, Underwood, and John H. that Long encouraged and supported Watson's husband's mental abuse towards Watson, physically abused Watson, and only wanted Watson's money.

On October 5, 2006, Watson granted Underwood a durable power of attorney. The power of attorney gave Underwood the power "[t]o establish trust funds, revocable or irrevocable, funded or unfunded, for the benefit of [Watson], [her] spouse, [her] children and [her] lineal descendants, and to transfer any of [her] assets to such trusts." It also provided Underwood could transfer any of Watson's assets to her "spouse, [her] children and [her lineal descendants by gift, including to any such person serving as attorney[-]in[-]fact, or to any trust funds which [she] may have established, revocable or irrevocable . . . ." The power of attorney provided mental incapacity or physical disability by Watson would not effect it.

On the same day, Watson executed a last will and testament. She devised $2,000 to each of her grandchildren and $1,000 to each of her great-grandchildren living at the time of her death. She bequeathed her husband and Long[2] $1 each.[3]

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[1] Watson was eighty-eight years old at the time of the incident.

[2] Watson noted in the will that she had made "many advancements" to Long. She had previously gifted Long half of an acre, which was located in the middle of twenty-seven acres Watson owned. Watson informed Townsend she wished to undo the gift but her attorney advised her that she could not. She also told him Long would be inheriting the bulk of Watson's husband's estate.

Underwood and John H. were devised the residuary to be split equally. Both the will and the power of attorney were prepared by Townsend.

On March 13, 2009, during the night, Long moved Watson out of the assisted living facility[4] where she resided, Sterling House, without notifying Underwood or John H. On March 31, 2009, Watson's husband died, and Long later withdrew funds from his bank account with his power of attorney, withholding from the bank that he had died. The account was payable to Watson on her husband's death. In mid-March 2009, Underwood, John H., and their spouses visited Townsend's office to discuss how to protect Watson's assets from Long. Watson had complained to Townsend numerous times about Long's abusiveness and desire for her money.[5] Townsend recommended an irrevocable trust be created and Watson's assets be transferred into the trust. On April 2, 2009, Underwood executed an irrevocable trust naming herself and John H. as co-trustees. Watson received all net income and principal necessary for her upkeep, maintenance, and support from the trust, and at her death, the trust would terminate and the assets were to be distributed in accordance with her will dated October 5, 2006. The trust was funded with three bank accounts[6], a car, and real property consisting of the approximately 26.5 acres Watson owned, upon which her house was located. According to Underwood, Watson initially approved of the trust.

On June 18, 2009, Long moved Watson out of an assisted living facility, Generations, where Watson had been living for about a month. Also that day, Watson revoked Underwood's power of attorney. On January 12, 2010, Watson executed a codicil to the 2006 will, naming Long as the sole beneficiary of the will. On January 26, 2010, Watson filed an action against Underwood and John H., as individuals and trustees, as well as her future and potential heirs of the trust (collectively, Respondents), challenging the validity and funding of the trust. Underwood and John H. answered on February 16, 2010. On April 29, 2010,

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[3] At her attorney's urging, she devised them $1 instead of leaving them out entirely as she had done under her previous will.

[4] In July 2008, Watson had a stroke. Her doctor believed she could not live independently and needed twenty-four-hour supervision.

[5] Townsend testified Watson was scared of Long.

[6] Two of the accounts were in Watson's name. The third account contained approximately $50,000 and was in John H.'s name and possibly Underwood's too.

Watson filed a petition[7] to terminate the trust under section 62-7-411 of the South Carolina Code, contending she, as the lifetime beneficiary of the trust, and the residuary beneficiary, Long, consented to its termination. Respondents filed a return with supporting affidavits and a deposition of Townsend. Following a hearing, the circuit court denied the petition on October 1, 2010. The circuit court found "(1) the codicil could not serve as a document incorporated by reference into the trust;" (2) the codicil, as Watson attempts to use it, is a modification of the trust, which requires the consent of all trust beneficiaries; and "(3) the effective date of the codicil does not relate back to the time of the execution of the annexed October 5, 2006 will, rather the annexed will advances to become effective as of the time of the execution of the codicil." Watson filed a motion to reconsider, which was also denied.

Respondents filed a motion for partial summary judgment on the issue of whether the power to create an irrevocable trust may be expressly granted and delegated by a competent principal to his or her agent in a power of attorney. Watson filed a cross-motion for summary judgment, contending (1) the deed was void as matter of law because it conveyed property to a trust rather than the trustees and (2) Underwood's using her fiduciary powers to create an irrevocable trust that incorporates a fully revocable will, created a will in violation of the powers of a power of attorney. The circuit court held a hearing on the matter on August 26, 2011. On December 13, 2011, the circuit court filed an order granting Respondents' motion and denying Watson's. The court found (1) the power of attorney expressly authorized Underwood to create the trust, such power was legally delegable to the attorney-in-fact, and the trust was not a will and (2) the deed transferring real property was not invalid for lack of a properly named grantee. Watson filed a motion for reconsideration[8], which the circuit court denied. This appeal followed.

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[7] The pleading appeared under the caption of the original complaint and was not accompanied by a summons. Thus, the circuit court treated the pleading as a motion.

[8] The Rule 59(e), SCRCP, motion stated the circuit court failed to make specific findings of fact regarding (1) the deed transferring property to a trust rather than trustees, (2) a power of attorney creating an irrevocable trust that references a will created a will, and (3) a power of attorney locking an estate's distribution through an irrevocable trust.

LAW/ANALYSIS

I. Creation of a Will by a Power of Attorney

Watson argues the circuit court erred in denying her motion for summary judgment and granting Respondents' partial summary judgment motion on the question of the validity of the trust because the effect of the trust is to create a will in violation of the powers of a power of attorney under South Carolina law.[9] We disagree.

To the extent that Watson's argument addresses the denial of her motion for summary judgment, we will not consider it. The denial of a motion for summary judgment is not appealable because it does not finally determine anything about the merits or strike a defense. *Ballenger v. Bowen*, 313 S.C. 476, 476-77, 443 S.E.2d 379, 379 (1994).

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of

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[9] We believe the concurrence/dissent is wrong to suggest the circuit court's ruling of the grant of summary judgment should be vacated. Watson did not raise in her 59(e), SCRCP, motion that the circuit court went beyond the relief requested by Respondents. "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). Nor does Watson raise it as an issue on appeal. "[A]ppellants have the responsibility to identify errors on appeal, not the [c]ourt." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001). "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) (brackets and internal quotation marks omitted). Accordingly, we will not vacate the circuit court's holdings when Watson never asked us or the circuit court to do so.

law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

"A trust . . . may be created by: (i) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death . . . ." S.C. Code Ann. § 62-7-401(a)(1) (Supp. 2013).

The power of attorney specifically granted Underwood the power to create trusts, both revocable and irrevocable. Simply because the trust used the will to specify how to distribute the assets held by the trust, this in no way impeded Watson's right to change her will. Watson can still execute a new will or a codicil specifying how her other assets[10] should be distributed upon her death and modify any burial plans. Underwood's creation of the trust did not amount to the execution of a will. Accordingly, the circuit court properly granted Respondents' partial summary judgment motion.

II. Scope of Power of Attorney

Watson further asserts Underwood did not have the authority to execute the trust because the power of attorney was only to be used if her health failed. We disagree.

"'A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.'" *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001) (footnotes omitted by court) (quoting 3 Am. Jur. 2d *Agency* § 23 (1986)). "A durable power of attorney allows a person, the principal, to designate another as his or her attorney[-]in[-]fact to act on the principal's behalf as provided in the document even if the principal becomes mentally incompetent." *Id.* (citing S.C. Code Ann. § 62-5-501 (Supp. 2000)).

[10] The record does not specifically provide what assets of Watson's were not transferred to the trust but her personalty and her inheritance from her husband were not transferred to the trust.

This court has previously determined "a cause of action to set aside [a power of attorney] is more closely akin to an action to set aside a contract, deed, or petition than it is to a will contest." *Id.* at 571, 544 S.E.2d at 857. The same reasoning lends itself to the conclusion that an action to interpret a power of attorney is similar to an action to interpret a contract. An action to interpret a contract is an action at law. *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "The construction of a contract which is ambiguous, or capable o[f] more than one construction, is a question of fact." *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993).

Generally, "the construction of contracts is a question of law for the court." *Hope Petty Motors v. Hyatt*, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992). Determining what the parties intended becomes a question of fact for the jury only when the contract is ambiguous. *Id.* "If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms." *Bates v. Lewis*, 311 S.C. 158, 161 n.1, 427 S.E.2d 907, 909 n.1 (Ct. App. 1993). "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one." *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* "Resort to construction by a party is only done when the contract is ambiguous or there is doubt as to its intended meaning." *Id.* "The [c]ourt's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.*

In support of this argument, Watson cites to her testimony during a deposition.[11] However, the power of attorney is not ambiguous on its face. It does not provide

[11] Conversely, Townsend provided he explained the power of attorney would continue to be in effect if she were to become incapacitated. He testified Watson had declined a healthcare power of attorney. He further stated Watson had not

that it only takes affect if her health failed. It actually describes how mental incapacity and physical disability shall not affect the power of attorney. Accordingly, because the power of attorney is not ambiguous on its face, the court cannot look beyond it and consider other evidence such as testimony. Therefore, the power of attorney took effect once executed.

III. Confidential Relationship and Fiduciary Duty

Watson maintains the circuit court erred in granting Respondents' summary judgment motion on the question of whether or not the irrevocable trust is valid because there were multiple questions of fact for a jury to determine. Watson contends Underwood had both a confidential and fiduciary relationship with Watson and by creating the irrevocable trust naming herself as a beneficiary she violated those duties. We find these issues are not properly before this court.

Watson's memorandum in support of her reply to Respondents' summary judgment motion and her cross-motion for summary judgment alleges Underwood and Watson had a confidential and fiduciary relationship. Respondents' memorandum of law in support of their motion of partial summary judgment and in opposition to Watson's cross-motion for summary judgment addressed Watson's allegations regarding breach of fiduciary duty in creating trust. It stated, "This portion of the Memo of Law addresses [Watson's] arguments that are beyond the particular questions presented but which [Respondents] cannot allow to go unanswered." The circuit court's order makes no reference to whether a fiduciary or confidential relationship was violated here. In Respondents' brief they state, "The motion for partial summary judgment did not raise, and the Order under appeal did not address, and rightfully so, trust validity issues related to a confidential relationship, undue influence or fiduciary duty . . . ." "Generally, an issue must be raised to and ruled upon by the circuit court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review")). Accordingly, because these issues were not addressed in the grant of Respondents' motion for partial summary judgment or raised in Watson's 59(e) motion, we will not examine them on appeal.

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asked for a springing power of attorney, which would only come into effect if she was to be declared incompetent, because if she had, he would have prepared one.

IV. Denial of Summary Judgment—Transfer to Trust

Watson asserts the circuit court erred in denying her motion for summary judgment regarding when a deed purports to transfer her property to a trust rather than to the trustees. The denial of a motion for summary judgment is not appealable because it does not finally determine anything about the merits or strike a defense. *Ballenger*, 313 S.C. at 476-77, 443 S.E.2d at 379. It "simply decides the case should proceed to trial." *Id.* at 477, 443 S.E.2d at 380. It "does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." *Id.*

> [A] judge deciding a case on the merits is not bound by a prior order of another judge denying summary judgment. If the law were otherwise, a party could never obtain relief from an erroneous order denying summary judgment since orders denying summary judgment are never appealable, not even after final judgment.

Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). "[I]t is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment." *Ballenger*, 313 S.C. at 478 n.1, 443 S.E.2d at 380 n.1. However, when denying Watson's motion for summary judgment, the circuit court made conclusions of law. Because the denial of a motion for summary judgment cannot be appealed, we cannot consider this issue. We note that Watson is not bound by the circuit court's conclusions of law on this issue and can raise the issue again at trial.

V. Denial of Petition to Terminate Trust

Watson contends the circuit court erred in denying her petition to terminate the trust. She maintains all the terms and conditions of section 62-7-411 of the South Carolina Code (Supp. 2013) were satisfied because she and Long are the sole beneficiaries, Watson is the settlor, and they gave their consent to terminate the trust. We find this issue is not appealable at this time.

"The right of appeal arises from and is controlled by statutory law." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id.* (citing S.C. Code Ann. § 14-3-330(1) (1977); Rule 72, SCRCP; Rule 201(a), SCACR). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section 14-3-330 of the South Carolina Code (1977 & Supp. 2013)]." *Id.* "Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable." *Id.* "An order 'involves the merits,' as that term is used in [s]ection 14-3-330(1)[,] and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense. *Id.* at 7, 630 S.E.2d at 467 (footnote omitted). "The phrase 'involving the merits' is narrowly construed . . . . An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." *Id.* at 7, 630 S.E.2d at 467-68.

"The provisions of [s]ection 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000).

"An order affects a substantial right and is immediately appealable when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action.'" *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709 (brackets omitted) (quoting § 14-3-330(2)). Usually, an order that does not finally end a case or prevent a final judgment from which a party could appeal is not immediately appealable. *Id.* A judgment that determines what law is applicable but leaves questions of fact unsettled is not a final judgment. *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41, 21 S.E.2d 209, 212 (1942). Additionally, a decree or judgment that leaves in doubt whether the plaintiff will prevail is not final. *Donaldson v. Bank*, 4 S.C. 106, 115 (1873). An order is not immediately appealable when appellants "have not 'arrived

at the end of the road' and [would] be able to appeal the decision after the trial [wa]s finished." *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).

However, "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation." *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).[12] Generally, "[t]his [c]ourt reviews interlocutory orders when they contain other appealable issues." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). However, this court has declined to consider interlocutory issues even when accompanied by an appealable order, such as the grant of summary judgment, when the court found the issue to be novel and relating to the sufficiency of the allegations, which the trial court had not had the opportunity on which to rule. *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998). The supreme court has noted "if the question involved will be inherent in the final judgment and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal." *Good*, 201 S.C. at 41, 21 S.E.2d at 212 (internal quotation marks omitted).

In ruling on the petition, the circuit court referred to it as interlocutory. Watson did not immediately appeal the denial of her petition; she waited and appealed it with the court's grant of Respondents' partial summary judgment motion and the denial of her summary judgment motion. Here, the granting of Respondents' summary judgment motion is immediately appealable. Therefore, we could consider the denial of the petition if it would avoid unnecessary litigation. However, because the matters at issue in terminating the trust are intertwined with those to be determined at trial, we find the petition is not appealable until a final judgment has occurred. This court's ruling on this issue would not avoid unnecessary litigation because this matter is still to be litigated. Accordingly, we will not review the circuit court's denial of the petition in this appeal.

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[12] The denial of summary judgment is never appealable, even after final judgment. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003).

CONCLUSION

We affirm the circuit court's grant of Respondents' partial summary judgment motion. We do not address the denial of Watson's summary judgment motion nor petition to terminate the trust. Accordingly, the circuit court is

AFFIRMED.

PIEPER, J., concurs.

FEW, C.J., concurring in part, and dissenting in part: I concur in the majority's decision to affirm partial summary judgment to Underwood on the only two issues raised in her motion: (1) Did Watson grant Underwood power of attorney; and (2) Did Underwood have authority under that power of attorney to create an irrevocable trust. Because Underwood's motion raised no other issues, I would vacate all other relief granted by the circuit court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ted E. Abney, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-164906

ON WRIT OF CERTIORARI

Appeal From Newberry County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5207
Heard November 13, 2013 – Filed March 19, 2014

AFFIRMED

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

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General J. Rutledge Johnson, all of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Ted E. Abney claims his trial counsel's assistance was rendered ineffective when counsel did not request a jury instruction on the lesser included offense of strong arm robbery. He further contends he was prejudiced by his attorney's decision because he was convicted of armed robbery. We affirm.

FACTS/PROCEDURAL HISTORY

The victim testified that on October 30, 2004, she parked outside the Citgo Station in Prosperity, South Carolina. She went into the store, purchased items, and returned to her car. She put her purchases on the passenger seat and walked around to the driver's side. As she opened the driver's side door, Abney came up behind her and leaned over her so that she could not get away. He pushed something into her ribs and told her "don't move, don't say nothing or I will kill you." She testified at trial she believed he had a gun. He then took her purse and drove away in a white van. Abney turned himself in to the Newberry police a few days after the incident. He admitted taking the purse but insisted he never had a weapon. No weapon was ever recovered.

Abney was charged with armed robbery and possession of a firearm or knife during the commission of a violent crime. During his trial, the court granted Abney's motion for directed verdict on the possession of a firearm or knife during the commission of a violent crime charge. The armed robbery charge went to the jury. Neither Abney nor the State asked for a jury charge on the lesser included offense of strong arm robbery. Abney was found guilty of armed robbery and sentenced to twenty-six years' imprisonment. He appealed his sentence to this court, which dismissed the appeal.[1] On March 12, 2009, he filed an application for PCR. On May 24, 2010, the PCR court issued an order denying relief and dismissing the application. Abney then filed a petition for writ of certiorari. This court granted the petition. This appeal followed.

STANDARD OF REVIEW

"In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011). A petitioner for PCR bears the burden of establishing he is entitled to relief. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). An appellate court "will uphold the findings of the PCR

[1] *State v. Abney*, No. 2008-UP-184 (S.C. Ct. App. filed Mar. 17, 2008).

court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id.* Appellate courts give great deference to PCR courts' findings of fact and conclusions of law. *Holden*, 393 S.C. at 573, 713 S.E.2d at 615.

LAW/ANALYSIS

Abney argues trial counsel was ineffective because he did not request a jury instruction on the lesser included offense of strong arm robbery. He believes this decision fell below an objectively reasonable standard. He asserts he was prejudiced by this decision because he would have been convicted of strong arm robbery instead of armed robbery if the jury received the instruction. We disagree.

The South Carolina Code defines armed robbery as the commission of a:

> robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, *or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon*.

S.C. Code Ann. § 16-11-330 (2003) (emphasis added). Strong arm robbery is defined under common law "as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003).

The trial court is required to charge a jury on a lesser included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). However, the trial court should refuse to charge on a lesser included offense when there is no evidence that the defendant committed the lesser rather than the greater offense. *State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356

(2006). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691.

South Carolina has not considered the specific situation presented by this case. However, other states have determined whether failing to ask for a jury charge on a lesser included offense is a valid trial strategy. Alabama, Georgia, and Utah all found refusing to ask for a charge on a lesser included offense could be a reasonable trial strategy. *See Harbin v. State*, 14 So. 3d 898, 909 (Ala. Crim. App. 2008), *Ojemuyiwa v. State*; 647 S.E.2d 598, 605 (Ga. Ct. App. 2007); *Havard v. State*, 928 So. 2d 771, 791 (Miss. 2006). The Supreme Court of Mississippi stated that "[t]rial counsel's decision not to submit lesser offense instructions, while it turned out to be unsuccessful, was appropriate trial strategy, and thus beyond the realm of serious consideration on a claim of ineffective assistance of counsel." *Havard*, 928 So. 2d at 791.

We find evidence supported the PCR court's decision. Abney does not prove trial counsel failed to meet an objectively reasonable standard. Trial counsel was able to articulate a valid reason for employing his strategy. He testified that during a break in the trial, he and Abney felt they were winning the case and he would be found not guilty of armed robbery.[2] Therefore, the trial counsel did not feel it was in his client's best interests to ask for a jury instruction on strong arm robbery.

[2] The dissent believes trial counsel did not understand the elements of armed robbery; however, we find pursuant to *State v. Muldrow*, 348 S.C. 264, 268, 559

We, therefore, do not reach whether Abney was prejudiced by his trial counsel's actions.

CONCLUSION

Because the record contains evidence supporting the PCR court's finding and Abney failed to meet his burden of proof, the PCR court's decision is

AFFIRMED.

PIEPER, J., concurring.

I concur with the majority opinion that the evidence supports the PCR court's determination Abney did not prove trial counsel rendered ineffective assistance by failing to request a jury instruction on the lesser included offense of strong arm robbery. I write separately to further discuss the decision-making authority between a criminal defendant and his lawyer.

Certain decisions are considered fundamental and personal to a criminal defendant, and thus, are waivable only by the defendant. *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992). For example, a defendant has the ultimate authority to decide "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Conversely, decisions primarily involving trial strategy and tactics may be made by trial counsel. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998). Examples of such decisions include "which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined." *People v. Hambrick*, 96 A.D.3d 972, 973 (N.Y. App. Div. 2012). What motions to file and "whether to put on evidence so as to preserve the final word in closing argument" are also strategic and tactical decisions to be made by trial counsel. *Wright v. State*, 745 S.E.2d 866, 868 (Ga. Ct. App. 2013).

The 1980 American Bar Association's (ABA) Standards for Criminal Practice commentary provided the decision to ask for a lesser included offense was a right reserved for the defendant, explaining:

S.E.2d 847, 849 (2002), and the record, trial counsel had an accurate understanding of the law.

> [It is] important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. For instance, in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter.

People v. Colville, 979 N.E.2d 1125, 1129 (N.Y. 2012) (emphasis omitted) (quoting ABA Standards for Criminal Justice, Defense Function, § 4-5.2 (2d ed. 1980)).

In *People v. Brocksmith*, 642 N.E.2d 1230, 1232 (Ill. 1994), the Illinois Supreme Court, relying in part on the 1980 ABA commentary, found:

> We believe that the decision to tender a lesser included offense is analogous to the decision of what plea to enter, and that the two decisions should be treated the same. Because it is [the] defendant's decision whether to initially plead guilty to a lesser charge, it should also be [the] defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence. In both instances the decisions directly relate to the potential loss of liberty on an initially uncharged offense.

However, in 1993, the commentary to the third edition of the ABA standards was amended to omit the portion of the commentary providing the decision to request a lesser included offense is a right reserved for the defendant. ABA Standards for Criminal Justice, Prosecution Function and Defense Function, § 4-5.2 (3d ed. 1993). The 1993 ABA commentary now provides in its entirety: "It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, § 4-5.2 (3d ed. 1993).

After the 1993 ABA commentary revision, courts addressing the issue have determined the decision to request a lesser included offense rests with trial counsel, not the defendant. For example, in *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008), the Colorado Supreme Court was asked to determine whether the decision to request a lesser included offense is a tactical decision to be made by trial counsel or the defendant. The court explained some trial decisions, such as whether to plea, waive a jury trial, or testify, "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant." *Id*. The court noted "these rights are so important to the integrity of the legal process that the decision to waive them may require a trial court to determine that the defendant has made a voluntary, knowing, and intelligent decision." *Id*. However, the *Arko* decision recognized "[o]ther decisions are regarded as strategic or tactical in nature, and final authority to make such decisions is reserved to defense counsel." *Id*. The court determined "[t]he decision whether a lesser offense instruction should be requested is distinguishable from the decision to plead guilty," reasoning:

> When a defendant pleads guilty, he waives all rights attendant to a jury trial. On the other hand, a defendant retains all of his trial rights when he requests that a jury consider a lesser offense instruction. He also retains the opportunity to advocate for outright acquittal. Thus, this decision is not analogous to the decision whether to plead guilty. Because the defendant retains these fundamental trial rights, we conclude that the decision to request a lesser offense instruction is strategic and tactical in nature, and is therefore reserved for defense counsel. This tactical decision requires sophisticated training and skill which attorneys possess and defendants do not . . . .

Id. at 558-59 (internal citation omitted). Like *Arko*, other jurisdictions addressing the issue have also decided the decision to request instructions on lesser included offenses is a matter of strategy and tactics for trial counsel. *See United States v. Estrada-Fernandez*, 150 F.3d 491, 496 (5th Cir. 1998) ("In deciding whether to request a lesser-included-offense instruction, defense counsel must make a strategic choice: giving the instruction may decrease the chance that the jury will convict for the greater offense, but it also may decrease the chance of an outright acquittal."); *Cannon v. Mullin*, 383 F.3d 1152, 1167 (10th Cir. 2004) (rejecting a claim of ineffective assistance based on the change in the ABA commentary because "[w]hether to argue a lesser-included offense is a matter to be decided by

counsel after consultation with the defendant"); *Simeon v. State*, 90 P.3d 181, 184 (Alaska Ct. App. 2004) (relying in part on the change in the ABA commentary to hold the decision to request a lesser offense instruction rests with trial counsel); *Mathre v. State*, 619 N.W.2d 627, 630 (N.D. 2000) (holding that as a matter of trial strategy, trial counsel has the authority to decline requesting an instruction "on lesser included offenses and thereby take an all or nothing risk that the jury will not convict of the greater offense"); *Colville*, 979 N.E.2d at 1129-30 (discussing the 1980 ABA commentary, the 1993 ABA commentary, and the law in various jurisdictions in determining the decision to request a lesser included offense rests with defense counsel); *State v. Grier*, 246 P.3d 1260, 1268 (Wash. 2011) (indicating that "the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and [defense] counsel but ultimately rests with defense counsel"); *State v. Eckert*, 553 N.W.2d 539, 544 (Wis. Ct. App. 1996) (noting that the proposition contained within the 1980 ABA commentary does not contain any citation to authority and observing that the decision whether to request lesser included instruction is "a complicated one involving legal expertise and trial strategy").

Although the ABA guidelines are not binding upon the appellate courts of our state, I agree with the foregoing authorities that the decision to request a lesser included offense instruction is a tactical decision to be made by defense counsel, not the defendant. The reasoning that the decision to request a lesser included offense is a matter of strategy requiring the legal expertise of trial counsel is compelling. *See Van Alstine v. State*, 426 S.E.2d 360, 363 (Ga. 1993) (rejecting the 1980 ABA commentary and noting the decision to request a lesser included offense "is often based on legal complexities only the most sophisticated client could comprehend, not unlike the tactical decisions involved regarding the assertion of technical defenses"). While trial counsel should consult with his client, the final decision on strategy belongs to counsel.

Furthermore, in determining whether the decision to request a lesser included offense rests with trial counsel, I have also considered whether the trial court has an absolute duty to sua sponte charge a lesser included offense when not requested by the parties. I believe this analysis is necessary because if the trial court does have this absolute duty absent any request by counsel, I would not hold the decision may be made by counsel. It is often recognized in our state that if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense, a trial court must charge a lesser included offense. *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). A trial court has a general duty to charge the law that is applicable to the facts. This duty requires the

trial court to consider any lesser included charges the court determines are warranted by the facts. This general duty does not, however, amount to an absolute requirement that the trial court sua sponte charge a lesser included offense. In *State v. Parker*, our supreme court found the trial court did not err by failing to charge the jury on a lesser included offense because such charge was not requested; "there was no duty on the court to sua sponte provide the charge"; and the evidence did not warrant the charge. 315 S.C. 230, 236-37, 433 S.E.2d 831, 834 (1993). Other jurisdictions have likewise determined the trial court does not have an absolute duty to charge a lesser included offense. *See People v. Romero*, 694 P.2d 1256, 1269 (Colo. 1985) (explaining the trial court is "not obligated to instruct on a lesser offense unless either the prosecution or the defense requests such instruction" and "[i]n the absence of a request by the defendant, it may reasonably be assumed that he elected to take his chance on an outright acquittal or conviction of the principal charge rather than to provide the jury with an opportunity to convict on a lesser offense"); *State v. Kobel*, 927 S.W.2d 455, 460 (Mo. Ct. App. 1996) (holding a trial court does not err by failing to sua sponte charge the jury on a lesser included offense when it is not requested by defense counsel, reasoning defense counsel sometimes consciously decides "not to request an instruction on a lesser included offense for strategic purposes"). Based upon the policies and reasoning previously discussed, I would find the trial court is only absolutely required to charge a lesser included offense if the facts support the charge and counsel requests the charge. Here, even though the evidence warranted the lesser included offense, because neither the State nor defense counsel requested the charge, the trial court was not required to instruct the jury on strong arm robbery.

Having determined the decision to request a lesser included offense is a strategic decision to be made ultimately by trial counsel after consultation with the defendant, I agree with the denial of Abney's PCR application. Here, trial counsel's testimony at the PCR hearing supports the PCR court's finding that trial counsel consulted with Abney in deciding not to request the lesser included offense. Evidence in the record supports the PCR court's finding that trial counsel was not ineffective by failing to request the lesser included offense of strong arm robbery because it was a valid strategic decision under the facts of this case. Therefore, I concur in the decision to affirm the PCR court's decision.

FEW, C.J., dissenting.

I agree with the majority that the decision not to request a jury charge on a lesser-included offense *can* be a valid trial strategy. In this case, however, counsel's

decision not to request a charge on strong armed robbery was ineffective under the Sixth Amendment because the decision was based on a critical misunderstanding of the law. Further, counsel's deficient performance prejudiced Abney because it deprived him of the chance to avoid being convicted of armed robbery. For these reasons, I respectfully dissent.

The victim's testimony provided the only evidence of how the theft occurred.[3] The victim testified Abney "pushed into my ribs and he said 'don't move, don't say nothing, I will kill you.'" She described him as "leaning over me and . . . talking into my left ear." She testified he threatened her again, and "this time he was much more angry and much more forceful and he pushed harder on me and he said . . . 'shut the f*** up or I will kill you.'" She also stated, "I was so afraid that he was going to shoot me that I was afraid to hit the panic button [on my car key] or do anything except just stand there." Abney grabbed her purse, threw it into his vehicle, and sped off. As he sped off, she reached for the purse, "holding on [to the car] for about seven or eight feet," but she "finally let go" and he got away. She testified she "did not see" the object Abney pushed into her ribs and "he [n]ever refer[red] to having a gun," but, "It was a gun." There was no other evidence presented as to how the theft occurred.

In his closing argument, counsel conceded Abney used violence and fear to accomplish the theft when he stated, "she was standing in the open door of her car about to get into the SUV. Mr. Abney steps out of his car and he immediately grabs her and pushes into her. And he makes . . . these terrible threats to her. He says 'stay here or I will kill you.'" Counsel testified at the PCR hearing that his "trial strategy" was to "admit he was guilty of the charge but . . . that it was an unarmed purse snatching," and "all through the trial . . . I'm telling the jury he's guilty of . . . [strong armed] robbery, my closing, my opening." **(R. 214:16-19).** Under these facts, the theft that counsel admitted Abney committed could only have been robbery. *See State v. Mitchell*, 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009) (stating "robbery . . . is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence *by violence or by putting such person in fear*" (emphasis added) (internal quotations omitted)).

As to whether the robbery was armed robbery, counsel correctly pointed out in his closing argument that the State failed to prove Abney possessed a gun during the robbery. In fact, the trial court directed a verdict in Abney's favor on the charge of

[3] Abney did not testify at trial.

possession of a firearm because the court found the State produced no evidence Abney possessed a gun. Counsel argued, therefore, the robbery could not have been armed robbery based on the actual use of a gun.

However, the law allows the State to prove armed robbery without proving possession of a gun if the State proves the defendant committed robbery "while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." S.C. Code Ann. § 16-11-330(A) (2003). Counsel understood the State could convict Abney of armed robbery without proving he possessed a gun, but misunderstood what the law required to accomplish that. Counsel stated in his closing argument, "The judge is going to charge you [that] unless [Abney] alleges he ha[d] a deadly weapon[,] threats do not make the crime armed robbery." The trial court recognized counsel's misunderstanding and interrupted at this point, stating, "Counsel, wait a minute now. I am going to have to step in on that. It says by action or words." Counsel then engaged the court in an argument in front of the jury, thereby clearly demonstrating his misunderstanding of the armed robbery statute. Counsel stated, "I take the position, your honor, that the words have to allege the representation of a weapon and I am going to cite the case I brought." To this, the court responded, "I am going to charge exactly what the law says and I am pointing out to you, it says 'either by action or words.'" Counsel then stated, still in the presence of the jury, "Yes, sir. And I am going to ask the judge to charge the jury also that the mere use of the words alone does not make it armed robbery. And at the end of my closing argument I would ask for an argument, just a closing charges motion."

Under subsection 16-11-330(A), the State may convict a defendant of armed robbery by proving he "alleg[ed], *either by action or words*, he was armed." *Id.* (emphasis added). Therefore, it is not necessary, as counsel incorrectly believed, for the defendant to represent that he possessed a gun with words. Rather, as the trial court pointed out to counsel when it interrupted his closing, "action" may suffice as a representation of a weapon. Thus, the premise of counsel's belief that Abney could not be guilty of armed robbery was wrong. Counsel's misunderstanding could have been corrected by reading the statute or cases interpreting the statute,[4] or *listening* when the trial court corrected him. Counsel

[4] The case was tried in May of 2005. In 2002, the supreme court interpreted subsection 16-11-330(A), stating,

gambled his client's opportunity to avoid an armed robbery conviction on the premise that he could be convicted of armed robbery only if he said he had a gun, when the law clearly allowed him to be convicted of armed robbery for merely acting like he had a gun. The error was critical considering the facts of this case because Abney did not say he had a gun, but his actions led the victim to believe he had one. No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. *See Watson v. State*, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (Pleicones, J., dissenting) (stating a valid strategic decision cannot be "grounded in a fundamental misunderstanding of the law"); *Gallman v. State*, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where "an error of law was involved").

The State relies on counsel's testimony that he consulted with Abney, who agreed to the strategy. The argument misses the point of the Sixth Amendment. A criminal defendant is entitled to rely on the advice and expertise of his lawyer—not vice versa. By failing to understand the law on which the State sought to convict his client, and by acting on that misunderstanding, counsel deprived his client of the chance to be convicted of a lesser-included offense for a crime the client admitted to committing. Thus, I would find counsel rendered deficient performance under the Sixth Amendment.

The more difficult question is whether counsel's error prejudiced Abney. To prove prejudice under *Strickland*, "the PCR applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *McHam v. State*, 404 S.C. 465, 474-75, 746 S.E.2d 41, 46 (2013) (internal quotations omitted). In this case, Abney must

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> [T]he State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, *either by action or words*, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.

State v. Muldrow, 348 S.C. 264, 267-68, 559 S.E.2d 847, 849 (2002) (emphasis added).

demonstrate a reasonable probability the jury would have found him guilty of strong armed robbery if the trial court had charged it.

In light of the evidence that Abney stole the victim's purse and counsel's admission to the jury that Abney was "guilty of strong armed robbery," it was impossible for Abney to be "not guilty" of robbery. The State presented convincing evidence that Abney "alleged" the use of a deadly weapon by the act of pushing into the victim's side and telling her to shut up or he would kill her. However, to convict Abney of armed robbery, the State was also required to prove the victim "reasonably believed" Abney had "a deadly weapon." § 16-11-330(A). In this regard, it is important to remember the victim's testimony:

> Q: Did you ever see a weapon in Mr. Abney's hand?
> A: I did not see it.
> Q: Did you see any sort of knife?
> A: No.
> Q: Firearm?
> A: No.
> Q: Anything?
> A: No.

Our experience in criminal trials teaches us that no result is certain. This is particularly true when it comes to factual findings regarding mental state, such as whether the victim's belief was "reasonable." The standard for prejudice is not whether Abney *would* have been convicted of the lesser offense, but whether there is a reasonable probability he would. *See McHam*, 404 S.C. at 474-75, 746 S.E.2d at 46. If one juror stood firm on his or her position that the State failed to prove beyond a reasonable doubt that the victim's belief that Abney had a gun was reasonable, that would have been enough to prevent a conviction for armed robbery, and could have been enough for the jury to find him guilty of the lesser charge.

Counsel's all or nothing strategy depended on the jury applying the State's burden of proof in a purely technical fashion and finding an admitted robber not guilty. Such optimism is refreshing, but it has no place at the defense table of a criminal trial when the defendant's right to the effective assistance of counsel is at stake. Counsel apparently reflected on his strategy later, and at the PCR hearing admitted it "was an objectively wrong decision to make when you're telling the jury he's guilty of [strong armed] robbery but then not give them the option." The same practical reflection before or during trial would have informed counsel what a juror

told him afterwards—"[the jury] didn't think that the defendant was actually armed, 'but we aren't letting a creep like that just go home either.'"

I would find counsel's performance was deficient and prejudiced Abney. I would reverse the conviction and remand to the court of general sessions for a new trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amber Johnson, Respondent,

v.

Stanley E. Alexander, Mario S. Inglese, and Mario S. Inglese, P.C., Defendants,

Of whom Stanley E. Alexander is the Appellant.

Mario S. Inglese and Mario S. Inglese, P.C., Third-Party Plaintiffs,

v.

Charles Feeley, Third-Party Defendant.

Appellate Case No. 2011-196007

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

Opinion No. 5208
Heard October 16, 2013 – Filed March 19, 2014

REVERSED AND REMANDED

Joel W. Collins, Jr., Collins & Lacy, P.C., of Columbia, and Robert Fredrick Goings, Goings Law Firm, LLC, of Columbia, for Appellant.

Justin S. Kahn, Kahn Law Firm, LLP, of Charleston, and Mary Leigh Arnold, Mary Leigh Arnold, P.A., of Mt. Pleasant, for Respondent.

FEW, C.J.: This is an appeal from an order of partial summary judgment in a legal malpractice action in which the circuit court ruled attorney Stanley E. Alexander breached his duty to his client Amber Johnson and proximately caused her damages in connection with a real estate closing. We reverse and remand for trial.

I. Facts and Procedural History

In 2006, Johnson entered into a contract to purchase real estate in North Charleston from Carla Anderson, and retained attorney Mario Inglese to close the transaction. Inglese contracted with attorney Charles Feeley to perform a title search on the property. Due to a scheduling conflict, Inglese was unable to conduct the closing and Alexander acted as the closing attorney. Alexander paid Inglese for Feeley's report of the results of his title search. The report indicated all taxes due on the property had been paid. In actuality, Anderson had not paid the 2003 and 2004 taxes, and in October 2005, the Charleston County delinquent tax collector seized the property from Anderson and sold it at a tax sale to Westwood Properties, LLC.

Johnson sued Alexander, Inglese, and Inglese's law firm. Alexander admitted an attorney-client relationship existed, and thus he owed a duty of reasonable care to Johnson, but denied he breached his duty. Alexander cross-claimed against Inglese and his law firm, claiming he reasonably relied on the title search Inglese provided to him. Inglese cross-claimed against Alexander and filed a third-party complaint against Feeley. After discovery, Johnson filed a motion for partial summary judgment against Alexander. The circuit court granted the motion, finding as a matter of law Alexander breached his duty to Johnson and caused her damages in an amount to be determined at trial.

II. Standard of Review

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRCP." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (citation omitted). Rule 56 provides the trial court shall grant summary judgment if "there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

III. Analysis

The attorney-client relationship is fiduciary in nature, *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011), and requires the attorney "to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). An attorney is not a guarantor of a favorable result to the client, but is liable only if he fails to meet the appropriate standard of care. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (stating "[a] plaintiff in a legal malpractice action must establish four elements," including "a breach of duty by the attorney"); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010) (citing language quoted above from *Holy Loch Distributors* as "[t]he correct standard of care" for attorneys). In the specific context of a real estate closing, "[t]he fact that an attorney is incorrect as to the ultimate marketability of a title to real estate does not establish that he was negligent." *Bass v. Farr*, 315 S.C. 400, 404, 434 S.E.2d 274, 277 (1993); *see also Jennings v. Lake*, 267 S.C. 677, 680, 230 S.E.2d 903, 904 (1976) (stating "an attorney, who *negligently* certifies a title to be good, is liable to his client for the damages sustained as a proximate result of such *negligence*" (emphasis added)). Rather, a plaintiff alleging legal malpractice arising out of a real estate closing must establish the standard of care for the particular situation and prove the attorney breached the standard. *Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745.

The circuit court focused its inquiry on whether an attorney conducting a title search on this property should have discovered the delinquent taxes from 2003 and 2004 and the tax sale from 2005. That inquiry, in turn, focused on whether the information was in fact reflected in the public records of Charleston County when Feeley performed the title search in August 2006. On this question, Johnson submitted affidavits from the interim Delinquent Tax Collector and a non-lawyer in the business of conducting title searches, both of whom stated the information

was publicly available at that time. The circuit court ruled based on these affidavits that "[i]n August 2006, . . . Charleston County Delinquent Tax records showed the property taxes were delinquent in the years 2003 and 2004, and that the Property had been sold at a tax sale on October 3, 2005," and "the public records concerning these issues were available . . . by using the Charleston County Online Tax System."

This would be the correct focus if the issue were the liability of the attorney who performed the title search. Alexander, however, did not perform the title search. To determine Alexander's liability, the issue is not whether a reasonable attorney conducting a title search on the property would have found the information, but whether Alexander acted reasonably under the existing circumstances in relying on the title search performed by Feeley. The circuit court correctly recognized this as the issue, stating, "The standard of care for a title examination is not the issue. The issue is the standard of care for an attorney conducting a real estate closing." The circuit court noted "a closing lawyer may rely upon the title examination performed by others," and correctly stated "the closing attorney must not be negligent" in doing so.[1] The court went on to conclude:

> Alexander was negligent in not ensuring good and marketable title because he (or his agent) failed to determine that public records showed the delinquent taxes on the property . . . and that the property had been sold at a tax sale . . . . It was the failure to discover and properly act upon public records that results in Alexander being negligent and liable to Johnson.

The court's correct identification of the issue—whether Alexander acted with reasonable care in relying on Feeley's title search—is inconsistent with its ruling that Alexander is liable as a matter of law for Feeley's failure to discover what was in the public records. Feeley is the attorney who failed to discover the contents of the public record. If Feeley was negligent, Feeley is liable. For Alexander to be liable, however, his reliance on Feeley, or his decision not to do the title search himself, must have been negligent. As to Alexander's liability, Johnson was not entitled to summary judgment. First, Johnson offered no evidence as to the standard of care a real estate closing attorney must meet in relying on a title search

[1] The court actually stated "the closing attorney must not be negligent in ensuring the purchaser gets good and marketable title to the property." We address the significance of this language below.

performed by another attorney. *See Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745 (stating "a plaintiff in a legal malpractice action must establish this standard of care by expert testimony"). Second, the circuit court recognized "a closing attorney may rely upon the title examination performed by others," and yet held Alexander liable as a matter of law because the "other" attorney did not discover the information about the delinquent taxes and sale.

We find the evidence relating to the correct issue—whether Alexander acted with reasonable care in relying on Feeley's title search—viewed in the light most favorable to Alexander, leaves a genuine issue of material fact for trial and thus precludes judgment for Johnson as a matter of law.

The circuit court ruled, and Johnson argues on appeal, Alexander admitted his standard of care when Alexander stated Johnson "was supposed to have good and marketable title," and he "had a duty or responsibility to make sure that she got the property free and clear with good and marketable title." Alexander also stated in the same discussion, however, that his responsibility was "to close [Johnson's] transaction for her to the best of my abilities and based on the information I had at the time." We have no doubt these statements by Alexander will be important at trial. For summary judgment purposes, however, we do not believe Alexander's statements can be fairly interpreted as a concession that he had an absolute responsibility to deliver good and marketable title. Rather, considering Alexander's statements in the light most favorable to him, he conceded only that he must act with reasonable care in closing the transaction, including his decision to rely on Feeley's title search and not do a title search himself.

Johnson also argues Alexander is liable because Feeley was Alexander's agent. However, the circuit court did not grant partial summary judgment on the basis of agency. Though the circuit court made a reference to Feeley being Alexander's agent, the court made no findings as to whether Johnson established the elements of agency as a matter of law. *See generally Jamison v. Morris*, 385 S.C. 215, 221-22, 684 S.E.2d 168, 171 (2009) (defining agency); *Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) (defining actual authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (defining apparent authority). In most situations, "[a]gency is a question of fact," *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984), and "questions of agency ordinarily should not be resolved by summary judgment." *Fernander v. Thigpen*, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (citation omitted). Our supreme court has not addressed whether or under what circumstances an agency

relationship exists as a matter of law between a real estate closing attorney and a person performing a title search, and we decline to address the issue here. Whether Feeley was Alexander's agent is a question to be resolved on remand.

IV. Conclusion

We hold Alexander cannot be liable as a matter of law simply because Feeley failed to discover the unpaid taxes and tax sale. The decision of the circuit court is **REVERSED** and the case is **REMANDED** for trial.

KONDUROS, J., concurs.

PIEPER, J., concurring in result.

I concur in the result reached in the majority opinion to reverse the grant of summary judgment and to remand. I believe a material dispute exists as to the nature of any agency relationship between the attorneys involved. I also believe a material dispute exists as to whether Johnson, as the client, authorized the use of, or agreed to rely upon, the title work of any other attorney. *See Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed."); *Simmons v. Berkeley Elec. Co-op. Inc.*, 404 S.C. 172, 178, 744 S.E.2d 580, 584 (Ct. App. 2013) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tyrone Whatley, Appellant.

Appellate Case No. 2011-185486

Appeal From Florence County
D. Craig Brown, Circuit Court Judge

Opinion No. 5209
Heard November 15, 2013 – Filed March 19, 2014

AFFIRMED

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

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Jennifer Ellis Roberts, all of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

CURETON, A.J.: Following convictions for first-degree burglary, two counts of armed robbery, and conspiracy, Tyrone Whatley was sentenced to life

imprisonment without the possibility of parole (LWOP). He appeals, arguing the trial court erred in improperly limiting the scope of his cross-examination of a witness concerning the mandatory minimum sentences she avoided by testifying against him. We affirm.

FACTS

After two motel patrons in Florence were robbed at gunpoint in July 2009, Whatley was indicted for first-degree burglary, two counts of armed robbery, and conspiracy. Police also arrested John Barfield and Jessica Ussery. Whatley was tried in February 2011.

At trial, the State presented testimony from the victims, Brandon Cross and Ciera Davis, who stated that on July 21, 2009, the couple was robbed and their motel room was burglarized by two men and a woman. One man was white and carried a shotgun; the other man was black and did not appear armed.

Moments after Cross and Davis escaped and called 911, police officers pulled over a car matching the descriptions given by Cross and Davis. Two men ran from the passenger side of the car and escaped. Officers discovered Davis's bags in the back seat and a shotgun in the trunk, and arrested the driver, Ussery.

Ussery testified her boyfriend, Barfield, had threatened her if she told police about him. She admitted that, during her arrest, she had lied to police, claiming two men with a gun had approached her in the parking lot and forced her to participate in the robbery. However, Ussery stated after she spent some time in jail and realized she was safe from retribution, she modified her story. Ultimately, Ussery explained she had driven Barfield to pick up an acquaintance she knew as "Rom" or "Jamal Bryant" and then to the motel.

Using information gained from Ussery, the police arrested Barfield about a week after the robbery. After approximately seven months in jail, Barfield, in turn, provided them with sufficient information to locate and arrest Whatley, who used the nickname Rom. While in jail, Barfield identified Whatley as Rom in a photographic lineup. At trial, both Ussery and Barfield testified Whatley was the man they knew as Rom, who had participated in the robbery.

Ussery admitted she was initially charged with two counts of armed robbery with a deadly weapon, failure to stop for a blue light, and falsification of information to the police. However, she stated after Barfield's and Whatley's arrests, the armed robbery charges against her were reduced to accessory before and after the fact of armed robbery. Those charges were pending at the time of Whatley's trial. Barfield testified he was initially charged with first-degree burglary, two counts of armed robbery, conspiracy, and possession of a weapon, but pled guilty to two counts of attempted armed robbery. By the time of Whatley's trial, the other charges against Barfield had been dismissed, and he had received sentences totaling seven years' imprisonment.

During Whatley's cross-examinations of Ussery and Barfield, the trial court sustained the State's objections to questions about the potential sentences they faced. Specifically, after Whatley elicited from Ussery that accessory charges were pending against her, the following exchange between Whatley and Ussery occurred:

> Q. . . . You know what your exposure is on those charges?
>
> A. What is what?
>
> Q. What you could get?
>
> A. No, sir.
>
> Q. What kind of time you could get?
>
> [The trial court sustained the State's objection "to any amount of time that she may be able to catch on those charges."]
>
> Q. Okay. You were charged with armed robbery; is that correct?
>
> A. Yes, sir.

Q. All right. Now, are you aware of what kind of time you were looking at on arm[ed] robbery?

A. No, sir, not of the full extent, no sir. . . . I just know it carries a long sentence.

Q. Okay. So nobody's ever told you what arm[ed] robbery carries?

A. I'm not aware of or how long the year term is.

Ussery explained she did not know when the charges against her were reduced, but she knew the reduction occurred sometime after Barfield and Whatley were arrested. Ussery denied having made a plea deal in exchange for her testimony.

Subsequently, Whatley established Barfield had received a seven-year sentence after pleading guilty to reduced charges and asked him:

Q. So your arm[ed] robbery charges were both dismissed?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Did you know what you were facing for arm[ed] robbery?

[The trial court sustained the State's objection concerning "any amount of time that the [witness] was subjected to."]

Q. Mr. Barfield, let me ask you this, were you aware that you could receive substantially more time than you got for --

A. Yes.

Q. -- for attempted arm[ed] robbery?

A. Yes.

Q. And your burglary first charge[,] are you aware you could receive substantially more time for that as well?

A. Yes.

The following day, after further consideration, the trial court reversed its ruling on the State's objection and offered Whatley the opportunity to fully question Barfield.[1] The trial court reasoned the answer "could possibly go to the bias or prejudice of this witness." Whatley then cross-examined Barfield concerning his knowledge that the sentence for armed robbery ranged from ten to thirty years and the sentence for burglary ranged from fifteen years to life. However, neither the parties nor the trial court raised the possibility of re-examining Ussery.

After deliberations, the jury convicted Whatley of all charges. Due to a prior conviction for armed robbery, the trial court imposed LWOP sentences on Whatley for first-degree burglary and each of the armed-robbery convictions. He received a concurrent sentence of five years' imprisonment for conspiracy. This appeal followed.

STANDARD OF REVIEW

As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000).

LAW/ANALYSIS

[1] The trial court indicated it reversed its ruling after reviewing *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004), *aff'd as modified*, 373 S.C. 601, 646 S.E.2d 872 (2007).

Whatley asserts the trial court erred in improperly limiting the scope of his cross-examination of Ussery regarding the mandatory minimum sentences she avoided by testifying against him. We agree but find the error was non-prejudicial.

A person who commits robbery while armed with a firearm or other deadly weapon "is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years." S.C. Code Ann. § 16-11-330(A) (2003). "A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony . . . is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon." S.C. Code Ann. § 16-1-40 (2003). The punishment for a person who commits the offense of accessory after the fact has no mandatory minimum. S.C. Code Ann. §§ 16-1-20, -55 (2003).

"The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers." *State v. Aleksey*, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); *see* U.S. Const. amend. VI (stating "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him"). "This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." *Aleksey*, 343 S.C. at 33-34, 538 S.E.2d at 255. "On the contrary, 'trial [courts] retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id.* at 34, 538 S.E.2d at 255 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). "The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

> A criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.

State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) (quoting *Van Arsdall*, 475 U.S. at 680) (internal quotation marks omitted). The *Mizzell* court highlighted the competing concerns with regard to certain witnesses:

> The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence. However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence.

Id. at 331-32, 563 S.E.2d at 318.

Recently, our supreme court revisited limitations on the scope of cross-examination in light of the Confrontation Clause and concluded: "The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012). "It is of no moment that at some point during the proceedings one of the witnesses confirmed the existence of a mandatory minimum sentence. The fact remains that Appellant was unable to fully develop this information through the cross-examination . . . ." *Id.* at 375 n.4, 731 S.E.2d at 886 n.4. "In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless." *Id.* at 377, 731 S.E.2d at 887.

However, the *Gracely* court acknowledged "[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *Id.* at 375, 731 S.E.2d at 886.

> Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include [1] the *importance of the witness's testimony* in the prosecution's case, [2] whether the testimony was *cumulative*, [3] the presence or absence of evidence *corroborating* or contradicting the testimony of the

> witness on material points, [4] the *extent of cross*[-] *examination* otherwise permitted, and, of course, [5] the *overall strength* of the prosecution's case.

Id. (quoting *Van Arsdall*, 475 U.S. at 684 (emphasis added in *Gracely*)).

Gracely requires the trial court to allow an accused to develop evidence that (1) a cooperating witness, (2) avoided, (3) a mandatory minimum sentence. 399 S.C. at 374-75, 731 S.E.2d at 886. Although Ussery provided eyewitness testimony, she was also implicated in the crime and, after her arrest, faced two different sets of charges. After her arrest, she was charged with two counts of armed robbery, each of which carried a mandatory minimum sentence of ten years. *See* § 16-11-330(A). After Barfield's and Whatley's arrests, Ussery's charges were reduced to accessory before and after the fact. For the charge of accessory to an armed robbery before the fact, Ussery still faced a mandatory minimum sentence of ten years. *See id.*; § 16-1-40. However, a charge of accessory after the fact does not carry a mandatory minimum sentence. *See* §§ 16-1-20, -55 (establishing maximum sentences but no minimum sentences for persons convicted of accessory after the fact). During Whatley's cross-examination of Ussery, the trial court excluded questions concerning the sentences Ussery faced for the reduced charges. Because at least one of the charges against Ussery was reduced from an offense with a mandatory minimum sentence to an offense without such a sentence, the trial court erred in precluding Whatley from questioning her on the sentences she faced for the reduced charges.

Nevertheless, we find Whatley suffered no prejudice. The limitation the trial court imposed upon Whatley's cross-examination of Ussery, though improper, did not "prevent[] a full picture of [her] possible bias." *See Gracely*, 399 S.C. at 377, 731 S.E.2d at 887. Analyzing the evidence in this case in view of the first three *Van Arsdall* factors, the importance of a witness's testimony to the prosecution's case and whether it was cumulative to or corroborated by other evidence, we find Whatley suffered no prejudice. *See id.* at 375, 731 S.E.2d at 886. The State presented the testimony of six witnesses, including the two victims and the law enforcement officers who pursued the robbers. Of those six witnesses, only Ussery and Barfield identified Whatley as one of the robbers. However, Barfield's testimony established the same material facts as Ussery's, and more. Moreover, Ussery's testimony did not contradict Barfield's on any essential point. Both Barfield and Ussery recalled picking up Whatley and driving to the motel. Both

testified Whatley supplied the gun, Barfield carried it, and Barfield and Whatley left Ussery to fend for herself after she pulled over for the police. In addition, both witnesses described Barfield's, Whatley's, and Ussery's respective roles in the robbery up to the time the men entered the motel room. Without Ussery's testimony, the State presented evidence of all those events through Barfield. Furthermore, Barfield corroborated the victims' testimony concerning events in the motel room that Ussery had not witnessed. Thus, although Ussery's testimony was important to the State's case against Whatley, it was cumulative to, and corroborated by, Barfield's testimony.

The evidence relevant to the fourth *Van Arsdall* factor, the extent of cross-examination allowed, also does not support a finding of prejudice. Aside from sustaining the State's objection to Whatley's question concerning the sentences Ussery faced for her accessory charges, the trial court did not restrict Whatley's cross-examination of Ussery in any way.

With regard to the final factor, the overall strength of the State's case, Whatley correctly observes the State presented no physical evidence tying him to the robbery, and several months elapsed between the robbery and Whatley's arrest. Additionally, neither the victims nor the officer who responded to the robbery could identify him. In fact, the only evidence identifying Whatley as one of the robbers came from Barfield and Ussery.

Notwithstanding, Whatley suffered no prejudice from the improper limitation of his cross-examination of Ussery. He availed himself of extensive opportunities to delve into Ussery's bias and poor credibility, capitalizing on her inconsistent statements to the police. Furthermore, although Ussery avoided a mandatory minimum sentence of ten years for armed robbery by agreeing to testify against Whatley, she still faced the same mandatory minimum sentence for the reduced charge of accessory before the fact. In view of this evidence, we find the trial court's error in restricting the scope of Whatley's cross-examination of Ussery did not result in prejudice to Whatley.

CONCLUSION

We find the trial court erred in preventing Whatley from cross-examining Ussery concerning the mandatory minimum sentence she faced for the reduced charges pending against her at the time of Whatley's trial. However, under the facts present

in this case, we find Whatley had ample opportunity to demonstrate Ussery's bias and, therefore, suffered no prejudice. Accordingly, the decision of the trial court is

AFFIRMED.

FEW, C.J., concurs.

PIEPER, J., concurs in result only.