OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1

January 3, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Darla R. Floyd and Dana Nichole Floyd, Plaintiffs,

v.

Nationwide Mutual Insurance Company, Defendant.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
G. Ross Anderson, Jr., United States District Judge

Opinion No. 26088
Heard November 2, 2005 – Filed December 28, 2005

CERTIFIED QUESTION ANSWERED

Bryan D. Ramey, of Bryan D. Ramey & Associates, P.A., of Piedmont, and John S. Nichols, of Bluestein & Nichols, of Columbia, for Plaintiffs.

John Robert Murphy and Adam J. Neil, both of Murphy & Grantland, P.A., of Columbia, for Defendant.

JUSTICE BURNETT: We accepted this certified question regarding the interpretation of a statute addressing the offer of underinsured motorist coverage to insured persons pursuant to Rule 228, SCACR.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are drawn from the district court's certification order and an appendix filed by the parties. Plaintiff Darla R. Floyd (Darla) is the mother of Plaintiff Dana N. Floyd (Dana). Dana suffered serious injuries in an automobile collision on September 19, 2003, when her car was struck by another automobile. The at-fault driver's liability carrier paid its policy limits of $15,000 to Dana in exchange for a covenant not to execute a judgment against the at-fault driver.

Dana filed a claim with Nationwide Mutual Insurance Co. (Nationwide), seeking to recover against underinsured motorist (UIM) coverage. Dana, a Class I insured,[1] sought to stack UIM coverages for each of three vehicles covered by the Nationwide policy purchased by her mother. Dana sued Nationwide after it refused to pay benefits and the case was removed to federal district court on Nationwide's motion.

Darla purchased a Nationwide policy in 1997. A Nationwide agent's employee completed a form titled "Offer of Optional Additional Uninsured and Underinsured Automobile Insurance Coverages." The employee checked the "no" box which followed the question "Do you wish to purchase underinsured motorists coverage?" The employee checked the "yes" box which followed the question "Do you wish to purchase additional uninsured motorists coverage?" and wrote "15/30" and "25,000" on lines for selecting the desired limits.

Darla signed the UIM offer form indicating her rejection of UIM coverage, thereby purchasing only the minimum liability limits and

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[1] Class I insureds include the named insured and his or her spouse and relatives residing in the same household. Class II insureds are those using the insured vehicle with permission of the named insured and a guest in the motor vehicle. In South Carolina, only Class I insureds can stack coverage. See e.g. Concrete Servs., Inc. v. U.S. Fid. & Guar. Co., 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998).

corresponding uninsured motorist (UM) coverage. Darla also signed the "Applicant's Acknowledgment" at the end of the UIM offer form. This paragraph stated:

> I hereby acknowledge that I have read, or have had read to me, the above explanations and offers of additional uninsured motorist coverage and underinsured motorist coverage. I have indicated whether or not I wish to purchase each coverage in the spaces provided. I further understand that the above explanations of these coverages are intended only to be brief descriptions of uninsured motorist coverage and underinsured motorist coverage, and that payment of benefits under any of these coverages is subject both to the terms and conditions of my automobile insurance policy and to the State of South Carolina's laws.

Darla did not otherwise personally mark the UIM offer form to select desired coverages and limits.

Darla increased the coverage limits on her policy in 2000. An employee in the Nationwide insurance agent's office completed another UIM offer form, checking the "no" box which followed the question "Do you wish to purchase underinsured motorist coverage?" The agent's employee checked the "yes" box which followed the question "Do you wish to purchase additional uninsured motorist coverage?" and wrote "100/300" and "50,000" on lines for selecting the desired limits.

Darla again signed the form in two places –rejecting UIM coverage and below the "Applicant's Acknowledgment," the same paragraph set forth above. Darla did not otherwise personally mark the UIM offer form to select desired coverages and limits.

At her deposition, Darla testified she signed the offer forms, but did not read the forms or have someone read them to her. No one explained or discussed UIM coverage or the offer form with her, and she did not understand UIM coverage at the time she signed the forms. She did not recall reading the acknowledgment paragraph before signing the forms. "To the

best of my rememberance (sic), I was told what I needed and given the paper to sign," Darla testified. "I was given the paper to sign and I signed it. I was not explained that I needed to read it."

Nationwide relies solely on the two UIM offer forms as proof that it made a meaningful offer of UIM coverage to Darla, and not on any verbal discussions or explanations of the coverage. The parties agree both UIM forms are identical to South Carolina Department of Insurance Form 2006 and contain the content required by S.C. Code Ann. § 38-77-350(A) (2002).

QUESTION

> Is an offer form in which the blanks were filled in by an insurance agent or his employee in the presence of the named insured, and the form was then signed by the named insured, properly completed and executed pursuant to S.C. Code Ann. § 38-77-350(B) (2002), such that the form may be conclusively presumed to constitute a meaningful offer of UIM coverage?[2]

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2004), and S.C. Code Ann § 14-8-200 (Supp. 2004)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to 'choose ye this day whom ye will serve'; and, in the duty of this decision, the

[2] We have redrafted the question to refine the issue before us.

court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

LAW AND ANALYSIS

Plaintiffs argue that, in order for the UIM offer form to be "properly completed and executed by the named insured" pursuant to Section 38-77-150(B), the named insured not only must sign the offer form, but also must personally fill in the blanks to indicate the desired coverages and limits. Plaintiffs point to language in Section 38-77-150(A) requiring the offer form to contain "a space for the insured to mark" whether the insured wishes to accept or reject UIM and additional UM coverages, a "space for the insured to select" the coverage limits desired, and "a space for the insured to sign" the form to acknowledge the coverages have been offered to her. Plaintiffs further contend that imposing such a requirement would compel insurers to require the named insured read the form rather than simply signing a form prepared by an insurance agent or his employee. This practice would better fulfill the Legislature's intent that a meaningful offer actually be made to the insured before an executed form is presumed to constitute such an offer.

Nationwide argues it is entitled to benefit from the statutory presumption that a meaningful offer is made when the named insured signs the form as required, regardless of whether an agent or his employee filled in the blanks to indicate the desired coverages and limits. Darla has not asserted the form was erroneously completed by the agent's employee, but has argued only that the manner in which it was completed is improper under the statute. Consequently, Nationwide contends the interpretation of the statute suggested by Plaintiffs would lead to an absurd result because the Legislature could not have intended to disallow the presumption of a meaningful offer in such circumstances.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature. Mid-State Automotive Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in

light of its manifest purpose. Jackson v. Charleston County School Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist. Cobb v. Benjamin, 325 S.C. 573, 583, 482 S.E.2d 589, 594 (Ct. App. 1997). The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the Legislature. *Cf.* Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968) (stating this principle with regard to UM coverage).

Automobile insurance carriers are required to offer, at the option of the insured, UIM coverage up to the limits of the insured's liability coverage. S.C. Code Ann. § 38-77-160 (2002). The insurer bears the burden of establishing that it made a meaningful offer of UIM and additional UM coverages. Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 348, 608 S.E.2d 569, 571 (2005); Butler v. Unisun Ins. Co., 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). A noncomplying offer has the legal effect of no offer at all. Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." Butler, 323 S.C. at 405, 475 S.E.2d at 760.

In order for an insurer to make a meaningful offer of UIM coverage, (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium. State Farm Mut. Auto Ins. Co. v.

Wannamaker, 291 S.C. 518, 521, 345 S.E.2d 555, 556 (1987). In response to Wannamaker, the Legislature enacted Section 38-77-350 to establish the requirements for forms used in making offers of optional insurance coverage such as UIM. Progressive Cas. Ins. Co., 362 S.C. at 349, 608 S.E.2d at 571-72.

Section 38-77-350 provides, in pertinent part:

> (A) The director or his designee shall approve a form which automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:
>
> > (1) a brief and concise explanation of the coverage,
> > (2) a list of available limits and the range of premiums for the limits,
> > (3) a space *for the insured to mark* whether the insured chooses to accept or reject the coverage and a space *for the insured to select* the limits of coverage he desires,
> > (4) a space *for the insured to sign* the form which acknowledges that he has been offered the optional coverages,
> > (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer. [Emphasis added.]
>
> (B) If this form is properly completed and executed by the named insured it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor any insurance agent has any liability to the named insured or any other insured under the policy for the insured's failure to purchase any optional coverage or higher limits.

. . .

> (D) Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits and no person, including, but not limited to, an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by the named insured.

An insurer enjoys a presumption it made a meaningful offer when a form is executed in compliance with this statute. Progressive Cas. Ins. Co., 362 S.C. at 349, 608 S.E.2d at 571-72; Section § 38-77-350(B). The insurer may not benefit from the protections of the statute when the form does not comply with the statute. Progressive Cas. Ins. Co., 362 S.C. at 349, 608 S.E.2d at 572; Osborne v. Allstate Ins. Co., 319 S.C. 479, 486, 462 S.E.2d 291, 295 (Ct. App. 1995). Furthermore, a form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance. Butler, 323 S.C. at 408-409, 475 S.E.2d at 761. The purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage "is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs." Progressive Cas. Ins. Co., 362 S.C. at 352, 608 S.E.2d at 573.

We acknowledge that a competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress. See Moye v. Wilson Motors, Inc., 254 S.C. 471, 479-80, 176 S.E.2d 147, 151-52 (1970) (automobile insurance contract); Camden Inv. Co. v. Gibson, 204 S.C. 513, 519, 30 S.E.2d 305, 307 (1944) (lease agreement); Horton v. Atlantic Life Ins. Co., 187 S.C. 155, 197 S.E. 512 (1938) (life insurance contract); Federal Land Bank of Columbia v. Summer, 168 S.C. 510, 167 S.E. 830 (1933) (real property deed); In re King's Will, 132 S.C. 63, 128 S.E. 850 (1925) (testator's will). Plaintiffs in the present case have not asserted Darla's signature was improperly obtained. However, this fact is not dispositive in this case because of the plain and unambiguous language of Section 38-77-350, emphasized above in the quoted portions of the statute.

Accordingly, we answer "no" to the question certified by the district court. We conclude the Legislature intended, by the plain and unambiguous terms of the statute, for the *insured herself* to personally mark, select, and sign the UIM offer form pursuant to Section 38-77-350(A). The offer form is not "properly completed and executed by the named insured" – thus triggering the conclusive statutory presumption a meaningful offer was made pursuant to Section 38-77-350(B) – unless the insured herself personally marks, selects, and signs the form. In imposing these requirements, the Legislature apparently recognized that an insured person who is required to personally complete an offer form inevitably will find it necessary to seek further explanation from the insurance agent when he or she is unable to complete the form due to a lack of knowledge or understanding of the concepts of UM and UIM coverages. We agree with Plaintiffs that such a result is more likely to accomplish the important goal of adequately informing insured persons about coverage options, enabling them to make an informed decision of which type and amount of coverage will best suit their needs. See Progressive Cas. Ins. Co., 362 S.C. at 352, 608 S.E.2d at 573.

Our decision does not resolve the question of whether Insurer made a meaningful offer to Darla in this case. We simply conclude that Insurer, by allowing an agent or his employee to partially complete the offer form in a manner inconsistent with the plain terms of Section 38-77-350, is denied the benefit of the conclusive statutory presumption a meaningful offer was made. Such a case presents a factual issue for resolution by the factfinder, with the insurer bearing the burdens of proof and persuasion in demonstrating whether a meaningful offer was made to the insured pursuant to the Wannamaker analysis. Progressive Cas. Ins. Co., 362 S.C. at 349, 608 S.E.2d at 572; Osborne, 319 S.C. at 486, 462 S.E.2d at 295.

CONCLUSION

We conclude an offer form in which the blanks were filled in by an insurance agent or his employee in the presence of the named insured, and the form was then signed by the named insured, was not properly completed and executed pursuant to Section 38-77-350(B), such that the form may be

conclusively presumed to constitute a meaningful offer of UIM coverage to the named insured.

CERTIFIED QUESTION ANSWERED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte:

Missy Wilson, Respondent.

In Re:

BB&T of South Carolina, Plaintiff,

v.

Kim A. Pender, Defendant,

of whom BB&T of South Carolina is Appellant.

Appeal From Lexington County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 26089
Heard November 3, 2005 - Filed December 28, 2005

DISMISSED

John William Ray, of Greenville, for Appellant

Christian E. Boesl and David Kent Snyder, both of Columbia, for Respondent.

JUSTICE BURNETT: BB&T of South Carolina (Appellant) appeals a lower court order quashing a subpoena duces tecum, which Appellant issued to a nonparty prior to commencing any procedure to enforce a judgment. We certified the case for review from the Court of Appeals, pursuant to Rule 204(b), SCACR. We dismiss the appeal because the lower court order is not immediately appealable.[1]

FACTUAL/PROCEDURAL BACKGROUND

On January 14, 2003, Appellant filed a summons and complaint in the Lexington County Court of Common Pleas seeking a judgment against Kim A. Pender for debt collection. On March 14, 2003, a default judgment was entered in favor of Appellant against Pender.

In April 2003, the Law Offices of Paul J. Kamber represented a Kim A. Pender in a real estate closing. In preparation for the closing, Kamber's office sought to determine whether Kamber represented the same Kim A. Pender who was subject to Appellant's default judgment. On April 14, 2003, Missy Wilson (Respondent), Kamber's legal assistant, faxed an inquiry to Appellant requesting identification data on the Pender subject to Appellant's judgment. On the same day, Appellant replied to the request and asked Kamber for identification data of his client. Kamber's office did not reply. On April 26, 2003, Appellant again requested the identification data on Kamber's client, but Kamber's office did not reply.

On May 12, 2003, Appellant served Respondent or the records custodian of Kamber's office with a subpoena duces tecum requesting "your entire Kim Pender file." On or about May 19, 2003, Respondent served a motion to quash the subpoena duces tecum on the grounds the documents in the file were protected by the attorney-client privilege and there was no pending action between Appellant and Pender. Appellant filed a return to Respondent's motion on July 15, 2003.

[1] We have modified the case caption to accurately reflect the status of the parties on appeal.

At a hearing on Respondent's motion, Appellant admitted it had not attempted enforcement of the judgment against Pender by issuance of a writ of execution or through supplemental proceedings. Appellant argued post-judgment discovery before enforcement of the judgment is proper under Rule 69, SCRCP.

By Order filed July 17, 2003, the circuit court granted Respondent's motion to quash, concluding Rule 69, SCRCP, did not permit discovery after judgment except in supplementary proceedings or in aid of execution. Further, the requested documents were subject to attorney-client privilege, which had not been waived.

ISSUES

I. Is an order quashing a subpoena duces tecum, which was issued to a nonparty prior to the commencement of enforcement of a judgment, immediately appealable?

II. Did the lower court err in granting Respondent's motion to quash on the ground that the discovery was improper under Rule 69, SCRCP?

LAW/ANALYSIS

I. Appealability

Appellant argues the lower court order quashing the subpoena duces tecum is immediately appealable. We disagree.

The novel issue presented in this case is whether an order quashing a subpoena duces tecum, issued to a nonparty prior to the commencement of enforcement of a judgment, is immediately appealable.

South Carolina Code Ann. § 14-3-330 (1976 & Supp. 2004) addresses appellate jurisdiction.[2] Section 14-3-330 provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
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> (2) An order affecting a substantial right made in an action when such order (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;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

[2] Section 14-3-330 also applies to equity cases. See Charleston County Dep't Soc. Servs. v. Father, Stepmother, and Mother, 317 S.C. 283, 287, 454 S.E.2d 307, 309 (1995). Supplementary proceedings are equitable in nature. Ex Parte Roddey, 171 S.C. 489, 172 S.E. 866 (1934).

As a general rule, only final judgments are appealable. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final. Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993). See also Good v. Hartford Accident & Indemn. Co., 201 S.C. 32, 21 S.E.2d 209 (1942) ("a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term . . . .").

We have previously held an order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision. Lowndes Products, Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974); Patterson v. Specter Broadcasting Corp., 287 S.C. 249, 335 S.E.2d 803 (1985). Also, we have held an order directing a nonparty to submit to discovery is not immediately appealable. Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986).

Similarly, an order quashing a subpoena duces tecum issued to a nonparty prior to commencement of enforcement of a judgment, is interlocutory and not immediately appealable. This discovery order is not a final order because it leaves some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined.[3]

Absent some specialized statute, the immediate appealability of

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[3] See Central States, Southeast and Southwest Areas Pension Fund v. Express Freight Lines, Inc., 971 F.2d 5, 6 (1992) (citations omitted):

> The judgment entered pursuant to Fed.R.Civ.P. 58 ends the proceeding to determine liability and relief, but it begins the collection proceeding if the defendant refuses to pay. A contested collection proceeding will end in a judgment or a series of judgments granting supplementary relief to the plaintiff. The judgment that concludes the collection proceeding is the judgment from which the defendant can appeal.

an interlocutory or intermediate order depends on whether the order falls within § 14-3-330. Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004). Intermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1). An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid-State Distribs., Inc., 310 S.C. at 334, 426 S.E.2d at 780. Interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Id*. at 335 n.4, 426 S.E.2d at 780 n.4. We conclude the order quashing the subpoena duces tecum neither involves the merits nor affects a substantial right, and the order is, therefore, not immediately appealable.

Appellant argues the order granted an injunction and is, therefore, immediately appealable pursuant to § 14-3-330(4). Further, Appellant argues this Court can consider the order because there is an otherwise appealable issue before the Court. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002) (an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation). Appellant's arguments are without merit.

II. Discovery under Rule 69, SCRCP

Although, we dismiss the order as not immediately appealable, we address this novel issue in the interest of judicial economy. Appellant argues post-judgment discovery may be properly conducted under Rule 69, SCRCP, without the issuance of a writ of execution or the commencement of supplementary proceedings. We disagree.

Rule 69 is entitled "Execution" and provides:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in

> aid of a judgment, and in proceedings on and in aid of execution shall be as provided by law. In the aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for obtaining discovery.[4]

The Notes to Rule 69, SCRCP, state: "This Rule 69 is substantially the Federal Rule, omitting references to Federal Statutes. It preserves by reference present State practice under S.C. Code Sections 15-39-10 through 15-39-150, and brings to the assistance of the judgment creditor the right to obtain discovery under Rules 26 through 37."[5]

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[4] See generally Johnson v. Serv. Mgmt., Inc., 319 S.C. 165, 166, 459 S.E.2d 900, 902 (Ct. App. 1995), affirmed in part, 324 S.C. 198, 478 S.E.2d 63 (1996):

> Judgments generally are enforced by writs of execution issued to the sheriff. See S.C.Code Ann. § 15-35-180 (1976) (providing that judgments requiring the payment of money or the delivery of real or personal property "may be enforced in those respects by execution as provided in this Title."); S.C.Code Ann. § 15-39-80 (setting forth the requirements for the contents of the execution, including that it be directed to the sheriff and intelligibly refer to the judgment, stating the court, the county in which the judgment roll or transcript is filed, and the amount of the judgment). If a judgment is unsatisfied, the judgment creditor may institute supplementary proceedings to discover assets. S.C.Code Ann. § 15-39-310. Supplementary proceedings also "furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action." Lynn v. International Brotherhood of Firemen & Oilers, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955).

[5] Rule 34, SCRCP, incorporates by reference Rule 45, SCRCP.

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003); Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. See Maxwell, 356 S.C. at 617, 591 S.E.2d at 26; Knotts v. S.C. Dep't of Natural Resources, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). Courts should consider not only the particular clause in which a word may be used, but the word and its meaning in conjunction with the purpose of the whole rule and the policy of the rule. S.C. Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991) (applying this rule of construction to a statutory provision). In construing a rule, language in the rule must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT&T Communications of Southern States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004) (applying this rule of construction to a statutory provision). The Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP.

When the phrase "[i]n the aid of the judgment or execution" in the last sentence of Rule 69 is construed in conjunction with the purpose of the rule—execution of a judgment either by a writ of execution or by supplemental proceedings—and the policy of the rule, the phrase must relate back to the two previous sentences. The phrase in question can be harmonized with the subject matter of the rule—Execution—by reading Rule 69 to require the issuance of a writ of execution or initiation of supplementary proceedings before post-judgment discovery is conducted. See Anchor Gas, Inc. v. Border Black Top, Inc., 381 N.W.2d 96, 97-98 (Minn. Ct. App. 1986) (post-judgment discovery under Rule 69, Minn. RCP, may be conducted after issuance of writ of execution but prior to the writ being returned as unsatisfied).

CONCLUSION

We dismiss the appeal because the order quashing the subpoena duces tecum is not immediately appealable. Further, in clarifying the procedure for discovery under Rule 69, SCRCP, we conclude the rule requires a writ of execution be issued or supplementary proceedings initiated before discovery may be commenced.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Stephen S. Bartlett, concur,

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael E. Upchurch, Respondent,

v.

Susan O. Upchurch, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Colleton County
Jane D. Fender, Family Court Judge

Opinion No. 26090
Heard September 21, 2005 - Filed January 3, 2006

AFFIRMED IN PART; REVERSED IN PART

Gregory Samuel Forman, of Charleston, for Petitioner.

Lucius Scott Harvin, of Hetrick Law Firm, of Walterboro, for Respondent.

CHIEF JUSTICE TOAL: We granted certiorari to review the court of appeals' dismissal of Susan Upchurch's appeal of a family court order as untimely. *Upchurch v. Upchurch*, 359 S.C. 254, 597 S.E.2d 819 (Ct. App.

2004). We also review the family court's award of child support and denial of attorney's fees. We affirm in part and reverse in part.

FACTUAL / PROCEDURAL BACKGROUND

Michael E. Upchurch ("Husband") and Susan O. Upchurch ("Wife") were married in March of 1981. The parties had three children together. They were divorced in February of 2001.

The parties entered into a separation agreement, which was incorporated into the final divorce decree. The divorce decree granted joint custody to the parties, with Husband designated as the primary custodial parent. At the time of the divorce, the family court relied on the incorporated separation agreement in determining the need for child support. The separation agreement provided that "[d]ue to the current financial situation of the parties, including wife's establishment of a new household in Charleston, South Carolina, the husband waives child support. The husband and wife may decide to revisit the issue of child support should the financial situation of either party change dramatically." On September 26, 2001, Husband brought a petition requesting that Wife pay private school tuition and child support for their minor children. Wife counterclaimed for attorney's fees.

At the hearing, Husband testified about changed circumstances including his oldest daughter's college expenses, increased medical costs uncovered by insurance, and orthodontic treatment for all three children. Wife objected only to the relevance of testimony regarding the college expenses of the oldest child, these expenses having occurred beyond the daughter's eighteenth birthday.

The family court denied Husband's claim for private school tuition, but granted his petition for child support in accordance with the statutory guidelines, retroactive to the filing of the petition. The family court denied Wife's counterclaim for attorney's fees.

The family court order was signed on May 30, 2002. The following day, the court's administrative assistant mailed the original signed order to the clerk of court with a letter requesting that the clerk file the order and send certified copies to the attorneys of record. This letter, including copies of the signed order, was carbon copied to both attorneys of record. The order was not filed until June 12, 2002. Wife did not receive service of the filed order until August 23, 2002, and on September 11, 2002, Wife appealed.

The court of appeals dismissed the action as untimely. This Court granted certiorari to review the following issues:

I. Did the court of appeals err in dismissing Wife's appeal as untimely?

II. Did the family court err in awarding child support without a showing of a dramatically changed financial situation or changed circumstances?

III. Did the family court err in allowing the presentation of evidence regarding changed circumstances?

IV. Did the family court err in awarding retroactive child support?

V. Did the family court err in denying Wife's claim for attorney's fees?

LAW / ANALYSIS

I. Timing of the Appeal

Wife argues that the court of appeals erred in dismissing her appeal as untimely. We agree.

Our Court rules provide that "[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of *entry* of the order or judgment." Rule 203(b), SCACR (emphasis added). Generally,

a judgment is effective only when so set forth and entered in the record. Rule 58(a) SCRCP. An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case. *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) (citations omitted). However, "the moment …[the order] is filed by the clerk of court, it becomes the judgment of the court, and fixes the rights of the parties." *Archer v. Long*, 46 S.C. 292, 295, 24 S.E. 83, 84 (1896). Stated otherwise, the effective date of an order is not when it is signed by the judge, but when it is entered by the clerk of court. *Bowman*, 335 S.C. at 93, 515 S.E.2d at 261.

Two court of appeals cases offer further analysis as to when notice occurs under our procedural rules.

In *Bowman v. Richland Mem'l Hosp.*, the trial court dismissed the respondent as a party based on the appellants' failure to amend the complaint within ten (10) days of the date of the trial court's order. *Id* at 90, 515 S.E.2d at 259. The order was signed on September 19, 1996, but was not entered by the clerk until September 23, 1996. The appellants served an amended complaint on October 2, 1996, which was 13 days after the order was signed and 9 days after the order was filed. The court of appeals held that the appellant's amendment of the complaint was timely, finding that the "final and effective date of the trial judge's order was the date the order was entered by the clerk of court…, not when the order was signed." *Id* at 92, 515 S.E.2d at 261.

In *Rosen, Rosen & Hagood v. Hiller*, the court of appeals addressed the notice requirement under Rule 12(a), SCRCP. [1] 307 S.C. 331, 415 S.E.2d 117 (Ct. App. 1992). The appellant in the *Rosen* case made a motion to the trial court for a change of venue. The motion was denied after the appellant

[1] Rule 12(a), SCRCP, provides that "if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after *notice of the Court's action*…" (emphasis added).

failed to appear at the hearing. The respondent's attorney mailed a letter to the appellant which included an unsigned, undated, and unfiled copy of the order issued by the court denying appellant's motion. The respondent subsequently moved for an order of default because the appellant did not file an answer as required by Rule 12(a), SCRCP. The appellant argued that he had not received notice of the court's action because he had not received the signed, dated, and filed order as required by Rule 77(d), SCRCP.[2] The court of appeals rejected this argument, stating "we see nothing in Rule 12(a) that requires the actual filed order be served upon a party to affect notice [of the court's action]." *Id* at 334, 415 S.E.2d at 118.

Because a critical issue of this case is *entry* of the order of judgment, we find the instant case more comparable with *Bowman*. In *Bowman*, the court held that principles of fairness and equity required a finding of timeliness because "parties to an action are not provided notice of a judge's ruling at the time the judge signs an order. Rather, only after the order is filed with the clerk of court are the parties given notice of the order." *Bowman*, 335 S.C. at 92, 515 S.E.2d at 261. To hold Wife responsible for notice of an event that had not yet occurred runs afoul of the notions of fairness and equity articulated in *Bowman*.

By its plain language, Rule 203(b) requires notice of entry of the order. Entry of the order occurs when the clerk of court files the order. Delivery of the order to the clerk is not analogous to the entry of the order. Accordingly, we hold that the time to file a notice of appeal pursuant to Rule 203(b), SCACR, begins to run when written notice that the order has been entered

[2] Rule 77(d), SCRCP states that "immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing. Such mailing shall not be necessary to parties who have already received notice. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of entry on any other party in the manner provided in Rule 5 for the service of such papers."

into the record by the clerk of court has been received. Therefore, the May 31st letter from the judge's assistant was not notice of entry of judgment; the very language of the letter indicated that the order had not yet been filed. Accordingly, the court of appeals erred in dismissing the appeal as untimely.

II. Child Support

Wife contends that the family court erred in awarding child support without a showing of dramatically changed financial situation or changed circumstances. We agree.

In order to determine the proper standard, we must first determine if this is 1) an action to establish an order of child support or 2) an action to modify an order of child support.

Generally, a petition is treated as an action to establish child support if the issue was not addressed previously in the separation agreement or the divorce decree. *McElrath v. Walker*, 285 S.C. 439, 440, 330 S.E.2d 313, 313 (Ct. App. 1985). However, when the divorce decree or separation agreement addresses the issue of child support, the petition is considered one for modification. *Miller v. Miller*, 299 S.C. 307, 310-11, 384 S.E.2d 715, 716-17 (1989) (reviewing the denial of a petition to decrease child support set by the divorce decree using the modification standard of changed circumstances). Additionally, it is possible for the issue of child support to be held in abeyance by the divorce decree or incorporated separation agreement. *Boyer v. Boyer* 291 S.C. 183, 184-85, 352 S.E.2d 514, 515-16 (Ct. App. 1987) (holding that the court could award child support without a showing of changed circumstances where the original divorce decree awarded child support to be set after a specified time upon petition to the court). Nevertheless, an agreement between the parents may not affect the basic support rights of minor children. *Lunsford v. Lunsford*, 277 S.C. 104, 105, 282 S.E.2d 861, 862 (1981). Notwithstanding any provisions of a separation agreement, the family court retains jurisdiction to do whatever is in the best interest of the children. *Moseley v. Mosier*, 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983).

We hold that the petition in the instant case was one for modification of child support. The separation agreement, which was incorporated into the divorce decree, specifically addresses the issue of child support. Furthermore, there is no indication in the separation agreement or the divorce decree that the issue of child support would be held in abeyance. Therefore, any subsequent review of the issue by the family court would be for modification.

The separation agreement, in the instant case, provided that the parties may "revisit the issue of child support should the financial situation of either party change dramatically." This language essentially mirrors the court's own changed circumstances standard for modification of child support obligations. Therefore, the court's application of the changed circumstances standard encompasses the standard agreed on by the parties. Accordingly, we do not need to determine if parties may change the standard for modification of a child support award by agreement. Therefore, applying the standard of changed circumstances, we find that Husband did not provide sufficient evidence to warrant a modification of the original decree.

A child support award rests in the discretion of the trial judge, and will not be altered on appeal absent abuse of discretion. *Hallums v. Hallums*, 296 S.C. 195, 197, 371 S.E.2d 525, 527 (1988). However, in reviewing an appeal from the family court, the appellate court may find the facts in accordance with its own view of the preponderance of the evidence. *Scott v. Scott*, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003).

The family court may always modify child support upon a proper showing of a change in either the child's needs or the supporting parent's financial ability. *Moseley*, 279 S.C. at 351, 306 S.E.2d at 626. The party seeking the modification has the burden to show changed circumstances. *Miller*, 299 S.C. at 310, 384 S.E.2d at 716. This burden is increased where the child support award is based on a settlement agreement. *Townsend v. Townsend*, 356 S.C. 70, 74, 587 S.E.2d 118, 120 (Ct. App. 2003). However, changes within the contemplation of the parties at the time of the initial decree are not sufficient bases for the modification of a child support award. *Miller*, 299 S.C. at 310, 384 S.E.2d at 717. Further, general testimony

regarding increased expenses, without specific evidentiary support, is an insufficient showing of changed circumstances. *Thornton v. Thornton*, 294 S.C. 512, 516, 366 S.E.2d 37, 39 (Ct. App. 1988).

Husband testified generally about changed circumstances, but provided few concrete figures to support his claim. Husband also relied on expenses such as orthodontic bills and private school tuition which were likely anticipated at the time of the separation agreement and divorce decree.[3] This testimony alone does not provide sufficient proof of a change in the children's needs or circumstances to modify the previous child support order.

Additionally, Wife did not submit a financial declaration in the initial divorce proceeding. Therefore, in the present case, the family court faced further challenges in determining if Wife's current financial situation differed from her situation at the time of the divorce. Evidence was presented to show that Wife no longer had a house in Charleston as outlined in the divorce decree, but no further evidence of changed circumstances appears in the record.

Accordingly, this Court finds that Husband failed to prove changed circumstances and the record is insufficient to justify the modification of the child support award. Therefore, the family court's order awarding child support to Husband is reversed.

III. Evidence of Changed Circumstances

Wife asserts that the family court erred in allowing the presentation of evidence regarding changed circumstances not pled in the Husband's complaint. We disagree.

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP; *McCurry v. Keith***,**

[3] Husband filed the petition for child support just eight months after the order of divorce.

325 S.C. 441 ,447, 481 S.E.2d 166, 169 (Ct. App. 1997). If a party does not object to the evidence when presented at trial, the issue is considered tried by consent. *Simmons v. Tuomey Reg'l Med. Ctr.*, 330 S.C. 115, 120 n.2, 498 S.E.2d 408, 410 n.2 (Ct. App. 1998).

Wife consented to the presentation of the evidence regarding changed circumstances because she only objected to the testimony regarding college expenses for the oldest child. Wife did not object to any other testimony presented at trial. Accordingly, we affirm the family court's admission of testimony regarding changed circumstances.

IV. Retroactive Child Support

Wife contends that the family court erred in awarding child support retroactive to the filing of the petition for support. We agree.

The award of retroactive child support is incident to the award of general child support. Because we reverse the family court's award of child support, the award of retroactive child support does not need to be addressed.

V. Attorney's Fees

Wife contends that the family court erred in denying her claim for attorney's fees. We disagree.

South Carolina Code Ann. § 20-7-420(38) (Supp. 2004) authorizes the family court to award attorney's fees. The award of attorney's fees is left to the discretion of the trial judge and will only be disturbed upon a showing of abuse of discretion. *Ariail v. Ariail*, 295 S.C. 486, 489, 369 S.E.2d 146, 148 (Ct. App. 1988). In making this determination, the court should evaluate the requesting party's ability to pay, the parties' respective financial conditions, the effect of the award on each party's standard of living, and the beneficial results achieved. *Patel v. Patel*, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). Beneficial result alone is not dispositive of whether a party is entitled to attorney's fees. *Mazzone v. Miles*, 341 S.C. 203,214, 532 S.E.2d 890, 894 (Ct. App. 2000).

The family court did not make any specific findings as to the reasons for denial of the request for attorney's fees. Further, in light of the evidence in the record, we cannot conclude that either party is in a position to pay the other's attorney's fees. Accordingly, the family court did not abuse its discretion in denying Wife's claim for attorney's fees.

CONCLUSION

Based on the above reasoning, we reverse the court of appeals' decision dismissing Wife's appeal as untimely. We also reverse the family court's modification of child support and the award of retroactive child support. Finally, we affirm the admission of testimony regarding changed circumstances and the denial of wife's claim for attorney's fees.

MOORE, WALLER, and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jacqueline Mekler, Appellant.

Appeal From Orangeburg County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4035
Heard September 14, 2005 – Filed October 31, 2005
Withdrawn, Substituted, and Refiled December 15, 2005

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

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

Solicitor David Michael Pascoe, Jr., of St. Matthews, for Respondent.

HUFF, J.: In this criminal case, Jacqueline Mekler appeals following her conviction for murder. Mekler asserts the trial judge erred in (1) refusing to allow her to impeach one of the State's witnesses, the deceased's wife, with evidence that the witness expressed fear of the deceased after a domestic dispute when the witness denied she was ever afraid of the victim; (2) refusing to allow evidence appellant was aware of the deceased's prior act of violence against the wife and the wife's property, as this was relevant to appellant's claim of self-defense; and (3) refusing to instruct the jury on the law of involuntary manslaughter because appellant asserted a self-defense theory, where there was evidence appellant armed herself in self-defense but discharged the gun due to her reckless handling of the weapon. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

On the night of March 8, 2002, officers responded to a call at the home of Mekler after receiving a report that a man had been shot. When the first officer arrived, he found a man lying face down on the ground and observed two women standing near the porch of the home. The women approached him and one of them, Mekler, told the officer she "just shot the person who was lying on the ground." The victim, Phillip Bubba Spires (hereinafter Bubba), was transported to the hospital with gun shot wounds to the chest. The medical personnel lost Bubba's pulse on the way to the hospital and Bubba was later pronounced dead at the hospital. An autopsy revealed Bubba died from a single gunshot that caused numerous pellets to hit and enter his body, resulting in damage to vital organs. Deputy Richard Combs arrived on the scene and took a statement from Mekler.[1] Mekler told Deputy

[1]After the initial statement to the first officer on the scene, Mekler was advised of her rights before any further statements were

Combs that she had been sitting on her porch with Bubba's wife, Robette Spires, talking and drinking when Bubba pulled up in her yard in his truck. Bubba began screaming and yelling at Robette, asking why she was not at home and stating that she should have called him. Mekler told Bubba to leave several times. After a few minutes of "yelling back and forth," Bubba left in his truck. A few minutes later, Bubba returned on foot. This time, Bubba had a knife in his hand. Bubba came onto the porch and the screaming and yelling started again. Mekler went into her house and retrieved a sixteen-gauge shotgun. When she returned to the porch, Bubba still had a knife in his hand. Bubba continuously tried to get Robette to leave with him. Mekler told Bubba several times to leave or she would shoot him. Mekler was afraid Bubba was going to hurt Robette if Robette left with him. Mekler stated she did not remember pulling the trigger, nor the shotgun going off, and the next thing she knew, Bubba grabbed his chest and Robette said, "You shot him."

Deputy Combs also took a statement from Robette that night. Robette told him that she and Mekler had been talking and drinking on the front porch when Bubba pulled up in the yard in his truck. Bubba started yelling and screaming at her, "Why aren't you home? You should have called and told me where you were." Mekler told Bubba several times to leave. Bubba left a few minutes later and, a few minutes after that, returned on foot. When Bubba came back, he had a knife in his hand. Mekler, at that time, went into the house and retrieved a sixteen-gauge shotgun. Mekler told Bubba several times to leave or she would shoot him. Robette asked Bubba why he had the knife, and he stated "it's not for you, it's for the dog in case it tries to attack me." Robette did not think Mekler heard Bubba say that. Robette stated she believed that Mekler believed she was protecting Robette.

Detective Rhonda Bamberg testified that as she transported Mekler to the Orangeburg County Sheriff's Office, Mekler began to tell

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given by her, and there is no issue as to the voluntariness of any of her statements.

her about the incident. Mekler told the detective that she and Robette were drinking and talking when Bubba came up in his truck. Bubba "got out and began to carry on about why Robette was not home and why she didn't call." Mekler told Bubba he needed to calm down or leave. Bubba got in his truck and left. A little while later, Bubba returned, brandishing a knife. Mekler told Bubba he did not need a knife. Mekler grabbed her dog that was chained to the front porch. Bubba said the knife was for the dog. Mekler told Bubba that if he were to quiet down, the dog would stop. Mekler told Bubba to leave or she would shoot him. Mekler stated Bubba was a big man and she was afraid of him. Bubba would not leave. Mekler went into the house and came out again. "She brought the gun down and don't (sic) remember the shot, but Robette said, Jackie, you've shot him." Mekler said, "No, I didn't." Robette said, "Yes, you did." Mekler told Robette to go call 9-1-1. Mekler again stated that she was afraid of Bubba and that he would not leave.

Once at the Sheriff's Office, Mekler gave another statement, this time to Detective Rush. Mekler told the detective that she and Robette were sitting on her porch drinking and talking. One of Robette's daughters pulled into the yard and told Robette that Bubba had called and wanted Robette to call him when she got home. Thereafter, Bubba pulled up in his truck, got out and then began "screaming and crying at Robette." Bubba said, "Why are you doing this to me? Didn't they tell you to call me?" Robette said, "Yes," and began walking toward Bubba. Then Bubba started yelling at Robette saying "Why are you here? Why haven't you called me?" Mekler described Bubba as "loud and showing himself." Mekler stated she was afraid Bubba was going to hit Robette, and stated Bubba was "flailing around" and possibly hit his truck. Mekler walked down to Bubba and asked him to come sit with them and talk. Bubba kept yelling at Robette, and the two women tried to calm him. Bubba kept yelling and Mekler told him that if he did not calm down, he would have to leave because he could not act that way in her yard. Bubba replied, "this is my wife and I'll act any way I want." Robette told Bubba he could not "show out like that" in Mekler's yard. Bubba ran into the street and yelled that he was not in the yard and asked what Mekler was "going to do now." Mekler told

him she would call the police. Bubba continued to yell at them. Mekler told him she kept a gun and Bubba replied, "Bring it on." Bubba then got in his truck and left. Robette, who had gone back to the porch and sat down, stated that Bubba was expecting her to "go up there." Mekler advised Robette she should not go, but should give Bubba time to cool down. About five minutes later, Bubba walked into Mekler's yard and started yelling again. Mekler told Bubba he needed to go home. Mekler then went to her bedroom and got the shotgun, moving it to her living room, but did not take it outside. When she went back outside, Bubba started coming up the walk and Mekler's dog was "going crazy." Mekler told Bubba to stop because the dog would bite him. Mekler grabbed the dog, and that is when she saw a knife in Bubba's hand. Mekler told Bubba he could not come up there with a knife in his hand. Bubba stated the knife was for the dog. Mekler told him "You can't come on the porch with a knife in your hand like that." She told Bubba to leave again and that she would walk to the store and call the police. Mekler stated, however, that she was not going to leave to go to the store because she was afraid of what Bubba might do to Robette. Mekler further stated that she was really afraid for both Robette and herself. Mekler turned around to get the gun, but before she did, she told Bubba to leave. She then retrieved the gun and brought it out on the porch. Bubba was standing on the walk, but was not as close as he was when Mekler went into the house. Mekler stated, "He wouldn't leave, and I wasn't trying to shoot him, and I didn't mean for the gun to fire, but I did cock the gun, and I must have had my finger on the trigger. When the gun went off, it shocked me. Robette said, Jackie, you shot him. I said, no, I didn't. She said, yes, you did. And I said, there's no way." Robette again said that Bubba was shot and Mekler told her to go call 9-1-1.

The State presented the testimony of Robette Spires at the trial. Robette testified that she and Mekler were drinking alcohol on Mekler's front porch on the night in question. It was after dark when Bubba drove up to Mekler's house in his pick-up truck. Bubba got out of the truck and started hollering, wanting to know why she had not called him back. Robette stated Bubba "was crying, he was upset, it wasn't a violent, mean (sic)." He was asking why she had not called

him, why she was doing this, and why she would not come home. Bubba came into the yard but did not come onto the porch. Robette did not remember Bubba ever cursing, threatening or putting his hands on either her or Mekler. Robette did not remember at what point the knife came out, but she did remember Bubba saying it was for the dog. During his first trip to the house when Bubba was hollering and crying at Robette, Mekler started hollering back at Bubba telling him to calm down, and if he did so, he could join them for a drink. At one point Mekler told Bubba, "You can't be hollering here, you can't scream, you've got to go, I'm going to shoot you if you don't." Robette claimed she never had the chance to respond to Bubba's questions because when Bubba would scream, Mekler would scream. Bubba finally got in his truck and left, but a few minutes later, he came walking back up the street, apparently having left his truck at Robette's house. When he returned, Bubba was still crying and hollering, saying the same things as before. Robette testified she was embarrassed by Bubba's behavior and then irritated because she could not "get a word in between [Bubba and Mekler]." When Bubba came back the second time, the dog was chained to the porch and was barking. Bubba made it to the steps, but could come no further because the dog would have reached him. When Mekler saw the knife, she told Bubba to put it away. Bubba responded that the knife was for the dog. At that point, Robette claims she stood up and began walking away, toward her home. She did not remember seeing Mekler go inside to get the shotgun, but she remembered seeing her come out with the gun. Robette stated she was leaving because Bubba and Mekler were hollering and she had "had enough." She stated she did not think Mekler would use the shotgun. At the moment the shot was fired, Robette had stepped off the porch and was heading away and did not actually see Mekler shoot Bubba. Robette saw a flash of light over her shoulder and as she turned, Bubba said, "She shot me." Bubba began walking toward Robette. He told her he loved her, and then fell to the ground.

Mekler took the stand and testified in her own defense. She stated that on the night of the incident, she and Robette were on her porch talking when Bubba pulled into her yard, jumped out of his truck,

and began screaming and hollering at Robette. He was yelling, "Why aren't you home, why are you here, why do you keep doing this to me?" Robette walked down into the yard to talk to him, but Bubba continued to scream and yell. He started flailing around, and may have hit the truck. Mekler stated she became afraid Bubba was going to hit Robette. Mekler did not call the police because she did not have a phone, and she did not walk to the store to use the phone because she was not going to leave Robette "with [Bubba] in that state." At some point Bubba left, driving down the street. Robette and Mekler sat back down and Robette told Mekler Bubba had pulled into Robette's yard and that he was expecting Robette to come up there. Mekler told her not to go there yet, but to let him calm down, stating to Robette that she was scared for Robette to go up there. Robette then said she would not go up there. As they were sitting on the porch, Mekler's dog "Fuzzy" began to bark. Fuzzy was sitting in a chair and was chained to the porch. The dog got up and was "looking in that direction" barking when Robette said, "there's Bubba." Mekler looked and observed Bubba walking quickly into her yard, coming up the walk. As Bubba reached the steps, Fuzzy jumped down the steps and stopped Bubba's momentum. Mekler stepped down and grabbed Fuzzy saying to Bubba, "What are you doing? Have you lost your mind?" Bubba was still screaming and hollering at Robette, "You're going to come with me. Why are you still here?" Mekler told Bubba he needed to go home. Bubba would not back up any farther, so Mekler reached down to grab Fuzzy with her other hand. As she did, she noticed the knife in Bubba's hand. Mekler asked Bubba, "What is wrong with you? You pull a knife on me?" Bubba replied the knife was for the dog. Mekler then stated, "Bubba, the dog is between me and you." Bubba then said, "Well, she's my wife, and . . . I'm going to get her." Mekler replied, "No, you're not." She told Bubba to calm down and that he needed to go home. She told him, "You can't come on the porch like that, with a knife." Bubba said, "That's my wife and I will do what I want to with her." Mekler again told Bubba he would not, and that he needed to leave. Mekler handed the chain on Fuzzy to Robette. Robette asked Bubba why he pulled a knife, and at that point, Mekler stepped inside and got her shotgun. Mekler testified she retrieved the shotgun because there was no stopping Bubba, she had pleaded with him to leave, he

came back to her home on foot, she was scared, and he had told her there was nothing that was going to stop him from coming on the porch. When Mekler came back out with the shotgun, Bubba had stepped back about a foot. She had already told Bubba earlier that she kept a loaded gun, and he was still standing there, holding the knife. Mekler told him to "please go home." Bubba stated that he was not going anywhere, he was going to come up on the porch, and he was going to get Robette and did not mind going through Mekler to get her. Mekler stated she was really scared, and at some point, she cocked the gun. As she was cocking the gun, Bubba leaned to the right and the gun fired. Mekler stated she did not remember pulling the trigger. Robette said, "Jackie, you shot him." Mekler told her, "No, I didn't." Robette said, "Yes, you did." Mekler again replied, "No, I didn't." When Robette again stated that she had shot him, Mekler told Robette to call 9-1-1.

On cross-examination, the solicitor asked Mekler if she meant to shoot Bubba. Mekler responded that she "meant for [Bubba] to stop." When asked again if she meant to shoot him, Mekler stated, "I wanted to live." She further stated, "I would never want to shoot anybody." The solicitor again asked her if she meant to shoot Bubba. Mekler testified that she got the gun, she cocked the hammer, she wanted to live, and that she wanted Robette to live. The solicitor again asked Mekler whether she meant to shoot him or she did not mean to shoot him. Mekler replied that she was scared, that Bubba would not stop, that Bubba moved, "and then the gun fired." Mekler stated that when she advised Bubba she had a gun, she did not contemplate using it at that point, but was just trying to scare him. Neither did she contemplate using it when she went inside and moved it from her bedroom to a place near the front door. The solicitor asked Mekler why she pointed the gun at Bubba with the hammer cocked back and her finger on the trigger if she did not intend to shoot Bubba. Mekler stated she did not have the gun at shoulder level and did not have it pointed at him. Rather, she claimed she had the gun resting on her hip in order to cock the hammer back. When asked by the solicitor if she was "defending this case on the grounds that [she] had to kill him, Mekler replied, "Yes." The solicitor then stated, "you're telling me

that you didn't mean to shoot him, and that you had the gun down here?" Mekler replied that she was trying to cock the gun. The solicitor stated Mekler must have had her finger on the trigger and Mekler replied that her finger must have slipped "and got on the trigger," and that she did not remember pulling the trigger.

LAW/ANALYSIS

I. Failure to allow evidence to impeach Robette

Mekler first contends the trial judge erred in failing to allow her to impeach Robette, after Robette denied on the stand that she had ever been afraid of Bubba, with evidence Robette told a police officer during a prior dispute that she was afraid of Bubba and that Bubba had threatened to kill Robette. Mekler argues the evidence was relevant to the credibility of Robette and therefore the trial judge erroneously excluded the evidence. We disagree.

During defense counsel's cross-examination of Robette, he asked if it was her testimony that she was not afraid of Bubba the night of the shooting. Robette replied that she was not. She testified she was mad at him for hollering at her, but she was not scared. Counsel then asked Robette if she had been scared of Bubba before. Robette denied that she had ever been scared of him, claiming she had only been mad at him. At this point, the trial judge excused the jury and counsel informed the court he wished to inquire about an incident at Robette's home on December 29, 2001, about two months and nine days prior to this shooting incident. When the court inquired as to the relevance, counsel stated Robette had testified she was never afraid of Bubba, but he had a report that clearly stated that she was, and the issue was relevant to Robette's credibility. The court then allowed counsel to proffer the evidence. Robette testified in an in camera hearing that her mother had been the one to call the authorities the past December. Robette admitted she told the officer that Bubba had threatened to kill her, but denied telling him she was afraid for her life. She stated she had explained to the officer that she was angry because Bubba put a hole in her door. She stated Bubba was drunk at the time, but she was

not scared of him. When counsel began to read from a police report on the incident that Robette indicated she was frightened of Bubba, the court cut counsel off, telling him the issue was an ancillary issue that had nothing to do with the issues in the case.

Counsel again argued to the court that the issue went to Robette's credibility and asked to proffer the officer's testimony. Detective McCord then testified in camera, stating he remembered going to Robette's home on December 29, 2001. Robette told him that Bubba had threatened to kill her and that she was afraid. When Bubba returned to the home he was very boisterous and, using profanity, said he wanted Robette to come outside. At that point, Detective McCord placed Bubba under arrest for criminal domestic violence. Bubba was subsequently convicted as charged. The trial judge ruled it was a collateral issue, it could unduly lengthen the trial, and it might confuse the jury. He determined it had no bearing on any issue in the case at that time and refused admission of the evidence based on Rule 403, SCRE.[2] Robette's cross-examination resumed and she testified that Bubba was not vicious and was not "normally a violent person of any kind." She claimed that his beating on her door was the worst thing Bubba had ever done and it made her angry, but he was drunk at the time and he was not a violent person.

On appeal, Mekler contends the trial judge erred in excluding the impeachment evidence. She argues the evidence was admissible under Rule 608(c), SCRE, and because it was proper cross-examination under the rule, the trial judge abused his discretion in denying its admission. We disagree. First it must be noted that Rule 608(c) provides, "Bias, prejudice or any motive to misrepresent may be shown to impeach the

[2]This rule provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

witness either by examination of the witness or by evidence otherwise adduced." Here, Mekler did not proffer the evidence to show "bias, prejudice, or any motive to misrepresent" on the part of Robette. Rather, counsel continuously stated he was offering the evidence to generally attack Robette's credibility. Thus, Mekler cannot rely on Rule 608(c) to show the evidence was proper.

Further, we note case law supports our finding that the trial judge committed no error in denying the admission of this evidence. In State v. Beckham, 334 S.C. 302, 320-21, 513 S.E.2d 606, 615 (1999), appellant asserted on appeal that the trial judge erred in excluding impeachment evidence of certain phone calls conceivably made by a witness to a Myrtle Beach business after the witness testified that he had not been in contact with anyone from that business for a year or more prior to the trial. Appellant wanted to impeach the witness with these phone records. Our Supreme Court found no error in the exclusion of evidence of the telephone calls holding "[w]hen a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness." Id. at 321, 513 S.E.2d at 615. In the case at hand, because Robette denied she had ever been scared of Bubba, and because this was a matter collateral to the case in chief, there was no error in the trial judge's refusal to allow Mekler to introduce contradictory evidence to impeach Robette.

II. Refusal to allow evidence of appellant's knowledge of decedent's prior act of violence

Mekler next contends the trial judge erred in refusing to allow evidence that Mekler was aware of Bubba's prior act of violence against Robette and Robette's property, arguing the evidence was relevant to Mekler's claim of self-defense and defense of others. We agree.

During direct-examination, Mekler testified she knew of Bubba's reputation for peace and good order and that it was both good and bad. Counsel then asked Mekler whether she was aware of an incident that

occurred as a result of which Bubba was convicted of criminal domestic violence. Mekler testified that she was aware of it. On cross-examination, the solicitor questioned Mekler about the events of the night of the shooting. He asked Mekler why she did not simply go inside her home and lock her door during the incident with Bubba. Mekler responded, "because I knew he would beat in my door, too, and come in." When asked by the solicitor if locking the door and having the shotgun in the house would not have helped, Mekler stated it would not, because "a door would not stop him."

Following his redirect-examination of Mekler, defense counsel asked to proffer some testimony from Mekler regarding her specific knowledge of Bubba having broken the door in Robette's home. The trial judge indicated he would allow the proffer, but he would not let the evidence go before the jury because it was a collateral issue that would unduly lengthen the trial and was not necessary to any issue in the case. He noted he had allowed Mekler to testify that she was aware of Bubba's criminal domestic violence conviction, but he would not allow evidence of the details of the crime. Thereafter, counsel proffered testimony from Mekler that she first became aware of the criminal domestic violence incident involving Bubba and Robette when she heard Bubba "beating in [Robette's] door" from her house. She later learned Bubba had been drinking when he went to Robette's house, threatened Robette, and beat Robette's door until he broke through it with his fists. She became aware that Bubba was arrested for the incident and was later convicted. The trial judge stated, "I specifically decline to permit that testimony."

In State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), our Supreme Court found the trial judge committed reversible error by excluding testimony of a past violent act that was closely related in time and occasion to the homicide in that case. Specifically, Day, who was claiming self-defense in his prosecution for the murder of Renew, sought to introduce evidence that Renew had previously held a gun to the head of witness Szumowicz for eighteen hours as he drove around Aiken County, accusing Szumowicz of being involved with others in a drug trafficking scheme at his residence. Id. at 420, 535 S.E.2d at 436.

The trial judge ruled that specific instances of Renew's conduct were inadmissible, but allowed Szumowicz's opinion testimony as to whether Renew was a violent person. Id. The Supreme Court stated that "[i]n the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." Id. at 419-20, 535 S.E.2d at 436. The court noted that the prior act of violence against Szumowicz occurred only four months prior to Renew's death, and held the evidence was admissible to prove Day had a reasonable apprehension of violence from Renew, an essential element of his self-defense claim. Id. at 421, 535 S.E.2d at 437.

In the case at hand, the prior act of violence by Bubba against Robette occurred less than three months prior to Bubba's death and was so closely connected at point of time to indicate Bubba's state of mind at the time of the shooting. The prior incident of criminal domestic violence was also admissible to prove Mekler had a reasonable apprehension of great bodily harm from Bubba, an essential element of Mekler's claim of self-defense as well as her claim of defense of others.

III. Failure to charge the jury on the law of involuntary manslaughter

Mekler finally contends the trial judge erred in refusing to instruct the jury on involuntary manslaughter. We agree.

At the close of the evidence, defense counsel requested a jury instruction on involuntary manslaughter. The trial judge found there was a strong inference from Mekler's testimony that she "certainly intended to shoot [Bubba]." He noted Mekler said she was afraid of Bubba and was protecting herself and quoted Mekler as saying, "I meant to stop him." The trial judge thus determined involuntary

manslaughter would be an inappropriate charge based on what he "perceive[d] to be self-defense."

The law to be charged must be determined from the evidence presented at trial. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense. State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). Stated another way, if there is any evidence from which the jury could infer the defendant committed a lesser rather than a greater offense, the trial judge must charge the lesser-included offense. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004).

Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. Chatman, 336 S.C. at 152, 519 S.E.2d at 101. A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. Crosby, 355 S.C. at 52, 584 S.E.2d at 112; State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The negligent handling of a gun can support a finding of involuntary manslaughter. Burriss, 334 S.C. at 265, 513 S.E.2d at 109.

Here, there is evidence that would support a finding Mekler was lawfully armed in self-defense at the time of the fatal shooting. Further, there is ample evidence from which the jury could infer Mekler did not intentionally discharge the shotgun. Although Mekler stated on cross-examination that she had cocked the gun and "meant for [Bubba] to stop," she clearly testified on direct that, as she was cocking the gun, Bubba leaned to the right "and the gun fired." Mekler specifically testified she did not remember pulling the trigger. Mekler also consistently maintained in her statements to police that she did not remember pulling the trigger. In her detailed statement taken at the

Sheriff's Office, Mekler stated she was not trying to shoot Bubba, and did not mean for the gun to fire. She indicated when the gun went off, it shocked her. Mekler also consistently stated that when Robette told Mekler she had shot Bubba, Mekler replied in disbelief that she had not. She further testified during cross-examination that her finger must have slipped "and got on the trigger," and that she did not remember pulling the trigger.

In Crosby, the facts showed Crosby was involved in an incident with a group of people when the victim began charging at Crosby with his hand behind his back. Crosby indicated that he pulled out a gun, closed eyes and pulled the trigger, but he did not know he pulled the trigger. Crosby, 355 S.C. at 50, 584 S.E.2d at 111. Our Supreme Court found, in spite of Crosby's admission that he closed his eyes and pulled the trigger, Crosby immediately added that he did not even know that he pulled the trigger. The fact that there may have been evidence showing the shooting was intentional did not negate the other inferences that could be drawn from all the evidence. Thus, the court found Crosby was entitled to a jury charge on the law of involuntary manslaughter. Id. at 53, 584 S.E.2d at 112-13.

We likewise hold, given the evidence adduced at trial, Mekler was entitled to have the jury charged on the law of involuntary manslaughter. Because there is evidence from which the jury could have inferred Mekler did not intentionally discharge the shotgun, the trial judge erroneously concluded an involuntary manslaughter charge was precluded by Mekler's self-defense claim.

CONCLUSION

Based on the foregoing, we hold the trial judge erred in excluding testimony of the past violent act by Bubba that was closely related in time and occasion to the shooting death of Bubba. We further hold the trial judge erred in failing to instruct the jury on the law of involuntary manslaughter. For the foregoing reasons, Mekler's murder conviction is

REVERSED AND REMANDED.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy Jackson, Appellant,

v.

City of Abbeville, Riley's BP,
and Angela McCurry,
Defendants,
of whom City of Abbeville is Respondent.

Appeal From Abbeville County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4056
Submitted October 1, 2005 – Filed December 12, 2005

AFFIRMED

Fletcher N. Smith, Jr., of Greenville, for Appellant.

James D. Jolly, Jr., of Anderson, for Respondent.

KITTREDGE, J.: This is a civil action brought under the South Carolina Tort Claims Act for violation of the state constitution, malicious

prosecution and false arrest. Timothy Jackson appeals from an order of the circuit court granting the City of Abbeville's (City) motion for summary judgment and denying Jackson's motion for summary judgment. At issue is whether a City police officer had probable cause to arrest Jackson at a convenience store in Abbeville on February 22, 1999. We hold the officer had probable cause to arrest Jackson and affirm.

FACTS

On February, 22, 1999, Jackson entered Riley's BP, a convenience store located in Abbeville, South Carolina, and asked the attendant whether he could put up a flyer in the store for a party he was having at his club. The attendant said he could not. A video surveillance tape from the store indicates that Jackson became enraged, accusing the attendant of racism. She asked Jackson to leave the premises. Jackson refused to leave, and the attendant called the police.

When the officer arrived, Jackson repeatedly interrupted the officer while he was attempting to find out what happened from the attendant. The officer told Jackson to be quiet several times, but Jackson refused to do so. The attendant again told Jackson to leave the premises. When Jackson refused to leave, the officer put Jackson on trespass notice. Jackson continued to interrupt. The officer told Jackson to be quiet or he would be arrested. Jackson ignored the officer's repeated demands, and the officer attempted to place him under arrest. A scuffle ensued as Jackson resisted and backup was summoned to effect the arrest.

After being arrested and taken to jail, Jackson was charged with disorderly conduct and resisting arrest. Jackson was not charged with trespass after notice. The municipal judge dismissed the charges.[1]

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[1] The record is not clear as to the basis of the dismissal of the charges in municipal court. According to the City's brief, the disorderly conduct charge was dismissed because Jackson's "actions did not rise to the level of 'fighting words' as required by Houston v. Hill, 482 U.S. 451 (1987) and State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991)." The resisting arrest charge was also dismissed, apparently on the belief that the dismissal of the

Jackson sued the City of Abbeville[2] under the South Carolina Tort Claims Act[3] for: (1) violation of the South Carolina Constitution, (2) malicious prosecution, and (3) false arrest. Both sides moved for summary judgment. After a hearing, the circuit court granted the City's motion for summary judgment and denied Jackson's motion. This appeal followed.

STANDARD OF REVIEW

Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002).

LAW/ANALYSIS

An essential element in each of Jackson's causes of action is the lack of probable cause to arrest him.[4] The dispositive issue before us is whether the

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underlying charge precluded a stand-alone prosecution for resisting arrest. The present uncertainty as to the reasons why the charges against Jackson were dismissed does not impact this appeal, because the City—for purposes of its summary judgment motion—assumed a lack of probable cause concerning the charged offenses.

[2] Riley's BP and Angela McCurry have been dismissed from the case.

[3] S.C. Code Ann. §§ 15-78-10 to -200 (2005).

[4] Jackson predicated his constitutional violation claim on the lack of probable cause. His false imprisonment claim also requires lack of probable cause. See Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999) ("An action for false imprisonment may not be maintained where the plaintiff was arrested by lawful authority . . . [and] [t]he fundamental issue in determining the lawfulness of an arrest is whether there was 'probable cause' to make the arrest."). Finally, a malicious prosecution action fails if the plaintiff cannot show malice and lack of

"probable cause to arrest" determination is confined to the actual charges or whether consideration of an uncharged offense is appropriate. The City concedes for purposes of this appeal the absence of probable cause to arrest Jackson for disorderly conduct and the related offense of resisting arrest. The City contends, however, that it may—to defeat Jackson's claims—properly rely on the presence of probable cause in connection with an uncharged offense. We hold that the determination of "probable cause to arrest" for the purpose of Jackson's tort claims may properly include consideration of an uncharged offense.

The uncharged offense for which the City asserts probable cause existed is trespass after notice. Trespass after notice is a misdemeanor criminal offense prohibited by section 16-11-620 of the South Carolina Code (Supp. 1998). "Statutory criminal trespass involves . . . the failure to leave a dwelling house, place of business or premises of another after having been requested to leave." State v. Cross, 323 S.C. 41, 43, 448 S.E.2d 569, 570 (Ct. App. 1994). The City has an ordinance patterned after section 16-11-620. A police officer may, without a warrant, arrest a person who commits trespass after notice—or any misdemeanor—in the officer's presence. See S.C. Code Ann. § 17-13-30 (1985); State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974).

Jackson has the burden of demonstrating lack of probable cause. Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965). Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983). "'Probable cause' is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). Probable cause is

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probable cause. Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965); see also Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986) (listing the elements of malicious prosecution, including "want of probable cause").

determined as of the time of the arrest, based on facts and circumstances—objectively measured—known to the arresting officer. The determination of probable cause is not an academic exercise in hindsight. George, 323 S.C. at 509, 476 S.E.2d at 911; Eaves v. Broad River Elec. Co-op., Inc., 277 S.C. 475, 478, 289 S.E.2d 414, 415-16 (1982); State v. Goodwin, 351 S.C. 105, 110, 567 S.E.2d 912, 914 (Ct. App. 2002); State v. Robinson, 335 S.C. 620, 634, 518 S.E.2d 269, 276-77 (Ct. App. 1999); 5 Am. Jur. 2d Arrest § 40; 6A C.J.S. Arrest § 25 (2004). "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Horton v. California, 496 U.S. 128, 138 (1990).

Concerning the narrow issue before us, we find no South Carolina case directly on point, but we find the reasoning of three cases persuasive.

The first case is State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999). There, police officers responded to a call and found an "escalating altercation" between Tyndall and his father. Id. at 12, 518 S.E.2d at 280. The father asked Tyndall to leave the house. Id. The officers told Tyndall that if he did not comply he would be arrested for trespass after notice. Id. at 12-13, 518 S.E.2d at 280. Tyndall refused to leave, and when the officers attempted to arrest him, he became belligerent and attacked the officers. Id. at 13, 518 S.E.2d at 280. Tyndall was charged with multiple offenses, but not trespass after notice. He was convicted of two counts of assault and battery with intent to kill and resisting arrest.

Tyndall appealed from the trial court's refusal to dismiss the resisting arrest charge because "he was never arrested or prosecuted for trespass after notice . . . ." Tyndall, 336 S.C. at 14, 518 S.E.2d at 281. His specific contention was "that[] because no judicial determination was made as to the officers' probable cause to arrest him for trespass after notice, 'the actions taken by the officers were absent probable cause . . . .'" Id. at 15, 518 S.E.2d at 282. This court rejected Tyndall's argument and found as a matter of law the existence of probable cause to arrest for the uncharged offense of trespass after notice: "Because Tyndall committed this crime [trespass after notice in violation of section 16-11-620] in the presence of the police officers, they had the power and authority to arrest Tyndall without a warrant. There was no

requirement for a judicial determination as to probable cause to arrest for trespass after notice." Id. at 16, 518 S.E.2d at 282.

The second case is Ruff v. Eckerd Drugs, Inc., 265 S.C. 563, 220 S.E.2d 649 (1975). Ruff was approached while leaving an Eckerds Drug Store by the store's manager and accused of shoplifting. An altercation occurred when the manager attempted to make a citizen's arrest. Id. at 566, 220 S.E.2d at 650. Ruff was charged with simple assault and disorderly conduct. He was convicted on the assault charge, but the disorderly conduct charge was dismissed. Because of the dismissal, Ruff filed an action for malicious prosecution. Id. Ruff prevailed at trial, but lost on appeal. Our supreme court's analysis in rejecting Ruff's claim has application in the case before us.

The salient portions of the Ruff analysis include the observation that one "may not maintain an action for malicious prosecution because he was charged with the wrong offense." Id. at 567, 220 S.E.2d at 651. The court further noted:

> The fact [Ruff] was discharged by the magistrate on the charge of disorderly conduct is not conclusive on the question of probable cause; that is, if it appears affirmatively from the facts [that Ruff] was guilty of a misdemeanor, although one which contains different elements, there still would not be an absence of probable cause.

Id. at 568, 220 S.E.2d at 651.

The court concluded by finding that the drugstore manager was "in possession of knowledge of the existence of such facts and circumstances as would excite the belief in a reasonable mind that [Ruff] had committed a crime." Id. at 568, 220 S.E.2d at 652.

The third case is State v. Freiburger, Op. No. 26042 (S.C. Sup. Ct. filed Sept. 26, 2005) (Shearouse Adv. Sh. No. 37 at 26). Freiburger was hitchhiking when he was stopped by a Tennessee state trooper. The trooper

patted Freiburger down prior to placing him in the patrol car. The pat-down yielded a pistol, and Freiburger was arrested for "carrying arms," but not hitchhiking. Id. at 27. The pistol was traced to a homicide in Columbia, South Carolina. Id. at 27-28.

At the murder trial in South Carolina, Freiburger unsuccessfully challenged the admissibility of the pistol seized in Tennessee—the murder weapon—on several grounds. The relevant ground for our purposes is Freiburger's claim that search was illegal because he was not charged with hitchhiking, and hence probable cause was lacking. Our supreme court rejected this argument, noting that "the fact Freiburger was not ultimately arrested for hitchhiking is not dispositive." Id. at 30. The Freiburger court held that "an officer's 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause . . . .'" Id. (quoting Devenpeck v. Alford, 125 S.Ct. 588, 594 (2004) (repeating the settled principle that "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action'"); Whren v. United States, 517 U.S. 806, 813 (1996) (quoted in Devenpeck)).

We find the reasoning in Tyndall, Ruff, and Freiburger leads to the conclusion that it is permissible to rely on an uncharged offense to establish probable cause. We believe this legal principle applies in a false imprisonment or malicious prosecution claim and holds true here although Jackson was not convicted of a crime. As previously noted, in the context of a tort action, Jackson has the burden of proving lack of probable cause. Although there was no finding of probable cause—as to the offense of trespass after notice—in the underlying criminal case, such a judicial determination is not required. Tyndall, 336 S.C. at 16, 518 S.E.2d at 282.

We now turn to the factual question presented—did the police officer have probable cause to arrest Jackson for the offense of trespass after notice? Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion. Parrott, 246 S.C. at 323, 143 S.E.2d at 609. We have carefully reviewed the record in the light most favorable to Jackson and

conclude that, as a matter of law, the facts known to the officer "would induce an ordinarily prudent and cautious man, under the circumstances, to believe" that Jackson had committed the offense of trespass after notice. Jones, 301 S.C. at 65, 389 S.E.2d at 663. Jackson was put on notice to leave the premises, and he refused to do so. The fact that Jackson was not charged with trespass after notice is immaterial. Since the law sanctions the City's reliance on the uncharged offense of trespass after notice—and concomitantly the presence of probable cause—the circuit court properly granted summary judgment to the City.

CONCLUSION

We hold, to the exacting summary judgment standard, that the City police officer had probable cause to arrest Jackson for trespass after notice, an uncharged offense. We further hold that the City's reliance on the uncharged offense is sufficient to defeat Jackson's claims. Thus, summary judgment was properly granted for the City on all causes of action.[5]

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.

[5] We need not address the City's alternative basis for disposing of the malicious prosecution claim.