OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14

April 10, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nationwide Mutual Insurance Company, Petitioner,

v.

Kimberly Erwood, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 26305
Heard November 14, 2006 – Filed April 9, 2007

AFFIRMED AS MODIFIED

J. R. Murphy and Adam J. Neil, both of Murphy & Grantland, of Columbia, for Petitioner.

James C. Cothran, Jr. and Thomas Barksdale Cabler, both of Spartanburg, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review a decision of the Court of Appeals holding invalid, as against public policy, a provision in an automobile insurance policy purporting to limit the portability of basic uninsured motorist (UM) coverage. Nationwide Mut. Ins. Co. v. Erwood, 364 S.C. 1, 611 S.E.2d 319 (Ct. App. 2005). We affirm.

FACTS

Erwood was a passenger on an uninsured motorcycle owned and driven by her husband when he had an accident. Erwood's husband was at-fault in the accident. Erwood owned an automobile insured by Nationwide under a policy providing $15,000 in UM coverage. She sought to recover under the UM provision of her Nationwide policy, but Nationwide denied her claim.

Nationwide brought this declaratory judgment action, and the circuit court granted it summary judgment. On appeal, the Court of Appeals reversed, citing Burgess v. Nationwide Mut Ins. Co., 361 S.C. 196, 603 S.E.2d 861 (Ct. App. 2004) *reversed* Op. No. 26304 (S.C. Sup. Ct. filed April 9, 2007). Although we do not find Burgess, which concerned a policy limitation on the portability of underinsured (UIM) coverage, controls this case, we affirm the result reached by the Court of Appeals here.

ISSUE

> Whether an automobile insurance policy limiting basic UM coverage is void as against public policy?

ANALYSIS

Erwood was injured while a passenger on an uninsured motorcycle owned by her spouse. Nationwide relied upon this policy provision to deny Erwood's claim:

> 3. If a vehicle **owned by you or a relative** is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall:

a) be primary if the involved vehicle is your auto described on this policy; or

b) be **excess** if the involved vehicle **is not your auto described on this policy**. The amount of coverage applicable under this policy **shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident**.

(emphasis supplied).

The Court of Appeals held, as it had in Burgess, that UM coverage is "personal and portable," that is, it follows the insured and not the vehicle. We agree. See e.g., Hogan v. Home Ins. Co., 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973) ("unlike the provisions relative to liability coverage, the statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his or her household at all times and without regard to the activity in which they were engaged at the time. Such coverage is nowhere limited by the statute to the use of the insured vehicle").

The court also held that S.C. Code Ann. § 38-77-160 (2002) does not permit an automobile insurance company to exclude or restrict basic UM coverage. Unlike the Court of Appeals, however, we conclude that the controlling statute is not § 38-77-160, which covers stacking claims,[1] but rather the statute referred to in Hogan, which is now found at S.C. Code Ann. § 38-77-150 (Supp. 2002). Section 38-77-150 mandates UM coverage in all automobile insurance policies. We find that the mandatory nature of this coverage distinguishes it from the voluntary UIM coverage at issue in Burgess, and that pubic policy requires that basic UM coverage be afforded to Erwood even when she is a passenger on her spouse's uninsured

[1] Since Erwood is not seeking to stack insurance coverage, we are not concerned by her status as a Class I insured.

motorcycle.[2] Compare State Farm Mut Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) (insurance policy endorsement providing for set-off of worker's compensation benefits for UIM valid where UM set-off is not, because UIM coverage is voluntary).

CONCLUSION

We affirm, as modified, the Court of Appeals' decision holding that Erwood is entitled to collect basic UM benefits under her Nationwide policy.

Affirmed as Modified.

MOORE and WALLER, JJ., concur. TOAL, C.J., and BURNETT, J., dissenting in separate opinions.

[2] We do not decide whether basic UM coverage is universal, such that the owner of an uninsured vehicle involved in the accident would be entitled to basic UM coverage from an at-home vehicle. We are troubled by the thought that a person operating a vehicle without insurance in violation of the Motor Vehicle Financial Responsibility Act would be allowed to collect benefits from the insurer of another of the owner/operator's vehicles.

CHIEF JUSTICE TOAL: I respectfully dissent. I would hold that uninsured motorist coverage is not "portable" for a party who is injured while operating or while a passenger of a vehicle of which the party would be an insured had he or she purchased insurance coverage.

Just as it does in the context of underinsured motorist coverage, S.C. Code Ann. § 38-77-160 (2002) contains a limitation on just how "personal and portable" uninsured motorist coverage can be. We recognized this limitation and made good use of it in deciding that an insured may not apply underinsured coverage from an insurance policy covering one vehicle to a separate policy, covering a separate vehicle, under which the insured declined the insurance company's offer of such coverage. *See Burgess v. Nationwide Mut. Ins. Co.*, Op. No. 26304 (S.C. Sup. Ct. filed April 9, 2007). In reaching that decision, we noted that "[u]pholding this limit on portability encourages persons to purchase UIM insurance on all their vehicles." *Id*. Because this situation is no different, and because the public policy concerns are identical, I see no need to retreat from that holding in the instant case.[3]

I think the majority rightly expresses concern at the thought that under similar logic to that used in the court of appeals' decision, an owner of an uninsured vehicle involved in an accident could be entitled to use uninsured motorist coverage from a separate vehicle to recover for his or her injuries. Undeniably, this result would be absurd. Instead, the owner of multiple vehicles who chooses to insure only one with uninsured and underinsured motorist coverage ought to be precluded from recovering basic UM and UIM limits on any of his or her vehicles for which he or she has not purchased this coverage. In my view, this is the precise concern that drove us to hold as we did in *Burgess*, and by holding as the majority does in the instant case, we chip away at that foundation.

Although I appreciate the view expressed by my brother Justice Burnett in dissent, I believe it is far too late in the day to argue that the language of an

[3] In reaching this conclusion, I note that S.C. Code Ann. § 38-77-30(7) (2002) defines an insured as both the named insured and, if a resident of the same household, the spouse of the named insured.

insurance contract is the end of the inquiry in these cases. *See Charleston County Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 6, 437 S.E.2d 6, 8 (1993) (noting that statutory provisions relating to insurance contracts have long been held by this Court to be part of these contracts). Because the court of appeals found a provision of the contract in the instant case was contrary to public policy and therefore void, we must necessarily proceed beyond the terms of the contract in our analysis.

For the reasons I have outlined, I would reverse the court of appeals' decision and find that Respondent is not entitled to basic uninsured motorist coverage from her automobile insured by Nationwide.

BURNETT, J.: I respectfully dissent. In my opinion, it is unnecessary to address either S.C. Code Ann. § 38-77-160 (2002) or the personal and portable nature of UM coverage for the language of the insurance contract itself provides no coverage for Erwood.

The construction of an agreement is a matter of contract law. McDuffie v. McDuffie, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993). The primary objective in construing a contract is to ascertain and give effect to the intention of the parties. Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). The Court must first look at the language of the contract in order to determine the intention of the parties. Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Blakely v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976).

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." C.A.N. Enter., Inc. v. South Carolina Health and Human Serv. Fin. Comm'n, 296 S.C. 373, 377-378, 373 S.E.2d 584, 586 (1988) (quoting Warner v. Weader, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983)). "[I]t is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties." Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975).

Erwood entered into an insurance contract with Nationwide. The insurance contract applied to any vehicle owned by her or her relative and contemplated the involvement or ownership of an uninsured vehicle. As noted by the majority, the pertinent portion of Erwood's insurance contract states:

> 3. If a vehicle owned by you or a relative is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall:

a) be primary if the involved vehicle is your auto described on this policy; or

b) be excess if the involved vehicle is not your auto described on this policy. The amount of coverage applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.

Subsection (a) of the policy is inapplicable because the involved vehicle was uninsured. Subsection (b), therefore, applies to limit the amount of coverage available. The amount of coverage applicable under subsection (b) is the lesser of coverage limits under Erwood's policy or the coverage limits on the vehicle involved in the accident. The vehicle involved in the accident was uninsured. Thus, the clear and unambiguous language of this provision does not provide any coverage for Erwood. When the language of a policy is "plain, unambiguous, and capable of only one reasonable interpretation," it must be given full force and effect. See Blakely, 266 S.C. at 72, 221 S.E.2d at 769. Accordingly, I would reverse the decision of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina Water Service, Inc., Petitioner,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Town of Lexington, Petitioner,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Carolina Water Service, Inc., Petitioner,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Town of Lexington, Petitioner,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Town of Lexington, Petitioner,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

Lexington County Joint Municipal Water and Sewer Commission, Condemnor, Respondent,

v.

Carolina Water Service, Inc., Utilities, Inc., Landowners, Petitioners,

Town of Lexington, Other Condemnee, Petitioners.

Unknown Claimants. Carolina Water Service, Inc., Petitioner,

v.

Lexington County Joint Municipal Water and Sewer Commission, Respondent.

ON WRIT OF CERTIORARI

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26306
Submitted April 3, 2007 – Filed April 9, 2007

REVERSED

Clifford O. Koon, Jr., of Moses Koon & Brackett, PC, of Columbia; John M. S. Hoefer, Paige J. Gossett, and K. Chad Burgess, all of Willoughby & Hoefer, PA, of Columbia; and Timothy E. Madden, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Petitioners.

Joel W. Collins, Jr., and William A. Bryan, Jr., both of Collins & Lacy, of Columbia; and Nikki G. Setzler, of Setzler & Scott, PA, of W. Columbia, for Respondents.

PER CURIAM: This case arises out of a petition for a writ of certiorari to review the Court of Appeals' decision in Carolina Water Svc. Inc. v. Lexington County Joint Municipal Water and Sewer Comm'n, 367 S.C. 141, 625 S.E.2d 227 (2006). We hereby grant the petition, dispense with further briefing, and reverse the Court of Appeals' decision.

Respondent instituted a condemnation action against petitioners, and petitioners filed an action challenging respondent's right to condemn the property. The circuit court issued an order staying both the condemnation action and petitioners' challenge action pending the resolution of a related case before the South Carolina Administrative Law Court. After the Administrative Law Judge issued a decision, the circuit court lifted the stay of petitioners' action. Petitioners filed an appeal with the Court of Appeals. Relying on Hiott v. Contracting Svcs., 276 S.C. 632, 281 S.E.2d 224 (1981), the Court of Appeals held an order lifting a stay is immediately appealable.

Subsequently, this Court decided Edwards v. SunCom, 369 S.C. 91, 631 S.E.2d 529 (2006), in which we held an order granting a stay was not immediately appealable. Additionally, we explicitly overruled Hiott v. Contracting Svcs., supra, and Carolina Water Svc., supra, to the extent they were inconsistent with Edwards, supra.

Accordingly, we hereby reverse the Court of Appeals' decision in this matter since the order on appeal was not immediately appealable.

REVERSED.

MOORE, A.C.J., WALLER, BURNETT and PLEICONES, JJ., concur. TOAL, C.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Connor Holdings, LLC and
MAL Entertainment, Inc., Appellants,

v.

Charles Cousins, in his capacity
as Director of Planning of the
Town of Hilton Head Island,
and Island Cabaret, Inc., Respondents.

Appeal From Beaufort County
Ralph E. Tupper, Special Referee

Opinion No. 26307
Heard March 8, 2007 – Filed April 9, 2007

AFFIRMED

John P. Seibels, Jr., of Seibels Law Firm, P.A., of Charleston, for Appellants.

Gregory M. Alford, of Alford Wilkins & Strickroth, P.C., of Hilton Head Island, for Respondent Charles Cousins.

Bert G. Utsey, III, and Grahame E. Holmes, both of Peters, Murdaugh, Parker, Eltzroth and Detrick, P.A. of Walterboro, for Respondent Island Cabaret, Inc.

JUSTICE BURNETT: Connor Holdings, LLC and MAL Entertainment, Inc. (collectively Appellants) appeal the dismissal of their action against Charles Cousins, in his capacity as Director of Planning of the Town of Hilton Head Island, and Island Cabaret, Inc. We certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR, and we affirm.

FACTUAL/PROCEDURAL BACKGROUND

Connor Holdings currently owns a commercial building located at #1 Dunnagan's Alley in the Town of Hilton Head Island (Town). Connor Holdings leases the building to MAL Entertainment, which operates an adult entertainment business. In August and September 2002, MAL Entertainment filed a written complaint with Cousins in accordance with Town's Land Management Ordinance (LMO) § 16-8-103(C). MAL Entertainment asked Cousins to investigate whether Island Cabaret had a valid special exception to operate an adult entertainment business at 130 Arrow Road in the Town and further asked Cousins to prevent Island Cabaret from operating an adult entertainment business until the necessary special exception was obtained.

When Cousins failed to respond to MAL Entertainment's complaint, MAL Entertainment and Connor Holdings commenced this action against Cousins and Island Cabaret. Appellants sought an injunction against Island Cabaret from establishing or reestablishing an adult entertainment use at 130 Arrow Road until Island Cabaret received a valid special exception as required by the LMO. They also sought a writ of mandamus requiring Cousins to exercise his authority in accordance with the LMO as it related to Island Cabaret's establishment and operation of an adult entertainment business.

After a hearing on the matter, the special referee found Connor Holdings and MAL Entertainment lacked standing and failed to exhaust their administrative remedies. He also determined Cousins properly complied with the LMO and properly construed the LMO to find Island Cabaret had a valid special exception. The special referee granted summary judgment in favor of Cousins and Island Cabaret.

ISSUE

Did the special referee err in granting summary judgment to Cousins and Island Cabaret on the ground Appellants lacked standing?

STANDARD OF REVIEW

A lower court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the lower court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

LAW/ANALYSIS

Appellants argue the special referee erred in finding they lacked standing under LMO § 16-8-105. We disagree.

Standing to sue is a fundamental requirement in instituting an action. Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). LMO § 16-8-105 provides:

> An adjacent or neighboring property owner who would be specially damaged by any violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration,

> conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure or land. This is in addition to the right of the Town to bring an enforcement action.

LMO § 16-8-105 plainly gives an adjacent or neighboring property owner the right to bring an enforcement action when the property owner is specially damaged by certain violations of the LMO. See Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 576, 614 S.E.2d 619, 622 (2005) ("The main factor in determining whether a statute creates a private cause of action is legislative intent.").

Connor Holdings owns the property located at #1 Dunnagan's Alley and MAL Entertainment is its tenant. Therefore, MAL Entertainment, as a tenant, lacks standing under LMO § 16-8-105 to pursue this enforcement action.

As a neighboring property owner, Connor Holdings may pursue this action if it is specially damaged. Special damages in a zoning enforcement action generally are the diminution in the value of the plaintiff's property due to the violating use. See Momeier v. John McAlister, Inc., 203 S.C. 353, 359, 27 S.E.2d 504, 511 (1943) (finding a material depreciation in the value of the plaintiff's property constituted special damages in a zoning enforcement case); Bell v. Bennett, 307 S.C. 286, 295, 414 S.E.2d 786, 791-92 (Ct. App. 1992); (finding the master-in-equity properly dismissed defendant's claim that plaintiff failed to comply with a zoning ordinance because defendant failed to plead or prove his property value was diminished by plaintiff's violating use). Connor Holdings, however, does not allege a diminution in the value of its property. Rather, Connor Holdings alleges, in an affidavit, its special damages include adverse affects to its economic and property interests and a transformation of its adult entertainment use from conforming to nonconforming due to Island Cabaret's operation.

Although this Court has not addressed whether a loss in profits due to competition constitutes special damages, the theory has been consistently rejected if increased competition is the sole basis for special damages. See generally 4 Rathkopf's The Law of Zoning and Planning § 63.34 (4th ed.

2005) ("[G]enerally, persons whose only complaint is that the rezoning or grant of special permit or variance would create competition with them in the conduct of their business have been held not to have standing to litigate the validity of the zoning action."); 1 Am.Jur. Proof of Facts 3d 495 § 7 (1988) (noting an owner of commercial property generally does not have standing if "special damages amount to a loss of business due to the position of the violating use as a competing business," but commercial property owner may be specially damaged if he "allege[s] adverse impact on his business other than by increased competition"). Yet, Connor Holdings asserts the loss of profits from increased competition in conjunction with the change of its use from conforming to nonconforming constitutes special damages based on Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082 (Fla. 1978).

In Skaggs-Albertson's, an owner of a liquor store objected to another liquor store's violation of the zoning regulations. The Florida Supreme Court acknowledged the general rule that "loss of business from a potential competitor ordinarily cannot provide the existing proprietor with the requisite standing." 363 So.2d at 1090. The Court then noted, although other businesses were subject to regulation, the alcoholic beverage industry was subject to stringent government regulation. The Court recognized the regulations restricted the number and proximity of liquor stores and the Court distinguished a liquor license, which is a form of property, from other types of licenses, which are not property. *Id.* Due to the unique regulation of the alcoholic beverage industry, the Court found the liquor store owner had standing on the basis of business competition. *Id.*

Connor Holdings' alleged special damages are distinguishable from those in Skaggs-Albertson's. Although Connor Holdings is subject to more regulations under the LMO if its use is nonconforming, Connor Holdings is not subject to the same type of stringent regulations as the liquor store owner in Skaggs-Albertson's. In addition, Connor Holdings has failed to prove any adverse impact on its economic interests other than due to increased competition or to its property interests. We conclude Connor Holdings lacks standing to pursue this action because it failed to plead or prove any special damages. Rule 9(g), SCRCP ("When items of special damage are claimed, they shall be specifically stated."); Sheek v. Lee, 289 S.C. 327, 329, 345

S.E.2d 496, 497 (1986) ("Special damages must be alleged in the complaint to avoid surprise to the other party.").

CONCLUSION

We affirm the special referee's dismissal of the action based on Appellants' lack of standing. Based on the foregoing, we need not address Appellants' remaining issues on appeal. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

AFFIRMED.

MOORE and PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: I concur in the result reached by the majority. I write separately, however, to address two curiosities in this case on the issue of standing.

In the federal courts, the requirements for what is commonly termed as "constitutional standing" have been relatively long-established. These requirements provide that in order to maintain a cause of action, (1) the plaintiff must have suffered an invasion of a legally protected interest (an "injury in fact") which is concrete and particularized, and actual or imminent; (2) there must be a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains; and (3) it must be likely that the plaintiff's injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). We have used these boundaries of federal constitutional standing to outline the requirements of the minimum a plaintiff must show in order to bring an action in a South Carolina court. *E.g., Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing *Lujan*, 504 U.S. at 559-61).

I find the land management ordinance in this case interesting in two regards. First, I would interpret the ordinance's requirement that a neighboring landowner either sustain or be in danger of sustaining special damages as not bearing on the issue of standing. Instead, I would hold that the requirement of special damages goes to the substantive adequacy of the neighbor's claim. The federal courts have adopted a rule providing that when a statutory limitation is not expressly characterized as jurisdictional, courts should treat the restriction as non-jurisdictional in character. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, __, 126 S.Ct. 1235, 1245 (2006). I would follow their lead. Holding otherwise would require the neighbor in the instant case to effectively prove his case before he can go to court.

But this distinction reveals the second curiosity. In essence, the land management ordinance at issue in this case authorizes a neighboring property owner to bring a lawsuit to prevent any action which may inflict upon him "special damages." Failing to see how this ordinance does anything other

than repeat the constitutional standing requirement of an "injury in fact," I would resolve the case on those grounds alone.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Rita Greenwood Bixby, Respondent.

Appeal From Abbeville County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 26308
Heard December 7, 2006 – Filed April 9, 2007

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for appellant.

Jeffrey P. Bloom, of Columbia; and Joseph Collins Smithdeal, of Ayers, Smithdeal, & Bettis, PC, of Greenwood, for respondent.

JUSTICE MOORE: On December 8, 2003, Abbeville County Deputy Sheriff Danny Wilson and South Carolina State Constable Donnie

Ouzts were allegedly murdered by respondent's husband and son.[1] The murders culminated from a dispute between respondent and her husband and the Department of Transportation in its attempt to seize a portion of their property for a road-widening project. Respondent, who was not present at the scene of the murders, was indicted for misprision of a felony, criminal conspiracy, and two counts of accessory before the fact of murder.[2]

The State served notice of its intent to seek the death penalty on the accessory charges. Respondent moved to dismiss the notice of intent to seek the death penalty and to declare her ineligible for the death penalty. After a hearing, the trial judge entered an order stating that to notice respondent with the death penalty presupposes that she faces a charge of murder, which she does not. He found respondent ineligible for the death penalty and granted the motion to dismiss the State's notice of intent. The appeal from that decision follows and we affirm.

ISSUE

> Did the lower court err by finding respondent ineligible for the death penalty under South Carolina law because she was merely charged with accessory before the fact of murder?

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[1]Respondent's son, Steven Bixby, was convicted of murder and was subsequently sentenced to death on February 21, 2007.

[2]The elements that must concur to justify the conviction of one as an accessory before the fact are: (1) that the defendant advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) that the defendant was not present when the offense was committed; and (3) that the principal committed the crime. State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993).

DISCUSSION

Respondent was charged with accessory before the fact to the murders of the officers pursuant to S.C. Code Ann. § 16-1-40 (2003), which states:

> A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.

The punishment prescribed for the principal felon, *i.e.* for murder, is that a person who is convicted of or pleads guilty to murder must be punished by death, by life imprisonment, or by a mandatory minimum imprisonment term of thirty years. S.C. Code Ann. § 16-3-20(A) (2003). Therefore, a plain reading of §16-3-20(A) and §16-1-40 indicates that one who is charged with accessory before the fact to murder is clearly subject to the punishments of life imprisonment or a mandatory minimum imprisonment term of thirty years because these are the punishments rendered when one is found guilty of murder.[3] However, respondent's eligibility for the death penalty is not so clear. A review of § 16-3-20 is necessary to determine her eligibility.

S.C. Code Ann. § 16-3-20 (2003) states:

> (A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a

[3] *See, e.g.*, State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987).

> recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. . . .
>
> (B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. . . .
>
> . . . Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.
> Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. . . .
> Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.

(Emphasis added).

A possible sentence of death applies only when one is convicted of or has pled guilty to the crime of murder. Following the plain language of § 16-3-20, the State may seek the death penalty upon conviction or adjudication of guilt of a defendant of murder.[4] *See* State v. Muldrow, 348 S.C. 264, 559

[4]The dissent states that resting the defendant's eligibility for the death penalty on the State's decision whether to prosecute a defendant as an accessory before the fact to murder or for the murder itself is an illogical result. However, giving the prosecutor discretion in determining what

S.E.2d 847 (2002) (words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction). The statute does not provide any other crimes for which a defendant may be eligible for the death penalty. *Cf.* State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991) (when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant).

Although § 16-1-40 provides that one who is convicted as an accessory before the fact must be punished in the manner prescribed for the punishment of the principal felon, the Legislature has not indicated any intent in § 16-3-20 to have such an accessory be subject to the most severe punishment of death. *See* State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004) (if Legislature had intended certain result in a statute it would have said so); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980) (where there is conflict between general statute and specific statute, the specific prevails).

Given the plain language of § 16-3-20 and the fact the Legislature has not shown an intent to make one charged with accessory before the fact to murder death penalty-eligible, the trial judge properly found that respondent is not eligible for the death penalty and properly dismissed the State's notice of intent to seek the death penalty.

Our disposition of this issue makes it unnecessary to address petitioner's factual argument. *See* Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive). Accordingly, the decision of the lower court is
AFFIRMED.

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charges to bring against a defendant and whether a defendant should be eligible for the death penalty is exactly what our law provides. A prosecutor should not be hampered in making these determinations. *Cf.* *Ex parte* Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000) (South Carolina Constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands).

WALLER, BURNETT and PLEICONES, JJ., concur. TOAL,C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. I would reverse the decision of the trial court finding Respondent ineligible for the death penalty. In my opinion, a charge of accessory before the fact to murder implicates the death penalty under South Carolina law.

I agree with the majority's contention that the plain language of S.C. Code Ann. § 16-3-20 (2003) allowing the State to seek the death penalty only applies upon conviction or adjudication of guilt of a defendant of murder, and that the statute does not provide any other crimes for which a defendant may be eligible for the death penalty. However, in my view, a conviction of accessory before the fact to murder is regarded by law as a conviction for murder and therefore § 16-3-20 applies.

S.C. Code Ann. § 16-1-40 (2003) defines an accessory as follows:

> A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed *is guilty of a felony* and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon. (Emphasis supplied).

In this case, Respondent was indicted on two counts of accessory before the fact to the underlying felony of murder. To illustrate my interpretation of § 16-1-40 and its applicability to the issue here, if we were to replace each instance of the general term *felony* in § 16-1-40 with the specific felony of *murder* relevant in this case, the result is that a "person who . . . is an accessory before the fact in the commission of a *murder* by counseling, hiring, or otherwise procuring the *murder* to be committed is guilty of a *murder* . . . ." Therefore, if a jury convicted Respondent for accessory before the fact to murder, the plain language of § 16-1-40, in my view, would regard Respondent as guilty of the crime of murder.

Accordingly, Respondent would be eligible for the death penalty under § 16-3-20.[5]

Furthermore, practical concerns dictate that an accessory before the fact to murder be eligible for the death penalty under South Carolina's statutory scheme. A person who counsels, hires, or otherwise procures a felony to be committed may be indicted and convicted as *either* an accessory before the fact *or* for the substantive felony. S.C. Code Ann. § 16-1-50 (2003). Under the majority's conclusion then, whether a defendant who counseled, hired, or otherwise procured a murder is eligible for the death penalty ultimately comes down to whether the State decides to prosecute the defendant as an accessory before the fact to murder or for the murder itself. The General Assembly certainly did not intend such an illogical result.

Ultimately, the majority's conclusion rests on hesitancy to apply the clear language of the accessory statute. However, § 16-1-40 clearly states that an accessory is guilty of the principal felony and is punished accordingly. I see no reason to depart from this reading of the plain language.

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[5] Interestingly, in 1977 when the General Assembly created a bifurcated trial structure consisting of a guilt phase and a sentencing phase for cases in which the death penalty is sought, § 16-1-40 read as follows:

> Whoever aids in the commission of a felony or is accessory thereto before the fact by counseling, hiring or otherwise procuring the felony to be committed shall be punished in the manner prescribed for the punishment of the principal felon.

In 1993, the General Assembly amended § 16-1-40 to read in its present form. *See* 1993 S.C. Acts 3229, 3237-38. Although the 1993 amendment consisted mainly of grammatical changes, it is interesting to note the addition of the phrase that an accessory "is guilty of a felony" just before the language declaring the manner of "punishment" for an accessory. In my view, this alteration makes the statute easily applicable to the bifurcated trial structure created by the General Assembly fifteen years earlier.

For the foregoing reasons, I would hold that a defendant who is an accessory before the fact to murder is guilty of murder by operation of law and is subject to the death penalty in accordance with § 16-3-20. Accordingly, I would reverse the trial court's finding that Respondent was ineligible for the death penalty and reinstate the State's notice of intent to seek the death penalty.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary E. McClain, Respondent,

v.

Pactiv Corporation, Howard Sellers, Tim Randall, Jody Rowland, Joseph P. Berley, Linda Milton, Joe Powell, Doug Boynton, Larry Wonoski, Joe Garrison, Ron Clark and Robin Montgomery, Defendants,

of whom Pactiv Corporation and Joseph P. Berley are, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26309
Heard March 21, 2007 – Filed April 9, 2007

DISMISSED AS IMPROVIDENTLY GRANTED

Paul H. Derrick, of Jackson Lewis, LLP, of Cary, North Carolina, for Petitioners.

J. Dennis Bolt, of Bolt Law Firm, of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in McClain v. Pactiv Corp., 360 S.C. 480, 602 S.E.2d 87 (Ct. App. 2004). After careful review of the appendix and briefs, we dismiss the writ as improvidently granted.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cally R. Forrest, Jr., Respondent,

v.

A.S. Price Mechanical and
O'Steen Adjusting Services, Appellants.

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

Opinion No. 4227
Heard March 6, 2007 – Filed April 2, 2007

AFFIRMED

Duke K. McCall, Jr., Rebecca H. Zabel and Zandra Johnson, all of Greenville, for Appellants.

Belinda Ellison, of Lexington and James B. Richardson, of Columbia, for Respondent.

KITTREDGE, J.: In this workers' compensation case, Cally R. Forrest, Jr. sustained injuries from a work-related accident while employed

by Appellant A.S. Price Mechanical.[1] Appellant concedes that Forrest is entitled to lifetime medical and workers' compensation benefits. Appellant assigns error to the Workers' Compensation Commission's computation of Forrest's compensation, the finding that Forrest has reached maximum medical improvement (MMI), and the admission of Forrest's vocational expert's report. We affirm.

I.

With the exception of four semesters spent at Clemson University, Forrest was employed full-time since graduating from high school in 1995, usually working multiple jobs.[2] As a high school student, Forrest worked regularly, including seasonal, full-time work with Monetta Peach Packers. He continued seasonal employment with Monetta Peach Packers until his injury on May 26, 2001. During the remaining months of the year, Forrest worked for several employers, including Appellant A.S. Price Mechanical, Price's Metal Shop, Gibson Construction Company, and J.E. Oswalt & Sons ("Oswalt").

After leaving Clemson in December of 1998, Forrest began working full-time for Larry Price at Price's Metal Shop.[3] Forrest also worked for Appellant on the weekends. In the fall of 1999, Forrest's job with Appellant changed from part-time to full-time, and he began working for Larry Price only part-time. When work with Appellant was slow, Forrest would work for Gibson Construction Company. Eventually, his job with Gibson Construction Company became full-time, and he worked for Appellant only

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[1] The employer's carrier, O'Steen Adjusting Services, is also an appellant.

[2] Forrest testified that although he received a scholarship to attend Clemson, he left after two years because he wanted to work full-time and get married.

[3] Larry Price is Forrest's father-in-law and Allen Price's uncle. Allen Price is the owner of Appellant A.S. Price Mechanical.

part-time. By the start of the 2000 peach season, the specific construction Forrest was working on was completed with Gibson Construction Company, and Forrest once again began his seasonal work with Monetta Peach Packers.

At the end of the peach season in 2000, Forrest began working full-time for Oswalt and part-time with Appellant. When the peach season began in 2001, he left his job at Oswalt and went back to Monetta Peach Packers. Forrest testified he intended to go back to work for Oswalt at the end of the 2001 peach season. He further noted that the owner of Oswalt and one of the owners of Monetta Peach Packers were friends and knew of his intentions.

Forrest was injured during the 2001 peach season when he fell from a roof while working part-time for Appellant. Forrest was twenty-four years old at the time of the accident. The injuries rendered him a paraplegic.

Appellant agreed to pay Forrest workers' compensation at a rate of $490.00. This amount reflected Forrest's combined wages from Appellant and Monetta Peach Packers.

The single commissioner subsequently adjusted the compensation rate to $532.72. This compensation rate represented Forrest's average weekly wage from January 1, 2001 to May 26, 2001, while working for Appellant, Monetta Peach Packers, and Oswalt. The Commission adopted the order of the single commissioner. The circuit court held the Commission's findings were supported by substantial evidence and affirmed.

II.

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). Under the substantial evidence standard, the appellate court

may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). The appellate court may reverse or modify the Commission's decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Id. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

III.

Appellant argues the circuit court erred in affirming the Commission's computation of Forrest's average weekly wage of $532.72. First, Appellant asserts that the doctrines of estoppel and laches preclude Forrest from asserting a different wage than the parties agreed upon. Next, Appellant objects to the inclusion of Oswalt as an employer in the rate computation, and maintains that Forrest was not employed with Oswalt at the time of his injury. Appellant contends any wages earned as a result of his previous employment with Oswalt are irrelevant per section 42-1-40 of the South Carolina Code (Supp. 2006). Finally, Appellant argues there are no exceptional circumstances justifying an adjustment or computation of Forrest's average weekly wage in a method other than that employed originally.

At the outset we hold that the doctrines of estoppel and laches do not preclude the Commission from adjusting the average weekly wage prior to the administrative body's final determination. Appellant's argument stems from the fact that Forrest's initial compensation rate was $300 per week until he requested that this rate be increased to include wages earned from Monetta Peach Packers. Appellant states it agreed to the new calculation ($490 per week) and filed a new Form 15 with the Commission in exchange for Forrest agreeing to withdraw his request for a hearing. Forrest filed a new Form 19 with the Commission confirming his acceptance of the rate, and Appellant maintains it relied to its detriment on Forrest's promise of acceptance.

The circuit court correctly held that neither a Form 15 nor a Form 19 is a final judgment. Section 42-17-10 of the South Carolina Code (1985) allows the Commission to adjust a claimant's compensation rate after the filing of the claim, even when the parties agree to the preliminary compensation rate. Section 42-17-10 provides: "All such agreements [between the claimant and employer as to rate of compensation] shall be subject to adjustment and correction as to the compensable rate if subsequent to filing with the Commission it is determined that such rate does not reflect the correct average weekly wage of the claimant." Moreover, Appellant has failed to establish any detrimental reliance.

On the merits, we disagree with Appellant's contention that the Commission erred in including Oswalt as an employer in Forrest's average weekly wage computation. Section 42-1-40 of the South Carolina Code (Supp. 2006) defines "average weekly wage" for the purposes of computing compensation and sets forth four different methods of calculation.[4] The

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[4] Section 42-1-40 provides as follows:

> "Average weekly wages" means the earnings of the injured employee *in the employment in which he was working at the time of the injury* during the period of fifty-two weeks immediately preceding the date of the injury . . . . "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. Where, by reason of a shortness of time during which the employee has

methods for calculating average weekly wage explained in section 42-1-40 have been interpreted by our courts to implement the "usual" job situation with one employer. See Foreman v. Jackson Minit Markets, Inc. 265 S.C. 164, 167, 217 S.E.2d 214, 215 (1975) (summarizing the four different methods of calculating average weekly wage in the predecessor to section 42-1-40). However, section 42-1-40 further provides that when exceptional reasons make one of the standard approaches unfair to either the employer or employee, "such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." We note that exceptional circumstances have been found where an employee has multiple employers at the same time. See, e.g. Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 111, 542 S.E.2d 732, 734 (Ct. App. 2001) (listing several cases where multiple employment has been sufficient to justify exceptional circumstances).

Appellant argues section 42-1-40 requires that the wage being earned at the time of the injury be the wage that controls the compensation rate. On the date of the injury, Appellant correctly points out that Forrest only worked for Appellant and Monetta Peach Packers.

The Commission found that the following "exceptional circumstances" justified deviation from the usual statutory method of average weekly wage computation: (1) Forrest's young age of twenty-four years at the time of

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> been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

(Emphasis added.)

injury;[5] (2) Forrest's demonstration of the interest, aptitude, ability, work ethic, and work history to be both a welder or maintenance worker and an employee who had worked year-round with multiple employers; (3) the fact that Forrest worked for Monetta Peach Packers during the peach season for several months each year since he was fifteen and had worked for two or three additional employers to complete his annual earnings and year-round employment; (4) the severity of Forrest's injury; and (5) the fact that Appellant knew that Forrest regularly worked full-time and part-time for multiple employers.

The circuit court did not err in affirming the Commission.[6] The Commission acted within its broad discretion in determining that exceptional circumstances existed. In finding exceptional circumstances in other cases, this court has reasoned that "[section 42-1-40] provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002). "Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity." Elliott v. S.C. Dep't of Transp., 362 S.C. 234, 238, 607 S.E.2d 90, 92 (Ct. App. 2004). "Disability reaches into the future, not the past; loss as a result of the injury must be thought of in terms of its impact on probable future earnings." Id. (citing Bennett v. Gary Smith Builders, 271 S.C. 94, 98-99, 245 S.E.2d 129, 131 (1978)).

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[5] The Commission's order states Forrest was twenty-three at the time of injury. Forrest's testimony and birth date (May 22, 1977) show, however, that Forrest turned twenty-four four days prior to his accident.

[6] We recognize the difficulty with the factor concerning the severity of a claimant's injury and the implication of a sliding scale relationship between injury and determination of average weekly wage. But see Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 699 (Ct. App. 2002) (finding the extent of Sellers' injury was a factor warranting a ruling of exceptional circumstances).

Forrest's work history demonstrates a laudable, strong work ethic. There is no reason to second-guess the Commission's finding that, were it not for his injury and subsequent paraplegia, Forrest would be working full-time and part-time, year-round for several different employers because of his commitment to seasonal employment with Monetta Peach Packers. To arrive at a fair average weekly wage in this case, it was reasonable for the Commission to examine Forrest's actual work history. The Commission looked to the period from January 1, 2001 until the date of Forrest's injury on May 26, 2001—a twenty-one-week period. This time period reflected Forrest's true earnings and thus a fair estimation of his future earning capacity. The rate of compensation determined by the Commission is consonant with the statutory scheme, as well as a fair rate to both Forrest and Appellant.

Appellant attempts to distinguish this case from Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), a case relied upon by the Commission. This case is not distinguishable in any meaningful way that Appellant urges. In Sellers, a case where exceptional circumstances were found to exist, a sixteen-year-old became a paraplegic as a result of a job injury. 350 S.C. at 186, 564 S.E.2d at 696. The Commission noted the similarity between the two claimants (Sellers and Forrest) in that they were both of a young age and regularly worked three jobs. Appellant contends in Sellers the claimant demonstrated that he planned to become a master electrician, which warranted the Commission increasing his compensation rate to that of an electrician. Unlike the claimant in Sellers, Appellant argues Forrest has made no such showing. Appellant contends Forrest "has voluntarily assumed a pattern of work that is somewhat unconventional[.]" By conceding Forrest's "pattern of work," Appellant in effect lends support to the Commission's reliance on Forrest's true work history. This reliance on Forrest's demonstrated work history supports the Commission's finding of exceptional circumstances. If anything, Forrest presents a stronger case for a finding of exceptional circumstances than Sellers did.

As for the argument that Forrest's testimony about intending to return to work for Oswalt is too speculative to determine future earnings, we find substantial evidence supports the Commission's findings. Forrest's future

work plans, interrupted by his injury, may be reasonably gauged by his work history.

Perhaps Forrest's strong work ethic is "unconventional," but that is no reason to discount his actual work history and earnings. The law mandates the Commission evaluate each case (including a claimant's average weekly wage) in accordance with its particular facts. The quest here is one for truth in light of the particular case, not by resort to an employer's idea of what is "conventional" that can be advanced when an employer is up against a claimant with a solid work ethic and a demonstrable pattern of consistent work and earnings. Substantial evidence supports the Commission's determination of Forrest's average weekly wage.

IV.

As for Appellant's remaining assignments of error, we affirm pursuant to Rule 220(b)(2), SCACR, and the following authorities: Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006) (noting that MMI is a factual determination left to the discretion of the Commission); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 580-81, 514 S.E.2d 593, 596 (Ct. App. 1999) (finding MMI "indicate[s] that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment[,]" while disability is the "incapacity because of an injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"); Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (noting the qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion); Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) ("Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony."); Gadson, 368 S.C. at 229, 628 S.E.2d at 270 (finding that the Commission acted within its discretion in allowing a certified rehabilitation counselor with a master's degree to render an opinion on employability).

V.

For the reasons stated above, the order of the circuit court is

AFFIRMED.

ANDERSON, and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sherrie Lynn Abercrombie, Respondent,

v.

Keith Abercrombie, Appellant.

Appeal From Laurens County
John M. Rucker, Family Court Judge

Opinion No. 4228
Heard March 7, 2007 – Filed April 2, 2007

AFFIRMED

Rodney M. Brown, of Fountain Inn, for Appellant.

Jim S. Brooks, of Spartanburg, for Respondent.

HEARN, C.J.: In this domestic action, Keith Abercrombie (Husband) appeals the family court's (1) valuation and equitable division of marital property, (2) award of alimony to Sherrie Lynn Abercrombie (Wife), and (3)

decision to retain a portion of the equitable distribution awarded to Husband to clean hazardous waste materials he left on the marital property. We affirm.

FACTS

Husband and Wife married in December 1974. The parties separated in 2003, and Wife sought a divorce based on Husband's adultery. The family court granted Wife the divorce based on Husband's infidelity, granted Wife custody of the children, awarded Wife child support, made a fifty-fifty equitable distribution of the marital estate, awarded Wife alimony, and retained a portion of Husband's equitable distribution to clean hazardous waste from the marital property.[1]

After the hearing, the family court found the marital property of the parties consisted of the marital home, a small rental property, a mobile home, forty-six acres of property, a daycare business and accompanying real estate, and the proceeds of a sale of additional rental property. The family court valued the assets as follows: the marital home, mobile home, and forty-six acres at $300,000; the rental property at $20,000; the daycare business and property at $200,000; and the proceeds from the sale of rental property at $31,965.39. The real estate of the parties was found to be encumbered by a mortgage of $418,000. Thus, the total value of the marital estate was found to be $133,965.39. The family court then divided the marital property equally between Husband and Wife with each receiving a distribution equaling $66,982.70.[2]

Wife received the marital real estate and daycare business, along with the $418,000 mortgage. The family court, however, reduced Husband's share of the marital property by $48,453.47, which accounted for an $18,000 child support arrearage and $30,453.47 in delinquent taxes Husband owed

[1] The parties had three children, only one of which was a minor at the time of the divorce. Neither custody nor child support is at issue in this appeal.

[2] Husband was not present at the hearing but was represented by counsel.

Greenville County. After these offsets, Husband's equitable distribution was reduced to $18,529.23, which the family court ordered be placed in escrow to be used for the removal of hazardous waste left on the property by Husband. No post trial motions were filed. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 615 S.E.2d 98 (2005). In spite of this broad scope of review, we remain mindful that the family court judge saw and heard the witnesses and generally is in a better position to determine credibility. Id.

LAW/ANALYSIS

Husband argues the family court erred in valuing the marital property. Specifically, he argues section 20-7-472 of the South Carolina Code (Supp. 2005) applies to valuation of marital property, and because the family court did not use the fifteen factors to value the property, the court erred in valuing the marital home, forty-six acres, and the daycare. We disagree.

Section 20-7-472 provides in part:

> In a proceeding for divorce a vinculo matrimonii or separate support and maintenance . . . and in other marital litigation between the parties, the court shall make a final equitable apportionment between the parties of the parties' marital property upon request by either party in the pleadings. In making apportionment, the court must give weight in such proportion as it finds appropriate to all of the following factors . . . .

(emphasis added). It is evident from the language of section 20-7-472 itself that the factors apply to the apportionment of marital property not the

valuation of the property. Furthermore, in Husband's brief he does not cite any authority for his proposition that this section applies to valuation of marital property.

In making an equitable distribution of marital property, the family court must identify real and personal marital property and determine the property's fair market value. Cannon v. Cannon, 321 S.C. 44, 48, 467 S.E.2d 132, 134 (Ct. App. 1996). "In the absence of contrary evidence, the court should accept the value the parties assign to a marital asset." Id. Moreover, in South Carolina, a property owner is competent to offer testimony as to the value of his property. Cooper v. Cooper, 289 S.C. 377, 379, 346 S.E.2d 326, 327 (Ct. App. 1986). "A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." Woodward v. Woodward, 294 S.C. 210, 215, 363 S.E.2d 413, 416 (Ct. App. 1987).

In this matter, Wife specifically testified, as she was qualified to do as owner of the property, that the marital home and forty-six acres had a value of $300,000, and the daycare had a value of $200,000. While Husband provided other values for the business, the value accepted by the family court was within the range presented at trial. Accordingly, the family court did not err in valuing the marital property.

Husband next argues the family court erred in effecting the equitable distribution.[3] He claims his portion of the award should have totaled "at the minimum a distribution in kind or proceeds after a sale of $400,000." Specifically, he contends the family court erred in the division because it improperly valued the marital assets and offset his equitable distribution share by the $18,000 outstanding child support, the $31,965.39 in unpaid taxes, and the $18,529.23 to remove the hazardous waste from the property. However, we note that Husband never raised the issue of the offset of child support, unpaid taxes, or the cleaning fee to the family court by way of a Rule

[3] Husband agrees the fifty-fifty split is proper. He merely challenges the impact the offsets had on his portion of the distribution.

59(e), SCRCP, motion. Therefore, the issue is not preserved for our review. See Washington v. Washington, 308 S.C. 549, 551, 419 S.E.2d 779, 781 (1992) (holding when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.)

Lastly, Husband argues the family court erred in awarding Wife alimony. Husband essentially argues there was no factual basis to support an award of alimony. We disagree.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). The family court is required to consider all relevant factors in determining alimony. Patel v. Patel, 347 S.C. 281, 290, 555 S.E.2d 386, 391 (2001); Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (Ct. App. 1994).

The record reflects that the family court considered the relevant statutory factors in awarding alimony to Wife. In making the award of alimony to Wife, the family court properly considered the income levels of the parties, the duration of the marriage, the fault of Husband, the standard of living established during the marriage, and the financial ability of Husband to pay support. At the hearing, Wife specifically testified to Husband's income, his marital misconduct, the length of the marriage, and the standard of living the parties enjoyed during the marriage.[4] Therefore, the family court did not abuse its discretion in awarding alimony to Wife.

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[4] Husband presented no evidence to counter Wife's testimony regarding these issues. In fact, Husband failed to even file a financial declaration with the family court as required by the family court rules. Therefore, he cannot now complain that the family court improperly relied on Wife's testimony in awarding alimony. See, e.g., Hough v. Hough, 312 S.C. 344, 347, 440 S.E.2d 387, 390 (Ct. App. 1994) (stating the appellant has the burden "to

CONCLUSION

Based on the foregoing, the order of the family court is hereby

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

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show the family court committed reversible error and a party cannot sit back at trial without offering proof, then come to the appellate court complaining of the insufficiency of evidence to support the family court's findings").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Torrey L. Jamison, Appellant.

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

Opinion No. 4229
Submitted March 1, 2007 – Filed April 2, 2007

AFFIRMED

Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

GOOLSBY, J.: Torrey L. Jamison appeals his convictions for trafficking cocaine, trafficking crack cocaine, resisting arrest, failure to stop for a blue light, and possession of a firearm during the commission of a violent crime. We affirm.[1]

FACTS

On the night of January 6, 2004, the Greenville County Sheriff's Office dispatched Deputy Andrew Wall to investigate a suspicious vehicle parked in the middle of a dead-end road located in a cul-de-sac. He found the vehicle, a Chevrolet pickup truck, parked without any lights on. Wall shone his patrol vehicle's exterior spotlight into the truck as he was driving by, did not see anyone inside, and believed the truck was abandoned. He positioned his patrol car behind the truck and called in the truck's license plate to his dispatcher.

While waiting for the dispatcher to respond, Wall saw an individual, later identified as Jamison, suddenly sit up in the driver's seat of the truck. Jamison immediately put the truck into motion and began driving away. Wall turned on his blue lights and pursued the truck. The truck stopped several times during the chase, but never long enough for Wall to approach the truck on foot. Wall radioed for backup; Deputy John Little and Deputy Tasha Cox quickly joined the pursuit.

Once the truck stopped long enough for the deputies to approach, Wall and Cox advanced toward the vehicle on foot. Wall ordered Jamison to exit the vehicle and he slowly complied. The deputies searched Jamison and placed him into one of the patrol vehicles. Upon searching Jamison's truck, the deputies discovered a loaded .45 caliber pistol and a bag from a fast-food restaurant containing four, clear plastic bags with drugs inside. Two of the four bags contained cocaine and the other two contained crack cocaine.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Altogether the bags contained 54.77 grams of cocaine and 19.21 grams of crack cocaine.

The Greenville County Grand Jury indicted Jamison for trafficking cocaine, trafficking crack cocaine, resisting arrest, failure to stop for a blue light, and possession of a firearm during the commission of a violent crime. A jury found Jamison guilty on all charges and the trial court sentenced him to concurrent terms of confinement totaling ten years plus three years probation.

LAW/ANALYSIS

Jamison argues the trial court abused its discretion by allowing the State to present expert testimony about the dollar value of cocaine and crack cocaine. We disagree.

The qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party. Nelson v. Taylor, 347 S.C. 210, 214, 553 S.E.2d 488, 490 (Ct. App. 2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

During Jamison's trial, the State sought to call Investigator Keith Grounsell of the Greenville County Sheriff's Office as an expert on the street value of cocaine and crack cocaine. Jamison objected, arguing testimony about the value of cocaine and crack cocaine was irrelevant and prejudicial because there was no evidence he committed or attempted a drug transaction. The trial court allowed Grounsell to testify as an expert, but limited his testimony to the "wholesale" and "retail" values of cocaine and crack cocaine for the general area.

The trial court allowed Grounsell's testimony based on several cases from the United States Court of Appeals, Fourth Circuit. The trial court

reasoned that jurors typically do not have knowledge about the illegal drug industry.[2] Grounsell testified that the drugs found in Jamison's truck had a street value of between $2,750.00 and $9,319.00, depending on the quantities sold.

In his defense, Jamison claimed the drugs belonged to someone else, possibly one of his employees who also had access to the truck.

We agree with the trial court that jurors typically do not know the current street prices of illegal drugs. Grounsell's valuation of the drugs, based on his years of law enforcement experience, allowed the jury to better determine whether a person would reasonably leave expensive narcotics unguarded and disguised as trash in a truck allegedly used by numerous people.

If the jury did not believe Jamison's assertion that an unknown individual left thousands of dollars worth of drugs disguised as garbage in an area where other people had access to the drugs and might even throw them away, it reinforced the State's case that Jamison was knowingly in actual or constructive possession of the drugs at the time of his arrest, a key element of the trafficking charges. We therefore hold the trial court did not err by allowing Grounsell to testify about the street value of the drugs found in Jamison's truck.[3]

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[2] See, e.g., U.S. v. Gastiaburo, 16 F.3d 582, 589 (4th Cir. 1994) (noting the court has "repeatedly upheld the admission of law enforcement officers' expert opinion testimony in drug trafficking cases."); U.S. v. Johnson, 54 F.3d 1150, 1156-57 (4th Cir. 1995) (holding the district court did not err in qualifying a detective as an expert and allowing the detective to testify about the current street price of illegal drugs).

[3] See State v. Matthews, 720 So. 2d 153 (La. Ct. App. 1998) (holding an agent from the Drug Enforcement Agency could testify regarding the street value of cocaine where the agent was testifying regarding matters within his personal knowledge and experience as a narcotics officer); State v. McCoy, 414 S.E.2d 392, 395 (N.C. Ct. App. 1992) (ruling a law enforcement officer's testimony on the street value of cocaine was properly admitted in defendant's

AFFIRMED.

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

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trial for trafficking cocaine because the testimony was both helpful and relevant in showing the defendant's intent); Martin v. State, 823 S.W.2d 726, 728 (Tex. Crim. App. 1992) (ruling a sheriff's testimony on the price of marijuana was admissible and relevant because it allowed the jury to comprehend the quantity of illegal drugs recovered in terms that are easily understood); cf. State v. Lawrence, 264 S.C. 3, 16, 212 S.E.2d 52, 58 (1975) (ruling that testimony as to the black market resale value of prescription drugs when sold without a prescription was relevant to prove motive for the charge of conspiracy).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Respondent,

v.

William White Rutledge, Appellant.

Appeal from York County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 4230
Heard March 6, 2007 – Filed April 9, 2007

AFFIRMED

Daniel D. D'Agostino, of York, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliot, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

HEARN, C.J.: William White Rutledge appeals his conviction for simple possession of marijuana, first offense, arguing the trial court erred in ruling that the search warrant was sufficient to establish probable cause, and in determining that the affidavit in support of the warrant was valid. We affirm.

FACTS

This case began when narcotics officers from the Rock Hill Police Department assigned to the York County Multi-Jurisdictional Drug Enforcement Unit received an anonymous tip through Crime Stoppers regarding drug activity at 162 Bailey Avenue in Rock Hill. The anonymous informant stated that Rutledge and two other men were selling marijuana at that address. Based on the tip, the officers checked the electric company records and determined that the electricity at that address was registered in Rutledge's name. The officers also checked Rutledge's criminal history and discovered he had two prior convictions for simple possession of marijuana in 1990 and 1991. The officers conducted surveillance for several days at the address, but did not see any activity at the residence. The officers then conducted a "trash pull" at the address. The trash can was located at the curb in front of 162 Bailey Avenue, but not on the property itself. The officers found marijuana seeds and stalks inside, about midway down the trash can.

Based on this information the officers went to the magistrate seeking a search warrant for the residence. The affidavit supporting the search warrant stated, in pertinent part:

> The affiant, who is a certified Law Enforcement officer assigned to the York County Multi-Jurisdictional Drug Enforcement Unit and has several years law enforcement experience, to include narcotics investigations, states the following facts to support probable cause to search the premises within the curtilage of the property listed within:
>
> The affiant has received information that William Rutledge and two other subjects only known as Steve

> and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina.
>
> Within the past 72 hours officers of the YCMDEU conducted a narcotics investigation focused on 162 Bailey Ave., Rock Hill, SC. As a result of this investigation, officers recovered marijuana, marijuana seeds and marijuana stalks from 162 Bailey Ave. A Criminal Records check of William Rutledge found that Rutledge has prior convictions for marijuana. Officers of the YCMDEU confirmed through Rock Hill Utilities that William Rutledge is drawing power at 162 Bailey Ave.
>
> Based on the affiant's training and experience in narcotics investigations, it is believed that drug dealers keep contraband, proceeds of drug sales and records of drug transactions that may include written records, photographs, video tapes, audio tapes, computer hard drives and disks within secure locations of their residences and out buildings within the curtilage of their property. See oral testimony.

In addition, the following oral testimony was provided with the affidavit:

> On July 21, 2005 Officer Cantey of the York County Multi Jurisdictional Drug Enforcement Unit conducted a narcotics investigation focused on the illegal drug activities occurring at 162 Bailey Ave., Rock Hill, County of York, South Carolina. During the investigation the trash from the residence was located in front of the residence. The trash was located off the property and sat out for normal pick-up. This date is the regularly scheduled day for the garbage collection from the residence. During the investigation, marijuana was recovered from the trash of the residence.

Based on this information, the magistrate issued the search warrant.

When they executed the search warrant, officers found marijuana on the kitchen counter. Rutledge acknowledged to the officers that the marijuana was his, and told the officers that there was also a marijuana plant in the house that belonged to him. The officers found the plant inside what the officer described as "a hydroponics marijuana grower" in Rutledge's bedroom.

After a bench trial, Rutledge was convicted of simple possession of marijuana, first offense, and sentenced to thirty days incarceration or to pay a fine of $100 plus court costs and assessments, for a total of $432.50. This appeal followed.

STANDARD OF REVIEW

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding that probable cause existed. State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). A reviewing court should give great deference to a magistrate's determination of probable cause. State v. Davis, 354 S.C. 348, 355, 580 S.E.2d 778, 782 (Ct. App. 2003).

LAW / ANALYSIS

Rutledge argues the circuit court erred in determining that the affidavit was sufficient to demonstrate probable cause, and in failing to determine that the search warrant was misleading and therefore invalid. We disagree.

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). Search warrants may be issued "only upon affidavit sworn before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (1985). Oral testimony may be used to supplement search warrant affidavits. State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000). The magistrate's task in determining whether to issue the search warrant is to

make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004).

I. Insufficiency Argument

Rutledge first argues that the affidavit was insufficient to demonstrate probable cause. Specifically, he argues that the affidavit fails to detail the "investigation" referred to, to mention that the trash can where the marijuana was found was in the public domain and not on the property of the residence, and because the confidential informant's reliability was not established. We disagree.

The affidavit stated that the officers had "received information that William Rutledge and two other subjects only known as Steve and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina." This tip provided the specific crime being committed, the names of the people involved in the crime, and the specific location where the activity was occurring. See Bellamy, 336 S.C. at 144, 519 S.E.2d at 349 (noting that specificity of information provided by a confidential informant indicates greater reliability). Because an anonymous informant is correct about some facts, that informant is more likely correct about other facts, including illegal activity. Illinois v. Gates, 462 U.S. 213, 244 (1983).

Rutledge cites State v. Coin Operated Video Games Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), to attack the reliability of the confidential informant's tip. This case holds that a warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. Id. However, the warrant in this case was not based solely on the tip from the confidential informant. The marijuana the officers found in the trash can in front of the residence, and Rutledge's prior convictions for marijuana serve as additional evidence of a crime, while along with the electric bill registered in Rutledge's name, also substantiating the credibility of the informant and the veracity of his statements. See Bellamy, 336 S.C. at 144-45, 519 S.E.2d at 349 (finding confirmation of the reliability of an informant's information, which detailed

the caliber and/or make of three guns, when the information correlated with 3 of 20 guns that had been stolen from a police station).

Given all the circumstances in the affidavit and the supporting oral testimony, including the informant's information, the electric bill in Rutledge's name, Rutledge's prior convictions, and the marijuana found in the trash can in front of the residence, we conclude that the magistrate had substantial basis for concluding that probable cause existed to issue a search warrant of the residence. Accordingly, we find the affidavit was sufficient.

II. Misleading Argument

Rutledge next argues that the affidavit was misleading, demonstrating a reckless disregard for the truth, because it overstates the evidence the officers had of any ongoing illegal activity. Specifically, he argues that the affidavit should have disclosed the lack of independent evidence of ongoing illegal activities at the residence, should have indicated that the marijuana, seeds, and stalks were discovered in a trash can off the property, and that Rutledge's prior convictions were in 1990 and 1991. He thus requests that the alleged distorted facts in the affidavit be disregarded pursuant to Franks v. Delaware, 438 U.S. 154 (1978), in considering the affidavit's sufficiency to demonstrate probable cause. We disagree.

There is a presumption of validity with respect to the affidavit supporting the search warrant. Id. at 171. Rutledge contends first that the affidavit incorrectly informed the magistrate that illegal activities at the residence were ongoing. However, the anonymous tip and the marijuana found in the trash can within seventy-two hours of the affidavit's submission support such a contention.

Rutledge next contends the affidavit improperly implied that the officers recovered the marijuana, seeds, and stalks from the residence itself. But, the affidavit merely states, "[O]fficers recovered marijuana, marijuana seeds, and marijuana stalks from 162 Bailey Avenue." Nowhere does the affidavit say it was found in the house. Further, the affiant's oral testimony stated exactly how and where the officers found the trash can and the

marijuana. These statements do not constitute a reckless disregard for the truth.

Finally, Rutledge argues that the officers improperly left out the dates and severity of Rutledge's marijuana convictions. However, the exculpatory value of that information is dubious. Rutledge contends that the omission of that information left the magistrate with the impression that Rutledge was involved with illegal narcotics. But the inclusion of the specific date and type of conviction could still allow that impression. Further, there is no Franks violation if the affidavit, including the omitted exculpatory information, still contains sufficient evidence to establish probable cause. Id. Had the affidavit noted the dates of Rutledge's prior marijuana convictions, the substantial basis for probable cause would not be diminished, because any doubt as to current illegal activities at the residence would be obviated by the recent informant's tip and discovery of marijuana outside the residence. Therefore, we find nothing in the affidavit demonstrates a reckless disregard for the truth.

CONCLUSION

Based on the foregoing, Rutledge's conviction for simple possession of marijuana, first offense, is

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stearns Bank National Association, Plaintiff,

v.

Glenwood Falls, LP, a South Carolina limited partnership; DC Development, Inc.; McBride Building Supplies & Hardware, Inc.; First Federal Savings and Loan Association of Charleston; Charleston Affordable Housing, Inc.; and the Building Center, Inc., Defendants,

Of whom DC Development, Inc., is the Respondent,

v.

and Glenwood Falls, LP, a South Carolina limited partnership, is the Appellant.

Appeal from York County
S. Jackson Kimball, III, Master-in Equity

Opinion No. 4231
Heard March 6, 2007 – Filed April 9, 2007

AFFIRMED

Michael W. Tighe and Mary Dameron Milliken, of Columbia, for Appellant.

William E. Booth, III, of West Columbia, for Respondent.

KITTREDGE, J.: Glenwood Falls, LP, appeals the master's order denying its motion to set aside a default judgment. We affirm.

I.

Glenwood Falls is a South Carolina limited partnership. Glenwood Falls hired DC Development, a South Carolina corporation, to construct apartments on real property Glenwood Falls owned in York County. To fund this project, Glenwood Falls obtained a $1.8 million mortgage from Stearns Bank.

On January 30, 2004, Stearns Bank brought a foreclosure action against Glenwood Falls, DC Development, and Charleston Affordable Housing ("Affordable Housing"). Affordable Housing, a South Carolina non-profit corporation, is one of Glenwood Falls' general partners. On March 15, 2004, DC Development answered and filed a cross-claim against Glenwood Falls, seeking to foreclose a mechanic's lien on the property and asserting causes of action for breach of contract, unjust enrichment, and quantum meruit. DC Development's attorney, William Booth, mailed the cross-claim via certified

mail to Glenwood Falls' registered agent, Cathy Kleiman, but Kleiman did not sign the return receipt. Instead, an unauthorized person signed it.

Kleiman nevertheless received the cross-claim and, on May 13, 2004, forwarded it to Robert Nettles, an attorney she believed represented Glenwood Falls. Over the next several months, Kleiman attempted to contact Nettles multiple times to ascertain the status of the cross-claim, but Nettles did not respond. The record does not establish that Nettles was ever retained to represent Glenwood Falls in this matter.

On June 17, 2004, the master issued a foreclosure order, but retained jurisdiction to hear the cross-claim. On July 28, 2004, DC Development's attorney, Booth, purportedly received a phone message from Affordable Housing's attorney, Frank Cisa, regarding Cisa's representation of Glenwood Falls. On November 8, 2004, Booth wrote Cisa the following:

> I represent DC Development, Inc. and I believe you represent Glenwood Falls, LP and Charleston Affordable Housing, Inc. I have scheduled the trial of a Cross-Claim of DC Development, Inc. against Glenwood Falls, LP. The trial is scheduled for December 16, 2004, at 1:30 PM in the office of the Master in Equity for York County.

Cisa replied the next day ("the November 9 letter"). He wrote:

> I do represent Charleston Affordable Housing, Inc. and I am now taking over the representation of Glenwood Falls, LP. What I gather from you[r] letter is that no Answer was filed on behalf of Glenwood Falls, LP to the Cross-Claim of DC Development, Inc. If that is the case, it was caused by the failure of the original attorney for Glenwood Falls, LP to respond. In any event, for DC Development, Inc. to recover any money in this action, my opinion is that Glenwood Falls, LP needs to assert a claim over and

> against the architects and engineers who designed this project. Glenwood Falls, LP has no assets . . . .

On December 16, 2004, the master heard DC Development's cross-claim against Glenwood Falls, as Booth mentioned in his letter to Cisa. Cisa, however, did not appear on Glenwood Falls' behalf. That same day, Booth filed an affidavit of default. On January 5, 2005, the master entered a default judgment of $1.3 million against Glenwood Falls.

In April 2005, Glenwood Falls moved to set aside the default judgment. Glenwood Falls argued (1) the judgment was void because the court did not have personal jurisdiction over Glenwood Falls as a result of DC Development's failure to properly serve Glenwood Falls, and (2) the judgment was procured through excusable neglect. The master denied Glenwood Falls' motion. The master found (1) the court had personal jurisdiction over Glenwood Falls, despite DC Development's failure to serve Glenwood Falls properly, because Glenwood Falls made a voluntary appearance, which waived its right to contest personal jurisdiction, and (2) the judgment was not procured through excusable neglect. Glenwood Falls appeals.

II.

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." Id. at 551, 633 S.E.2d at 503.

III.

Glenwood Falls argues the master erred in denying its motion to set aside a default judgment because (1) the judgment was void, as Glenwood Falls was not properly served and did not make a voluntary appearance, and (2) the judgment was procured through excusable neglect, as Glenwood Falls' attorneys abandoned it. We find no abuse of discretion in the denial of Glenwood Falls' motion for relief from default judgment.[1]

A. Voluntary Appearance

Glenwood Falls contends the judgment was void as a result of DC Development's improper service, and the master erred in finding Glenwood Falls made a voluntary appearance. We disagree.

A court may set aside a default judgment in accordance with Rule 60(b), SCRCP. See Rule 55(c), SCRCP. Rule 60(b)(4) provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment . . . [if] the judgment is void . . . ." "A judgment is void if a court acts without personal jurisdiction." BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

A court usually obtains personal jurisdiction by the service of the summons and complaint. To serve a partnership, a copy of the summons and complaint must be delivered to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process," or sent by "registered or certified mail, return receipt requested and

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[1] The amended Rule 60(b), SCRCP, motion that is the basis of this appeal is generic and unspecific, leaving us to speculate as to the precise basis of the motion. Beyond this, the record on appeal does not contain the transcript from the motion hearing. Although we could affirm on issue preservation grounds alone, we elect to treat the issue as preserved, for we can reasonably discern the basis of the motion in the master's order denying the motion.

delivery restricted to the addressee." Rule 4(d)(3) & (8), SCRCP. Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance. Rule 4(d) ("Voluntary appearance by defendant is equivalent to personal service.").[2]

As the master found, and neither party contests, DC Development did not properly serve Glenwood Falls under Rule 4(d)(8), because an unauthorized person signed the return receipt. Normally, this would be a suitable ground to grant relief from judgment under Rule 60(b)(4). See Rule 4(d)(8) ("Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person."). But the master did not set aside the default judgment under Rule 60(b)(4) because he found Glenwood Falls made a voluntary appearance, which under Rule 4(d) is "equivalent to personal service." Thus, the master concluded the court had personal jurisdiction over Glenwood Falls.

The critical issue, therefore, is whether the master erred in finding Glenwood Falls made a voluntary appearance. "The term 'appearance' is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction." 4 Am. Jur. 2d Appearance § 1 (1995). "An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." Id. No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door." Stephens v. Ringling, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915). Accordingly, courts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction.

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[2] Although Rule 5(b), SCRCP, generally provides less stringent standards for serving pleadings subsequent to the original summons and complaint, Rule 5(a), SCRCP, requires service pursuant to Rule 4 when a party makes new or additional claims against another party that has been held in default for failure to appear.

Here, the master found the November 9 letter from Glenwood Falls' attorney, Cisa, to DC Development's attorney demonstrated an intent to submit to the court's jurisdiction and, therefore, constituted a voluntary appearance. The master cited Petty v. Weyerhaeuser Company, 272 S.C. 282, 251 S.E.2d 735 (1979), for the proposition that a letter from one attorney to another may constitute a voluntary appearance. Glenwood Falls argues Petty is distinguishable from this case.

In Petty, plaintiff's counsel sent the summons and complaint to defense counsel in Tacoma, Washington. A few weeks later, defense counsel called plaintiff's counsel to request an extension of time to answer the complaint, which plaintiff's counsel granted. Defense counsel memorialized this exchange in a letter to plaintiff's counsel, which read: "Confirming our telephone conversation of February 27, please consider this letter as an informal notice of appearance on behalf of [the defendant] in the suit you recently instituted . . . ." Id. at 284, 251 S.E.2d at 736. The letter also stated the defendant would like to "explore settlement possibilities prior to retaining counsel in South Carolina for formal appearance, answer and defense or settlement by local counsel." Id. When, after numerous attempts, plaintiff's counsel could not reach defense counsel to discuss settlement possibilities, plaintiff's counsel filed an affidavit of default, and an order of default was issued. Defense counsel moved to set aside the order of default, arguing the court did not have personal jurisdiction over the defendant because the plaintiff improperly served it. The trial court found service was proper and, even if service were improper, the defendant made a voluntary appearance. Our supreme court found service was improper, but nevertheless held the defendant made a voluntary appearance.

Glenwood Falls asserts Petty is distinguishable from this case because (1) in Petty defense counsel acknowledged the summons and complaint, but in this case Cisa did not acknowledge the cross-claim; and (2) in Petty defense counsel expressly stated the letter should be considered an appearance, but in this case Cisa did not expressly state the November 9 letter should be considered an appearance.

Glenwood Falls' attempt to distinguish Petty is unpersuasive. First, Cisa *does* acknowledge DC Development's cross-claim. In the November 9 letter to Booth, Cisa writes, "What I gather from you[r] letter is that no Answer was filed on behalf of Glenwood Falls, LP to the Cross-Claim of DC Development, Inc." (emphasis added).[3] Clearly, then, Cisa recognized DC Development's cross-claim against Glenwood Falls.

Second, the mere fact that Cisa did not mention the word "appearance" in the November 9 letter does not mean Glenwood Falls failed to make an appearance. Again, the inquiry is whether Glenwood Falls' conduct demonstrated an intent to submit to the court's jurisdiction. The inquiry is *not* whether Glenwood Falls invoked the term "appearance."[4] On many

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[3] Glenwood Falls emphasizes in its brief to this court that the November 9 letter does not even mention the cross-claim. Glenwood Falls writes Cisa "simply stated that he was 'now taking over the representation of Glenwood Falls, LP' without even mentioning the Cross-Claim." (emphasis added). Glenwood Falls' claim is not accurate, for the November 9 letter clearly addresses the cross-claim.

[4] Glenwood Falls argues that because the November 9 letter did not formally announce Glenwood Falls' intent to make an appearance, Glenwood Falls did not waive its right to contest personal jurisdiction. Glenwood Falls cites Boland v. South Carolina Public Service Authority, 281 S.C. 293, 315 S.E.2d 143 (Ct. App. 1984), for the proposition that a letter from defense counsel to plaintiff's counsel does not constitute a voluntary appearance if the letter does not expressly invoke the term "appearance." Boland does not create such a bright-line rule. In Boland, this court upheld the trial court's finding that the communication from defense counsel to plaintiff's counsel did not constitute an appearance. That the communication did not use the term appearance was only one fact, among many, that was considered in the decision. Other relevant factors included, for example, the timing and level of communication between the attorneys, as well as the fact that the defendant's "next move in [the] lawsuit following [defense counsel's] letter was to make a special appearance . . . ." Id. at 297, 315 S.E.2d at 146. It is

occasions our supreme court has found that a party can make a voluntary appearance without formally announcing it. See, e.g., Triangle Auto Spring Co. v. Gromlovitz, 270 S.C. 386, 389-90 n.1, 242 S.E.2d 430, 431 n.1 (1978) (holding that consenting to a confession of judgment constitutes a voluntary appearance); Connell v. Connell, 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967) (holding that raising the defense of res judicata constitutes a voluntary appearance); Se. Equip. Co. v. One 1954 Autocar Diesel Tractor, 234 S.C. 213, 218, 107 S.E.2d 340, 342 (1959) (holding that filing a motion to set aside an attachment constitutes a voluntary appearance).

As the master correctly held that a letter from one attorney to another may serve as a basis to find a voluntary appearance, we now examine whether the master erred in finding that Glenwood Falls made a voluntary appearance. We believe the November 9 letter manifests Glenwood Falls' intent to submit to the jurisdiction of the court. In the November 9 letter, Cisa not only announces his representation of Glenwood Falls without reservation but also expresses an intent to reach the merits of the case, especially when he writes "for DC Development, Inc., to recover any money in this action, my opinion is that Glenwood Falls, LP needs to assert a claim over and against the architects and engineers who designed this project." See Jenkinson v. Murrow Bros. Seed Co., 272 S.C. 148, 154, 249 S.E.2d 780, 783 (1978) (Ness, J., concurring) ("In order to establish waiver of the right to contest jurisdiction, it is only necessary that a party, by its conduct, evince an intent to proceed to the merits of the case."). Moreover, the November 9 letter contains not the slightest hint of a desire to challenge service of process. Based on the record before us, we hold the master did not err in finding the November 9 letter was a voluntary appearance by Glenwood Falls.[5]

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thus incorrect to suggest that the holding in Boland turned merely on the absence of the term "appearance" in the letter.

[5] In light of this holding, we need not address whether Cisa's actions on behalf of Affordable Housing also constituted a voluntary appearance for Glenwood Falls.

B. Excusable Neglect

Glenwood Falls contends the master erred in finding the judgment was not procured through excusable neglect because Glenwood Falls' attorneys willfully abandoned it. We disagree.

A default judgment may be set aside on the grounds of mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1), SCRCP. Relief from judgment is available upon a showing of excusable neglect and a meritorious defense; case law also directs the trial court to consider the presence or absence of prejudice to the party opposing the motion. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001) ("In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party.").

In the case before us, because of our ultimate disposition, we need only address Glenwood Falls' excusable neglect claim arising from the assertion of willful abandonment by its counsel. Concerning a claim of attorney neglect, the general rule is that "the neglect of the attorney is attributable to the client." Graham v. Town of Loris, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978). In discussing this general rule, the Graham court quoted approvingly from Simon v. Flowers, 231 S.C. 545, 551, 99 S.E.2d 391, 394 (1957):

> Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct or inadvertence of counsel employed in the case, the general rule undoubtedly is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to the attorney can be successfully used as a ground for relief, unless it would have been excusable if

> attributable to the client. The acts and omissions of the attorney in such case are those of the client.

However, "[t]he rule that an attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment does not necessarily prevail in the event of the attorney's abandonment or withdrawal from the case." Graham, 272 S.C. at 452, 248 S.E.2d at 599 (citing 46 Am. Jur. 2d Judgments § 737 (1969)). To overcome the general rule that the neglect of the attorney is attributable to the client, the client must establish that its former attorney willfully and unilaterally abandoned it. Id. at 452, 248 S.E.2d at 599; Paul Davis Sys. Inc. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 226, 607 S.E.2d 358, 361 (Ct. App. 2004) ("This is not a case of willful and unilateral abandonment of the client by counsel in which we could refuse to apply the general rule that the neglect of the attorney is the neglect of the client.").

Our law thus instructs that an exception to the general rule applies when the attorney's inaction was the consequence of willful abandonment or withdrawal from the case. Where an attorney is merely neglectful, the general rule applies and relief from judgment is unavailable; where an attorney's conduct transcends mere neglect and the party seeking relief establishes willful abandonment or withdrawal from the case, relief from judgment is available.

The facts in Graham are instructive. The Town of Loris was represented by its city attorney. The day before a summary judgment hearing the Town of Loris received a letter from the city attorney announcing his immediate resignation. The city attorney did not inform any town official of the impending summary judgment hearing. When no one appeared at the hearing on behalf of the Town of Loris, summary judgment was entered against it. The trial court ultimately granted the Town of Loris relief from judgment, holding that the Town of Loris had no notice of the summary judgment hearing and that its attorney had resigned. The supreme court affirmed, noting that "under the rare circumstances of this case," the Town of Loris "should not be charged with the abandonment of the case by its counsel." Graham, 272 S.C. at 452, 248 S.E.2d at 599.

In Simon, 231 S.C. 545, 99 S.E.2d 391, defense counsel failed to answer a complaint because he was involved in a multi-day trial. As a result of defense counsel's failure to answer the complaint, the court entered a default judgment against defendant. On appeal, our supreme court was sympathetic to defense counsel's plight but nevertheless adhered to the general rule and imputed the neglect of counsel to his client. The court explained:

> [T]he default was the result of forgetfulness on [the attorney's] part which in turn was due to pressure of his business in the trial of cases . . . . In the crowded routine of a busy lawyer's life a mistake such as the record here discloses is understandable; but it entails the penalty of default under strict enforcement of the rule of procedure, and the trial court's refusal to forgive it affords no basis for reversal.

Id. at 550-51, 99 S.E.2d at 394.

We now turn to Glenwood Falls' claims of excusable neglect in connection with attorneys Nettles and Cisa.

1. Nettles

Glenwood Falls argues Nettles willfully abandoned it. We initially observe that it is doubtful whether Nettles actually represented Glenwood Falls in this litigation. In fact, Nettles wrote Kleiman and Cisa on June 24, 2004, and disavowed any representation of Glenwood Falls. This uncertainty about Nettles' purported representation of Glenwood Falls, standing alone, is enough to sustain the master's ruling.

Moreover, under no circumstance has Glenwood Falls shown that it was prejudiced by Nettles alleged representation. As the November 9 letter illustrates, Glenwood Falls arranged for Cisa to take over the representation of Glenwood Falls before default was entered. Therefore, Glenwood Falls,

through Cisa, had ample time following the November 9 letter to take appropriate action to protect itself from default. Glenwood Falls failed to do so. Now, Glenwood Falls attempts to resurrect its alleged problems with Nettles in May, June, and July of 2004 to extricate itself from its failure to act to protect its interests in November and December of 2004. This it cannot do. We find the master did not abuse his discretion in denying Glenwood Falls relief based on the purported representation by Nettles.

2. Cisa

Glenwood Falls argues Cisa willfully abandoned it.[6] Cisa began representing Glenwood Falls on November 9, 2004, at the latest. Even if we assume that Cisa's failure to act between the November 9 letter and the default judgment was neglectful, we may not assume that Cisa's failure to act transcends mere neglect and rises to the level of willful abandonment or withdrawal from the case. Resolution of the appeal concerning Cisa turns on this critical difference.

As noted, mere neglect invokes the general rule of imputing the neglect of the attorney to the client, while willful abandonment triggers the exception to the general rule and allows relief to the client. This distinction may be best illustrated by reiterating the critical factual distinction between Simon and Graham. In Simon, the attorney simply forgot to answer the complaint

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[6] We question whether this issue was part of Glenwood Falls' Rule 60(b) motion. Glenwood Falls' Rule 60(b) motion is conclusory and while it is clear from the master's order that the Rule 60(b) motion involved attorney Nettles, we are left to speculate about Cisa. The master, for example, in his order denying Rule 60(b) relief focused on Nettles and observed, "The only substantial reason posed for [Glenwood Falls'] failure to act promptly in this matter is alleged 'abandonment' by its original attorney." The master further noted that "Glenwood [Falls] asserts that its first counsel in this matter abandoned it . . . ." Although there is no substantive discussion about Cisa in the master's order, the order does contain indirect references to "either counsel" of Glenwood Falls and the "attorneys" of Glenwood Falls. While a close question is presented, we treat the claim against Cisa as preserved.

against his client, and the supreme court upheld the trial court's denial of relief of judgment because the attorney's conduct did not transcend mere neglect. Simon, 231 S.C. at 550-51, 99 S.E.2d at 394. In Graham, the moving party established that its attorney affirmatively withdrew by resigning on the eve of a summary judgment hearing leaving the client unaware of the imminent and dispositive motion hearing. Our supreme court upheld the trial court's decision to grant relief from judgment based on the fact that the attorney willfully abandoned his representation by resigning right before the summary judgment hearing. Graham, 272 S.C. at 453, 248 S.E.2d at 599.

This case is controlled by Simon, for evidence of willful abandonment is missing. Thus, even if we assume Cisa's failure to act following the November 9 letter constituted neglect, the scant record before us does not permit the additional finding of willful abandonment, partly due to Glenwood Falls' generic and nonspecific Rule 60(b) motion. We, of course, decline to speculate in a manner that favors Glenwood Falls. Therefore, Glenwood Falls has not established that Cisa willfully abandoned or withdrew from the case. We find no abuse of discretion in the master's refusal to find excusable neglect.

Consequently, we find no error in the master's denial of Glenwood Falls' Rule 60(b)(1) motion to set aside a default judgment for excusable neglect with respect to attorneys Nettles and Cisa.

IV.

We hold the master did not abuse his discretion in refusing to set aside the default judgment obtained by DC Development against Glenwood Falls. The November 9 letter constitutes a voluntary appearance by Glenwood Falls, and the judgment was not procured through excusable neglect. The master's order is

AFFIRMED.

SHORT, J., concurs.

ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting in a separate opinion): I disagree with the majority's reasoning and analysis. In my view, the trial court erred in failing to set aside the default judgment on the basis of mistake, inadvertence, surprise, or excusable neglect. Specifically, Glenwood is entitled to relief because its attorneys abandoned it. I **VOTE** to **REVERSE.**

ABANDONMENT

Juridical writing in South Carolina articulates the general rule that the acts and omissions of an attorney are attributable to the client. Hillman v. Pinion, 347 S.C. 253, 257, 554 S.E.2d 427, 429 (Ct. App. 2001); Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391, 394 (1957). The exception to this rule is recognized in the seminal case, Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978). Graham inculcates:

> Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct or inadvertence of counsel employed in the case, the general rule undoubtedly is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client.
>
> However, under the facts of the present case, we are not merely considering neglect, inadvertence, or mistake of counsel. We are concerned with a wilful and unilateral abandonment of the client by counsel. There is authority for the proposition that the general rule is not applied to such a factual situation. This exception to the general rule is expressed at 46 Am. Jur. 2d, Judgments, s 737 (1969) in the following language:

> The rule that an attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment does not necessarily prevail in the event of the attorney's abandonment or withdrawal from the case.

272 S.C. 442, 451-52, 248 S.E.2d 594, 599; accord Paul Davis Systems, Inc. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 226, 607 S.E.2d 358, 361 (Ct. App. 2004) (recognizing an exception to the general rule when the attorney's conduct constitutes willful abandonment).

The rule that the acts and omissions of an attorney are attributable to the client is not a hard and fast rule. Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001). "Rather, it is one that is 'to be applied rationally, with a fair recognition that justice to the litigants is always the polestar.' " Id. (citing Graham, 272 S.C. at 452, 248 S.E.2d at 599).

In Graham, our Supreme Court held "the attorney's action in withdrawing from this case at a crucial stage without reasonable notice to his client is one of willful abandonment." 272 S.C. at 452, 248 S.E.2d at 599. "An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice." Graham, 272 S.C. at 452-53, 248 S.E.2d at 599 (citing Perkins v. Sykes, 233 N.C. 147, 152, 63 S.E.2d 133, 137 (1951)); Floyd v. Kosko, 285 S.C. 390, 393, 329 S.E.2d 459, 460 (Ct. App. 1985). When counsel withdraws from a case at a crucial stage in litigation without reasonable notice to his client, the "[client] should not be charged with the abandonment of the case by its counsel." Graham, 272 S.C. at 452-53, 248 S.E.2d at 599 ("Conscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client.").

The majority enunciates the position that any failure of counsel must be based upon assumptions. The French phrase "pas du tout"[7] is efficacious. Not only does the failure in this case transcend mere neglect, it rises to the level of abandonment.

Kleinman believed Nettles to be Glenwood's attorney when she forwarded DC Development's cross-complaint to him on May 13, 2004. She persisted in attempting to contact Nettles, but he did not respond, nor did he file an answer to the cross-claim. On June 24, 2004, in a letter to Kleinman and Cisa, Nettles disavowed representation of Glenwood. In addition, Cisa's November 9, 2004 letter to counsel for DC Development indicated he was taking over Glenwood's representation. Cisa explained the reason no answer to DC Development's cross-claim had been filed was due to "the failure of the original attorney for Glenwood Falls, LP to respond."

It is commonly understood that a client may assume a lawyer who has previously represented him will continue to serve in that capacity. When the attorney becomes aware the client is operating under that assumption, it is incumbent upon the attorney to immediately and clearly resolve any doubt about whether the attorney-client relationship still exists. Delay in clarifying whether the representation continues risks exposing the client to prejudice, should the client mistakenly believe the attorney is acting to protect the client's interests. Although Nettles had the cross-complaint in his possession and had received multiple contacts from Kleinman, he nevertheless delayed nearly six weeks before addressing the attorney-client relationship. During that time the cross-complaint should have been answered to avoid admission of the allegations therein. Glenwood needed the advice of counsel on how to protect its interests. Glenwood was unquestionably prejudiced by Nettles' conduct.

The etiology of the default position of Glenwood arises from the failure and inaction of Nettles. The default position of Glenwood is concatenated from Nettles through Cisa. On November 8, 2004, Cisa received DC Development's letter informing him of the December 16, 2004 trial date. In

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[7] This phrase means "not so" or "not at all".

acknowledgement of that letter, Cisa confirmed he was taking over Glenwood's representation and indicated he intended to proceed on the merits of the case. Cisa represented Glenwood on November 9, 2004, at the latest. The majority agrees his conduct thereafter was neglectful.

Recognizing the dissimilitude of the facts in Graham v. Town of Loris as juxtaposed to this record, the annunciation of the principles and doctrines of law in Graham command the same result in this case. The attorney representing the Town of Loris resigned the day before a summary judgment hearing without notifying the town of his resignation. When no one appeared at the summary judgment hearing the court granted summary judgment against the Town of Loris. In this case, Cisa acknowledged he represented Glenwood, had notice of the December 16 trial, yet simply failed to appear at the trial. Entry of default and the subsequent default judgment against Glenwood resulted from Cisa's abandonment. His failure to appear at this critical stage in litigation without any notice to Glenwood was tantamount to unilateral and willful abandonment. The rationale in Graham is equally applicable in this case: "Conscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client."

CONCLUSION

The opinion of the majority is infected with expository difficulty when juxtaposed to the precedent extant in South Carolina law on abandonment. I **VOTE** to **REVERSE.**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Travis Anthony Ladson, Appellant.

Appeal From Dorchester County
Steven H. John, Circuit Court Judge

Opinion No. 4232
Heard March 6, 2007 – Filed April 9, 2007

REVERSED AND REMANDED

Appellate Defender Aileen P. Clare, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor David M. Pascoe, Jr., of Summerville, for Respondent.

KITTREDGE, J.: Travis Anthony Ladson was convicted of first-degree burglary following a three-day trial. Ladson was sentenced on November 10, 2004, to prison for a non-parolable term of twenty-five years. Ladson timely appealed his conviction and sentence. In accordance with standard procedure, Ladson promptly requested the transcript of the trial from the court reporter. Approximately ten months later, in August of 2005, the court reporter finally disclosed that there was no record of the trial court proceedings.

Because of the complete absence of a transcript, Ladson moved this court to reverse the convictions and sentences and for a new trial. Based on the State's assurance that the record could be easily reconstructed, a judge of this court denied Ladson's motion and remanded the matter to the trial court to reconstruct the record. More than a year after the trial, the trial judge convened a hearing with trial counsel in an effort to reconstruct the record.

We now have before us what the State contends is a reconstructed record of the trial court proceedings sufficient to permit appellate review. Ladson contends the conclusory and summary nature of the purported record on appeal does not permit meaningful appellate review. Because we find the reconstructed record insufficient for meaningful review of direct appeal issues, we reverse and remand for a new trial.

I.

On January 5, 2006, pursuant to this court's order, the trial judge held a hearing to reconstruct the record for appeal.[1] It was clear from the outset of

[1] As the original trial took place more than a year before this reconstruction hearing, it was obviously quite difficult to reconstruct the record. Although the hearing was orderly, it took on a conversational tone—counsel and the trial court often informally discussed their recollections of the earlier trial. In fairness to the outstanding trial judge and the parties' trial counsel, the order of this court left no option but to attempt a reconstruction of the record. As the trial court noted at the outset of the January 26, 2006, hearing, it would do the "best it can … to reconstruct the record."

this hearing that reconstructing the record from scratch, after such a substantial delay, would be an uphill struggle. The State presented two affidavits from witnesses and "summarized" the testimony of the other witnesses.

The information provided by the State was conclusory. The State usually prefaced its recall of witness testimony with statements like "his testimony generally would be," "he testified generally to the following," and "the next witness . . . will be by summation." Ladson took issue with the State's summary reconstruction of the record. The trial judge, noting that he no longer had his handwritten notes from the trial, typically would conclude with respect to a particular witness that the State presented "an accurate summation of the testimony," or the State's general description was "a correct summation of the testimony," or "the summation presented by the State . . . [was] a correct statement."

When the State concluded its summary of the testimony of one witness, the trial court concurred with the summary as "an accurate reflection of her testimony," and further held that the witness was "qualified as an expert in her field, and . . . the court found her testimony to be credible." The trial court then remarked, "I do not believe there was any question, at any point in time, as to the chain of evidence regarding these particular fingerprints." The State corrected the trial court and noted that the witness was not qualified as an expert and further that Ladson's trial counsel had preliminarily objected to the chain of custody. The trial court promptly agreed and explained the confusion by referring to another witness.

The State, too, had difficulty recalling the witnesses and the testimony. For example, the State had completely forgotten about one witness, whose identity was determined only by reference to Ladson's trial counsel's notes. As the Solicitor acknowledged, "the final witness that I have to admit I discovered from [Ladson's trial counsel's] notes."

There is even a dispute as to whether Ladson testified in his own defense. Ladson claims he did not testify. The trial court found otherwise, noting the "court's remembrance and recollection that the Defendant was not credible, and did not help himself in his testimony before the jury."

The trial court appeared equally confident that the jury returned its verdict the same day it began its deliberations: "My only recollection is that, after the court answered [a question from the jury], that the jury came out relatively soon after that with a verdict." When confronted with a different recollection from Ladson's counsel (claiming the jury was excused for the day and reached a verdict the following day), the trial court responded, "I usually require the jury to stay for as long as it takes [until it] come[s] back with a verdict. I don't ever remember an occasion where I have allowed a jury to go home and come back." The trial court's recollection was proven faulty when the State called attention to the juror note dated November 9, 2004, and the jury's verdict dated the next day, November 10.

The trial court and the State are confident that Ladson made timely objections at trial and moved for a directed verdict "based upon the evidence." Presumably, the State believes these concessions enlighten Ladson and us to the specific issues to address on appeal.

On January 26, 2006, the trial court issued an "Order for the Record on Appeal."

II.

Ladson maintains the reconstructed record does not allow for meaningful review of his direct appeal. The State disagrees and asserts this court should find the record adequate for appellate review of the claims Ladson raised at the reconstructed hearing.

It is clear from the record before us that all parties made a diligent effort to reconstruct the record. Despite these good faith efforts, the reconstructed record is largely conclusory, with testimony, objections, and the like recalled only in summary fashion. Thus, we must first determine the analytical framework for assessing the sufficiency of a reconstructed record, followed by a determination if the law warrants a new trial under the record before us.

South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal. In China v. Parrot, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968), our supreme court held that where a portion of the court reporter's notes were lost, the trial judge properly considered affidavits from counsel and the court reporter in reconstructing the record. See also Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court's power to remand for a reconstruction hearing), overruled on other grounds by State v. Gentry, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (finding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992) (holding trial court did not err in granting property owner's request to reconstruct the record of zoning proceeding where portions of original tape of hearing were incapable of being transcribed).

The authority of the trial court in South Carolina to reconstruct the record for appellate purposes aligns our state with the majority of jurisdictions that hold "the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." Smith v. State, 433 A.2d 1143, 1148 (Md. 1981); e.g., Lewis v. State, 123 S.W.3d 891, 893 (Ark. 2003); Wilson v. State, 639 A.2d 696, 699 (Md. 1994); State v. Deschon, 85 P.3d 756, 760 (Mont. 2004); Lopez v. State, 769 P.2d 1276, 1280 (Nev. 1989); State v. Izaguirre, 639 A.2d 343, 346 (N.J. Super. Ct. App. Div. 1994); People v. Shire, 803 N.Y.S.2d 309, 310 (N.Y. App. Div. 2005); State v. Quick, 634 S.E.2d 915, 918 (N.C. Ct. App. 2006); Dickerson v. Commonwealth, 548 S.E.2d 230, 232-33 (Va. Ct. App. 2001).

Most jurisdictions require an appellant to demonstrate specific prejudice flowing from an incomplete or reconstructed record. See, e.g., Lewis, 123 S.W.3d at 893 ("[I]t is the appellant's duty to demonstrate that prejudice results from the state of the record"); State v. Williams, 629 A.2d 402, 406 (Conn. 1993) (holding appellant must show "specific prejudice that results from having to address his claims on appeal with the reconstructed record"); Jones v. State, 923 So.2d 486, 489 (Fla. 2006) (noting appellant must point to prejudice resulting from missing portions of trial transcript);

State v. Wright, 542 P.2d 63, 65 (Idaho 1975) (holding appellant must demonstrate "specific prejudice" resulting from failure to reconstruct record); Simpson v. Commonwealth, 759 S.W.2d 224, 228 (Ky. 1988) (holding a showing of "prejudicial error" in having to proceed using substitute transcript is required); Smith, 433 A.2d at 1148 (noting "defects must be of a prejudicial character"); Commonwealth v. Chatman, 406 N.E.2d 1037, 1040 (Mass. App. Ct. 1980) (holding appellant must "come forward with articulable claims [by] which the reconstruction may be judged"); State v. Borden, 605 S.W.2d 88, 92 (Mont. 1980) (holding appellant must demonstrate prejudice); State v. Dupris, 373 N.W.2d 446, 449 (S.D. 1985) (holding appellant must show "specific error or prejudice" resulting from failure to record entire proceedings of trial); State v. Neal, 304 S.E.2d 342, 345 (W. Va. 1983) ("Generally, the failure to report some part of the proceeding will not alone constitute reversible error[;] [s]ome identifiable error or prejudice must be shown by the defendant."). "[B]efore a defendant can establish that he is entitled to a new trial on the basis of an inadequate reconstructed record, he must identify a specific appellate claim that this court would be unable to review effectively using the reconstructed record." Harris v. Comm'r of Corr., 671 A.2d 359, 363 (Conn. App. Ct. 1996). We believe our supreme court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice flowing from an inadequate record.

We conclude from China and its progeny, combined with a review of the law of other jurisdictions, that our supreme court would require a reconstructed record on appeal to allow for "meaningful appellate review." A new trial is therefore appropriate if the appellant establishes that "the incomplete nature of the transcript prevents the appellate court from conducting a 'meaningful appellate review.'" In re D.W., 615 S.E.2d 90, 94 (N.C. Ct. App. 2005); see also State v. Chanze, 565 S.E.2d 379, 382-83 (W. Va. 2002) (finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from reconstructed record, a new trial is appropriate). For a host of reasons, we find Ladson has established prejudice and demonstrated that the reconstructed record before us does not allow for meaningful appellate review.

We recognize that the excellent trial judge did the best he could to reconstruct this case under difficult circumstances. Approximately ten months transpired after the appeal was filed before the court reporter notified the parties (for a reason that is unclear) that her recording equipment failed and no part of the trial was recorded.[2] The court reporter's delay in disclosing the lack of a transcript made a bad situation worse, as the passage of time clearly dimmed the recall of the participants. We, too, must accept our share of the blame, for the remand order of this court required the trial court to reconstruct the record, with no option given to simply conclude that the record could not be reconstructed with the specificity to support meaningful appellate review. Cf. Koon, 358 S.C. at 367, 595 S.E.2d at 460 (denying request to remand for reconstruction of a post-conviction hearing after appellant failed to allege specifics regarding his assignments of error); and Whitehead, 352 S.C. at 221, 574 S.E.2d at 203 (remanding matter to circuit court for reconstruction hearing and instructing, "If the circuit court judge determines that reconstruction is not possible, he shall notify this Court . . . .").

The hearing to reconstruct the record for this three-day trial on a violent, non-parolable offense took place on January 5, 2006, more than a year after Ladson was convicted and sentenced. We are mindful of the tremendous workloads faced by our fine trial court judges. It is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances—reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules. The continuing dispute as to whether Ladson even testified (much less the content of his purported testimony) is but one example of the trial court and counsel groping in the dark as to what actually happened at trial.

Most cases around the country addressing this subject concern situations where only a part of the trial transcript is unavailable. In many such circumstances, meaningful appellate review can occur and the rights of the parties are not prejudiced. In this case, we are essentially left with a bare bones summary of the evidence (with more remaining unknown than known)

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[2] At oral argument, the State commented that the court reporter "used tapes that just wouldn't hold sound."

from a lengthy multi-day and fact-intensive trial that resulted in a non-parolable twenty-five year prison term.

Moreover, the fact of a missing portion of the trial transcript is usually brought to the court's attention much earlier than the year-plus delay present here. We are left with a few gratuitous references to generic motions and objections, but we do not know the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence. The list of unknowns continues. In short, we are left to speculate, and we decline to do so. See In re Rholetter, 592 S.E.2d 237, 244 (N.C. Ct. App. 2004) ("If a transcript is altogether inaccurate and no adequate record of what transpired at trial can be reconstructed, the court must remand for a new trial.").

The record before us does not permit meaningful appellate review. To hold this record is sufficient would guarantee the affirmance of Ladson's conviction and twenty-five-year non-parolable sentence without a genuine review. We would simply be constrained to affirm based on an insufficient record and issue preservation principles. Moreover, it would effectively foreclose any collateral challenge through post conviction relief or otherwise. We hold Ladson has demonstrated clear prejudice.

We finally remind the State that this court previously remanded this matter to the trial court for the purpose of reconstructing the record on the "assurance" by the State that this was a simple and straightforward case. The State should therefore have no problem retrying this simple and straightforward case.

III.

For the reasons stated above, we are convinced that under the circumstances of this case the reconstructed record lacks the completeness and reliability necessary for this court to engage in meaningful appellate review. We reverse and remand for a new trial.

REVERSED and REMANDED.

SHORT, J., concurs.

ANDERSON, J., concurring in result only in a separate opinion.

ANDERSON, J. (concurring in result only in a separate opinion): I disagree with the reasoning and analysis of the majority. The reliance by the majority on decisions from other jurisdictions is unnecessary. I respectfully concur in result **ONLY**. I **VOTE** to **REVERSE and REMAND** the convictions and sentences of Travis Anthony Ladson for a new trial.

The precedent extant in South Carolina, consisting of: China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004); and Dolive v. J.E.E. Developers, Inc., 308 S.C. 380 418 S.E.2d 319 (Ct. App. 1992), establishes the rule and procedure in regard to reconstruction of the record of the trial court proceedings. Our law places the burden upon the circuit judge to utilize discretion in the reconstruction proceeding. The ruling of the circuit court judge will only be reversed in the event of an abuse of discretion.

In China:

The defendant objects to the fact that the trial judge considered the affidavits of plaintiff's counsel and the court reporter in determining what transpired. The trial of this case was held in January 1965 and the affidavits were signed in April and May of 1967, over two years after the trial. The defendant contends that the long lapse of time since the trial should have rendered the affidavits of little probative value, especially in view of the inability of the trial judge and defendant's counsel to recall what took place and the statement by the trial judge in his previous order that the verdict of the jury apparently exonerated the defendant of the charge of recklessness. We find no error in the action taken by the trial judge.

Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge.

. . .

In doing so he properly considered the affidavits of counsel and the court reporter as to what happened. The fact that the notes of the court reporter were lost and the trial judge had no independent recollection of the incident under inquiry did not preclude him from determining the question upon the basis of the affidavits submitted. Their probative value was for him to determine and his conclusions thereabout are binding on the court.

251 S.C. at 333-34, 162 S.E.2d at 278 (internal citations omitted).

Whitehead inculcates:

Petitioner sought a remand to reconstruct the record of his first PCR hearing. See China v. Parrott, supra. We now grant his motion and remand the case to Jasper County for a hearing to reconstruct the first PCR record. This hearing should be held within 45 days of the date this opinion is filed. If the circuit court judge determines that reconstruction is not possible, he shall notify this Court and the parties within 15 days of the reconstruction hearing. If the record is reconstructed, the parties shall notify this Court and the matter will proceed according to King v. State, supra.

352 S.C. at 221, 574 S.E.2d at 203.

Our supreme court in Koon succinctly instructs as to the judicial duty if the original trial record is deficient:

Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968) (trial judge reconstructed the record where court reporter records were unavailable).

358 S.C. at 367, 595 S.E.2d at 460.

Finally, this court edifies in Dolive:

Appellants first contend the circuit court erred in allowing additional matters into the record on appeal arguing that, while Title 5 zoning cases allow supplementation of the record, there is no such provision for Title 6 zoning cases under which this case falls. However, this case does not involve supplementation of the record. The circuit court merely allowed J.E.E. to reconstruct the record by means of an affidavit. In China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968), our Supreme Court held, where portions of stenographic notes of a trial proceeding were lost before they were transcribed by the court reporter, it was not error for the trial judge to consider affidavits of plaintiff's counsel and the court reporter in determining what transpired. Based on the fact that this matter has already been twice appealed to the circuit court and the loss of the vital portions of the record appear to have been through no fault of the respondent, we find no error in the circuit court's ruling allowing for reconstruction of the record.

308 S.C. at 383, 418 S.E.2d at 321.

The vagaries and vicissitudes of a reconstruction hearing are demonstrated with clarity in the case sub judice. The reconstructed record contains:

1. Affidavit of the victim, Charles Smith, given on December 21, 2005.
2. Affidavit of the crime scene investigator, Sergeant Ryan Depoppe, given on December 21, 2005.
3. Handwritten notes of the original court reporter, Hilda Jordan.
4. Handwritten notes of M. Thomas, Ladson’s attorney at trial.
5. Large drawing showing the layout of Smith’s home.
6. Coin box found inside Smith’s home.
7. Hatchet discovered outside Smith’s home.
8. Wallet found inside Smith’s home.
9. Plastic Bag found inside Smith home.
10. Fingerprint samples given by Ladson.
10. Fingerprint analysis from the Charleston Police Department stating prints found on the coin box match those of Ladson.

Despite a brobdingnagian effort by the circuit judge and trial counsel, we are confronted with an epigrammatic record as it relates to appellate issues.

At oral argument, counsel was queried by the court in regard to an identification of appellate issues based on the reconstructed record. Counsel for the State was unable to identify the appellate issues with any degree of exactitude.

Because the reconstructed record is profoundly deficient in guiding the court to preserved appellate issues, I come to the ineluctable conclusion that a retrial is mandated.

I **VOTE** to **REVERSE and REMAND** the convictions and sentences of Travis Anthony Ladson for a new trial.