
# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 15**

**April 4, 2005**

**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of the Estate of
Mary Frances Pallister

Ann Garman Diem Patton, as personal representative of the Estate of Ruth Eleanor Diem, Respondent,

v.

James E. Reames, Stephen L. Reames, Marsha R. Bozard, and David S. Reames, as personal representative of the Estate of F.S. Reames, Appellants.

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Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

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Opinion No. 25960
Heard February 15, 2005 – Filed March 28, ,2005

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**AFFIRMED**

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John R. Chase, of Haynsworth Sinker Boyd, P.A., of Florence, and B. Eric Shytle, and Sarah P. Spruill, both of Haynsworth Sinkler Boyd, P.A., of Columbia, for Appellants.

Kenneth B. Wingate and Paul D. Kent, of Sweeny, Wingate and Barrow, P.A., of Columbia, for Respondent.

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**JUSTICE BURNETT:** This is a lost or missing will case. A probate court jury found that Ann Patton, personal representative of the Estate of Ruth Eleanor Diem, proved by clear and convincing evidence Mary Frances Pallister (Testatrix) did not destroy her original last will and testament with an intent to revoke it.[1] The circuit court affirmed the verdict and Appellants, the nephews and niece of Testatrix, appeal. We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR, and now affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Testatrix died April 7, 2001, at the age of 89, leaving an estate with an estimated, after-tax value of $1.4 million. Testatrix's husband predeceased her and she left no children.

The parties agreed Testatrix was competent to execute the last will and testament dated October 22, 1999, the will in issue, but litigated the question whether the will was revoked by Testatrix because the original document could not be found after Testatrix's death. Ruth Eleanor Diem (Diem), the primary beneficiary to the will, was the sister of Testatrix's husband. Patton, a contingent beneficiary in the will, is Diem's daughter. James Reames (James) and the other Appellants are the children of Testatrix's two brothers.

James is a contingent beneficiary in the will, but will not take under it because Diem survived Testatrix. James and the other Appellants

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[1] The jury rendered a verdict in favor of Ruth Eleanor Diem, Patton's mother, who originally petitioned the probate court to accept the will and appoint her as Testatrix's personal representative. Diem testified at trial. After Diem died, Patton was substituted in her place as personal representative of Diem's estate.

would inherit Testatrix's estate if the will is deemed destroyed with an intent to revoke, such that intestacy laws apply.

Testatrix executed two wills while living in New Mexico. The primary and contingent beneficiaries named in Testatrix's 1983 will were her husband, Diem, and Patton. The 1983 will named these same persons as personal representatives in the same order of priority.

The primary and contingent beneficiaries named in Testatrix's 1997 will, prepared after her husband's death, were Diem, Patton, and Testatrix's sister-in-law, Lola Reames, wife of Testatrix's brother and mother of James. The 1997 will named these same persons as personal representatives in the same order of priority.

Diem and Patton lived in California, while Testatrix lived in New Mexico during the last two decades of her life. Testatrix and Diem were close friends for fifty-five years, staying in touch through visits, joint vacations, telephone calls, cards, and letters. Diem was Testatrix's matron of honor at her 1946 wedding. Patton and Testatrix maintained a similar, close relationship.

Testatrix, who grew up in Bishopville, S.C., moved from New Mexico to South Carolina in 1998. The will in issue was prepared by a South Carolina attorney and executed on October 22, 1999.[2] In this will, Testatrix named as her primary and contingent beneficiaries Diem, Patton, and James, a Florence resident. The 1999 will named these same persons as personal representatives in the same order of priority. Testatrix told her accountant in

[2] The 1999 will contained the usual language revoking all prior wills and codicils. The parties agree the 1999 will was valid upon execution. If Testatrix subsequently revoked the 1999 will, that revocation would not revive a prior will absent clear, cogent, and convincing evidence Testatrix intended to revive the prior will. See S.C. Code Ann. § 62-2-508 (1987). The record contains no such revival evidence, therefore, Testatrix's estate would be distributed under intestacy laws if the 1999 will was revoked.

South Carolina she planned to leave her estate to Diem and Patton, *i.e.*, her husband's side of the family, to honor the memory of her husband and his efforts. He was the primary breadwinner and his earnings and investment acumen resulted in an estate which afforded Testatrix a comfortable lifestyle.

After moving to South Carolina, Testatrix placed Diem and Patton as joint-signatories on her bank accounts and granted them right of access to her safe deposit box. About a month after executing the 1999 will, Testatrix signed a durable power of attorney naming Diem as her agent, with Patton as alternate agent, in financial and other matters. On the date she executed the 1999 will, Testatrix signed a health care power of attorney naming James as her agent for health care decisions if she were to become mentally incompetent.

Testatrix, by all accounts, was a "delightful," "organized" woman who knew her own mind and did not hesitate to express her wishes and opinions. The attorney who prepared the 1999 will testified she discussed various types of trusts with Testatrix, but Testatrix desired only a simple will. The attorney delivered the original will to Testatrix and encouraged her to place it in a safe deposit box.

Testatrix's tax accountant testified Testatrix was an organized, "by the books" person. Administrators at the Methodist Manor, where Testatrix lived, described her, although she had some physical frailties, as "organized," "on the ball," "very sharp mentally," and an "independent, private person." Diem, Patton, and James offered similar testimony. Such testimony referred to witnesses' general knowledge of Testatrix during the years they knew her and was not necessarily focused on the last weeks of her life.

Testatrix was generous to close relatives. From 1996 to 1999, Testatrix gave, in cash or assets such as stocks and bonds, $183,000 to Patton, $30,000 to Diem, and $104,000 to James. In addition, Testatrix made a business loan of $100,000 to James in 2000, although James apparently considered it a gift, not a loan.

While living at the Methodist Manor in Florence, Testatrix gradually developed a close relationship with James and his family. James visited and helped Testatrix at her home at least once or twice a week. Testatrix sometimes had dinner at James' home. James testified he visited Testatrix at her home or in the hospital every day during the last several weeks of her life as her health worsened, at times spending most or all of the day with her. A nurse assistant, who sat with Testatrix at the hospital on the evening of her death and who did not know the family, testified Testatrix repeatedly asked for James during the final hours of her life.

James testified he knew where Testatrix kept financial records at her home, including her bank and brokerage accounts, and he sometimes filed financial documents for her. Testatrix kept extensive financial records from years past. James helped Testatrix sort her mail, but did not discard anything without her permission. At trial James initially denied helping Testatrix with her financial or business matters in the final months of her life. When confronted with his conflicting deposition testimony, James testified he wrote checks for Testatrix and sometimes even signed her name. He carried a bag, containing Testatrix's checkbooks and investment records, for Testatrix while taking her to and from the hospital in the last weeks of her life.

James testified he had a key to Testatrix's Methodist Manor apartment "from day one." He also had the keys to her car, which he testified she gave him several months before her death. The record shows, however, the title never had been transferred by Testatrix's signature. James, a car salesman for thirty-two years, testified that although he was "in the used car business . . . I do not do title work."

He further testified Testatrix gave him a copy of the 1999 will some time following its execution. He saw the will a second time two to three months before Testatrix's death in January or February 2001, lying on a table in her apartment. On that occasion, he picked it up when it fell on the floor with some books and replaced it on the table. He testified he did not know what happened to the original 1999 will and denied discarding or destroying it.

Testatrix was hospitalized with congestive heart failure and related health problems for eight days in March 2001 and from April 5 until her death on April 7, 2001. In the last month of her life, Testatrix and part of her belongings were moved from her independent living unit to an assisted living unit at the Methodist Manor.

On April 4, 2001, James asked a bank officer to contact Testatrix at her apartment. The bank officer testified she spoke with Testatrix by telephone and, at Testatrix's direction, prepared forms to add James to Testatrix's checking and money market accounts on which Diem and Patton already were listed as joint signatories. The bank officer also prepared a form allowing James to enter Testatrix's safe deposit box.

James obtained an account transfer form from Testatrix's brokerage firm on April 4. James asked a brokerage representative to accompany him to the Methodist Manor to assist his aunt in completing the form, but the representative was unable to leave the office.

James took the bank and brokerage forms to Testatrix's apartment. He testified Testatrix, who was using an oxygen tank, signed the forms in the presence of a notary public, who was a Methodist Manor employee; an unidentified "sitter" who was staying with Testatrix that afternoon; and an unidentified, older woman who was a Manor resident and friend of Testatrix's. Signing the forms consumed about half an hour. The notary public later testified that only he, Testatrix, and James were in the apartment when the forms were signed during a five-minute period.

James returned to the bank and brokerage firm the same afternoon. James transferred $80,000 from Testatrix's joint bank accounts to his individual account. He transferred Testatrix's brokerage account, worth about $633,000, to his individual brokerage account.[3]

[3] The parties tried only the issue of whether the 1999 will had been lost by mistake or destroyed with an intention to revoke it. The jury heard

continued . . .

On the morning of April 5, 2001, James entered Testatrix's safe deposit box for the first time. He testified he did so out of "curiosity" and to search for the health care power of attorney form which had been requested by her doctor in order to admit Testatrix to the hospital. James and his wife testified they could not find the form Testatrix had given James because many of their belongings were in storage while they built a new home. James testified he again entered Testatrix's safe deposit box after her death on April 9, 2001, in the presence of a bank officer, to retrieve vehicle-related documents.

Patton testified she and Diem first learned on April 10, 2001, about James' transfer of assets to himself and his entries into Testatrix's safe deposit box. Patton testified she and Diem, following Testatrix's death, could not find the original 1999 will in Testatrix's safe deposit box or among her belongings or other financial documents. When they finally spoke to James by telephone after several attempts to reach him since arriving, he told them he had never seen Testatrix's will. Patton and Diem visited Testatrix's apartment and found it in an uncharacteristically messy and unkempt state.

Testatrix had kept her previous wills in a safe deposit box. The record is unclear whether Testatrix ever entered her safe deposit box after executing her last will on October 22, 1999. The last date signed by Testatrix on the record of entry form was partially scratched out or written over. A bank officer testified the ambiguous number may be an "8" or a "9" and appears to show Testatrix last entered the box on "9-13-99," although the date is uncertain.

Patton testified she and Diem found an empty envelope marked "Last Will and Testament" when they entered Testatrix's safe deposit box on April 10, 2001. The attorney who prepared Testatrix's 1999 will, however, testified the envelope was not similar to ones she used in such matters.

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evidence, but did not decide the validity, of James' transfers of Testatrix's assets to himself.

James testified he was "concerned" when he first saw the 1999 will and "didn't understand why it was the way it was when [Testatrix] had charged me with certain other responsibilities." The attorney who prepared the will testified James expressed his anger about the will provisions to her in a telephone call shortly after the will had been prepared. James said he was upset the entire estate was left to Diem or Patton, while he was burdened with helping Testatrix with health care and other matters without getting anything from the estate. The attorney testified James accused her, wrongfully, of advising Testatrix to draft such a will. James' brother, Stephen Reames, testified at his deposition James told him – after he had transferred Testatrix's assets to himself – James had "got his inheritance from [Testatrix]." Stephen testified at trial he could not recall whether James used the word "gift" or "inheritance" in describing the transferred assets.

## ISSUES

I. Did the circuit court err in affirming the jury's verdict because Patton failed to present clear and convincing evidence rebutting the presumption Testatrix had destroyed her original will, which could not be found after her death, with an intent to revoke it?

II. Did the circuit court err in affirming the probate court's refusal to instruct the jury on the principle that a person is never presumed to commit a crime?

## STANDARD OF REVIEW

An action to contest a will is an action at law. Johnson v. Johnson, 235 S.C. 542, 546, 112 S.E.2d 647, 649 (1960); Golini v. Bolton, 326 S.C. 333, 338, 482 S.E.2d 784, 787 (Ct. App. 1997). If the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them. Matter of Howard, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993); Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); In re Estate of

Weeks, 329 S.C. 251, 262, 495 S.E.2d 454, 460 (Ct. App. 1997). Under the Probate Code, a circuit court hearing an appeal from the probate court must apply the same rules of law as an appellate court would apply on appeal. Matter of Howard, 315 S.C. at 360-61, 434 S.E.2d at 256-57; S.C. Code Ann. § 62-1-308 (Supp. 2004).

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

## LAW AND ANALYSIS

### I. EVIDENCE SUPPORTING JURY'S VERDICT

Appellants contend the probate and circuit courts erred in denying their directed verdict and post-trial motions for a judgment in their favor as a matter of law. Appellants argue Patton failed to present clear and convincing evidence rebutting the presumption Testatrix had destroyed her will with an intent to revoke it because the original document could not be found after her death. Appellants argue "there is not a scintilla of evidence of a cause, other than revocation, for the Will's disappearance." We disagree.

A will is an expression of a testator's intent to dispose of the testator's property after death. A will may be freely modified or revoked by a mentally competent testator, acting of the testator's own volition, until the testator's death. Lowe v. Fickling, 207 S.C. 442, 447, 36 S.E.2d 293, 294 (1945); S.C. Code Ann. 62-2-506 (1987) (revocation of will by writing or act).

"When a testator takes possession of his [original] will and the same cannot be found after his death, the law presumes the testator destroyed it animo revocandi, *i.e.*, with an intent to revoke it. This is merely a presumption of fact and may be rebutted by the evidence the will existed at

the time of his death, was lost subsequent thereto, or had been destroyed by another without authority to do so. The same presumption arises where it is shown the testator, while not having the will in his actual possession, had ready access to it." Lowe, 207 S.C. at 447, 36 S.E.2d at 294-95; Bauskett v. Keitt, 22 S.C. 187, 191 (1885); Golini v. Bolton, 326 S.C. 333, 340, 482 S.E.2d 784, 787-88 (Ct. App. 1997); In re Estate of Mason, 289 S.C. 273, 277, 346 S.E.2d 28, 31 (Ct. App. 1986).

Consequently, the person attempting to rebut the presumption and submit a copy of the lost or missing will to the probate court for administration must present clear and convincing evidence (1) the original will existed at the time of the testator's death and (2) the original will was lost after his death or destroyed by a third party without the testator's knowledge or consent. Lowe, 207 S.C. at 447, 36 S.E.2d at 294-95; Golini, 326 S.C. at 340, 482 S.E.2d at 788; Estate of Mason, 289 S.C. at 277, 346 S.E.2d at 31.

The person contesting the validity of a will usually bears the burdens of proof and persuasion. Golini, 326 S.C. at 340, 482 S.E.2d at 787; S.C. Code Ann. § 62-3-407 (Supp. 2004). However, these burdens are reversed in cases of lost or missing wills. The person asserting that an original will was, in fact, valid but mistakenly lost or destroyed by another, bears the burden of presenting clear and convincing evidence to rebut the presumption the testator destroyed the will with an intent to revoke it. Lowe, 207 S.C. at 451, 36 S.E.2d at 296; Golini, 326 S.C. at 340, 482 S.E.2d at 788.

The mere fact a person who would benefit from destruction of a will possessed it or had access to it, standing alone, is not sufficient to rebut the presumption the testator himself revoked the will by destroying it. Lowe, 207 S.C. at 448, 36 S.E.2d at 295. However, "[p]roof that a testator, whose will cannot be found after death, entertained a kindly or loving feeling toward the beneficiaries under the Will carries weight and tends toward the conclusion of nonrevocation of the Will by the testator." Golini, 326 S.C. at 342, 428 S.E.2d at 788-89.

We conclude Patton presented clear and convincing evidence from which a jury could determine the original 1999 will existed at the time of Testatrix's death, and it was either lost after her death or destroyed by a third party without her knowledge or consent. Accordingly, we affirm the jury's verdict in favor of Patton.

It is undisputed the 1999 will was valid upon execution. The attorney testified she delivered the original will to Testatrix and James testified he saw it in her apartment two to three months before her death. The primary and first contingent beneficiaries of the will were the same persons Testatrix had named in her wills since 1983 – Diem and Patton. The record contains no evidence Testatrix expressed any desire to change or revoke her will in order not to pass assets to Diem and Patton; nor is there any evidence Testatrix grew unhappy or displeased with them in any way. The record contains clear and convincing evidence upon which the jury may have relied in determining the original will existed at Testatrix's death.

Testatrix previously had kept her wills in a safe deposit box. She may have placed the 1999 will in her box, although it is unclear due to the ambiguous date on the bank's record of entry form. Regardless, Testatrix usually was an organized, "by the books" person who regularly maintained files containing current and past financial and investment documents. Some of those documents were transported in a bag to and from the hospital on several occasions in the month preceding her death. Some of her belongings were moved from an independent living unit to an assisted living unit at the Methodist Manor in the last weeks of her life. Diem and Patton found Testatrix's apartment in an unusually disorganized and unkempt state after her death.

In addition, Testatrix regularly had consulted professionals – lawyers, accountants, and stock brokers – throughout her life when making important decisions and preparing significant documents. The jury may have reasoned that if Testatrix had wanted to revoke her 1999 will, it is not likely she would have torn it up or discarded it. Instead, it is far more likely she would have consulted the lawyer who had drafted the will to make other arrangements. The record contains clear and convincing evidence upon

which the jury may have relied in determining the original 1999 will was misplaced or lost during Testatrix's final illness and frequent moves.

Moreover, James knew about the will and admitted he was displeased with its terms. He telephoned Testatrix's attorney to complain about it and accused her of convincing Testatrix to leave everything to Diem and Patton. He had unfettered access to Testatrix's apartment, knew where she kept financial and investment records, and by his own testimony spent days on end there as Testatrix's health worsened. He had access to Testatrix's apartment for eleven days while she was hospitalized shortly before her death.

The mere fact James, who would benefit financially were the will revoked, had access to Testatrix's missing will is not, standing alone, sufficient to rebut the presumption Testatrix herself revoked it by destroying it. However, in addition to the evidence of Testatrix's practice of keeping careful records and consulting professionals, the record reveals more than motive to destroy the will and opportunity to do so by a third party.

James acted decisively to ensure he received, using the word ascribed to him by his brother, his "inheritance" from Testatrix. James transferred about $713,000 in assets from Decedent to himself on the day she re-entered the hospital – three days before her death – after obtaining her signature on necessary bank and brokerage forms.

James testified several people were in the room during a half-hour signature session. The notary public testified only he, James, and Testatrix were present during a five-minute period. When questioned by Diem and Patton about the transfers and the location of Testatrix's original 1999 will after Testatrix's death, James told them he had never seen the will. The record contains clear and convincing evidence upon which the jury may have relied in determining a third party destroyed the will without Testatrix's consent or knowledge.

II. JURY INSTRUCTION

Appellants contend the probate court erred in refusing to give the following instruction to the jury: "The law does not presume that a will has been destroyed by another person without the knowledge or consent of the maker, for this would be a crime under the laws of South Carolina and a crime is never presumed." Appellants argue the charge, drawn from Lowe, 207 S.C. at 447, 36 S.E.2d at 295, was necessary to ensure the jury understood its verdict could not be based on speculation the will was destroyed by a third person. We disagree.

The probate court, accepting Testatrix's arguments against the charge, rejected it because use of the term "crime" was inflammatory and potentially placed too much weight on one method of rebutting the presumption a missing will was destroyed by the Testatrix with an intent to revoke it.

A trial court must charge the current and correct law. McCourt by McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995). The law to be charged to the jury is determined by the evidence at trial. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). In reviewing jury charges for error, appellate courts must consider the charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). A jury charge is correct if, when read as a whole, it contains the correct definitions and adequately covers the law. Id. at 495-96, 514 S.E.2d at 574; In re McCracken, 346 S.C. 87, 94, 551 S.E.2d 235, 239 (2001). It is not error for the trial judge to refuse a specific request to charge when the substance of the request is included in the general instructions. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 160, 345 S.E.2d 711, 715 (1986).

We conclude the probate court judge properly instructed the jury on the law governing lost wills, the rebuttable presumption a testator destroyed his will with an intent to revoke if it cannot be found after his death, and Patton's burden to rebut the presumption by clear and convincing evidence. When read as a whole, the charge correctly defined and adequately covered the law. Moreover, Appellants' specific request to

charge was included in the general instructions. The probate court judge did not abuse his discretion in refusing the requested charge.

## CONCLUSION

We affirm the decision of the circuit court and thereby affirm the verdict of the probate court jury. Patton may present a copy of Testatrix's 1999 will to the probate court for administration despite the loss of the original will.

**AFFIRMED.**

**MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice L. Casey Manning, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Evelyn H. Conner, Appellant,

v.

City of Forest Acres, Respondent.

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

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Opinion No. 25961
Heard February 1, 2005 - Filed April 4, 2005

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**AFFIRMED**

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Howard A. Hammer, of Hammer, Hammer & Potterfield, of Columbia; and Scott Elliott, of Elliott & Elliott, PA, of Columbia, for Appellant.

Kathryn Thomas and Derwood L. Aydlette, III, both of Gignilliat, Savitz & Bettis, L.L.P., of Columbia, for Respondent.

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**JUSTICE BURNETT:** Evelyn H. Conner (Employee) appeals a jury verdict in favor of the City of Forest Acres (City) in this wrongful discharge action. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Employee brought this wrongful discharge action, grounded in breach of contract, in what is commonly known as a "employee handbook claim," against City in 1994. We reversed a grant of summary judgment to City and remanded the case for trial. Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) (affirming in part and reversing in part the unpublished opinion of the Court of Appeals).

Employee was a police dispatcher and office worker in City's police department for nine years. From November 1992 to June 1993, six written reprimands were issued to Employee for violating the dress code, tardiness, performing poor work, leaving work without permission, and using abusive language.

In July 1993, Employee was evaluated as unsatisfactory and placed on a ninety-day probation. She received written reprimands twice in August 1993 and her October 1993 evaluation reflected only slight improvement. Police Chief J.C. Rowe notified Employee by letter dated October 7, 1993, that she was terminated from her job.

Various witnesses for both parties, including Chief Rowe, testified that until her last year or so in the job, Employee was a competent, motivated employee who excelled as a dispatcher – "among the best," "fantastic," "consistent and effective," and "top of the line." Witnesses presented by Employee testified they had a good working relationship with her in 1992-93, although some were patrol officers who had limited contact with office staff. Employee, then age 50, admitted she made some mistakes and sometimes even described herself to other staff members as a "b----." But she denied most of the allegations of wrongdoing as well as City's effort to portray her as a troublemaker who enjoyed disrupting the office staff.

In contrast, witnesses presented by City, most of whom worked in police and municipal court offices, testified Employee's attitude, behavior, and work habits deteriorated severely in 1992-93. Employee belittled or

berated co-workers for no reason, took excessive smoking and bathroom breaks, purposely misplaced or disorganized facsimile messages and arrest paperwork, showed disrespect toward police supervisors in the presence of private citizens, ignored the requests of disliked co-workers, used excessive profanity, and generally refused to work cooperatively with other office staff.

The jury rendered a verdict for City at the conclusion of a four-day trial. This appeal was certified for review from the Court of Appeals pursuant to Rule 204(b), SCACR.

## STANDARD OF REVIEW

The admission or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. Pike v. S.C. Dept. of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997); Timmons v. S.C. Tricentennial Commn., 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); Powers v. Temple, 250 S.C. 149, 160, 156 S.E.2d 759, 764 (1967).

## ISSUE

Did the trial court err by prohibiting Employee from introducing evidence about the grievance process, which occurred after Employee's initial termination date, and in instructing the jury to disregard all such evidence?

## DISCUSSION

Employee contends the trial court committed reversible error by refusing to allow Employee to introduce evidence about events which occurred after Employee's initial termination on October 7, 1993, and in instructing the jury to disregard subsequent events. Employee argues that evidence of the disciplinary process followed in Employee's case, the vote and recommendation of the grievance committee which heard her case, and the actions of city council which reviewed her case were admissible. Such evidence was necessary to establish the existence of a contract and lack of the evidence allowed the jury to draw an inference that the procedure was not binding and thus no contract existed. Employee asserts the evidence also was admissible on the issue of whether City acted in good faith and had a sufficient and reasonable basis to terminate Employee. We agree in part.

City moved in limine to prohibit admission of any evidence of events occurring after October 7, including the actions of the grievance committee and city council. City argued that Employee in her complaint had not alleged City had failed to follow the grievance procedure. City asserted it had fully complied with the County and Municipal Employees Grievance Procedure Act,[1] which City contended provides for nothing more than a review of a decision already made and does not limit City's power to terminate at-will employees.

The trial court ruled this Court in Conner, 348 S.C. 454, 560 S.E.2d 606, had conclusively established October 7 as Employee's effective, final termination date. Therefore, Employee would not be allowed to introduce evidence of grievance proceedings occurring after that date because

[1] S.C. Code Ann. §§ 8-17-110 to -160 (1996 & Supp. 2004). The Act allows a county or municipality to adopt a plan for the resolution of employee grievances. The employee may submit her grievance to a committee, which conducts a hearing and has the authority to request pertinent documents and witnesses. The committee must report its findings to the individual or body vested with employment and discharge authority, which approves or rejects the committee's decision without further hearing.

such events were irrelevant and likely to cause unfair prejudice to City or confuse the jury. See Rules 401-403, SCRE. The trial court ruled Employee would be required to prove her case – *i.e.*, the existence of a contract which modified her at-will employment status by virtue of mandatory language in the handbook and, if a contract existed, the lack of a reasonable, good-faith belief that City had sufficient cause to terminate her – based solely on evidence of events occurring on or before October 7.

The trial court erred in interpreting Conner to effectively establish October 7, which was mentioned in the recitation of the facts, as the final termination date. We further conclude the trial court erred in relying in its ruling on section 15-2 of City's municipal code, which states the police chief "shall have complete authority to appoint, suspend and remove all police personnel and employees of the police department." The disciplinary and grievance policies contained within the various handbooks, combined with the particular facts of this case revealing City followed those policies, demonstrate city council made the final decision to terminate Employee when it voted to reject the committee's recommendation and uphold the police chief's decision.

We disagree with City that the ordinance somehow supercedes established City policies and practices by vesting sole and final termination authority in the police chief. "However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Kiriakides v. United Artists Commun., Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

The entire grievance process would be a meaningless exercise in futility if we were to adopt City's interpretation of the ordinance. Instead, we interpret the ordinance to mean simply the police chief has the final termination authority within the department, subject to established grievance

policies and review as set forth in City's personnel manuals and the Grievance Procedure Act.[2]

City presented as evidence the written disciplinary and grievance procedures contained in City's personnel manuals issued in 1987 and 1993 and in the police department's personnel manual. The manuals were discussed at length in general terms by City's witnesses, who also emphasized language in the manuals which disclaimed any contract of employment, as well as statements signed by Employee acknowledging the manuals were not contracts of employment. Thus, City repeatedly presented evidence the handbook did not modify Employee's at-will status.

The trial court barred evidence City actually followed its handbook policies in Employee's case, *i.e.*, that a grievance committee heard the matter, the committee voted 2-1 to reinstate Employee, and city council voted to reject the grievance committee's recommendation and uphold the termination. Specifically, the trial court excluded testimony from W.D. Morris, chairman of the grievance committee appointed to hear Employee's case, about the hearing. The trial court also excluded testimony from Ron Garbinsky, city administrator, about the grievance hearing or city council's

[2] The Grievance Procedure Act indicates a supervisor's initial termination of a government employee entitled to a grievance process is not the final decision. The Act provides that the "committee shall . . . make its findings and decision and report the findings and decision to the individual or body vested with employment and discharge authority. If the individual or body vested with employment and discharge authority approves, the decision of the grievance committee is final. . . . If, however, the individual or body vested with the employment and discharge authority rejects the decision of the committee, it shall make its own decision without further hearing, and that decision is final. . . ." S.C. Code Ann. § 8-17-140 (Supp. 2004). Therefore, the police chief in this case did not have the sole and final authority to terminate Employee, who would have been reinstated if city council had approved the grievance committee's decision.

actions. Employee testified she filed a grievance and a hearing was held, but the trial court excluded further testimony about the hearing.

Despite the trial court's rulings, the jury heard Employee testify she filed a grievance and a grievance hearing was held. Employee's vocational rehabilitation expert mentioned Employee's grievance proceeding. The city administrator testified the grievance committee held a hearing and issued a written decision to city council. City's former mayor testified the grievance committee held a hearing, issued a report recommending Employee "shouldn't be fired," and city council voted on the report.

In keeping with its evidentiary rulings, the trial court instructed the jury

> I want you to remember one thing particularly in the course of your deliberations. The City terminated [Employee] on October the 7th, 1993. October the 7th, 1993. You are not to consider anything beyond that date. There's been some evidence or some discussion in this case about a grievance procedure and a procedure that's outlined in the manual and a Grievance Committee which may have acted after October the 7th. You're not to concern yourselves with that. The law says that you must judge the City's actions through Chief Rowe as of October the 7th. In effect, in effect, you are now the Grievance Committee and you are the judge of the City's actions.

We analyze this case in light of the presumption the jury followed the trial court's instructions to ignore any evidence it heard about post-October 7 events. See Buff v. S.C. Dept. of Transp., 342 S.C. 416, 426 n.3, 537 S.E.2d 279, 284 n.3 (2000) ("Juries are presumed and bound to follow the instructions of the trial judge.") (Pleicones, J., dissenting); Kennedy v. Kennedy, 86 S.C. 483, 68 S.E. 664 (1910) (appellate court will presume the jury heeded the admonition of the trial court regarding the effect or consideration of certain evidence).

South Carolina recognizes the doctrine of at-will employment. This doctrine provides that a contract for employment may be immediately terminated by either employer or employee when unsupported by consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation. Such a termination may occur at any time and for any reason or no reason at all, subject to certain limited exceptions to the at-will employment doctrine and subject to certain prohibitions against illegal discrimination which are not at issue in this case. E.g. Horton v. Darby Elec. Co., 360 S.C. 58, 66-68, 599 S.E.2d 456, 460-61 (2004); Conner, 348 S.C. at 463-64, 560 S.E.2d 610-11; Stiles v. American Gen. Life Ins. Co., 335 S.C. 222, 224-25, 516 S.E.2d 449, 450 (1999); Baril v. Aiken Regl. Med. Ctrs., 352 S.C. 271, 281-82, 573 S.E.2d 830, 836 (Ct. App. 2002); Burns v. Universal Health Servs., Inc., 361 S.C. 221, 233-34, 603 S.E.2d 605, 611-12 (Ct. App. 2004) (discussing exceptions).

In the exception to the at-will employment doctrine, an employee handbook containing mandatory statements regarding disciplinary and grievance policies may be enforced against an employer as contractual obligations in a wrongful discharge action, despite the presence of a disclaimer in the handbook which asserts it is not intended to create a contract of employment. Conner, 348 S.C. at 463-64, 560 S.E.2d at 610-11; Fleming v. Borden, Inc., 316 S.C. 452, 460-63, 450 S.E.2d 589, 594-96 (1994); Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987).[3]

A jury initially must determine whether an employment contract exists, such that an employee may be fired only for sufficient cause. Conner, 348 S.C. at 463-65, 560 S.E.2d at 610-12. "[T]he disclaimer is merely one factor to consider in ascertaining whether the handbook as a whole conveys

[3] The Legislature has enacted S.C. Code Ann. § 41-1-110 (Supp. 2004), which took effect March 15, 2004. This statute provides a handbook shall not create an employment contract if it is conspicuously disclaimed. This statute does not apply in Employee's case because it only applies to handbooks issued after June 30, 2004. Employee's handbooks were issued in 1993 and earlier.

credible promises that should be enforced. . . . The entire handbook, including any disclaimer, should be considered in determining whether the handbook gives rise to a promise, an expectation, and a benefit." Fleming, 316 S.C. at 463, 450 S.E.2d at 596.

Furthermore, it is proper to consider events occurring after an employee's initial termination date and during the grievance process when deciding whether the employee's at-will status was modified by promises contained in a handbook. See Burns, 361 S.C. at 236, 603 S.E.2d at 615 (employer's handling of employee's termination, such as issuing a written warning in compliance with its handbook, inferentially demonstrates an employment contract); O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 847 (Mass. 1996) (employer's adherence to grievance procedure in personnel manual was some evidence of existence of contract based on manual's terms); Warner v. Federal Express Corp., 174 F. Supp. 2d 215, 228 (D.N.J. 2001) (considering whether employer followed established grievance policies after termination of employee in deciding whether employee had established breach of alleged contract); Stephenson v. State Street Bank & Trust Co., 924 F. Supp. 1258, 1280 (D. Mass. 1996) (employer's dissemination of an employment manual and its adherence to grievance procedure may constitute evidence of employment contract); Marrs v. Marriott Corp., 830 F. Supp. 274, 280 (D. Md. 1992) (considering evidence of parties' compliance with employer's grievance policies in determining whether employer had met contractual obligation allegedly bestowed on employee by handbook); Plummer v. Humana of Kansas, Inc., 715 F. Supp. 302, 304 (D. Kan. 1988) (considering terminated employee's failure to follow grievance procedures in granting summary judgment to employer on handbook-based claim).

If the jury finds the existence of a contract, *i.e.*, that the handbook's mandatory policies and procedures modified the employee's at-will employment status, the jury next must determine whether the contract was breached. When an employment contract only permits termination for cause, the appropriate test on the issue of breach focuses on whether the employer had "*a reasonable good faith belief* that sufficient cause existed for termination." Conner, 348 S.C. at 464-65, 560 S.E.2d at 611 (emphasis in

original). "[T]he fact finder must not focus on whether the employee actually committed misconduct; instead, the focus must be on whether the employer reasonably determined it had cause to terminate." Id. at 464-65, 560 S.E.2d at 611.

The trial court erred in excluding evidence of events occurring after Employee's initial termination date and in instructing the jury to disregard such events. Employee should have been allowed to submit testimony and evidence about the grievance proceeding in her case, in the limited manner further explained below, for two reasons.

First, when the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 303, 468 S.E.2d 292, 300 (1996) (contract may be based on verbal understanding to which both parties have mutually assented and upon which both are acting); Gaskins v. Blue Cross-Blue Shield of S.C., 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978) ("agreement" does not necessarily import any direct or express stipulation, nor is it necessary that it should be in writing; if there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement); Baylor v. Bath, 189 S.C. 269, 1 S.E.2d 139 (1938) (in lawsuit to enforce specific performance of an alleged oral agreement by elderly bachelor to make a will in consideration of care and nursing, it was proper to admit evidence that plaintiffs provided care and nursing for three years until bachelor's death to prove existence of the contract and performance under its terms). A contract may arise from actual agreement of the parties manifested by words, oral or written, or *by conduct*. Prescott v. Farmers Tel. Co-op., Inc., 335 S.C. 330, 335, 516 S.E.2d 923, 926 (1999) ) (emphasis added); Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct. App. 2003).

These cases demonstrate courts have applied rudimentary contract principles in handbook cases. Consequently, evidence of whether City adhered to its disciplinary and grievance policies is relevant and

admissible on the issues of whether Employee's at-will status had been modified, *i.e.*, the existence of a contract, the meaning of the terms of the contract, and whether either party breached the contract by failing to comply with its terms.

Second, if the jury were to conclude a contract existed, the actions or omissions of City's supervisors and agents during the post-termination grievance proceedings may in some instances be relevant and admissible in determining whether those agents had a reasonable, good faith belief that sufficient cause existed to terminate Employee. Circumstances surrounding a grievance proceeding, or the lack thereof, may reveal whether an employer's reasons for termination were pretextual, did not constitute sufficient cause, or were not done in good faith.

We emphasize that detailed or extensive testimony about grievance proceedings which occurred after the initial termination date ordinarily should not be admitted. The aggrieved employee should have the opportunity to present evidence focusing on the policies and procedures allegedly required by the employee handbook, and whether the employer adhered to those policies and procedures. Such evidence generally should be limited to the fact and duration of a grievance proceeding, a general description of the purpose and substance of the proceeding, and the identity and relationship of participants in the proceeding. Such evidence usually should not include extensive references to or repetition of particular testimony or evidence in the grievance proceeding, although a party is free to use prior, sworn testimony for impeachment purposes when permissible under evidentiary rules.

We further emphasize that the specific recommendation or vote of the grievance committee or the individual or body vested with employment and discharge authority generally is not admissible evidence. We have not found nor has either party cited any controlling authority on this point. We agree with City's contention the vote of a grievance committee or other body vested with employment and discharge authority is akin to the finding of a prior jury or administrative agency, which usually is not admissible at trial. See Nohrden v. Northeastern R.R. Co., 59 S.C. 87, 101, 37 S.E. 228, 237

(1900) ("[I]t would be improper to allow any reference to the action of the former jury calculated to influence the jury then trying the case. Each jury must act upon [its] own responsibility, and according to [its] own view of the testimony submitted to [it], entirely uninfluenced by the action of any other jury."); Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997) (public policy dictates that findings made by Employment Security Commission on narrow issue of unemployment benefits will not be given collateral estoppel effect in subsequent wrongful termination lawsuit).

Moreover, admission of evidence of a grievance committee's specific recommendation or vote is likely to cause unfair prejudice and confusion, and constitutes an unwarranted intrusion into the jury's role as factfinder. See Rule 403, SCRE; Barfield v. Orange County, 911 F.2d 644, 651 (11th Cir. 1990) (admission of a report by the federal Equal Employment Opportunity Commission on whether reasonable cause exists to believe employment discrimination occurred "may be much more likely to present the danger of creating unfair prejudice in the minds of the jury than in the mind of the trial judge, who is well aware of the limits and vagaries of administrative determinations and better able to assign the report appropriate weight and no more"); Cammer v. Atlantic Coast Line R. Co., 214 S.C. 71, 81, 51 S.E.2d 174, 178 (1948) (tasks of resolving contradictions in evidence, determining witnesses' credibility, and deciding what testimony to accept when resolving a case are all left to the jury as factfinder; and these propositions are such elementary observations there is no need to cite supporting authority).

While we find error in the trial court's rulings excluding evidence of the grievance proceeding, as well as the charge requiring the jury to ignore evidence of events occurring after Employee's initial termination date, we find the errors were harmless in this case. An error may be harmless when the aggrieved party fails to establish a claim or defense even when both the admitted and excluded evidence are considered. See Triple "F," Inc. v. Gerrard, 298 S.C. 44, 378 S.E.2d 67 (Ct. App. 1989) (even if trial court wrongly excluded extension agent's testimony university had not endorsed feed program for area dairy farmers, the error was harmless because only

testimony on record did not establish feed suppliers' claim that feed program marketer had committed fraud).

The jury in this case returned a general verdict. The jury may have determined no employment contract existed due to the handbook or, if there was a contract, City proved it had a reasonable, good faith belief sufficient cause existed to terminate Employee. If we assume, for purposes of argument, Employee would have been able to establish the existence of a contract had she been allowed to present the wrongly excluded evidence, we, nonetheless, are persuaded the jury would not have found in her favor. The record is replete with compelling evidence Employee's attitude, behavior, and work habits deteriorated severely in 1992-93. Thus, City had a reasonable, good faith belief sufficient cause existed for Employee's termination. Employee has failed to demonstrate a reasonable probability the jury's verdict was influenced by the lack of the wrongly excluded evidence.

## CONCLUSION

We conclude the trial court erred in excluding evidence of the grievance proceedings which occurred after Employee's initial termination date and in instructing the jury to ignore such evidence. Such evidence may be presented in a wrongful discharge action based on mandatory policies and procedures contained in an employee handbook for the reasons and within the limitations we have described. We further conclude Employee has failed to demonstrate a reasonable probability the jury's verdict was influenced by the lack of the wrongly excluded evidence. Accordingly, the jury's verdict in favor of City is affirmed.

**AFFIRMED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Evening Post Publishing Co., d/b/a The Post and Courier, and Ms. Parthinea Snowden, as Personal Representative of the Estate of Edward Snowden, Deceased, Plaintiffs,

Of which Evening Post Publishing Co., d/b/a The Post and Courier, is Petitioner,

v.

City of North Charleston, Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Charleston County
Gerald C. Smoak, Sr., Circuit Court Judge

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Opinion No. 25962
Heard March 2, 2005 – Filed April 4, 2005

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**REVERSED AND REMANDED**

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John J. Kerr, of Buist, Moore, Smythe & McGee, of Charleston, for Petitioner.

J. Brady Hair, Derk Van Raalte, and Richard Lingenfelter, all of North Charleston, for Respondent.

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**JUSTICE PLEICONES:** This is a Freedom of Information Act (FOIA)[1] case. We granted a writ of certiorari to review Evening Post Publishing Company v. City of North Charleston, 357 S.C. 59, 591 S.E.2d 39 (Ct. App. 2003), in which the Court of Appeals affirmed the circuit court's decision that Respondent City of North Charleston (the City) properly denied the FOIA request of Petitioner Evening Post Publishing Company (the Post). We reverse and remand to the circuit court.

## FACTS

Four Caucasian men attacked an African-American man (the victim) in front of a store, and the store owner called 911. When police officers arrived, the victim was inside the store and holding a gun. The officers shot and killed him.

The four attackers were arrested and charged with lynching. The police officers were not charged with a crime.

The 911 tape contains the store owner's description of the attack to the dispatcher. The tape also contains conversations between the dispatcher and police officers about the incident.

Several months prior to the lynching trial, the Post filed with the City a FOIA request for a copy of the tape. The Solicitor of the Ninth Judicial Circuit was consulted by the City and opined that the tape would be evidence in the upcoming lynching trial. Consequently, the Solicitor suggested, the tape was exempt from disclosure pursuant to South Carolina Code section 30-

[1] S.C. Code Ann. §§ 30-4-10 through 30-4-165 (1991 & Supp. 2004).

4-40(a)(3)(B).[2] In respect of the Solicitor's assessment, the City denied the Post's request.

The Post then filed a complaint for declaratory judgment and injunction to compel release of the tape. The circuit court held that under section 30-4-40(a)(3)(B), the tape was exempt from disclosure until the lynching trial concluded.[3] The Post appealed, and the Court of Appeals affirmed.[4]

## ISSUE

Whether the 911 tape was exempt from disclosure pursuant to South Carolina Code section 30-4-40(a)(3)(B).

## ANALYSIS

Under FOIA, "[a]ny person has a right to inspect or copy any public record of a public body," unless that record is exempt from disclosure. S.C.

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[2] S.C. Code Ann. § 30-4-40(a)(3)(B) (1991). Although not pertinent here, subsection 30-4-40(a)(3) was amended in 2002. 2002 Act No. 350, § 1 (effective July 19, 2002); see also S.C. Code Ann. § 30-4-40(a)(3) (Supp. 2004).

[3] The victim's estate intervened in the action and also sought production of the tape in its civil suit against the City. The estate received a copy pursuant to the South Carolina Rules of Civil Procedure but was ordered to not publicize the tape until the lynching trial ended. Earlier, the lynching defendants had received copies of the tape pursuant to the South Carolina Rules of Criminal Procedure.

[4] After the tape was played in open court at the lynching trial, the Post published a transcript. We agree with the Court of Appeals that the case is not moot, because "the facts presented here are capable of repetition yet evading review." Evening Post Pub. Co., 357 S.C. at 62, 591 S.E.2d at 41.

Code Ann. § 30-4-30(a) (1991).[5] Whether a record is exempt depends on the particular facts of the case. City of Columbia v. ACLU, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). Underlying each case, however, is the principle that the exemptions in section 30-4-40 are to be narrowly construed so as to fulfill the purpose of FOIA ... "to guarantee the public reasonable access to certain activities of the government." Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); S.C. Code Ann. § 30-4-15 (1991); Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). To further advance this purpose, the government has the burden of proving that an exemption applies.

Here, the City invoked section 30-4-40(a)(3)(B), which exempts from disclosure

> [r]ecords of law enforcement and public safety agencies not otherwise available by law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by … [t]he premature release of information to be used in a prospective law enforcement action.

S.C. Code Ann. § 30-4-40(a)(3)(B) (1991).

All of the elements of this exemption are present except "harm the agency."

The City argues that pre-trial release of the tape would have led to substantial pre-trial publicity, which likely would have tainted the entire jury pool, causing the venue of the trial to be changed. According to the City, the harm would have been that the Solicitor's Office could not have afforded the financial cost of a change of venue.

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[5] That a record is exempt does not mean that the government has a duty of non-disclosure. Rather, an exemption provides the government with discretion to either withhold the record or release it. S.C. Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846-47 (1994); Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

At the outset, we note that the harm claimed by the City would actually have been harm to the Solicitor's Office. We agree with the City that with respect to the lynching prosecution, harm to the Solicitor's Office would have constituted harm to the City. The City and the Solicitor's Office have a shared interest in the prosecution of persons charged with committing crimes in the City.

The financial cost of a venue change, however, is not the type of harm that section 30-4-40(a)(3)(B) is intended to prevent.[6] Rather, it is intended to prevent harms such as those caused by release of a crime suspect's name before arrest, the location of an upcoming sting operation, and other sensitive law-enforcement information. We do not close the door to pre-trial publicity ever factoring into a decision whether this exemption applies. We hold only that the financial burden of a potential change in venue did not justify withholding the 911 tape.[7]

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[6] The City and the Solicitor were not actually seeking to protect the defendants' rights to fair trials, and the defendants did not intervene in attempt to protect themselves. Thus, the issue whether this FOIA exemption would have been a proper mechanism by which to protect the defendants is not before the Court. We do note that in the past we have addressed pre-trial publicity's threat to a fair trial in other contexts. See, e.g., Ex parte The Island Packet, 308 S.C. 198, 201-02, 417 S.E.2d 575, 577-78 (1992) (explaining the test for the closure of a court proceeding); Ex parte First Charleston Corp., 329 S.C. 31, 34-35, 495 S.E.2d 423, 424-25 (1998) (in another closed-proceeding case, observing that even in highly publicized cases, *voir dire* is usually sufficient to ensure a fair trial); State-Record Co. v. State, 332 S.C. 346, 350-59, 504 S.E.2d 592, 594-99 (1998) (upholding a temporary restraining order (TRO) that prevented the media from publishing the contents of a videotape prior to trial).

[7] At the circuit court, the prosecutor in charge of the lynching trial testified that another harm would have occurred. He asserted that allowing the City to release the tape prior to trial would have caused him to lose his license to practice law, for he would have thereby violated Rules 3.6 and

The Court of Appeals erred by holding that harm is irrefutably presumed when the subject of the FOIA request will be evidence in a prospective criminal trial. We reject this categorical rule in favor of the usual case-by-case approach. The City was required to prove particular harm.

The Court of Appeals based its holding in part on State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991), cert. denied, 303 U.S. 937, 112 S. Ct. 1477, 117 L. Ed. 2d 620 (1992), in which we did adopt a narrow *per se* rule. We held that section 30-4-40(a)(3)(B) "exempts discovery of material that is not otherwise discoverable under Rule 5(a)(3)" of the South Carolina Rules of Criminal Procedure. "No specific showing of harm is required by the State if the [FOIA] request involves such material." Robinson, 305 S.C. at 476-77, 409 S.E.2d at 409. In other words, a criminal defendant's obtaining more information through FOIA than that to which he is entitled through discovery presumptively "harms the agency."

The Court of Appeals misapprehended that Robinson merely reflects the widely accepted principle that FOIA is not to be used by those under criminal charges to circumvent the limitations of discovery. See, e.g., State ex rel. Wyant v. Brotherton, 214 W.Va. 434, 438-39, 589 S.E.2d 812, 816-17 (W.Va. 2003); Henderson v. State, 745 So.2d 319 (Fla. 1999). That principle is not implicated here, because the 911 tape was available through both criminal and civil discovery. Indeed, the lynching defendants received copies

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3.8(e) of the South Carolina Rules of Professional Conduct, which generally prohibit a prosecutor from creating pre-trial publicity. Rules 3.6 and 3.8(e), RPC, Rule 407, SCACR. We appreciate the prosecutor's desire to act professionally, but the Rules of Professional Conduct did not affect whether the 911 tape was exempt from disclosure under FOIA. Disclosure under FOIA is the obligation of the government. Professionalism is the personal obligation of a government attorney. See Lawyer Disciplinary Bd. v. McGraw, 194 W.Va. 788, 799-800, 461 S.E.2d 850, 861-62 (W.Va. 1995) (distinguishing between the state attorney general's professional obligations and the state's FOIA obligations).

of the tape through criminal discovery, and the victim's estate received a copy through civil discovery. See, supra, note 3.

In addition, the Court of Appeals misinterpreted Turner v. North Charleston Police Department, 290 S.C. 511, 351 S.E.2d 583 (Ct. App. 1986), in which the Court of Appeals upheld the denial of a FOIA request pursuant to section 30-4-40(a)(3)(B). In the case *sub judice*, the Court of Appeals held that Turner stands for the rule that evidence in a forthcoming criminal trial is categorically exempt from disclosure under FOIA. Evening Post Pub. Co., 357 S.C. at 63-64, 591 S.E.2d at 41. Yet, the result in Turner was reached because of a threat of particular harm,[8] not because of any *per se* rule. Like Robinson, therefore, Turner does not support the decision of the Court of Appeals.

As we have explained, the City was not entitled to a presumption that it would be harmed by disclosure of the 911 tape's contents. The City was required to prove that it would suffer particular harm, and the City did not meet its burden. The City's non-disclosure therefore violated FOIA.

## CONCLUSION

The City's denial of the Post's request for a copy of the 911 tape violated FOIA. The tape was not exempt from disclosure pursuant to South Carolina Code section 30-4-40(a)(3)(B). The Court of Appeals' decision is reversed, and the case is remanded to the circuit court for a determination whether any further relief should be granted.

**REVERSED AND REMANDED.**

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

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[8] The 911 tape at issue in Turner "included calls from regular informants as well as Crimestopper calls from citizens." 290 S.C. at 513, 351 S.E.2d at 584. The sensitive nature of that information was the basis for applying section 30-4-40(a)(3)(B), though we note that another exemption specifically addresses "[d]isclosing the identity of informants not otherwise known." S.C. Code Ann. § 30-4-40(a)(3)(A) (1991).

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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George Allen Evans, Petitioner,

v.

State of South Carolina, Respondent.

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ON WRIT OF CERTIORARI

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Appeal From York County
Lee S. Alford, Circuit Court Judge
John C. Hayes, III, Trial Judge

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Opinion No. 25963
Submitted April 21, 2004 – Filed April 4, 2005

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**AFFIRMED IN PART; REVERSED IN PART**

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John Martin Foster, of Rock Hill, and Lisa Dunbar of the South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Lakesha Jeffries, all of Columbia, for Respondent.

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**JUSTICE BURNETT:** We granted George Allen Evans' (Petitioner's) petition for a writ of certiorari to decide whether a criminal defendant has the right to obtain documents pertaining to the impanelment of the state grand jury which indicted him. We conclude a defendant has a right to obtain such documents. We affirm in part and reverse in part.

## FACTS / PROCEDURAL POSTURE

Petitioner was tried in his absence in 1992, convicted of one count of trafficking in cocaine, and sentenced to twenty-five years in prison and fined $50,000. The Court of Appeals vacated the conviction due to a lack of subject matter jurisdiction. State v. Evans, 319 S.C. 320, 460 S.E.2d 578 (Ct. App. 1995). We reversed. State v. Evans, 322 S.C. 78, 470 S.E.2d 97 (1996).

Petitioner filed a post-conviction relief (PCR) action and sought the "files of the state grand jury," including, but not limited to, the State's petition and the court order impaneling the state grand jury which indicted him for trafficking in cocaine. The clerk of the state grand jury refused to release the documents pursuant to S.C. Code Ann. § 14-7-1770 (Supp. 2003).

However, by agreement of the parties and upon order of the PCR judge, the clerk provided the documents to the PCR judge for *in camera* review. The parties' attorneys have not reviewed the documents. However, the documents have been submitted to and reviewed by this Court.

The PCR judge denied Petitioner's application following an *in camera* review of the documents. The PCR judge found the petition and order were proper and the state grand jury that indicted Petitioner was properly impaneled. Therefore, the circuit court had subject matter jurisdiction in Petitioner's case.

The PCR judge further ruled Petitioner's trial counsel was not ineffective in failing to challenge the indictment for lack of subject matter

jurisdiction and Petitioner failed to demonstrate prejudice. Further, the documents provided to Petitioner no information Petitioner had not already received from the State, *i.e.*, transcripts of witnesses' testimony and documentary evidence presented to the state grand jury.

## ISSUES

I. Must the State provide documents pertaining to the impanelment of a state grand jury upon a criminal defendant's timely request?

II. Does the record contain any evidence of probative value supporting the judge's ruling that Petitioner's counsel was not ineffective in failing to request and review the impanelment documents before Petitioner's trial?

## DISCUSSION

### I. Availability of impanelment documents

Petitioner asserts, first, he has a right to obtain and review the State's petition, supporting materials, and the judge's order impaneling the state grand jury which indicted him; second, trial counsel should have obtained the documents in order to determine whether the state grand jury which indicted Petitioner had been properly impaneled pursuant to S.C. Code Ann. § 14-7-1630 (Supp. 2003); and, third, the circuit court would lack subject matter jurisdiction in his case if the state grand jury was not properly impaneled.

Petitioner argues the Due Process Clause,[1] the Sixth Amendment,[2] the state constitutional mandate that all courts shall be public,[3]

[1] U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.

[2] U.S. Const. amend. VI.

and public policy as expressed in the state Freedom of Information Act[4] all support his argument. Petitioner asserts the Court of Appeals recognized the legitimacy of his position in State v. Adams, 319 S.C. 509, 462 S.E.2d 308 (Ct. App. 1995) (concluding impanelment petition and order, reviewed only by Court of Appeals and not the parties, complied with State Grand Jury Act). Petitioner further argues Section 14-7-1770 is not a complete prohibition on the production of impanelment documents, but requires such documents remain secret only to the extent necessary to prevent disclosure of matters under consideration by the state grand jury.

Petitioner's arguments relating to the Sixth Amendment, public courts, and Freedom of Information Act are not preserved for review. See Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (issue or argument which is neither raised at PCR hearing nor ruled upon by the PCR court is procedurally barred from appellate review); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same).

However, we conclude impanelment documents, including the State's petition, supporting materials, and the impaneling judge's order, may be released to a defendant prior to trial upon timely request or to an applicant in a PCR proceeding. The State may, of course, redact information not related to a particular defendant's case or information concerning other persons or matters under consideration by the state grand jury. Release of the documents may be appropriate because (A) Section 14-7-1770 is not a complete prohibition on the release of the information; (B) release of the documents usually is not prohibited by secrecy provisions or other concerns following the issuance of a true bill of indictment; and (C) a defendant has the right to review the documents to determine whether to timely challenge the legality of the state grand jury which indicted him.

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[3] S.C. Const. art. I, § 9.

[4] S.C. Code Ann. §§ 30-4-15 to -165 (1991 & Supp. 2003).

A. Impact of Section 14-7-1770

Section 14-7-1770 provides that "[r]ecords, orders, and subpoenas relating to state grand jury proceedings must be kept under seal *to the extent and for that time as is necessary to prevent disclosure of matters occurring before a state grand jury*" (emphasis added). The clerk of the state grand jury relied in part on this provision in refusing to produce the impanelment documents in the present case.

The terms of the statute do not impose a complete prohibition on the release of impanelment documents or other records, such that they must remain secret forever. The emphasized language indicates that, at some point in cases in which the grand jury returns a true bill of indictment, matters other than the grand jury's deliberations and voting may be disclosed to a defendant. Removing the veil of secrecy after a defendant has been indicted is consistent with the legislative intent expressed in Section 14-7-1770 and the Act as a whole. E.g., Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998) ("[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute").

B. Secrecy provisions and concerns

State grand jury proceedings are secret and those involved in such proceedings are prohibited from disclosing the nature or substance of the deliberations or vote of the state grand jury, or the testimony of a witness, unless otherwise ordered by a court. S.C. Code Ann. § 14-7-1720 (Supp. 2003).[5] The attorney general and other specified persons involved in grand jury proceedings may not disclose the testimony of a witness except when directed by the court in limited circumstances, including "complying with

[5] The secrecy provisions do not prohibit a client from discussing with his attorney the client's testimony or other matters discussed in the client's presence before a state grand jury. Section 14-7-1720(C).

constitutional, statutory, or other legal requirements or to further justice." Section 14-7-1720(A)(5).

The stringent secrecy provisions contained in the Act mirror the view long held uniformly by courts nationwide that secrecy of grand jury proceedings is desirable and necessary. As the United States Supreme Court has explained in a case involving the federal grand jury system,

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

United States v. Sells Engineering, Inc., 463 U.S. 418, 424, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 743, 752 (1983). See also State v. Whitted, 279 S.C. 260, 305 S.E.2d 245 (1983) ("[i]nvestigations and deliberations of a grand jury are conducted in secret and are, as a rule, legally sealed against divulgence"), overruled on other grounds by State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998); State v. Williams, 263 S.C. 290, 295-296, 210 S.E.2d 298, 301 (1974) (rejecting challenges under Fifth, Sixth, and Fourteenth amendments to competency and adequacy of evidence presented to grand jury, in part due to the "long-established secrecy of grand jury actions and the nature and of its operations and functions"); State v. Sanders, 251 S.C. 431, 437, 163 S.E.2d 220, 224 (1968) (rejecting argument that defendant should have right to have judge poll the grand jury to ensure at least twelve of them voted to indict him

because such a procedure would violate "the cloak of secrecy which has always been thrown around the deliberations of that body"); Margolis v. Telech, 239 S.C. 232, 241, 122 S.E.2d 417, 421 (1961) (emphasizing secret nature of grand jury matters in rejecting effort of defendant in civil case to present evidence of events and testimony that allegedly occurred in presence of grand jury, which chose not to indict relative who later sued defendant for malicious prosecution); State v. Rector, 158 S.C. 212, 225, 155 S.E. 385, 390 (1930) ("[a]s long as the grand jury has been known to our judicial system, and that body came with the organization of our first courts, their acts and proceedings have been regarded as almost sacredly secret"; inquiry or divulgence of grand jury proceedings uniformly is prohibited, absent legislation allowing the same).

The secrecy provisions applicable to a particular case are relaxed after an indictment has been issued by the state grand jury. All proceedings and testimony before the state grand jury are recorded by a court reporter, except the grand jury's deliberations and voting. A defendant is entitled to review and reproduce recorded materials of those proceedings, subject to the limitations contained in Sections 14-7-1720, 14-7-1770, and Rule 5, SCCrimP. S.C. Code Ann. §§ 14-7-1700 (Supp. 2003). A defendant's right to obtain such information in preparing his defense necessarily arises post-indictment. Cf. Rector, 158 S.C. at 238, 155 S.E. at 394 (person does not have right to challenge qualification of grand juror until he is indicted).

Similarly, the State's petition, supporting materials, and the impaneling order may be made available to a defendant when a defendant's right to obtain recorded materials of the proceedings arises. Although maintaining secrecy is essential while a matter is under deliberation by the grand jury, such concerns diminish following issuance of a true bill of indictment. A defendant is allowed to obtain and use the impanelment documents in preparing a defense and ensuring protection of his due process rights.

C. Use of impanelment documents to challenge legality of grand jury

Initially, we note we address this third rationale for our decision today in light of our recent decision in State v. Gentry, Op. No. 25949 (S.C.

Sup. Ct. filed March 7, 2005) (Shearouse Adv. Sh. No. 11 at 37). In Gentry, we abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid indictment by either a county or state grand jury. Under the former approach, except for certain minor offenses, the circuit court did not have subject matter jurisdiction in a criminal case unless there was an indictment which sufficiently stated an offense, the defendant had waived presentment of the indictment to the grand jury, or the charge was a lesser included offense of the crime charged in the indictment. Under that former approach, a defective or insufficient indictment could result in a lack of subject matter jurisdiction, which is a matter that may be raised at any time, including on direct appeal, in a PCR action, or *sua sponte* by the trial or appellate courts.

In Gentry, taking our cue from the United States Supreme Court and in keeping with our view of subject matter jurisdiction in civil cases, we explained that the subject matter jurisdiction of the circuit court and the sufficiency of an indictment are two distinct concepts. "[S]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Gentry at 42; see also Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000) (stating same principle); Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (stating same principle); S.C. Const. art. V, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.").

In Gentry, then, we returned to our earlier view that an indictment is a "notice document," albeit one required by our state constitution and statutes. See S.C. Const. art. I, § 11 and art. V, § 22;[6] S.C.

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[6] Article I, § 11 provides, in pertinent part:

No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed.

continued . . .

Code Ann. § 17-19-10 (2003) ("[n]o person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury" except in specified instances). The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted. Gentry at 44-45; S.C. Code Ann. § 17-19-20 (2003). This required notice is a component of the due process that is accorded every criminal defendant. See U.S. Const. amend. V; S.C. Const. art. I, § 3. Given that the sufficiency of an indictment will no longer be considered an issue of subject matter jurisdiction which may be raised at any time, we applied the general rule regarding preservation of error and held that a defendant must raise an issue regarding the sufficiency of the indictment before the jury is sworn in order to preserve the error for direct appellate review. Gentry at 43 (citing S.C. Code Ann. § 17-19-90 (2003)).

In the present case, we are concerned not with the sufficiency of a particular indictment, but with the legality and sufficiency of the process of the state grand jury which issued the indictment. However, we analyze this case in light of Gentry and with due regard for our renewed focus on the

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. . . The General Assembly may provide for the waiver of an indictment by the accused. Nothing contained in this Constitution is deemed to limit or prohibit the establishment by the General Assembly of a state grand jury with the authority to return indictments irrespective of the county where the crime has been committed and that other authority, including procedure, as the General Assembly may provide.

Article V, § 22 provides, in pertinent part:

The grand jury of each county, and the state grand jury, as the General Assembly may establish by general law, shall consist of eighteen members, twelve of whom must agree in a matter before it can be submitted to the Court.

indictment as a notice document instead of a document which confers subject matter jurisdiction on the court. As we stated in Gentry,

> [w]hen that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge.

Gentry at 44 (quoting State v. Faile, 43 S.C. 52, 59-60, 20 S.E. 798, 801 (1895), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him. See S.C. Const. art. I, § 11 and art. V, § 22. "[O]ne who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law" in violation of the state constitution. Rector, 158 S.C. at 230, 155 S.E. at 392 (internal quotes omitted).

However, in keeping with our approach in Gentry, we conclude such a challenge does not implicate the subject matter jurisdiction of the circuit court. A defendant must challenge the legality and sufficiency of the process of the state grand jury before the jury renders a verdict in order to preserve the error for direct appellate review. See S.C. Code Ann. § 14-7-1140 (Supp. 2003) (in statute which has been found to apply to petit and grand juries, "no irregularity . . . in the drawing, summoning, returning, or impaneling of jurors is sufficient to set aside verdict, unless the party making the objection was injured by the irregularity or unless the objection is made

before the returning of the verdict").[7] When a defendant timely moves to quash an indictment on grounds such as those further explained below, the circuit court must determine whether the defendant's constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated.

In the first category of cases, an indictment or "notice document" issued by a grand jury which is established or constituted illegally is deemed a nullity. An indictment which is a nullity would be insufficient, as a matter of law, to give the required notice to a defendant. In such cases, a defendant's challenge "does not assert a disqualification which affects only a member of a body otherwise lawful, nor a mere irregularity in doing [that] which the law requires, which assumes a power to act; but it goes to the existence of the grand jury as a body, that it is void as such, and that its indictment is therefore a nullity." State v. Edwards, 68 S.C. 318, 322, 47 S.E. 395, 396 (1904) (where legislative act under which grand jury was created and impaneled was later declared unconstitutional, grand jury was an illegal

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[7] To the extent the following cases stand for the proposition that an indictment which is deemed to be a nullity because it was issued by an illegal grand jury implicates an issue of subject matter jurisdiction that may be raised at any time, we overrule them: Lollis v. Manning, 242 S.C. 316, 130 S.E.2d 847 (1963); State v. Hann, 196 S.C. 211, 12 S.E.2d 720 (1940); State v. Rector, 158 S.C. 212, 155 S.E. 385 (1930); State v. Edwards, 68 S.C. 318, 47 S.E. 395 (1904); and State v. Rafe, 56 S.C. 379, 34 S.E. 660 (1900).

Although this case involves the state grand jury, we similarly conclude that challenges to the legality and sufficiency of the process of a county grand jury also must be made before the jury renders a verdict in order to preserve the error for direct appellate review.

We recognize that in Gentry, relying on Section 17-19-90, we held the sufficiency of an indictment must be challenged before the jury is sworn. In contrast, a challenge to the legality or sufficiency of the process of the grand jury must be made before the jury renders its verdict pursuant to Section 14-7-1140.

body and thus murder indictment issued was a nullity and incurable). See also State v. Sanders, 251 S.C. 431, 438, 163 S.E.2d 220, 224 (1968) (indicating that exclusion of women from grand jury service could cause indictment to be a nullity based on challenge that goes to existence of grand jury as a whole, but in this case the male-only grand jury which indicted defendant was proper under then-existing law, as women were not allowed to serve on juries until state constitutional amendment in 1967 and grand jury system could not undergo fundamental change overnight); State v. Rafe, 56 S.C. 379, 34 S.E. 660 (1900) (stating that if record revealed every grand juror was disqualified or if only twelve grand jurors participated and one of them was disqualified, then the grand jury would be illegal and any indictment issued would be a nullity).[8]

Similarly, an indictment issued by a grand jury in which the jurors were selected in an illegal or discriminatory manner likely would be deemed a nullity and, as a matter of law, would be insufficient to give the required notice to a defendant. See e.g. Campbell v. Louisiana, 523 U.S. 392, 398, 118 S.Ct. 1419, 1423, 140 L.Ed.2d 551, 559 (1998) (finding white defendant had standing to raise equal protection challenge to discrimination against black persons in selection of grand jury; "discrimination on the basis of race in the selection of members of a grand jury . . . strikes at the fundamental values of our judicial system because the grand jury is a central component of the criminal justice process"); Vasquez v. Hillary, 474 U.S. 254, 263-264, 106 S.Ct. 617, 623, 88 L.Ed.2d 598, 609 (1986) (holding racial discrimination in selection of grand jury is fundamental flaw undermining

[8] We note this Court later rejected language in Rafe and other cases that appeared to require a defendant to show prejudice when challenging the formation or legality of a grand jury. This Court has recognized the important role of the grand jury in the criminal justice system, as well as the impossibility of demonstrating prejudice due to the secret nature of the grand jury's deliberations and voting. Rector, 158 S.C. at 222-243, 155 S.E. at 389-396 (to require a defendant to show prejudice by proving an ineligible grand juror participated in the consideration of his case "is to demand an impossibility. It is to tell him that he must establish something, even if it be true, that he is powerless to have disclosed.").

structural integrity of criminal tribunal itself and, therefore, is not subject to harmless error review); Sheppard v. State, 357 S.C. 646, 656-57, 594 S.E.2d 462, 468 (2004) (affirming denial of defendant's timely motion to quash indictment based on claim that racial discrimination infected grand jury selection process because statistical data did not support the claim).

In a second category of cases, a defendant may assert a lesser irregularity in the selection or makeup of a grand jury which indicted him, such as proving the disqualification of an individual grand juror. See Lollis v. Manning, 242 S.C. 316, 130 S.E.2d 847 (1963) (explaining the difference between a challenge to existence of grand jury as a legally constituted body and a challenge raising an irregularity relating to qualification of a grand juror); State v. Jackson, 240 S.C. 238, 125 S.E.2d 474 (1962) (where defendant timely moved to quash indictment before jury verdict, Court affirmed dismissal of a murder indictment issued by grand jury whose members had been drawn from a pool not constituted as then required by statute); State v. Hann, 196 S.C. 211, 218-230, 12 S.E.2d 720, 723-728 (1940) (reaffirming principles set forth in State v. Bibbs, 192 S.C. 231, 6 S.E.2d 276 (1939), and State v. Rector, 158 S.C. 212, 220-243, 155 S.E. 385, 388-396 (1930), but finding defendant was fully aware of potential challenge to qualification of grand jurors and expressly waived his right to require State to re-present indictment to grand jury containing only members whose voter registration certificates had been properly signed and delivered by registration board).[9]

In the first and second categories of cases, the circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity or proves the disqualification of an

[9] Various statutes govern the qualifications and selection of grand jurors, including S.C. Code § 14-7-130 (Supp. 2003) (setting forth basic qualifications to be included in list of persons eligible for jury service); S.C. Code Ann. § 14-7-810 to -870 (Supp. 2003); (disqualifications, exemptions, and excusals from jury service); and S.C. Code Ann. § 14-7-1660 (Supp. 2003) (selection of state grand jurors).

individual juror. Otherwise, the defendant's constitutional right to demand that his case be considered by a grand jury which is properly established and constituted under the law would have no force or effect.

In a third category of cases, a defendant may assert a truly minor irregularity in the functioning or processes of the grand jury. Such a challenge does not implicate the legality of the grand jury or constitute a lesser irregularity which rises to the level of a constitutional violation. See State v. Orrs, 189 S.C. 1, 199 S.E. 865 (1938) (rejecting challenge to grand jury based on fact that some paper ballots had blue lines and others had red lines as result of cutting same sort of white paper, where statute required ballots to be on same type of paper); State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440 (1887) (statute which changed the time of holding court did not make illegal a grand jury which had been drawn under previous statute). The circuit court ordinarily should not quash an indictment when a defendant, in a timely motion made before the jury renders its verdict, asserts a truly minor irregularity in the grand jury process.

In sum, a defendant is entitled to review impanelment documents in order to determine, by a timely motion to quash an indictment made before the jury renders its verdict, whether the state grand jury which indicted him was legally established or suffered from any lesser irregularity which implicates the defendant's constitutional right to have his case considered by a grand jury which is properly constituted under the law.

Accordingly, impanelment documents ordinarily may be released to a defendant after the state grand jury has issued a true bill of indictment against that defendant. A defendant's request should be made prior to trial pursuant to Rule 5, SCCrimP. If the State should object to releasing all or part of the impanelment documents, a defendant may move to compel discovery of the documents. See Rule 5(d), SCCrimP. The burden of proof is on the State to demonstrate why the documents should not be released because only the State possesses the necessary information to analyze the issue and explain to the court why releasing the documents should be prohibited or delayed. See Rector, 158 S.C. at 228, 155 S.E. at 391 (explaining that requiring a defendant to show he was prejudiced by the presence of a disqualified grand juror, where defendant had no right to

inquire into vote of grand jury, "is to demand an impossibility"). The circuit court may, if necessary, conduct an *in camera* review of the impaneling documents to determine whether the State has met its burden in either prohibiting or delaying their release.

The regularity of grand jury proceedings is presumed absent clear evidence to the contrary. State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Thus, after a defendant obtains the requested information, the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury or its proceedings is predicated. E.g. State v. Jackson, 240 S.C. 238, 243, 125 S.E.2d 474, 477 (1962). Further, the appellate court will reverse the circuit court's decision on the issue only if that court has abused its discretion.

## II. Ineffective assistance of counsel

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, supra; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). Thus, an applicant must show both error and prejudice to obtain relief in a PCR proceeding. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325. S.C. 182, 480 S.E.2d 733 (1997).

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An appellate court may affirm the PCR court's decision when its findings are supported by any evidence of probative value in the record. Cherry, supra. However, an appellate court will not affirm the

decision when it is not supported by any probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

As previously explained, the PCR judge denied relief to Petitioner after conducting an *in camera* review of the State's petition, supporting materials, and the impaneling judge's order. After our own review of those same impanelment documents, we conclude the petitions and impaneling orders dated November 1991 and June 1992 comply with the statutory mandates. See Adams, supra.

The supporting materials submitted with the State's petition contain a synopsis of the investigation. The materials include a review of information gathered, the scope and geographic extent of the alleged crimes, law enforcement agencies involved, and a list of potential suspects. The PCR judge correctly reasoned that most of this information was contained in the documents and transcripts of proceedings Petitioner obtained as a result of his discovery requests during the PCR proceeding.

The only information Petitioner may not have obtained was the list of potential suspects, to which he is not entitled. The State is free to redact information unrelated to a defendant's case or information about other persons or matters under consideration by the state grand jury – including a list of potential suspects – prior to releasing impanelment documents and supporting materials to a defendant.

We conclude Petitioner's trial counsel was not ineffective in failing to request and review the impaneling documents and supporting materials. See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Furthermore, Petitioner has not demonstrated prejudice under the facts of this case. The PCR judge's denial of relief to Petitioner is supported by evidence of probative value in the record; therefore, we affirm his decision.

## CONCLUSION

We reverse the PCR judge's decision prohibiting the release of the impanelment documents to Petitioner. We affirm the denial of Petitioner's PCR application because he failed to demonstrate error or prejudice resulting from his trial attorney's actions.

**AFFIRMED IN PART; REVERSED IN PART.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Norman Jeffrey Cockrell, as Guardian ad litem for Ryan Jeffrey Cockrell, Appellant,

v.

Hillerich & Bradsby Company d/b/a Louisville Slugger, James A. Sherwood, University of Massachusetts at Lowell Baseball Research Center, the National Federation of State High School Associations, and the South Carolina High School League, Defendants,

of whom James A. Sherwood and University of Massachusetts at Lowell Baseball Research Center are Respondents.

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

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Opinion No. 25964
Heard February 15, 2005 – Filed April 4, 2005

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**AFFIRMED**

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Charles W. Whetstone, Jr., of James C. Anders, P.A., of Columbia; J. Kendall Few, of J. Kendall Few, P.A., of Greer; and Stephen D. Baggett and Kenneth W. Poston, both of McDonald, Patrick, Tinsley, Baggett & Poston, of Greenwood, for Appellant.

C. Mitchell Brown, of Columbia, and Elizabeth M. McMillan, of Greenville, both of Nelson, Mullins, Riley & Scarborough, L.L.P., for Respondents.

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**JUSTICE WALLER**: This is a products liability and negligence case in which the circuit court granted the respondents' motion to dismiss for lack of personal jurisdiction. We affirm.

## FACTS

On March 16, 2002, Ryan Cockrell, a thirteen-year old seventh grader, was pitching in a Greenwood High School junior varsity baseball game. A line drive ball off the bat of an opposing player hit Ryan in the head causing severe injuries. The bat was an aluminum bat manufactured by defendant Hillerich & Bradsby Company d/b/a Louisville Slugger (Hillerich). The respondents, the University of Massachusetts at Lowell Baseball Research Center (Research Center) and James Sherwood (Sherwood), a mechanical engineering professor and the Director of the Research Center, certified the bat as meeting certain National Collegiate Athletic Association (NCAA) regulations.

The appellant, Ryan's father, brought this action alleging products liability, negligence, breach of warranties, and fraudulent concealment against Hillerich; negligence and negligent misrepresentation against the National Federation of High Schools; and negligence against the South Carolina High School League. The appellant also alleges negligence, recklessness, and fraudulent concealment against the respondents. The respondents filed a motion to dismiss for lack of personal jurisdiction. The circuit court granted the respondents' motion and the appellant appeals.

## ISSUE

Did the circuit court err in granting the respondents' motion to dismiss for lack of personal jurisdiction?

## DISCUSSION

I. Background

Typically, aluminum bats substantially outperform traditional wooden bats and other metal bats. However, aluminum bats also increase the risk to pitchers and other infield players because the high speed of the balls batted off these bats decreases these players' reaction time. The NCAA developed a maximum-batted exit speed and certain weight and length requirements for aluminum bats and announced that the respondents would test and certify that all aluminum bat models meet these requirements.

After the respondents have certified a bat model, a permanent certification mark must be clearly displayed on the barrel end of each bat. Further, the NCAA rules specifically state: "The manufacturer may use the certification mark in descriptive materials (such as catalogs) to identify bats that comply with this testing standard, but may make no other use of the mark. Use of the certification mark to advertise or promote the sale or distribution of bats is expressly prohibited." We note the certification of a bat means simply it has passed the standards which the NCAA has set forth. It does not mean the bat has been otherwise tested for safety.

Apparently, some aluminum bats manufactured by Hillerich pass the NCAA certification tests in the lab but not in the field because in practice the bats swing faster. The respondent Sherwood recognized this as evidenced by his February 7, 2000 memo to the NCAA and his presentation to the annual meeting of the New England Intercollegiate Baseball Association on February 20, 2000. Sherwood sought reassurance that his certification of these bats would not render him liable and action from the NCAA to close the loopholes. This information was widely disseminated throughout

numerous media reports and the NCAA later changed its rules in an attempt to close any loopholes.

II. Personal Jurisdiction

The circuit court granted the respondents' motion to dismiss for lack of personal jurisdiction finding that the respondents did not have sufficient minimum contacts with South Carolina and it would be unfair and unreasonable to exercise personal jurisdiction over them. We agree.

Sherwood is a resident of Massachusetts and the Research Center is a corporation with its principal place of business in Massachusetts. In the amended complaint, the appellant alleges South Carolina courts have personal jurisdiction over the respondents solely because the respondents "have tested and certified baseball bats including the subject model, large numbers of which are sold, distributed and used in South Carolina."

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. Engineered Prods. v. Cleveland Crane & Eng'g, 262 S.C. 1, 201 S.E.2d 921 (1974). The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law. Id. at 4, 201 S.E.2d at 922. At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits. Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 426 S.E.2d 777 (1993).

Specific jurisdiction over a cause of action arising from a defendant's contacts with the state is granted pursuant to the long arm statute. S.C. Code Ann. § 36-2-803 (2003). South Carolina's long-arm statute, which includes the power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause. Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (1998). Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process. Moosally v.

W.W. Norton & Co., Inc., 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004)(citing Sonoco Prods. Co. v. Inteplast Corp., 867 F.Supp. 352, 354 (D.S.C.1994).

## Due Process/Sufficient Minimum Contacts

Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Atlantic Soft Drink Co. v. South Carolina Nat'l Bank, 287 S.C. 228, 336 S.E.2d 876 (1985). Without minimum contacts, the court does not have the "power" to adjudicate the action. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 260, 423 S.E.2d 128, 131(1992). The court must also find that the exercise of jurisdiction is "reasonable" or "fair." Id.

Under the fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991). See also Southern Plastics Co., 310 S.C. at 260, 423 S.E.2d at 131.

The due process requirements must be met as to each defendant and thus the Court is to assess individually each defendant's contacts with South Carolina. See Rush v. Savchuk, 444 U.S. 320 (1980). Further, the focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity. . . ." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984)(holding "unilateral activity of another party or a third person is not an appropriate consideration"). The foreseeability that is critical to due process analysis is not the mere likelihood that a product

will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. World-Wide Volkswagen Corp., 444 U.S. at 297.

The appellant alleges the following facts support finding the respondents purposefully availed themselves of the laws of South Carolina. The Research Center was the exclusive testing and certification facility for all bats used in schools under the auspice of the NCAA and the National Federation of State High School Associations and there are 20 NCAA schools and 194 high schools in South Carolina. Thus, the appellant concludes that the respondents have an effect on 6,000 students in South Carolina. Additionally, the appellant alleges that the sale of 14,000 bats in South Carolina annually generates sales of more than $2 million. The appellant then contends that of the $1 million paid to the respondents,[1] $14,000 would be attributable to sales of bats in South Carolina.

The Court of Appeals recently held that an individual does not "purposefully avail" himself of the laws of this State merely by virtue of having authored a single literary work on a topic of national interest. Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004).[2] In Moosally, the explosion of the battleship USS IOWA was the subject of two CBS *60 Minutes* programs and subsequently a book was written by one of the programs' producers. The plaintiffs brought a libel suit alleging the defendants incorrectly placed the blame for the explosion on them. The defendants were the Virginia producer of the television program who subsequently wrote the book, a Maryland interviewee, and a New York publishing company. Id.

[1]In computing this figure, the appellant included $600,000 which the respondents received from the National Baseball League (NBL), the NCAA, and the National Federation in the form of grants. However, these grants were not only for testing bats – the NBL also commissioned the respondents to test baseballs which have nothing to do with this lawsuit.

[2]We note that this case was decided after the circuit court ruled on the respondents' motion to dismiss.

The book had been distributed throughout the United States, including South Carolina. The trial court granted the defendants' motions to dismiss for lack of personal jurisdiction. On appeal, the Court of Appeals found that the court had personal jurisdiction over the book publisher because it conducted business in the state, selling books in approximately 315 bookstores in the state and probably selling at least one copy of each title in South Carolina, in addition to conducting other business activities that amounted to directing its activities at South Carolina residents. Id. at 335, 594 S.E.2d at 886.

The Court of Appeals also found that personal jurisdiction did not exist for the interviewee, as "merely providing information to an author about an event that did not occur in South Carolina" was not sufficient to "purposefully avail" himself of South Carolina's laws or establish minimum contacts. Id. at 333, 594 S.E.2d at 885.

The Court of Appeals found that the court did not have personal jurisdiction over the author, because "merely . . . having authored a single literary work on a topic of national interest" was not enough to meet the power prong of the due process analysis. Id. at 334, 594 S.E.2d at 885. The plaintiffs had alleged that the following activities by the producer/author satisfied the minimum contacts requirement: (1) he was a producer on the television show *60 Minutes*, which airs in South Carolina; (2) he attended a funeral in South Carolina in 1972 as a reporter for CBS; (3) copies of his book were sold in South Carolina; (4) a movie version of his book was aired in South Carolina on the FX network; and (5) he made at least one business call to South Carolina for information on the battleship IOWA. Id. at 333, 594 S.E.2d at 885. The Court of Appeals held "[t]he fruits of [the producer/author's] labor -- be it in literary or in cinematic form -- arrived in South Carolina not through [his] efforts, but through the efforts of others, and therefore cannot serve as the basis for jurisdiction." Id. at 334, 594 S.E.2d at 885.

The Court of Appeals concluded that South Carolina does not have specific personal jurisdiction over a defendant who is the producer of a nationwide television program and the author of a book distributed nationwide who would directly profit from the sale of his books. Likewise,

we conclude that South Carolina also does not have personal jurisdiction over the respondents in this case. The bats did not arrive in South Carolina through the respondents' efforts. As the NCAA regulations state, "[u]se of the certification mark to advertise or promote the sale or distribution of bats is expressly prohibited." Hillerich unilaterally distributed and sold them in South Carolina. The respondents had no control over the distribution of the bats and did not profit from their sale. The respondents merely certified the bats as having met the NCAA rules, which is clearly less activity than producing a nationwide television program or authoring a book.

The circuit court also found there was no basis for exercising general jurisdiction over the respondents. We agree. A court may assert general jurisdiction if the defendant has an "enduring relationship" with the forum state. See S.C. Code Ann. § 36-2-802 (2003). General jurisdiction attaches even when the nonresident defendant's contacts with the forum state are not directly related to the cause of action, if the defendant's contacts are both "continuous and systematic." Helicopteros Nacionales, 466 U.S. at 413-14 nn. 8-9. These contacts must be "so substantial and of such a nature as to justify suit against [the respondents] on causes of action arising from dealings entirely different from those activities." International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945). Furthermore, the defendant's contacts with the forum must satisfy the due process clause. Federal Ins. Co. v. Lake Shore Inc., 886 F.2d 654, 660 (4th Cir. 1989). The respondents have not directed their activities at South Carolina and, as discussed above, their contacts with South Carolina cannot fairly be described as continuous and systematic so as to satisfy due process. See Helicopteros Nacionales, 466 U.S. at 416.

In conclusion, we hold the respondents do not have the minimum contacts with South Carolina necessary to comply with the due process requirements. Accordingly, the trial court correctly granted the respondents' motion to dismiss due to lack of personal jurisdiction.

**AFFIRMED.**

**TOAL, C.J., MOORE and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Petitioner,

v.

Marion L. Parris, Respondent.

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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

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Opinion No. 25965
Heard February 2, 2005 – Filed April 4, 2005

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**REVERSED**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, all of Columbia; Harold W. Gowdy, III, of Spartanburg; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Petitioner.

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

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**JUSTICE WALLER:** We granted a writ of certiorari to review State v. Parris, 353 S.C. 582, 578 S.E.2d 736 (Ct. App. 2003), in which the Court

of Appeals held Respondent, Marion L. Parris, was entitled to a directed verdict on the charge of breach of trust with fraudulent intent. We reverse.

## FACTS

Parris was the owner of Parris Home Sales (PHS), which sold mobile homes in Gaffney. The mobile homes he sold to third parties were financed by a $750,000 floor plan line of credit from First National Bank (FNB) of the Carolinas. FNB held title to the mobile homes until such time as the person who purchased each mobile home obtained financing, and FNB's lien was paid off.

On February 3, 1999, in order to finance the purchase of a double-wide mobile home, serial numbers THL2936AAL and THL2936 BAL, PHS executed a note to First National Bank for $37,405. The note required PHS to pay monthly interest on the outstanding balance of the loan until February 5, 2000, at which time the full balance was due.

On November 1, 1999, Jerry and Sherry Martin signed a purchase agreement to buy the above mobile home (serial numbers THL2936AAL and THL2936 BAL) for $40,340. The contract provided that title to the mobile home would remain in Seller until the purchase price was paid in full and that **"thereupon, title to the within described unit passes to the buyer as of the date of . . . full cash payment** . . . even though the actual physical delivery may not be made until a later date." (emphasis supplied).

The Martins obtained financing for their mobile home from Bank of America, and the loan was closed on November 18, 1999. Bank of America issued two checks totaling $40,340 which were jointly payable to Jerry Martin and Parris Home Sales. Martin endorsed the checks and gave them to Parris. Parris signed an endorsement on the back of the checks, as follows, "for value received, by endorsement, the payee does warrant good title to and full right to convey a 1999 Legend Mobile Home." After endorsing the checks, Parris took them and opened a checking account at American Federal Bank. Thereafter, he wrote checks to himself and others, but not FNB, totaling nearly $40,000.

On December 6, 1999, Sherry Martin was in her new mobile home (which had been delivered around Thanksgiving) when she saw the president of FNB, Steve Moss, walking around her property. When he knocked on the door and asked her for the serial number, she told him it was none of his business, at which time he told her that it was his business as he owned the home and could repossess it. The Martins went to the bank to speak to Moss, who told them to go to a lawyer and to police.

Parris was subsequently arrested and charged with breach of trust with fraudulent intent. FNB accelerated the underlying note; PHS' assets were seized and sold by FNB.[1] A jury convicted Parris of breach of trust with fraudulent intent; he was sentenced to ten years. The Court of Appeals reversed his conviction, finding the State failed to prove the existence of a trust relationship. Accordingly, it found Parris should have been granted a directed verdict. State v. Parris, 353 S.C. 582, 578 S.E.2d 736 (Ct. App. 2003).

## ISSUE

Was there evidence of a trust relationship to support submission of the offense of breach of trust with fraudulent intent to the jury?

## STANDARD OF REVIEW/LAW

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

[1] FNB took the money owed from the sale of Parris' property and ultimately gave the Martins title to the mobile home.

The elements of breach of trust with fraudulent intent are not set forth in S.C. Code Ann. § 16-13-230 (1985). However, in State v. McCann, 167 S.C. 393, 400, 166 S.E. 411, 414 (1932), we recognized that breach of trust with fraudulent intent is peculiar to this jurisdiction, stating:

> In other states, the crime, as known to us, is called by different names, such as "larceny after trust," "larceny by a bailee," "larceny by false pretenses," and very commonly as "embezzlement." All the offenses are regarded as statutory, and one must look to the respective statutes to ascertain a definition of the crime. In text-books, law encyclopedias, and digests, references to decisions concerning these offenses are usually found under the title or subject of "embezzlement." The general purpose running through the statutes creating and defining these crimes is, however, the same; to declare as a crime, and usually as one coming within the classification of larceny, acts which were formerly not deemed to be larceny at common law, because of the fact that possession of property had been obtained through the consent of the owner.

See also State v. Owings, 205 S.C. 314, 316, 31 S.E.2d 906, 907 (1944) (defined the offense as "larceny after trust, which includes all of the elements of larceny or in common parlance, stealing, except the unlawful taking in the beginning"); State v. Scott, 330 S.C. 125, 130, 497 S.E.2d 735, 738 (Ct. App. 1998) ("[t]he primary difference between larceny and breach of trust is that in common-law larceny, possession of the property stolen is obtained unlawfully, while in breach of trust, the possession is obtained lawfully").

In State v. Shirer, 20 S.C. 392, 408 (1884), the Court stated, "the object of our [breach of trust] act was simply to enlarge the field of larceny, removing what before might have been a defense for those who received property in trust and afterwards fraudulently appropriated it. The question under our act is, whether the party received the property in trust, which he afterwards violated . . . ." Therefore, the State must prove the existence of a trust relationship to sustain a charge of breach of trust with fraudulent intent. See State v. LeMaster, 231 S.C. 321, 98 S.E.2d 756 (1957). Failure to prove

the existence of a trust relationship will result in a directed verdict of acquittal for the defendant. Id.

A trust is an "arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit." State v. Jackson, 338 S.C. 565, 527 S.E.2d 367 (Ct. App. 2000), *citing* Black's Law Dictionary 1047 (6th Ed. 1991). Thus, the transferor of the property must intend that the trustee will act for the transferor's benefit instead of on his own behalf. Id. See State v. McCann, 167 S.C. 393 166 S.E. 411 (1932).

## DISCUSSION

Essentially, the Court of Appeals held that because there is no testimony in the record from the Martins themselves that they gave the money to Parris with the specific instruction that he pay off the FNB lien, there is no evidence that a trust relationship was formed, such that Parris was entitled to a directed verdict. This was error. We find sufficient evidence in the record from which the jury could have inferred a trust relationship.

The State's first witness, FNB's chief lending officer Thomas Hale, testified as to the floor plan under which the mobile homes were financed. He testified that FNB was owed $37,405 on the mobile home, and that before anyone could take clear title of that home, FNB would have to be paid that amount. He testified that "normally, the new owner would obtain financing or pay cash . . . and arrangements would be made with the seller, Mr. Parris, and the bank . . . to pay off the lien that existed on the mobile home." Paula Griggs, who worked for PHS and was responsible for bringing the Martins in as customers, testified that she knew FNB had a lien on the mobile home, and that when she told Parris that he needed to pay off FNB's lien on the Martin's home, Parris told her he would take care of it. She testified that in the normal course of PHS' business, the checks that came in would be deposited and then the payments would be made against the liens.

Marcia Jolly, a vice-president of Bank of America, testified that, at the closing, Martin endorsed the checks, and then she handed them to Parris. Thereafter, Parris endorsed the checks, with the following language, "for

value received, by endorsement, the payee does warrant good title to and full right to convey a 1999 Legend Mobile Home." Deborah Ellis, PHS' secretary/office manager, testified that she never received the Bank of America check to go to FNB and that she was told that Parris said "he would take care of it." James Parker, sales manager for PHS, testified that whenever a mobile home was sold, Marion Parris was responsible for making sure FNB was paid.

Jerry Martin testified that when he gave Parris the $40,340 check, he expected his bank would get a clear title. Sherry Martin testified that, as far as she knew, her mobile home had been paid for with the checks from Bank of America, and she did not learn otherwise until Mr. Moss (from FNB) came to the home and told her otherwise on December 6, 1999.

In State v. Jackson, 338 S.C. 565, 570, 527 S.E.2d 367, 370 (Ct. App. 2000), the Court of Appeals stated:

> [a] trust is an 'arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit.' Black's Law Dictionary 1047 (6th Ed.1991). Thus, the transferor of the property must intend that the trustee will act for the transferor's benefit instead of on his own behalf.

Clearly, the Martins here entrusted their checks to Parris with the intent they be used for their benefit, rather than for Parris' own benefit. Accordingly, we find the evidence presented, taken in the light most favorable to the State, was sufficient to present a jury issue as to the creation of a trust relationship. The Court of Appeals' opinion is reversed.

**REVERSED**.

**TOAL, C.J., MOORE and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.**

**JUSTICE PLEICONES:** I agree that the Court of Appeals' decision should be reversed, but I respectfully disagree with the majority's rationale. In my opinion, breach of a "trust," as that term is traditionally understood, is not essential to a conviction for breach of trust with fraudulent intent. Rather, the trust that must be breached for the crime to be complete is that confidence reposed by the victim in the recipient of the property.

Breach of trust with fraudulent intent "is nothing more or less than larceny. It might well be termed 'statutory larceny,' as distinguished from larceny at common law. The main distinction between the two crimes is this: In common-law larceny, possession of the property stolen is obtained *unlawfully*, while in breach of trust, the possession is obtained *lawfully*." State v. McCann, 167 S.C. 393, 397-98, 166 S.E.2d 411, 413 (1932) (emphasis in original). "[T]he object of [breach of trust with fraudulent intent] was simply to enlarge the field of larceny, removing what before might have been a defense for those who received property in trust and afterwards fraudulently appropriated it." State v. Shirer, 20 S.C. 392, 408 (1884).

I disagree with the majority's interpretation of the language from Shirer, "received in trust," as meaning "received as a trustee."[2] In my opinion, the Shirer Court used the word "trust" in a lay sense, as in confidence in the integrity of another person. The Court was merely explaining the dichotomy between lawful and unlawful acquisitions in the context of larceny. A friend, an employee, or some other "trusted" person might receive property lawfully, but if he thereafter converts the property to his own use with *animus furandi*, then he is guilty of larceny through breach of trust with fraudulent intent.

In this case, that Parris lawfully received the Martins' money is undisputed. The Martins trusted that Parris had title to the mobile home, and they tendered their money as consideration. Because there is evidence that

[2] Apparently, this interpretation was first made in State v. LeMaster, 231 S.C. 321, 98 S.E.2d 756 (1957).

Parris converted the Martins' money for his own use, thus breaching their confidence, Parris was not entitled to a directed verdict.

If the State were in fact required to prove the existence of a trust, however, then the Court of Appeals' decision should be affirmed. There is no evidence that the Martins intended to be the settlors of a trust. As the Court of Appeals noted, the Martins were not even aware that FNB financed and held title to Parris's inventory. Had Parris owned title to the mobile home, as the Martins believed, then he would have used their money – their consideration under the sales contract – for his own benefit. He was not their trustee; there was no trust formed.

For the reasons stated, I concur in the result reached by the majority and join in the reversal of the decision of the Court of Appeals.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Hassan Abu-Shawareb, Appellant,

v.

South Carolina State University, Respondent.

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Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

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Opinion No. 3968
Heard December 8, 2004 – Filed March 21, 2005

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**AFFIRMED**

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Jay Bender and Holly L. Palmer, both of Columbia, for Appellant.

Wilbur E. Johnson, Stephen L. Brown, and Matthew K. Mahoney, all of Charleston, for Respondent.

**STILWELL, J.:** Hassan Abu-Shawareb appeals the trial court's grant of judgment notwithstanding the verdict in favor of South Carolina State University, arguing the court erred by determining a prior order and release barred his bailment claim. We affirm.

## FACTS

In response to a student's sexual harassment complaint, Abu-Shawareb was suspended from the faculty at the university, required to leave campus immediately, and prohibited from returning pending a criminal investigation. He left behind several volumes of his private library in his locked office, along with teaching materials, maps, photographs, and personal mementos.

After he was acquitted on the criminal charge, Abu-Shawareb brought a federal civil rights claim against the university alleging wrongful suspension and demanding reinstatement. The parties successfully mediated his claim and agreed to enter into a settlement agreement. According to the agreement's terms, the university was to be released from all claims arising out of Abu-Shawareb's employment, and he was to be permitted to return as a tenured faculty member.

Upon returning to the university but prior to signing the release, Abu-Shawareb discovered the contents of his former office were missing. The parties' counsel exchanged correspondence in an attempt to locate the missing items. Abu-Shawareb's attorney informed the university it would have to either locate his client's property or compensate Abu-Shawareb for the loss.

Counsel for the university replied, "It is my understanding that the University is continuing the effort to locate any materials which belong to the Plaintiff. I will keep you aware of the progress of this search. I do not believe that this unresolved issue should forestall the execution of a settlement agreement and I do not understand your letter to suggest that notion." A revised settlement agreement and release, proposed order of dismissal, and settlement check were enclosed with the reply.

Abu-Shawareb executed the revised settlement agreement and release. Although the release made no mention of his missing belongings, Abu-Shawareb's attorneys prepared for him a separate

handwritten statement purporting to reserve "any claims relating to the loss or destruction of . . . personal items or professional items housed or stored in the office of Hassan Abu-Shawareb[.]" This document was not executed by anyone on behalf of the university. The release was later adopted and incorporated into the federal court's order of dismissal terminating the litigation.

The missing items were never located, and Abu-Shawareb sued the university alleging causes of action for bailment, negligence, and conversion. The university denied his claims and raised several affirmative defenses, one of which was that the parties' agreement and release incorporated in the order of dismissal in the federal case barred Abu-Shawareb's claims.

At a hearing on a motion for summary judgment, the university argued the release and order of dismissal in the federal action barred the Abu-Shawareb's claims, relying on Bradley v. Family Ford Sales, Inc., 287 S.C. 401, 339 S.E.2d 122 (1986). The university's motion for summary judgment was taken under advisement by the court and the trial proceeded.

At trial, the university moved for a directed verdict, reasserting Abu-Shawareb's claims were barred by the Bradley decision. The court, however, refused to consider the motion and indicated the issue of whether Bradley barred the action remained under advisement for final determination on the university's summary judgment motion.[1] The trial court granted Abu-Shawareb's motion for directed verdict on the sole issue of whether a bailment was created. The jury ultimately returned a verdict for $100,000.

After the verdict, the trial court denied the university's motion for summary judgment, finding "that there are sufficient ambiguities in the language of the release that would allow the introduction of extrinsic evidence as to whether or not this cause of action was released[.]" The

[1] Abu-Shawareb abandoned his conversion and negligence claims during trial and proceeded on bailment alone.

court also determined "as a matter of law there was no intention on [sic] either party that this cause of action would be released."

The university filed a motion for JNOV or, in the alternative, motion for new trial, again arguing the bailment claim was barred by the provisions of the federal court order. The court determined "the language of the parties' Release, incorporated as an Order by Judge Currie, is broad and comprehensive" and the unambiguous terms of "the Order must be accepted at its face value." The trial court granted the university's JNOV motion after ultimately concluding the Bradley case was controlling.

## DISCUSSION

Abu-Shawareb contends the trial court erred as a matter of law by granting the university's JNOV motion, arguing the release was ambiguous and, as such, the court was required to determine whether the parties intended to release the university from his bailment claim. We disagree.

When we review a trial court's grant or denial of a motion for directed verdict or JNOV, we reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law. Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997).

In Bradley v. Family Ford Sales, Inc., 287 S.C. 401, 339 S.E.2d 122 (1986), our supreme court determined a prior order of dismissal that prohibited the parties to that action from "instituting or maintaining any further action with regard to the matters set forth in the complaint, answer and counterclaims herein" barred a subsequent claim by one of the parties based on the circumstances that gave rise to the original action, even though there may have been no intention to release that specific claim. The Bradley court held:

> The order of dismissal is not merely an agreement between the parties, it is an order of the court. It stands on its own

> and does not require resort to any extrinsic documents for a determination of its meaning and effect. Since the language is perfectly plain and capable of legal construction, the words alone will determine the provision's force and effect.

Id. at 403, 339 S.E.2d at 124.

In this case, the federal court explicitly stated "that the Settlement Agreement and Release of all Claims is adopted and incorporated herein as the Order of the Court[.]" The referenced release read:

> It is further agreed that this Release sets forth the acceptance of the sum set forth above and is in full and final settlement of any and all claims that the undersigned now has or may have in the future arising out of his employment with Defendant, South Carolina State University, the terms of his employment with Defendant, South Carolina State University, events surrounding his employment and the suspension of his employment, including but not limited to the claims set forth hereinabove.

Abu-Shawareb contends Bradley can be distinguished because the order of the court contained the specific operative language and did not rely on any extrinsic document, whereas the court order involved here requires reference to a separate document. We view this as a distinction without a difference, because the language carefully chosen and employed by the court in adopting and incorporating the release as a part of its order is the functional equivalent of reciting the language in the body of the order.

Because the release does not specifically include his bailment claim, Abu-Shawareb argues it is ambiguous, requiring the trial court to look at parol evidence to determine the parties' intentions. Although the release is broad, it is not ambiguous. See Jordan v. Sec. Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (holding silence

alone does not create an ambiguity). Ambiguity is created only when a release is inconsistent on its face or is reasonably susceptible of more than one interpretation. See e.g., Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). The release here clearly and definitely precludes future claims arising out of Abu-Shawareb's employment with the university and events surrounding his employment and suspension. Abu-Shawareb acknowledges his bailment claim arose from his employment by and suspension from the university. Accordingly, his claim is properly barred by the language of the release as incorporated in the order of dismissal. See Bradley, 287 S.C. at 403, 339 S.E.2d at 124 ("'If . . . the judgment is not ambiguous or uncertain, the parol evidence rule applies, and the written judgment should be accepted at its face value and without speculating as to the reasoning employed at reaching the particular result.'" ).

Abu-Shawareb also contends the trial court's denial of the university's summary judgment motion was inconsistent with its grant of the university's JNOV motion, because the former ruling was based on a finding the release was ambiguous while the latter found the release and order were clear. It is not error for the trial court to change its mind and reconsider a motion for summary judgment. See PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 335 (Ct. App. 1988) ("The trial judge, under our procedure, is afforded many opportunities to change his mind."); Brown v. Pearson, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997) (holding the decision whether to reconsider a motion for summary judgment is within the trial judge's discretion). The denial of summary judgment does not finally determine the merits of the case, and issues raised in a motion may be raised again in a motion to reconsider summary judgment or in a motion for directed verdict. Id.

## CONCLUSION

Because we read the language of the parties' release and the court order incorporating it as perfectly plain and capable of legal construction, we conclude the supreme court's holding in Bradley

controls to preclude Abu-Shawareb from maintaining his bailment action regardless of the parties' intentions.

**AFFIRMED.**

**BEATTY and SHORT, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Debra Clinton, Appellant,

v.

West American Insurance Company, a member of the Ohio Casualty Group, and Palmetto Insurance Assoc., Inc., Defendants,

of whom West American Insurance Company is Respondent.

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

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Opinion No. 3969
Submitted February 1, 2005 – Filed March 28, 2005

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**AFFIRMED**

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Randall L. Chambers, of Greenville, for Appellant.

Jennifer D. Eubanks, of Greenville, for Respondent.

**PER CURIAM:** Debra Clinton appeals the trial court's grant of summary judgment to West American Insurance Company, finding West American made a meaningful offer of underinsured motorist coverage. We affirm.[1]

In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Rec. Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998) (citation omitted). "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. . . ." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Clinton argues the trial court erred in finding West American made a meaningful offer to Joy Clinton, because although she specifically rejected UIM coverage on the offer form, she filled in "25/50" on the blank line located on the UIM offer form and no premium amount was filled in by the agent or insurer. In light of Progressive Casualty Ins. Co., v. Leachman, Op. No. 25919 (S.C. Sup. Ct. filed Jan. 10, 2005) (Shearouse Ad. Sh. 2 at 17, 23-24) (finding for purposes of a meaningful offer of UIM, S.C. Code Ann. § 38-77-350(A) does not require insurers to provide a blank line for insured to write in any amount of coverage up to the policy limit) and the reasoning set forth by the trial court, we conclude the trial court properly found a meaningful offer was made to Joy Clinton and the policy should not be reformed to include underinsured motorist coverage. The order granting

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

summary judgment to West American is hereby affirmed and reprinted as part of the opinion of this court.

THE ORDER OF JUDGE JAMES JOHNSON, JR.

Before the Court are both the plaintiff's and the defendant's motions for summary judgment. These matters came before the Court for hearing on January 8, 2004. The plaintiff was represented by Mr. Randall Chambers of the Joel Bieber Firm of Greenville and the defendant was represented by Ms. Jennifer Eubanks of Gallivan, White & Boyd, P.A. of Greenville. The parties both agreed that there were no genuine issues of fact before the Court. For the reasons set forth below, the plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is granted.

## 1. Procedural Background

On May 24, 1999, Debra Clinton ("Clinton") was a passenger in a 2000 Plymouth Neon LX, which was owned and operated by Joy Clinton, when that car was struck from the rear by a car operated by Courtney Young. Clinton filed suit against Courtney Young, alleging personal injury as a result of the collision in an action filed in the Court of Common Pleas for Greenwood County, C.A. No. 00-CP-24-982. Courtney Young's liability insurer, Farm Bureau, tendered its limits of $25,000 and Clinton tendered a claim for underinsured motorist ("UIM") coverage to Joy Clinton's insurer, West American. West American determined that Joy Clinton had declined UIM coverage after a valid and meaningful offer was made to her and declined to pay the claim.

Joy Clinton had only minimum limits coverage, $15,000 per person, $30,000 per accident and $10,000 for property damage per accident, on the 2000 Plymouth Neon LX at the time of the accident. Debra Clinton alleged over $45,000 in medical expenses as a result of the accident. In order to resolve the tort action, the parties entered into a Consent Order of Dismissal in which they stipulated that Clinton was entitled to file a declaratory judgment action to determine whether UIM coverage existed under the policy issued to Joy Clinton and that "in the event that a court of

law determines that UIM coverage exists, recovery shall be in the amount of $15,000, regardless of costs and attorney's fees."

Clinton filed the above-captioned action for declaratory judgment on May 21, 2002, alleging that the terms of the West American policy issued to Joy Clinton included UIM coverage in the amount of $15,000 per person or, in the alternative, that West American failed to make a meaningful offer of UIM coverage and that the West American policy should be reformed to include UIM coverage in the amount of $15,000 per person. Clinton also named Palmetto Insurance Assoc., Inc., Joy Clinton's insurance agent, as a defendant. Clinton voluntarily dismissed Palmetto as a defendant in the action by a Consent Order filed July 25, 2002.

## 2. Factual Background

On September 24, 1992, Joy Clinton submitted on application for personal automobile insurance with the David Stuart Agency in Greenwood. [footnote omitted]. A copy of her application was before the Court and constitutes a part of the record. On the first page of that application, Clinton listed three automobiles to be insured: a 1987 Chevrolet Celebrity, a 1987 Dodge Ram 50 and a 1979 GMC Pickup. Also on that page, she listed the coverages she sought to purchase for each automobile. The application shows that she sought bodily injury liability coverage in the amount of $50,000 per person and $100,000 per accident, and property damage liability coverage in the amount of $25,000 per accident. She also sought uninsured motorist ("UM") coverage in the amount of $25,000 per person, $50,000 per accident and $25,000 in property damage per accident. The section where Joy Clinton would have filled in the amounts of UIM coverage she sought is blank.

On the second page of the application, under the section entitled Binder/Signature, the application indicates that the insurance binder became effective on September 24, 1992. That section also reads: "This company binds the kind(s) of insurance stipulated on this application." The application is signed by Joy Clinton and dated September 24, 1992.

On that same date, Joy Clinton filled out a document entitled "Offer of Optional Additional Uninsured and Underinsured Automobile Insurance Coverages South Carolina" ("Offer"). The Offer is before the Court and constitutes a part of the record in this matter. The document is a form generated by the South Carolina Department of Insurance and bears the notation "SCDI Form Number 2006". The first page of the Offer contains an explanation of coverages. Regarding UIM coverage, the document reads:

> **Underinsured Motorist Coverage** compensates you, or other persons insured under your automobile insurance policy, including passengers within your motor vehicle, for amounts that you, or your passengers, may be legally entitled to collect as damages from an owner or operator of an at-fault underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle that is covered by some form of liability insurance, but that liability insurance coverage is not sufficient to fully compensate you for your damages.
>
> Your automobile insurance policy does not automatically provide any Underinsured Motorist Coverage. You have, however, a right to buy Underinsured Motorist Coverage in limits up to the limits of liability coverage you will carry under your automobile insurance policy. Some of the more commonly sold limits of Underinsured Motorist Coverage, together with the additional premiums you will be charged, are shown on this Form. If there are other limits in which you are interested, but which are not shown upon this Form, then fill-in those limits. If your insurance company is allowed to market those limits within this State, your insurance agent will then fill-in the amount of increased premium.

> It is important for you to understand that if you reject either one of these coverages upon this Form and if you are involved in an automobile accident, this Form then may be used by your insurance company as evidence against you if it denies your claim for additional Uninsured Motorist Coverage or Underinsured Motorist Coverage.
>
> If you do not complete this Form and return it to your insurance company or to your insurance agent within 30 days from your receipt of this Form, the law requires that additional Uninsured Motorist Coverage and Underinsured Motorist Coverage, at the same limits as the automobile liability insurance which you purchase, must be automatically added on to your automobile insurance policy. You will be required to pay an additional premium for each of these two coverages. If you do not pay that additional premium, your automobile insurance policy may then be cancelled.
>
> In the future, if you wish to increase or to decrease your limits of additional Uninsured or Underinsured coverage, you must then contact either your insurance agent or your insurance company. You will not be presented with another copy of this Form by your insurance agent or by your insurance company upon renewal of your automobile liability insurance policy.

On the second page of the Offer, the offer of additional UM coverage appears. Four limits of additional UM coverage are shown, along with the increased premium rate. Those limits are $15,000/$30,000/$5,000; $25,000/$50,000/$10,000; $50,000/$100,000/$25,000; and $100,000/ $300,000/$50,000. In addition, a blank was left for the insured to fill in any other limit of additional UM in which she was interested. She filled in

"25/50/25". The Offer also asked whether the insured wished to purchase additional UM coverage and a check mark appears beside the answer "yes."

On the third page of the Offer, the offer of UIM coverage appears. The same four limits of additional UM coverage are also listed as offers of UIM coverage. In addition, a blank was left for the insured to fill in any other limit of UIM in which she was interested. She filled in "25/50/". Where asked whether she wished to purchase UIM coverage, a check mark appears beside the answer "no." The Offer also requires the insured to sign her name if she did not desire UIM coverage. Joy Clinton's signature appears on that line.

Also on the third page of the Offer is a section entitled "Applicant's Acknowledgment." That section reads as follows:

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

Below the acknowledgement, Joy Clinton printed and signed her name, printed her address and dated the document September 24, 1992.

On September 24, 1992, West American issued a policy of automobile insurance to Joy Clinton bearing policy number DPW 05109293. See affidavit of Tom Dahl which was before the Court and constitutes part of the record in this matter. The policy was renewed several times in the

intervening years. In 1999, prior to the motor vehicle accident with Courtney Young, Joy Clinton decreased her liability limits to $15,000/$30,000/$10,000. See affidavit of Joy Clinton which was before the Court and constitutes a part of the record in this matter. On May 21,1999, Joy Clinton added the 2000 Plymouth Neon LX to the policy. She did not request to add UIM coverage to any of the vehicles covered by the policy. At the time of the accident, the policy declarations page shows that the 2000 Plymouth Neon LX had $15,000/$30,000/$10,000 in both liability and UM coverage; the declarations page shows that the 2000 Plymouth Neon LX was not covered by UIM coverage. See Declarations Page which was before the Court and constitutes a part of the record in this matter.

Joy Clinton submitted an affidavit in which she alleged that she believed that shortly after she purchased coverage in 1992, she noticed that she was paying for "double Uninsured and Underinsured Coverage." She alleges that she called her agent and told him that she did not want to pay twice for the same thing. She alleges that her agent had her come to the office and sign a blank form. However, she does not identify the form she signed. She did not recall filling out the Offer, but admitted that the signatures on the Offer appear to be hers. She also alleged that no one ever told her how much the premium would be for UIM coverage in the same limits as her liability coverage. Finally, she alleged that it was never her intention to cancel or reject UIM coverage.

## 3. Analysis

As an initial matter, and setting aside the issue of whether a meaningful offer of UIM coverage was made, the policy, as it was issued to Joy Clinton, did not provide UIM coverage for the 2000 Plymouth Neon LX. The policy declarations page indicates that no UIM coverage was issued for the Neon and no premium charged for UIM coverage. Moreover, Clinton, in her brief in support of her Motion for Summary Judgment does not argue that Joy Clinton's policy, as issued, contained UIM coverage for the Neon. As there is no indication to the contrary, this court concludes that the automobile insurance policy as issued to Joy Clinton did not provide UIM coverage for the Neon.

West American, as the insurer, has the initial burden of proving that a meaningful offer of UIM coverage was made to Joy Clinton. Jackson v. State Farm Mut. Auto. Ins. Co., 301 S.C. 440, 392 S.E.2d 472 (Ct.App. 1990), aff'd as modified, 303 S.C. 321, 400 S.E.2d 492 (1991). The test for determining whether an effective offer was made was set forth by the Supreme Court in State Farm Mutual Automobile Insurance Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987):

> (1) the insurer's notification process must be commercially reasonable, whether oral or in writing;
> (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;
> (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and
> (4) the insured must be told that optional coverages are available for an additional premium.

Wannamaker, 521, 556. If the insurer fails to make a meaningful offer of UIM coverage, the policy will be reformed to provide UIM coverage in the amount of the policy's liability limits. Id.

In the present case, the plaintiff alleges that the UIM offer was not meaningful for two reasons. First, Clinton alleges that the Offer does not reference the policy number and, therefore, there is no way of knowing whether the Offer was made in connection with the policy which covered the Neon or some other policy. Second, Clinton alleges that the Offer was not meaningful because it failed to provide a "list of available limits and the range of premiums for the limits" as required by § 38-77-350(A)(2) of the South Carolina Code of Laws. Specifically, Clinton alleges that because she filled in "25/50" in the UIM offer section of the form and no premium amount was filled in by the agent or insurer, she is entitled to reform her policy to include UIM coverage.

Clinton's argument that the Offer was invalid because it did not reference her policy number is meritless. First, neither the Wannamaker test nor the statutory law applicable to UIM coverage requires the offer form to contain the policy number. Second, the Offer was signed and dated the same date that Clinton made her application for personal automobile insurance coverage. Because a binder was issued that day, the insurer had likely not even issued a policy number on September 24, 1992. Finally, as made clear by the affidavit of Tom Dahl, a Personal Lines Underwriting Manager for the Ohio Casualty Group, West American issued only one policy of insurance to Joy Clinton, that being policy number DPW 05109293. Moreover, Joy Clinton, in her affidavit, does not allege that she ever held more than one policy with West American or the Ohio Casualty Group. Accordingly, because no other policy of insurance has ever been issued to Joy Clinton and because the date of the Offer and the policy application are identical, it is clear that the Offer signed by Joy Clinton was made in connection with her policy which covered the Neon.

West American made a valid and meaningful offer of UIM coverage to Joy Clinton by virtue of its Offer dated September 24, 1992. The Offer was commercially reasonable, being made on a form approved by the South Carolina Department of Insurance in compliance with § 38-77-350 of the South Carolina Code of Laws. The South Carolina Court of Appeals has specifically held that the form used by West American, Form 2006, meets the requirements of § 38-77-350. Osborne v. Allstate Ins. Co., 319 S.C. 479, 462 S.E.2d 291 (Ct.App. 1995) superceded by statute as stated in Moody v. Dairvland Ins. Co., 354 S.C. 28, 579 S.E.2d 527 (Ct.App. 2003); Butler v. Unisun Ins. Co., 323 S.C. 402, 475 S.E.2d 758 (S.C. 1996).

Clinton argues that because Joy Clinton filled in "25/50" in the blank left for the insured to fill in other limits of UIM coverage on the Offer and the agent did not fill in the premium amount, the Offer is rendered unmeaningful. Clinton argues that by filling in "25/50" in the UIM coverage blank, the insurer was under a duty to fill in the premium. However, this argument ignores the remainder of the Offer. First, "25/50" is not a complete coverage amount. There is no amount listed for property damage. Accordingly, no premium amount could be determined because the amount

requested is not complete. Second, Joy Clinton answered the question about whether she wanted UIM coverage in the negative, checking "no," and signed her name to that effect. Joy Clinton's declination of UIM coverage is corraborated [sic] by her insurance application which, while requesting additional UM coverage, does not request UIM coverage. Thus, because Joy Clinton declined UIM coverage, there was absolutely no need or point in determining a premium for "25/50."

## 4. Conclusion

Based on the foregoing, this Court denies the plaintiff's motion for summary judgment, grants the defendant's motion for summary judgment and declares that the policy of automobile insurance, policy no. DPW 05109293, does not, as issued, provide UIM coverage for the 2000 Plymouth Neon LX listed on the policy; that a valid and meaningful offer of UIM coverage was made to Joy Clinton on September 24, 1992; that Joy Clinton declined that valid and meaningful offer of UIM coverage on September 24, 1992; that the policy of automobile insurance issued by West American to Joy Clinton, policy no. DPW 05109293 cannot legally be reformed to provide UIM coverage; and that, on May 24, 1999, the 2000 Plymouth Neon did not have UIM coverage under West American policy number DPW 05109293.

**AFFIRMED.**

**HEARN, C.J., KITTREDGE and WILLIAMS, JJ., concur.**