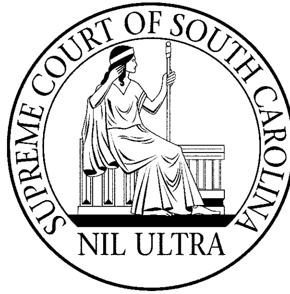

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 6, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Anthony Clark Odom, Respondent.

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

Opinion No. 26624
Heard March 5, 2009 – Filed March 30, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Appellant.

Andrew J. Johnston, of Spartanburg, Jack B. Swerling of Columbia, and Katherine Carruth Link, of West Columbia, for Respondent.

ACTING JUSTICE MOORE: This case involves questions as to the validity of criminal discovery orders obtained by the State under the federal PATRIOT Act for use in an online child predator sting.

Respondent Anthony Clark Odom (Respondent) allegedly communicated with a detective with the Spartanburg County Sheriff's Office, who was posing as a thirteen-year-old girl, in online chat rooms. Respondent was charged with criminal solicitation of a minor. In pre-trial hearings, the circuit court found that the Attorney General's office failed to comply with South Carolina law in procuring criminal discovery orders, and the orders were therefore not proper under 18 U.S.C. § 2703(d) and 18 U.S.C. § 3127(2)(B) (2006). The court further found that parts of the undercover investigation violated internal policies. The court denied Respondent's Motion to Dismiss but granted Respondent's Motion to Suppress certain evidence obtained pursuant to the orders and evidence obtained by methods which violated the policies. The State appealed to this Court.[1] We reverse.

FACTS

From March 12, 2006 until May 5, 2006, a detective with the Spartanburg County Sheriff's Office and member of the Internet Crimes Against Children Task Force (ICAC) chatted on Yahoo! Instant Messenger with an individual using the screen name "Danger6552000," which also displayed the name "Roge Wilson."[2] While chatting, the detective used a profile he created that indicated that the person chatting was a thirteen-year-old girl named "Melanie."[3] The detective testified that many of the chats

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[1] The State appealed pursuant to State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976).").

[2] We refer to the party with whom the detective chatted as "Roge" for consistency.

[3] The screen name used by the detective is not used in this opinion in order to protect ongoing investigations.

with Roge from March 12 until March 20 were conducted from his personal computer at his home, at times at which he was not officially on duty.

In the first chat, Roge noted that Melanie was thirteen years old and made sexually explicit comments, attempting to engage Melanie in cybersex. In later chats, Roge continued to make sexually explicit comments. Roge stated multiple times that he could not engage in actual sexual acts with Melanie until she was sixteen years old, but at one point he agreed to come see Melanie and at another agreed to meet her at the mall and take her to a hotel room, on both occasions for the purpose of having sex with Melanie.

On March 23, the Attorney General's Office requested an order from The Honorable G. Thomas Cooper, Chief Administrative Judge for the Fifth Judicial Circuit, under 18 U.S.C. § 2703(d) to obtain information from Yahoo! related to the screen names used by Roge. The State received the IP address[4] from Yahoo! and determined that the address belonged to Bellsouth Internet Service. The State then requested another § 2703(d) order to obtain the subscriber information and connection logs associated with the IP address, which was granted by the Honorable James W. Johnson, Jr. Based on the information provided by Bellsouth, the State determined that the screen names used by Roge belonged to Respondent. On May 8, the State requested and received another order from Judge Cooper to obtain more information about Respondent's account.

The State indicted Respondent on one count of criminal solicitation of a minor in violation of S.C. Code Ann. § 16-15-342 (2006). The circuit court held pre-trial hearings to deal with various motions made by Respondent. The judge granted Respondent's Motion to Suppress information obtained from the discovery orders after finding that the Attorney General's Office did

[4] "Each computer connected to the internet is assigned a unique numerical address, otherwise known as an Internet protocol or IP address, to identify itself and facilitate the orderly flow of electronic traffic. An IP address is a string of up to twelve digits, such as '202.134.34.9.'" Peterson v. National Telecommunications and Information Admin., 478 F.3d 626, 629 (4th Cir. 2007).

not comply with South Carolina law relating to the issuance of orders for pen registers and trap and trace devices. As a result, in the view of the trial judge, the South Carolina courts were not authorized to issue the orders under § 2703(d). Furthermore, the trial judge suppressed evidence of the internet chats between Respondent and the undercover officer which took place between March 12 and March 20 due to the fact that chats during this period were not conducted in compliance with ICAC Task Force standards. The State appealed.

STANDARD OF REVIEW

Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law. State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993).

ISSUES

A. Did the circuit court err in finding that the South Carolina courts were not authorized to issue the discovery orders under § 2703(d)?

B. Did the circuit court err in suppressing evidence of chats between March 12 and March 20 due to violations of ICAC policies?

DISCUSSION

A. Authority to issue § 2703(d) discovery orders

The State connected Respondent to the screen names associated with Roge through the use of criminal discovery orders allowed by the federal PATRIOT Act. At the circuit court, the State acknowledged that the substantive factual showings contained in the applications made to Judge Cooper and Judge Johnson were less than the probable cause standard required to obtain an order for a pen register or trap and trace device under South Carolina law and that the sole legal authority upon which it relied in

obtaining each of its discovery orders was 18 U.S.C. § 2703(d). The statute provides:

> (d) Requirements for Court Order. – A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State.

18 U.S.C. § 2703(d) (2006). The term "court of competent jurisdiction" is defined in 18 U.S.C. § 3127(2)(B):

> (2) the term "court of competent jurisdiction" means –
> . . .
> (B) a court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device;

18 U.S.C. § 3127 (2006).

The circuit court found that the orders were not properly issued because, in his view, (1) the issuing courts were not "court[s] of competent jurisdiction" since they were not authorized to enter orders authorizing use of a pen register or trap device; and (2) South Carolina law prohibits § 2703(d) orders. We hold that both findings were legal errors.

(1) Court of competent jurisdiction

Section 2703(d) provides that "[a] court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction . . . ." 18 U.S.C. § 2703(d). Section 3127(2)(B) defines a "court

of competent jurisdiction" as a "court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device." 18 U.S.C. § 3127(2)(B).

There is no dispute that the circuit court qualifies as a court of general criminal jurisdiction under the South Carolina Constitution. S.C. Const. art. V, § 11. Furthermore, § 17-29-30(A)(2) allows a law enforcement officer of this State to apply for a pen register from any circuit court. S.C. Code Ann. § 17-29-30.

Nonetheless, the circuit court found that the issuing courts were not courts of competent jurisdiction because, given that the State admittedly did not show probable cause, the courts were not authorized to issue pen registers in the instant case. In short, he found that the courts failed the second part of § 3127. This was error.

Section 2703 sets forth standards required in order to obtain information. Specifically, § 2703(d) requires a showing of "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). It is unlikely that Congress intended to require, as a threshold matter, that the forum state's standard for the issuance of pen devices be met and then require that "reasonable suspicion" standards of § 2703(d) be met before a court order is issued. Moreover, such an interpretation would defeat uniformity.

The more logical reading of the statute is that by requiring that applications under § 2703(d) be heard by a "court of competent jurisdiction" Congress meant to ensure that the courts deciding whether or not to issue § 2703(d) orders were competent to consider whether or not to grant orders of a similar type. For this reason, we find that the circuit court erred in finding that the South Carolina circuit courts were not "court[s] of competent jurisdiction" for purposes of § 2703.

(2) Prohibited by the law of such State

Though § 2703(d) allows for courts to issue orders for disclosure, it also limits the court's power to do so where a State governmental authority seeks the order. 18 U.S.C. § 2703(d). In that case, "such a court order shall not issue if prohibited by the law of such State." Id. In addition to finding that the issuing courts were not "courts of competent jurisdiction" under § 3127, the circuit court found, under § 2703(d), that the orders were prohibited by South Carolina law.

The trial court found § 2703(d) orders were prohibited by S.C. Code Ann. § 17-29-20(A) ("Except as provided in this section, no person may install or use a pen register or trap and trace device without first obtaining a court order under § 17-29-40."). The fundamental flaw in the trial court's reasoning is in equating the issuance of pen registers and trap and trace devices with § 2703(d) orders. Section 2703(d) addresses orders issued under subsection (b) or (c) of § 2703. 18 U.S.C. § 2703(d). Neither subsection calls for the issuance or use of pen registers and/or trap and trace devices. Moreover, the information obtained through the use of either subsection is very different from the information obtained through the use of a pen register and trap and trace device.

A pen register or trap and trace device is different from a § 2703(d) order in two main ways. First, while § 2703(d) orders seek information retrospectively, a pen register or trap and trace device captures information after its installation. See S.C. Code Ann. § 17-29-10. The devices intercept information in transmission while § 2703(d) orders elicit information already in the possession of the provider. See 18 U.S.C. § 2703(b), (c).

Second, information obtained by a § 2703(d) order is more specific than information obtained through use of a pen register or a trap and trace device. While § 2703(d) orders may be limited to a certain subscriber or time period, pen registers and trap and trace devices capture all phone numbers dialed from the targeted phone line without regard to the relevance to the ongoing investigation. See 68 Am. Jur. 2d Pen Registers § 342 (2008).

Because § 2703(d) orders do not call for issuance of a pen register or trap and trace device and allow parties to obtain information different than that obtained by a pen register or trap and trace device, we find that §§ 17-29-10, et seq. does not establish that § 2703(d) orders are prohibited by South Carolina law. Therefore, the trial court erred in finding that the orders were improperly issued on this ground.

B. Suppression due to violation of ICAC policies

The circuit court suppressed evidence of the chats between Roge and the undercover officer that occurred between March 12 and March 20 due to the officer's non-compliance with the ICAC Program and Investigative Standards (ICAC Standards) which were incorporated into a Memorandum of Understanding (MOU) between Spartanburg and the Attorney General's Office.

The MOU provides, among other things, that no personally owned equipment should be used in ICAC investigations and that only sworn, on-duty ICAC personnel should conduct investigations in an undercover capacity. At the pre-trial hearing, the undercover officer admitted violating the policies by communicating with Roge while the officer was officially off-duty and using his personal computer, rather than on ICAC computers. The ICAC computers are equipped with software capable of recording various information concerning all communications sent and received in the course of undercover investigation.

The State argues that the violations of the MOU and ICAC Standards go to the weight rather than the admissibility of the evidence. We agree.

This Court has held on a number of occasions that violations of procedure go to the weight, rather than the admissibility of evidence. See, e.g., State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002) (failure to conduct breathalyzer test using required sample); State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001) (flaw in chain of custody). Moreover, exclusion is typically reserved for constitutional violations. See Huntley, 349 S.C. at 6,

562 S.E.2d at 474 ("Exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures.").

The MOU and ICAC Standards are not codified and were created, not by the Legislature, but by law enforcement. The MOU and ICAC Standards serve a variety of purposes. We find that the violation of the MOU and ICAC policies speak to the weight of the evidence rather than its admissibility. Therefore, the circuit court erred in suppressing the chats between March 12 and March 20 on this basis.

CONCLUSION

The circuit court erred in finding a violation of § 2703(d) and in suppressing evidence on that basis and on the basis of violations of ICAC Standards. We therefore reverse the circuit court.

REVERSED.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Hartsville, Respondent,

v.

South Carolina Municipal Insurance & Risk Financing Fund, Appellant.

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26625
Heard March 4, 2009 – Filed April 6, 2009

AFFIRMED

J. R. Murphy and Jeffrey C. Kull, both of Murphy & Grantland, of Columbia, for Appellant.

Martin S. Driggers, of Driggers & Moyd, of Hartsville, for Respondent.

JUSTICE BEATTY: In this declaratory judgment action, South Carolina Municipal Insurance and Risk Financing Fund (Insurer) appeals the circuit court's order finding the Insurer had a continuing duty to defend the City of Hartsville (City) and ordering it to pay the City the costs it incurred from having to defend against a suit brought

by a Hartsville landowner. Pursuant to Rule 204(b), SCACR, this Court certified this appeal from the Court of Appeals. We affirm the decision of the circuit court.

FACTUAL/PROCEDURAL BACKGROUND

In 1991, Phelix Byrd (Byrd) purchased a 46.358 acre tract of land that lay partly in the City (the City tract) and partly in Darlington County (the County tract). The property was part of what used to be Coker Farms, a National Historic Landmark (NHL) as designated in 1964 by the National Park Service, a division of the United States Department of the Interior. This NHL designation, however, was never filed in the public records of Darlington County nor was any mention of the designation placed on deeds conveying portions of the Coker Farms properties to subsequent purchasers.

Byrd purchased a portion of the Coker Farms property in order to subdivide it and sell parcels to developers for commercial purposes. In 1998, Byrd approached the City about developing a carwash on a .86 acre parcel of the property located in the City. Because the City tract was zoned for agricultural use, Byrd petitioned the City to rezone it as commercial. Fearing that commercial development of any part of the Coker Farms would lead to the revocation of the NHL designation for all of Coker Farms, the City delayed acting on Byrd's petition.

After being assured that rezoning Byrd's property would not affect the NHL designation, the City rezoned the .86 acre parcel from agricultural to commercial pursuant to a City ordinance in February of 1999. By this time, however, Byrd's potential purchaser had lost the financing necessary to develop the property and, as a result, the sale never closed.

In July 1999, the City passed another ordinance which rezoned as commercial the balance of Byrd's property located within the City.

Shortly thereafter, Byrd entered into contracts to sell parcels of the City tract for development. These sales, however, were not

consummated because Darlington County, which maintained the records for both County and City property, would not approve the deeds. The County declined to approve the deeds on the ground the tax records for Byrd's property contained "flags," which stated "N'tl Park Serv. Ord/No Per or Deeds Issued" and, in turn, effectively restricted the issuance of deeds. The County had placed these flags on the tax records for all Coker Farms property in an attempt to protect the NHL designation. The flags were not removed from Byrd's tax records until approximately three years after the City tract had been rezoned.

In 2000, Byrd sued the City and the County, in addition to several other defendants, for damages arising from Byrd's difficulties and delays in being able to commercially develop his Coker Farms properties. In terms of his claims against the City, Byrd specifically pled causes of action for "gross negligence"[1] and "taking or inverse condemnation."

The City, represented by the Insurer,[2] moved for summary judgment on all of Byrd's claims. By order dated February 22, 2002,

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[1] In their briefs, the parties refer to this cause of action as one for negligent misrepresentation. However, a review of the pleadings indicates that Byrd titled this cause of action as "gross negligence."

[2] The City procured tort liability insurance from the Insurer in compliance with section 15-78-140 of the South Carolina Code, which provides in pertinent part:

> (b) The political subdivisions of this State, in regard to tort and automobile liability, property and casualty insurance shall procure insurance to cover these risks for which immunity has been waived by (1) the purchase of liability insurance pursuant to § 1-11-140; or (2) the purchase of liability insurance from a private carrier; or (3) self-insurance; or (4) establishing pooled self-insurance liability funds, by intergovernmental agreement, which may not be construed as transacting the business of insurance or otherwise subject to state laws regulating insurance.

S.C. Code Ann. § 15-78-140(b) (2005).

the circuit court granted the City's motion with respect to Byrd's takings and gross negligence claims. The court, however, denied the motion regarding Byrd's cause of action for inverse condemnation.

On March 28, 2002, the Insurer withdrew its defense of the City on the ground the remaining cause of action against the City for inverse condemnation was specifically excluded under the terms of the liability insurance policy the Insurer issued to the City.[3] The City protested the Insurer's withdrawal and requested that it continue to defend the City due to its concerns that the circuit court could permit Byrd to amend his complaint to add claims covered by the Insurer's liability policy. Despite this protest, the Insurer denied its duty to defend but indicated that it would reconsider its position in the event Byrd was permitted to reinstate the negligence cause of action. After the Insurer withdrew its defense, the City retained its own counsel.

Subsequently, the City filed a second motion for summary judgment with respect to Byrd's inverse condemnation claim. At the hearing on this motion, Byrd conveyed his theory that officials with the City and the County "conspired to have Darlington County 'flag' [his] property so that it could not be sold."

By order dated September 11, 2002, the circuit court granted the City's motion concerning the inverse condemnation cause of action, but denied the motion "with respect to the claim that the City of Hartsville has conspired with the County of Darlington in its actions." In so holding, the court reasoned:

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[3] The following provision is listed under the exclusions section of the liability policy:

> Inverse Condemnation
>
> Inverse condemnation, condemnation, temporary taking, permanent taking, or any claim arising out of or in any way connected with the operation of the principles of eminent domain; adverse possession or dedication by adverse use.

> [A]s to the allegation by [Byrd] that the City of Hartsville was involved with the County in 'flagging' the property, it would be inappropriate, at this time, for Summary Judgment to be granted. However, with respect to any independent acts by the City of Hartsville Officials, the Court finds that Summary Judgment would be appropriate as to those allegations.

Ultimately, on March 20, 2003, the circuit court dismissed the City as a defendant in Byrd's lawsuit. In reaching this decision, the court concluded that "South Carolina Code Section 15-78-60(17), as amended, grants immunity to the City of Hartsville for actions taken by its employees, even if proved, which would have involved an intent to harm Mr. Byrd, the Plaintiff, as it is claimed to have conspired with County employees." In its order denying Byrd's motion for reconsideration, the circuit court stated:

> In its Motion for Reconsideration, [Byrd] contends that these actions by the City of Hartsville, working along side the County of Darlington, would be independent conduct by the City of Hartsville, constituting inverse condemnation. The Court, however, concludes that this would be evidence of a conspiracy and, thus, is in fact, a tort and not a contract and is, thus, barred by the aforementioned Statute. As previously stated, the Court had already concluded in its Order of September 11, 2002, which was unappealed, that there were no independent acts or conduct by the City of Hartsville which would support an inverse condemnation claim.

Byrd appealed to the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR. In Byrd v. City of Hartsville,[4] 365 S.C. 650, 620 S.E.2d 76 (2005), this Court affirmed the circuit court's orders, holding: (1) the conspiracy claim was not before the Court given Byrd did not appeal from the circuit court's decision

[4] Because the County settled with Byrd, it was not a party to the appeal.

that the City would be immune from liability under the Tort Claims Act even if there were a conspiracy; and (2) summary judgment in favor of the City was proper because Byrd could not demonstrate that the City inversely condemned his property through regulatory delay.

While Byrd's appeal was pending, the City filed this declaratory judgment action against the Insurer to recover all costs incurred by the City in defending against Byrd's lawsuit after the Insurer withdrew its defense. Specifically, the City claimed the Insurer breached its contract of insurance with the City "while covered claims against [the City], including a tort claim for conspiracy, was still being litigated." Based on this alleged breach of contract, the City claimed it was entitled to be reimbursed for the costs and expenses of having to defend against the Byrd lawsuit since March 28, 2002, through the appeal. In response, the Insurer denied liability to the City on the ground that all claims which remained against the City after the February 22, 2002 order, including the conspiracy claim, were not covered by the liability policy issued to the City.

After a hearing, the circuit court ruled in favor of the City by order dated May 10, 2007. In reaching this decision, the court found: (1) Byrd's conspiracy claim against the City was a tort action that was separate from the cause of action for inverse condemnation; and (2) the conspiracy claim, a common law tort action, was not specifically excluded by the Tort Claims Act. Based on these findings, the court concluded the Insurer was contractually bound to defend the City against all tort claims, including the conspiracy claim. As a result, the court ordered the Insurer to reimburse the City for its defense costs in the amount of $17,642.55.

The Insurer appeals the circuit court's decision.

DISCUSSION

The Insurer argues the circuit court erred in finding it had a continuing duty to defend the City after the cause of action for negligent misrepresentation was dismissed. The Insurer claims its duty

to defend terminated at this point because any remaining duty to defend the City was based on the specifically-excluded inverse condemnation claim. The Insurer contends the remaining civil conspiracy cause of action did not "trigger" a duty to defend because the claim: (1) was not specifically pled by Byrd; (2) arose from the same alleged acts of the City as the inverse condemnation claim and was, therefore, subject to the same exclusion in the liability policy; and (3) constitutes an intentional tort which is barred by sovereign immunity under section 15-78-60 of the Tort Claims Act.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). A suit to determine coverage under an insurance policy is an action at law. State Farm Mut. Auto Ins. Co. v. James, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct. App. 1999). Therefore, this Court's jurisdiction "is limited to correcting errors of law and factual findings will not be disturbed unless unsupported by any evidence." Id.

Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the complaint. C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984). If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend. Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co., 274 S.C. 468, 265 S.E.2d 38 (1980).

An insurer's duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured. Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977). However, these duties are interrelated. If the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend. R.A. Earnhardt Textile Mach. Div. v. S.C. Ins. Co., 277 S.C. 88, 282 S.E.2d 856 (1981). Accordingly, the allegations of the complaint determine the insurer's

duty to defend. Hartford Accident & Indem. Co. v. S.C. Ins. Co., 252 S.C. 428, 166 S.E.2d 762 (1969).

"Although the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer's duty to defend is not strictly controlled by the allegations in the complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008); see BP Oil Co. v. Federated Mut. Ins. Co., 329 S.C. 631, 638, 496 S.E.2d 35, 39 (Ct. App. 1998) ("Although the determination of an insurer's duty to defend is based upon the allegations in a complaint . . . in some jurisdictions, the duty to defend will be measured by facts outside of the complaint that are known by the insurer.").

I.

As its first argument, the Insurer contends it had no duty to defend the City regarding Byrd's cause of action for civil conspiracy because it was not specifically pled and, thus, did not invoke potential liability coverage.

Although the Insurer conceded this issue during oral argument before this Court, we take this opportunity to reiterate the standard for determining an insurer's duty to defend.

Based on the above-outlined principles, we find Byrd's failure to plead the elements of the civil conspiracy did not negate the Insurer's duty to defend the City on this cause of action. Although a determination of an insurer's duty to defend is dependent upon the insured's complaint, an analysis of this duty involves the allegations of the complaint and not the specifically identified causes of action. Moreover, an insurer's duty to defend may arise from facts outside of the complaint that are known to the insurer.

In the instant case, the City acknowledged that Byrd did not specifically plead civil conspiracy in his original or amended complaints. However, as evidenced by the circuit court's orders, the allegations in these pleadings set forth Byrd's theory that the City and the County conspired to flag his property which prevented him from pursuing commercial development. Therefore, the allegations in the pleadings, the facts known to the insurer, and the circuit court's recognition of Byrd's conspiracy claim, created a possibility of coverage under the Insurer's liability policy. Accordingly, the Insurer was not justified in withdrawing its defense based on Byrd's failure to specifically plead a cause of action for civil conspiracy, particularly given the circuit court's express authorization of Byrd's continued pursuit of this claim. See Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991) (discussing an insurer's duty to defend and stating "[i]n examining the complaint, we must look beyond the labels describing the acts, to the acts themselves which form the basis of the claim against the insurer").

II.

Even if Byrd had pled conspiracy, the Insurer avers that this claim did not provide a basis for coverage independent from that of the inverse condemnation cause of action. Specifically, the Insurer contends that the "heart of the conspiracy claim is 'flagging,' which cannot be separated from the inverse condemnation claim against the County." Relying on the policy language of the inverse condemnation exclusion, the Insurer asserts the conspiracy claim "arose out of" the inverse condemnation claim. Because a claim for inverse condemnation is excluded under the liability policy, the Insurer argues it had no duty to defend the City against the civil conspiracy claim.

For several reasons, we disagree with the Insurer's contention. First, it is instructive to examine the elements of inverse condemnation and civil conspiracy.

The elements of an inverse condemnation are (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence. Rolandi v. City of Spartanburg, 294 S.C. 161, 164, 363 S.E.2d 385, 387 (Ct. App. 1987); see Cobb v. S.C. Dep't of Transp., 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005) ("In inverse condemnation cases, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking entitling him to compensation.").

In contrast, the tort of civil conspiracy contains three elements: (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. Pye v. Estate of Fox, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000) ("It is well-settled in South Carolina that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage.").

"An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used." LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988). "Specifically, it is not necessary for a plaintiff asserting a civil conspiracy cause of action to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act." Id. "Thus, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another." Id. (citations omitted) (emphasis added).

"The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se." Pye, 369 S.C. at 567-68, 633 S.E.2d at 511. "Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." Id. at 568, 633 S.E.2d at 511 (emphasis added).

As evidenced by the above-outlined principles, the elements and damages for the two causes of action are distinctly different.

Initially, we note the "object" of the alleged civil conspiracy is not entirely clear from the pleadings. Conceivably, such a conspiracy could have been intended to prevent Byrd from commercially developing the City tract but also from developing any other potentially acquired properties in the City or the County. Had the City and the County actually conspired, such a conspiracy could have had further reaching implications than just adversely affecting Byrd's City tract in an effort to preserve the NHL designation. Thus, the "object" of the civil conspiracy was not necessarily a "taking" or "inverse condemnation" of Byrd's property.

In terms of the elements of the causes of actions, a claim for civil conspiracy would have required Byrd to establish the existence of an overt act committed by a combination of individuals for the purpose of injuring Byrd. These elements were not present in Byrd's claim for inverse condemnation. Moreover, in order to prevail on his civil conspiracy claim, Byrd did not have to prove that a "taking" occurred.

Secondly, it is significant that the circuit court permitted Byrd to pursue his conspiracy claim after the court simultaneously dismissed the inverse condemnation cause of action. Clearly, this decision evidenced the circuit court's belief that Byrd's claim of civil conspiracy was a tort action that existed separate and independent from the inverse condemnation claim. Although the conspiracy claim was ultimately dismissed by the circuit court under the Tort Claims Act, we find the Insurer had a continuing duty to defend as long as there was a possibility of liability coverage for this tort claim.

Moreover, a review of the applicable exclusion in the liability policy does not support the Insurer's argument. The Insurer relies on the following language:

> Inverse condemnation, condemnation, temporary taking, permanent taking, **or any claim arising out of** or in any way connected with the operation of the principles of eminent domain; adverse possession or dedication by adverse use. (emphasis added).

Even though the facts of both causes of action were "intertwined," Byrd's claim for civil conspiracy was not inextricably connected or necessarily "arose out of" the inverse condemnation cause of action. As evidenced by the discussion regarding the elements of each cause of action, a civil conspiracy claim does not necessarily involve a "taking" or "the operation of the principles of eminent domain."[5]

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[5] In support of its argument that the civil conspiracy claim "arose out of" the inverse condemnation cause of action, the Insurer primarily relies on South Carolina Municipal Insurance and Risk Fund v. City of Myrtle Beach, 368 S.C. 240, 628 S.E.2d 276 (Ct. App. 2006). We find this case is distinguishable from the instant case.

In City of Myrtle Beach, the City was subjected to a class action lawsuit challenging a city ordinance which held landlords secondarily liable for their tenants' water bills. After judgment was granted to the class, the City sought indemnification from its insurer. Id. at 241, 628 S.E.2d at 277. In turn, the insurer filed a declaratory judgment requesting declarations that its liability policy with the City did not cover any of the claims or damages asserted by the class. In support of its action, the insurer relied on a policy provision which specifically excluded inverse condemnation actions. Because the policy excluded coverage for inverse condemnation actions, the insurer contended the class members' claim of a taking in violation of equal protection and due process was also excluded from coverage. Id. at 242, 628 S.E.2d at 277. After converting the motion into cross-motions for summary judgment, the trial court ruled in favor of the City. The insurer appealed. Id. at 243, 628 S.E.2d at 277.

Addressing only the insurer's contention that its policy expressly excluded coverage for claims based on a taking, the Court of Appeals reversed the trial court. Id. at 244, 628 S.E.2d at 278. In so ruling, the court specifically noted that the focus of the appeal was on the coverage provided by the liability policy and not the insurer's duty to defend. On the merits, the court found that the insurer should not have been required to indemnify the City for its loss because "the

Finally, any policy exclusion should be construed narrowly and in favor of the City. Because the Insurer's liability policy does not specifically exclude a cause of action for conspiracy, we find the Insurer was obligated to defend the City regarding this remaining cause of action. See Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs., 326 S.C. 6, 16, 482 S.E.2d 768, 774 (1997) (recognizing that an insurer is not justified in refusing to defend entire lawsuit containing several causes of action where some causes of action are covered under the policy and some are not); see also McPherson v. Mich. Mut. Ins. Co., 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993) (stating "rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed"); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990) (stating terms in an insurance policy should be liberally construed in favor of the insured).

III.

Next, the Insurer asserts the circuit court erred in finding that the Tort Claims Act[6] required it to provide coverage for the conspiracy claim and, in turn, established a duty to defend the City against this cause of action. In support of this assertion, the Insurer relies on the provision of the Tort Claims Act which grants sovereign immunity to a political entity for the intentional acts of its employees. S.C. Code

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violation of the class members' rights to due process and equal protection would not have occurred but for the wrongful exercise by the City of its eminent domain power," which in turn fell within the inverse condemnation policy exclusion. Id. at 245, 628 S.E.2d at 278-79.

We believe the City of Myrtle Beach is distinguishable from the instant case given it involved the insurer's duty to indemnify and not the initial duty to defend. Furthermore, unlike Byrd's claim of civil conspiracy, the class members' claim of a taking, which included allegations of due process and equal protection violations, necessarily arose out of the City's exercise of its eminent domain power.

[6] S.C. Code Ann. §§ 15-78-10 through -220 (2005 & Supp. 2008).

Ann. § 15-78-60(17) (2005) (stating a "governmental entity is not liable for a loss resulting from: employee conduct outside the scope of his official duties or which constitutes . . . intent to harm").

In view of this provision, the Insurer argues that "claims based on intentional harm such as conspiracy are barred by sovereign immunity under section 15-78-60(17)." Therefore, the Insurer contends that "if there is no liability under the Tort Claims Act, [the City] has no grounds for arguing that coverage must be provided." Based on this reasoning, the Insurer avers it had no duty to defend the conspiracy claim.

The Tort Claims Act provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005).

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Plyer v. Burns, 373 S.C. 637, 651, 647 S.E.2d 188, 195-96 (2007). "Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability." Id.

Notably, it appears the Insurer confuses its duty to defend with its obligation to pay for a covered claim. As we interpret its argument, the Insurer believes that if the City is immune under the Tort Claims Act for civil conspiracy claims then there is no liability coverage and, in turn, no duty to defend.

This argument, however, ignores the fact that sovereign immunity is an affirmative defense which must be raised by the party asserting it as a bar to liability. Logically, then the Insurer had a duty

to assert this defense on behalf of the City. Thus, the fact that the circuit court ultimately dismissed Byrd's conspiracy claim under the Tort Claims Act is of no consequence to a determination of whether the Insurer had a duty to defend the City on this claim. See Town of Duncan, 326 S.C. at 16 n.14, 482 S.E.2d at 774 n.14 ("An insurer's duty to defend depends on an initial or apparent potential liability to satisfy a judgment against the insured.").

IV.

Finally, even if it had a duty to defend the City against the conspiracy claim, the Insurer contends the circuit court erred in finding the duty continued after the circuit court dismissed the claim and Byrd failed to appeal the dismissal.

Because we hold the Insurer had a continuing duty to defend the City even after the negligent misrepresentation claim was dismissed, we agree with the circuit court's assessment of costs against the Insurer. See Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 554, 436 S.E.2d 182, 186 (Ct. App. 1993) ("An insurer that breaches its duty to defend and indemnify the insured may be held liable for the expenses the insured incurs in providing for his own defense.").

As acknowledged by the Insurer, the liability policy provided for the Insurer "to indemnify [the City] all costs and expenses incurred in the investigation, adjustment, settlement, defense and appeal of any claim or suit for which coverage is afforded by this Section III (General Liability) of this Contract." (emphasis added). Therefore, the Insurer was responsible for the costs and expenses incurred by the City through the appeal of Byrd's lawsuit.

CONCLUSION

Based on the foregoing, we hold the Insurer had a continuing duty to defend the City even after the negligent misrepresentation claim was dismissed given the civil conspiracy claim subjected the City to tort liability. Accordingly, we affirm the order of the circuit court

finding the Insurer had a continuing duty to defend and ordering the Insurer to pay the costs and expenses incurred by the City through the appeal of Byrd's lawsuit.

AFFIRMED.

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

The Supreme Court of South Carolina

In the Matter of George A. Harper, Respondent.

ORDER

Respondent was arrested and charged with six (6) counts of willfully failing to file a state income tax return and failing to pay taxes in violation of S.C. Code Ann. § 12-54-44(B)(3) (2000). The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

s/ Jean H. Toal J.
FOR THE COURT

Toal, C.J., not participating

Columbia, South Carolina

March 31, 2009

The Supreme Court of South Carolina

In the Matter of Sheryl Sisk Schelin, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that James M. Robbins, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Robbins shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Robbins may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that James M. Robbins, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James M. Robbins, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Robbins' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

April 3, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Herbert Bryant, Appellant.

Appeal From Horry County
Paul M. Burch, Circuit Court Judge

Opinion No. 4522
Heard February 3, 2009 – Filed March 25, 2009

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

KONDUROS, J.: Bryant appeals his convictions for three counts of first degree criminal sexual conduct (CSC) with a minor and three counts of committing a lewd act on a minor. He contends section 17-23-175 of the South Carolina Code (Supp. 2008), which provides for the admission of videotaped interviews of child sexual abuse victims under certain circumstances, was applied in contradiction to the savings clause accompanying enactment of the legislation. Bryant further argues the application of the statute violated the ex post facto clauses of the state and federal constitutions. We affirm.

FACTS

Bryant was tried and convicted of three counts of first degree CSC with a minor and three counts of committing a lewd act on a minor for molesting three neighbor children. He was sentenced to thirty years' imprisonment for each CSC charge and fifteen years for each lewd act charge, all to run concurrently.

After allegations by the three minor victims, their mother contacted police, and the victims were interviewed by a forensic interviewer. At trial, the victims, two females and one male, testified Bryant had taken inappropriate pictures of the female victims and made the children watch "nasty" videos with him. The victims testified Bryant made the male victim and one female victim perform oral sex on him at least once. The State sought to introduce the videotapes of the victims' forensic interviews into evidence pursuant to section 17-23-175 of the South Carolina Code (Supp. 2008). Bryant objected arguing the application of the statute would violate the ex post facto clause, and the statute specifically did not apply to pending cases pursuant to the savings clause accompanying the proposed statute. The trial court allowed the admission of the videotaped interviews, concluding section 17-23-175 constituted an addition to the statutory scheme and did not amend or repeal the statute as contemplated by the savings clause. The trial court further concluded applying section 17-23-175 did not constitute an ex post facto violation because it deals with evidentiary or procedural issues and

not the substantive rights of the defendant. The jury convicted Bryant and this appeal followed.

LAW/ANALYSIS

I. Savings Clause

Bryant contends the savings clause prohibited the admission of the videotaped interviews in his trial, because the savings clause prohibited any repeal or amendment from taking effect in pending cases. We disagree.

Section 17-23-175(A) of the South Carolina Code (Supp. 2008) allows the admission of out-of-court statements by child sexual abuse victims when the following conditions are met:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means . . . ;
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of the trustworthiness.

The savings clause accompanying the enactment of section 17-23-175 provides:

> The <u>repeal or amendment</u> by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or

> liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide.

2006 S.C. Act No. 346 § 7 (the Act) (emphasis added).

Generally, a savings clause is intended to be "a restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted appeal." Pierce v. State, 338 S.C. 139, 146 n.3, 526 S.E.2d 222, 225 n.3 (2000) (quoting Black's Law Dictionary 1343 (6th ed. 1990)).

> The longstanding common law view is that a "continued prosecution necessarily depend[s] upon the continued life of the statute which the prosecution seeks to apply. In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose. . . . Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it."

Id. at 145-46, 526 S.E.2d at 225 (quoting U.S. v. Chambers, 291 U.S. 217, 223, 226 (1934)) (omission by court).

The Act did several things in addition to providing a mechanism for admitting out-of-court statements by a child victim of sexual abuse via section 17-23-175. The Act also revised the criminal penalties for criminal sexual conduct with a minor, including adding the death penalty for certain repeat offenders. It also changed some of the procedures and punishment regarding electronic monitoring of offenders.

We do not believe section 17-23-175 repealed or amended any previously existing law as contemplated by the savings clause. Instead, section 17-23-175 was an addition to the statutory scheme that deals with the prosecution and punishment of sexual offenders. Therefore, we agree with the trial court that the savings clause did not prohibit the application of section 17-23-175 in Bryant's case.

II. Ex Post Facto Violation

Bryant also contends the application of section 17-23-175 constitutes an ex post facto violation making the admission of the videotaped interviews error. We disagree.

The purpose of an ex post facto clause is to prevent lawmakers from passing "arbitrary or vindictive legislation." Miller v. Florida, 482 U.S. 423, 429 (1987) (citations omitted). An ex post facto clause also ensures that legislative enactments "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 (1981). For a law to present an ex post facto violation, the law must (1) be retrospective and apply to events taking place prior to its enactment and (2) work to disadvantage the offender. State v. Huiett, 302 S.C. 169, 171, 394 S.E.2d 486, 487 (1990).

The seminal case of Calder v. Bull, 3 U.S. 386 (1798), sets forth four general categories of law that are violative of the ex post facto clause of the United States Constitution.

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law

required at the time of the commission of the offence, in order to convict the offender.

Id. at 390.

A change in the law does not run afoul of the ex post facto clause if it only affects a mode of procedure and does not alter "substantial personal rights." Huiett, 302 S.C. at 171, 394 S.E.2d at 487 (quoting Miller, 482 U.S. at 430). Furthermore, in order for the ex post facto clause to be implicated, the statute at issue must be criminal or penal in purpose and nature. Id. at 172, 394 S.E.2d at 487. "Even though a procedural change may have a detrimental impact on a defendant, a mere procedural change which does not affect substantial rights is not ex post facto." Id. at 171-72, 394 S.E.2d at 487.

The United States Supreme Court has determined changes in laws that made previously inadmissible evidence admissible did not violate the ex post facto clause. See Thompson v. Missouri, 171 U.S. 380, 386-87 (1898) (finding application of law admitting previously inadmissible handwriting samples did not violate ex post facto clause); Hopt v. Utah, 110 U.S. 574, 589 (1884) (holding admission of convicted felon's testimony, inadmissible at the time homicide was committed, did not violate ex post facto clause).

Other jurisdictions that have considered the admission of hearsay statements of child victims have reached the same conclusion. See Hall v. Vargas, 608 S.E.2d 200, 202 (Ga. 2005) (holding statutory change permitting state to introduce additional evidence in the form of hearsay statements attributed to child victim did not present an ex post facto violation); Villalon v. State, 805 S.W.2d 588, 591-92 (Tex. Ct. App. 1991) (finding statutory amendment changing rule of evidence to eliminate hearsay as a bar to the admissibility of certain category of outcry statements did not violate the ex post facto clause); Gladening v. State, 503 So. 2d 335, 337-38 (Fla. Dist. Ct. App. 1987) (finding no ex post facto violation when statutory amendment "did not increase the punishment or deprive [defendant] of a defense" and "the statute had no effect upon whether [defendant] committed the crime but

simply authorized the introduction of additional evidence to demonstrate his guilt").

The admission of the previously inadmissible videotaped interviews did not change the quantum of evidence required to convict Bryant nor did it change the elements of the crime. Once the jury determined Bryant's guilt, the admission of the videotape did not alter or effect the punishment to which he was subject. Rather than being penal in nature, section 17-23-175 deals with procedural, evidentiary matters. Consequently, we do not believe this addition to the statutory scheme allowing for such out-of-court statement falls into one of the four categories set forth in Calder.

Based on the foregoing, we conclude the admission of the victims' videotaped interviews under section 17-23-175 did not violate the ex post facto clause and did not contradict the savings clause found in the Act. Therefore, the ruling of the trial court is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Vernon Leroy Lawton, Appellant.

Appeal From Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4523
Heard January 7, 2009 – Filed March 25, 2009

REVERSED AND REMANDED

Chief Appellate Defender Joseph L. Savitz, III, and Assistant Appellate Defender Elizabeth Franklin-Best, both of Columbia, for Appellant.

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

HEARN, C.J.: Vernon Lawton was shot and seriously wounded as he entered the home of his former girlfriend. As a result of that incident, he was convicted of first degree burglary, possession of a firearm during the commission of a violent crime, and possession of a pistol by a person convicted of a violent crime. Lawton appeals, arguing the circuit court erred in allowing the State to cross examine him on the content of a letter which the State failed to disclose prior to trial. We reverse and remand.

FACTS

Lawton and Toni Badger[1] were involved in a relationship during the summer of 2003. Over the course of the relationship, the couple frequented local bars and restaurants, as well as spent time together at one another's house. After a few months, trust issues developed between the couple, and they decided to part ways. Despite their breakup, Lawton testified he would still, on occasion, buy gifts for Badger and help her out around her trailer.

In addition, Lawton testified he would frequently visit Badger's trailer at night, even after the couple had ended their relationship. He would first drive past the trailer, and if the outside porch light was on, park down the street and go inside for a visit. Lawton further explained it was not uncommon for him to access Badger's trailer by reaching through the doggy-door to unlock both the door and deadbolt.

On the night in question, Lawton passed by Badger's trailer and saw that the front porch light was on. As he approached, Badger's dogs began barking. After first trying the door and finding it locked, Lawton reached through the doggy-door, attempting to unlock the door so as to gain entry to the trailer.

Badger, awakened by the barking, went to her living room and saw what she believed to be an intruder coming through the doggy-door. She picked up the phone to call 911, went back to her bedroom, grabbed her handgun, and then came back into the doorway of her bedroom to see the intruder. Badger recognized Lawton, who was, by that time, halfway through

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[1]At the time of the incident, Badger, who is now married, was Toni Harralson.

the doggy-door. Badger testified she was initially relieved the intruder was Lawton, and placed her gun in an adjacent chair. However, while attempting to help Lawton to his feet, Badger noticed he was carrying what appeared to be a handgun. Badger asked Lawton to relinquish the gun, but Lawton refused. A struggle ensued, during which Lawton pushed Badger into the chair where she had previously placed her handgun. Badger grabbed the handgun and shot Lawton, severely injuring his leg.

Following the shooting, Lawton was arrested and charged with: (1) burglary; (2) pointing and presenting a firearm; (3) possession of a firearm during the commission of a violent crime; and (4) possession of a firearm by a person convicted of a crime of violence. At trial, Lawton testified he frequently visited his ex-girlfriend in this manner with her consent. On cross-examination, the State produced a letter Lawton had allegedly written to his ex-wife that contained this sentence: "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." Lawton immediately objected to the use of the letter based on the State's failure to disclose it prior to trial under Rule 5, SCRCrimP. Specifically, Lawton argued the State was required to produce the letter in response to his Rule 5 motion under Subsection (a)(1)(A)[2] because it qualified as a relevant written

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[2] Rule 5(a)(1)(A) provides as follows:

> (A) Statement of Defendant. Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

statement made by Lawton that was within the State's control. In response, the State argued the letter was not covered under Rule 5 because it was being used for impeachment purposes. The circuit court ruled the letter was admissible because it was only being used for impeachment.

Following a recess, counsel for Lawton requested and received permission to flesh out his objection to the use of the letter and to state additional grounds. Counsel then argued the letter also should have been produced in response to his Rule 5 motion under Subsection (a)(1)(C)[3], asserting that the letter was material to Lawton's defense. The circuit court found the letter was not "relevant" under Subsection (a)(1)(A) but was "a collateral matter having to do with the credibility of the witness," and therefore allowed the State to impeach Lawton pursuant to Rule 608, SCRE. Accordingly, the court allowed the State to ask Lawton if he had written a letter to his ex-wife that contained the quoted sentence. The jury convicted Lawton and this appeal followed.

LAW/ANALYSIS

Lawton argues the circuit court erred in failing to suppress the letter and all testimony related thereto based upon the State's failure to comply with Rule 5, SCRCrimP,[4] asserting the letter should have been disclosed under

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[3] Rule 5(a)(1)(C), SCRCrimP provides as follows:

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

[4] We note that Lawton initially couched his objection to the introduction of the letter in terms of a "Rule 5 <u>Brady</u> motion[.]" Rule 5, SCRCP, addresses

both Subsections (a)(1)(A) and (a)(1)(C). We agree the circuit court erred in failing to suppress the letter because of the State's failure to comply with Subsection (a)(1)(A).[5]

Initially, we note that we analyze the circuit court's ruling under an abuse of discretion standard. See State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006) (holding a violation of the rule governing the disclosure of evidence in criminal cases is not reversible error unless prejudice is shown); State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 248-49 (2000) (stating an appellate court shall not reverse a trial court's ruling on admissibility of evidence or the scope of cross-examination absent a showing of abuse of discretion and prejudice).

The circuit court stated that the letter involved the credibility of Lawton, which was merely a collateral issue in the case and therefore not relevant within the meaning of Subsection (a)(1)(A) of Rule 5. While the court was correct that the letter impacted on Lawton's credibility, we disagree that it was not "relevant." According to Webster's Dictionary, the meaning of "relevant" is "having a significant and demonstrable bearing on the matter at hand."[6] The circuit court utilized the following definition of relevance contained in Rule 401: "evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the

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the production of "relevant written or recorded statements" while Brady dealt with the production of exculpatory evidence. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding prosecutorial suppression of exculpatory evidence material to guilt or to punishment violates due process.) As there is no evidence indicating Lawton's statement was in anyway exculpatory, the Brady rule is not at issue in this case.

[5] We decline to address Lawton's argument under Rule 5(a)(1)(C), SCRCrimP, because that issue was never ruled on by the circuit court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (finding an issue cannot be raised for the first time on appeal); S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 344, 554 S.E.2d 870, 876 (Ct. App. 2001) (ruling an issue must be raised to and ruled on by the trial court for an appellate court to review the issue).

[6] See Merriam-Webster's Online Dictionary, "relevant" (last visited March, 4, 2009) <http://www.merriam-webster.com/dictionary/relevant>.

action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Under either definition, we believe the letter in question was clearly relevant and should have been provided by the State in response to Lawton's Rule 5 request.

Moreover, Lawton was prejudiced by the State's failure to turn over the letter before trial. Disclosure of the letter was clearly material to the preparation of Lawton's defense because it likely would have affected his decision to testify, a fundamental right. See Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 243, 616 S.E.2d 431, 436 (Ct. App. 2005) (stating the right to testify in criminal proceeding is essential to due process, and is a fundamental right). There is a reasonable probability Lawton would not have testified had he known the State possessed such strong impeachment evidence. The State's strategy in failing to disclose the letter and instead surprising Lawton with it during cross-examination clearly prejudiced Lawton.

Accordingly, the ruling of the circuit court is

REVERSED AND REMANDED.[7]

SHORT, J., and KONDUROS, J., concur.

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[7] Lawton also argues that the circuit court committed reversible error by failing to define reasonable doubt; however, we decline to rule on this matter. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E. 591, 598 (1999) (ruling an appellate court need not review all issues where one issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Huff Browder, Appellant,

v.

Cecil Ray Browder, Jr., Respondent.

Appeal From Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 4524
Heard March 5, 2009 – Filed March 26, 2009

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. Michael Taylor, of Columbia, for Appellant.

J. Mark Taylor and Katherine Carruth Link, of West Columbia, for Respondent.

PIEPER, J.: In this appeal of a divorce decree, Linda Huff Browder (Wife) asserts the family court erred in: (1) denying her request for alimony; (2) failing to hold Cecil Ray Browder, Jr. (Husband) in contempt; (3) valuing and apportioning the marital property; and (4) denying her request for attorney's fees. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Husband and Wife were married on December 15, 1973, and last resided together on November 22, 2003, in Lexington County, South Carolina. Prior to the filing of the instant matter, they were married for thirty-one years and had three children.

During the marriage, Husband worked as a salesman earning approximately $80,000 to $130,000 per year, while Wife was the primary caregiver of their three children. In 1992-93, when their youngest child was twelve, Wife began working part-time and eventually obtained certification from Midlands Technical College for floral design. Wife earned roughly $8.00 per hour through her part-time employment. Significant assets were acquired during Husband's higher income years which included a large home on Lake Murray, two parcels of property, and a home in Columbia, South Carolina, purchased for the use of their children while attending college (the College Street property).

Wife filed for divorce on October 30, 2003, citing the statutory grounds of habitual drunkenness and adultery. Prior to trial, a temporary order was issued ordering Husband to pay $1,750 per month in alimony to Wife. The temporary order also required Husband to provide a detailed accounting of the proceeds received from the sale of the College Street property.

On August 4, 2004, Wife claimed Husband failed to timely account for his handling of the College Street property proceeds and requested that Husband be held in contempt. After issuing a rule to show cause on August 9, 2004, the court ultimately found Husband adequately accounted for the funds at issue and declined to hold him in willful contempt.

The underlying case was heard on February 3, 2005, and March 10, 2005, before the Honorable Richard W. Chewning, III. At the time of the hearing, Husband was fifty-eight and was earning approximately $83,000 per year plus benefits as a salesman. Wife was fifty-four and was working part-time earning $8 per hour at a local floral shop. During the hearing, Husband admitted to committing adultery but denied Wife's allegations of habitual drunkenness. The parties stipulated to a 50/50 division of the marital

property and offered expert testimony as to the appraised value of particular marital property. Specifically, Wife asserted the appraised value of their river home in Edisto was $105,000, while Husband offered testimony that the appraised value of the property was $73,000. The marital home, which was listed for sale prior to the hearing, was appraised at around $700,000 and the parties agreed to split the proceeds equally upon the sale of the home.

In its final order dated August 1, 2005, the court granted Wife a divorce from Husband on the statutory ground of adultery and denied Wife's request for alimony reasoning that Wife's receipt of significant liquid assets in concert with her ability to be employed on a full-time basis did not warrant an award of alimony. The court divided the marital estate equally[1] and concluded that each party would be responsible for paying his or her own attorney's fees. However, Husband was ordered to reimburse Wife for her private investigator's fees and costs. Wife timely filed a motion to alter or amend the judgment, which the court granted in part to correct various mathematical and scrivener's errors. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). Despite this broad scope of review, we remain mindful of the findings of the family court judge, who saw and heard the witnesses, and was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id.

LAW/ANALYSIS

Wife argues the family court erred in failing to award alimony. We agree.

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[1] At the time of the hearing, the former marital residence was listed for sale and Wife was entitled to the exclusive use and possession of the residence until sale.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002); see also McKnight v. McKnight, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984) (stating the decision to grant or deny alimony rests within the discretion of the family court and will not be disturbed on appeal absent an abuse thereof). An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. Sharps v. Sharps, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

"The purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Love v. Love, 367 S.C. 493, 497, 626 S.E.2d 56, 58 (Ct. App. 2006). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." Craig v. Craig, 358 S.C. 548, 554, 595 S.E.2d 837, 840 (Ct. App. 2004) (quoting Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001)). The objective of alimony should be to insure that the parties separate on as equal a basis as possible. Patel v. Patel, 347 S.C. 281, 291, 555 S.E.2d 386, 391 (2001). Thus, "[i]t is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen, 347 S.C. at 184, 554 S.E.2d at 424.

In determining an award of alimony, the court is required to consider and give weight in such proportion as it finds appropriate to each of the following factors: (1) duration of the marriage; (2) physical and emotional health of each spouse; (3) educational background of each spouse; (4) employment history and earning potential of each spouse; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of both spouses; (7) current and reasonably anticipated expenses and needs of both spouses; (8) marital and nonmarital properties of the parties; (9) custody of the children; (10) marital misconduct or fault of either or both parties; (11) tax consequences as a result of the form of support awarded; (12) existence and extent of any prior support obligations; and (13) such other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2008). "Fault is an appropriate factor for consideration in determining

alimony in cases where the misconduct affected the economic circumstances of the parties or contributed to the breakup of the marriage." Craig, 358 S.C. at 554, 595 S.E.2d at 841 (quoting Smith v. Smith, 327 S.C. 448, 463, 486 S.E.2d 516, 523-24 (Ct. App. 1997)).

We find the family court's denial of alimony in the instant case was an abuse of discretion. Here, the family court denied Wife's request for alimony reasoning that Wife's receipt of significant liquid assets in conjunction with her ability to be employed on a full-time basis would alleviate her financial need. The court further found that "the proximity of the parties' net incomes does not warrant an award of alimony." However, the record fails to support the family court's factual finding that the parties' net incomes are in close proximity. Rather, at the time of the final hearing, the record indicates that Wife was working part-time earning $8 per hour, while Husband was earning $6,912 per month plus benefits. By the time of the hearing on Wife's motion to alter or amend, Wife had attained full-time employment at the rate of $10 per hour. The significant disparity between incomes is clearly evidenced by the record. Accordingly, the family court based its decision, in part, upon a finding of fact that is without evidentiary support.

Moreover, the court's emphasis on the speculative date of Husband's retirement was error. Although retirement may play into the factor of anticipated earnings, Husband was fifty-eight and gainfully employed at the time of trial. Any change in circumstances regarding Husband's retirement may warrant a modification of alimony when that event occurs; however, consideration of this anticipated but speculative occurrence at this time was inappropriate.[2] See Rimer v. Rimer, 361 S.C. 521, 528, 605 S.E.2d 572, 576 (Ct. App. 2004) ("[W]hen the effect of anticipated changes is not readily ascertainable, it is inappropriate for the family court to speculate as to the effect of such anticipated changes.").

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[2] South Carolina law allows a supporting spouse the right to petition the court for a reduction in alimony based upon a showing of a material change in circumstances. S.C. Code Ann. § 20-3-170 (1985). Our ruling does not in any way impinge upon any party's right to pursue a modification of the alimony award based upon the requisite showing.

Based upon our own view of the facts, we conclude an award of alimony is appropriate. We have considered all of the previously cited factors regarding alimony. We place significant weight in this case on five of those factors: (1) duration of the marriage; (2) earnings of each spouse; (3) educational background of each spouse; (4) employment history and earning potential; and (5) marital misconduct or fault of either party. The fact that this was a thirty year marriage in which Wife spent the bulk of the marriage caring for their children weighs heavily in favor of alimony. Additionally, Husband has a college degree and over thirty years of experience in sales, while Wife is a high school graduate and has little to no full-time work history; in this same regard, we have noted the disparity between the incomes of Husband and Wife. While we recognize that the purpose of alimony is not to penalize one party and reward the other, we also cannot ignore the fact that Husband admitted to committing adultery. Therefore, under our view of the evidence, we find an award of alimony is warranted. See Patel, 347 S.C. at 291, 555 S.E.2d at 391 (stating the objective of alimony should be to insure that the parties separate on as equal a basis as possible). Accordingly, we reverse the family court's denial of alimony and remand the matter for a determination of an appropriate award of alimony, including retroactive alimony. See Patel v. Patel, 359 S.C. 515, 531, 599 S.E.2d 114, 122 (2004) (holding wife was entitled to retroactive alimony when alimony was awarded on remand).

Wife next asserts the court erred in failing to hold Husband in contempt. We disagree.

On appeal, a decision regarding contempt is not subject to reversal absent an abuse of discretion. Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. Davis v. Davis, 372 S.C. 64, 82, 641 S.E.2d 446, 455 (Ct. App. 2006).

Contempt results from the willful disobedience of a court order. Bigham v. Bigham, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975). Willful disobedience requires an act to be "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent

to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Spartanburg Co. Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988). A party seeking a contempt finding for violation of a court order must show the order's existence and facts establishing the other party did not comply with the order. Abate v. Abate, 377 S.C. 548, 553, 660 S.E.2d 515, 518 (Ct. App. 2008).

Wife asserts Husband's failure to provide documentation of three accounts paid from the proceeds of the sale of the College Street property amounted to willful contempt of the court's order for an accounting. At trial, Husband explained that he repeatedly requested records of the accounts at issue to no avail. He further explained that the records were sent to the marital residence and that he was unable to find the pertinent information that Wife requested. In addition to his efforts to obtain the records, Husband's testimony at trial thoroughly explained the amounts and debts of the disputed accounts, which were accumulated prior to the instant action to pay for the parties' expenses as well as the expenses of their children. Based on this evidence, the court found Husband adequately explained the allocation of the proceeds of the College Street property and concluded that the debts were marital. This finding is supported by the evidence. Accordingly, the denial of a contempt finding by the court was not an abuse of discretion.

Turning to the next issue on appeal, Wife asserts the court erred in its valuation and apportionment of the marital property. Specifically, Wife contests (1) the valuation of the Edisto River property, (2) the valuation of Husband's personal property, and (3) the assignment of Husband's credit card debt as marital. We disagree.

In making an equitable distribution of marital property, the court must: (1) identify the marital property to be divided between the parties; (2) determine the fair market value of the property; (3) apportion the marital estate according to the contributions, both direct and indirect, of each party to the acquisition of the property during the marriage, their respective assets and incomes, and any special equities they may have in marital assets; and (4) provide for an equitable division of the marital estate, including the manner in which the distribution is to take place. Gardner v. Gardner, 368 S.C. 134,

136, 628 S.E.2d 37, 38 (2006). Generally, marital property subject to distribution is valued as of the date the marital litigation is filed or commenced. Id. The court has broad discretion in valuing marital property. Pirri v. Pirri, 369 S.C. 258, 264, 631 S.E.2d 279, 283 (Ct. App. 2006). As such, "[the] court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." Id.

Here, the parties stipulated to a 50/50 division of the marital assets. Among the assets to be apportioned was the River House property on Edisto River. Wife asserts the court's valuation of the property at $73,000 was an abuse of discretion. Both parties offered expert testimony from an appraiser as well as their own appraisal reports in valuing the River House property. Husband's appraiser valued the property at $73,000, and Wife's appraiser valued the property at $105,000. Despite Wife's assertion the property is worth more based on other comparable properties in the area, Husband's expert testified the valuation was adjusted to reflect the differences in the comparable properties. Because the court may accept one party's valuation over another and the valuation based on Husband's appraisal was within the evidence presented at trial, we find no abuse of discretion. See Pirri, 369 S.C. at 264, 631 S.E.2d at 283 (stating the court's valuation of marital property will be affirmed if it is within the range of evidence presented).

As to Husband's personal property, Wife asserts Husband's boat, valued at $2,500, and a DVD player, valued at $100, were improperly excluded from the court's valuation of the marital estate. This issue was not ruled upon by the trial court nor was it raised in Wife's Rule 59(e) motion to alter or amend; thus, it is not preserved for our review. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review); Woodward v. Woodward, 294 S.C. 210, 363 S.E.2d 413 (Ct. App. 1987) (finding husband's argument that the court erred in failing to consider certain items in equitable distribution was not preserved for appellate review where the issue was not raised to and ruled upon by the trial court).

As to the credit card debt in connection with the disputed funds from the College Street property, this issue was discussed in regard to the contempt finding above. As noted, there is sufficient evidence in the record to support the finding that these debts were marital. Husband's testimony revealed these debts, which had been used to pay the couple's monthly expenses as well as the expenses of their children while in college, were accumulated over time prior to the parties' separation. Additionally, despite Wife's assertion that it cannot be presumed that the debts were incurred before the filing of the instant action, the evidence indicated the disputed balance transfers took place in May and August 2003, prior to Wife's filing for divorce in October 2003. The proceeds from the sale of the College Street property were received on November 3, 2003, and the payments on the balance transfers occurred between November 5, 2003, and November 11, 2003. Accordingly, the court's inclusion of these debts as part of the marital estate was not an abuse of discretion.

Lastly, Wife asserts the court erred in failing to award attorney's fees. We agree.

An award of attorney's fees lies within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). In determining whether to award attorney's fees, the court should consider each party's ability to pay his or her own fees, the beneficial results obtained by counsel, the parties' respective financial conditions, and the effect of the fee on the parties' standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

Where the substantive results achieved by counsel are reversed on appeal, an award of attorney's fees is subject to reversal. Sexton v. Sexton, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993). In light of our disposition as to alimony, the results achieved by Wife's counsel were beneficial. Accordingly, we find an award of fees is appropriate and remand the issue to the family court for a determination of reasonable fees and costs.

CONCLUSION

For the foregoing reasons, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and LOCKEMY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chad Wyman Mead, Claimant,

v.

Jessex, Inc., d/b/a Midlands Glass; Uninsured Employers' Fund, Employers, Defendants,

of whom the Uninsured Employers' Fund is the Appellant,

and Chad Wyman Mead is the Respondent.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 4525
Heard February 4, 2009 – Filed April 2, 2009

REVERSED

Robert M. Cook, II, of Batesburg-Leesville, for Appellant.

Ann Mickle, of Rock Hill, and Tom Young, Jr., of Aiken, for Respondent.

GEATHERS, J.: In this workers' compensation case, the Uninsured Employers' Fund (the Fund) appeals the circuit court's order reversing the Appellate Panel's denial of Chad W. Mead's (Mead) application for a change of condition for the worse to his left hip and leg allegedly caused by his original compensable injury. The Fund asserts the circuit court erred in failing to affirm the Appellate Panel's finding that the claim for a change of condition was barred by res judicata. We agree.

FACTUAL AND PROCEDURAL BACKGROUND

In late January or early February 2000, Mead sustained an on-the-job injury. Mead alleged injuries to his right leg, right hip, and back arising out of and in the course of his employment with Jessex Inc., d/b/a Midlands Glass (Jessex). Initially, Jessex and the Fund denied Mead's claim, contending the injury was not sustained on the job.

The first hearing regarding Mead's compensation occurred on November 7, 2001, before Commissioner Holly Saleeby Atkins. On April 1, 2002, Commissioner Atkins issued her order finding that Mead "sustained an injury by accident to his right hip and right leg arising out of and in the course and scope of his employment," and that the injury was compensable under the South Carolina Workers' Compensation Act. Commissioner Atkins further found that Mead had a preexisting condition of avascular necrosis in his right leg and hip which was aggravated by his compensable injury. However, Commissioner Atkins specifically found Mead did not sustain a compensable back injury.

On March 21, 2003, Commissioner, J. Alan Bass, presided over a second hearing regarding Mead's injuries. Mead sought a final determination of the extent of disability he sustained to his right lower extremity and a determination of disability to his back as a result of the original compensable injury. Mead reached maximum medical improvement after the first hearing and the commissioner determined that he had a sixty percent loss of use of his right lower extremity.

At the March 2003 hearing, Mead testified that he began experiencing pain in his left hip and left leg in December 2002 or January 2003 as a result of having to shift his weight from his right leg to his left leg when standing. Mead contended that he bore "pretty much all" of his weight on his left leg. When Commissioner Bass specifically asked Mead if he believed his left hip and left leg problems arose from shifting his weight from his right to left leg, Mead responded, "I personally do."

Commissioner Bass found that the total right hip replacement Mead underwent following the first hearing caused Mead to have an altered gait. Furthermore, the "altered gait caused [Mead] to develop lower back pain." Commissioner Bass determined the back pain Mead complained of was directly related to his original compensable injury. Thus, the back pain was also a compensable injury.

Further, Commissioner Bass rejected Jessex's and the Fund's contention that Mead's back claim was barred by res judicata; rather, he found that Mead's "back claim is based on an altered gait which was not before the Commissioner at the November 7, 2001 hearing and did not manifest itself until after the November 7, 2001 hearing." However, Commissioner Bass specifically stated in his factual findings and conclusions of law that Mead failed to prove that his left hip symptoms were related to the original compensable right hip and right leg injury that occurred in 2000. Neither party appealed Commissioner Bass' order.

Subsequently, on June 2, 2006, there was a third hearing before Commissioner J. Michelle Childs. At this hearing, Mead alleged a change of condition for the worse, seeking "a finding that his left hip problems are causally related to his original injury such that the left hip problems and the treatment needed for the left hip will be compensable."[1] Mead presented the

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[1] S.C. Code Ann. section 42-17-90 (Supp. 2008) in the South Carolina Workers' Compensation Act provides a mechanism for reopening an award if there has been a change in condition. That section provides in relevant part:

opinion of Dr. Holford, the authorized treating physician, who based his opinion on a review of the March 21, 2003 hearing transcript, Mead's past medical records, and a physical examination. Commissioner Childs relied on Dr. Holford's opinion during the hearing.

In Dr. Holford's questionnaire responses, dated October 29, 2004, he stated that the pain Mead complained of during the hearing before Commissioner Bass was due to the natural progression of his avascular necrosis. Later in the same report, Dr. Holford opined that, based on his treatment and examination of Mead, Mead's complaints at the time of the 2004 report were "related to an aggravation of his pre-existing avascular necrosis of the left hip caused by his altered gait."

Commissioner Childs stated in her factual determinations that Mead's change of condition claim for his left hip and leg was an entirely new problem that manifested itself after the March 21, 2003 hearing. Additionally, Commissioner Childs found: "The authorized treating physician Dr. Douglas Holford has verified that he read the hearing transcript of March 21, 2003[,] and his opinion to a reasonable degree of medical certainty is that the current left hip complaints are new and different from the left hip symptoms prior to March 21, 2003." (emphasis in original). Commissioner Childs found that Mead's claim was compensable and the Fund's res judicata argument failed.

The Fund appealed Commissioner Childs' findings to the Appellate Panel. The Appellate Panel determined the "order of Commissioner Childs [] must be reversed because it [was] based upon legal error in finding that

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> (A) On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation.

[Mead's] injury to his left hip and left leg were compensable." Further, the Appellate Panel determined that Mead's left hip injury claim was barred by res judicata because the claim was previously ruled on by Commissioner Bass, and because the court in Owenby v. Owens Corning Fiberglass, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993) held that a change of condition claim based on an alleged worsening of condition, that was previously ruled on, was barred by res judicata. The Appellate Panel made the following findings:

> 1. That the claimant raised the issue of the compensability of the alleged injury to his left hip at the hearing on March 21, 2003. This finding of fact is supported by the transcript of that hearing, as well as the claimant's Form 50 and prehearing brief.
>
> 2. That the June 3, 2003, order finds, concludes and orders that the alleged injury to the claimant's left leg and left hip were not compensable. This finding of fact is supported by the order in question, including finding of fact number 6 and conclusion of law number 7.
>
> 3. That the claimant did not appeal the order of June 3, 2003, at all and specifically not with regard to that part of the order ruling that the alleged injury to the left leg and left hip were not compensable. This finding of fact is not disputed and, in any event, is clearly shown by the absence in the file of the Commission of any Form 30 appealing that order.
>
> 4. That the unappealed order of June 3, 2003, bars the claimant's current claim for the compensability of the left hip and left leg under the doctrine of res judicata.

Mead appealed the Appellate Panel's decision to the circuit court. The circuit court reversed the Appellate Panel, finding the Appellate Panel erred as a matter of law when it ruled Mead's application for compensation for his left leg and left hip condition was precluded by res judicata. The circuit court found that the instant case was controlled by Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997).[2] In addition, the circuit court stated that the Fund and the Appellate Panel "erroneously assume that [Mead's] left leg and hip symptoms are the same as those existing prior to and following the March 21, 2003 hearing." The court found Mead's post-March 21, 2003 symptoms were compensable because they fell within the definition of a change of condition, as defined by Estridge and recognized in Owenby. In reaching its conclusion, the circuit court relied on Dr. Holford's opinion during the hearing before Commissioner Childs: "The left leg and hip injuries at issue here have not been litigated previously, nor were they introduced in the underlying action, because the change of condition did not yet exist. Dr. Holford has confirmed this with his medical opinion – the only evidence in this record."

Furthermore, the circuit court stated that the Appellate Panel erred by focusing its reasoning on Commissioner Bass' unappealed order. The circuit court ruled that Mead's claim was for a change of condition — new symptoms manifesting in the same body part — and therefore, the claim was not barred by res judicata pursuant to Owenby and Estridge. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for decisions by the Appellate Panel of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981); Thompson v. S.C. Steel Erectors, 369 S.C. 606, 611, 632 S.E.2d 874, 877 (Ct. App. 2006).

[2] In Estridge, this Court held that a mental condition that is induced by a compensable physical injury is causally related to that physical injury, and thus may be compensated in a change of condition workers' compensation proceeding as part of the original injury. Id.

S.C. Code Ann. § 1-23-380 (Supp. 2008) provides that in judicial review of a decision of an administrative agency,

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: [] (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

In reviewing workers' compensation decisions, the appellate court ascertains "whether the circuit court properly determined whether the [A]ppellate [P]anel's findings of fact are supported by substantial evidence in the record and whether the [P]anel's decision is affected by an error of law." Baxter v. Martin Bros., Inc., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006) (citations omitted). "'Substantial evidence' is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." Clark v. Aiken Cty. Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005).

"Under our scope of review, the findings of the commission will not be set aside if they are supported by substantial evidence and not controlled by error of law." Estridge, 325 S.C. at 536, 482 S.E.2d at 579. The circuit court may reverse or modify the decision of the Appellate Panel if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law or are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Thompson, 369 S.C. at 612, 632 S.E.2d at 878. Accordingly, an appellate court may not "substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of

fact." West v. Alliance Capital, 368 S.C. 246, 251, 628 S.E.2d 279, 282 (Ct. App. 2006).

LAW/ANALYSIS

The Fund asserts the circuit court erred in failing to affirm the Appellate Panel's determination that the claim for a change of condition was barred by res judicata. We agree.

The doctrine of res judicata prevents the relitigation of issues previously decided between the same parties, and it is shown if (1) the identities of the parties are the same as in the prior litigation; (2) the subject matter is the same as in the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). All three elements are present in the case at hand.

The Appellate Panel correctly determined that Mead's claim for a change of condition was barred by res judicata because the left hip and leg symptoms alleged to Commissioner Bass and found not compensable, were the same symptoms subsequently brought before Commissioner Childs in the change of condition proceeding. As such, res judicata barred relitigation of the issue of compensability for Mead's left hip and leg symptoms. Mead's initial Form 50, dated August 8, 2002, and amended prior to the hearing before Commissioner Bass, stated that Mead sustained an accidental injury to his back and both legs. At the hearing before Commissioner Bass, Mead complained of left hip and leg pain that resulted from having to shift his weight from his right leg to his left leg. In the order dated June 3, 2003, Commissioner Bass specifically found that "Claimant failed to prove his left leg symptoms, which appeared three years after the original injury, were related to the original injury." He also concluded as a matter of law that "Claimant fails to prove that the left hip symptoms which appeared three years after the original injury are related to the original injury." It is undisputed that Mead did not appeal the order of Commissioner Bass. Therefore, it is the law of the case that Mead's left hip and left leg claim was not compensable. Brunson v. American Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. App. 2005) (factual findings and conclusions of

law of the single commissioner become the law of the case when not challenged on appeal).

After the hearing before Commissioner Bass, Mead filed a second Form 50, dated January 13, 2004, claiming that he sustained a change of condition to his left hip, left leg, and back. The doctrine of res judicata barred this second attempt at a claim for the left hip and left leg symptoms which were initially found not to be compensable.

Moreover, Mead's claim for compensability of his left hip and left leg condition on the basis of a change of condition is controlled by this Court's decision in Owenby v. Owens Corning Fiberglass, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). In that case, this Court held that the doctrine of res judicata barred the award of workers' compensation benefits for Owenby's psychological problems, despite her claim of a change of condition. 313 S.C. at 183, 437 S.E.2d at 131-32. In Owenby, the commissioner awarded compensation for Owenby's injury to her finger but, because he found her evidence not credible, denied compensation for her alleged psychological problems as he found any psychological problems suffered by Owenby were not proximately caused by the injury to her finger. Id. When Owenby later sought an increase in benefits due to the amputation of an additional portion of her finger, she also alleged that her psychological condition had worsened. Id. This Court held that her attempt to obtain compensation for her psychological condition was barred by res judicata. Id. As the commissioner had previously determined that any psychological problems Owenby may have had were not related to the injury to her finger, she could not relitigate the same issue based on a change of condition. Id. This Court also noted that the statute allowing review based on a change of condition applies only to claims that have been previously found compensable. Id.[3]

Likewise, in the instant case, Mead is barred from relitigating the same issue regarding his left hip and left leg. There was a prior finding of non-

[3] See Travelers Ins. Co. v. Edge, 151 S.E.2d 170 (Ga. App. 1966) (res judicata barred a subsequent claim for a change of condition involving an injury that was previously found not to be compensable).

compensability regarding Mead's left hip and left leg symptoms by Commissioner Bass, which was not appealed, and therefore, under the Owenby standard, the change of condition statute does not apply to his claim.

Thus, we find that the circuit court erred in reversing the Appellate Panel's decision that Mead's claim for a change of condition was barred by res judicata.

CONCLUSION

Accordingly, the circuit court's order is

REVERSED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Billy Wayne Cope, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4526
Heard September 16, 2008 – Filed April 2, 2009

AFFIRMED IN PART, REVERSED IN PART

David I. Bruck, of Lexington, Virginia, James M. Morton and Michael B. Smith, both of Rock Hill, Steven A. Drizin and Allison Flaum, both of Chicago, Illinois, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Office of the Attorney General, of Columbia; and Solicitor Kevin Scott Brackett, of York, for Respondent.

THOMAS, J.: A jury convicted Cope of murder, two counts of first degree criminal sexual conduct, criminal conspiracy, and unlawful conduct towards a child. He was sentenced to life imprisonment, plus thirty years.[1] Cope appeals. We affirm the convictions for murder, two counts of criminal sexual conduct in the first degree, and unlawful conduct toward a child, and reverse only as to the charge of conspiracy.

FACTS/PROCEDURAL HISTORY

Between approximately 2:00 and 4:00 a.m. on Thursday, November 29, 2001, 12-year-old Child was murdered in her bedroom. Billy Cope, her father, testified he awoke at 6:00 a.m. and called out to wake her. When she did not respond, he went to her room where he found her body lying on her bed. Cope called 911. He told police he did not hear any sounds that night because he sleeps with a sleep apnea machine that makes a loud noise. Police checked the exterior and interior of the house for any signs of forced entry, including all the doors and windows, but everything appeared to be secured. One of Cope's two younger daughters (Sister) testified she and Child locked both doors before they went to bed that evening.

Cope was standing outside when Jason Dillon, an emergency medical technician (EMT), arrived at the house. Cope advised Dillon and another EMT that Child had been dead "four hours." Dillon did not ask Cope if he meant "for" or "four." Cope told Dillon that Child choked herself with her blanket. He also told him he found Child naked and he dressed her. The forensic pathologist, Dr. James Maynard, arrived and found Child lying on her back on her bed, with her shirt pulled up and her left breast exposed. He

[1] Cope was sentenced as follows: life imprisonment for murder (2002-GS-46-3232) and thirty years for criminal sexual conduct first degree (2002-GS-46-3234), consecutive to the life sentence. He was also sentenced to thirty years for criminal sexual conduct first degree (2002-GS-46-3233); five years for conspiracy (2004-GS-46-200); and ten years for unlawful conduct toward a child (2004-GS-46-2614), all concurrent with the other two convictions.

testified it appeared she had not dressed herself because her bra was unattached and her pants were pulled up unevenly.

Dr. Maynard performed Child's autopsy and determined she had been beaten, strangled, severely sexually assaulted, and sodomized, most likely with a blunt foreign object such as a broom handle or a dildo. Dr. Maynard testified he believed Child had been repeatedly sexually abused and sodomized over a period of time, not just the night of the murder. He testified it did not appear Child was strangled by her blanket. He further testified some of Child's injuries were consistent with a 300-pound man jumping on her.[2] During the autopsy, Dr. Maynard discovered a bite mark on Child's right breast and took a swab of the area. Upon testing, it was discovered the saliva matched co-defendant James Sanders' DNA. Dr. Maynard testified the bruise on Child's breast was a similar age as the rest of her injuries, which all seemed to be inflicted at approximately the same time. The police also discovered semen on Child's pants, which matched Sanders' DNA. No other semen was found on or near Child's body.

Cope was first interviewed at the police station at about 8:00 a.m. on November 29, 2001. Cope consented to giving samples for a DNA test. Later that same day, about 12:00 p.m., police again interviewed Cope. His story changed slightly in the second interview as to the time his daughters went to bed and whether he had to kick in Child's bedroom door to enter her room that morning. Cope was allowed to leave the station after the second interview. At 10:50 p.m., police picked Cope up from his mother's house to take him back to the police station for a third interview. After the third interview, the officers decided to arrest Cope.

Charlene Blackwelder, detective for Rock Hill Police Department, took the arrest warrant to Judge Margy McNeely between 3:00 and 4:00 a.m. on November 30, 2001. Judge McNeely issued the warrant based on the fact that Cope was the only adult home at the time of the murder, and there was a lack of evidence of forced entry. Cope was placed in a cell at about 2:30 a.m. and he was charged with murder at 4:31 a.m.

2 At the time of Cope's arrest, he weighed 333 pounds.

Later, on the morning of November 30th, Cope was served with three warrants for unlawful neglect toward a minor child.[3] Blackwelder testified she served Cope with these warrants prior to his transportation to the Moss Justice Center at about 10:00 a.m. for his polygraph examination. Michael Baker, polygraph examiner at York County Sheriff's Office, read Cope his Miranda[4] warnings and Cope voluntarily waived his constitutional rights. After the exam, Baker informed Cope he had failed the polygraph exam. Lieutenant Herring and Baker continued questioning him. Cope gave his first confession at 2:25 p.m. Cope stated he awoke at 3:00 a.m. to use the bathroom, went into Child's room, and masturbated while she was sleeping. Child woke up and said, "gross, daddy," which angered Cope, so he jumped on top of her and began swinging his fists at her head. He slammed her head onto a video game on her bed and strangled her with both hands. He also used the blanket to choke her. Cope then used a broom handle both anally and vaginally on Child. Before going back to bed, he deleted temporary internet files from his computer and threw away his dildo.

At a bond hearing on December 1, 2001, Cope was approved for representation by a public defender. Later, on December 2, 2001, he told the police he wanted to talk to them again. On December 3, 2001, officers spoke with Cope again and Cope told them his prior statements were incorrect. In his second confession at 9:45 a.m., Cope said he was asleep and had a dream about an old girlfriend that had aborted his child. He got so angry that he jumped on her, beat her, and raped her with the broom. He did not realize it was Child until he fell backwards and was jarred to his senses. He then tried to throw away everything in the house that made him look guilty and he pulled up her pants. He went back to bed and when he woke up, he hoped it was a dream. After his second confession, Cope agreed to go back to his house with the police to reenact the crime on videotape. Cope gave his third confession at 4:55 p.m. when they returned to the police department. In the

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[3] The trial court severed the charges of unlawful neglect for the two younger children.

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

third confession, Cope confessed he had been going into Child's room since the end of October and "playing with her" by fingering her while she was asleep. That night, when he went into her room, she was asleep on her stomach and he inserted his dildo inside her, waking her. He then attacked and strangled her. He cleaned up, closed her bedroom door, and went to bed.

During Cope's third confession, Cope's appointed counsel arrived. Captain Cabaniss of the Rock Hill Police Department testified he informed Cope an attorney was there to meet with him, but Cope replied he did not want to see the attorney. Cope signed a statement to that effect.

Cope presented an expert who testified he scored Cope's polygraph examination and Cope passed the examination. Cope presented another expert, Dr. Clay Nichols, who testified Child's injuries were not specifically consistent with a 300-pound man jumping on her and there was no indication a broom was used on Child in the assault. Nichols also testified he did not see any signs of chronic sexual abuse. Additionally, Cope presented a locksmith to testify the doors could be opened with either a credit card or driver's license or by picking the lock without showing signs of forced entry.

The jury convicted Cope and this appeal follows.

LAW/ANALYSIS

I. EVIDENTIARY ISSUES

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007).

A. Admissibility of Similar Crimes

Cope argues the trial court erred in refusing to admit evidence of similar crimes in the Rock Hill area allegedly perpetrated by Sanders. Cope

argues he should at least have been able to introduce evidence of the other crimes without referring to Sanders as the perpetrator. Cope cites numerous jurisdictions and legal articles indicating when a defendant is attempting to introduce "other crimes" evidence, the court should apply a lower standard of similarity. We disagree.

The admissibility of "other crimes" evidence is governed in South Carolina by Rule 404(b) of the South Carolina Rules of Evidence, which provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; see State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (finding such evidence admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Clear and convincing evidence is more than a mere preponderance, but less than is required for proof beyond a reasonable doubt. Id. at 24, 664 S.E.2d at 483.

Although often discussed as similarity between crimes, the separate acts must be more than merely similar in results. There must be "such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations." State v. Tutton, 354 S.C. 319, 331, 580 S.E.2d 186, 193 (Ct. App. 2003); State v. Hubner, 362 S.C. 572, 584, 608 S.E.2d 463, 469 (Ct. App. 2005) (discussing admissibility of "other crimes" in criminal sexual conduct case).

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE (providing that evidence, although relevant, may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) (applying probative versus prejudicial test of Rule 403, SCRE, to "other crimes" evidence).

Some jurisdictions lower the standard of similarity necessary for admission of evidence of "other crimes" where a defendant is attempting to introduce the evidence. See State v. Garfole, 388 A.2d 587, 591 (N.J. 1978) (stating "a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State"); see also United States v. Stevens, 935 F.2d 1380, 1403 (3rd Cir. 1991) (applying a lower standard and quoting Garfole); United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989) (finding standard for admission relaxed when the evidence is offered by a defendant). This is sometimes called the "Reverse 404(b) Rule." Jessica Broderick, Comment and Casenote, Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties, 79 U.Colo.L.Rev. 587, 587 (2008). Even with a lower standard of similarity, the defendant must still show the other crimes are of a similar nature. See Rivera v. State, 561 So.2d 536, 539-40 (Fla. 1990) (recognizing lower standard of admissibility but finding other crimes dissimilar enough to determine trial court did not abuse discretion in excluding evidence).

The State charged Sanders with numerous crimes occurring shortly after Child's death. Cope proffered the testimony of four of Sanders' victims. Victim 1 testified that on December 12, 2001, at about 11:30 p.m., Sanders knocked at her apartment door and asked to use her phone. He pushed her door open, knocked her down, got on top of her, and kissed her. Sanders then raped her, demanded money, and destroyed her phone.

Victim 2 testified that on December 16, 2001, Sanders came to her house at about 1:00 a.m. She had fallen asleep on her couch and when she woke, Sanders was standing over her. She did not hear anyone come in the house and her dog did not bark. When she screamed, Sanders put his hand over her mouth and pinned her under a rocking chair. Sanders ran onto her

second-floor patio and jumped off when her dog began barking and her daughter called for her.

Victim 3 testified that on December 19, 2001, at about 7:30 p.m., she had just come home when Sanders came through her front door and attacked her. When she tried to crawl to her room, Sanders placed a plastic bag over her head. When she removed the bag, Sanders put a rug over her head and as she was trying to remove the rug, Sanders got on top of her and tried to remove her pants. She grabbed an ink pen from her pocket and stabbed Sanders in the leg. Sanders shoved Victim 3 into one of the bedrooms, closed the door, and left. At some point, he asked her for money.

Victim 4 testified that on January 12, 2002, at about midnight, she was in her room watching a movie when she heard a knock at her door. When Victim 4 opened the door, Sanders pushed the door in and shoved her into the bathroom. The fight continued in the kitchen where Sanders kicked and pushed Victim 4. Sanders also held Victim 4 in a choke hold and tried to get on top of her several times. While Victim 4 was on the floor, Sanders ran into her room and grabbed her purse. As he was trying to leave, Victim 4 grabbed a pan from the stove and hit Sanders with it. He dropped the purse and Victim 4 grabbed her mace. She tried to spray him, but missed. She then saw a small screwdriver on the floor and swung it at him, hitting him at least once in the shoulder.

Mindful of our standard of review, we find no reversible error in the trial court's exclusion of this evidence. Although there are some similarities between the other crimes and Child's assault, there are also many differences. For instance, no other crime resulted in the death of the victim or involved a child. None of the proffered crimes included the brutality of the attack on Child such as anal penetration and assault with a foreign object. Finally, most of the other crimes were not committed as late in the night as the attack on Child. We affirm the trial court's ruling that Sanders' other crimes are dissimilar to these facts and are, therefore, inadmissible under Lyle and Rule 404(b) even if reviewed under a lower standard because proffered by a defendant.

B. Testimony of James Hill

Cope argues the trial court erred in excluding testimony from James Hill. We disagree.

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Rule 401, SCRE. All relevant evidence is admissible. State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006). Relevant evidence may be excluded if the prejudicial effect of its admission substantially outweighs the probative value of the evidence. Rule 403, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

Cope proffered the testimony of James Hill, who is serving a sentence for burglary. Hill testified he was in his cell in a segregation unit in prison near the end of 2002. Hill recognized Sanders' distinctive voice and overheard Sanders and another inmate laughing about how easy it was to get away with crimes. Sanders allegedly stated he was "going to get away with what he did to that little girl in Rock Hill." Sanders allegedly "went on to explicitly describe what he had done." Sanders remarked about oral and anal sodomy and smothering the child. Finally, Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window." Sanders objected to the evidence as irrelevant. The court excluded the evidence as irrelevant because there were no identifying characteristics, noting the testimony did not specify time, place, or other circumstances. We again look to our standard of review and determine the trial court did not abuse its discretion in excluding Hill's testimony.

C. Admission of "False Confessions" Expert Testimony

Cope argues the trial court erred in excluding testimony of his false confession expert about two cases of coerced internalized false confessions. We disagree.

The admissibility of an expert's testimony is a matter within the trial court's sound discretion. State v. Douglas, 367 S.C. 498, 507, 626 S.E.2d 59, 63 (Ct. App. 2006). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. Id. at 507, 626 S.E.2d at 64. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Id. To warrant reversal, any error by the trial court in admitting or excluding expert testimony must result in prejudice. Id. at 508, 626 S.E.2d at 64.

Rule 702 of the South Carolina Rules of Evidence governs the admissibility of testimony by experts, providing:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE.

The precise issue of prohibiting an expert from relating case studies to the jury was raised in State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004). In Myers, the expert[5] was qualified as an expert in social psychology and testified about the psychology of confessions and false or coerced confessions. Id. at 50, 596 S.E.2d at 493. The trial court in Myers prohibited the expert from testifying about the facts of particular cases from Connecticut and Indiana in which people falsely confessed to crimes and were later exonerated. Id. In affirming the trial court, our supreme court found the expert related some facts about the specific cases but did not use names. Id. at 51, 596 S.E.2d at 494. Furthermore, the court found no prejudice in part because the expert "was able to testify at length about false and coerced confessions." Id. Therefore, the court found any error in excluding specific

[5] Dr. Kassin, the expert in this case, was also the expert in Myers.

case studies from the expert's testimony was harmless as the evidence was merely cumulative to the expert's other testimony. Id.

This issue was also addressed in State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). In Pittman, the trial court allowed the defendant to present "a copious amount" of evidence regarding the antidepressant drugs Selective Serotonin Reuptake Inhibitors (SSRIs). 373 S.C. at 578, 647 S.E.2d at 170-171. The defendant was permitted to introduce evidence that SSRIs could cause mania and other conditions, and to present anecdotal testimony regarding the antidepressant Paxil by a user of Paxil. Id. The trial court excluded anecdotal evidence regarding the antidepressant Zoloft.[6] Id.

In affirming the trial court, our supreme court stated:

> [T]he court was concerned about the reliability of the anecdotal reports compared with the reliability of reports from clinical studies done in a controlled environment. The court was also concerned with the trustworthiness of the sources of the anecdotal testimony, as well as the ability of experts to establish the causal link between the Zoloft and the incidents. Despite these concerns, the trial court permitted the above expert testimony regarding Zoloft obtained from reliable methods, consistent with the South Carolina Rules of Evidence.
>
> The record shows a conscientious decision on the part of the trial court to not admit evidence with questionable reliability where there was an abundance of other admissible evidence found to be reliable. Additionally, the trial court correctly found that the prejudicial effects outweighed the probative value of the anecdotal evidence.

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[6] Pittman changed antidepressants from Paxil to Zoloft shortly before committing a double homicide. Id. at 543, 647 S.E.2d at 152.

Id.

In this case, Cope presented an expert, Dr. Saul Kassin, who testified regarding false confessions. Dr. Kassin testified as to the interrogation techniques used by the police in obtaining false confessions and the techniques used in this case: (1) false evidence – the officers telling Cope he failed the polygraph; (2) positive confrontation – the officers claiming they knew Cope did it; (3) the officers' refusals to accept Cope's denials of guilt even though he agreed to a polygraph and waived an attorney; (4) minimization – the officers suggesting the crime was accidental; and (5) interrogation while Cope was traumatized and tired.

Dr. Kassin proffered testimony about Peter Reilly, who falsely confessed to murdering and sexually assaulting his mother, and Gary Gauger, who falsely confessed to murdering his parents. In both of these cases, the defendants denied involvement, were administered polygraphs and told they failed, believed they must have somehow committed the crimes, and confessed. The trial court refused to allow Dr. Kassin to testify regarding specific cases of false confession unless they were "on all fours" with this case and ultimately refused to allow the testimony. The trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony. The theories underlying the study of coerced internalized false confessions were exhaustively presented to the jury. Dr. Kassin explained the techniques used by interrogators that can lead to false confessions and informed the jury that there were "innumerable actual cases" of coerced internalized false confessions. Therefore, we find the exclusion of the testimony regarding the specific details of the Reilly and Gauger cases does not constitute reversible error.

D. Admissibility of Cope's Statements

Cope argues the trial court erred in denying his motion to suppress his statements because he was arrested without probable cause. We disagree.

"The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). "Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." Id. A magistrate's determination of probable cause should be paid great deference by the reviewing court. State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976) (reviewing magistrate's finding of probable cause to issue search warrant).

Whether probable cause exists depends upon the totality of the circumstances. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest). In assessing probable cause, the court looks to whether the facts and circumstances are sufficient for a reasonable person to believe that a crime has been committed by the person to be arrested. Id.

Judge McNeely testified she issued the warrant based on the fact that Cope was the only adult home at the time of the murder and there was a lack of evidence of forced entry. Based on the totality of the circumstances, we agree with the trial court there was probable cause to arrest Cope.[7]

Cope next argues the statements he made after the bond hearing on December 1st should have been suppressed because he applied for and was found eligible for representation by a public defender.[8]

In State v. Council, our supreme court stated:

> The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated

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[7] We also note Cope was served with the warrants for unlawful neglect toward a minor child the morning of November 30th, prior to any of his confessions.

[8] Only Cope's first confession, made November 30th, was made prior to the bond hearing.

> and at all critical stages. The Sixth Amendment right attaches only "post-indictment," at least in the questioning/statement setting. When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid **unless the defendant initiates the contact himself.**

335 S.C. 1, 15-16, 515 S.E.2d 508, 515 (1999) (internal citations omitted) (emphasis added). Furthermore, a waiver is knowingly and intelligently made where a defendant waives his right to counsel after having been apprised of his Miranda rights. State v. Howard, 296 S.C. 481, 494, 374 S.E.2d 284, 291 (1988) (citing Patterson v. Illinois, 487 U.S. 285, 296-97 (1988)).

Cope argues the bond hearing triggered his right to counsel. We need not determine if the bond hearing triggered Cope's right to counsel because we find Cope waived his right to counsel prior to making his second and third statements.[9] Cope was charged with murder in the early morning hours of November 30th. At approximately 9:00 a.m., Cope was served with the child neglect warrants and then taken to the polygraph examination where he was read his Miranda warnings. Between 9:30 and 10:00 a.m., Cope was transported to the Moss Justice Center for his polygraph examination. Baker read Cope his Miranda warnings and Cope voluntarily waived his constitutional rights. The polygraph examination began at 11:15 a.m. After the examination, Baker informed Cope he had failed. Lieutenant Herring and Baker continued questioning Cope. Cope gave his first confession at 2:25 p.m.

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[9] See Rothgery v. Gillespie County, Tex., 128 S.Ct. 2578 (2008) (comprehensively discussing the attachment of the Sixth Amendment right to counsel).

On Sunday, December 2, Cope told the Rock Hill police he wanted to talk to the investigating officers again. Officer Herring told the Rock Hill dispatcher to inform Cope they would speak to him the following day. On December 3d, Cope made his second and third confessions and the video reenactment.

We find Cope knowingly and intelligently waived his right to counsel by initiating the contact with the investigating officers prior to his second and third confessions and after receiving Miranda warnings. Accordingly, we find no error by the trial court in denying Cope's motion to suppress his confessions.

II. SEVERANCE

Cope argues the trial court erred in denying his motion for severance. Cope complains the evidence of Sanders' other crimes could be admitted as evidence of third-party guilt in a separate trial. We disagree.

A motion for a severance and separate trial is addressed to the sound discretion of the trial judge and the ruling will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Nichols, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). A defendant who alleges he was improperly tried jointly must show prejudice before the appellate court will reverse his conviction. State v. Dennis, 337 S.C. 275, 281-83, 523 S.E.2d 173, 176 (1999).

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. Id.; State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). This is true even when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses such as accusing each other of committing the crime. State v. Leonard, 287 S.C. 462, 473, 339 S.E.2d 159, 165 (Ct. App. 1986), reversed on other grounds, 292 S.C. 133, 355 S.E.2d 270 (1987).

Admissibility of evidence under the third-party guilt doctrine is governed by the rule in <u>State v. Gregory</u>, 198 S.C. 98, 16 S.E.2d 532 (1941). The rule states:

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

<u>Gregory</u>, 198 S.C. at 104-05, 16 S.E.2d at 534-35 (internal citations omitted). Evidence of third-party guilt may include: (1) facts that are inconsistent with the defendant's guilt; and (2) evidence raising a reasonable inference as to the accused's innocence. <u>State v. Rice</u>, 375 S.C. at 317, 652 S.E.2d at 416. <u>See also</u> <u>Holmes v. South Carolina</u>, 547 U.S. 319, 331 (2006) (holding that to prohibit, on the strength of the prosecution's case, evidence of third-party guilt proffered by an accused violated the right of the accused to present a complete defense).

Cope sought to introduce evidence of Sanders' other crimes in a separate trial to prove Sanders' guilt and his ability to enter victims' homes without signs of forced entry. The jury in this case was aware Sanders was involved in Child's murder due to the presence of his DNA. The jury was also aware the Cope house could have been entered without signs of forced entry as Cope presented evidence by a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have

been admitted in a separate trial. We find the introduction of the evidence of Sanders' other crimes would not have been inconsistent with Cope's guilt, even if admitted in a separate trial, and would not have raised an inference as to Cope's innocence. Accordingly, we find no error by the trial court in denying Cope's motion for severance.

III. CONSPIRACY

Cope argues the trial court erred in failing to direct a verdict on the conspiracy charge based on the lack of evidence supporting an agreement between Sanders and Cope. We agree.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." Kelsey, 331 S.C. at 62, 502 S.E.2d at 69 (1998). "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight." Id. In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated:

> [T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.**

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (emphasis in original) (internal citations omitted).

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). "Often proof of conspiracy is necessarily by circumstantial evidence alone." State v. Miller, 223 S.C. 128, 133, 74 S.E.2d 582, 585 (1953). Nevertheless, "the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy." State v. Crocker, 366 S.C. 394, 406, 621 S.E.2d 890, 897 (Ct. App. 2005). Moreover, in viewing the sufficiency of the evidence to support a charge of conspiracy, an appellate court "must exercise caution to ensure the proof is not obtained 'by piling inference upon inference.' " State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 81 (1993) (quoting Direct Sales Co. v. U.S., 319 U.S. 703, 711(1943)).

"The gravamen of the offense of conspiracy is the agreement or combination." Gunn, 313 S.C. at 134, 437 S.E.2d at 80; see also State v. Condrey, 349 S.C. 184, 193, 562 S.E.2d 320, 324 (Ct. App. 2002) (stating the crime of conspiracy "consists of the agreement or mutual understanding"). "Often proof of conspiracy is necessarily by circumstantial evidence alone." Miller, 223 S.C. at 133, 74 S.E.2d at 585. Recognition of this reality, however, does not compromise the standard that a trial court must use in deciding a directed verdict motion when the evidence against an accused is entirely circumstantial, namely, that the case must be submitted to the jury only "if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or form which his guilt may be fairly and logically deduced." State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004).

We agree with Cope that the absence of actual proof of an agreement and of some connection between him and Sanders warranted a directed verdict on the conspiracy charge. Here, there was no direct evidence of any association between Cope and Sanders. The State's evidence of a conspiracy was entirely circumstantial, consisting of: (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the same two-hour

time frame as the injuries that Cope confessed to inflicting, (2) Sister's testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry, and (3) the fact that the house was full of debris and passage inside, particularly at night, would have been difficult. These factors, whether considered individually or collectively, raise at most a suspicion that Cope and Sanders intended to act together for their shared mutual benefit. Any inference that they made an agreement to accomplish a shared, single criminal objective would be speculative at best. Therefore, because the State failed to prove the element of agreement for the crime of conspiracy, the trial court should have granted a directed verdict as to that charge.

CONCLUSION

We affirm the trial court's evidentiary rulings and the denial of Cope's motion for severance. As a result, the sentences of life imprisonment for murder, thirty years for criminal sexual conduct in the first degree to run consecutive to the life sentence, plus thirty years concurrent for the second of criminal sexual conduct in the first degree, and ten years concurrent for unlawful conduct toward a child are also affirmed. We further hold, however, the trial court erred in declining to direct a verdict of acquittal for Cope on the issue of conspiracy and reverse only as to that charge.

AFFIRMED IN PART, REVERSED IN PART.

PIEPER, J., concurs. SHORT, J., concurs and dissents in a separate opinion.

SHORT, J. (concurring in part and dissenting in part): I concur in part and respectfully dissent in part.

I concur with the majority that the trial court did not err by excluding similar crimes evidence, excluding the proffered testimony of James Hill, limiting the expert's testimony regarding specific cases of coerced internalized false confessions, and admitting Cope's statements. I also concur

with the majority that the trial court did not err in denying Cope's motion for severance. I respectfully dissent, however, regarding the trial court's failure to direct a verdict on the conspiracy charge and would affirm the trial court on this issue.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight." Id. In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated:

> [T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (emphasis in original) (internal citations omitted).

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). "A formal or express agreement need not be established." State v. Crawford, 362 S.C. 627, 637, 608 S.E.2d 886, 891

(Ct. App. 2005). To prove conspiracy, it is not necessary to prove an overt act. State v. Crocker, 366 S.C. 394, 405, 621 S.E.2d 890, 896 (Ct. App. 2005). "It is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone." State v. Horne, 324 S.C. 372, 381, 478 S.E.2d 289, 294 (Ct. App. 1996).

"Often proof of conspiracy is necessarily by circumstantial evidence alone." State v. Miller, 223 S.C. 128, 133, 74 S.E.2d 582, 585 (1953). "[I]n establishing the existence of a conspiracy or an individual's participation therein, it is permissible for the jury to consider circumstantial evidence because, by its very nature, a conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available." 15A C.J.S. Conspiracy § 176 (2002). Although mere presence at the scene of a crime may be insufficient to support a conspiracy conviction, presence at the scene of the crime is relevant to prove conspiracy. Id. at §§ 176 &187.

The State's theory was Cope served up Child to Sanders for their mutual perverse pleasures. Forensic evidence indicated the bite mark on Child where Sanders's DNA was found was inflicted within the same time period as the injuries Cope confessed to inflicting on Child. Additionally, no evidence existed of forced entry into the house by any of the windows or doors. Sister testified she locked the back door that evening and Child locked the front door with a chain lock. Viewing the evidence in the light most favorable to the State, a connection and an overt act could be inferred from the circumstantial evidence that Cope allowed Sanders entry into the home wherein Sanders committed unlawful sexual acts upon Child. I find the temporal connection of the timing of the injuries and the lack of evidence of forced entry are circumstantial evidence that both Cope and Sanders were inside the house at the same time. A circumstantial connection was also made between Cope and Sanders by Cope's confessions and the DNA evidence implicating Sanders. Considering the totality of the evidence, I conclude substantial circumstantial evidence, rising above mere speculative inferences, exists to support the trial court's submission of the conspiracy charge to the jury. Accordingly, I would affirm the trial court's denial of Cope's motion for a directed verdict on conspiracy.