The Supreme Court of South Carolina

In the Matter of
Gary Michael Wood, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Mr. Wood passed away on April 17, 2006, and requesting appointment of an attorney to protect Mr. Wood's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

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

operating account(s), and any other law office account(s) Mr. Wood maintained 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 Mr. Wood, shall serve as notice to the bank or other financial institution that Joshua M. Henderson, 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 Joshua M. Henderson, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Wood's mail and the authority to direct that Mr. Wood's mail be delivered to Mr. Henderson's 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 21, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16

April 24, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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4055-Aiken v. World Finance Corp.	Pending
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4059-Simpson v. World Fin. Corp.	Pending
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4062-Campbell v. Campbell	Pending
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2004-UP-482-Wachovia Bank v. Winona Grain Co.	Denied 04/19/06
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2004-UP-521-Davis et al. v. Dacus	Denied 04/06/06
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2004-UP-556-Mims v. Meyers	Denied 04/19/06
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2005-UP-519-Talley v. Jonas	Pending
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2005-UP-585-Newberry Elect. v. City of Newberry	Pending
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2005-UP-594-Carolina First Bank v. Ashley Tower	Pending
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2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
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2006-UP-022-Hendrix v. Duke Energy	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John L. McCombs, Appellant.

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

Opinion No. 26137
Heard March 8, 2006 – Filed April 17, 2006

AFFIRMED

Deputy Chief Attorney Wanda H. Carter, of Office of Appellate Defense, of Columbia, for appellant.

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

JUSTICE MOORE: Appellant was found guilty for intimidation of a court official and was sentenced to seven years in prison.

He argues the trial court erred by failing to grant a directed verdict in his favor. We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR, and now affirm.

FACTS

Donna Sands was appointed to represent appellant in a post-conviction relief (PCR) action. After appellant received an unfavorable ruling from Judge Diane Goodstein in the case, he wrote Sands three letters. Sands gave the third letter she received to Judge Goodstein because appellant wished to terminate her representation and because she was concerned about an alleged threat to her and Judge Goodstein contained in the letter. Sands filed a motion for reconsideration on appellant's behalf after receiving the letter, but she was ultimately relieved from representing him.

Appellant's third letter stated, in pertinent part:

> Dear Donna,
>
> . . . I am most highly displeased over your lack of loyalty & professionality in handling my case. . . . I must hereby terminate you from my case . . .
>
> Do not do anything else, since you don't know how to force a ruling out of that incipant [sic] judge, who made that personally biased comment from the bench, when she stated that she had no intention of ordering my release. I will not stop until I put you & her out of practice, since you personally acquise [sic] with her actions. Send me that file. . . .

Judge Goodstein testified that, after receiving the letter from Sands, she asked the solicitor's office to investigate the alleged threat. Following the investigation, Judge Goodstein was shown the other two letters written by

appellant[1] and she learned appellant was scheduled to be released from prison in approximately two years. She testified she already knew that appellant had been convicted of a violent crime. She believed appellant intended to threaten the court and interfere with the court's process. Although appellant did not directly contact her, Judge Goodstein stated she personally felt threatened and intimidated by him given his history.[2] Further, she said she was frightened by the three letters, which she found to be "absolutely vicious," appellant's release date, and his statement to a SLED officer. She interpreted appellant's statement in the letter that he would "put . . . her out of practice" as a threat to her personally and not to her law license. Judge Goodstein testified that when she subsequently received the motion to reconsider in appellant's PCR case, she recused herself because she could not

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[1]The first letter appellant wrote to Sands contained the following statements: "I hope to see you in Hell, because you are not going to like what I have to do just for you. . . . There is a price for everything, and you will find it particularly bitter."

The second letter contained the following statements:

> . . . I have a plan for you. I hope that you enjoyed that $500 you got for selling me out, because you will regret what you have done, and I will guarantee it. . . . How valuable is your practice to you? . . . If you think that you can do anything to a walking dead man, hit me with your best shot, because I will handle you . . . . I am set to destroying you, just like pulling the wings off of a fly, do you understand this? For whom does the bell toll? . . . By your own incompetent hand are you destroyed, when you reap as you have sown. Do you think that I will at all spare your images?

[2]Appellant was incarcerated in approximately 1981 for criminal sexual conduct and assault and battery of a high and aggravated nature.

be fair and impartial given that appellant had injected her personally into the case.

As part of the investigation into the alleged threat, SLED Officer John Garrison interviewed appellant while he was incarcerated. When Garrison asked appellant if, when he got out, he intended to go see Sands and Judge Goodstein, appellant replied, "I don't know, I think I'll have to go see them." Garrison testified appellant made no other statement during the interview that was threatening other than that he was going to see Judge Goodstein when he was released. Garrison stated his opinion was that a threat had been made against Judge Goodstein.

Following the close of the State's evidence, appellant's directed verdict motion was denied. The jury returned a verdict of guilty and appellant moved for a new trial. The court denied the motion because there was evidence to support the jury's verdict.

ISSUE

Did the trial court err by failing to grant a directed verdict in appellant's favor?

DISCUSSION

Appellant argues the trial court erred by failing to grant a directed verdict in his favor where there was insufficient evidence of his guilt.[3]

[3]The State argues the issue is not preserved for review because appellant did not renew his motion for a directed verdict at the close of all the evidence. However, because appellant did not present any evidence, he was not required to renew that motion. *Cf.* State v. Bailey, Op. No. 4079 (S.C. Ct. App. filed January 23, 2006) (Shearouse Adv. Sh. No. 4 at 91, 95, n.4) (if defendant presents evidence after denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency of the evidence).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). On appeal from the denial of a directed verdict, we must view the evidence in the light most favorable to the State. State v. McHoney, *supra*.

Appellant was charged with intimidation of a court official pursuant to S.C. Code Ann. § 16-9-340 (2003). Section 16-9-340 states:

> (A) It is unlawful for a person by threat or force to:
>
> (1) intimidate or impede a judge . . . in the discharge of his duty as such; or
>
> (2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court.

The trial court did not err by denying the motion for a directed verdict. There was evidence reasonably tending to prove appellant's guilt of the stated crime. The statements in the letters combined with appellant's violent history, his impending release date, and his statement to Officer Garrison that he was going to see Judge Goodstein after he was released, qualified as a threat and an attempt to interfere with the court's process. Judge Goodstein's ability to discharge her duty as a judge was impeded when she had to recuse herself from appellant's case.

CONCLUSION

Viewing the evidence in the light most favorable to the State and because there is evidence sufficient to survive a directed verdict motion, the trial court appropriately submitted this case to the jury. Therefore, the decision of the trial court is

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice J. Mark Hayes, II, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Floyd Thomas, Jr., Appellant,

v.

Pearlie Mae McGriff, as Personal Representative of the Estate of Ella Mae McGriff, Respondent.

Appeal From Lancaster County
Brooks P. Goldsmith, Family Court Judge

Opinion No. 26138
Heard March 8, 2006 – Filed April 17, 2006

REVERSED AND REMANDED

Robin Page Freeland and Francis L. Bell, Jr., both of Bell, Tindal & Freeland, of Lancaster, for Appellant.

B. Michael Brackett, of Moses, Koon & Brackett, of Columbia, and David R. Blackwell, of Lancaster, for Respondent.

JUSTICE PLEICONES: Appellant Floyd Thomas, Jr. (Appellant) brought this action in the family court against Respondent Pearlie Mae McGriff (Respondent), as Personal Representative of the Estate of Ella Mae McGriff, for a declaration that Appellant and Ella Mae McGriff were

common-law spouses on the date of Ella Mae's death. The family court granted Respondent's motion to dismiss for lack of subject-matter jurisdiction, holding that because Ella Mae was deceased and her probate estate was open, the probate court had exclusive jurisdiction over the matter. We certified the case pursuant to Rule 204(b), SCACR, and we now reverse the family court's decision and remand the case to the family court for further proceedings.

ISSUE

Whether the family court erred in dismissing Appellant's action for lack of subject-matter jurisdiction.

ANALYSIS

As the family court noted, this case turns on the interpretation of two statutes: South Carolina Code sections 20-7-420(5)[1] and 62-1-302(a)(1).[2] Section 20-7-420(5) provides: "The family court shall have exclusive jurisdiction ... [t]o hear and determine actions to determine the validity of marriages." Section 62-1-302(a)(1) provides: "To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to ... estates of decedents, including the contest of wills, construction of wills, and determination of heirs and successors of decedents and estates of protected persons."[3]

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[1] S.C. Code Ann. § 20-7-420(5) (1976) (re-designated by 2005 Act No. 132, §§ 1-3; see S.C. Code Ann. § 20-7-420(A)(5) (Supp. 2005)).

[2] S.C. Code Ann. § 62-1-302(a)(1) (Supp. 2005).

[3] The General Assembly amended both statutes, effective June 3, 2005. See 2005 Act No. 132, §§ 1-4. Each statute now specifically provides that the family and probate courts have subject-matter jurisdiction over issues relating to common-law marriage, except that the probate court has jurisdiction only to the extent that the issues are connected to estate,

The family court ruled that section 20-7-420(5) does not apply when one of the parties to the purported common-law marriage is deceased. Rather, the court held, section 62-1-302(a)(1) applies, because a determination that a party was the common-law spouse of the decedent is really a determination that the party is an heir of the decedent. We disagree.

Reading the statutes together, jurisdiction to determine the existence of a common-law marriage depends upon the ultimate issue before the court. If the ultimate issue is heirship, which is within the probate court's exclusive jurisdiction, then the probate court has jurisdiction to resolve the threshold issue whether the decedent was a party to a common-law marriage. If the existence of a common-law marriage is itself the ultimate issue, then the family court has exclusive jurisdiction. Cf. Neely v. Thomasson, 365 S.C. 345, 350-51, 618 S.E.2d 884, 887-88 (2005) (recognizing the difference between jurisdiction over an action and jurisdiction over an issue, and holding that although section 20-7-420(7)[4] vests the family court with exclusive jurisdiction over actions to determine paternity, under section 62-1-302(a)(1) the probate court has jurisdiction to resolve the issue of paternity when the issue is essential to the probate court's determination of heirs).

Here, Appellant brought an action for a declaration that he and Ella Mae McGriff were in a common-law marriage on the date of Ella Mae's death. Appellant admits that he might seek to utilize the declaration, if the family court makes it, to claim in the probate court that he is an heir of Ella Mae. While it would have been more judicially economical for Appellant to claim heirship in the probate court and allow the probate court to resolve the common-law-marriage issue, nothing prohibited Appellant from first bringing this action in the family court. The family court therefore erred in dismissing the action for lack of subject-matter jurisdiction.

CONCLUSION

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guardianship, or conservatorship matters. See S.C. Code Ann. §§ 20-7-420(B) and 62-1-302(c) (Supp. 2005).

[4] S.C. Code Ann. § 20-7-420(7) (1976) (re-designated by 2005 Act No. 132, §§ 1-3; see S.C. Code Ann. § 20-7-420(A)(7) (Supp. 2005)).

The family court has exclusive subject-matter jurisdiction to determine an action for a declaration that a common-law marriage exists or existed. The probate court has exclusive subject-matter jurisdiction to determine heirs, which might involve the issue whether a common-law marriage existed. Whether the family court or probate court has jurisdiction over the issue of common-law marriage depends on the nature of the action in which the issue arises. Here, Appellant's action is for a declaration that he and Ella Mae McGriff were parties to a common-law marriage on the date of Ella Mae's death. Appellant does not now seek a determination that he is an heir of Ella Mae's estate. Consequently, the family court has exclusive subject-matter jurisdiction over Appellant's action. We therefore reverse the dismissal of the action and remand the case to the family court for further proceedings.

REVERSED AND REMANDED.

TOAL, C.J., MOORE, WALLER, JJ., and Acting Justice J. Mark Hayes, II, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeroid John Price, Appellant.

Appeal From Richland County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 26139
Heard March 22, 2006 – Filed April 17, 2006

AFFIRMED

Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellant Defense; and Amye L. Rushing, of Hammonds & Rushing, PA, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J. Zelenka,
Assistant Attorney General Jeffrey A. Jacobs, all of Columbia; and
Solicitor Warren Blair Giese, of Columbia, for Respondent.

JUSTICE BURNETT: Jeroid John Price (Appellant) was convicted of the murder of Carl Smalls and was sentenced to thirty-five years

imprisonment. Appellant appeals and this Court certified the case for review from the Court of Appeals, pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On December 6, 2002, Alpha Phi Alpha fraternity hosted a party at Club Voodoo in Columbia, South Carolina. During the party, a confrontation between rival gangs, the Bloods and the Crips, occurred. Appellant, who conceded he was affiliated with the Bloods, and Smalls, a member of the Crips, confronted each other.

Around 2:00 a.m. on December 7, the party ended. Ryan Brooks retrieved a semi-automatic pistol from his car to protect himself and Appellant retrieved a pistol from his car for protection while his friends counted the money collected at the door that night. Derrick Watson testified around 2:00 a.m. Smalls asked him for a gun, but Watson did not have one.

Brooks saw Appellant and Smalls talking in the club. He testified Appellant reached towards his own waist and Smalls rushed Appellant; the two men struggled over Appellant's pistol. During the struggle, the pistol was pointed towards Brooks, who fired his own gun and shot Smalls. After firing his weapon, Brooks ran out of the club and heard more gunshots.[1]

Marcus Jones heard the first gunshot and saw the victim on the ground. He then saw two more shots and described the gunfire as "coming straight down." Jones testified the victim did not appear to have a gun and the gunman did not appear to be in danger. He later identified Appellant as the gunman.

Investigator James Richardson was qualified as an expert in gangs and gang activity. Richardson testified about the history of the Bloods and the Crips, gang activities in Columbia, gang clothing, and gang hand signals. During direct examination, Richardson testified Appellant was a member of the Bloods and was a supreme or officer within the gang.

[1] Brooks was also charged with the murder of Smalls.

The trial judge overruled defense counsel's objection to the hearsay testimony that Appellant was an officer in the Bloods. On cross-examination, Richardson conceded he did not know Appellant and that his testimony regarding Appellant was based on information from informants and not on his own personal knowledge.

The State presented the following evidence seized from Appellant's apartment as part of its theory that Appellant was a member of the Bloods: photographs of men, including Appellant, making Blood hand signals and wearing Blood colors; a gang code book; red clothing and hats; bullet-proof vests; and a document containing a pledge of allegiance to the United Blood Nation.

Appellant admitted shooting Smalls but asserted he acted in self-defense. Appellant testified he was not a Blood, but he was affiliated with that gang. He further testified Smalls was physically larger than him and, on the night of the shooting, Smalls attacked him without provocation. He testified they struggled over his gun and during this struggle the gun discharged, wounding Smalls.

The trial judge instructed the jury on murder and self-defense. Appellant was found guilty of murder, and this appeal follows.

ISSUE

Did the trial judge err in admitting testimony from an expert witness in the areas of gangs and gang activity that Appellant was an officer in a gang when the expert based his testimony on statements from informants?

STANDARD OF REVIEW

The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion. Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); State v. Caldwell, 283 S.C. 350, 322 S.E.2d

662 (1984). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005).

LAW/ANALYSIS

A. Hearsay

Appellant argues the trial court erred in admitting testimony from Investigator Richardson that Appellant was a supreme or an officer within the Bloods because the testimony was improper hearsay. We agree.

The State contends the testimony was admissible under Rules 702 and 703, SCRE,[2] because, when the testimony is viewed in context, Richardson did not solely base his opinion on hearsay information. This argument is without merit. Richardson did not testify to his expert opinion, but rather relayed information from informants.

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[2] Rule 702, SCRE, states:
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 703, SCRE, provides:
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Hearsay is an out of court statement offered to prove the truth of the matter asserted therein. Rule 801(c), SCRE; State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. Rule 802, SCRE; Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).

Although Richardson identified items seized from Appellant's apartment as related to the Bloods (*e.g.*, photograph with Appellant throwing a gang sign, notebook with a reference to Bloods, code book referring to the Bloods, and red clothing which is significant to the Bloods), Richardson did not testify he relied on these items in forming an opinion that Appellant was a supreme or officer in the Bloods. Furthermore, Richardson testified he solely based his testimony that Appellant was a supreme on statements from informants. This testimony was hearsay and was not admissible under any exception to the hearsay rule.

Although the testimony was improperly admitted, Appellant has not demonstrated reversible error. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (improper admission of hearsay evidence is reversible error only when the admission causes prejudice). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996).

Defense counsel impeached Richardson's improper testimony by eliciting that his testimony was solely based on information from informants. Also, the inadmissible hearsay testimony was merely cumulative. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other

evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless). Brooks testified Appellant was a Blood. Further, Lieutenant James Smith testified bullet-proof vests were seized from Appellant's apartment and Richardson properly testified officers within gangs may have bullet-proof vests. After reviewing the entire record, we find the improper admission of hearsay testimony that Appellant was an officer in the Bloods was harmless.

B. Confrontation Clause

Appellant also argues Richardson's testimony violated his right to confront witnesses under the Sixth Amendment to the United States Constitution and Article 1, § 14, of the South Carolina Constitution. This issue is not preserved for appellate review because Appellant did not properly raise the issue in the trial court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that 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.").

CONCLUSION

The admission of Richardson's testimony that Appellant was a supreme or officer within the Bloods was harmless error and we affirm Appellant's conviction.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard A. Blackmon, Respondent.

Opinion No. 26140
Submitted March 28, 2006 – Filed April 24, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Charles N. Pearman, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Richard A. Blackmon, of Sumter, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension from the practice of law for a period of up to sixty (60) days. See Rule 7(b), RLDE, Rule 413, SCACR. In addition, respondent agrees to pay any and all costs associated with ODC's inquiry into these matters. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a sixty (60) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

I.

Complainant A hired respondent to file a bankruptcy petition on her behalf; all of her papers related to the bankruptcy were located in respondent's office. Respondent also possessed important documents regarding Complainant A's deceased parents' estates, their wills, and the deed to their property.

Complainant A attempted to contact respondent on numerous occasions to obtain the documents relating to her parents and to her own bankruptcy petition. Respondent did not communicate with Complainant A.

Respondent acknowledges he was in possession of the estate papers and other documents. He also acknowledges his secretary informed him several times of Complainant A's attempts to contact him. Respondent states he did not adequately communicate with Complainant A because she did not fully pay him to file her Chapter 7 bankruptcy petition.

II.

Complainants B and C hired respondent to assume representation in a Chapter 13 bankruptcy which had already been filed by another attorney. The complainants attempted to contact respondent on several occasions to learn the status of their case and to seek an explanation as to why the trustee might dismiss their petition. Respondent asserts the new electronic filing rules and his antiquated software were the cause of part of the problems associated with the amended bankruptcy plan.

Respondent states he has no record of Complainants B and C contacting him with the frequency that they claim. He blames his answering machine for possibly not receiving some of their messages.

Nevertheless, respondent admits he did not adequately communicate the bankruptcy process and its obligations to Complainants B and C.

III.

Complainant D hired respondent to represent her in a motor vehicle accident. She attempted to contact respondent on numerous occasions to obtain a status report on her case.[1]

In his response to the Notice of Full Investigation, respondent essentially stated he was working on Complainant D's case. According to his records, she was still under the care of her treating physician and he asked her for updated medical bills and a wage statement. Respondent did not adequately address his failure to communicate with Complainant D. He now acknowledges he did not provide Complainant D with diligent representation and that he did not adequately communicate with her.

IV.

Complainant E hired respondent to represent her minor children who were involved in a motor vehicle accident. Complainant E attempted to contact respondent on many occasions to obtain the status of her children's case. Respondent failed to communicate with respondent concerning the status of the case. Complainant E resorted to personally contacting the insurance company to determine what was happening with her children's case.

In his response to the Notice of Full Investigation, respondent indicated he had been working on the case but was unable to settle the matter since another individual injured in the accident was still being treated. Respondent did not adequately address his failure to communicate with Complainant E.

[1] Complainant D states she attempted to contact respondent on more than one hundred occasions.

Respondent now acknowledges he did not diligently represent Complainant E. He further acknowledges he did not adequately communicate with Complainant E.

V.

Respondent represented Complainant F in a criminal matter. While in the midst of a post-conviction relief action, Complainant F contacted respondent by mail on two occasions and asked for his file.

Respondent failed to surrender Complainant F's file. Respondent acknowledges he received one request from the complainant about the file and told him he would provide the file to his post-conviction relief attorney if requested by the attorney or that he would provide the file to Complainant F at the conclusion of the post-conviction relief action.

In his response to the Notice of Full Investigation, respondent stated he "had no objection" to sending the file to Complainant F as soon as he had an opportunity to copy the file. Respondent acknowledges he failed to return Complainant F's file in a timely fashion.

VI.

In 2001, Complainants G and H retained respondent to file an action in magistrate's court. The case was apparently dismissed in May 2003 without the complainants' knowledge.

Respondent claims he was not aware the case had been dismissed.[2] Complainants G and H attempted to contact respondent on numerous occasions to obtain the status of the case, but respondent did not return their telephone calls or schedule an appointment to discuss

[2] Respondent states the case was dismissed due to lack of service of process which was usually handled by the magistrate's court.

the case. Respondent now acknowledges he did not provide these complainants with competent or diligent representation and he did not adequately communicate with them concerning the status of their case.

Respondent acknowledges his extensive disciplinary history. See In the Matter of Blackmon, 361 S.C. 641, 606 S.E.2d 777 (2004); In the Matter of Blackmon, 344 S.C. 83, 543 S.E.2d 559 (2001); In the Matte of Blackmon, 309 S.C. 400, 424 S.E.2d 472 (1992); In the Matter of Blackmon, 295 S.C. 333, 368 S.E.2d 465 (1988).

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter); Rule 1.15 (lawyer shall promptly deliver to client any property client is entitled to receive); Rule 1.16 (upon termination of representation, lawyer shall surrender property to which client is entitled); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). Finally, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period. In addition, respondent shall pay any and all costs associated with ODC's inquiry into this matter, including the court

reporter's fee of $60.00. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mikell A. Pinckney, Respondent,

v.

State of South Carolina, Petitioner.

Appeal from Lexington County
Kenneth G. Goode, Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 26141
Submitted March 22, 2006 – Filed April 24, 2006

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Sabrina C. Todd, all of Columbia, for petitioner.

Deputy Chief Attorney Wanda H. Carter, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

JUSTICE MOORE: We granted the State's petition for a writ of certiorari to review the grant of post-conviction relief (PCR) and now reverse.

FACTS

Respondent was convicted of first degree burglary after he broke into a home at night and barricaded himself in the bathroom. When police officers arrived, respondent threatened to kill himself and the officers by spilling lamp oil and lighting it. On appeal, respondent's conviction was affirmed.[1] He then commenced this action for PCR.

The PCR judge granted relief on the ground trial counsel was ineffective for failing to request an additional charge emphasizing that the intent to commit a crime must exist at the time of entry, and limiting the jury's consideration of intent to whether there was intent to commit the crime set forth in the indictment.[2]

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[1] On appeal, respondent argued he was entitled to a directed verdict of acquittal because there was no evidence he intended to commit a crime at the time he entered the dwelling. The Court of Appeals agreed and reversed respondent's conviction. On review of that decision, however, we found respondent's actions after he entered the house were some evidence of his intent to commit a crime. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). After remand to the Court of Appeals for consideration of an alternative ground of appeal, respondent's conviction was affirmed in an unpublished opinion.

[2] The indictment alleges that respondent did willfully and unlawfully enter a dwelling without consent and with the intent to commit a crime therein and

> was armed with a deadly weapon or explosive while in the dwelling and/or used or threatened the use of a dangerous instrument while in the dwelling, and/or did enter or remain in the dwelling in the nighttime, to wit: [respondent] did pour kerosene on himself and the floor of the dwelling and

ISSUE

Was counsel ineffective for failing to request an additional charge?

DISCUSSION

First degree burglary is defined in S.C. Code Ann. § 16-11-311 (2003):

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
>
> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
>
> (a) is armed with a deadly weapon or explosive; or
>
> . . .
>
> (c) uses or threatens the use of a dangerous instrument; or
>
> . . .
>
> (3) the entering or remaining occurs in the nighttime.

At trial, in addition to defining the aggravating circumstances regarding explosives, a dangerous instrument, or entry in the nighttime, the trial judge charged the following:

> I'm going to read from you directly from the law. It says a person is guilty of burglary in the first degree <u>if the person enters a dwelling without consent and with intent to commit a crime therein</u> and either – and there are three other alternatives, and if any of these alternatives are proven beyond a reasonable doubt,

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> threatened to light it and threatened to set responding officers on fire. . . .

> along with entering without consent and with intent to commit a crime then that would be burglary in the first degree. Again, if you find that that has been proven beyond a reasonable doubt. Those three alternatives are: while entering or being in the dwelling or in leaving the dwelling he is armed with a deadly weapon or explosive. The other is that while entering or being in the dwelling or leaving the dwelling he uses or threatens the use of a dangerous instrument. And the third is that the entering or remaining occurred in the nighttime. . . .
>
> Now again, burglary in the first degree must be proven beyond a reasonable doubt that the defendant entered the dwelling without consent. It must be proven beyond a reasonable doubt that when he entered, when he entered that he had intent to commit a crime therein.

(emphasis added).

This charge adequately instructed the jury that the State must prove that the intent to commit a crime existed at the time of entry.[3] Counsel was not ineffective for failing to request a more emphatic or specific charge since the charge adequately stated the elements of first degree burglary. *See* State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (failure to provide specific jury instructions not error when the given instructions use proper test for determining the issues); State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (if the trial judge refuses to give a specific charge, there is no error if the charge given sufficiently covers substance of the request).

Further, there is no requirement that the intent element is satisfied only by proving an intent to commit the specific crime that is charged in the indictment as an aggravating circumstance. The only requirement is that there be intent to commit any crime at the time of

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[3] At the PCR hearing, counsel testified that in her opinion the charge given covered this element but "in retrospect" she wished she had asked for a more specific charge.

entry. *Cf.* State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999) (to constitute burglary it is not necessary that the intended crime be committed).

In conclusion, the charge given was adequate and counsel was not ineffective for failing to request an additional charge. *See* Cartrette v. State, 323 S.C. 15, 448 S.E.2d 53 (1994) (counsel not ineffective for failing to request additional charge covered by substance of charge given). The grant of PCR is

REVERSED.

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

The Supreme Court of South Carolina

In the Matter of William J. LaLima, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, 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 Robert H. Mozingo, 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. Mozingo shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Mozingo

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 Robert H. Mozingo, 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 Robert H. Mozingo, 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. Mozingo's office.

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

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina
April 21, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sloan Construction Company, Inc., Appellant,

v.

Southco Grassing, Inc., Wanda Surrett, South Carolina Department of Transportation, and Greer State Bank, Defendants,

of whom South Carolina Department of Transportation is Respondent.

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

Opinion No. 4085
Heard January 10, 2006 – Filed February 21, 2006
Withdrawn, Substituted, and Refiled April 24, 2006

AFFIRMED

T. S. Stern, Jr., of Greenville, for Appellant.

Beacham O. Brooker, Jr., of Columbia, for Respondent.

WILLIAMS, J.: Sloan Construction Company, Inc., ("Sloan") appeals the dismissal of its action against the South Carolina Department of Transportation ("SCDOT"), arguing South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004) give rise to a private right of action against a violating state agency. We affirm.

FACTS

The facts of this case are largely uncontested. SCDOT hired Southco Grassing, Inc., ("Southco") as the general contractor on state highway project no. 23.504 ("the Project"). Pursuant to South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004), Southco provided SCDOT with proof it acquired a payment bond valued at 100% of the $440,016.90 contract amount. Amwest Surety Insurance Company ("Amwest Surety"), a company qualified and licensed for surety authority by the South Carolina Department of Insurance with an A- rating from the A.M. Best Company, issued the bond.

In November 2000, Sloan entered into a subcontractor agreement with Southco in connection with the Project. Over the course of Sloan's contract performance, Amwest Surety was judged insolvent by the insurance commissioner of Nebraska, the company's home state. In June 2001, the Nebraska courts ordered Amwest Surety to liquidate all its assets. Upon notice of Amwest Surety's insolvency, SCDOT wrote to Southco requesting proof of a replacement payment bond within seven days. Southco did not respond to this request. Sloan properly performed its portion of the Project, but was not paid the $51,937.66 owed for the completed job. Sloan did not file a claim against Amwest Surety through the company's appointed receiver.

In January 2002, Sloan submitted written notice to SCDOT of its unpaid claim, recounting its hardships with the insolvent Amwest Surety. Several months later, Southco submitted an affidavit to SCDOT averring all subcontractors on the Project were paid in full. In accordance with the agency's contract closeout procedures, which require an affidavit sworn by a principal of the general contractor stating all subcontractor claims are paid in full, SCDOT released the balance of the contract price to Southco.

In December 2003, Sloan commenced the present action against Southco, SCDOT, and others for the unpaid contract price. Sloan based its claim against SCDOT on South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004), asserting these statutes create an enforceable duty on the part of SCDOT to assure the payment bonds on its projects are, in fact, obtained and remain in effect until full payment. SCDOT responded by filing a 12(b)(6), SCRCP, motion to dismiss. The circuit court granted SCDOT's motion, concluding the statutes in question do not give rise to a private action against a violating state agency. This appeal followed.

SCOPE OF REVIEW

"Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action." Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003) (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)). The circuit court, in a civil action, may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Id. The motion cannot be granted if the facts set forth in the complaint and the inferences reasonably drawn therefrom would entitle the plaintiff to any relief on any theory of the case. Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987).

DISCUSSION

The circuit court concluded South Carolina Code Sections 29-6-250 and 57-5-1660(a)(2) (Supp. 2004) do not grant Sloan a private right of action against SCDOT. We agree.

Section 57-5-1660 of the South Carolina Code reads in pertinent part:

> (a) The Department of Transportation shall require that the contractor on every public highway construction contract, exceeding ten thousand dollars, furnish the Department of Transportation, county, or road district the following bonds, which shall become binding upon the award of the contract to such contractor:
>
> > (2) A payment bond with a surety or sureties satisfactory to the awarding authority, and in the amount of not less than fifty per cent of the contract, for the protection of all persons supplying labor and materials in the prosecution of work provided for in the contract for the use of each such person.

S.C. Code Ann. § 57-5-1660 (Supp. 2004). This statute, enacted to protect subcontractors and materialmen on SCDOT projects, is often referred to as the "Little Miller Act," as it was modeled after the federal Miller Act, 40 U.S.C.A. §§ 270a & 270b (1986) (following 2002 amendment, these federal statutes are cited as 40 U.S.C.A. §§ 3131-3133). Syro Steel Co. v. Eagle Constr. Co., 319 S.C. 180, 182, 460 S.E.2d 371, 373 (1995). In addition, Section 29-6-250, enacted in 2000, requires payment bonds for the protection of subcontractors on certain government projects for the full amount of the contract.

Section 29-6-250 reads in pertinent part as follows:

> (1) When a government body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract.
>
> . . . .

> (3) For the purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

S.C. Code Ann. § 29-6-250 (Supp. 2004).

Our analysis of whether these statutes grant an individual or corporation the right to sue a violating state agency begins with the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -200 (2005). "The Tort Claims Act governs all tort claims against governmental entities." Hawkins v. City of Greenville, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004). The Act, a limited waiver of the State's sovereign immunity from lawsuits, provides that State agencies are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations and exemptions provided in the Act. S.C. Code Ann. § 15-78-40 (2005).

When the Act is applied to the present facts, it is clear Sloan has no right to sue under the South Carolina Tort Claims Act's limited waiver of sovereign immunity. Because the "Little Miller Act" and section 29-6-250 deal solely with government contracts, a private individual would never be in a position to require these statutorily mandated bonds, and thus could never be liable for the failure to require them. See, e.g., Arvanis v. Noslo Eng'g Consultants, Inc., 739 F.2d 1287, 1290 (7th Cir. 1984); Hardaway Co. v. United States Army Corps of Eng'rs, 980 F.2d 1415, 1416-1417 & n.3 (11th Cir. 1993) (adopting this rationale regarding the federal Miller Act and Federal Tort Claims Act and acknowledging the application of similar analyses by the Fourth, Ninth, and Tenth Circuits). Because a private individual could never be liable under the bonding statutes, the South Carolina Tort Claims Act's limited waiver of sovereign immunity does not apply to suits brought against the government under the statutes in question.

We move now to the issue of whether South Carolina's statutory bonding scheme, in itself, constitutes a waiver of SCDOT's sovereign

immunity from suit. Because the "Little Miller Act" is patterned after the federal Miller Act, cases construing the federal Miller Act, absent a contrary expression of legislative intent, will be given great weight in the interpretation of its South Carolina counterpart. Syro Steel Co., 319 S.C. at 182, 460 S.E.2d at 373. Federal cases construing the federal Miller Act are nearly unanimous in their interpretation. Under federal law, failure of a government agency to follow the bonding requirements of the Miller Act, without other authority evincing a waiver of sovereign immunity, does not give rise to a private right of action against the agency. See, e.g., Active Fire Sprinkler Corp. v. United States Postal Service, 811 F.2d 747, 752-753 (2nd Cir. 1987) ("The Miller Act does not provide subcontractors with a right of recovery against the United States."); Arvanis, 739 F.2d at 1290 ("[In the Miller Act] [t]here is clearly no waiver of sovereign immunity."); Devlin Lumber & Supply Corp. v. United States, 488 F.2d 88, 89 (4th Cir. 1973) ("[A] violation of the Miller Act does not create liability on the part of the government . . . ."); Acousti Eng'g Co. of Florida v. United States, 15 Cl. Ct. 698, 701 (Cl. Ct. 1988) ("The Miller Act does not give subcontractors a substantive right to directly sue the United States for monies owed by [a] prime contractor.").

As there is no clear expression of legislative intent in South Carolina contrary to the interpretation of the federal Miller Act applied by the federal courts, we likewise conclude the statutes do not constitute a waiver of sovereign immunity and that a violation of our own statutory bonding scheme does not give rise to a private right of action against a state agency.[1] In doing so, we share the concern of the circuit court judge that "such a result is at odds with the overall goal of Miller Act type legislation – i.e., the protection of subcontractors who have no right to lien on government work." Nevertheless, as stated by Seventh Circuit Court of Appeals:

[1] Because we decide this case on the grounds that South Carolina's bonding scheme on state projects does not grant a subcontractor the right to bring a private action against a violating state agency, we need not address whether SCDOT complied with the statutes in question under the present facts.

> "[t]here does seem to be a gap in the statute; there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement. However, this is not a gap that we can fill with a remedy . . . ."

Arvanis, 739 F.2d at 1290. Should the General Assembly desire South Carolina's bonding scheme on state projects to allow private suits against the government, the statutes could easily call for such. See, e.g., Kelly Energy Systems, Inc. v. Brd. of Commissioners of Clarke County, 396 S.E.2d 498, 499-500 (Ga. App. 1990) ("[the Georgia bonding statute] provides that the governing body for which the work is done shall be liable to all materialmen for any loss resulting from the failure to require a payment bond.").

For the foregoing reasons, the circuit court's grant of SCDOT's motion to dismiss is

AFFIRMED.

STILWELL and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kristy and Scott Hambrick, and Others Similarly Situated, Appellants,

v.

GMAC Mortgage Corporation D/B/A Ditech.com, and Milton R. Cooley, an Agent, and John Doe, on behalf of other undiscovered Defendant Agents, Defendants,

Of Whom GMAC Mortgage Corporation d/b/a ditech. com is Respondent.

Appeal From Richland County
James R. Barber, Circuit Court Judge

Opinion No. 4104
Submitted February 1, 2006 – Filed April 17, 2006

AFFIRMED

Paul H. Hulsey, William J. Cook, of Charleston, for Appellants.

J.J. Van Ginhoven and James Y. Becker, both of Columbia and James W. McGarry, of Boston, for Respondent.

CURETON, J.: In this civil action, the circuit court dismissed Scott and Kristy Hambrick's (the Hambricks) suit against GMAC Mortgage Corporation, doing business as ditech.com (Ditech). The circuit court found the Hambricks's claims against Ditech all stemmed from the allegation that Ditech was engaged in the unauthorized practice of law. Accordingly, the circuit court concluded it lacked jurisdiction to hear this case and granted Ditech's motion dismissing the suit. We affirm.[1]

FACTS

The Hambricks obtained a real estate loan from Ditech that was secured by their home in Aiken County. The Hambricks claim Ditech engaged in the unauthorized practice of law during the loan process. First, the Hambricks claim Ditech impermissibly prepared loan-related documents without the use of an attorney and, second, Ditech failed to use an attorney to close the loan.

The Hambricks initially brought suit in Hampton County, individually and as a class action, against Ditech and Milton R. Cooley, a notary public of South Carolina, who they allege performed the real estate closing. In their complaint, the Hambricks stated eight legal and equitable claims, including breach of contract, breach of contract accompanied by a fraudulent act, fraud, constructive fraud, civil conspiracy, and a claim for accounting. Each allegation stemmed from the Hambricks's claim that Ditech charged them for

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

legal fees that were not provided nor could be provided due to Ditech's failure to utilize an attorney.

The case was removed to federal district court and ultimately remanded to state court where the Hambricks re-filed suit in Richland County. On July 26, 2004, Ditech moved for judgment on the pleadings, on the basis that South Carolina does not recognize a private right of action for the unauthorized practice of law. At the motion hearing, the Hambricks conceded that if their action sought to determine whether Ditech's actions constituted the unauthorized practice of law, then the suit should be brought in the original jurisdiction of the South Carolina Supreme Court. However, the Hambricks asserted Ditech's actions during the loan transaction process, pursuant to case law, have already been declared by the supreme court to be the unauthorized practice of law. Therefore, they allege the circuit court had jurisdiction to assess damages stemming from the improperly charged fees.

The circuit court granted Ditech's motion for judgment on the pleadings. The circuit court primarily relied on Linder v. Insurance Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002), in finding South Carolina law precludes private citizens from suing for money damages based on an allegation of the unauthorized practice of law. Further, the circuit court found the only claim that could be brought based on an allegation of the unauthorized practice of law is a request for declaratory relief brought in the original jurisdiction of the Supreme Court. Accordingly, the circuit court concluded it lacked jurisdiction to hear this case and granted Ditech's motion dismissing the suit. This appeal followed.

STANDARD OF REVIEW

The circuit court may dismiss a claim when the defendant demonstrates the plaintiff's "'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct. App. 2002) (quoting Rule 12(b)(6), SCRCP). The circuit court "must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697,

698 (1987) (citation omitted). "The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." Id. "All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings." FOC Lawshe Ltd. P'ship, 352 S.C. at 413, 574 S.E.2d at 230. This court applies the same standard of review implemented by the circuit court. Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

LAW/ANALYSIS

The sole issue on appeal is whether the circuit court erred in dismissing the Hambricks's complaint. For the reasons set out below, we find the Hambricks failed to allege facts sufficient to maintain this action. Accordingly, we affirm the judgment of the circuit court dismissing Hambricks's complaint.

The South Carolina Supreme Court has the duty to regulate the practice of law in this state and, accordingly, has the authority to define what constitutes the unauthorized practice of law. The South Carolina Constitution provides "[t]he Supreme Court shall have jurisdiction over the admission to the practice of law . . . ." S.C. Const. art. V. § 4; see also S.C. Code Ann. § 40-5-10 (2001) ("The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law is hereby recognized and declared."). The supreme court has stated the purpose behind laws prohibiting the unauthorized practice of law is "to protect the public from incompetent, unethical, or irresponsible representation." Renaissance Enters. Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 652, 515 S.E.2d 257, 258 (1999).

In Linder v. Insurance Claims Consultants, Inc., the Linders suffered property loss from a fire in their home. 348 S.C. 477, 483, 560 S.E.2d 612, 616 (2002). While their claim was being adjusted by the insurance company, the Linders hired a public insurance adjusting firm, Insurance Claims Consultants (ICC), to advocate on their behalf and they released the lawyer

they had previously hired. Id. at 483-84, 560 S.E.2d at 616. Additionally, the Linders requested their insurance company deal directly with ICC concerning their claim. Id. at 484, 560 S.E.2d at 616. When the Linders failed to pay ICC fees required under the contract, ICC brought suit in circuit court. In their answer, the Linders asserted, inter alia, that ICC engaged in the unauthorized practice of law, and thus the contract between the parties was void. The Linders also sought damages in tort. Additionally, the Linders filed a declaratory judgment action in the South Carolina Supreme Court seeking a judicial determination that ICC's acts constituted the unauthorized practice of law. Id. at 486, 560 S.E.2d at 617.

The supreme court found that public insurance adjusting did not per se constitute the unauthorized practice of law, but that some of ICC's actions, namely advising the Linders of their rights under the insurance policy, amounted to the unauthorized practice of law. Id. at 493-94, 560 S.E.2d at 621. Most important to the resolution of this case, the supreme court specifically rejected the Linders's claim, that "once an act is declared to be the unauthorized practice of law, then the circuit court has jurisdiction to hear various causes of action, including a tort action for damages." Id. at 496, 560 S.E.2d at 622. In rejecting this theory, the supreme court stated:

> In bringing the instant action, the Linders acted in accordance with this Court's decision in Unauthorized Practice of Law Rules, where we urged "any interested individual who becomes aware of such conduct [which may be the unauthorized practice of law] to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct." Unauthorized Practice of Law Rules, 309 S.C. at 307, 422 S.E.2d at 125. We did not, however, authorize a private right of action. Furthermore, there are statutes which prevent the unauthorized practice of law, and while they state such activity will be deemed a crime, they do not sanction a private cause of action. S.C. Code Ann. §§ 40-5-310-320 (2001). When faced with a

> similar issue, the Supreme Court of Hawaii found that its criminal statutes prohibiting the unauthorized practice of law, while providing remedies such as declaratory and injunctive relief, as well as criminal sanctions, did not create a private claim for damages. Reliable Collection Agency, Ltd. v. Cole, 59 Haw. 503, 584 P.2d 107 (1978). We adopt that reasoning and hold there is no private right of action in South Carolina for the unauthorized practice of law.

Id. at 496-97, 560 S.E.2d at 622-23.

The Hambricks contend that, unlike the situation in Linder, they are not seeking a judicial determination that Ditech's actions amounted to the unauthorized practice of law. They maintain the actions attributed to Ditech have already been deemed the unauthorized practice of law by prior case law.[2] Even if we assume Ditech's actions were tantamount to the unauthorized practice of law, Linder explicitly precludes a private right of action.

To get around Linder, the Hambricks argue their eight causes of action alleged in the complaint are somehow distinct from their claim Ditech engaged in the unauthorized practice of law. We disagree. Every allegation in the complaint ultimately stems from the Hambricks's assertion that Ditech engaged in the unauthorized practice of law during the loan transaction. For example, the Hambricks's claim for breach of contract accompanied with a fraudulent act alleges Ditech breached the contract by "manipulating the process so that attorneys would not be used" and Ditech "knew that licensed attorneys were legally required to handle all real estate loans in South Carolina." Even the Hambricks's equitable claim for unjust enrichment alleges Ditech charged fees for services that could not have been performed "absent the use of a licensed South Carolina attorney." The Hambricks's allegations in their complaint are intertwined with their claim Ditech's

[2] In Doe v. McMaster, 355 S.C. 306, 312, 585 S.E.2d 773, 776 (2003), the court held "what constitutes the practice of law turns on the facts of each specific case."

actions constituted the unauthorized practice of law. Only our supreme court has the constitutional duty to determine what acts constitute the unauthorized practice of law. See In re Unauthorized Practice of Rules Proposed by the S.C. Bar, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992) ("The Constitution commits to this Court the duty to regulate the practice of law in South Carolina") (citing S.C. Const. art. V. § 4).

CONCLUSION

We find the circuit court lacked jurisdiction to determine whether Ditech engaged in the unauthorized practice of the law. Further, we find even if the alleged acts were the unauthorized practice of the law, no private right of action exists under Linder. Accordingly, the circuit court did not err by dismissing the Hambricks's complaint. For the foregoing reasons, the decision of the trial court is

AFFIRMED.

SHORT, WILLIAMS, JJ., CONCUR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Legette, Appellant,

v.

Piggly Wiggly, Inc., Respondent.

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

Opinion 4105
Submitted March 1, 2006 – Filed April 17, 2006

AFFIRMED

B. Scott Suggs, of Florence, and Daphne A. Burns, of Mt. Pleasant, for Appellant.

R. Heath Atkinson, of Florence, for Respondent.

PER CURIAM: Linda Legette appeals the trial court's grant of summary judgment in favor of Piggly Wiggly in this slip and fall case. We affirm.[1]

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

FACTS

Legette went to the Piggly Wiggly grocery store in Marion, South Carolina, on June 19, 2000. As Legette entered the store, it was drizzling rain. While she was inside the store, a period of approximately twenty to twenty-five minutes, the rain increased due to an afternoon thundershower. As she began to exit the store, Legette slipped and fell in some moisture near the store's sliding glass doors. Immediately after her fall, Piggly Wiggly employees helped Legette into a chair and took photographs of her injuries and the scene. The store's owner and manager, Talbert Blackmon, prepared an incident report for its insurer. Legette was seen at the emergency room, and x-rays were negative for any broken bones. She claims to have injured her knee, elbow, thumb, and back in the fall. Eventually, in April 2001, Legette underwent back surgery to repair a disc herniation.

Legette sued Piggly Wiggly, Inc., claiming that the store knew or should have known of the dangerous condition and did nothing to remedy it and that the store failed to provide a safe shopping environment for invitees. The trial court granted Piggly Wiggly's motion for summary judgment, and Legette appeals.

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Cafe Assocs. Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). In determining whether any triable issues of fact exist, the evidence and all the inferences that can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court . . . ." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 861 (2002).

LAW/ANALYSIS

In order to establish liability in a "slip and fall" case, a plaintiff must show that the defendant either (1) created the defective condition or (2) had knowledge of the dangerous condition and failed to remedy it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). In the instant case, there is no contention that Piggly Wiggly created the dangerous condition, as Legette argues the floor was slippery from rainwater. Therefore, we are left to consider whether Piggly Wiggly should have known of the dangerous condition and failed to take reasonable steps to remedy it. It is well settled that merchants are not required to continuously inspect their floors for foreign substances. Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 166, 580 S.E.2d 440, 442 (2003). A merchant owes [customers] only "the duty of exercising ordinary care to keep the premises in reasonably safe condition." Milligan v. Winn-Dixie Raleigh, 273 S.C. 118, 120, 254 S.E.2d 798, 799 (1979).

In Young v. Meeting Street Piggly Wiggly, 288 S.C. 508, 512, 343 S.E.2d 636, 638 (Ct. App. 1986), this court concluded that the addition of mats at a store's entrance, the periodic mopping of the area, and the placement of at least one warning sign were all reasonable steps taken by the store to protect its customers. Customers, as ordinary, prudent persons, should understand the risks posed by rainy conditions. Id. The court stated: "Since it is impossible to keep commercial premises entirely free of tracked-in rain during bad weather, a merchant's liability may not be based solely on the presence of moisture." Id. at 510, 343 S.E.2d at 637-38.

While Blackmon concedes there was moisture on the floor, the record shows that Piggly Wiggly took reasonable precautions to provide safe premises for its customers. Legette testified she did not notice water on the floor prior to her fall. She further testified she did not remember seeing any mats or warning signs at the entry where she fell. However, photographs taken by store employees immediately following Legette's fall show large mats and warning signs in the area. Legette testified she did not recall employees bringing mats or warning cones out to the area after she fell or while she was sitting for the photographs. Testimony that contradicts

undisputed physical evidence generally lacks probative value. See Patterson v. I.H. Servs., Inc., 295 S.C. 300, 304, 368 S.E.2d 215, 218 (Ct. App. 1988) (citing Lail v. South Carolina State Highway Dep't, 244 S.C. 237, 136 S.E.2d 306 (1964) for the proposition that "testimony relied upon by plaintiff to establish liability was inconsistent with incontrovertible physical facts and therefore lacked probative value.").

The incident report completed by Blackmon indicated that warning signs were at the entrances to the store. Furthermore, there was testimony from Blackmon regarding the store's inclement weather procedures. This included having employees mop the entry areas as needed and putting out warning signs. According to Blackmon, mats were always in place inside the store at the entryway and were only removed if they became so saturated as to pose a greater danger than the bare floor. Blackmon did not recall the mats being removed on the day of the accident.

Even viewing all the evidence in the record in the light most favorable to Legette, we cannot conclude that summary judgment was inappropriate. Legette testified that she did not see the water before she fell. The inference to be drawn is that the accumulation of water was minimal. Furthermore, Blackmon's testimony, the incident report, and the photographs all support the conclusion that mats and warning signs were in place at the entrance to the store. The only evidence in the record to refute this is Legette's uncertain testimony.[2] Initially, she claimed no mats or cones were at the door. Then, when confronted with the photographs, she could only be certain that she did not remember seeing them; they might have been there or they might not have been there. Legette also testified that when she fell, she heard

[2] In Felder v. K-Mart Corp., 297 S.C. 446, 377 S.E.2d 332 (1989), the court, declining to overturn the jury's verdict, concluded there was a jury issue regarding whether or not the store had taken reasonable measures to protect its customers. The plaintiff claimed there were no mats or warning signs at the store's entrance and that a child slipped on the floor soon after he had fallen. There is no indication in the court's opinion that plaintiff ever wavered from that testimony. The evidence presented on behalf of K-Mart consisted solely of an employee's contradictory testimony.

Blackmon shouting at one of his employees saying, "why didn't they put out the mats, and why didn't somebody mop up the water." Again, after being confronted with the photographs, Legette's testimony changed. She claimed she did not hear Mr. Blackmon say anything about mats. "I said he said to mop. . . . No, I didn't say mats—mats. I said mop." In light of Legette's vacillating testimony and the other evidence presented, we cannot conclude there was a genuine issue of material fact for the jury's consideration regarding the store's liability.

AFFIRMED.

GOOLSBY, HUFF, and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Betty Kelley, Appellant,

v.

Henry Kelley, Respondent.

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

Opinion No. 4106
Submitted December 1, 2005 – Filed April 24, 2006

AFFIRMED

John S. Nichols and Robert M. P. Masella, both of Columbia, for Appellant.

Harvey L. Golden and J. Michael Taylor, both of Columbia, for Respondent.

PER CURIAM: This is an action to recover unpaid alimony awarded in a 1974 divorce decree. The decree required Henry Kelley (Husband) to pay alimony to Betty Kelley (Wife). The family court granted Husband's

motion to dismiss, finding Wife's claim for "past due alimony and future support" was barred by laches and equitable estoppel. We affirm.[1]

FACTS

Husband and Wife divorced on July 30, 1974, after fourteen years of marriage. The divorce decree required Husband to pay child support of fifty dollars per week per child and alimony of twenty-five dollars per week. At the time of the divorce, Husband lived in Florida and Wife lived in South Carolina. The court awarded Wife custody of the two children, Chuck and Kevin, who, at the time, were twelve and ten respectively.

Less then a year after the divorce, Wife sent Chuck to live with Husband in Florida because she thought Husband could better control him. Husband's counsel wrote a letter dated March 25, 1975, memorializing an agreement that would "reduce [Husband's] support payments by one-half (1/2) from this time forward and [Husband] will have complete custody and control of Chuck Kelley." Former Family Court Judge John A. Mason signed the bottom of this letter.

The parties continued under this half-support custody agreement for almost two years, until Chuck went back to live with Wife. By order dated September 23, 1977, the provisions of the original divorce decree were reinstated, and Husband was required to make payments to Wife to resolve a support arrearage of $4,450. This arrangement also did not last long. Less than five months after the 1977 order, Chuck returned to live with Husband in Florida, where he remained permanently. Wife maintained custody of Kevin at that time.

Six months after Chuck returned to Florida to live with Husband, Wife's then attorney obtained an *ex parte* order invoking the automatic arrest provision of the September 1977 order. This order was neither issued with notice to Husband's counsel nor was it ever served on Husband. Moreover,

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

Wife's current attorney conceded no evidence existed to show the order was served on Husband.

Less than one month after the *ex parte* order was signed, Kevin, who was then fifteen, went to Florida to visit Husband and decided to move there permanently as well. Husband claims that at this point, because the two children lived with him, he and Wife orally agreed that he no longer owed her any alimony, and she did not owe him child support. Wife disputes the existence of any such agreement.

On October 5, 2001, Wife instituted a rule to show cause, seeking to hold Husband in contempt for failure to obey the previous orders requiring him to pay alimony. Husband answered and moved to dismiss based upon laches, expiration of the statute of limitations, and estoppel. After a hearing on the merits, the family court denied Wife's claim for past due and future alimony on the grounds of laches and estoppel. Wife then moved to alter or amend the judgment which was denied by the trial court. This appeal followed.

STANDARD OF REVIEW

In an appeal from the family court, we have jurisdiction to find the facts in accordance with our view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not require us to disregard the family court's findings, and we remain mindful of the fact the family court judge, who saw and heard the parties, is in a better position to evaluate their credibility and assign weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

Wife contends the family court erred by denying her claim for alimony based on laches. We disagree.[2]

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001).

Whether laches applies in a particular situation is a highly fact-specific inquiry; therefore, the merits of each case must be closely examined. Muir v. C.R. Bard, Inc., 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999). Thus, "the determination of whether laches has been established is largely within the discretion of the trial court." Emery v. Smith, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004). Additionally, in order for the defense of laches to be sustained, "the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." Byers v. Cherokee County, 237 S.C. 548, 560, 118 S.E.2d 324, 330 (1961).

In this action, the family court found Wife's delay was unreasonable. It is undisputed that there has been at least a twenty-four year delay from the original divorce order to the present action. Alimony was awarded to Wife in

[2] Because alimony is a continuing obligation, the doctrine of laches would not apply to Husband's future alimony payments. See Stephens v. Hamrick, 358 S.E.2d 547 (N.C. Ct. App. 1987) (refusing to apply doctrine of laches to the enforcement of a court order for alimony because "the obligation to furnish support is continuous [and therefore] a lapse of time will not be a bar to the commencement"). However, the family court found Wife's claim for "past due alimony and future support" was barred by laches **and** equitable estoppel. We affirm that order, but note that Wife's claim for future support is barred solely by the doctrine of equitable estoppel, an issue we discuss below.

the 1974 divorce decree, reiterated in the 1977 order, and the present action was not commenced until 2001. Although Wife received an order in 1978 holding Husband in contempt, she admittedly never served Husband or his counsel. Despite seeing Husband at numerous gatherings over the years, including the weddings of both sons, Wife failed to have Husband served with the order. She also failed to write or call Husband to request alimony.

Wife further claims she did not know how to locate Husband and therefore her delay should be excused. However, the record shows Wife has seen her children at least once a year since 1978, and Husband has employed both sons intermittently over the years. Wife testified to having a good relationship with her sons, and she offered no explanation as to why she could not have asked her sons where Husband lived. Additionally, Husband presented evidence he owned property in Florida, his telephone number was listed, and he had an answering service when he traveled outside the state of Florida. Therefore, Wife's argument that she could not locate Husband is untenable. Accordingly, we agree with the family court's finding that Wife was afforded numerous opportunities to enforce her right to alimony over twenty-four years, and her failure to do so was unreasonable.

We further find Husband was prejudiced by Wife's delay in seeking alimony. Husband is sixty-five years old and approaching retirement. He testified his finances have been erratic over the past twenty-four years, and if he had known he had a lingering support obligation, he would have asked the court to terminate or reduce his payments. He is currently on his fourth marriage, and is a diabetic with extremely poor health. Wife, however, has maintained the same employment since the divorce and has been able to meet her own needs for the past twenty-four years. Therefore, we agree with the family court's finding that Husband would be materially prejudiced by Wife resurrecting an alimony obligation over twenty years old.

Wife also relies on the case of Miles v. Miles, 355 S.C. 511, 586 S.E.2d 136 (Ct. App. 2003), for the proposition that Husband cannot orally modify a court order. Although it is "axiomatic that parties cannot modify a court order," Wife's reliance on Miles is misplaced. Id. at 511, 586 S.E.2d at 140. In Miles, a husband brought an action to terminate alimony five years after

the divorce based on an oral modification. Id. at 518, 586 S.E.2d at 140. We found the divorce decree specifically incorporated an unambiguous written agreement by the parties that any agreement or court order could not be modified by the parties "without written consent of husband and wife." Id. In this action, no agreement exists regarding modification in the original divorce order as there was in Miles. Moreover, Husband is not seeking oral modification of a court order. Rather he argues that the conduct of both parties over the years reflects their mutual agreement that Husband no longer owed alimony. We find it particularly noteworthy that Wife sought to have Husband held in contempt in 1978, but failed to serve the order on Husband when Chuck and Kevin subsequently moved in with Husband. The reasonable inference from the evidence is Wife agreed not to pursue Husband's alimony obligation because Husband had a claim for child support against her. Therefore, Wife's reliance on Miles is misplaced.

Wife lastly argues the family court erred in finding her claims barred by equitable estoppel, arguing that Husband did not meet his burden in establishing equitable estoppel. We disagree.

In South Carolina, "the essential elements of estoppel are divided between the estopped party and the party claiming estoppel." Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994) (citations omitted). As to the party being estopped, the elements are: 1) conduct which amounts to a false representation, or conduct calculated to convey the impression that the facts are otherwise, 2) the intention that such conduct shall be acted upon by the other party, and 3) knowledge of the true facts. Id. at 477, 451 S.E.2d at 928; Johns v. Johns, 309 S.C. 199, 204, 420 S.E.2d 856, 859 (Ct. App. 1992). In order to claim estoppel, Husband must show: "1) a lack of knowledge and the means of knowledge of truth as to facts in question; 2) justifiable reliance upon the conduct of the party estopped; and 3) prejudicial change in the position of the party claiming estoppel." Walton v. Walton, 282 S.C. 165, 168, 318 S.E.2d 14, 16 (1984).

Here, Wife's conduct conveyed the impression that Husband was no longer obligated to pay alimony based on Husband's understanding that Wife agreed to waive alimony in exchange for him having custody of the children

and based on Wife's failure to demand alimony from Husband in over twenty years. Further, Wife intended Husband to rely on the agreement that he not pay her alimony, so that he, in turn, would not pursue child support against her. Husband's decision not to seek child support also shows he was justified in relying on the parties' decision to mutually waive support obligations. Lastly, Husband changed his position in reliance on the agreement because if he had known he had a lingering support obligation, he would have sought to have his obligation reduced or eliminated. Therefore, we find the family court correctly concluded equitable estoppel would also bar Wife's claim for alimony.

CONCLUSION

Accordingly, the family court's finding that Wife's claim for past due alimony and future alimony should be barred on the grounds of laches and equitable estoppel is hereby

AFFIRMED.[3]

HEARN, C.J., and HUFF and BEATTY, JJ., concur.

[3] Because our resolution of these issues is dispositive, we need not address Appellant's remaining issues. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (holding an appellate court need not address remaining issues when the resolution of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Russell W. Rice, Jr., **Appellant.**

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion 4107
Heard April 6, 2006 – Filed April 24, 2006

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

ANDERSON, J.: Russell W. Rice, Jr. appeals his convictions and sentences for murder and trafficking in cocaine arguing the trial court

erred in denying his motion to sever the charges. Rice contends he was prejudiced by having a single trial for both charges because the murder occurred six to seven weeks before the cocaine trafficking. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In September or October of 2002, upon leaving a restaurant in Greenville, Rice discovered his car, a 1994 Mercury Topaz, had been stolen from the parking lot. Rice suspected Homer Johnson, an acquaintance who sold drugs, stole the car. Drugs and money were inside the vehicle when it was stolen.

On November 4, 2002, despite Rice's suspicion that Johnson had stolen his car, Rice and Johnson entered into a drug deal. Johnson possessed twenty pounds of marijuana that he, Rice, and another person, Johnny Hamby, "cut up" into twenty individual bags. Johnson gave Rice ten pounds of marijuana and told him he owed $11,000. Although Rice was unhappy that he received only ten pounds of marijuana, he told Johnson he would pay him the money the next day.

The following day, Rice phoned Hamby. He asked Hamby to call Johnson and tell him that Rice would meet him at a Super 8 Motel. Hamby relayed the message to Johnson. Johnson was murdered at the motel.

During the course of the police investigation, Daniel Fuller, the investigator assigned to the case, attempted to contact Rice numerous times by telephone. On December 26, Investigator Fuller spoke with Rice, who informed Fuller he was leaving town and would not return until December 30. Fuller was skeptical of Rice and began looking for Rice in Greenville. Fuller observed Rice driving a 1994 Mercury Topaz – the car Rice claimed Johnson had stolen from him a few months earlier. Fuller found the car at a motel and discovered it was not insured or properly registered in South Carolina. Further, the forty-five day paper tag had expired. Fuller set up surveillance at the exits of the motel.

When Rice left the parking lot, Corporal Dave Dempsey followed Rice and pulled him over. Rice was unable to provide proof of insurance. Dempsey and Fuller asked Rice to exit the vehicle. They patted Rice down to see if he had a weapon. Dempsey found a pistol in Rice's front pocket and $2,500. They arrested Rice for the traffic violations. The officers conducted an inventory search before they removed the car from the scene. A search of the trunk produced a large amount of cocaine, a scale, and a rifle cut into several pieces in a plastic bag. Rice was subsequently charged with murder and trafficking in cocaine.

Before trial, Rice moved to sever the murder and trafficking in cocaine charges. Rice argued the traffic stop occurred six to seven weeks after the murder and the only connection between the two was that a weapon was found with the cocaine. Therefore, Rice alleged, no nexus between the two charges existed. The State disagreed and claimed the reason for the stop was the murder. The State believed the rifle found in Rice's car was the murder weapon. The State contended the "drug transaction was at the root of the murder itself" and the two charges involved the same or similar evidence. The trial court denied the motion to sever the charges. A jury convicted Rice of both charges.

STANDARD OF REVIEW

A motion for severance is addressed to the sound discretion of the trial court. State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); Walker, 366 S.C. at 656, 623 S.E.2d at 128; see also State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002) (declaring circuit court has wide discretion when deciding whether to consolidate charges for trial and its decision will only be overturned when abuse of discretion has occurred). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Walker, 366 S.C. at 656, 623 S.E.2d at 129.

LAW/ANALYSIS

SEVERANCE

Rice contends the trial court erred in refusing to sever the murder and trafficking in cocaine charges. Rice maintains the cocaine discovered in his car was unrelated to the murder that occurred six to seven weeks earlier. Therefore, Rice avers any evidence of cocaine trafficking was prejudicial to Rice in the murder trial, warranting severance of the charges. We disagree.

The appellate court considers several factors when deciding whether the trial court's consolidation of charges was proper. Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005); State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (noting where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place and character, trial judge has authority, in his discretion, to order indictments tried together over objection of defendant absent showing that defendant's substantive rights were violated); McCrary v. State, 249 S.C. 14, 36, 152 S.E.2d 235, 246 (1967) (stating "[t]he two offenses were of the same general nature, involving connected transactions closely related in time, place and character; and the trial judge had power, in his discretion, to order them tried together over objection by the defendant in the absence of a showing that the latter's substantive rights would have been thereby prejudiced."). Offenses are considered to be of the same general nature where they are interconnected. State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002); Jones, 325 S.C. at 315, 479 S.E.2d at 519.

Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same

evidence may not properly be tried together. See Simmons, 352 S.C. at 350, 573 S.E.2d at 860; Jones, 325 S.C. at 315, 479 S.E.2d at 519; see also State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial judge erred in consolidating the charges for one trial where the crimes did not arise out of a single chain of circumstances and they required different evidence); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (finding that joint trial on identical but unrelated forgeries violated defendant's right to a fair trial). Cf. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (ruling that consolidation was proper even though crimes occurred over numerous days because conduct arose from a single uninterrupted crime spree); Simmons, 352 S.C. at 351, 573 S.E.2d at 861 (concluding defendant's separate burglary offenses were properly joined when both arose out of a single chain of events, were of the same nature, and proved by the same evidence).

Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances; (2) are proved by the same evidence; (3) are of the same general nature; and (4) no real right of the defendant has been prejudiced. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); see also Simmons, 352 S.C. at 351, 573 S.E.2d at 861 ("Further, joinder of offenses in one trial is proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof.").

In the case sub judice, two separate indictments were issued against Rice. The first was for trafficking in cocaine, the second for murder. The cocaine trafficking charge arose out of a traffic stop the police set up because they suspected Rice of Johnson's murder. The police found the gun believed to be the murder weapon in the same search that produced the cocaine that forms the basis of the cocaine trafficking charge. The State surmised Rice's motive for murdering Johnson was in part to retrieve the cocaine and money Johnson stole from Rice's car. When the police arrested Rice at the traffic stop, he was found with large amounts of cocaine and money. Moreover, the

testimony at trial revealed the relationship between Rice and Johnson was largely based on selling drugs. The State's theory as to the motive for Johnson's murder involved the drugs Johnson stole from Rice when he stole Rice's car as well as the drug-related argument the two recently had involving the marijuana.

Additionally, Rice suffered no prejudice from the joinder of charges because, without the evidence of cocaine trafficking, the jury would not have received an accurate portrayal of the case. The cocaine trafficking evidence was necessary for a full presentation of the case without fragmentation. See State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), our Supreme Court explained:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . [and is thus] part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

Id. at 122, 470 S.E.2d at 370-71 (internal quotations omitted).

The information regarding the cocaine trafficking was relevant to show the complete, whole, unfragmented story regarding Johnson's murder. Therefore, Rice was not prejudiced by consolidating the two charges.

CONCLUSION

We hold the trial court did not abuse its discretion in refusing to sever the murder and trafficking in cocaine charges against Rice. Rice's arrest for trafficking in cocaine arose out of the murder investigation. Moreover, Rice murdered Johnson because of their history of selling drugs. Accordingly, Rice's convictions and sentences are

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth Middleton, Appellant,

v.

Elizabeth Ann Johnson and
Eugene Hollington, Respondents.

Appeal From Berkeley County
Jack Alan Landis, Family Court Judge

Opinion No. 4108
Submitted March 1, 2006 – Filed April 24, 2006

REVERSED AND REMANDED

Daphne A. Burns, of Mt. Pleasant, and Margaret D. Fabri, of Charleston, for Appellant.

Elizabeth Johnson McCants, of Florence, and Eugene Hollington, of Warner-Robbins, for Respondents.

HEARN, C.J.: Kenneth Middleton appeals from an order of the family court denying him visitation with Joshua Hollington, a minor child. Although Middleton admits he is not biologically related to Josh, he argues he is entitled to visitation because he served as Josh's "psychological parent" for ten years and because visitation is in Josh's best interest. We reverse and remand.

FACTS

Middleton and Elizabeth Johnson (Mother) had a long-term relationship from 1979 until the early 1990s. At the time they met, Mother had two small daughters: a four-year-old named Chelsea and a one-year-old named Tenille. Middleton also had two daughters; his older daughter, Andrea, was eleven, and his younger daughter, Kenisha, was four. While Mother dated Middleton, she and her children spent Thursdays through Sundays at his home. Middleton, with Mother's encouragement, developed a strong, parental relationship with both Mother's daughters. He supported the two girls financially and emotionally, and even though they are now grown, he still considers them his daughters. In fact, when Chelsea married, Middleton escorted her down the aisle despite the fact that her biological father attended the wedding.

By 1992, Mother and Middleton were no longer in a serious relationship; however, they had an intimate encounter in July of that year. Nine months later, on April 7, 1993, Joshua Hollington was born. During Mother's pregnancy, she told Middleton that Eugene Hollington was the father of her child. However, after Josh's birth, Mother called Middleton and told him he needed to see Josh, and she sent a photograph to Middleton when Josh was three months old. The implication was that Middleton was Josh's father because the resemblance between Josh and Middleton was so striking.

Once Middleton saw the photograph and the physical similarity between Josh and himself, he showed the picture to various family members and friends. They all thought, as did Middleton, that Josh and Middleton were biologically related. Subsequently, Middleton went to his doctor to

have a blood test performed, and the test did not exclude him as Josh's biological father.

Beginning when Josh was three months old, Middleton took an active role in Josh's life. He regularly spent time with Josh and supported him financially. When Josh was approximately one year old, a DNA test revealed Eugene Hollington to be Josh's biological father. By that time, Middleton testified he was already committed to being Josh's father, and with Mother's blessing, Middleton continued to love and take care of Josh as though he were a son. When Josh was three, Mother lived in a home owned by Middleton that was next door to Middleton's father's house. Middleton checked on his father daily, and nearly every time Middleton was at his father's house, Mother sent Josh over to visit. Often, Middleton would take Josh home to spend the night.

When Josh began preschool, Middleton and Mother shared the costs. Middleton signed Josh's report cards and picked Josh up from preschool at least three days per week. Essentially, Middleton and Mother had a joint custody arrangement, with Mother caring for Josh Mondays through Wednesdays and Middleton keeping Josh the remainder of the week.

This joint custody arrangement was interrupted briefly when Josh was approximately four years old, and Mother moved in with her boyfriend. At that point, Mother attempted to stop Middleton from seeing Josh because her boyfriend did not like Middleton's presence in their lives. This was resolved when Middleton offered to pay Josh's entire daycare expense, at which point, his normal Thursday through Sunday visitation schedule resumed.

When Josh started public school, Middleton, without Mother, took Josh to his first day of kindergarten. Josh's teachers from second, third, and fourth grades testified that they all believed Middleton was Josh's biological father. Even on the days when Josh did not spend the night with Middleton, Middleton would drive him to school in the mornings. He also picked up Josh nearly every day after school, and he attended PTA meetings, open houses, field trips, and other school-related activities. The teachers acknowledged Middleton as Josh's father in front of Mother, and Mother

never corrected them. Middleton also enrolled Josh in the Boy Scouts and in a basketball league. Josh's basketball coach testified that Josh referred to Middleton as "my dad," and Middleton took Josh to every practice and game.

When Josh was in third grade, Mother began to date John McCants. As the couple became more serious, Mother called Middleton and stated McCants did not want Josh at Middleton's house every weekend. To accommodate her boyfriend, Mother came up with a schedule where she and Middleton rotated days every week. By this point in time, McCants was living with Mother, and eventually the two married.

As part of the rotating schedule, Josh spent Christmas of 2002 with Middleton and New Year's Eve with Mother. According to the visitation schedule, Josh was to return to Middleton's house on January 1, 2003; however, Mother called Middleton that day and explained that she was not going to bring Josh over because he had been acting up, and she had to punish him. When Josh came over the following day, he hugged Middleton and told him that Mother had left marks on him by hitting him with a studded belt. Josh showed Middleton the marks on his upper thighs, near his groin area.

Middleton testified that he had previously observed signs of physical abuse and that he had spoken to Mother about hitting Josh. Middleton was concerned that if he reported this suspected abuse, Mother would forbid him from seeing Josh. Because Middleton did not want to jeopardize his relationship with Josh, he spoke with Josh's principal about the marks, but did not otherwise contact the authorities.

Later that evening, Mother called and asked to speak with Josh. Middleton informed her Josh was about to get in the shower, and that Josh would call her back once he was through. Moments later, Mother called back and demanded Josh be brought to her. Middleton did not understand what could have transpired in those few minutes to make Mother so angry, but speculated that Mother's change in demeanor could have occurred because she thought Middleton might see the marks she left on Josh when Josh undressed to shower. Middleton told Mother it was his night with Josh, and

because Josh had been sick earlier, he should not travel outside in the winter right after a shower. Middleton testified he was afraid for Josh's welfare and refused to bring him to Mother's house. When the telephone conversation ended, he called the police department and reported the alleged abuse. Mother and McCants also contacted the police to report Middelton's refusal to return Josh.

When the police arrived, they brought Mother and McCants with them. Because Mother had legal custody, Josh was returned to her. Officer Maggie Carver reported the case to the Department of Social Services, but inexplicably, the Department informed Officer Carver in a voicemail that it would not "take the case." Officer Carver testified she believed Middleton's reason for reporting the alleged abuse was out of true concern for Josh.

After this incident in January 2003, Mother terminated all contact between Josh and Middleton. She also contacted school officials and told them Middleton was not allowed to see Josh. Approximately one year later, Mother, McCants, and Josh moved to Florence, South Carolina.

On February 11, 2003, Middleton filed this action seeking custody of Josh.[1] He also filed a motion to have a guardian ad litem appointed to represent Josh. Mother answered, stating the action should be dismissed because Middleton, not being biologically related to Josh, lacked standing to proceed. The family court (1) denied Mother's motion to dismiss; (2) appointed a guardian to represent Josh; (3) required Middleton to join Eugene Hollington, Josh's biological father; and (4) denied Middleton any visitation. On April 14, 2003, Middleton filed an amended complaint joining Hollington to the action. Despite being joined in the action and having the pleadings served on him by certified mail, return receipt requested, Hollington has never made an appearance or responded.

On June 23, 2003, the guardian filed a motion seeking counseling for Josh. The family court issued an order requiring Mother, Middleton, and

[1] At trial, Middleton amended the complaint, seeking only visitation with Josh.

Josh to cooperate in counseling. Several months later the guardian filed an ex parte emergency motion seeking to compel Mother's continued compliance with court mandated counseling because Mother stopped taking Josh to counseling. After a hearing, the family court ordered both Mother and Josh to continue meeting with the therapist, Dr. Kay Newman.

On November 10, 2004, Dr. Newman issued her report recommending Middleton resume visitation with Josh. In her report she stated Josh was a kind, gentle boy whose primary concern was that Dr. Newman understand how much he loves Middleton. According to Dr. Newman, Josh and Middleton separately, "report[ed] a very close, happy relationship between them. Josh reminisce[d] much about Mr. Middleton's taking him to church, Boy Scouts, signing him up for and attending his basketball league, and other events." Dr. Newman noted that Josh's biological dad had never been involved in Josh's life,[2] while Middleton had been, with Mother's blessing, very involved. She also stated McCants declined to be involved in any of the therapy sessions. Further, her report revealed that because Middleton had been instrumental in involving Josh in activities and was an important source of socialization, the move to Florence coupled with losing contact with Middleton, had a negative impact on Josh emotionally. Ultimately, Dr. Newman recommended Josh resume visitation with Middleton, with Mother's liberal input into the form of visitation.

After a three-day trial, the family court denied Middleton's right to visitation. The family court found that despite Mother's position that Middleton had been overindulgent with Josh, Middleton had done nothing "which would have a negative effect on the relationship between the child and his Mother." However, the family court found that under the law of South Carolina, a fit, biological parent has the fundamental right to make decisions concerning whether a third party may visit her child. The family court reasoned that because Josh knew he had a biological father, Middleton could not be his psychological parent, and therefore Middleton had no legal right to petition for visitation. This appeal followed.

[2] Other than seeing Josh one time when Josh was three days old, Hollington has never visited Josh.

STANDARD OF REVIEW

On appeal from the family court, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not require us to disregard the family court's findings. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). We remain mindful of the fact the family court judge, who saw and heard the parties, is in a better position to evaluate their credibility and assign weight to their testimony. Id.

LAW/ANALYSIS

In this case, we are asked to determine what legal standard applies to a third party's claim for visitation of a non-biological child for whom he claims to have functioned as a psychological parent. On appeal Middleton argues he has standing to seek visitation because he functioned as a psychological parent to Josh. For the reasons set forth below, we agree, and find the family court erred in concluding Middleton was not Josh's psychological parent and erred in finding Middleton was not entitled to visitation. Accordingly, we reverse and remand.

I. Standing

In all child custody cases, the welfare of the child and the child's best interest is the "primary, paramount and controlling consideration of the court . . . ." Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978) (citing Davenport v. Davenport, 265 S.C. 524, 220 S.E. 2d 228 (1975)). To further promote the goal of safeguarding the best interests of children, the General Assembly has recognized that in certain circumstances, persons who are not a child's parent or legal guardian may be proper parties to a custody proceeding. Section 20-7-420 (20) of the South Carolina Code grants the family court jurisdiction to award custody of a child to the child's parent or "any other proper person or institution." Pursuant to that statute, third parties have been allowed to bring an action for custody of a child. See Kramer v.

Kramer, 323 S.C. 212, 473 S.E.2d 846 (Ct. App. 1996) (awarding custody to child's aunt and uncle over biological mother); Donahue v. Lawrence, 280 S.C. 382, 312 S.E.2d 594 (Ct. App. 1984) (finding stepmother had standing to initiate termination of parental rights action).

Under the penumbra of custody is the lesser included right to visitation. Because Middleton would have standing to bring an action for custody, it follows that he would also have standing to seek visitation. In Dodge v. Dodge, 332 S.C. 401, 415 505 S.E.2d 344, 351 (Ct. App. 1998), this court found "no authority" to grant visitation rights to a stepfather of nineteen months, once the biological father, who had been in prison, resumed full custody. However, we specifically found no psychological parent relationship existed between stepfather and children, as the children often saw their biological father. Id. at 413, 505 S.E.2d at 350.

In this case, Middleton claims he has a right to visitation based on his status as a psychological parent and the significant harm denying visitation causes Josh. As explained more fully below, we agree, and hold the family court erred in finding Middleton lacked standing to bring this action.

II. Third Party's Right To Visitation

A. Psychological Parent Doctrine

In refusing to grant Middleton visitation, the family court specifically found that because Josh knew he had a biological father, Middleton was not Josh's psychological father. We disagree.

The notion of a psychological parent or de facto parent was first recognized by the South Carolina Supreme Court in Moore v. Moore, 300 S.C. 75, 386 S.E.2d 456 (1989). In Moore, the supreme court found that although a psychological parent-child relationship existed between the child and his unrelated custodians, such a bond was inadequate to support awarding permanent custody to the custodians where the biological parent was fit. Id. at 80-81, 386 S.E.2d at 459. Notably, the supreme court found the psychological parent-child relationship was built largely upon the

custodians' overt acts, which inhibited the relationship between the biological father and the child.

Subsequently, in Dodge v. Dodge, 332 S.C. 401, 413, 505 S.E.2d 344, 350 (Ct. App. 1998), this court found that although the children had a close and loving relationship with their stepfather and grandparents, the level of attachment did not rise to the level of a psychological parent-child relationship. Therefore, we found the family court erred in granting joint custody to the stepfather and grandparents, and should have awarded the biological father full custody. Id. at 415, 505 S.E.2d at 351.

Both Moore and Dodge recognized the existence of the psychological-parent doctrine; however, neither case explores how a party establishes that he or she is the psychological parent to a child of a fit, legal parent.

The question of who may be deemed a psychological parent for purposes of receiving parental responsibilities has been answered variously. Some states define a psychological parent by breaking down parenthood to its fundamental elements. In California, for example, a de facto parent is defined as "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period." Cal. Rules of Court, R. 1401 (8); see also C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004) (declining to define a de facto parent, but noting "it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life").

Other states have attempted to refine the concept further by expanding the definition of psychological parenthood. The Alaska Supreme Court has defined a psychological parent as:

> [O]ne who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for an adult. This adult becomes an essential focus of the child's

> life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs . . . . The wanted child is one who is loved, valued, appreciated, and viewed as an essential person by the adult who cares for him. . . . This relationship may exist between a child and any adult; it depends not upon the category into which the adult falls – biological, adoptive, foster, or common-law – but upon the quality and mutuality of the interaction.

Evans v. McTaggart, 88 P.3d 1078, 1082 (Alaska 2004). Similarly, in In re Clifford K., 619 S.E.2d 138 (W.Va. 2005), the West Virginia Supreme Court defined the nature of the relationship that supports a finding that the third party acted as a psychological parent. The court stated:

> A "psychological parent," who has greater protection under the law in a child custody proceeding than would ordinarily be afforded to one who is not the biological or adoptive parent of the child, is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support.

Id. at 157.

The Wisconsin Supreme Court has developed a four-prong test for determining whether a person has become a psychological parent. In order to demonstrate the existence of a psychological parent-child relationship, the petitioner must show:

> (1) that the biological or adoptive parent[s] consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the

> child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; [and] (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

In re Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995). We believe this test provides a good framework for determining whether a psychological parent-child relationship exists. These four factors ensure that a nonparent's eligibility for psychological parent status will be strictly limited.

The first factor is "critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child." V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000) (explaining the Wisconsin test's first prong). This factor recognizes that when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced. The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child. Where a legal parent encourages a parent-like relationship between a child and a third party, "the right of the legal parent [does] not extend to erasing a relationship between [the third party] and her child which [the legal parent] voluntarily created and actively fostered." Id. at 552 (citing J.A.L. v. E.P.H., 682 A.2d 1314, 1322 (Pa. 1996)). A parent has the absolute control and ability to maintain a zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she voluntarily invites a third party to function as a parent to the child. See In re E.L.M.C., 100 P.3d 546, 560 (Colo. Ct. App. 2004); see also Rubano v. DiCenzo, 759

A.2d 959, 976 (R.I. 2000) (explaining that when a legal parent allows a third-party to assume a role equal to one of the child's two parents, she renders her own parental rights with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been).

As for the second prong, which considers whether the psychological parent and child have lived together, it further protects the legal parent by restricting the class of third-parties seeking parental rights. Normally, the child, legal parent, and psychological parent have at one point, all resided together under the same roof. However, we can conceive of a situation, as in this case, where the legal parent and the psychological parent operated under a sort of joint custody agreement where the child spends half the time at the legal parent's house. The other half of the time is spent at the psychological parent's house, which the child also considers home. This type of arrangement also suffices to meet the second part of the test.

The last two prongs are the most important because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child. The psychological parent must undertake the obligations of parenthood by being affirmatively involved in the child's life. The psychological parent must assume caretaking duties and provide emotional support for the child. These duties, however, must be done for reasons other than financial gain, which guarantees that a paid babysitter or nanny cannot qualify for psychological parent status. See In re E.L.M.C., 100 P.3d at 560 (citing Rubano, 759 A.2d at 976) ("The additional elements further protect the legal parent against claims by neighbors, caretakers, babysitters, nannies, au pairs, nonparental relatives, and family friends."). We further note that when both biological parents are involved in the child's life, a third party's relationship with the child could never rise to the level of a psychological parent, as there is no parental void in the child's life.

Additionally, the length of time the psychological parent acted in a parental capacity must be sufficient for a parent-child bond to have been established. The existence of a parent-child bond "is simply not a court-bestowed determination . . . [t]he finding of the existence of such a bond

reflects that the singular emotional and spiritual connection, ordinarily only expected in the relationship of a legal parent and child, has been created between an adult and child" who have neither blood nor adoption between them. Id. at 557 (Long, J., concurring). Further, "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed or terminated." In re E.L.M.C., 100 P.3d at 560. South Carolina has long recognized the importance of the degree of attachment, echoed by other jurisdictions, between a child and a third-party in making a custody determination between a biological parent and the third party. See Moore, 300 S.C. at 80-81, 386 S.E.2d at 459 (considering whether a psychological parent-child relationship exists in order to determine the degree of attachment); see also In re Clifford K., 619 S.E. at 157 ("The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.").

Turning to the facts here, the record is replete with evidence showing that Mother invited Middleton to act as a father. Mother sent Middleton pictures of Josh as a baby and insinuated that he was Josh's father. When Josh was three years old, Mother and Middleton worked out a schedule whereby Middleton had Josh from Thursday through Sunday every week. Middleton paid at least half of the daycare costs, and was listed as the emergency contact on the daycare registration.

As Josh entered elementary school, it was Middleton rather than Mother who accompanied him to his first day of kindergarten, and it was Middleton who brought Josh to school almost every morning. Middleton also picked up Josh from school nearly every day and accompanied Josh on school field trips. Middleton took Josh to doctor and dentist appointments, and Josh attended family reunions and functions with Middleton.

For the first ten years of his life, Josh spent a considerable amount of time with Middleton. Mother cultivated this relationship by giving Middleton parental responsibilities and by allowing Josh to spend a significant amount of his childhood with Middleton. In essence, Josh lived with Middleton at least half of the week for most of his life. Mother, by

ceding over a large part of her parental responsibilities to Middleton, fostered the parent-child bond between Middleton and Josh.

The second prong in the psychological parent test, that the child and psychological parent reside together, is also met. The evidence shows Josh spent at least half of any given week residing with Middleton. Additionally, Josh had his own room, clothes, and school books in Middleton's house.

We also find Middleton assumed the obligations of parenthood by taking significant responsibility for Josh's care, education, and development. Middleton paid for Josh's preschool. Additionally, he paid mother $250 dollars per month while Josh was in Mother's custody. Although Middleton had not thought to keep receipts, he was able to document approximately $12,000 he had given Mother over the years. Further, Middleton established a savings account for Josh's education.

Middleton not only contributed financially to Josh's development, he also spent quality time with Josh. On weekends they would go to movies and visit Frankie's Fun Park. On Sundays, Middleton and Josh attended church. Hollington, on the other hand, made no attempt to fulfill Josh's emotional need for a father. In fact, other than seeing Josh one time when he was three days old, Hollington has never visited Josh. This parental void left by Josh's biological father coupled with the parental obligations assumed by Middleton compel us to find that Middleton undertook the responsibilities necessary to meet the third prong of the psychological-parent test.

As to the fourth prong, the record reveals Josh spent ten years of his life thinking of Middleton as a father and is suffering greatly in his absence. Dr. Newman, the court-appointed therapist, opined that Middleton is a psychological parent to Josh. She stated that even though Josh has not seen Middleton in two years, he wanted her to tell the court that he misses Middleton and wants to see Middleton. In her clinical opinion, the emotional attachment between Josh and Middleton is so strong that despite the passing of two years' time, Josh still feels a sense of loss. According to Dr. Newman,

the severance of the relationship between Middleton and Josh will have a profound, negative impact for the rest of his life.[3]

B. Compelling Circumstances

In declining to grant Middleton visitation, the family court stated: "When our law does not allow us to grant autonomous visitation to grandparents against the wishes of a fit parent, I don't know how we can grant autonomous visitation to an unrelated third party against the wishes of a fit parent." While great deference is accorded to the visitation decisions made by a fit parent, the family court can in fact grant visitation to a third-party over a fit parent's objection when faced with compelling circumstances.

In Troxel v. Granville, the Supreme Court of the United States considered whether the application of the state of Washington's visitation statute violated Granville's due process right to make decisions concerning the custody, care, and control of her children. 530 U.S. 57 (2000). The dispute in Troxel arose because Granville sought to limit her in-laws' visitation to one visit per month and holidays. Id. at 71. In turn, the grandparents sought visitation under a Washington statute that provided "any person" could petition for visitation rights at "any time." Id. at 61. The grandparents did not rely on a common law de facto or psychological parent doctrine.

A plurality of the Court explained that parents have a protected liberty interest in the care, custody, and control of their children. Id. at 65-66. The plurality noted this fundamental right of parents encompasses the presumption that a fit parent will act in the best interest of his or her child.

The Supreme Court held Washington's visitation statute unconstitutionally infringed upon Granville's fundamental right to direct the upbringing of her children. The statute's language effectively allowed "any

[3] Additionally, Dr. Newman says that Josh knows he has a biological father, but does not sense a loss in not knowing him. Josh's sense of loss is directly related to the loss of Middleton in his life.

third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review," and if the trial judge disagreed with the parent's determination of the child's best interest, the judge's view would prevail. Id. at 67. The plurality noted the trial court's order "was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions" regarding her children. Id. at 68.

The plurality gave three reasons to support its conclusion that no "special factors" justified the State's interference in this case. First, the grandparents did not allege that Granville was an unfit parent, and therefore Granville was presumed to have acted in the best interest of her children. Id. at 68. Second, the trial court did not give special weight to Granville's determination of what was in her children's best interest. Id. at 69. Third, Granville had not sought to cut off visitation entirely. Notably, the plurality did not consider "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." Id. at 73. The Court explained, "[w]e do not, and need not, define today the precise scope of the parental due process right in the visitation context." Id. Thus, the Troxel decision, which turned on the constitutionality of the state of Washington's extremely liberal visitation statute, has little bearing on the peculiar facts of the case before us.

We find the decision by our own supreme court in Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003), more pertinent to our determination of whether Middleton can be awarded visitation with Josh. In Camburn, maternal grandparents successfully petitioned the family court for visitation of their daughter's three children over the objection of the children's mother and her husband.[4] Despite uncontested evidence that the children were well-cared for by their mother and her husband, the family court found visitation would be in the children's best interest because their grandparents were a stabilizing factor in their lives. Mother and her husband appealed, and our

[4] Mother's husband was the biological father of one of the children the grandparents sought to visit.

supreme court reversed. The Camburn court held: "Before visitation may be awarded over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest." Id. at 579-80, 586 S.E.2d at 568. As an example of a compelling circumstance, the Camburn court specifically mentioned a situation in which denying visitation would cause "significant harm to the child." Id. at 579, 586 S.E.2d at 568. Ultimately, the supreme court found that the circumstances in Camburn were not compelling enough to justify awarding grandparents visitation of the three children in the face of their mother and her husband's decision to the contrary.

Here, the record is replete with evidence illustrating how Mother's refusal to allow Middleton to visit with Josh has caused Josh significant harm. After the separation, Josh's fourth grade teacher asked the school's guidance counselor to talk with Josh because "he just wasn't himself [and] seemed really sad." The guidance counselor testified that she arranged for Josh to attend a support group for children who have suffered from losing someone they love. During these group sessions, Josh expressed grief over losing Middleton, who Josh talked about "as his father and his dad."

Mother's daughter, Tenille Johnson, testified about the special relationship Middleton had with Josh. Since Josh's visitation with Middleton ended, Johnson testified that Josh "is not the same happy person that he used to be" and that his attitude toward life has changed.

Dr. Newman, who counseled Josh for eighteen months prior to the final hearing, explained that the severance of Middleton's visitation with Josh "will have a profound impact . . . [that] reverberates throughout life." Dr. Newman further explained that Josh, who was ten years old when his relationship with Middleton abruptly ended, was particularly devastated by the loss because he was at a stage in life when he was learning how to socialize. In the report she submitted to the court, Dr. Newman opined that Josh's loss of contact with Middleton rendered Josh "at-risk regarding his ability to trust, [and to] form and maintain close relationships."

Similar to the testimony from Josh's teachers, counselor, and his sister, the court-appointed guardian ad litem reiterated: "[T]he one thing that I can tell the Judge that I strongly believe is that Joshua Hollington loves Kenneth Middleton. He misses Kenneth Middleton. I have no doubt of that whatsoever." The guardian testified that "the separation of a year, year and a half had done nothing to lessen [Josh's] feelings there. . . . [S]ince [the relationship with Middleton] ended he is – I'm not trained like Ms. Newman is. I don't know the correct terms as far as grieving, but he's missing Mr. Middleton quite a bit." Even Mother herself testified that she did not have "any doubt at all that Josh loves Kenneth Middleton . . . [or] that Josh misses Kenneth Middleton."

CONCLUSION

Based on the overwhelming evidence in the record, we reverse the family court's finding that Middleton was not Josh's psychological parent. Middleton's absence from Josh's life has caused and will continue to cause significant harm to Josh. Thus, the circumstances of this case are compelling enough to meet the "evidentiary hurdle" third-parties must overcome when seeking visitation over the objection of a fit parent. Camburn, at 579-80, 586 S.E.2d at 568.

We caution that our decision today does not automatically give a psychological parent the right to demand custody in a dispute between the legal parent and psychological parent. The limited right of the psychological parent cannot usually overcome the legal parent's right to control the upbringing of his or her child. See In re Clifford K., 619 S.E.2d 138, 157-58 (W.Va. 2005) (noting that in "exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding . . . when such intervention is likely to serve the best interest of the child(ren) . . . .") (emphasis added); see V.C., 748 A.2d at 554 (stating that custody is usually given to the legal parent, with "[v]isitation" as the "presumptive rule" for psychological parents).

Establishing psychological parenthood is a difficult undertaking. However, once established, the bond between the psychological parent and child should not be unilaterally severed by the biological parent who fostered the relationship in the first place. The standard to be applied is whether compelling circumstances exist to overcome the presumption that a fit, legal parent acts in the child's best interest, and of course, visitation must actually be in the child's best interest. The compelling circumstances standard encompasses a situation where, as here, a third party has attained psychological parent status.

Accordingly, we reverse the order of the family court and remand the action so that a suitable visitation schedule can be established as expeditiously as possible. Because we find Josh is suffering from Middleton's absence, we order that visitation between Middleton and Josh resume on a schedule of one weekend per month, beginning in the month of May 2006, until a final hearing can be scheduled.

REVERSED AND REMANDED.

KITTREDGE, J., concurs and ANDERSON, J., concurs in result only in a separate opinion.

ANDERSON, J. (concurring in result only in a separate opinion): In Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court of the United States held that parents have a protected liberty interest in the care, custody and control of their children that is a fundamental right protected by the Due Process Clause. This fundamental right encompasses the presumption that a fit parent will act in the best interest of his or her child. I have gargantuan trepidation in regard to expanding Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003), and Moore v. Moore, 300 S.C. 75, 386 S.E.2d 456 (1989), beyond the actual holdings in these cases.

I **VOTE** to **ALLOW** visitation in the case sub judice over the objection of the biological mother and would confine the holding to the unique factual circumstances in this particular case.