# The Supreme Court of South Carolina

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## N O T I C E

IN THE MATTER OF WILLIAM H. JORDAN, PETITIONER

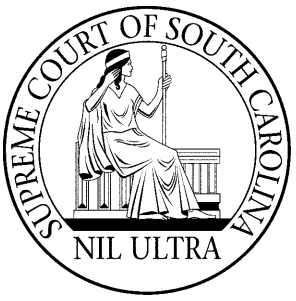
On October 26, 2009, Petitioner, who practiced law in Charleston, South Carolina, was definitely suspended from the practice of law for nine months. In the Matter of Jordan, 385 S.C. 614, 686 S.E.2d 682 (2009). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than June 29, 2010.

Columbia, South Carolina
April 30, 2010




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 17**
**May 3, 2010**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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

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The State, Respondent,

v.

Hoss Hicks, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Spartanburg County
Gordon G. Cooper, Circuit Court Judge

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Opinion No. 26812
Submitted April 20, 2010 – Filed May 3, 2010

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**VACATED**

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Appellate Defender Kathrine H. Hudgins, of Columbia, for Petitioner.

John Benjamin Aplin, of S.C. Department of Probation, Parole & Pardon Services, of Columbia, for Respondent.

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**PER CURIAM:** Petitioner pled guilty to assault and battery of a high and aggravated nature (ABHAN). He was sentenced to ten years' imprisonment, suspended upon time served and five years' probation. He was also required to register under the South Carolina Sex Offender Registry. The Court of Appeals affirmed his conviction and sentence. State v. Hicks, 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008).

Subsequently, petitioner's probation was revoked, and ninety days of his sentence was reinstated, after which probation was to be reinstated. Additionally, Sex Offender Conditions promulgated by the South Carolina Department of Probation, Pardon and Parole Services (DPPPS) were added as a condition of petitioner's probation. Petitioner appealed to the Court of Appeals; however, he challenged only one of the three conditions the probation revocation judge found he violated. The Court of Appeals addressed the merits of petitioner's arguments and affirmed the revocation and the addition of conditions. State v. Hicks, 382 S.C. 370, 675 S.E.2d 769 (Ct. App. 2009).

Petitioner has now filed a petition for a writ of certiorari in which he makes the same arguments he made to the Court of Appeals. We deny the petition as to Questions 2 and 3, but grant the petition as to Question 1 and dispense with further briefing.

Where the ruling of a trial judge is based on more than one ground, an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based. Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996). In this case, the Court of Appeals erred in addressing the merits of petitioner's argument regarding the revocation of probation based on a violation of Sex Offender Conditions because the probation revocation judge revoked petitioner's probation on two additional grounds, which petitioner did not challenge. We therefore vacate the Court of Appeals' opinion and affirm the probation revocation judge's ruling.

**VACATED.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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

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Jamia Hoard, a minor under the age of fourteen years, by Karen Elizabeth Hoard, her Mother, Respondent,

v.

Roper Hospital, Inc., Carolina Care Alliance, Karen Johnson, Robert H. Smith, M.D., Marshall Goldstein, M.D. and John Doe and Mary Roe, representing one or more unknown parties, Defendants,

of whom Robert H. Smith, M.D., is the Petitioner.

Karen Elizabeth Hoard and William Dwight, Respondents,

v.

Roper Hospital, Inc., Carolina Care Alliance, Karen Johnson, Robert H. Smith, M.D., Marshall Goldstein, M.D. and John Doe and Mary Roe, representing one or more unknown parties, Defendants,

of whom Robert H. Smith, M.D., is the Petitioner.

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ON WRIT OF CERTIORARI

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Appeal from Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

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Opinion No. 26813
Heard March 2, 2010 – Filed May 3, 2010

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**REVERSED**

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Andrew F. Lindemann, of Davidson & Lindemann, of Columbia, M. Dawes Cooke, Jr. and John A. Jones, of Barnwell Whaley Patterson & Helms, of Charleston, for Petitioner.

Cameron Lee Marshall, of Charleston, and Coming B. Gibbs, Jr., of Gibbs & Holmes, of Charleston, for Respondents.

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**JUSTICE KITTREDGE:** In this medical malpractice case, the court of appeals reversed the trial court's grant of summary judgment in favor of Petitioner Robert Smith, M.D. We granted a writ of certiorari to review the court of appeals decision in *Hoard v. Roper Hospital, Inc.*, 377 S.C. 503, 661 S.E.2d 113 (Ct. App. 2008). We reverse the decision of the court of appeals and reinstate the trial court's order granting summary judgment to Dr. Smith.

## I.

Shortly after Jamia Hoard was born at Roper Hospital in Charleston, South Carolina on March 30, 2002, she developed respiratory distress and was transferred from the Level 1 newborn nursery to the Level 2 nursery. Jamia's treating physician was Marshall Goldstein, M.D., a board-certified neonatologist. Dr. Goldstein determined it was necessary for Jamia to have a peripheral intravenous line (IV) for infusion of medications and fluids and for withdrawal of blood for testing. After nurses were unable to place the IV, Dr. Goldstein ordered pediatric nurse practitioner Karen Johnson to insert an umbilical vein catheter (UVC).[1]

A chest X-ray was taken prior to insertion of the UVC. Johnson initially advanced the UVC to a depth of 11 to 13 centimeters. Because the UVC was not drawing blood, Johnson inserted it deeper into Jamia's chest. A second X-ray was made to confirm whether the UVC was placed properly. When Johnson read the second X-ray, she did not observe a problem with the UVC placement. The X-rays were sent to the radiology department for review by a radiologist.

The next morning, the on-call radiologist, Robert Smith, M.D., read Jamia's X-rays. Dr. Smith's written report stated: "An umbilical vein catheter

[1] An umbilical vein catheter (UVC) is inserted into the large vein that travels thorough the umbilical cord.

has been placed. The tip terminates high within the right atrium. There are persistent bilateral coarse infiltrates essentially unchanged compared with the prior exam. No pneumothorax is seen." At 10:34 a.m., Dr. Smith sent the X-rays and his report to the nursery.

When Dr. Goldstein made rounds that afternoon at 2:00 p.m., he examined Jamia, reviewed her lab results and X-rays, and read Dr. Smith's radiology report. Following this examination, Dr. Goldstein wrote a note in Jamia's chart in which he stated the UVC was placed "in approximately [the] right atrium."

At approximately 4:00 a.m. the next day, April 1, Jamia went into cardiac arrest. The nursing staff called Dr. Goldstein, who instructed staff to pull the UVC back and to transfer Jamia immediately to the Level 3 nursery at the Medical University of South Carolina (MUSC).[2] At MUSC, neonatologists determined Jamia was experiencing "cardiac tamponade," a potentially fatal syndrome.[3]

In her deposition, neonatologist Anne Hansen, M.D. explained that the tip of the UVC slowly eroded the wall of the right atrium. Hansen explained that the fluid, which was being infused on a continuous basis, was filling the pericardial sac instead of going into the bloodstream. Ultimately, the volume of fluid surrounding the heart rendered it unable to properly expand and contract. Hansen described the process that led to Jamia's cardiac arrest:

> [T]he fluid actually [comes] out of the tip of the [UVC] causing a perforation through the atrium wall and then this fluid filling up this potential space between the pericardial sac and the [heart]

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[2] MUSC has the only Level 3 nursery in the Charleston-area.

[3] "Cardiac tamponade" is the mechanical compression of the heart by large amounts of fluid within the pericardial space. This compression limits the normal range of motion and function of the heart. Medline Plus (Merriam-Webster 2010) (available at http://www.merriam-webster.com/medlineplus).

> muscle. . . . So here is this line with intravenous fluid coming through. [B]etween the plastic itself and the fluid eroding, eroding, eroding until it erodes all the way through the [heart] muscle wall. And then it accumulates and pushes this sac away and pushes the heart muscle in and causes a pressure build up all the way around the heart.
>
> . . . .
>
> [T]he effects of this tamponade situation were severe enough that . . . it actually perfused the heart muscle where it was so poor that the muscle itself stopped working.

Jamia and her parents (the Hoards) filed professional malpractice actions against Drs. Smith and Goldstein, Roper Hospital, and Karen Johnson, alleging their actions or omissions caused Jamia to experience cardiac arrest, which in turn caused her to suffer brain damage and partial paralysis. All defendants, except Dr. Smith, settled with the Hoards. Dr. Smith moved the trial court for summary judgment, contending no evidence was presented to suggest that his alleged negligence was the proximate cause of Jamia's injury.

The Hoards contended at summary judgment that Jamia's injuries were caused by the improper insertion of the UVC. They additionally asserted Jamia may not have suffered cardiac arrest if Dr. Smith had contacted the nursery after he read the X-rays at 10:34 a.m. or had stated in his written report that the UVC was "malpositioned." Four expert witnesses testified regarding the standard of care applicable to radiologists and neonatologists.

The trial court initially determined the evidence presented a question of fact regarding Dr. Smith's alleged negligence in failing to clearly indicate that the UVC was "malpositioned" or other term of similar import. Summary judgment was granted, however, as the trial court held that "[t]he Plaintiffs'

case against Dr. Smith fails because there was no proximate causation between Dr. Smith's alleged negligence and the injury to Jamia Hoard." The Hoards appealed.

On appeal, Jamia's parents asserted: "It is hornbook law that a jury is the judge of the credibility of a witness and may disregard all or part of a witness's testimony." The court of appeals agreed with this position and reversed the grant of summary judgment. We accepted Dr. Smith's petition for certiorari to review the court of appeals decision.

## II.

This case turns on whether there is any evidence that Dr. Smith's alleged negligence was a proximate cause of the injury. The trial court found no evidence that Dr. Smith's alleged failure to act within the established standard of care proximately caused Jamia's cardiac arrest. The trial court's finding was based on the fact that, approximately fourteen hours before Jamia experienced cardiac arrest, her treating physician, Dr. Goldstein, made a clinical judgment not to reposition the UVC. Dr. Goldstein made this decision well aware that the placement of the UVC was elevated in the atrium, not "optimal" and outside the standard of care.[4]

Dr. Goldstein considered repositioning the UVC, but decided the risks outweighed the potential advantages. Dr. Goldstein was concerned that if he withdrew or repositioned the UVC twenty-two hours after it was placed, withdrawal of the line could dislodge a blood clot and cause additional problems. Moreover, it was Dr. Goldstein's assessment that Jamia was improving and the only indication of a problem with the UVC was Dr. Smith's report.

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[4] Experts testified that the standard of care requires that the UVC generally be placed "above the diaphragm and below the heart," also referred to in the record as the "11 to 13 cm. range."

In reversing the trial court's order, the court of appeals held "a jury could have chosen not to believe Dr. Goldstein's testimony. Simply because testimony is uncontradicted does not render it undisputed." *Hoard*, 377 S.C. at 510, 661 S.E.2d at 117. The court of appeals therefore concluded the trial court had erred in granting summary judgment to Dr. Smith on the question of proximate cause because a jury would be free not to believe Dr. Goldstein.

## A.
## Summary Judgment

Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). Summary judgment is properly granted when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c), SCRCP.

When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP, and summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

## B.
## Proximate Cause

A plaintiff alleging medical malpractice must provide evidence showing: (1) the generally recognized and accepted practices and procedures that would be followed by the average, competent physician in the defendant's field of medicine under the same or similar circumstances, and (2) the defendant departed from the recognized and generally accepted standards. *Jones v. Doe*, 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct. App. 2006). Additionally, the plaintiff must demonstrate the defendant's departure from such generally recognized practices and procedures proximately caused the plaintiff's alleged injuries and damages. *David v. McLeod Regl. Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006).

"In a medical malpractice action, it is incumbent on the plaintiff to establish proximate cause as well as the negligence of the physician." *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (citing *Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976)). "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Id.* at 125, 473 S.E.2d at 795. When expert testimony is the only evidence of proximate cause relied upon, the testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Id.* at 125, 473 S.E.2d at 795.

"Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *Hughes v. Children's Clinic, P. A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) (citing *Gunnels v. Roach*, 243 S.C. 248, 133 S.E.2d 757 (1963)).

## III.

In his motion for summary judgment, Dr. Smith presented evidence that Dr. Goldstein read the radiology report and reviewed the X-rays on the afternoon of March 31 and knew the UVC was not optimally placed. It was Dr. Goldstein's judgment that, as described above, removing the UVC presented greater risk to Jamia than leaving it in place. Well aware that the UVC was not optimally placed, Dr. Goldstein made a knowing judgment not to move the line. Fourteen hours later, Jamia experienced cardiac arrest.

The Hoards presented the deposition testimony of several experts. Dr. Anne Hansen, a neonatologist, testified for the Hoards. According to Dr. Hansen, if Dr. Goldstein had repositioned the UVC on March 31, Jamia would have been fine. Dr. Hansen stated that, in her practice, when an x-ray shows the UVC is in the right atrium, "we pull those lines back as soon as we find out and those babies are all fine." Dr. Hansen was asked: "Is there anything in [Dr. Goldstein's] admission note at 2:00 p.m. on the 31st of March that would justify a clinical decision by him to leave the UVC in the position he notes there?" She responded: "No." Hansen testified that Jamia's blood pressure reading at 2:00 p.m. on March 31 indicated there was "no tamponade going on at that point." Dr. Hansen explained:

> [T]here was probably slow erosion of the inner wall of the right atrium, but it had not happened to the extent that there was actually erosion through into the pericardial space at this point. So if they had pulled this line out on the 31st at 2:00 p.m., the baby would have been fine.

Dr. Smith correctly contends the record fails to establish that a genuine question of material fact exists regarding whether his alleged failure to act within the standard of care could have been a proximate cause of Jamia's cardiac arrest and subsequent injuries. This is so because the record demonstrates that Dr. Goldstein was aware of the standard of care concerning UVC placement and he made an intentional and independent decision not to

move the UVC based on numerous factors. We further observe that Dr. Goldstein had on other occasions moved catheter lines that were not optimally placed.

The Hoards counter that the court of appeals properly reversed the grant of summary judgment because the evidence established a question of fact regarding the element of proximate cause. In making this argument, they contend it is possible that Dr. Goldstein gave false testimony and did not actually know the standard of care. Therefore, if Dr. Smith had been clearer in his report or had orally communicated his findings, then Dr. Goldstein may have been alerted to the "malposition" of the UVC and may have repositioned it. We reject this "speculative hypothetical." *David v. McLeod Regl. Med. Ctr.*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006) (rejecting "speculative hypothetical[s]" and holding: "In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture.").

We turn to the standard relied on by the court of appeals, in which it adopted the Hoards' position that "a jury could have disregarded Dr. Goldstein's testimony and found Dr. Smith's failure to alert Dr. Goldstein of the line's position was a proximate cause of Jamia's injuries. . . . Simply because testimony is uncontradicted does not render it undisputed." *Hoard*, 377 S.C. at 509-10, 661 S.E.2d at 116-17. A jury's prerogative to disregard uncontradicted testimony is a sound principle of law, but it has no application in a summary judgment setting.

The court of appeals relied upon *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) and *Ross v. Paddy*, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000). In *Black*, the court of appeals affirmed a jury verdict for Respondent Hodge despite Black's contention on appeal that the jury was required to accept her uncontradicted testimony. 306 S.C. at 198, 410 S.E.2d at 596. There, the court of appeals' decision correctly stated that a jury is not required to accept uncontradicted witness testimony, as credibility is a question for the jury. *Id.* Likewise, in *Ross*, on appeal from a jury verdict, the court of appeals found issues concerning witness credibility

were properly resolved by the jury. 340 S.C. at 434, 532 S.E.2d at 615. The principle enunciated in *Black* and *Ross* is sound.

One may not, however, avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. This argument, if accepted, would render summary judgment obsolete, and it is in any event at odds with Rule 56, SCRCP, and our summary judgment jurisprudence:

> [R]ule 56(e), SCRCP, requires that when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. The adverse party's response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial.

*SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); *see also Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001) (explaining that "a party opposing summary judgment [must] come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial").

A plaintiff cannot create a genuine issue of material fact with the argument that the jury does not have to believe a witness. A party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact. As Rule 56(e), SCRCP, states, a party "may not rest upon the mere allegations or denials of his pleading[s]."

In response to Dr. Smith's evidence that his alleged breach of the standard of care was not a proximate cause of Jamia's injury, the Hoards could rely on neither speculation nor the suggestion that a jury may ultimately find Dr. Goldstein not believable to create a genuine issue of material fact. We find the Hoards failed to produce any evidence that Dr. Smith's alleged negligence was a proximate cause of Jamia's injuries.

## IV.

We reverse the decision of the court of appeals and reinstate the trial court's order granting Dr. Smith summary judgment.

**REVERSED.**

**TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.**

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

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Oncology and Hematology Associates of S.C., LLC, d/b/a Cancer Center of the Carolinas, Petitioner, and US Oncology Inc., Intervenor, Petitioners,

v.

South Carolina Department of Health and Environmental Control and Spartanburg Regional Healthcare System, d/b/a The Village at Pelham Cancer Center, Respondents.

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ON WRIT OF CERTIORARI

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Petition from the Administrative Law Court
John D. McLeod, Administrative Law Court Judge

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Opinion No. 26814
Heard February 18, 2010 – Filed May 3, 2010

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**VACATED AND REMANDED**

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Lewis T. Smoak, of Ogletree, Deakins, Nash, Smoak & Stewart, of Greenville, and Raymon E. Lark, Jr., of Austin & Rogers, of Columbia, for Petitioners.

Stuart M. Andrews, Jr., Travis Dayhuff, Alice V. Harris, and Holly G. Gillespie, all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Respondents.

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**JUSTICE KITTREDGE:** We granted a writ of certiorari to review a series of discovery orders of the administrative law court (ALC). S.C. Const. art. V, § 5. We vacate the ALC's discovery orders and remand.[1]

## I.

The parties in this case are fiercely competitive healthcare providers in upstate South Carolina. The primary parties, Petitioner Oncology and Hematology Associates of South Carolina, d/b/a Cancer Centers of the Carolinas (CCC), and Respondent Spartanburg Regional Healthcare System (SRHS), are licensed to provide linear accelerator[2] services in adjoining service areas.[3] CCC is a private physician group,

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[1] In challenging the discovery orders, Petitioners initially combined their writ of certiorari with a writ of supersedeas and a notice of appeal. We dismissed the notice of appeal from the discovery orders as interlocutory and not immediately appealable. We determined exceptional circumstances existed, warranting the grant of a writ of certiorari.

[2] A linear accelerator is used by radiation oncologists to provide external radiation treatments to cancer patients.

[3] CCC is licensed by DHEC to provide linear accelerator services in the service area that includes Greenville, Pickens, and Oconee

and SRHS is a public entity. CCC and SRHS compete with each other primarily for cancer patients who reside in proximity to the Greenville-Spartanburg County line. The underlying dispute concerns CCC and SRHS vying for cancer patients in Greer, South Carolina. Part of Greer is located in Spartanburg County and part of Greer is located in Greenville County.

In August 2007, SRHS submitted a Certificate of Need (CON) application to the South Carolina Department of Health and Environmental Control (DHEC) asking to relocate one of its linear accelerators from the Gibbs Regional Cancer Center in Spartanburg to its Village of Pelham Cancer Center in Greer. The Village of Pelham is located on the Spartanburg County side of Greer. Four miles away, CCC operates a linear accelerator at the Greenville Hospital System (GHS) facility on the Greenville County side of Greer.

The Greer community is viewed as fertile territory for providing treatment to cancer patients. Both CCC and SRHS seek to maximize utilization of their respective linear accelerators in the Greer community. Despite CCC's protest, DHEC staff recommended approval of SRHS's request to relocate one of its linear accelerators from the Gibbs Regional Cancer Center to Greer. The DHEC Board approved the staff's recommendation and granted the CON to SRHS.[4]

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Counties, while SRHS is licensed to provide linear accelerator services in the adjoining service area comprised of Spartanburg, Cherokee, and Union Counties.

[4] DHEC staff found SRHS had established that the relocation of its linear accelerator would serve its current patient population, provide a more convenient location for existing patients, and relocation was financially viable. DHEC additionally determined that SRHS's proposed relocation would not adversely affect other facilities in the service area.

CCC requested a contested case hearing before the ALC to challenge DHEC's approval of the CON.[5] In its petition, CCC contended SRHS's application to relocate its linear accelerator, and DHEC's review process, had failed to address significant criteria required by the 2004-2005 South Carolina Health Plan. CCC asserted: "The DHEC Board similarly erred by failing to grant CCC's request for final Board review and [to] reverse DHEC Staff's approval letter for SRHS's CON application." CCC unsuccessfully sought to vacate the CON and to remand the matter to DHEC.

SRHS responded to CCC's challenge by inundating it with discovery requests.[6] Rather than tailoring discovery to the challenged CON, which addressed only the relocation of a linear accelerator to the Greer location, SRHS took a shotgun approach and sought virtually all information concerning every facet of CCC's operation. The following is a sampling of the information SRHS sought from CCC by way of requests for production (RFP) and interrogatories:

> **RFP 6:** Produce all business plans, pro formas, market analyses, strategic plans, and projections and/or forecasts of any kind for all of CCC's locations in the Anderson, Greenville, Cherokee, Oconee, Union, Pickens, and Spartanburg County areas from 2006 forward.
>
> **RFP 7:** For each of the following years, 2005, 2006, 2007, and 2008 . . . produce information and documents in an electronic Excel compatible format (with patient-identifying information redacted) identifying by each such year at each CCC location in the Anderson, Greenville, Cherokee, Oconee, Union, Pickens, and Spartanburg County areas by location:

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[5] DHEC takes no position on CCC's challenge to the ALC's discovery orders.

[6] Likewise, CCC served SRHS with discovery requests. There is no issue before us concerning CCC's discovery requests.

1. the number of linear accelerator procedures performed;

2. the date of service for each procedure;

3. the CPT code, HCFA Common Procedure Code System (HCPCS) designation, ICD-9, DRG, and Ambulatory Procedure Code (APC) for each such procedure;

4. the physician or P.A. who performed each such procedure;

5. the charge, payor category, and payment for each such procedure;

6. the Zip Code and county of the patient who received each such procedure; and

7. the referring physician for each patient.

**RFP 8:** For each of the following years, 2005, 2006, 2007, and 2008 . . . and for each of the 24 physicians referenced on page 299 of the DHEC record and for all other physicians that are now or will be affiliated in any way with CCC, produce information and documents in an electronic Excel compatible format (with patient-identifying information redacted) identifying by each such year at each CCC location in the Anderson, Greenville, Cherokee, Oconee, Union, Pickens, and Spartanburg County areas by location and by physician:

1. the number of linear accelerator [] procedures referred to each specific location;

2. the date of service for each procedure;

3. the CPT code, HCFA Common Procedure Code System (HCPCS) designation, ICD-9, DRG, and Ambulatory Procedure Code (APC) for each such procedure;

4. the physician or P.A. who performed each such procedure;

5. the gross charge, payor category, and net payment for each such procedure;

6. the Zip Code and county of the patient who received each such procedure; and

7. the referring physician of the patient who received each such procedure.

**RFP 23:** [Produce] [c]opies of all strategic plans for CCC and USO[7] [U.S. Oncology, Inc.] from the last five years to the present.

**RFP 24:** [Produce] [a]ll communications to or from CCC or USO related to the development of strategic plans from the last five years to the present.

**RFP 26:** [Produce] [c]opies of each single budget for CCC for each location and consolidated from each of the past five years to the present.

**Interrogatory 16:** Describe in detail all aspects of CCC's 'partnership with GHS' referenced on page 299 of the DHEC record, including all financial aspects to the partnership.

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[7] USO is an entity affiliated with CCC. Because of the reach of SRHS's discovery requests, USO has intervened in this matter.

**Interrogatory 18:** Identify all agreements, contracts, written understandings, leases, subleases, and all other forms of written arrangements between the following parties, including a description of the arrangement and date of the arrangement:

a. CCC and [USO] and/or any entity affiliated with USO.

b. CCC and any physicians affiliated in any way with CCC.

c. USO and any physicians located in South Carolina who are affiliated in any way with USO.

d. CCC and [GHS] and/or any entity affiliated with [GHS].

e. USO and [GHS] and/or any entity affiliated with [GHS].

f. CCC and any other individual or entity related to the provision of linear accelerator services.

**Interrogatory 29:** Provide the number of patients treated with linear accelerators owned, operated, leased, and/or in any way connected to CCC for calendar years 2005, 2006, 2007, 2008, and 2009 to date by linear accelerator.

CCC responded to some discovery requests and produced voluminous information and documentation to SRHS. As to the discovery requests CCC found objectionable, it contended the information sought was overbroad, overly burdensome, protected by work-product doctrine, or irrelevant to the pending matter. CCC additionally asserted that it would be harmed competitively if required to provide SRHS with confidential information that revealed contracts

and rates it had negotiated with other organizations. Moreover, CCC maintained that the presence of a protective order did not transform irrelevant material into relevant material.

SRHS moved the ALC to compel CCC to fully respond to its discovery requests. SRHS contended that "each of the contested interrogatories . . . identify subjects that are relevant and necessary for [SRHS] to explore in order to assess the merits of this litigation." CCC provided supplemental responses to SRHS's discovery requests, and again contended it had furnished reasonable and complete responses. CCC asked the ALC to deny SRHS's motion to compel further discovery, stating:

> While CCC acknowledges the scope of discovery is generally broad, in the instant case both SRHS and the Court itself have taken positions, which clearly impose limitations on the discovery propounded by SRHS for which it now seeks to compel provision of additional responses and information from CCC. CCC takes very seriously proper discovery in an administrative contested case for development of issues, and CCC is concerned about and objects to SRHS's tactics.
>
> *SRHS is intentionally over-reaching and attempting to game the contested case proceeding before the Court herein in order to further its own goals of damaging CCC as a competitor and of expanding its competitive market influence in physician referrals and provision of radiation and medical oncology services in Upstate South Carolina.* Such actions are extremely inappropriate. CCC is confident the Court will readily agree and not permit SRHS to abuse the process. (Emphasis added).

At the hearing on SRHS's motion to compel discovery, SRHS complained about CCC's meddling efforts to challenge the CON for, as the ALC put it, "just moving one machine to a different place."

> **The Court:** You're saying in other words they asked for it?
>
> **[SRHS]:** That's right. Yeah. Yeah. And there's a cost to jumping in and that's part of the cost.

Although the ALC referred to SRHS's discovery requests as a "fishing expedition," the ALC ultimately granted SRHS's motion to compel.

Following the hearing, but prior to the issuance of the order, SRHS served USO with a subpoena duces tecum requesting documents related to its relationship with GHS and CCC. Thereafter, USO moved to intervene for the limited purpose of addressing the discovery matters before the ALC. The ALC conducted another hearing, after which it issued five orders: (1) order denying CCC's motion to quash the subpoena served on GHS; (2) order denying USO's and CCC's motions to quash the subpoena served on USO; (3) order denying CCC's motion for reconsideration of the ALC's prior discovery rulings; (4) order granting USO's request to intervene for the limited purpose of challenging the discovery orders; and (5) order compelling CCC to respond to SRHS's first and second interrogatories and requests for production.

The ALC's order explained: "I find these materials to be well within the generally recognized parameters of Rule 26(b) in that the requests are reasonably calculated to lead to the discovery of admissible evidence." Moreover, the ALC found the confidentiality order already in place protected CCC from the misappropriation of confidential information by SRHS.

This case concerns the five interlocutory orders issued by the ALC.

## II.

"The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." S.C. Const. art. V, § 5. "A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion." *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (citing *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989)). "A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist." *Id.* at 577, 683 S.E.2d at 498 (citing *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009)). Exceptional circumstances exist in this challenge to the ALC's discovery orders.

## III.

CCC contends the information and documents required under the discovery orders are not remotely relevant to resolution of the issue before the ALC. We agree.

We are keenly aware that the scope of discovery is broad. Rule 26(b)(1), SCRCP, provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [and] [i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Yet, there are limits, which we see trial courts generally unwilling to recognize and enforce. SRHS's discovery requests of CCC and its business partners are abusive and beyond the pale.

Our willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial "hen's tooth." We have no desire to micromanage discovery orders. It is our hope that in resolving this matter, we will speak to trial courts generally. While discovery serves as an important tool in the truth-seeking function of our legal system, we are concerned that "discovery practice" has become a cottage industry and the merits of a claim are being relegated to a secondary status.

We find persuasive a decision of the Texas Supreme Court in a similar situation. *See In re CSX Corp.*, 124 S.W.3d 149 (2003). The Texas Supreme Court granted a party mandamus relief from discovery requests the court determined were overly broad and irrelevant to resolution of the dispute at hand:

> Generally, the scope of discovery is within the trial court's discretion. However, the trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure.
>
> Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is 'reasonably calculated to lead to the discovery of admissible evidence.' . . . Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be 'reasonably tailored' to include only relevant matters.

*Id.* at 152 (internal citations omitted). After finding the trial court had abused its discretion by issuing an overly broad discovery order, the trial court order compelling discovery was vacated. *Id.* at 153.

In this case, the ALC correctly identified the "central issue" in the case before it, i.e., whether the 2004-2005 South Carolina Health Plan standards applied to the relocation of SRHS's linear accelerator. SRHS contends the standards applied only to the addition, and not the relocation, of a linear accelerator. CCC contends otherwise.

SRHS's discovery requests are not remotely relevant to a resolution of the issue concerning the relocation of the linear accelerator. A challenge to relocation of the linear accelerator does not entitle SRHS to the information it seeks from CCC and affiliated entities. SRHS abused the discovery process with its scorched-earth approach.

We decline to rewrite and narrowly tailor SRHS's oppressive discovery requests so as to make them proper. That would reward improper conduct. Where, as here, a party abuses discovery, the proper remedy is to vacate the requests and require the party to start over. As a result, we vacate the five discovery orders before us.

## IV.

We vacate all discovery orders and remand for further proceedings consistent with this opinion.[8]

**VACATED AND REMANDED.**

**TOAL, C.J., PLEICONES, HEARN, JJ., and Acting Justice James E. Moore, concur.**

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[8] We are vacating all discovery orders, including those impacting GHS and USO. If the ALC determines that SRHS's discovery may properly reach entities affiliated with CCC, or that an affiliated entity should be permitted intervenor status, it will be done on a clean slate.

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

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In the Matter of Roger Paul Roy, Jr., Respondent.

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Opinion No. 26815
Heard March 4, 2010 – Filed May 3, 2010

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# PUBLIC REPRIMAND

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Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard and Harvey M. Watson, III, both of Columbia, for Respondent.

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**PER CURIAM**: This attorney disciplinary matter arises out of Roger Paul Roy, Jr.'s (Respondent) management of his trust account and handling of his personal refinance loan closing. The Investigative Panel (the Panel) recommended Respondent be publicly reprimanded for his misconduct and assessed the costs of the proceedings. Both the Office of Disciplinary Counsel (the ODC) and Respondent object to the Panel's recommendation. However, we agree with the Panel's recommendation.

## FACTS/PROCEDURAL BACKGROUND

Respondent's law practice handles a relatively large amount of real estate transactions, in addition to other matters. On October 19, 2006, Respondent refinanced the mortgage on his home and handled the closing himself.

While negotiating the refinance, Respondent obtained a payoff amount over the telephone from the original lender. This oral payoff amount did not include a prepayment penalty. A written payoff statement was sent, but did not arrive until after the closing. Thus, Respondent closed his refinance loan without a written payoff statement from the original lender. In total, approximately $658,000 was received from the refinance lender and deposited into Respondent's trust account.

On October 24, 2006, checks were distributed from the trust account: $492,119.42 to payoff the original lender's mortgage; $63,324.45 to payoff what appears to be an additional prior mortgage with the refinance lender; $98,516.57 was excess cash to close and was paid to Respondent and his wife; the remaining several thousand dollars were disbursed by checks written to cover various fees and costs associated with the closing. The $492,119.42 check to the original lender was rejected because it did not include a prepayment penalty that was due under the terms of the mortgage.

For the next year, Respondent attempted to negotiate a new payoff amount with the original lender. Respondent continued making the monthly payments of $3,400 on the original mortgage, using the $492,119.42 in his trust account. During this time, Respondent did not inform the refinance lender that the original mortgage had not been paid off and satisfied as the terms of the refinance loan required. This failure placed the refinance mortgage in junior priority to the original mortgage. Additionally, Respondent failed to inform his title insurance company of this irregularity. Thus, both the refinance lender and the

title insurance company were exposed to unanticipated and unbargained for risk.

Respondent finally paid off the original mortgage on October 21, 2007. Because interest had continued to accrue on the original mortgage balance, Respondent had to deposit over $22,000 of his own funds into the trust account to have sufficient funds to payoff the original mortgage.

Throughout this time and into 2008, Respondent had an accountant reconciling his trust account. While he was unaware of any noncompliance at the time, Respondent admits the accountant's methods did not comply with Rule 417, SCACR. During this time, Respondent's accounting ledgers indicated that several individual client account ledgers carried negative balances. Because other client account ledgers carried sufficient positive balances to indicate an overall positive balance in the trust account, the deficiencies were not noticed during the accountant's "bank to book" reconciliations. This accounting practice effectively meant that some clients' funds were being used to cover other client's deficiencies, although no checks were returned for non-sufficient funds in the account.

Respondent contends that the accounting software insisted upon by his title insurance company caused much data to be lost during the transition and later updates. As a result of lost data, a $6,000 check was not indicated in Respondent's accounts. Once Respondent paid off the original mortgage in October 2007, there was a $6,000 shortfall. The shortfall was caught the next month during the routine reconciliation process, and Respondent promptly deposited personal funds into the account to make up the shortfall.

In September 2007, Respondent's title insurance company came for the routine audit and pronounced the trust account in complete disarray. The title company filed the complaint with the ODC, alleging Respondent's failure to properly reconcile his trust account. The ODC then brought formal charges in November 2008 and Respondent replied to those charges in December 2008.

The Panel found violations of the following rules: Rule 417, SCACR, for failing to reconcile and adequately maintain accounting of his financial records; Rule 1.1 Competence, for failing to competently conduct the refinance; Rule 1.15 Safeguarding Property, for failing to safeguard both the proceeds of the refinance and the lien position of the refinance lender's new mortgage, and client funds in his trust account; and Rule 8.4 Misconduct, by his continuing failure to resolve the original mortgage payoff for nearly one year and for failing to properly reconcile his trust account and individual client account ledgers. The Panel recommended Respondent be given a public reprimand and be ordered to pay the costs of the disciplinary proceedings.

The ODC takes exception to this recommendation, urging that the serious nature of these violations requires a more serious sanction, even though no clients were injured and Respondent is currently in compliance with the Rules. Respondent also takes exception to the Panel's recommendation, asserting that the facts do not warrant a public sanction, and that a private sanction would be most appropriate, given Respondent's standing in the legal community and lack of prior disciplinary history.

## STANDARD OF REVIEW

The sole authority to discipline attorneys and decide appropriate sanctions after a thorough review of the record rests with this Court. *In re Thompson*, 343 S.C. 1, 10-11, 539 S.E.2d 396, 401 (2000). In such matters, this Court may draw its own conclusions and make its own findings of fact. *Id.* Nonetheless, the findings and conclusions of the Panel are entitled to much respect and consideration. *Id.*

## ANALYSIS

Respondent urges that the Panel's recommended public sanction is too severe given the facts of this case. We disagree.

"This Court has made it abundantly clear that an attorney is charged with a special responsibility in maintaining and preserving the integrity of trust funds." *In the Matter of Houston*, 382 S.C. 164, 167, 675 S.E.2d 721, 723 (2009) (citation omitted). The facts of *In the Matter of Houston* are similar to this case. In that case, the attorney failed to properly comply with the record-keeping requirements of the Rules of Professional Conduct. *Id.* at 166, 675 S.E.2d at 722-23. Like in this case, no clients were harmed and no funds were misused. *Id.* at 167, 675 S.E.2d at 723. The attorney failed to keep proper records of the money going through the trust account, but already had taken corrective measures by the time this Court heard the case. *Id.* Nonetheless, this Court, taking into consideration the severity of the misconduct, ordered the attorney be given a public reprimand, obtain the assistance of a certified public accountant, attend four hours of CLEs, and pay the costs of the proceedings. *Id.* at 167-68, 675 S.E.2d at 723.

Here, Respondent admits that he failed to properly reconcile his trust account for more than two years. By failing to keep proper financial records in accordance with the Rules of Professional Conduct, Respondent opened his clients to an inexcusable risk of harm. Additionally, his improper handling of his refinance exposed both his refinance lender and title insurance company to significant risk as the refinance lien was unprotected and in a secondary position throughout the eleven months Respondent attempted to negotiate a new payoff amount.

Further, over the eleven months Respondent was making the monthly payment on the original mortgage, he depleted the funds entrusted to him for payment of the original mortgage in excess of $28,000. Thus, Respondent was effectively using his clients' funds to meet his personal repayment obligations. Respondent deposited over $22,000 of his personal funds into the trust account to meet the final payoff amount for the original mortgage. Afterwards, he noticed there was still a $6,000 shortfall in the trust account, so he deposited the amount necessary to bring it into balance. If Respondent had simply

paid off and satisfied the original mortgage upon closing the refinance loan, as he was obligated to, this shortfall would not have occurred.

Although no clients complained, no client funds were lost or intentionally misappropriated, and the account was never overdrawn throughout this period, it appears to be mere fortuitous happenstance that no actual harm was caused. Accordingly, we find a public sanction is an appropriate sanction under these circumstances.

## CONCLUSION

We adopt the Panel's recommendations and hereby publicly reprimand Respondent and order him to pay the costs of this action within ninety days of the filing of this opinion.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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

Adel A. Faltaous and Mona S. Faltaous, Respondents,

v.

Anderson Ocean Club Development, LLC and New Resorts, LLC, Defendants,

Of Whom Anderson Ocean Club Development, LLC, is Appellant.

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

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Opinion No. 4679
Heard November 16, 2009 – Filed April 28, 2010

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**AFFIRMED**

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David B. Miller and Benjamin A. Baroody, both of Myrtle Beach, for Appellant.

William A. Bryan, of Surfside Beach, for Respondents.

**SHORT, J.:** Anderson Ocean Club Development, LLC (Seller) appeals the trial court's decision denying a motion to compel arbitration. We affirm.

## FACTS

Adel Faltaous and Mona Faltaous (collectively, Buyers) signed a preconstruction contract, in which they agreed to purchase a condominium building from Seller for a price of $710,000. Seller agreed to construct the building in Myrtle Beach, South Carolina. The contract required Buyers to pay $106,500 in earnest-money deposit, which they did.

After the building was substantially complete, Buyers visited the property and first learned that parking for the condominium building was not onsite but rather, was located two streets behind the condominium. Upon learning this, Buyers requested they be refunded their earnest-money deposit. Seller refused this request, and Buyers filed a lawsuit. In their complaint, Buyers asserted causes of actions for breach of contract, negligent misrepresentation, and unfair trade practices. The complaint was later amended to add a cause of action based upon a violation of the Interstate Land Sales Full Disclosure Act.

Seller counterclaimed and sought specific performance to require Buyers to close the purchase, damages based on breach of contract, and a declaratory judgment. Additionally, Seller filed a motion to compel arbitration based on the arbitration clause in the contract. The trial court issued an order denying the motion, finding the dispute between the parties did not come within the scope of the arbitration clause. This appeal followed.

## STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review. MBNA Am. Bank v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App.

2008). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Id.

## LAW/ANALYSIS

Seller argues the trial court erred in concluding the dispute did not come within the scope of the arbitration clause. We disagree.

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). The policy of this State is to favor arbitration of disputes. Id. Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Id. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement. Id.

To decide whether an arbitration agreement encompasses a dispute, we must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the label assigned to the claim. Id. However, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Id. Additionally, unless we can say with positive assurance the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id.

The first page of the contract includes the following: "**THIS AGREEMENT CONTAINS A BINDING AND IRREVOCABLE AGREEMENT TO ARBITRATE ANY AND ALL DISPUTES AND CLAIMS PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT FOUND AT CODE SECTION 15-48-10, ET. SEQ.**" Additionally, paragraph 19 of the contract states:

> **ARBITRATION AGREEMENT**: Any and all claims, disputes, demands, actions and causes of action of every nature and kind which arise out of or

> are in any manner whatsoever related to the development, design, construction, condition, merchantability, habitability, fitness for a particular purpose or any other implied or express warranty for the common elements of or the individual units at the [condominium] that are asserted against Seller, the architect or contractor for the Project, and their respective agents, employees, owners, officers, subcontractors, consultants, successors or assigns by any entity formed to serve as the Regime's Homeowners' Association or by any person or entity which now has or hereafter acquires any interest in a unit at the [condominium] shall be subject to and resolved by final and binding arbitration conducted in Horry County, South Carolina pursuant to the terms of the South Carolina Arbitration Act found at South Carolina Code Section 15-48-10, et. Seq.

Buyers sued for breach of contract, negligent misrepresentation, unfair trade practices, and a violation of the Interstate Land Sales Full Disclosure Act. Seller counterclaimed for declaratory judgment, breach of contract, and specific performance. Even if we assume Buyers' claims fall within the arbitration clause, Seller's counterclaims do not.

Seller sought specific performance requiring Buyers to close the purchase and argued it was entitled to Buyers' earnest-money deposit. As counsel for Seller acknowledged during oral arguments, neither of these claims fall within the purview of the arbitration clause.

The introductory words to the arbitration clause are broad, stating "[a]ny and all claims." However, following these words, the clause is drawn specifically and limits the matters that can be arbitrated to disputes that result "from the development, design, construction, condition, merchantability, habitability, fitness for a particular purpose or any other implied or express warranty for the common elements of or the individual units at the

[condominium]. . . ." Disputes that arise out of the contract itself, as Seller's counterclaims do, are absent from the arbitration clause's reach. Therefore, we find the trial court properly denied Seller's motion to compel arbitration.

## CONCLUSION

Accordingly, the trial court's decision is

**AFFIRMED.**

**THOMAS and KONDUROS, JJ., concur.**

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

The State, Respondent,

v.

Luther Garner, Appellant.

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

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Opinion No. 4680
Heard December 10, 2009 – Filed April 28, 2010

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**AFFIRMED**

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Appellate Defender M. Celia Robinson, of Columbia; and Stuart Mark Axelrod, of Myrtle Beach, 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 Melody J. Brown, all of Columbia; Solicitor John Gregory Hembree, of Conway, for Respondent.

**THOMAS, J.:** In this criminal matter, Luther Garner (Appellant) was convicted of murder, first-degree burglary, and attempted armed robbery, stemming from an incident at the home of Amadro Flores Espinozat (Victim). The State's key eyewitness was Lonya Sowdon. Appellant now appeals three evidentiary rulings of the trial court as to various parts of Sowdon's testimony. We affirm.

## FACTS

On December 11, 2005, authorities found Victim deceased in his home. Investigators determined Victim was severely beaten in the living room and subsequently dragged down the hallway, where he was left to die. The scene yielded one bloody shoe print, a bloody handprint, and a single bullet hole and casing from a .22 caliber bullet.

The same day, detective Oz Santiago interviewed Victim's housemates, Jonas and Rene Trujillo (collectively the Trujillos). Among other standard information, the housemates told him Victim was alive when they left for work on the morning of December 11. At trial, Appellant attempted to introduce Santiago's testimony that the housemates stated Victim was alive the morning of December 11. However, the State objected and the trial court ruled because the Trujillos were not available for cross-examination, the testimony was inadmissible hearsay.

At trial, the State offered the testimony of Sowdon to establish that on or around December 10 or 11, 2005, Appellant, Sowdon, and Lee Pierce went to Victim's home. Sowdon testified she went in the home shortly after Appellant and Pierce and found Appellant had already beaten Victim quite badly. She testified that Appellant was "hollering at [Victim] wanting . . . money and cocaine . . . but [Victim] could not understand English." Appellant allegedly dragged Victim down the hallway, while continuing to beat him with the butt of a pistol. Meanwhile, Pierce was in the back of the house looking for money and cocaine. Unable to find money or drugs, Sowdon testified the trio left and proceeded to Summer Wind Drive to dispose of one of the pistols and then traveled to the home of Paul Graham so Appellant could change his bloody clothes.

Sowdon testified that she remained high on crack cocaine for the remainder of the day of the murder and possibly up to two days following. When she "came down" on the afternoon of December 12, 2005, she realized the magnitude of what had occurred and called 911. The trial court admitted the recording of this call based on Sowdon's identification of her own voice. Appellant objected to the introduction of the tape through Sowdon rather than the 911 representative.

A jury found Appellant guilty of murder, first-degree burglary, and attempted armed robbery. The trial court sentenced him to forty years' imprisonment. This appeal followed.

## ISSUES ON APPEAL

I. Did the trial court err in preventing Santiago from testifying as to the Trujillos' statement of seeing Victim alive on the morning of December 11, 2005?

II. Did the trial court err in admitting the recording of Sowdon's 911 call?

III. Did the trial court err in allowing certain portions of Sowdon's testimony when Appellant alleged it was inadmissible hearsay?

## STANDARD OF REVIEW

In criminal cases an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Evidentiary rulings are within the sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant. State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support. Id. at 315, 652 S.E.2d at 415.

## LAW/ANALYSIS

### I. Suppression of the Trujillos' Statement

Appellant contends the Trujillos' statement to Santiago that Victim was alive the morning of December 11, 2005, is "relevant and admissible, non-testimonial, non-hearsay." We disagree.

In this case, Appellant attempted to introduce the evidence through Santiago, arguing "it's admissible . . . [as] non-testimonial evidence under State v. L[a]dner." The trial court ruled the evidence inadmissible hearsay. Because Appellant made no argument the statement was either admissible as non-hearsay or admissible as hearsay under the excited utterance exception, both of which he now argues on appeal, the only issue before this court is whether the evidence is admissible as an alleged non-testimonial statement. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (stating in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge); Knight v. Waggoner, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004) (indicating arguments raised for the first time on appeal are not preserved for our review).

On this issue, Appellant's argument is premised on the notion that non-testimonial evidence is admissible as a matter of course. However, we find the distinction between testimonial and non-testimonial hearsay is significant only in the context of determining whether there has been a Sixth Amendment Confrontation Clause violation. The Supreme Court has held testimonial hearsay against a defendant violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 54 (2004). Similarly, the South Carolina Supreme Court has recognized the Sixth Amendment is not implicated by non-testimonial hearsay. See State v. Ladner, 373 S.C. 103, 113, 644 S.E.2d 684, 689 (2007) (noting "the Sixth Amendment simply has no application outside the scope of testimonial hearsay"). However, the fact that the Sixth Amendment is not implicated by non-testimonial hearsay does not mandate the evidence be admitted. See id. at 111, 644 S.E.2d at 688 (indicating the rule in this regard

to be: the admission of admissible hearsay violates the Sixth Amendment when such evidence is testimonial in nature).

The Crawford court indicates "that not all hearsay implicates the Sixth Amendment[]." Crawford, 541 U.S. at 51. If a statement is admissible hearsay, the Confrontation Clause may operate to render this otherwise admissible hearsay inadmissible if testimonial in nature. See id. at 68 (stating that testimonial evidence implicates the Sixth Amendment and the admission of non-testimonial evidence remains the province of each state's rules of evidence). However, this does not imply the inverse; that otherwise inadmissible hearsay becomes admissible if non-testimonial in nature. See Rules 801 to 806, SCRE (providing no support for excluding non-testimonial evidence from the definition of hearsay or excluding non-testimonial evidence from the prohibition against hearsay). Rather, if evidence is deemed inadmissible hearsay, the inquiry is concluded and a determination of whether such evidence is testimonial or non-testimonial is irrelevant. Thus, Appellant's argument is without merit.[1]

## II. The 911 Tape

Appellant argues the trial court erred in allowing the 911 tape into evidence through Sowdon rather than a 911 representative. We find this allegation of error to be abandoned.

To this issue, Appellant's argument states in total: "Counsel for [A]ppellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911 representative." Accordingly, this issue is abandoned on appeal. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

[1] Furthermore, we note the record indicates Dr. Proctor specifically testified that his medical opinion was that Victim died on December 11, 2005. Thus, the evidence Appellant attempted to introduce through Santiago was introduced through Dr. Proctor.

## III. Sowdon's testimony

Appellant argues the trial court erred in admitting certain hearsay statements through Sowdon. We disagree.

"[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors. Id. An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence. Id. at 199-200, 682 S.E.2d at 280.

At trial, Appellant objected to a portion of Sowdon's testimony regarding the events that transpired at Graham's house, specifically objecting in anticipation of Sowdon testifying to a hearsay statement made by Graham. On appeal, Appellant alleges that the trial court erred in allowing Sowdon to bolster and corroborate her own testimony through the repetition of these inadmissible hearsay statements.

Notwithstanding that the record does not demonstrate any of Graham's hearsay statements were actually admitted, we fail to find, and Appellant fails to bring to our attention, any prejudice caused by the alleged bolstering and corroboration of Sowdon's testimony.

## CONCLUSION

For the aforementioned reasons, the ruling of the trial court is

**AFFIRMED.**

**SHORT and KONDUROS, JJ., concur.**