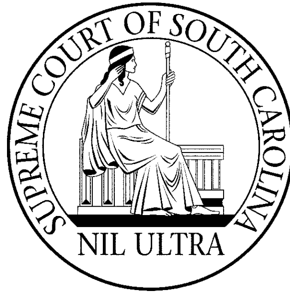

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 12, 2003

ADVANCE SHEET NO. 18

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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Donald V. Myers, Respondent.

Opinion No. 25647
Heard September 19, 2002 - Filed May 5, 2003

PRIVATE REPRIMAND

AND

LETTER OF CAUTION

Henry B. Richardson Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

A Camden Lewis, of Lewis, Babcock & Hawkins, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Panel of the Commission on Lawyer Conduct recommended that Respondent receive a public reprimand for violating Rule 5.1 of the *Rules of Professional Conduct* (RPC), Rule 407, SCACR, finding that he had failed to ensure that his Deputy Solicitor adhered to these Rules

(hereinafter the Quattlebaum Matter). Further, the Panel recommended that Respondent receive a letter of caution for permitting a member of his "jury selection team" to attempt to contact a member of the jury venire (hereinafter the Juror Matter).

I. THE QUATTLEBAUM MATTER

On Memorial Day, May 29, 1995, Robert Joseph "BJ" Quattlebaum ("Quattlebaum"), a murder suspect, was brought to the Lexington County Sheriff's Department for questioning. John Earl "Jack" Duncan ("Duncan"), Quattlebaum's attorney, arrived at the station shortly thereafter. The Sheriff's Office summoned Deputy Solicitor Frances Humphries ("Humphries") to the station that evening for the interview.

Their initial interviews with Quattlebaum convinced the officers that a polygraph test would flush out some inconsistencies in his statements, so they asked Quattlebaum to take a polygraph test, and he consented. David Grice ("Grice"), the polygraph operator for the Lexington County Sheriff's Department, conducted a two-hour interview of Quattlebaum in the polygraph room, a small room equipped with a video surveillance camera. Grice left the room giving Quattlebaum time to "stew" over his responses and returned to his office, where he monitored and recorded what occurred in the polygraph room through a television monitor and a VCR machine.

Deputy Scott Frier ("Frier") was in Grice's office when Grice returned. Both men looked at the monitor and saw that Jack Duncan had entered the polygraph room and began having a conversation with his client. The VCR had ejected the videotape that was inside it, so Grice pushed the tape back into the machine and pushed the record button. Duncan and Quattlebaum were unaware that Grice was recording their conversation.

Grice and Frier then summoned Deputy Solicitor Humphries, lead investigator Edward Hite ("Hite"), and Lieutenant "Bucky"

Phillips to the office to witness the events that were unfolding in the polygraph room. The officers arrived first and saw and heard the privileged conversation between Quattlebaum and Duncan. When Humphries arrived shortly thereafter, he saw the monitor, heard the conversation, and the officers told him "two words"[1] to describe what the suspect had uttered to his lawyer. Humphries told the officers to turn the monitor off and left the room. As he departed, Humphries was asked if he thought the conversation could be used as evidence against Quattlebaum and responded, "not unless the Supreme Court has ruled differently over the last twenty-four hours." Grice originally intended to return to the polygraph room to continue the polygraph examination, but the plan changed when the officers arrested Quattlebaum shortly after Duncan left the polygraph room.

Respondent Donald V. Myers is the Solicitor for the Eleventh Judicial Circuit. He has served with distinction for 26 years and has never previously been disciplined for any lawyer misconduct. Around a week later, Humphries reported to his superior, Solicitor Myers, what transpired the night of May 29. Respondent Myers learned that the group overheard a confidential conversation between Duncan and Quattlebaum and that the suspect uttered "two words" relating to the substance of the conversation, which dramatically enhanced the import of the dialogue. Humphries informed the Respondent that he told the officers to turn off the monitor, and Respondent stated that Humphries had responded appropriately to the scenario. As of this meeting, no evidence shows that Respondent Myers knew that the conversation was recorded, and there is conflicting evidence as to whether Humphries knew that Grice was recording the conversation.[2] Respondent did not instruct Humphries, his Deputy Solicitor, that he should inform the

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[1] In deference to the fact that Quattlebaum is awaiting retrial, "two words" is the way that the record describes the overheard statement Quattlebaum made to his attorney.

[2] Grice testified that after Humphries told the officers to turn off the tape, Grice asked Humphries what he should do with the tape.

defense that he and the officers eavesdropped on a privileged conversation of significant substance. Grice placed the tape in the safe in his office.

On June 2, 1995, Detective Hite submitted his eleven-page Investigative Report about the murder for which Quattlebaum was charged. The highly detailed report failed to include an account of the eavesdropped confidential conversation, nor did the report disclose that the conversation was recorded on videotape. Respondent Myers testified that the report should have included those facts, which is how the defense would have discovered that the conversation was overheard. Humphries reviewed the report after Hite finished it and made no comment about the lack of disclosure. The Solicitor's office made no effort to disclose to the defense the fact that Humphries and the officers had heard and taped the confidential eavesdropped conversation. The defense did not discover the fact that the conversation was eavesdropped or the existence of the tape for another twenty-seven months, until just three months before the scheduled commencement of the Quattlebaum trial.

As of around March 1996, Humphries had discussed the potential existence of a tape recording of the Duncan/Quattlebaum conversation with Detective Hite, who would frequently ask Humphries what he should do with the tape. Eventually, Humphries reported a "rumor" of the tape's existence to Respondent Myers. The two discussed whether the tape was discoverable, and Respondent Myers stated that if there was a tape, Humphries should give it to the defense.[3] Despite the frequent conversations with Detective Hite and Respondent's mandate to hand it over to the defense, Humphries made no specific request for the tape to the Sheriff's Department.

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[3] Hite testified that when he would mention the tape to Humphries, he never said there was a "rumor" of the tape. He would only ask Humphries for instructions as to what to do with the tape.

On June 30, 1997, Quattlebaum's new attorney, Katherine Evatt ("Evatt"), sent Humphries a discovery request that included a specific demand for "copies of all videotape or audiotape of any interviews with the Defendant." Evatt made the request for audio or video recordings merely as a "catchall" request. She had no reason to believe that the videotape existed. Humphries discussed the discoverability of the tape again with Respondent, and was again instructed to hand over the tape to the defense. Humphries then informed Detective Hite to make a copy of the tape. Hite immediately asked Grice to make a copy, and the copy was delivered to Humphries.[4] Humphries delivered the tape to defense counsel Kathy Evatt on August 8, 1997.

The Quattlebaum matter eventually went to trial in the Eleventh Circuit. Quattlebaum's attorneys moved for the recusal of Humphries and the Eleventh Circuit Solicitor's Office as prosecutors because of the surreptitious intrusion upon the confidential conversation between Quattlebaum and Duncan. The trial judge denied the defense's motion, and Quattlebaum was ultimately convicted and given a death sentence. On appeal, the South Carolina Supreme Court overturned Quattlebaum's convictions and sentence because we found that the Eleventh Circuit Solicitor's Office had committed deliberate prosecutorial misconduct, which deprived Quattlebaum of his Sixth Amendment right to counsel.[5]

Panel Finding

The Commission on Lawyer Conduct dismissed the charge that Respondent violated Rule 5.1(c) of the *Rules of Professional Conduct* (RPC), Rule 407, SCACR, finding that he never secreted from the defense the existence of the videotape or the fact that Humphries and the officers overheard the Quattlebaum-Duncan conversation. However, the Panel held that Respondent violated RPC 5.1(b), Rule

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[4] Hite testified that it might have taken only one day to deliver the tape to Humphries after Humphries requested it.

[5] *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000).

407, SCACR, because as a supervising attorney, he should have ensured that Humphries disclosed the tape's existence or the occurrence of the eavesdropped confidential conversation. Accordingly, the Panel recommended a penalty of public reprimand. Respondent has taken exception to the Panel's finding that he violated RPC 5.1(b).

Law/Analysis

In an attorney disciplinary proceeding, this Court gives great deference to the recommendation of the Panel of the Commission on Lawyer Conduct. *In re Diggs* 344 S.C 397, 544 S.E.2d 628 (2001). However, the Court may exercise de novo review of the Panel's findings of fact and conclusions of law. *Id*. Furthermore, the State must prove that the attorney violated a rule of Professional Responsibility by clear and convincing evidence. *Id*.

We find the Panel correctly held that the State proved by clear and convincing evidence that Respondent violated RPC 5.1(b), which provides: "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." In order to establish that Respondent violated RPC 5.1(b), the state must prove that (1) Respondent held "direct supervisory authority" over Humphries; (2) Humphries failed to adhere to the Rules of Professional Conduct; and (3) Respondent failed to "make reasonable efforts" to ensure that Humphries adhered to the Rules of Professional Conduct. *In re Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 184-185, 552 S.E.2d 10 (2001).

Respondent, as Solicitor, held supervisory authority over his Deputy Solicitor, Humphries. Further, the Panel of the Commission of Lawyer Conduct found that Humphries violated the Rules of Professional Responsibility.[6] In assessing whether Respondent made

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[6]The Panel found that Humphries violated the rules when he: (1) Failed to immediately notify Jack Duncan that the police and Humphries had overheard his privileged conversation with Quattlebaum; (2) Failed to

reasonable efforts to ensure Humphries was complying with the Rules, this Court must consider the Comments to RPC 5.1:

> The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, *or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary*.[7]

We hold that the Panel correctly concluded that the Eleventh Circuit Solicitor's Office is a law office where complex ethical questions arise, which necessitate a more elaborate system to ensure that the attorneys in the Solicitor's Office comply with the Rules. Respondent's supervisory system failed because the defense knew nothing of either the eavesdropped conversation between Duncan and Quattlebaum or that it had been videotaped for over two years.

<u>The Eavesdropped Conversation</u>

Respondent learned of the surreptitious intrusion upon the Duncan/Quattlebaum conversation approximately one week after it occurred. At that time, respondent told the Deputy Solicitor that he had appropriately directed the officers to turn off the monitor, but Respondent did not instruct the Deputy Solicitor to inform the defense of the eavesdropped conversation and the "two words" that Quattlebaum uttered. Respondent failed again to order his Deputy

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ensure that the Hite Investigative Report disclosed the interception of the Duncan/Quattlebaum conversation; (3) Failed to immediately investigate whether a videotape of the Duncan/Quattlebaum conversation existed.

[7] Comments to RPC 5.1(emphasis added).

Solicitor to communicate the fact of the overheard conversation to the defense when Humphries brought up the "rumor" of the videotape some ten months later in March 1996.[8] In fact, the only reason why the defense discovered that the Duncan/Quattlebaum dialogue was overheard was because on June 30, 1997, defense counsel Evatt made a discovery motion, which included a request for any video or audiotape of the defendant. Only then, when Humphries responded to the request on August 1, 1997, by stating that the defense would receive "[a] copy of a videotape containing statements made by the Defendant" did the defense have any notion that Humphries and the Lexington County officers had intruded on the Duncan/Quattlebaum attorney-client conversation.

Respondent testified that he assumed that Detective Hite's Investigative Report would have revealed the existence and nature of the eavesdropped conversation. As discussed, the Report contained no account of the incident, and Humphries knew the detail was left out because he reviewed the document before he gave it to the defense. Respondent's supervisory system failed because he assumed that Detective Hite, an officer from another government agency (the Lexington County Sheriff's Office) would inform the defense through an Investigative Report about the eavesdropped conversation. Respondent's supervisory system also failed because he did not ensure that Humphries himself communicated to the defense about the overheard dialogue. Accordingly, Respondent failed in his supervisory capacity to ensure the defense promptly learned of the eavesdropped conversation and thus violated RPC 5.1(b).

The Videotape Recording

While we find Respondent's failure to ensure that the defense learned of the *eavesdropped conversation* supports a finding that Respondent has violated RPC 5.1(b), we do not believe that his handling of the *videotape* violated the Rules of Professional Conduct.

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[8] He did, however, instruct Humphries to turn over the tape if it existed.

First, no evidence points to Respondent having any knowledge of the tape's existence until Humphries gave it to the defense on August 8, 1997. While a lack of knowledge is not a complete defense to a violation of Respondent's duty to supervise,[9] Respondent sufficiently stated his office's policy when Humphries brought up the videotape "rumor" in March 1996: "If there is a tape, give it to the defense." (R.p. 510). Respondent's clear articulation of what to do with the tape constitutes sufficient "reasonable efforts" by Respondent to ensure that Humphries complied with the Rules.

In our opinion, however, the Panel incorrectly held that Respondent did not violate RPC 5.1(c). Rule 5.1(c) states:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and *knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action*.[10]

Respondent knew that Humphries and the officers eavesdropped on the privileged conversation within one week after it occurred, while the defense did not know of the intrusion into the Quattlebaum-Duncan dialogue until twenty-seven months later. Respondent should have made sure that Humphries informed the defense immediately, or he could have called defense counsel himself. Immediate notification

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[9] *In re Anonymous*, 346 S.C. 177, 552 S.E.2d 10.

[10] Rule 407, SCACR, *Rules of Professional Conduct*, Rule 5.1(c).

would have given Quattlebaum twenty-seven more months to protect his rights[11] and would have avoided the necessity of this Court's finding of deliberate prosecutorial misconduct and breach of Quatttlebaum's Sixth Amendment right to counsel.[12] Because Respondent failed to immediately inform the defense himself or through Humphries, his Deputy Solicitor, we find that he violated RPC 5.1(c).

For the violation of both RPC 5.1(b) and RPC 5.1(c) in failing to properly supervise Humphries to ensure that the fact of the eavesdropping was reported to Quattlebaum's defense counsel, we sanction Respondent with a Private Reprimand. *See In re Anonymous,* 346 S.C. 177, 552 S.E.2d 10 (2001).

We hold a solicitor in this state to the highest ethical standards, for his actions determine a criminal's fate. We understand that the pressures of the position, as well as imperfect communication procedures with the county sheriff's office, may impede the solicitor in exercising his supervisory authority, but no excuse can justify actions which prejudice the defendant in a capital case.

A solicitor must implement and manage a system that enables him to appropriately supervise his deputies so that when he discovers

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[11] After Humphries' first meeting with Respondent, Respondent knew of the "two words" that Quattlebaum uttered during his conversation with Duncan. Respondent's knowledge of this severe intrusion into the attorney-client conversation, coupled with his failure to make sure the defense knew about it, is the only reason why he should be sanctioned. Further, a strong presumption exists that the officers arrested Quattlebaum shortly after they heard the conversation due to what Quattlebaum said to Duncan. Consequently, the defense had to wait over two years to even pursue its constitutional defenses, such as the "fruit of the poisonous tree" doctrine.

[12] *Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105.

that they may be violating a Rule of Professional Conduct, he can immediately ameliorate any prejudicial effect that the violation may have on the defense.

RPC 5.1 (a) and Government Agency

Respondent argues that RPC 5.1(a) only applies to a private law firm. We disagree. RPC 5.1(a) states: "A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." RPC 5.1(a).

We agree with the Comments to RPC 5.1, which clearly state that RPC 5.1(a) applies to government agencies, as well as law firms.[13]

II. THE JUROR MATTER

The Eleventh Circuit Solicitor's Office tried the death penalty case of Robert "Bo" Southerland ("Southerland") in March of 1992. On the night before striking the jury, Respondent assembled his "jury selection team," as was customary before a murder trial. The group of officers and Respondent met in Respondent's conference room to review the names on the jury venire to determine which jurors the prosecution would strike in the next day's voir dire. The group immediately singled out Richard Otto Cannon as the first potential juror that Respondent should strike. Respondent was familiar with many Cannons who were criminals in his district and did not want him as a juror for a capital case.

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[13]"Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm *or legal department of a government agency*. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; *lawyers having supervisory authority in the law department of an enterprise or a government agency…*" Comments to RPC 5.1 (emphasis added).

The group also noticed two different addresses on Cannon's Juror Questionnaire with only one phone number. In order to discern if Cannon lived at the address on the Questionnaire, an officer at the other end of the table from Respondent picked up the phone, dialed the number, announced that he represented law enforcement, and asked whether Richard Otto Cannon lived at the specified address. The person who answered the phone stated that Cannon did not live at that address.

Panel Finding

The Panel concluded that Respondent violated RPC 8.4 of the *Rules of ProfessionalConduct* (RPC), Rule 407, SCACR, when he impliedly permitted a member of his "jury selection team" to telephone a potential juror and recommended a letter of caution. Respondent has taken exception to the Panel's finding of an RPC 8.4 violation.

Law/Analysis

Rule 3.5(b) of the *Rules of ProfessionalConduct* (RPC), Rule 407, SCACR, forbids a lawyer from communicating ex parte with a member of the jury venire. RPC 8.4 forbids a lawyer from violating the Rules of Professional Conduct through the acts of another. RPC 3.5(b) was violated when a member of Respondent's "jury selection team" dialed the number of Richard Otto Cannon, a member of the jury venire, while the group was meeting in Respondent's conference room on the eve of jury selection for the Southerland murder trial. Although the team member did not call Cannon at Respondent's direction, Respondent failed to stop him from making the call. Just as this Court "looks with disfavor upon officers of the court approaching jurors after a verdict has been written,"[14]it also should not condone pre-trial contact with a member of a jury venire. Since Respondent allowed a member

[14]*In re Delgado*, 279 S.C. 293, 306 S.E.2d 591 (1983).

of the "jury selection team" to contact Mr. Cannon, he violated RPC 8.4(b).

This court has issued a public reprimand to an attorney who approached jurors after his trial was over but while the jurors remained on the venire.[15] But since Respondent did not actively attempt to communicate with prospective juror Cannon, and since the state presented no other evidence of juror contact by Respondent or any member of his "team," we find a letter of caution is appropriate.

III. COSTS OF THE PROCEEDINGS

Rule 7(b)(8), of the *Rules for Lawyer Disciplinary Enforcement*, (RLDE), Rule 413, SCACR, states that an attorney who violates the Rules of Professional Responsibility may be responsible for the costs and fees of the disciplinary proceedings. Further, Rule 27(e)(3) of the *Rules for Lawyer Disciplinary Enforcement*, (RLDE), Rule 413, SCACR, states that, "[t]he Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct." The state argues that the Panel erred in not addressing the cost issue and asks the Court to assess costs upon the parties in its discretion. We find that Respondent is responsible for the costs of these proceedings.

IV. CONCLUSION

Respondent failed to adequately supervise his Deputy Solicitor Fran Humphries in the wake of the bizarre events that took place on May 29, 1995. Since Respondent did nothing in his supervisory capacity to ensure that his office disclosed that a privileged attorney-client conversation was overheard, he violated RPC 5.1(b) and RPC 5.1(c) of the Rules of Professional Responsibility.

This Court must now determine what sanction is appropriate. We are aware that any disciplinary sanction we impose in this matter will

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[15] *In re Smith*, 338 S.C. 465, 527 S.E.2d 758 (2000).

be made public because of the procedural posture of this case. Under our current Rules for Lawyer Disciplinary Enforcement (RLDE), thirty days after the answer has been filed or the time to answer has expired in a misconduct case, the record and all subsequent proceedings are made public no matter what the ultimate disposition may be. Rule 12(b), RLDE. It would, therefore, be a simple expedient to agree with the panel and impose a public reprimand. We do not believe that would be fair to Solicitor Myers, because it would treat him differently from the way we treated the civil lawyer in *In re Anonymous*.

In this case, we have not found that Solicitor Myers engaged in any direct misconduct. He is being disciplined because he did not exercise the appropriate supervisory control over his Deputy Solicitor, Fran Humphries. Similarly, in *In re Anonymous*, we disciplined a civil lawyer, partner in a law firm, for his failure to ensure that his subordinate lawyers turned over discovery material to opposing counsel in a serious products liability case. There, we imposed a private reprimand. We found the conduct to be a serious breach of the lawyer's duty to supervise as we do here. We imposed private discipline because it was the first time we as a court had given direction in this area.

South Carolina has had since 1990 a stronger "duty to supervise" rule than many states. This is the first case in which we have made it clear that this "duty to supervise" also applies to public attorneys and to Solicitor's offices. The Respondent has had no other disciplinary matters in his 31 years of practice. All these factors influence the level of discipline we impose for this violation.

The vast majority of the misconduct relating to the failure to supervise was committed before the Rules of Lawyer Disciplinary Enforcement became effective on January 1, 1997. Under the former Rule on Disciplinary Procedure, the appropriate sanction would have been a private reprimand, and we find that is the appropriate sanction in this case. While, as discussed above, the private nature of the reprimand cannot be maintained under our current procedure, a private reprimand still has significance since it is not reported to the American

Bar Association's National Discipline Data Bank and indicates our belief that the misconduct warrants less than a public reprimand. Accordingly, we impose a private reprimand under Paragraph 7A(5) of the former Rule on Disciplinary Enforcement.[16]

Additionally, we also hold that Respondent violated RPC 8.4 when he permitted a member of his "jury selection team" to attempt to contact a member of the jury venire. We issue a letter of caution for this violation.

TOAL, C.J., MOORE, WALLER, BURNETT, JJ., and Acting Justice Edward B. Cottingham, concur.

[16] Under Rule 7(b)(10), RLDE, this Court may impose any sanction or requirement that it determines is appropriate. Therefore, this Court is not limited to the sanctions listed in Rule 7.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dennis Sauner, Cliff Derreth, Joanne Derreth, Timothy James McClelland, Robert Keith Brown, III, Darlene M. Hesseltine as attorney-in-fact for Curtis L. Hesseltine, Robert C. Hodge, Barney R. Atkinson, Richard L. Huggins, Ann Weeks Huggins, R. Donald Crews, Steven V. Foster, Charles H. Andrews, Robert Austin, and Edith Austin, on behalf of the residential, commercial, and all other leaseholders of property owned and leased by Santee Cooper, Plaintiffs,

of whom Dennis Sauner, Cliff Derreth, Timothy James McClelland, Robert Keith Brown, III, Darlene M. Hesseltine as attorney-in-fact for Curtis L. Hesseltine, Robert C. Hodge, Barney R. Atkinson, Richard L. Huggins, Ann Weeks Huggins, R. Donald Crews, Steven V. Foster, and Charles H. Andrews are the Appellants,

v.

Public Service Authority of
South Carolina, d/b/a Santee
Cooper, Respondent.

Appeal From Orangeburg County
Gerald C. Smoak, Circuit Court Judge
Perry M. Buckner, Circuit Court Judge

Opinion No. 25648
Heard January 22, 2003 - Filed May 12, 2003

AFFIRMED

Bradford P. Simpson, D. Michael Kelly, B. Randall Dong, all of Suggs & Kelly, P.A., of Columbia; John E. Parker, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton; and Reta S. Hampton, of Marietta, Georgia, all for Appellants.

B. Rush Smith, III, William C. Hubbard, Kevin A. Hall, C. Mitchell Brown, all of Nelson, Mullins, Riley & Scarborough, of Columbia; and Charles H. Williams and C. Bradley Hutto, of Williams & Williams, of Orangeburg, for Respondent.

CHIEF JUSTICE TOAL: Appellants appeal from the trial court's grant of summary judgment in favor of Respondent.

FACTUAL / PROCEDURAL BACKGROUND

Respondent, South Carolina Public Service Authority ("Santee Cooper"), was established in 1934 to develop the Congaree, Cooper, and Santee Rivers as a public utility.[1] Santee Cooper acquired 210,000 acres for this purpose, and flooded approximately 170,000 to form Lakes Marion and Moultrie. Under its license from the Federal Power Commission ("FPC"), Santee Cooper was required to maintain ownership of all land located within its project boundaries. As demand for recreational property increased, Santee Cooper began developing residential subdivisions on project land around the lake, making lots available for long-term lease to individuals.

In 1962, Santee Cooper's Board of Directors adopted a resolution that it would not sell any land in the leasing program. Some time later, Santee Cooper published a Land Policies and Procedures booklet in which it declared its policy on land sales. The booklet stated, "Santee Cooper does not, as a general rule, sell any property. The sale of property is only considered in cases where the property is declared surplus and such sale has no adverse affect on Santee Cooper, the community, or the public."

In 1979, the Federal Energy Regulatory Commission ("FERC"), the successor to the FPC, redefined Santee Cooper's project boundaries, removing most of the leased lots from the project boundaries as surplus.[2] Santee Cooper continued to lease lots after 1979, and by 1994, Santee Cooper was administering 2,931 fixed-term residential leases. The rents on these leases ranged from $75 to $300 annually and ran for terms of 40 to 50 years. Although the leases ran for lengthy fixed terms, either party could terminate the lease, with or without cause, by giving 90 days notice.

Many lessees made improvements on their leased lots, and the leases specifically addressed improvements to the property. The leases generally

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[1] S.C. Code Ann. §§ 58-31-10 et seq.

[2] The FERC's changes relieved 2,533 parcels of leased property from the original "no sale" prohibition.

stated, "[u]pon any termination of this lease other than by the Lessor under the [90 day notice provision], any buildings and improvements remaining upon the property shall become the property of the Lessor." The lease agreements continued to operate on this basis into the 1990's.

In March 1993, Santee Cooper sent a letter to the lessees notifying them that it was considering selling the leased lots to the lessees. In July of 1994, Santee Cooper sent a survey to the lessees to gauge their interest in buying their lots. In both letters, Santee Cooper stated that any decision to place leased property for sale would not have any affect on current lease contracts, and that leases would not be revoked if Santee Cooper decided to offer the lots for sale to the lessees. According to Santee Cooper officials, the overwhelming majority of lessees (78%) indicated that they would be interested in buying the lots they were leasing.

In January of 1995, Santee Cooper's Board authorized the initiation of a sales program, giving leaseholders an opportunity to buy their lots.[3] The Resolution established that Santee Cooper would hire qualified appraisal firms to establish "fair market value" for the lots, and would give a leasehold value credit of 15% if the lot were purchased within two years from the initial offering and a value credit of 10% if purchased within three to five years of the initial offering. Additionally, the Resolution offered those lessees who chose not to purchase their lots an option to renew for 10 years after the expiration of their leases if their lease did not so provide.

Santee Cooper notified its lessees of its intention to initiate this sales program and of the terms of sale encompassed in the Resolution. The letter estimated that surveys and appraisals of all the lots would be completed and the lots available for sale within 12 to 18 months. In closing, the letter assured the lessees that they were under "absolutely no obligation to purchase the lot and that [they] may continue with their lease agreement[s] through their expiration and any extensions as outlined [in the letter]."

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[3] Leased lots were not offered for sale to the public.

Santee Cooper appraised the lots to determine their fee simple value in an *unimproved* condition. Each lot was appraised at least two times and the offered price was the average of the two appraisals, less the discounts for early purchase outlined in the letter to the lessees. After all lots were surveyed and appraised, Santee Cooper held public meetings to outline the appraisals and the discounts available. Santee Cooper also explained that upon purchase, Santee Cooper and the leaseholder would sign a mutual cancellation of the lease, after which the purchaser would receive fee simple title to the property.

In response to Santee Cooper's program, many lessees organized to complain about the appraisal methods employed by Santee Cooper's appraisers. They formed the Santee Cooper Owners and Leaseholders Association ("SCOLA") and held meetings to discuss their dissatisfaction regarding the appraisal methods. Whether they were satisfied or dissatisfied with the offered price, many lessees purchased their lots, including most of the named plaintiffs in this suit.

Appellants filed their complaint in January of 1998.[4] Appellants moved for class certification in July 1998, and their motion was denied in February 1999. Appellants filed a motion to alter or amend the order denying class certification. Several months later, three more leaseholders ("Intervenor Appellants") filed a motion to intervene. The judge granted the motion to intervene and then denied the motion to alter the order denying class certification. In April 1999, Santee Cooper filed a motion for summary judgment on all causes of action. Appellants filed a motion for partial summary judgment. In May 2001, the circuit court granted summary judgment in favor of Santee Cooper.

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[4] Ten people filed the original and amended complaints: Dennis Sauner, Cliff Derreth, Joanne Derreth, Timothy McClelland, Robert Brown, III, Darlene Hesseltine, Robert Hodge, Barney Atkinson, Richard Huggins, and Anne Weeks Huggins. All of the Appellants except Robert Hodge have purchased their lots. Appellant Hodge continues to lease; his lease will expire in 2025.

Appellants raise the following issues on appeal:[5]

I. Did the trial court err in finding that no genuine issues of material fact exist to support the essential elements of Appellants' causes of action for breach of contract, negligent misrepresentation, and unjust enrichment?

II. Did the trial court err in failing to terminate Intervenor Appellants' permissive intervention?

III. Did the trial court err in denying Appellants' motion for class certification?

IV. Did the trial court err in finding that Appellants' claim for negligent misrepresentation is barred by the South Carolina Tort Claims Act?

LAW /ANALYSIS

I. Genuine Issue of Material Fact

Appellants argue that the trial court erred in finding no genuine issues of material fact exist to support their causes of action for breach of contract, negligent misrepresentation, and unjust enrichment. We disagree.

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55

[5] Before summary judgment was granted, Appellants abandoned several causes of action raised in their complaint. The remaining causes of action were breach of contract, negligent misrepresentation, unjust enrichment, and equitable estoppel. Appellants have not appealed the equitable estoppel issue.

(1997). Upon review of the trial court's grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *George v. Fabri,* 345 S.C. 440, 548 S.E.2d 868 (2001).

A. Breach of Contract

Appellants argue that the Santee Cooper Board's 1995 Resolution along with the letter sent by Santee Cooper to its leaseholders notifying them of the decision to sell the leased lots, constituted a unilateral modification of their contract (lease agreement) with Santee Cooper. We disagree.

At the summary judgment hearing, Appellants asserted that the Board's Resolution and letter to the leaseholders *unilaterally* modified their contracts, but the trial court appears to have applied the analysis for bilateral modification, not unilateral modification. On appeal, Appellants insist that the Resolution and letter constitute a unilateral modification, comparable to an employer's unilateral modification of its employee's contract of employment. Appellants claim that Santee Cooper unilaterally modified the provisions of the lease agreements by (1) giving ten year extensions to those lessees who did not have that option written into their leases, (2) removing Santee Cooper's 90 day cancellation authority, and (3) giving each leaseholder the option to purchase the property at fair market value. Appellants then contend that Santee Cooper breached the modified lease agreements by failing to offer to sell the lots at fair market value. In order to represent fair market value, Appellants insist that the appraisals should have included the value of the leasehold interests.

Appellants cited this Court's decision in *Fleming v. Borden, Inc.,* 316 S.C. 452, 450 S.E.2d 589 (1994), in support of their unilateral modification argument. In *Fleming*, this Court considered whether an employer could *unilaterally* modify a *unilateral* contract created by the employee handbook. *Id.* Ultimately, the Court held that employers could unilaterally modify such contracts by amending the employee handbook as long as the employee had actual notice of the change. *Id.* The Court noted, however, that "the promisor does not enjoy the unfettered right to modify or terminate a

unilateral contract prior to completion." *Id.* at 461, 450 S.E.2d at 594. Essentially, the Court made a policy exception from this general rule in the employer/employee context to allow employers "a mechanism . . . to alter the employee handbook to meet the changing needs of [both parties]." *Id.* at 462, 450 S.E.2d at 595.

Appellants' reliance on *Fleming's* analysis is flawed. The original lease agreements between the Appellants and Santee Cooper are bilateral contracts, not unilateral contracts. A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance. *See International Shoe Co. v. Herndon*, 135 S.C. 138, 133 S.E. 202 (1926). A bilateral contract, on the other hand, exists when both parties exchange mutual promises. *Id.* Here, the lease agreements are clearly bilateral: Santee Cooper promised to lease specified property to the Appellants and, in return, the Appellants promised to pay a certain amount of rent per year.

We cannot find anything in *Fleming* or elsewhere that allows a party to alter the terms of a bilateral contract by unilateral modification. It is well established that "[a] written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract." *Florence City-County Airport Comm'n v. Air Terminal Parking Co.,* 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984). The necessary elements of a contract are an offer, acceptance, and valuable consideration. A valid offer "identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.,* 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993).

The Board's Resolution and letter to the leaseholders did not identify the bargained for exchange (the sale price) or make acceptance an option. The letter simply explained that all lots would be resurveyed and appraised over the next 12 to 18 months. Notification that the Board had authorized Santee Cooper to sell the lots, and that Santee Cooper would begin the process of survey and appraisal for future sale, does not constitute an offer. As such, the Appellants' claim fails.

Furthermore, as a practical matter, the Board's Resolution and letter to the leaseholders do not modify the terms of the Appellants' lease agreements. Both the Resolution and the letter state explicitly that the terms of the existing lease agreements will be honored. All of the Appellants had the option to continue leasing until the leases expire at which point Santee Cooper agreed to renew the leases for an additional 10 years. Although the leaseholders may have expected that they would be able to renew and extend their leases into perpetuity, their lease agreements did not so provide. All of the lease agreements were made for definite terms, and each allowed for cancellation with 90 days notice, by either party, with or without cause. Therefore, we hold there is no genuine issue of material fact to support Appellants breach of contract claim.

B. Negligent Misrepresentation

Appellants contend that Santee Cooper made two separate negligent misrepresentations to them: (1) that Santee Cooper negligently misrepresented that the appraisals would establish fair market value for the lots, and (2) that Santee Cooper negligently misrepresented the truth when it told leaseholders prior to the Board's Resolution that it would not sell the lots. Appellants' brief fails to analyze the elements of this cause of action or apprise the Court of how the facts of their case satisfy the elements of negligent misrepresentation. They simply assert that the representations by Santee Cooper are "negligent misrepresentations" and argue that the trial court erred in finding there was no genuine issue of material fact to support their cause of action. We disagree.

To establish liability for negligent misrepresentation, the plaintiff must show "(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *AMA Management Corp. v. Strasburger*,

309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992). "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." *Winburn v. Insurance Co. of North America,* 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct. App. 1985).

Appellants have not satisfied the elements of negligent misrepresentation. First, Santee Cooper's statement that it would "engage qualified appraisal firms to establish fair market value for each lot" has not been proven false. Appellants do not dispute that Santee Cooper engaged qualified appraisal firms, they simply disagree with the appraisal methodology employed by those firms. Santee Cooper's appraisers did not consider the value of the leasehold interests in their calculation of fair market value because Santee Cooper told them that the lots would be offered for sale only to the leaseholders. Santee Cooper and its experts contend it did establish fair market value for the lots and that the value of Appellants' leasehold interests were properly excluded from the appraisals based on the following rationale:[6]

(1) Santee Cooper offered the lessees a choice; they could continue to lease or cancel their leases and purchase their lots. In other words, they were free to accept or reject the offer.

(2) The leases contained cancellation clauses that allowed the lessee and the lessor to cancel the leases on 90 days notice. Therefore, the leases were never true long-term leases.

(3) The tenant was offered an opportunity to purchase the land in fee and cancel the lease; it was not required to do so.

Appellants' expert, Robert Jaeger, also submitted an affidavit. He asserts the proper methodology is the "discounted cash flow analysis." Although only a small portion of Mr. Jaeger's deposition was included in the

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[6] Douglas Brown and Thomas Hartnett submitted affidavits attesting to the validity of Santee Cooper's appraisal methodology. Both are certified real estate appraisers with extensive experience. Mr. Brown holds the MAI designation (the highest given by the Appraisal Institute) and is a past president of the Appraisal Institute.

record, it appears that Mr. Jaeger's opinion depends on the lease continuing to the end of its term. Mr. Jaeger was asked, "Does all of Paragraph 6 assume that the lease continues in place and runs to its term?" Mr. Jaeger answered, "It does." Santee Cooper argues that Mr. Jaeger conceded that his opinion depended on the lease not running to term. Appellants have done nothing to contradict Santee Cooper's assertion that Mr. Jaeger conceded this point. Similarly, Appellants have not disputed the fact that none of the purchased leases would continue to term because the parties executed a mutual cancellation of the lease upon purchase.

Regardless, Santee Cooper's statement that it would establish fair market value for the lots is a statement about the future. The appraisals had not been conducted at the time it made the statement. As such, it is not actionable as a misrepresentation. To be actionable, "the representation must relate to a present or pre-existing fact and be false when made." *Koontz v. Thomas,* 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct. App. 1999). Representations based on statements as to future events or unfulfilled promises are not usually actionable. *Id.*

This rule applies with equal force to bar Appellants' claim that statements made by Santee Cooper to the leaseholders that it would not or could not sell the leased lots were false prior to 1995. Santee Cooper was not authorized to sell the land by its Board until the 1995 Resolution. Accordingly, the statements were true when made. Therefore, we hold there is no genuine issue of material fact to support Appellants' negligent misrepresentation cause of action.

C. Unjust Enrichment

Appellants argue that the trial court erred in holding no material issue of genuine fact exists to establish the essential elements of the cause of action for unjust enrichment. We disagree.

Restitution is a remedy designed to prevent unjust enrichment. *Stanley Smith & Sons v. Limestone College,* 238 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct. App. 1984). To recover on a theory of restitution, the plaintiff must

show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Niggel Assoc., Inc. v. Polo's of North Myrtle Beach, Inc.,* 296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1988).

In *Player v. Chandler,* 299 S.C. 101, 382 S.E.2d 891 (1989), this Court found that the record failed to establish a cause of action for unjust enrichment. In *Player*, the plaintiffs leased property from the defendant, and built a restaurant on the property. *Id.* The lease contemplated improvements to the premises and established that plaintiffs could enjoy the use of the improvements during the term of the lease. *Id.* The dispute between the parties arose after plaintiffs offered to purchase the property, and defendant declined to sell, but said that he might be willing to extend the lease term. *Id.* The day after this conversation, plaintiffs began construction of a second restaurant on the property. Three weeks later, defendant told plaintiffs he would not extend the term of the lease unless additional terms and conditions were met. *Id.* The plaintiffs claimed that defendant was unjustly enriched by refusing to extend the lease. This Court disagreed, and found the plaintiffs would be able to enjoy their improvements for the term of the existing lease and that any retention of benefit by the defendant was a result of the initial terms of the lease. *Id.*

In our opinion, the facts here are similar to those in *Player.* Appellants' lease agreements provided that all improvements to the leased property would become the property of Santee Cooper upon termination of the lease (other than upon termination by Santee Cooper). The leases in this case were for very long terms, and Appellants were able to enjoy the improvements they made for many years. Therefore, we find no genuine issue of material fact to support Appellants' claim for unjust enrichment.

II. Intervention

Appellants contend that the trial court erred in denying Intervenor Appellants' motion to terminate intervention. We disagree.

Rule 24, SCRCP, provides for intervention of right and permissive intervention. Without citing any authority, Intervenor Appellants claim that because they intervened permissively under Rule 24(b), not as of right, they should be allowed to terminate their intervention whenever they choose. Rule 24(b) does not provide for any method of termination of intervention.

After Judge Smoak denied class certification, but while a motion to alter or amend that judgment was pending, Intervenor Appellants moved for permissive intervention. Judge Smoak granted their motion to intervene on June 8, 2000. A few days later, Judge Smoak denied Appellants' motion to alter or amend his order denying class certification. Intervenor Appellants then sought to terminate their intervention as a "result of denial of Plaintiffs' Motion for Reconsideration of the Class in the present case."

Judge Buckner denied the motion to terminate intervention finding that to do so would substantially alter or affect Judge Smoak's prior orders. *See Dinkins v. Robbins,* 203 S.C 199, 26 S.E.2d 689 (1943). According to *Dinkins,* "the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases where the right to do so has been reserved to the succeeding Judge, when it is allowed by rule or statute, or when the subsequent order does not substantially affect the ruling or decision represented by the previous order." 203 S.C. at 202, 26 S.E.2d at 690.

Respondent argues that terminating intervention would have had a substantial affect on Judge Smoak's prior order granting intervention. We agree. When Intervenor Appellants moved to intervene in this action, they consented to the jurisdiction of the Orangeburg County Court of Common Pleas and agreed to be bound by the rulings and judgment of such court. *See* 67A C.J.S. *Parties* § 86, at 843 (1978). By granting the motion, Judge Smoak made the decision that the rights of Intervenor Appellants would be adjudicated in this action. Judge Smoak grant of intervention and then denial of class certification indicate his intention for the ultimate judgment in this case to bind the Intervenor Appellants and preclude the relitigation of their claims in another forum.

The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion. *See South Carolina Tax Commn. v. Union City Treasurer,* 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988). We hold it was within Judge Buckner's discretion to deny Intervenor Appellants' motion to terminate intervention.

III. Class Certification

Because we find there is no genuine issue of material fact to support the Appellants' causes of action, we decline to address this issue.

IV. Tort Claims Act

Because we find there is no genuine issue of material fact regarding Appellants' negligent misrepresentation claim, we find it is unnecessary to address this issue.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the trial court's grant of summary judgment in favor of Santee Cooper and the trial court's denial of Intervenor Appellants' motion to terminate intervention. We find it unnecessary to address the class certification and Tort Claims Act issues.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James N. Bryant, III, Appellant.

Appeal From Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 25649
Heard April 1, 2003 - Filed May 12, 2003

REVERSED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, 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 S. Creighton Waters, all of Columbia; and J. Gregory Hembree, of Conway, for respondent.

PER CURIAM: Appellant was convicted of murder and armed robbery and sentenced to death. Appellant argues the trial judge erred by denying his motion for a new trial on the basis that law enforcement's contact

with jurors' family members compromised his right to a fair and impartial jury. We agree.

FACTS

Appellant was indicted for the murder and armed robbery of Horry County Police Officer Dennis Lyden. Jury selection began on Monday, June 18, 2001. The next day, members of the jury pool were examined for the purpose of "death penalty qualification." On Wednesday, June 20, the parties agreed to select the jury from thirty-nine death penalty qualified jurors. Selection of the jury began on the morning of Thursday, June 21. The guilt phase of trial began the same day. The sentencing phase began on Sunday, June 24; the jury returned with its recommended sentence on Monday, June 25.

The following day, defense counsel learned improper contact may have been made with a member of the jury pool. After further investigation, appellant filed a motion for a new trial alleging members of the prosecution and/or their agents contacted jurors' relatives after the jurors were death penalty qualified. Appellant attached two affidavits to his motion; they are summarized below:

> Affiant 1: Detective George Merritt of the Horry County Police Department telephoned her place of employment on June 20, 2001. He informed her he was conducting a background check on potential Juror AA. Affiant 1 stated she told Detective Merritt that Juror AA was her daughter. In addition to other questions, the detective asked Affiant 1 if she thought Juror AA could vote for the death penalty and Affiant 1 responded affirmatively. Detective Merritt told Affiant 1 their conversation could remain between the two of them and she did not have to tell Juror AA he had called. When Juror AA arrived for work, Affiant 1 told her the police had telephoned.
>
> Affiant 2: On June 21, 2001, a police detective contacted her by telephone at her place of employment. The detective stated he was calling with questions regarding her husband's jury duty. The detective

stated "they were trying to get a death penalty conviction" and inquired if her husband "could sign the paper for death." She told the detective she and her husband believed in the death penalty. The detective instructed Affiant 2 not to tell her husband about the telephone call until his jury service was completed.[1]

The State filed a response admitting it conducted investigations on the death penalty qualified jurors, but claiming the contact with jurors' family members was unintentional and did not prejudice appellant. The response stated the Solicitor's Office specifically requested Horry County Police Department Detectives George Merritt and Jamie Debari be assigned to conduct the inquiries because they had conducted investigations in two prior capital cases. The Solicitor's Office instructed detectives to use the following protocol in conducting background investigations of prospective jurors:

1) An investigator may not call on the juror or any member of the household or any immediate family member of any death qualified juror, but may call on employers, neighbors, fellow church members, associates and/or acquaintances of the juror.

2) The investigator must identify himself and state the purpose of his inquiry from the outset of the communication.

3) The investigator must instruct the party to whom the inquiry is addressed that the fact that an inquiry has been made or information communicated though the inquiry must not be communicated to a death penalty qualified juror until after the trial of the Defendant is completed, or in the case of a juror who is not selected as a member of the petit jury, after jury selection is completed.

[1]The State struck Juror AA; it excused Affiant 2's husband as an alternate juror.

4) The investigator must end the inquiry immediately if the party to whom the inquiry is addressed indicates an unwillingness to speak with the investigator.

The State asserted it was not aware of any irregularities in the investigation until July 11, 2001, when the Solicitor's Office met with the Horry County Police Department detectives to discuss appellant's new trial motion. At that time, the Solicitor's Office learned a Horry County Police Department detective directly contacted family members of at least three death qualified jurors. The State's reply asserted the Solicitor's Office was unaware this detective had been appointed by the Horry County Police Department to conduct jury investigation.

The trial judge granted the State's motion for an evidentiary hearing. Prior to the hearing, the State and appellant agreed the trial judge would individually voir dire the twelve jurors and two alternates who sat on appellant's jury and ask a limited number of questions submitted by the parties. Summations of the jurors' testimony follows:

> Juror N: Between death penalty qualification and being seated as a juror, she discovered Horry County Sheriff's Department detectives had questioned her neighbors. Initially, Juror N thought the questioning was related to her upcoming marital separation hearing. When she overheard two jurors discussing contact, she realized the detective's inquiries were about the trial.
>
> Juror K: After she was death penalty qualified, she saw an undercover officer question her neighbor. Although the neighbor declined to speak with Juror K about the conversation, Juror K assumed it was about the trial. Another death penalty qualified juror told Juror K a detective had questioned her neighbors, too.
>
> Juror J: After trial, she learned detectives had gone to her husband's employment, but her husband was not present.

Juror H: After he was seated on the jury, he learned from Juror N that someone had spoken with her neighbors.

Juror F: After he was seated on the jury, another juror mentioned a detective had contacted her family member.

Juror E: While she was sequestered, Juror E's mother told her someone had contacted Juror E's father asking questions about Juror E. Juror E assumed it was about the trial. Juror E testified Juror K told her someone had gone to her neighbor's house and talked to them.

Juror B: He was aware during trial that a detective had contacted his employer and spoken with some of his coworkers; he assumed it was about the trial. Juror B stated he overheard other jurors discussing the fact that their neighbors or employers had been contacted.

In addition, appellant submitted sworn statements from nine death penalty qualified jurors. In seven of these statements, qualified jurors stated their relatives had been questioned by either detectives or unknown individuals. One juror stated an unknown person questioned his great aunt, mother, and thirteen year old daughter. Some jurors stated concern about the investigation, one expressly noting he felt as if the questioning amounted to jury tampering.

Concluding appellant's right to an impartial jury as guaranteed by the Sixth Amendment was not violated, the trial judge denied appellant's motion for a new trial.

ISSUE

Did the trial judge err by denying appellant's motion for a new trial based on the assertion that contact between law enforcement and jurors' family members compromised the impartiality of the jury in contravention of the Sixth Amendment to the United States Constitution?

DISCUSSION

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); see also S.C. Const. art. I, §§ 3 & 14. "[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature." State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993). In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed.2d 654 (1954).[2]

After thorough consideration of the trial record, the new trial hearing, and the applicable law, we conclude appellant's right to a fair trial by a panel of impartial and indifferent jurors was compromised by the State's action. While we do not as a rule disapprove of juror background

[2] Both the trial judge and State rely on the Rules of Professional Conduct (RPC), Rule 407, SCACR, to determine whether there was error. We note, however, that the RPC have no bearing on the constitutionality of a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993); see Scope of RPC ("[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."). For example, in Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), the Court explained prosecutorial misconduct resulting from the failure to disclose information to the defense as required by the Constitution is not "necessarily synonymous" with misconduct as defined in the RPC because the focus of the analysis is different, i.e., the fairness of the procedure against the defendant vs. the attorney's alleged misconduct.

investigations,[3] we can not condone the activity which admittedly occurred in this case.[4]

Here, appellant was indicted on a charge of capital murder for the death of a Horry County Police officer. After the State and appellant individually questioned each juror as to his or her view on the death penalty and the trial judge determined that thirty-nine jurors could fairly and impartially carry out their duties if seated on the jury (i.e., impose a sentence of either life imprisonment or death based upon the circumstances of the crime and the characteristics of appellant),[5] detectives from the Horry County Police Department contacted relatives of the qualified jurors. In at least two instances, the detectives asked family members whether their relative could impose the death penalty. In one instance, the detective informed a juror's wife the police wanted the death penalty. During the trial, the jurors were aware police investigators had contacted their family members.

We find the questioning of jurors' family members by Horry County Police detectives in a case in which the victim was a Horry County Police Department Officer was, at minimum, an attempt to influence the jury. See In the Matter of Two Anonymous Members of the South Carolina Bar

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[3] See Bailey v. State, 309 S.C. 455, 424 S.E.2d 503 (1992) (recognizing need for background investigations of prospective jurors in capital trials); Long v. Norris & Assoc., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000) (recognizing parties may conduct juror background checks so long as investigation meets requirements of RPC and other authorities).

[4] The State concedes it is responsible for the conduct of the police detectives.

[5] See State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (in capital case, proper standard for determining qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his or her duties in accordance with the instructions and oath).

278 S.C. 477, 298 S.E.2d 450 (1982) (explaining purpose of former rule DR 7-108(F) prohibiting contact between lawyer and prospective juror's family was to eliminate ability of family member to exert influence). Under the circumstances, the questioning could have been perceived as an attempt to intimidate jurors. Given the nature of the case, the timing of the inquiries, and the questions which were asked, we conclude the jury investigation produced a jury which was not fair and impartial and, therefore, appellant's Sixth and Fourteenth Amendment rights were violated.

Accordingly, appellant's conviction and sentence are **REVERSED.**[6]

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

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[6] We affirm Issue 3 pursuant to Rule 220(b)(1), SCACR, and the following authority: State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one basis for objection at trial and another ground on appeal).

In light of our disposition of this appeal, it is unnecessary to rule on the remaining issues presented.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Emma F. Hessenthaler, Petitioner,

v.

Tri-County Sister Help, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25650
Heard November 21, 2002 - Filed May 12, 2003

REVERSED

William Gary White, III, of Columbia, for Petitioner.

Chalmers Carey Johnson, of Chalmers Johnson Law Firm, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: Petitioner asks this Court to review the Court of Appeals' finding that the trial judge should have granted Respondent's motions for directed verdict and JNOV because the language in

the Respondent's employee handbook did not alter Petitioner's at-will employment status.

Factual/Procedural Background

Frances Hessenthaler ("Hessenthaler") began working as a shelter monitor for Tri-County Sister Help ("the shelter"), a domestic violence shelter for battered women and their children, in 1984. Hessenthaler worked under the Executive Director, Natalie Simpson ("Simpson"), who trained her to manage many of the shelter's affairs, including keeping the books and records, training volunteers, supervising the other monitors, and assisting the women and children in the shelter. By late 1995, Hessenthaler had risen to the position of shelter director, which was directly below the Executive Director position. Simpson described Hessenthaler as "one of those rare employees that you are so thankful every day to have. She always finished every task and she was willing. She loved the clients, you know."

Hessenthaler was an hourly rate employee until the early 1990's, but because she was going to be working over 40 hours a week, Simpson suggested that she and Hessenthaler sign an employment contract so that the shelter would not be liable for all the overtime that Hessenthaler would be working. So they signed the contract, and Simpson placed it in Hessenthaler's employment file. The contract contained terms of payment, Hessenthaler's duties, her exemption from comp time, and her right to take time off. Simpson asked Hessenthaler to write an employment manual for the shelter, which was based on manuals from other shelter programs in the state.

Simpson left the shelter in 1995, and the shelter's board of directors found her replacement, Audrey Harrell ("Harrell"). As soon as she was hired, Harrell began firing members of the staff. Harrell, an African-American, left messages on Hessenthaler's answering machine, telling her to inform the employees, who were white women, that they were fired. Harrell hired two black women and one white woman to replace them. Hessenthaler told one of the new black women to man the hotline, and the woman screamed at her for a few minutes, and the other black woman joined in. Hessenthaler reported the incident to Harrell and told Harrell that she was

going to file a grievance. Harrell refused to let her file a grievance and told her the next day that she would not be supervising the two women.

On January 1, 1996, someone called Hessenthaler at home to report that no one was answering the 24-hour hotline that the shelter operated. Hessenthaler then called Harrell to report the problem. Harrell demanded that Hessenthaler reveal who informed her about the hotline, and Hessenthaler refused to answer the question and told Harrell that she had to go. Hessenthaler then hung up the phone and eventually called a board member to inform her of the hotline and the conversation with Harrell.

The next day Harrell had Hessenthaler meet with her after work, a meeting that lasted three hours and forty-five minutes. Harrell told her that she was going to be punished, that she was going to be demoted from shelter director, that her office would become a bedroom, that Harrell would "destroy her," and that hanging up the phone on her was "just like calling [Harrell] the 'n' word." Harrell suspended Hessenthaler for two days for insubordination, failure to assist Executive Director in an investigation, and failure to follow proper chain of command. Harrell told Hessenthaler that a board member would contact her to inform her whether or not she could return to work.

Hessenthaler experienced some health problems including depression. She also had a hysterectomy and subsequently broke some ribs in a car accident. She sent the shelter her doctor's statements justifying her leave of absence from January to mid-April. The board voted to give her an unpaid leave of absence beginning in late January. In February, Harrell sent her a new employee manual, which she did not read at that time. Hessenthaler and Harrell, after some back and forth communication via the mail, finally met on May 8.[1] Harrell read the employee manual out loud to Hessenthaler. The

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[1]One of the communications was a job offer dated April 26, which was accompanied with a list of responsibilities:

1. Train shelter staff and volunteers on shelter policies and procedures
2. Ensure that these policies and procedures are followed by shelter residents

manual contained a disclaimer in bold on the first page, and it also contained an anti-harassment and an anti-discrimination provision. Hessenthaler testified that she did not recall Harrell reading the disclaimer language but remembered thinking it ironic that Harrell was reading a section about fair employment practices.

Harrell then offered her the shelter manager position. Harrell significantly increased the job description from her earlier offer. She included ten more requirements, which were:

1. Recruit, train, and motivate volunteers
2. Assess the need for volunteers and coordinate volunteer schedule to ensure 24-hour coverage and other related client services
3. Assist public relations coordinator to establish a Speaker's Bureau to promote public awareness and community education on domestic violence
4. Serve as speaker for the Bureau
5. Receive and process all non-monetary donations
6. Maintain appropriate statistics and logs on volunteers and complete required reports
7. Act as PR coordinator in development and distribution of newsletter
8. Assist in fund-raising activities
9. Solicit donations from various groups and organizations
10. Design and coordinate an incentive award program for volunteers
11. Coordinate mass mailings to churches, social and professional clubs, and organizations in York, Lancaster and Chester Counties

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3. Provide general facility maintenance and security management
4. Meet with shelter clients weekly to discuss any problems/concerns regarding the shelter
5. Recommend shelter purchases to Assistant Director
6. Facilitate group on shelter orientation and house rules with residents
7. Ensure that appropriate codes and standards are met
8. Purchase approved groceries for shelter
9. Other duties as assigned

Harrell also told Hessenthaler that she expected her to get a college degree. Harrell also told her that she would have to assume the responsibilities of the volunteer coordinator as well. Hessenthaler testified she felt like about eight people were needed to do all of that work. Barbara Close, a member of the shelter board since 1984, resigned because of the way Hessenthaler was treated. She said that there was no way that one person could have accomplished all of these duties.

Hessenthaler left the meeting telling Harrell that she would have to think about whether or not she should accept the position due to all of the job requirements. She did not return to work by May 13 and found out that she had been terminated.

Hessenthaler brought a breach of contract action against the shelter alleging she was constructively discharged because of her race. The jury found in her favor awarding her $25,000 in actual damages. The Court of Appeals reversed, finding that the trial judge erred in not granting the shelter's motions for directed verdict and judgment notwithstanding the verdict. *Hessenthaler v. Tri-County Sister Help, Inc.*, Op. No. 2001-UP-325 (S.C. Ct. App. Filed June 19, 2001).

This Court granted Hessenthaler's petitions for certiorari to review the Court of Appeals reversal of the trial judge. The following issue is presented for review:

> Did the Court of Appeals err in finding that the shelter's employee handbook was not a contract?

Law/Analysis

Hessenthaler contends that the Court of Appeals erred in finding that the disclaimer language in the shelter's employee handbook was conspicuous as a matter of law and that the handbook did not alter Hessenthaler's status as an at-will employee. We agree.

When reviewing a denial of a motion for directed verdict or a motion for JNOV on appeal, this Court must view the evidence in the light most

favorable to the non-moving party. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). As long as the evidence gives rise to more than one reasonable inference, a directed verdict or JNOV are not appropriate legal remedies. *Id*.

Generally, an employer may terminate an at-will employee for any reason or no reason and will not be subjected to a breach of employment contract claim. *Conner v. City of Forest Acres*, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002); *Stiles v. American Gen. Life Ins. Co.,* 335 S.C. 222, 516 S.E.2d 449(1999). This Court has held that the determination of whether an employee manual alters an employee's at-will status is a question for the jury. *Fleming v. Borden*, 316 S.C. 452, 460, 450 S.E.2d 589, 594 (1994); *Small v. Springs Industries*, 292 S.C. 481, 357 S.E.2d 452 (1987). An employee manual that contains promissory language and a disclaimer is "inherently ambiguous," and a jury should interpret whether the manual creates or alters an existing contractual relationship. *Fleming*, 316 S.C. at 463-464, 450 S.E.2d at 596 (citation omitted).

Based on the principles of *Fleming*, we hold that the trial judge properly submitted the question of whether the employee manual operated as an enforceable contract between Hessenthaler and the shelter to the jury. According to *Fleming*, the shelter's manual was "inherently ambiguous," as it contained an anti-discrimination provision and a disclaimer. Since Harrell read the manual aloud to Hessenthaler, the manual was especially ambiguous because Hessenthaler could not have appreciated the conspicuousness of the disclaimer language. When viewed in the light most favorable to Hessenthaler, we hold that the trial judge did not err in allowing the jury to resolve this ambiguity rather than granting a directed verdict or JNOV in favor of the shelter.

Conclusion

Accordingly, we **REVERSE** the Court of Appeals' granting of a directed verdict in favor of the shelter and reinstate the $25,000 verdict in favor of Hessenthaler for constructive discharge.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Henry F. Floyd, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
Delbert Louis Smalls,	Appellant.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3638
Heard February 13, 2003 – Filed May 5, 2003

VACATED

Assistant Appellate Defender Robert M. Pachak of SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and

Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

STILWELL, J.: The Charleston County Grand Jury true-billed an indictment against Delbert Smalls for second-degree lynching. When the case was called to trial, he pled guilty to assault and battery of a high and aggravated nature (ABHAN) rather than the lynching charge.[1] The trial court accepted the guilty plea and sentenced Smalls as a youthful offender to a term of imprisonment not to exceed six years. Smalls appeals, arguing the trial court lacked subject matter jurisdiction to accept the guilty plea. We agree and vacate the conviction.

BACKGROUND

Smalls' indictment for second-degree lynching alleges:

> That Delbert Louis Smalls did in Charleston County on or about the 2nd day of June, 1998 willfully and unlawfully and feloniously participate as a member of a group consisting of three people in committing an act of violence against the person of Richard Spearing by hitting him with their hands, feet, and a metal chair, in violation of Section 16-3-220 of the South Carolina Code of Laws (1976) as amended.

At trial, Smalls' attorney informed the court that although the charge against Smalls was "listed as a lynching" Smalls was "[p]leading down to an ABHAN." No separate indictment charging Smalls with ABHAN had been prepared. Counsel for Smalls explained, "Your honor, as I understand it, the way that Mr. Smalls is pleading to the ABHAN is actually a waiver on the

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[1] Smalls simultaneously pled guilty to several other offenses. On appeal of all of the convictions, Smalls' appellate counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), asserting the appeal was without merit. This court agreed as to the other charges and dismissed the appeal as it pertained to them, but ordered the parties to brief the issue discussed in this opinion.

same piece of paper, on the same sentencing sheet as the lynching second." In questioning Smalls about his intent to waive presentment to the grand jury, the trial court explained to Smalls that "you are indicted for lynching. The question, of course, is whether the ABHAN, which is what the offer is to plead to, has in fact been indicted or is in fact a lesser included offense . . . . Do you want to waive that right and proceed today on the ABHAN charge or do you want me to send that charge to the grand jury?" Smalls responded: "I waive it." The court then proceeded to accept Smalls' plea.

According to the sentencing sheet, Smalls pled guilty under indictment 1998-GS-10-8378, which included only the charge of second-degree lynching. The indictment was never amended to charge Smalls with ABHAN. The sentencing sheet expressly refers, however, to ABHAN as the crime to which Smalls pled guilty and for which he was sentenced.

DISCUSSION

On appeal, Smalls asserts that because no indictment charging him with ABHAN was ever prepared, his waiver of presentment to the grand jury was insufficient to confer subject matter jurisdiction upon the trial court to accept his plea of guilty to that charge. We agree.

The South Carolina Constitution provides:

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

S.C. Const. art. I, §11.

South Carolina Code Annotated section 17-19-10 states:

> No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in the following cases:
>
> (1) When a prosecution by information is expressly authorized by statute;
> (2) In proceedings before a police court or magistrate; and
> (3) In proceedings before courts martial.

S.C. Code Ann. § 17-19-10 (2003).

Any person arrested upon a warrant for a felony or a non-magistrate level misdemeanor may apply to the clerk of court for immediate disposition of the case. S.C. Code Ann. § 17-23-120 (2003). South Carolina Code Annotated sections 17-23-130 and 17-23-140 govern the disposition of such cases.

> Upon receipt by the solicitor of the warrant forwarded to him pursuant to the provisions of § 17-23-120, he may forthwith prepare a formal indictment as now provided by law in such cases and shall return it to the clerk of court. The clerk of court shall then notify the sheriff or one of his duly authorized deputies to bring the defendant before the clerk at a time and place to be stated in the notice at which time the clerk shall have the defendant sign a waiver of the presentment by the grand jury and his plea of guilty; provided, that no plea shall be entered or made under this section except by and with the consent of the solicitor of the circuit after investigation by such solicitor.

S.C. Code Ann. § 17-23-130 (2003) (third emphasis in original).

> Upon the defendant's signing the waiver of presentment and the plea of guilty the clerk of court shall deliver the indictment to the sheriff or one of his duly authorized deputies whose duty it shall be to appear before the resident judge of the circuit or presiding judge therein at some convenient time and

> place, having with him the defendant. And upon the defendant's acknowledging his plea before the judge the judge shall sentence the defendant as though the indictment had been presented by the grand jury and the plea of the defendant taken at the regular term of the court of general sessions of the county in which the case arose. Provided, however, that in the event the defendant is charged with a felony, the acknowledgement by the defendant of his plea and the sentencing by the judge shall take place only in open court and shall not take place in chambers.

S.C. Code Ann. § 17-23-140 (2003) (fourth emphasis in original).

Compliance with sections 17-23-130 and -140 is mandatory. Odom v. State, 350 S.C. 300, 302, 566 S.E.2d 528, 529 (2002).

Our case law describes the existence of a sufficient true-billed indictment or a valid waiver of presentment as a prerequisite to a valid guilty plea. "Except for certain minor offenses, the circuit court does not have jurisdiction to hear a guilty plea unless there has been an indictment, a waiver of presentment, or unless the charge is a lesser included offense of the crime charged in the indictment." Hopkins v. State, 317 S.C. 7, 9, 451 S.E.2d 389, 390 (1994). See also Odom, 350 S.C. at 302, 566 S.E.2d at 529 ("In the absence of an indictment, there must be a valid waiver of presentment for the trial court to have subject matter jurisdiction of the offense."). Here, no indictment was prepared stating the offense of ABHAN. Nor was the indictment charging Smalls with second-degree lynching amended to charge him with ABHAN. Additionally, because "circumstances of aggravation" is an element of ABHAN not included in second-degree lynching, ABHAN is not a lesser-included offense of second-degree lynching. Knox v. State, 340 S.C. 81, 84-85, 530 S.E.2d 887, 888-89 (2000); S.C. Code Ann. § 16-3-220 (1985) (defining second-degree lynching as "[a]ny act of violence inflicted by a mob upon the body of another person and from which death does not result"); State v. Easler, 327 S.C. 121, 133, 489 S.E.2d 617, 624 (1997) (defining ABHAN as an unlawful act of violent injury to another person accompanied by circumstances of aggravation).

Because ABHAN is not a lesser-included offense of second-degree lynching, our inquiry is confined to whether an effective waiver of presentment can occur when no indictment charging the relevant offense was prepared. The plain language of sections 17-23-130 and 17-23-140, viewed in conjunction with the case law governing acceptance of guilty pleas, requires preparation of a formal indictment as a condition precedent to a valid waiver of presentment. See City of Columbia v. ACLU of S.C., Inc., 323 S.C. 384, 387-88, 475 S.E.2d 747, 749 (1996) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). Inasmuch as no indictment was prepared charging Smalls with ABHAN as required by statute, no valid written waiver of presentment to the grand jury could have been accomplished and, in turn, the trial court was without subject matter jurisdiction to accept the guilty plea. See Summerall v. State, 278 S.C. 255, 256, 294 S.E.2d 344, 344 (1982) ("By their plain language, §§ 17-23-130 and 140 make a written waiver of presentment of indictments not presented to a grand jury mandatory before the trial judge can accept the plea."). Because "parties cannot confer subject matter jurisdiction by consent," Smalls' signature on the sentencing sheet was insufficient absent an indictment charging him with ABHAN. State v. Grim, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000).

VACATED.

CURETON and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sherwood N. Fender, Respondent,

v.

Heirs at Law of Roger Smashum, John Smashum and Arthur Smashum, if living or such heirs of them as may be living, Carolee H. Goodwine, Mae Olive Henderson, Audrey Polite Sawyer, Diana Cornish, Heirs of John Frasier, if living or such heirs of them as may be living, Bernadette Anderson, Eloise Gadson and all other persons unknown, having or claiming any right, title or estate or interest in or lien upon the real property described in the complaint herein, being designated collectively as John Doe and Sarah Roe, including all minors, persons in the armed forces, insane persons and all other persons under any other disability who might have or claim to have any right, title or interest in or lien upon the real property described in the complaint herein, Defendants,

Of whom Henrietta Jones, Sarah Shepard and Lucy Smith, as heirs at law of John Smashum, and Queen Smashum, as grantee of Adam Smashum, heir at law of John Smashum, are Appellants.

Appeal From Beaufort County
Perry M. Buckner, Circuit Court Judge

Opinion No. 3639
Heard March 11, 2003 – Filed May 5, 2003

REVERSED and REMANDED

Derek C. Gilbert, of Beaufort, for Appellants.

Alysoun Meree Eversole, of Beaufort, for Respondent.

CURETON, J: Henrietta Jones, Sarah Shepard and Lucy Smith, as heirs of John Smashum, and Queen Smashum, as grantee of Adam Smashum, heir of John Smashum (collectively "Heirs"), appeal the circuit court's grant of summary judgment to Sherwood N. Fender in this quiet title action. We reverse and remand.

FACTS

The parties each claim title to a parcel of unimproved land. Each can trace their titles through a series of intestate and deed conveyances to two "Head of Family Land Certificates" granted by the United States District Tax Commission to Roger Smashum around 1867. Roger Smashum's interest eventually passed through intestacy to his son John Smashum and eventually to two of his grandsons, Arthur Smashum and Thomas Smashum.

Fender claims title through a November 1988 deed derived from a succession of conveyances from Arthur Smashum. In 1966, Arthur Smashum conveyed his interest in the property to Betty M. Sloan by quit-claim deed. Sloan conveyed the property back to Arthur in 1969 by quit-claim deed. In 1983, Arthur conveyed the property to himself and Charlie Mae Brantley as joint tenants with the right of survivorship. Arthur died in 1984 and in 1988 Charlie Mae conveyed the property to W. Thomas Parker and Fender by warranty deed.[1]

Henrietta Jones, Sarah Shepard and Lucy Smith, claim a tenancy-in-common with Fender as heirs of Thomas Smashum. Queen Smashum claims a one-eighth tenancy in common interest with Fender through a 1999 quit-claim deed from Adam Smashum, an heir of Thomas Smashum.

In December 1999, Fender initiated the present action seeking to quiet title to the property. He asserted the absence of estate or administrative proceedings related to the estates of Roger Smashum, John Smashum, and Arthur Smashum left a cloud over his title. In his complaint, Fender alleges the interest of a business associate and his was adverse to all others. His complaint states:

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[1] In February 1990, Parker and Fender conveyed their interests to Fender, Parker-Matthews Investors, Inc., and Mary Hudson Feltner. Feltner conveyed her interest to Fender in 1993.

> That possession of the property which is the subject of this cause of action has been in actual, open, notorious and exclusive possession of [Fender and a business associate] under claim of title and that there has been such continued occupation and possession of the premises for over ten (10) years.

Queen Smashum answered on behalf of herself and the heirs of Thomas Smashum in May 2000, and counterclaimed to quiet title to the property in the name of the Heirs. The Heirs claimed Queen Smashum, Henrietta Jones, Sarah Shepard, and Lucy Smith each owned an undivided one-eighth interest in the property.

In June 2001, Fender made a motion for summary judgment. The circuit court conducted a hearing on Fender's motion the following month. In its order issued in August 2000, the court granted summary judgment to Fender. This appeal follows.

STANDARD OF REVIEW

Summary judgment is appropriate 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). When determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn from it, must be viewed in the light most favorable to the nonmoving party. Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 540 (2002). If triable issues exist, those issues must be submitted to the jury. Young v. S.C. Dep't of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). Even where no dispute as to evidentiary facts exists, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002). Moreover, summary judgment is a drastic remedy that should be cautiously invoked to ensure no person is improperly deprived of a trial of disputed factual issues. Lanham v.

Blue Cross & Blue Shield of S.C., 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002).

LAW/ANALYSIS

The Heirs argue the circuit court erred in finding Fender acquired title to the subject property through adverse possession. We agree.

As an initial matter, the Heirs assert the circuit court erred in failing to find that they are co-tenants in the subject property with Fender. The Heirs cite 86 C.J.S. Tenancy In Common § 8 (1997) for the proposition that upon the intestate death of John Smashum and his wife, his two surviving children, Arthur Smashum and Thomas Smashum owned the property as tenants in common. They further argue that any grantees of Arthur necessarily owned a proportional interest in the property as tenants in common with them as heirs of Thomas Smashum. While acknowledging that Arthur and Thomas were cotenants, Fender asserts the cotenancy came to an end when Arthur conveyed the property to a stranger, reacquired title to the property, and thereafter conveyed the property by warranty deed to himself and Charlie Mae Brantley.[2] He further refers to the deposition testimony of Queen Smashum that prior to the death of Arthur Smashum in 1985, she obtained permission from him for her and her husband Adam to plant a garden on the property.

As stated in the case of Andrews v. McDade, 201 S.C. 24, 28-29, 21 S.E. 2d 202, 204 (1942):

> As to real property, the general rule is that where the state has passed a perfect legal title, the doctrine of abandonment is not applicable thereto, and that the title vested in the grantee cannot be

[2] Fender cites 20 Am. Jur. 2d Cotenancy and Joint Ownership, Section 31 for the proposition that "a tenancy in common will come to an end upon forfeiture or abandonment of the common property, upon its conveyance, voluntary or otherwise, to a stranger, or upon the definite ouster by the cotenant of his fellows."

> affected or transferred by his act in departing from the land and leaving it unoccupied, or otherwise ceasing to exercise dominion over it . . . .
>
> At common law, while an incorporeal hereditament may be lost by abandonment, the principle is firmly established that perfect legal title to a corporeal hereditament cannot be abandoned, or lost by abandonment, operating alone, and dissociated from other acts or circumstances; and so it is frequently said that so far as land is concerned, there can be an abandonment only in a case where the title is imperfect, or less than absolute. The doctrine of abandonment has, therefore, no application to a fee simple; but inchoate rights and equitable rights in land may be abandoned, and so may mere possessory rights, and rights acquired by user ….

Although technically a fee simple title holder may not by nonuse abandon his title, his nonuse and failure to assert his title to the property may constitute an important circumstance in a determination of whether another has held the property adversely to the title holder. As clarified at oral argument, Fender does not claim he ousted the Heirs, but rather claims his predecessors in title ousted the Heirs. Thus, he reasons he is not a cotenant with the Heirs and thus need only prove adverse possession for ten years prior to the date of the commencement of this action. We first examine whether Fender's predecessors in title ousted the Heirs.

> "Ouster" is the actual turning out or keeping excluded a party entitled to possession of any real property. Grant v. Grant, 288 S.C. 86, 340 S.E.2d 791 (Ct. App. 1986). . . . Actual ouster of a tenant in common by a cotenant in possession occurs when the possession is attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits. Woods v. Bivens, 292 S.C. 76, 354 S.E.2d 909 (1987); Brevard v. Fortune, 221 S.C. 117, 69 S.E.2d 355 (1952). The acts relied upon to establish an ouster must

> be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. Felder, 278 S.C. at 330, 295 S.E.2d at 642. Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property. Id., 278 S.C. at 331, 295 S.E.2d at 642.

Freeman v. Freeman, 323 S.C. 95, 99-100, 473 S.E.2d 467, 470 (Ct. App. 1996). "Ouster is presumed from possession only if it is continued for a period of twenty years. Title by ten years' adverse possession by a cotenant against another may be acquired only after actual ouster of which the latter has notice, or should have in the exercise of a reasonable diligence and vigilance." Watson v. Little, 224 S.C. 359, 364, 79 S.E.2d 384, 387 (1953).

We conclude the conveyance from Arthur to Betty Sloan by quit-claim deed in 1966; the reconveyance by Sloan to Arthur in 1969; the conveyance to himself and Charlie Mae Brantley as joint tenants in 1983, and the conveyance by Brantley[3] to Fender and W. Thomas Parker by a purported warranty deed in 1988, together with the fact Queen Smashum obtained Arthur's permission to plant a garden on the property are insufficient by themselves to establish that the Heirs were ousted. "In the absence of authorization or ratification, any attempted conveyance of the common property by one cotenant is not binding upon his cotenants, and operates to pass title to nothing more than the seller's own interest." 20 Am. Jur. 2d Cotenancy and Joint Ownership § 106 (1995). We recognize that these conveyances are some evidence of ouster and should not be ignored[4] for possession under such deeds and the assertion of exclusive and unequivocal ownership in time could ripen into title by adverse possession. Nevertheless, Arthur did not enter into possession under such a deed.

[3] Arthur died in 1985.

[4] These conveyances arguably constitute color of title under our adverse possession statutes. Woods v. Bivens, 292 S.C. 76, 78-79, 354 S.E.2d 909, 911 (1987).

Moreover, his transfer to Betty Sloan in 1966 and her reconveyance to him in 1969 were by quit-claim deeds which gives rise to the inference Arthur realized he may have had less than a good legal title.[5] In addition, we find that Fender did not present evidence regarding the character of Arthur's possession or that Arthur took actions to exclude the Heirs from the property or asserted exclusive ownership over the land. Likewise, there is no evidence of the character of Charlie Mae's possession of the property.

We conclude, therefore, that a question of fact exists whether Fender established the Heirs were ousted of their interest in the property by Arthur or Charlie Mae. We further conclude that under the posture of the record in this case, Fender and the Heirs are co-tenants in the property. Therefore, Fender must show that his actions toward the property amounted to an ouster of the Heirs before he can establish title by adverse possession.

> There are well-established principles applicable to cotenancy, which control the controversy . . . . A cotenant has the right, in common with his cotenants, to the possession of the property owned in common, so ordinarily the possession by one cotenant is the possession of all. The latter ceases when the exclusive possession of a cotenant becomes adverse to the right of possession by the other cotenant or cotenants; but the hostile character of the possession must be such as to amount to an ouster of the other cotenant or cotenants and must be clearly and unmistakably established by the evidence. While the possessor need not give express notice of the hostility of his possession to the other or others, the nature of it must be brought home, as it has been said, to the other owner or owners.

Watson, 224 S.C. at 365, 79 S.E.2d at 387. One claiming title to land by adverse possession has the burden of proving adverse possession by clear and convincing evidence. Lusk v. Callaham, 287 S.C. 459, 460, 339 S.E.2d 156, 157 (Ct. App. 1986).

[5] According to Fender, he had actual notice of these deeds.

The circuit court makes no reference to ouster in its order, but analyzes Fender's claim of title based solely on an adverse possession analysis. In fact, as we understand Fender's claim, he does not claim title to the property pursuant to ouster of the heirs, but rather based solely on adverse possession. Inasmuch as ouster is a prerequisite to a cotenant claiming title by adverse possession, we will analyze Fender's evidence to determine whether a question of fact exists as to whether Fender met this prerequisite.

The circuit court found the ten-year statutory period began with the November 14, 1988 deed to Fender and Parker, and ended in November 1998. In finding adverse possession, the court relied on: 1) the receipt by Fender of a warranty deed dated November 14, 1988; 2) the paying of property taxes for the statutory period of ten years; 3) the assertion of title by the giving and receiving of fractional interests through successive conveyances by warranty deeds during the statutory period; and 4) the erection of no trespassing signs on the property during the statutory period. The trial court also presumed Adam and Queen Smashum's previous use of the property was merely permissive, based on Queen's statement that Arthur gave her "the privilege" to plant a garden on the property before his 1984 death. While Fender's affidavit states he and his co-owner "exercised ownership rights …by tending and maintaining the property," the affidavit does not indicate how, nor does the circuit court place any significance to this statement.

We find the actions cited by the circuit court do not as a matter of law establish ouster and consequently do not show Fender obtained title to the property by adverse possession. Fender's proof is not clear and unequivocal that he exercised "hostile, open, actual, notorious and exclusive" possession of the tract throughout the ten-year period. The fact that Fender placed "No Trespassing" signs on the property, without more, cannot be shown to be adverse to the rights of the other co-tenants. Especially in the light of the deposition testimony of Queen Smashum that she visited the property in recent years and did not see the "No Trespassing" signs allegedly posted by Fender. See Felder v. Fleming, 278 S.C. 327, 330, 295 S.E.2d 640, 642 (1982) and Horne v. Cox, 237 S.C. 41, 44-45, 115 S.E.2d 513, 515 (1960) (Possession of

one tenant in common is the possession of all and, for one tenant to establish title against a cotenant by adverse possession, he must overcome the strong presumption that he holds possession in recognition of the cotenancy.) In addition, the fact that Fender paid the taxes does not constitute ouster. See Watson, 224 S.C. at 368, 79 S.E.2d at 387 (payment of taxes by a cotenant ordinarily entitles him only to a proportionate contribution from the other cotenants). The circuit court erred in finding that Fender established title by adverse possession to the subject property.

For the forgoing reasons, the circuit court's summary judgment order is reversed and the case remanded to the circuit court for proceedings consistent with this decision.

REVERSED AND REMANDED.[6]

STILWELL and HOWARD, JJ, concur.

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[6] Because we reverse on this issue, we do not address Smashum's other issues on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

William Adams,

Appellant.

Appeal From Spartanburg County
John C. Few, Circuit Court Judge

Opinion No. 3640
Heard April 9, 2003 – Filed May 5, 2003

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of the SC Office of Appellate Defense, of Columbia, for Appellant.

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

ANDERSON, J.: William Adams was convicted of third degree burglary and grand larceny. He was sentenced to consecutive terms of imprisonment of five years for third degree burglary and five years, suspended upon the service of four years plus five years probation, for grand larceny. These sentences were consecutive to the federal sentence Adams was serving at the time. Adams appeals, arguing that (1) the trial court lacked subject matter jurisdiction under the Interstate Agreement on Detainers Act (IAD); and (2) the trial court erred in failing to declare a mistrial after prejudicial testimony was admitted. We affirm.

FACTS/PROCEDURAL BACKGROUND

Brian Freeman and his father, both of Red Oak Builders, developed some property for a subdivision called Abner Creek Station in Spartanburg County. Freeman lived adjacent to the subdivision. On the evening of January 21, 1998, Freeman returned to his home after work and noticed the garage door of the model home in the subdivision was open. He contacted the police, noted that two cabinets were missing from the home, and filed a police report. After securing the home, Freeman returned to his house across the street.

In the early morning hours of January 22, 1998, Freeman awoke and discovered that the garage door to the model home was open again. Freeman called the police. He observed that furniture was missing from the home, including two leather wingback chairs and a cherry wood dining table and chair set.

The police questioned Adams regarding the burglary. Adams gave a statement admitting his participation in the crime. Adams declared he took "some leather chairs and some odds and ends furniture." He showed the police the house in Abner Creek that he burglarized. Adams executed a permission to search form. Police officers recovered the cherry wood dining table and chairs. The leather chairs were never recovered.

In July 1998, Adams was indicted by the Spartanburg County grand jury for second degree burglary and grand larceny in indictments 98-GS-42-3973 (3973) and 98-GS-42-3974 (3974), respectively, in connection with the burglary of the furniture. Adams was not tried, however, because he was incarcerated in federal prison in North Carolina sometime thereafter.

On October 14, 1999, Adams wrote to the solicitor for Spartanburg County requesting a list of charges pending against him. On October 27, 1999, the solicitor's office wrote to Adams, informing him that two charges of second degree burglary and two charges of petit larceny, indictments 98-GS-42-3952 through 3955, were pending against him. No mention was made of indictments 3973 or 3974.

On December 28, 1999, the Federal Bureau of Prisons sent the solicitor a notice indicating that a detainer had been filed against Adams in the State's favor and that Adams was tentatively scheduled for release on July 23, 2001. Adams was given a Notice of Untried Indictments from the Federal Bureau of Prisons, dated February 23, 2000, which listed his Spartanburg untried indictments as indictments 3952, 3953, 3954, 3955, and 3982. It did not list indictments 3973 or 3974.

On May 12, 2000, the solicitor sent the Inmate Systems Manager for the Federal Bureau of Prisons a letter regarding outstanding indictments against Adams. The letter included "certified copies of Indictment # 98-GS-42-3952 through 3955 and # 98-GS-42-3967 through 3982 as detainers" against Adams and requested the prison to advise the State "as to his intentions concerning disposition of these charges through IAD." Adams was served with copies of the detainers.

On September 11, 2000, Adams sent the solicitor a letter with the subject line "IAD-Notice of Untried Indictments." Adams advised the solicitor that he received the detainers filed against him, waived extradition, and expected his case to be brought to trial within 180 days or else he would seek a dismissal of the charges. A Waiver of Extradition, dated September 6, 2000, and signed by Adams was included with the letter. The waiver stated that Adams was waiving extradition on case numbers 98-GS-42-3952 through 3955 and 98-GS-42-3967 through 3982. Adams included a motion

for a fast and speedy trial on indictments numbered 98-GS-42-3952 through 3955 and 98-GS-42-3967 through 3982.

On October 12, 2000, the Inmate Systems Manager for the Federal Bureau of Prisons sent the solicitor a letter informing him that Adams had requested disposition of pending charges against him. In the letter, the Inmate Systems Manager requested that the State take action under the IAD in order to dispose of the pending charges. The letter indicated that the outstanding charges included indictments 3952, 3953, 3954, 3955, and 3982. A certificate of inmate status was sent on the same date. The certificate listed the same indictments. Neither the certificate of inmate status nor the letter listed indictments 3973 or 3974.

Adams was extradited to Spartanburg County. He was tried on indictments 3973 and 3974 in April 2001. Adams complained prior to the start of trial and during the trial that the State should not be allowed to try Adams on indictments 3973 and 3974 because they were not listed in the initial notification of outstanding indictments sent to Adams and because the State did not correct the Federal Bureau of Prisons when it sent the October 12, 2000, certificate of inmate status which failed to list 3973 and 3974. The trial court denied the motion and allowed the State to proceed on the indictments. The State later admitted that it did not have a copy of the detainer.

After the State presented its case, Adams moved for a directed verdict arguing, in part, that the State was not entitled to proceed on indictments 3973 and 3974 under the IAD. The court denied the motion. The jury acquitted Adams of the second degree burglary charge, but found Adams guilty of the lesser included offense of third degree burglary. Additionally, Adams was convicted of grand larceny.

ISSUES

I. Did the trial court have subject matter jurisdiction to try Adams under the Interstate Agreement on Detainers Act?

II. Did the trial court err in failing to declare a mistrial after testimony regarding a prior bad act was admitted?

LAW/ANALYSIS

I. INTERSTATE AGREEMENT ON DETAINERS ACT (IAD)

Adams contends the trial court did not have subject matter jurisdiction over the burglary and grand larceny charges because the State failed to follow the requirements of the IAD. We disagree.

A. Requirements of the IAD

We initially address the requirements of the IAD. The purpose of the IAD is to allow participating states to uniformly and expeditiously treat requests by prisoners for disposition of outstanding charges. S.C. Code Ann. § 17-11-10, Art. I (2003); State v. Patterson, 273 S.C. 361, 256 S.E.2d 417 (1979); see also State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982) ("The purpose of I.A.D. is to foster the expeditious disposition of charges outstanding against prisoners so as to eliminate uncertainties which accompany the filing of detainers."). Article III of the IAD provides in pertinent part:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint;

provided, that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

. . . .

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or

> effect, and the court shall enter an order dismissing the same with prejudice.

§ 17-11-10, Art. III (2003) (emphasis added).

The IAD clearly requires that an inmate send written notice to the appropriate prosecuting officer of his desire for a final disposition of outstanding indictments against him in that jurisdiction. This notice must include a certificate of the inmate's status at the correctional facility, including his sentence, good time credit, and projected parole date. Although the Federal Bureau of Prisons sent the State a certificate of inmate status on October 12, 2000, it is not clear whether this was accompanied by a copy of Adams' notice for disposition under the IAD. Further, the September 11, 2000 memorandum, which purports to be a notice under the IAD, includes a handwritten note dated September 27, 2000, that Adams did not file the IAD. Because it is unclear whether Adams followed the requirements of § 17-11-10, Art. III(a) regarding notice, Adams may not come within the penumbra of the IAD at all.

In any event, it appears that Adams had notice that the State intended to try him on indictments 3973 and 3974. Despite the fact that the October 27, 1999, letter from the solicitor informing Adams of outstanding charges did not list 3973 or 3974, the solicitor filed copies of outstanding indictments 3967 through 3982 with the federal prison as detainers in May 2000. Further, Adams moved for a speedy trial and signed a waiver of extradition on indictments 3967 through 3982. This range of indictments included numbers 3973 and 3974. Because the State eventually lodged a range of detainers against Adams that included 3973 and 3974, and Adams requested a speedy trial and waived extradition on the same range of indictments, Adams' request for disposition operated as a request for final disposition of all untried indictments against him, including 3973 and 3974. See S.C. Code Ann. § 17-11-10 Art. III(d) (2003). Concomitantly, the trial court did not err in finding the requirements of the IAD were followed.

B. Subject Matter Jurisdiction

1. Federal Analysis

Courts have recognized that a violation of the IAD is not recognizable as a claim of lack of subject matter jurisdiction. In Frisbie v. Collins, 342 U.S. 519 (1952), the United States Supreme Court referenced the rule announced in Ker v. Illinois, 119 U.S. 436 (1886), that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" Id. at 522. The Frisbie Court explained:

> [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Id.

2. State Law Explication

Turning to subject matter jurisdiction under South Carolina law, we find no merit to Adams' claims.

Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong. City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). A circuit court acquires subject matter jurisdiction over a criminal matter where there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser included offense of the crime charged in the indictment. State v. Wilkes, Op. No. 25607 (S.C. Sup. Ct. filed March 17, 2003) (Shearouse Adv. Sh. No. 10 at 24); State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002); State v. Lynch, 344 S.C. 635, 639, 545 S.E.2d 511, 513 (2001).

Lack of subject matter jurisdiction is fundamental and may not be waived. Hooks v. State, Op. No. 25590 (S.C. Sup. Ct. filed February 3, 2003) (Shearouse Adv. Sh. No. 4 at 60). Questions regarding subject matter jurisdiction may be raised at any time. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Brown, 351 S.C. 522, 570 S.E.2d 559 (Ct. App. 2002); see also State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time).

An indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995); State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002); see also Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998) (indictment is sufficient if it apprises defendant of elements of offense intended to be charged and apprises defendant what he must be prepared to meet). The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. Browning, 320 S.C. at 368, 465 S.E.2d at 359; State v. Reddick, 348 S.C. 631, 560 S.E.2d 441 (Ct. App. 2002).

In South Carolina, an indictment "shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided." S.C. Code Ann. § 17-19-20 (2003). An indictment passes legal muster if it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Reddick, 348 S.C. at 635, 560 S.E.2d at 443.

Adams asserts that he only waived extradition on the indictments initially listed in the solicitor's first letter. Whether Adams was properly transferred to South Carolina for trial on indictments 3973 and 3974, when he argues he only waived extradition on other indictments, is a question of personal jurisdiction. Generally, jurisdiction of the person is acquired when the party charged is arrested or voluntarily appears in court and submits himself to its jurisdiction. State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953). A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case. See State v. Bethea, 88 S.C. 515, 70 S.E. 11 (1911); see also State v. Castleman, 219 S.C. 136, 138-39, 64 S.E.2d 250, 251 (1951) ("A defendant may, of course, waive his objection to the jurisdiction of the Court over his person . . . ."); Town of Ridgeland v. Gens, 83 S.C. 562, 65 S.E. 828 (1909) (the court found no personal jurisdiction problem where the defendant appeared for his trial, was represented by an attorney, and defended his case on the merits). Questions of personal jurisdiction will not deprive a trial court of subject matter jurisdiction.

Further, Adams does not claim that indictments 3973 and 3974 failed to adequately state the elements of the offenses for which he was charged. He does not allege that the indictments failed to adequately apprise him of what he must be prepared to meet. Nothing in the IAD purports to deprive a trial court of subject matter jurisdiction where the notice requirements are not followed. Moreover, the indictments apprised Adams of the elements of the offenses intended to be charged and informed him of what circumstances he must be prepared to defend. See Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000) (indictment is sufficient to convey jurisdiction if it apprises defendant of elements of offense intended to be charged and informs defendant of circumstances he must be prepared to defend). The indictments stated the offense with sufficient certainty and particularity to enable the trial court to know what judgment to pronounce and Adams to know what he was being called upon to answer. See State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001) (indictment is sufficient to confer jurisdiction if offense is stated with sufficient certainty and particularity to enable court to know what judgment to pronounce, and defendant to know what he is called upon to answer).

Because the indictments adequately alleged the elements of the charges against Adams, the trial court had subject matter jurisdiction.

II. MISTRIAL

Adams maintains the trial court erred in admitting testimony regarding the previous theft of the cabinets because it amounted to the prejudicial admission of a prior bad act. He claims the court should have declared a mistrial. We disagree.

Adams objected when Freeman testified regarding the two cabinets missing from the model home when he first noticed something suspicious at the model home in Abner Creek. Adams requested a mistrial, arguing that he was not being tried in connection with the missing cabinets, the testimony was not relevant, and the jury was prejudiced "from hearing that the same crime occurred within a couple of hours before." The State alleged the information regarding the cabinets taken in the first burglary, during the day, was relevant to show that the more expensive furniture was not taken until the second burglary, during that evening and the early morning hours. The trial judge ruled the State could introduce the testimony and asked Adams whether he would like a jury instruction to the effect that he was not being tried in connection with the taking of the cabinets. Adams refused the jury instruction and renewed his motion for a mistrial. The court found the evidence admissible and denied the motion for a mistrial.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); see also State v. Arnold, 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) (the general rule of this State is that "the ordering of, or refusal of a motion for mistrial is within the discretion of the trial judge and such discretion will not be overturned in the absence of abuse thereof amounting to an error of law.").

"The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977); see also State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons). The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998).

A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Harris, 340 S.C. at 63, 530 S.E.2d at 628; see also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "Whether a mistrial is manifestly necessary is a fact specific inquiry." State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000).

A mistrial should not be ordered in every case where incompetent evidence is received. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). "An instruction to disregard objectionable evidence is usually deemed to cure the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced." Id. at 89-90, 512 S.E.2d at 801.

A. Relevance

Adams argues that a mistrial was necessary because evidence regarding the prior theft of the cabinets was not relevant to the charges for which he was on trial.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State

v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

All relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); see also Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); In the Matter of the Care and Treatment of Corley, Op. No. 25596 (S.C. Sup. Ct. filed February 24, 2003) (Shearouse Adv. Sh. No. 7 at 13) (evidence is relevant if it tends to establish or make more or less probable the matter in controversy).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. Id. at 358, 543 S.E.2d at 593.

The evidence regarding the theft of the cabinets from the first burglary was relevant to the overall timing of events in this case. Freeman noticed the first burglary occurred after he returned home from work and he knew that only cabinets were missing at that time. Because testimony regarding the

first burglary was admitted, testimony regarding what was taken in the first burglary was relevant to the issue of whether the furniture was taken in the later burglary. No evidence was presented at trial that Adams was a suspect in the burglary of the cabinets. As the evidence was relevant to the timing of the events in this case, we find no error in its admission. See Aleksey, 343 S.C. at 35, 538 S.E.2d at 256 (trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion).

Furthermore, Adams refused an instruction to the jury not to consider the first burglary against Adams. The evidence admitted in this case was relevant and its admission did not require the extreme remedy of a mistrial.

B. Res Gestae/Lyle

Adams contends the trial court erred in allowing the admission of evidence regarding the theft of the cabinets because it amounted to the prejudicial admission of a prior bad act.

Our Supreme Court discussed the res gestae theory in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996):

> 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 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980)). Under the res gestae theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999).

We rule the testimony regarding the cabinets was admissible under the res gestae theory. The timing of the burglaries, and what was taken from the model home in each one, were integral parts of the context in which the crime was committed. Thus, admission of the testimony regarding the cabinets was necessary and relevant to a full presentation of the evidence. The trial court did not err in allowing the admission of the evidence under the res gestae theory. Additionally, the court properly denied Adams' motion for a mistrial.

Further, although Adams now argues on appeal that the admission of evidence regarding the theft of the cabinets amounted to the improper admission of a prior bad act in violation of Lyle,[1] he did not raise this argument before the trial court. Arguments not raised to or ruled upon by the trial court are not preserved for appellate review. See State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999) (issues not raised to and ruled upon by the trial court will not be considered on appeal). Moreover, a defendant may not argue one ground below and another on appeal. See State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (issue not preserved if defendant argues one ground for objection at trial and a different ground on appeal). As Adams' Lyle argument is not properly before this Court, we decline to address it.

[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (evidence of accused's other crimes or wrongs is generally not admissible to prove his propensity to commit the crime charged, but may be admissible to show motive, identity, common scheme or plan, absence of mistake or accident, or intent).

C. Harmless Error

Finally, we find that even assuming the trial court erred in allowing testimony regarding the prior theft of the cabinets, the error was harmless.

Error is harmless where it could not reasonably have affected the result of the trial. State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993); State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984). 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); see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside conviction for insubstantial errors not affecting result).

Adams confessed to the police regarding the break-in and theft of the furniture from the home. He led police to the site of the burglary and helped in the recovery of some of the items. Assuming the admission of Freeman's testimony regarding the theft of the cabinets from the first burglary was error, it did not affect the evidence that supported Adams' guilt in the second burglary. We conclude the evidence supporting Adams' conviction rendered any error harmless.

CONCLUSION

Adams waived extradition under the IAD for a range of indictments, including 3973 and 3974. These indictments informed Adams of the charges against him and apprised him of what he had to defend against. The indictments were sufficient to convey subject matter jurisdiction on the circuit court. Because the evidence regarding the theft of the cabinets was relevant and was admissible under the res gestae theory, the trial court did not

err in denying Adams' motion for mistrial. Accordingly, Adams' convictions and sentences are

AFFIRMED.

CONNOR and HUFF, JJ., concur.