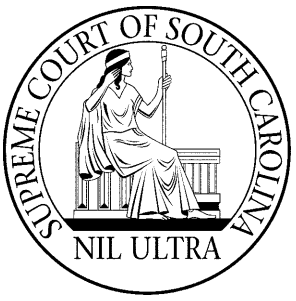

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 5, 2004

ADVANCE SHEET NO. 18

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(Clarendon, Judge Thomas W. Cooper, Jr.)

PETITIONS FOR REHEARING

3724-State v. Pagan	Pending
3744-Angus v. Burroughs & Chapin	Pending
3747-RIM Associates v. Blackwell	Pending
3748-Ellis v. Davidson	Pending
3762-Jeter v. SCDOT	Pending
3763-Fuller v. Blanchard	Pending
3766-Craig v. Craig	Pending
3767-Hunt v. S.C. Forestry Comm'n	Pending
3770-Hinds v. Elms	Pending
3772-State v. Douglas	Pending
3773-State v. Richardson	Pending
3774-Marlboro Park v. SCDHEC	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2004-UP-114-State v. Bailey	Pending
2004-UP-117-State v. Simpson	Pending

2004-UP-120-State v. Harris Pending

2004-UP-148-Lawson v. Irby Pending

2004-UP-186-State v. Randolph Pending

2004-UP-200-Krenn v. State Farm Pending

2004-UP-211-State v. Anderson Pending

2004-UP-215-State v. Jones Pending

2004-UP-216-Arthurs v. Brown Pending

2004-UP-221-Grate v. Bone Pending

2004-UP-227-State v. Medlin Pending

2004-UP-229-State v. Scott Pending

2004-UP-236-State v. Skanes Pending

2004-UP-237-In the interest of B., Justin Pending

2004-UP-238-Loadholt v. Cribb Pending

2004-UP-241-Richie v. Ingle Pending

2004-UP-256-State v. Settles Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al. Pending

3602-State v. Al-Amin Pending

3607-State v. Parris Pending

3610-Wooten v. Wooten Pending

3623-Fields v. Regional Medical Center Pending

3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart Stores	Pending
3646-O'Neal v. Intermedical Hospital	Pending
3647-State v. Tufts	Pending
3650-Cole v. SCE&G	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Pending
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3658-Swindler v. Swindler	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
3671-White v. MUSC et al.	Pending
3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending

3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending
3690-State v. Bryant	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3717-Palmetto Homes v. Bradley et al.	Pending

3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3728-State v. Rayfield	Pending
3729-Vogt v. Murraywood Swim	Pending
3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3742-State v. McCluney	Pending
3743-Kennedy v. Griffin	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-277-Jordan v. Holt	Pending

2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending

2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending

2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending

2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending
2004-UP-050-Lindsey v. Spartan Roofing	Pending
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vivian K. Newell, Respondent,

v.

Trident Medical Center, Appellant.

and

William Newell, Respondent,

v.

Trident Medical Center, Appellant.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 25815
Heard March 16, 2004 - Filed May 3, 2004

REVERSED

C. Mitchell Brown, Zoe S. Nettles, and Elizabeth H. Campbell, all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Appellant.

W. Jefferson Leath, Jr. and Timothy W. Bouch, both of Leath, Bouch & Crawford, LLP, of Charleston, for Respondents.

PER CURIAM: This is an unusual informed consent case. The jury returned verdicts against appellant Trident Medical Center (Hospital), finding doctors were the Hospital's actual agents for purposes of obtaining informed consent. We reverse.

FACTS

Respondent Vivian Newell (Vivian) sought medical care from Dr. Thomas for gall bladder problems. Dr. Thomas recommended surgery and Vivian agreed. The surgery took place at Hospital, where Dr. Thomas held staff privileges. At the time of Vivian's surgery, one of Dr. Thomas' partners (Dr. Litton) in the practice known as Tri-County Surgical Associates was Chief of Staff at Hospital.

During Vivian's laparoscopic gall bladder removal surgery, Dr. Thomas severed Vivian's common bile duct rather than the cystic duct, leading to numerous medical complications. Vivian and her husband, respondent William Newell (Husband), sued Dr. Thomas, Tri-County Surgical Associates, and Hospital for battery, negligence, and loss of consortium. Vivian and Husband settled all their claims against Dr. Thomas and Tri-County. The jury trial against Hospital resulted in a verdict for Vivian of $3,500,000 actual damages and $7,000,000 punitive damages, and $100,000 for Husband on his consortium claim. The trial judge set-off these verdicts based on the prior settlements.

As noted at the outset, this case was tried on an informed consent theory. Vivian contended that Dr. Thomas inadequately explained the surgical risk of severing the common bile duct during laparoscopic gall bladder surgery, and failed to inform her that he would be undergoing elective coronary triple bypass surgery three days after operating on her.

Vivian alleged that Dr. Thomas was the Hospital's agent for the purposes of obtaining informed consent and that his failure to do so is attributable to the Hospital. Vivian also contends that since Dr. Thomas' partner, Dr. Litton, was Hospital's Chief of Staff at the time of her surgery, that position combined with his personal knowledge of Dr. Thomas' impending heart surgery gave rise to a separate duty on the part of Hospital to inform Vivian of that operation.

ISSUE

Was there any evidence that either Dr. Thomas or Dr. Litton was Hospital's agent for purposes of obtaining Vivian's informed consent?

ANALYSIS

The dispositive issue in this case is whether the trial judge erred in failing to direct a verdict for Hospital because neither doctor was the Hospital's agent for purposes of obtaining Vivian's informed consent. We find that the Hospital was entitled to a directed verdict, and reverse.

The Hospital's "Medical Staff Bylaws" (Bylaws) define "Medical Staff" as "the single organized Medical Staff which includes all duly licensed Physicians and dentists who have been granted Privileges….The Staff is an integral part of the Health System and is not a separate legal entity." The Bylaws' preamble states in part "the Medical Staff must cooperate with and is subject to the ultimate authority of the Board of Directors."

Vivian introduced into evidence a document created by Hospital entitled "Fundamentals of Consent." In part, this document provides:

> INFORMED CONSENT
>
> It is the duty of the physician or surgeon to inform the patient of the nature of the illness, the proposed treatment, the risks and chances involved in the proposed treatment, the alternative treatments, if any, and the risk of failure in

> the alternative procedure. The patient must have a true understanding of the procedure and its seriousness. Though there is a duty to inform, there likewise is a duty not to inform which is a matter of judgment to be exercised in each particular situation.
>
> It is not the responsibility of hospital personnel to undertake to inform the patient. This remains the responsibility of the attending physician or surgeon. However, when it is apparent to the hospital personnel that the patient has not been informed, it should be immediately brought to the physician's attention. Some hospitals in concert with the surgeon may wish to document "informed consent" through a form signed by the patient and the physician.

The Hospital's "Medical Staff Rules & Regulations" (Rules & Regs) were also introduced into evidence. The Rules & Regs include this provision:

> 20. Practitioners shall be responsible for obtaining informed consent prior to treatment. When an adult patient is able to appreciate the nature and implications of his condition and the proposed health care and is able to communicate his decisions in an unambiguous manner, the Physician shall obtain informed consent from the patient prior to treatment. When an adult patient is unable to consent, the Physician shall follow the provisions of the South Carolina Adult Health Care Consent Act, S.C. Code 44-66-10 et. [sic] seq. to determine inability to consent, document the inability to consent, and determine the individual who has priority to make health care decisions for the patient. If the adult patient is unable to consent, the Physician must obtain informed consent from the individual with

> priority to make health care decisions for the patient unless the situation falls within an exemption as set forth in the Adult Health Care Consent Act. The patient or person with priority must be informed of 1) diagnosis; 2) general nature of the contemplated procedure; 3) the material risks associated with the procedure; 4) probability of success if the procedure is carried out; 5) prognosis if the procedure is not carried out; and 6) alternatives to the procedure. If the treatment requires a written consent form according to Health System policy, both the patient, or person with priority, and the Practitioner shall sign the consent form affirming that the Practitioner personally obtained informed consent from the patient or person with priority prior to signing the form. Space shall be provided on the form for the Practitioner to document what was explained to the patient or person with priority and that the patient or person with priority understood and agreed to the proposed treatment.

Vivian also introduced a Hospital document titled 'Consent: Obtaining Signature of Patient on Form Entitled "Consent to Operation, Anesthesia & Other Medical Services."' This Nursing Protocol document provides:

> **PURPOSE**:
>
> To establish the nursing protocol in completing the hospital form. It is a statement by the patient and the physician that the procedure is authorized by the patient and that the physician has PREVIOUSLY and INDEPENDENTLY obtained informed consent.

POLICY:

South Carolina case law concerning the doctrine of informed consent requires that a physician who performs a diagnostic, therapeutic, or surgical procedure has a duty to disclose the following things to a patient who is of sound mind, in the absence of an emergency that warrants immediate medical treatment:

- the diagnosis
- the general nature of the contemplated procedure
- the material risks involved in the procedure
- the probability of success associated with the procedure
- the prognosis if the procedure is not carried out
- the existence of any alternatives to the procedure

To inform a patient of the above information requires the unique knowledge of a physician. Therefore, the hospital and its employees shall not under any circumstances participate in the process of the physician obtaining informed consent from the patient.

The hospital form entitled "Consent to Operation, Anesthesia and Other Medical Services" [1] does not constitute informed consent and is not intended as a part of informed consent.

[1] The text of the Consent Form is reproduced in the opinion, *infra*. The form filled out by Dr. Thomas and signed by him and by Vivian in connection with her surgery was introduced at trial.

A signed hospital form is a statement to the hospital by the patient and the surgeon who has obtained informed consent that:

- the surgical procedure is authorized by the patient
- the physician has previously obtained informed consent
- the patient acknowledges and authorizes that if unforeseen conditions arise, additional or different procedures or services may be utilized
- anesthetics may be utilized
- the patient consents to disposal of bodily tissues
- the patient understands the form

This Nursing Protocol goes on to explain the Hospital's internal use of these 'consent forms.'

Finally, Vivian introduced her signed copy of the "Consent to Operation, Anesthesia and Other Medical Services Form" (Surgical Consent Form), promulgated by Hospital, which is the subject of the foregoing Nursing Protocol. This Surgical Consent Form is reproduced below:

Date: _____

Time: _____

I authorize the performance upon _____
(myself or name of patient)
of the following operation _____
(state nature and extent of operation)
to be performed under the direction of Dr. _____,
and/or such assistants as may be selected by him to perform such operation.

I recognize that during the course of the operation, unforeseen conditions may necessitate additional or different procedures or services than those set forth and I further authorize and request that the above-named surgeon and/or his

associates, assistants or designees perform such procedures as are, in his professional judgment, necessary and desirable.

I consent to the administration of such anesthetics as may be considered necessary or advisable by the person responsible for such service with the exception of:

_____

(state exception or write 'none')

The nature, purpose and possible consequences of the operation, or procedure, and possible administration of blood and/or blood components and alternative methods of treatment, the risks involved and the possibility of complications have been fully explained to me by my attending physician and/or surgeon. No guarantees or assurances have been made or given by anyone as to the results that may be obtained.

I consent to the disposal by hospital authorities of any tissue or members which may be removed during the course of the operation.

I, THE UNDERSIGNED, HAVE HAD THIS FORM EXPLAINED TO ME AND FULLY UNDERSTAND THE CONTENTS OF THIS AUTHORIZATION.

Signed: _____

(Patient or Authorized Person)

Witness: _____

(relationship)

To be placed on patient's chart. _____, M.D.

(Surgeon Obtaining Consent)

Vivian contends that medical doctors holding staff privileges at Hospital are the Hospital's agents for purposes of obtaining informed consent from patients. She argues first that the Medical Staff is defined as a part of the Hospital. #6 Bylaws. The Medical Staff is subject to Hospital's Board of Trustees, Bylaws Preamble, and are required to abide by the Medical Staff

Rules & Regs. § 33(10) Bylaws. The Rules & Regs require the practitioners to obtain informed consent. ¶ 20 Rules & Regs. According to Vivian, since the Hospital's Rules & Regs require the Medical Staff to obtain informed consent, and since the Staff is a part of the Hospital, they act as the Hospital's agents when obtaining this consent. In support of these contentions, Vivian relies heavily on what she alleges are inconsistencies and imperfections in the Surgical Consent Form which she refers to, inaccurately, as the "Informed Consent Form."

"The test to determine agency is whether or not the purported principal has the *right to control* the conduct of the alleged agent." Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982)(italics in original). Reading the Bylaws, the Rules & Regs, the Nursing Protocol, and the Surgical Consent Form together leads to the conclusion that, under the Hospital's rules and in accord with South Carolina law, obtaining informed consent is a matter solely for the attending physician, to be done within the privacy and sanctity of the physician-patient relationship. See Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690, *certiorari denied in order expressly approving Court of Appeals' decision*, 283 S.C. 64, 320 S.E.2d 35 (1984) (physician must obtain informed consent before treatment).

To hold, as Vivian urges, that Dr. Thomas was the Hospital's agent for purposes of obtaining informed consent would represent an enormous expansion of this Court's existing hospital-physician agency jurisprudence. See Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001) (hospital may owe duty to patient who chooses treatment at that facility under § 429 of the Restatement (second) of Torts) *citing* Simmons v. Tuomey Reg. Med. Center, 341 S.C. 32, 533 S.E.2d 312 (2000) (hospital may be liable for independent contractor doctor's negligence under ostensible agency theory). Further, Vivian cites no authority from another jurisdiction that adopts her agency theory as a basis for holding a hospital liable, nor has our independent research revealed any support. Finally, while South Carolina has not explicitly considered this type of agency claim, the reasoning in Simmons and Osborne preclude a recovery under the actual agency theory advanced by Vivian.

In Simmons, this Court held that a hospital might be vicariously liable under an apparent agency theory for the acts of its emergency room physicians, even though those physicians are independent contractors. In order to hold the hospital liable, the injured person must demonstrate:

> 1) the hospital held itself out to the public by offering to provide services;
>
> 2) the injured person looked to the hospital rather than to the individual physician for care; and
>
> 3) a similarly situated person reasonably would have believed the doctor treating the patient was a hospital employee.
>
> Simmons at 52, 533 S.E.2d at 323 (emphasis supplied).

The Simmons Court went on to emphasize:

> Our holding does not extend to situations in which the patient is treated in an emergency room by the patient's own physician after arranging to meet the physician there. **Nor does our holding encompass situations in which a patient is admitted to a hospital by a private, independent physician whose only connection to a particular hospital is that he or she has staff privileges to admit patients to the hospital. Such patients could not reasonably believe his or her physician is a hospital employee.**
>
> Id. at 52, 533 S.E.2d at 323 (emphasis supplied.)

In Osborne, the Court reversed a grant of summary judgment to the hospital, finding the plaintiff had made a *prima facie* showing that the hospital could be liable under an apparent agency theory for the negligence of the neonatologists practicing there. The Court noted the plaintiff presented

evidence that the hospital had marketed itself as having a specialized neonatal unit; that she had selected the hospital, rather than the doctors practicing there, based on the hospital's representations; and that the hospital's marketing efforts would lead a reasonable person to believe that the physicians were employees of the hospital's specialized unit. The Osborne decision cited from Simmons, emphasizing the limitations of the apparent agency theory:

> The [Simmons] decision was limited, however, "to those situations in which a patient seeks services at the hospital as an institution, and is treated by a physician who reasonably appears to be a hospital employee." [internal citation omitted] The holding did not "encompass situations in which a patient is admitted to a hospital by a private, independent physician whose only connection to a
>
> particular hospital is that he or she has staff privileges to admit patients to the hospital." Id.
>
> Osborne at 8, 550 S.E.2d at 321.

Vivian concedes, as she must, that she cannot meet the Simmons/Osborne apparent agency test and dismisses it as "simply irrelevant." Instead, she argues that Hospital's control of physicians holding staff privileges, as evidenced by the documents recited above, establishes actual agency. If Vivian is correct, then hospitals are potentially more responsible for the acts of admitting physicians than for the actions of physicians who are independent contactors as in Osborne and Simmons. We find neither precedent nor public policy support such a re-allocation of responsibility and liability between hospitals and physicians with staff privileges. We decline to adopt such a rule, and emphasize that hospital liability for non-employee physician negligence is limited to apparent agency situations. Osborne, *supra*; Simmons, *supra*.

No actual agency relationship regarding informed consent existed between Hospital and Dr. Thomas by virtue of the Hospital's Bylaws, Rules

& Regs, Nursing Protocol, and/or Consent Form. Further, the fortuitous happenstance that Dr. Thomas's partner, Dr. Litton, was Chief of the Medical Staff, and was aware of Dr. Thomas' upcoming elective coronary surgery, does not give rise to any duty on the part of the Hospital to inform Vivian of the planned surgery.

CONCLUSION

We reverse the judgments, finding no agency relationship between the doctors and the Hospital.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

Corey Sparkman, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 25816
Heard March 4, 2004 - Filed May 3, 2004

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and John Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: Petitioner Corey Sparkman ("Sparkman") was convicted of armed robbery and sentenced to twenty years in prison. He now seeks to reverse the Court of Appeals' ruling affirming the trial judge's

denial of his motion for mistrial. Sparkman alleges that during *voir dire*, the jury's foreman, Arthur Scott ("Scott"), intentionally concealed that he had been the victim of an assault and that this concealment materially diminished Sparkman's use of peremptory challenges and wrongfully influenced the jury, resulting in his conviction. We disagree and affirm Sparkman's conviction.

FACTUAL/PROCEDURAL BACKGROUND

On March 31, 2001, at approximately 2:15 a.m., two men entered a Days Inn in Myrtle Beach. Christopher Newton ("Newton"), the assistant manager, was in the back office counting money when he heard the men at the front desk. When the men requested a room, Newton told them that none were available, so the men turned to leave. As Newton returned to the back office, the men accosted him. The taller of the two men drew a switchblade and demanded money. He took money from the cash drawers and then demanded that Newton open the safe. After Newton told the men that he could not open the safe, the taller man stabbed Newton twice in the shoulder. Then, the shorter man struck Newton in the head and knocked him unconscious. When Newton regained consciousness, he called the police.

During questioning, the police asked Newton to identify his attackers out of a photo line-up. He identified Sparkman as one of his attackers—on two separate occasions—from two different photographs.[1]

During *voir dire*, the trial judge asked the venire members whether they had been a victim of a serious crime. Scott did not stand up. The trial judge asked those who stood up whether being a victim of a crime would affect their ability to be impartial during deliberation, and they all replied that it would not. None of the people who stood up were drawn for the jury. However, Scott was drawn and named foreman.

[1] Newton identified Sparkman as the man who knocked him unconscious. His eyewitness testimony was the sole evidence connecting Sparkman to the crime.

After deliberating for eight hours, the jury found Sparkman guilty.[2] Because the jury did not present a verdict until the late evening, the trial judge postponed Sparkman's sentencing hearing until the following morning.

Sometime before the sentencing hearing, a member of the jury, Regina Jenerette ("Jenerette"), contacted the public defender's office and told Sparkman's attorney that a fellow juror might have decided to convict Sparkman based upon "something that happened in [sic] him in the past." At the hearing, Jenerette testified that during jury deliberation, upon discussing eyewitness credibility, Scott announced that forty years ago he had been the victim of an attack and that he would never forget the face of his attacker.[3] The trial judge questioned Scott about the past incident, asking Scott why he did not stand up during *voir dire* and inform the parties that he was a victim of a serious crime. Scott explained that he did not remember his attack until after deliberations began and that he was unsure whether the attack was a "serious" crime.

The trial judge then asked every jury member whether Scott's recount of his attack affected their decision to convict Sparkman, and they unanimously replied that it did not, including Jenerette.

Sparkman's counsel then made a motion for mistrial, which was denied, and the Court of Appeals affirmed. Sparkman submits the following issue for review:

> Did the Court of Appeals err in affirming the trial judge's denial of Sparkman's motion for mistrial based upon juror misconduct?

---

[2] After six and a half hours, the jury reported being deadlocked and the trial judge gave an *Allen* charge. *See Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896) (the trial judge may give a jury charge urging jury members to reach a verdict).

[3] Scott and his wife (then girlfriend) were attacked in a public place in St. Louis, Missouri. They were sitting on a wall when two strangers rushed them and assaulted them. Scott had his tooth chipped during the incident.

LAW/ANALYSIS

Sparkman argues that this Court should overturn his conviction because (1) Scott intentionally concealed that he was the victim of a serious crime during *voir dire*; and (2) in telling the jury that he would never forget his attacker, Scott unfairly heightened the credibility of the victim's eyewitness testimony, which is the only evidence connecting Sparkman to the crime. Sparkman asserts that his trial counsel would have used one of eight remaining peremptory strikes to strike Scott had counsel known about Scott's attack, and consequently the trial judge erred in denying his motion for a mistrial. We disagree.

A trial judge's ruling on a motion will not be disturbed absent an abuse of discretion amounting to an error of law. *State v. Harris*, 340 S.C. 59, 63, 530 S.E. 2d 626, 628 (2000).

This Court granted a criminal defendant a new trial because a juror failed to provide the trial judge with an honest answer to a question asked during *voir dire*. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). In *Woods*, during *voir dire*, a juror failed to inform the parties that she worked as a volunteer victims' advocate in the solicitor's office. The Court developed a two-part test to determine whether a juror's failure to disclose a potential bias warranted granting the defendant a new trial. First, the court determines if "the juror intentionally concealed the information during *voir dire*," and if the answer to the first inquiry is yes, the court must then "determine if the information concealed would have supported a challenge for cause or would have been a material factor in the use of respondent's peremptory challenges." *Id.* at 588-590, 550 S.E.2d at 284-285 (citing *State v. Kelly*, 331 S.C. 132, 146, 502 S.E.2d 99, 106-107 (1998)).

Intentional or Unintentional Concealment

Whether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis. *Woods*, 345 S.C. at 588, 550 S.E.2d at 284. In *Woods*, this Court distinguished intentional concealment from unintentional concealment:

> intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs **where the question posed is ambiguous or incomprehensible to the average juror**, or where the subject of the inquiry is insignificant **or so far removed in time that the juror's failure to respond is reasonable under the circumstances.**

Id. (emphasis added).

The Court of Appeals held that Scott's concealment was unintentional. *State v. Sparkman*, Op. No. 2003-UP-165 (Ct. App. Filed February 27, 2003). We agree that Scott's failure to recall his attack was reasonable under the circumstances.

First, Scott's attack occurred approximately forty years ago—a lapse of time that we believe renders his failure to respond reasonable. Scott testified that he did not remember his attack until he began to discuss whether he believed that Newton's eyewitness testimony was credible. In our review, it is reasonable that Scott did not recall his attack until he began to draw from his own experiences while considering the evidence.

Second, Scott testified that he was unsure whether his attack was a "serious crime." We understand that the term "serious crime" is ambiguous and recognize that it was reasonable that Scott was unable to distinguish between "serious" crimes and other, "non-serious" crimes.

We find that Scott unintentionally concealed that he was the victim of an attack.

Concealment as a Material Factor in Defense's Use of Peremptory Challenges

The Court of Appeals held that if Scott's concealment was unintentional, the court does not "need to determine whether the information would have supported a challenge for cause or would have been a material factor in the defense's use of a peremptory challenge." *State v. Sparkman*, Op. No. 2003-UP-165 (Ct. App. Filed February 27, 2003). In *Woods*, we held that "where the failure to disclose is innocent, no inference of bias can be drawn." *Woods*, 345 S.C. at 388, 500 S.E.2d at 284.

Because Scott's concealment was unintentional our inquiry is over, however, we fail to see how Sparkman was prejudiced given that the trial judge questioned the jury after the verdict. In *Woods*, this Court said, "[w]here a juror, without justification, fails to disclose a relationship, it may be inferred, **nothing to the contrary appearing**, that the juror is not impartial." *Id*. (emphasis added).

After being informed of Scott's attack, the trial judge asked every member of the jury, individually, if Scott's comments persuaded them to convict Sparkman and no one answered affirmatively, including Regina Jenerette. Usually we must develop inferences of jury bias because we do not have the luxury of post-verdict juror testimony. However, in this case, the juror testimony is clearly "contrary" to an inference of bias or prejudice, and the trial judge was in the best position to make a factual decision concerning the effects of Scott's alleged misconduct. *See Harris*, 340 S.C. at 63, 530 S.E.2d at 627 (2000) (citing *Kelly*, 331 S.C. at 141, 502 S.E.2d at 104) ("The trial court has broad discretion in assessing allegation of juror misconduct…[t]he determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court.")

Conclusion

We hold that the Court of Appeals did not err in upholding Sparkman's conviction because (1) Scott did not intentionally conceal that he had been

the victim of an attack, and (2) all of the jurors testified that Scott's recount of his attack did not affect their decision to convict Sparkman. Therefore, we **AFFIRM** the Court of Appeals' ruling upholding Sparkman's conviction.

MOORE, WALLER, PLEICONES, JJ., and Acting Justice Roger M. Young, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Franklin Lucas, Petitioner,

v.

Rawl Family Limited Partnership, Wayne P. Rawl, Howard N. Rawl and Mary R.Wingard, its general partners, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 25817
Heard February 5, 2004 - Filed May 3, 2004

REVERSED

Joseph M. Epting, of The Epting Law Firm, LLC, of Irmo, and Katherine Carruth Link, of Columbia, for Petitioner.

Robert J. Thomas, of Rogers Townsend & Thomas, PC, of Columbia, for Respondents.

ACTING JUSTICE MACAULAY: We granted certiorari to review the Court of Appeals' decision in Lucas v. Rawl Family Ltd.

Partnership, Op. No. 2003-UP-62 (S.C. Ct. App. filed January 22, 2003). We reverse.

FACTS

Petitioner purchased approximately 118 acres of land in Lexington County in 1990, where he grew Coastal Bermuda grass and other crops. He also built a home on the property and used a pond for recreation and fishing.

In 1996, respondents purchased a 146-acre tract north of and adjacent to petitioner's property. Respondents' land is higher in elevation, and water naturally flows from respondents' property to petitioner's property. Sometime after the purchase, respondents cleared approximately forty acres of land for farming by cutting trees and removing the stumps.

On May 5, 1998, heavy rains caused extensive flooding on petitioner's property. When petitioner and his son-in-law, Robert Howell, arrived to inspect the property, they saw that surface water, silt, and debris from respondents' land had washed over the fields and into the pond. The fields were covered in standing water and the pond was flooded, causing extensive damage. The pond dam was eroding and Howell was forced to remove boards holding the dam in place to relieve the pressure and prevent the dam from bursting and flooding the nearby Pelion School. Petitioner presented evidence that the property now floods every time there is a heavy rain and, as noted by the Court of Appeals, the flood-damaged fields do not produce Coastal Bermuda as vigorously as they did prior to respondents' clearing their land.

Petitioner's suit against respondents alleged negligence, trespass, and nuisance. Respondents moved for a directed verdict following the presentation of evidence. The trial judge ruled that the case did not properly sound in negligence, and granted the directed verdict motion on the negligence claim. However, the trial judge refused to grant a directed verdict on the trespass and nuisance causes of action.

The jury found in favor of respondents on the trespass cause of action,

and found for petitioner on the nuisance cause of action.[1] Respondents appealed, arguing, among other things, that they were entitled to a directed verdict on the nuisance cause of action.

The Court of Appeals reversed and found that, because the common enemy rule did not apply, the trial judge erred in failing to direct a verdict on the nuisance claim.

ISSUE

Did the Court of Appeals err in holding that the trial judge should have granted the motion for a directed verdict on the nuisance cause of action?

ANALYSIS

Prior to ruling on whether the trial court erred in refusing the directed verdict motion, the Court of Appeals held the common enemy rule did not apply because respondents were merely preparing the land for farming and did not intend to influence the course of surface water. Accordingly, the Court of Appeals held the nuisance exception to the common enemy rule could not apply, and that respondents were entitled to clear their land irrespective of the future effect it would have on surface water. This was error.

South Carolina follows the common enemy rule with respect to the diversion of surface waters naturally flowing across land. Baltzeger v. Carolina Midland Ry. Co., 54 S.C. 242, 247-48, 32 S.E. 358, 360 (1899); Johnson v. Phillips, 315 S.C. 407, 412, 433 S.E.2d 895, 898 (Ct. App. 1993), rev'd on other grounds by Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995); William T. Toal, Surface Water in South Carolina, 23 S.C. L. Rev. 82, 83 (1971). The rule allows a landowner to treat surface water as a common enemy and dispose of it as the landowner sees fit. Glenn v. School

[1] The jury awarded $128,000 in damages. However, the trial judge permitted a $10,000 offset from an earlier settlement petitioner had received from another adjoining landowner. Therefore, the trial judge entered a verdict for $118,000.

Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988).

There are, however, two exceptions. First, the common enemy rule is subject to the law of nuisance and an individual may not obstruct or alter the flow of water to create a nuisance per se. Johnson v. Phillips, id. at 414, 433 S.E.2d at 899; Baltzeger v. Carolina Midland Ry. Co., id. at 247, 32 S.E. at 359-60. Second, except by contractual or prescriptive right, an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land. Johnson v. Phillips, id. at 414, 433 S.E.2d at 899.

In his complaint, petitioner alleged respondents began an active and aggressive program of grading, clearing, bulldozing, ditching, land alteration, and removal of trees and vegetation from a substantial portion of their property prior to May 5, 1998. Petitioner alleged those actions resulted in an "alteration and/or diversion in the natural flow of surface water so as to create a nuisance and/or also [respondents] artificially collected surface water and cast it in a concentrated form upon [petitioner's] land."

Neither respondents nor petitioner ever argued that the common enemy rule did not apply. Further, petitioner objected to respondents' proposed jury charge on the common enemy rule because it failed to charge the nuisance and casting exceptions. The trial judge agreed with petitioner, and charged both exceptions.

The Court of Appeals initially noted that both parties had agreed the damage to petitioner's land was caused by surface water runoff from respondents' land. The Court of Appeals then stated that the extension of the common law doctrine, known as the common enemy rule, applies only "when a landowner takes direct action addressing surface water to the detriment of an adjoining landowner, such as obstructing or altering its natural flow." Concluding that the record was devoid of any evidence that the clearing of trees and stumps from respondents' property was for any purpose other than to prepare the land for farming, the Court of Appeals found there was no

evidence respondents intended to influence the natural flow of surface water. Therefore, the Court of Appeals held the common enemy rule, together with its nuisance exception, could not apply.

The Court of Appeals erred for two reasons. First, neither petitioner nor respondent ever argued that the common enemy rule did not apply at trial or on appeal.[2] It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court. Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000); Smith v. Phillips, id. at 455, 458 S.E.2d at 429. Therefore, the Court of Appeals erred because the trial judge's unappealed ruling that the common enemy rule applied was the law of the case. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160, 177 S.E.2d 544, 544 (1970) (stating that an issue which is not challenged on appeal, whether right or wrong, becomes the law of the case).

Second, even if the Court of Appeals did not err in addressing the issue, it erred in holding that the common enemy rule is merely an extension of the common law rule.

There are three basic rules governing the disposal of unwanted surface water: (1) the common law or common enemy rule, (2) the civil law rule, and (3) the reasonable use or modified civil law rule. Toal, 23 S.C. L. Rev. at 82. In adopting the common law rule in Edwards v. Charlotte, C. & A.R. Co., 39 S.C. 472, 475, 18 S.E. 58, 59 (1893), this Court held that, "[u]nder the common law rule, surface water is regarded as a common enemy." See also Janet Fairchild, Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 A.L.R.3d 1193, 1199 (1979) (under "the common enemy, common law, or Massachusetts doctrine," each landowner is entitled to take whatever steps he pleases, on his own land, to dispose of surface water without liability to adjoining landowners).

It is clear that the "common law" and "common enemy" rules are the same rule. Further, despite the fact that respondents did not intend to alter

[2] In fact, respondents argued in their brief to the Court of Appeals that, "the common law, common enemy rule applies."

the flow of surface water, there was ample evidence that respondents' clear-cutting prevented surface water from being absorbed into the soil and increased the flow of water onto petitioner's land, including testimony from respondents' own expert that clearing the land decreased surface water absorption and increased runoff. Therefore, the Court of Appeals erred in holding that the common law rule applied, that the common enemy rule did not apply, and that the common enemy rule was merely an "extension" of the common law rule.

Respondents argue that, even if the Court of Appeals erred in holding the common enemy rule did not apply, respondents were still entitled to a directed verdict on the nuisance cause of action because petitioner failed to prove respondents' actions amounted to a nuisance per se. We disagree.

In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998). The trial court should deny the motion where either the evidence yields more than one inference, or its inference is in doubt. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). This Court will reverse the trial court's rulings on a directed verdict motion only where there is no evidence to support the ruling or where the ruling is controlled by an error of law. Hinkle v. National Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

Respondents argue, as they did at trial and before the Court of Appeals, that petitioner provided no evidence respondents' actions amounted to a nuisance per se. Accordingly, respondents contend the trial judge erred in submitting the case to the jury.

The traditional test for determining the existence of a nuisance per se is whether the nuisance has become dangerous at all times and under all circumstances to life, health, or property. Suddeth v. Knight, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct. App. 1984); Black's Law Dictionary 1094 (7th ed. 1999) (a nuisance per se is an interference so severe that it would

constitute a nuisance under any circumstances).

In the present case, there was evidence that petitioner's fields now flood in every heavy rain and that petitioner has been unable to grow crops on a portion of his land because of the standing water, silt, and other debris that accompany the flooding. Accordingly, there existed a jury question as to whether the respondents' actions constituted a nuisance per se and were dangerous to the property at all times because of the continuing nature of the flooding and because of the diminished production of the Coastal Bermuda fields. Deason v. Southern Ry. Co., 142 S.C. 328, 140 S.E. 575 (1927) ("whether or not the nuisance 'had become dangerous at all times and under all circumstances to life, health, or property' was for the jury"); Suddeth v. Knight, id. at 545-46, 314 S.E.2d at 15 (it was peculiarly a question for the jury as to whether the flooding of plaintiff's property and its attendent problems was dangerous at all times and under all circumstances to life, health, or property).

CONCLUSION

The judgment of the Court of Appeals is reversed and the verdict, as offset by the trial judge, is reinstated.

REVERSED.

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

JUSTICE PLEICONES: I respectfully dissent, and would affirm the decision of the Court of Appeals setting aside the jury verdict in this case.

In my opinion, the facts of this case demonstrate that respondents' actions were not an attempt to deal with the "common enemy," but instead establish that respondents were simply preparing their land for agricultural use. To hold, as the majority does, that these actions implicate the common enemy doctrine flirts with adoption of an expansive view of the "New Jersey Rule" which we rejected in Irwin v. Michelin Tire Corp., 288 S.C. 221, 341 S.E.2d 783 (1986).[3] Since, however, the parties tried this matter as if the doctrine were applicable, I agree that we should review whether there was any evidence of nuisance *per se* here.

I find no evidence of nuisance *per se* warranting submission of this case to the jury. The nuisance exception to the common enemy rule requires, as a predicate for its application, the existence of evidence that surface water has accumulated. See, e.g., Deason v. Southern Ry. Co., 142 S.C. 328, 140 S.E. 575 (1927)(jury issue whether defendant's creation of pond by raising embankment and stopping up drainage ditch created a nuisance *per se*); Baltzeger v. Carolina Midland Ry. Co., 54 S.C. 242, 32 S.E. 358 (1899)(grant of demurrer on nuisance *per se* reversed where complaint alleged defendant constructed embankment and ditches causing surface water to accumulate and stagnate); Suddeth v. Knight, 280 S.C. 540, 314 S.E.2d 11 (Ct. App. 1984)(jury issue where evidence that defendant's construction caused standing water 40 inches deep to accumulate and stagnate on plaintiff's property for 6-10 months a year); see also F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts (2nd ed. 1997) pp. 222-223 (". . . accumulations of water can have other effects in addition to direct impacts like flooding—providing a place for mosquitoes to breed, for example; and there may be a nuisance for these other effects"). That the nuisance *per se* exception is limited to situations where the accumulation of surface water leads to

[3] "Obviously, every construction project of any magnitude could decrease the absorption, seepage, and percolation rate of the land, and potentially allow every lower riparian or adjoining landowner to institute a cause of action. If there is to be such a fundamental change in the law, we believe that it should be by legislative action and not judicial decision." Irwin at 225, 341 S.E.2d at 785.

secondary problems, and that it is those secondary effects which give rise to the nuisance is exemplified by the requirement that one alleging the nuisance must show that "it has become dangerous, at all times and under all circumstances, to life, health, or property." Baltzeger at 360. Unlike the majority, I find no evidence of continuing danger in the possibility of periodic flooding, nor do I perceive any danger to life, health, or property in the reduced productivity of petitioner's turf farming operation.

While I am not unsympathetic to the impact of respondents' agricultural development on petitioner's property, this is a situation *damnum absque injuria*. For these reasons, I would affirm the Court of Appeals' decision.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Errin Hutton, Appellant.

Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3785
Submitted March 8, 2004 – Filed April 26, 2004

AFFIRMED

Chief Attorney Daniel T. Stacey, 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 Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

HUFF, J.: Following a jury trial, Errin Hutton was found guilty of three counts of kidnapping, one count of armed robbery, two counts of attempted armed robbery, one count of burglary in the first degree, and one count of grand larceny. Hutton appeals the trial judge's denial of his motion to dismiss based on the fact that his counsel was deprived of the opportunity to fully cross-examine a key State's witness when he was not provided with a pre-trial statement. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Hutton was indicted for the various charges in connection with events occurring on March 8, 2001. James Bellinger testified that on the night of the incident, he was at home with his wife and two young children watching television when he heard a knock at the door. He found a man named Darryl and the appellant, Errin Hutton, at the door. Darryl asked Bellinger if he could get him a bag of marijuana. Bellinger, who had met Darryl on one previous occasion, told him he had to go across the street and talk to a friend to see if he could get the drugs. Bellinger was accompanied by appellant when he went across the street and asked his friend J.T. to get "a quarter bag." After being told it would be twenty-five to thirty minutes before they could get the drugs, Bellinger and appellant walked back across the street to a car. Sitting in the car's driver's seat was a woman, identified by appellant as his girlfriend, and sitting in the backseat was a man. Darryl then got in the car, and the man sitting in the backseat, Tony, got out of the car. Tony and appellant asked Bellinger if he had anything to smoke in the house, and then began telling Bellinger that he owed them $500.00. Bellinger testified that as he stepped onto his porch, a gun was pulled on him and he was instructed to go inside his home. Once inside, appellant escorted Bellinger to the bedroom, while Tony stood in the hallway to keep an eye on Bellinger's wife. While in the bedroom, appellant ransacked the area and asked where Bellinger kept his valuables. Appellant started getting upset when he could not find anything. When appellant turned his back, Bellinger attempted to get the gun, but appellant hit him in the head with the gun. Bellinger stumbled and appellant hit him again. Appellant then cocked the gun and Bellinger saw a bullet fly out of the chamber. Bellinger's wife indicated

there was a phone call, at which point appellant told Bellinger to go into the living room. Bellinger's wife then realized what was happening, and told the men to leave her home. As she approached the front door, Tony picked her up and sat her on the couch. Tony then took Bellinger's wife's purse and emptied the contents. Appellant held Bellinger at gunpoint as Tony ransacked the children's room. The ordeal in the living room lasted approximately fifteen minutes, during which time appellant put the gun to Bellinger's head, and on his wife and children, and threatened to kill them in front of each other. Because appellant was becoming increasingly upset that they could find no valuables and continued to threaten the family, Bellinger told him he "knew someone [who] had some money." Appellant got the home phone number and wrote it down and indicated he was going to leave Tony in the house so he could contact him if Bellinger "tried anything stupid."

Bellinger testified he and appellant left in a car belonging to Bellinger's wife and drove to Dusty's house. There, they ran into Carson Keen and Nathan Seals, who were in Nathan's truck. Appellant and Bellinger spoke to Carson about getting drugs, and they then left to go to Jessie's house. Jessie was not home, and they then drove to a convenience store so Carson could use a phone. Carson exited the truck and went to the pay phones while Nathan remained in his truck. Appellant instructed Bellinger to get out of the car, and as Bellinger approached the pay phones, he observed appellant talking to Nathan through the truck window. Appellant opened the truck door and sat inside it. Bellinger then noticed that Nathan "got a really scared look on his face." He saw Nathan dig through his pockets, and then take the keys out of the ignition and give them to appellant. During this time, while Carson was at the phones, Bellinger attempted to relay to Carson what was happening, but he did not seem to understand. At that time, appellant made Nathan get out of the truck, and had all of them walk into the store. After purchasing beer and cigarettes, the men walked back outside, and appellant proceeded to pull the gun on Carson to rob him. Carson pulled a knife on appellant and the two began to struggle. Bellinger and Nathan then ran, until they reached a home where the occupants allowed them to call the police. Approximately two weeks later, Bellinger identified appellant in a

photographic line-up as the man who held him hostage and left the house with him that day.

Belinda Bellinger likewise testified that on the night in question, she was at home watching television with her husband and her eighteen month old and ten day old sons, when they heard a knock at their door. Her husband eventually went to answer the door, and was gone for about ten to fifteen minutes. When he returned, he was accompanied by two men. One of the men went to the bedroom while the other stood in the hallway. Belinda did not recognize either of the men. She made an in-court identification of appellant as the man who went into the bedroom with her husband.

While her husband was in the bedroom with appellant, the door was shut. The other man told Belinda everything was okay, which made Belinda suspicious. Their neighbor, J.T., from across the street called and asked to speak to Bellinger. When Belinda approached the bedroom to tell her husband he had a phone call, Bellinger and appellant exited the room. Belinda then noticed a red mark on Bellinger's neck and saw that Bellinger looked scared. She then knew something was not right. When Bellinger talked on the phone, she overheard him talk about marijuana. The men then started asking for money. Belinda told them to "take it outside," and the man who had stood in the hallway then picked her up, sat her on the couch, told her to keep her mouth shut, and removed her glasses from her face so that she could not see well. The men started saying they wanted money, and appellant opened the clip of the pistol to show Belinda the bullets and told her he was not afraid to use the gun. The men ransacked the house, dumping Belinda's purse and removing a small amount of cash from her wallet. One of them also found Belinda's pepper spray, and threatened to spray it on her son's face. The men became very angry when they could not find anything to take, and appellant held the gun to Belinda's nose and to Bellinger's temple, threatening to shoot each of them in the presence of the other.

Bellinger told appellant he could take him to get "some money or whatever he wanted," at which point appellant indicated he would go with Bellinger, while the other man stayed at the house with Belinda and the children. Appellant got the home phone number and stated he would call if

anything happened. He also said he had friends outside in a car in case Belinda attempted to leave. Bellinger and appellant left the house, and the other man stayed with Belinda. Although she never saw him with a gun, the other man told her he had one and he would use it. While waiting in the house, the neighbor, J.T., kept calling on the phone and asking if everything was okay. After a while, another neighbor, Mrs. Smith, came over to the house and asked Belinda if she was okay. Belinda did not invite her inside for fear of putting her neighbor in danger. She told the neighbor she was all right, and the neighbor left. J.T. continued to call Belinda asking her what was wrong, but she could not tell him. Belinda then noticed some headlights through the window blinds. After looking through the window and realizing there were police out there, the man ran out the back door. Belinda walked outside with her children and saw numerous police cars. She also observed a man and a woman on the ground with handcuffs on them.

Nathan Seals testified that on March 8, 2001, he was with Carson Keen at Dusty's house when Bellinger and appellant pulled up in a car. Bellinger looked like "he had fear in his eyes." He and Carson left in his truck to go to Jessie's house, with Bellinger and appellant following behind. When Jessie was not home, Carson told Nathan to drive to the store so he could use the pay phone. While in the truck, Nathan gave Carson a steak knife because he had a feeling that something was amiss. Carson exited the truck and he and Bellinger went up to the pay phone. As Nathan sat in his truck, appellant jumped inside, pulled a gun out, and shoved it into Nathan, telling Nathan he "needed to give him everything." Appellant told Nathan to remove his necklace. He asked Nathan if he had any guns, then began searching the car for any weapons. He then told Nathan that Bellinger owed him money and if he did not get it, all of them, along with Bellinger's wife and children, would be killed. Appellant stated that Belinda and the children were being held at gunpoint and if anything went wrong, he would call and have them shot. Nathan handed appellant his necklace, and appellant took the keys from the ignition.

Appellant told Nathan to get out of the truck, and all of the men walked inside the store. Some beer was purchased, and all of them walked back outside. Appellant called Carson over to talk to him, at which point he put a

gun to Carson's side. Carson then pulled out the knife and held it to appellant's throat. The two men began yelling at each other, and Nathan and Bellinger ran away. After going to a couple of homes, someone finally let them in their house to call the authorities. Nathan testified he had never seen appellant before this incident. He subsequently identified appellant from a photographic line-up as the man who had robbed him that day.

Carson Keen testified that on the night of March 8, 2001, he was at Dusty's house with Nathan Seals when Bellinger and appellant drove up and asked for some cocaine. Carson had never met appellant before. Carson told them he could get them the drugs. He noticed that Bellinger was acting like "something bad was going on." They went over to Jessie's house to get some cocaine, but Jessie was not home. Bellinger and appellant followed them to a convenience store, where Carson made some calls in an attempt to get some cocaine. Carson could not reach the dealers he was trying to call, but stayed at the phones pretending to make other calls because he was concerned about the way Bellinger was acting. Carson saw appellant get into Nathan's truck. At some point, appellant asked Carson to get him some beer. When Carson asked appellant for money to purchase the beer and appellant told Carson to "just go get it," Carson thought he was going to be robbed. When the men all walked into the store, Bellinger followed behind Carson and told him appellant was holding his family hostage. Carson purchased the beer and walked back outside toward the telephones, where he intended to call the police. Before he had a chance to use the phone, appellant called him over to the truck and pulled a gun out, sticking it in Carson's side. Appellant told Carson to get in the truck. Carson refused and appellant told him to give him all his money. At that time, Carson pulled out a knife and stuck it to appellant's throat. Appellant then ran, jumped in the truck, and drove away. Carson went into the store and told them to call the police.

Detha Smith testified that on the night of the incident, she received a phone call from J.T. As a result of that call, she went over to Belinda's house. She knocked on the door, and when Belinda answered, she observed a man sitting on the couch. Mrs. Smith asked Belinda what was wrong, because it was unusual for Belinda to be sitting in her living room with the lights out. She could also tell that Belinda was upset. When Mrs. Smith

would ask her questions, Belinda was unusually quiet. Mrs. Smith told Belinda that she was going to her house to try to get some help. When she reached her home, she called 9-1-1, and shortly thereafter numerous officers arrived on the scene.

During cross-examination of Bellinger, it became apparent that Bellinger had given more than one written statement to the police. Bellinger testified that he gave a total of three written statements. In the first statement, Bellinger wrote about one third or one half of the way down the page, but did not finish it. In this statement, he wrote only about the robbery, and did not provide any information about the drug activity. Bellinger stated, "I wrote [the first statement] and [the police officers] told me are you sure you're telling the truth. They told me we know about the drug incident. We know about there was drugs involved. And they said, if you don't tell the truth right now, admit to everything, that you could get in trouble. And that's when I wrote the next one and told the truth about everything." Bellinger said he lied on the first statement, but only by leaving out the drug activity. He stated, "[T]he only difference in the statements was the fact that I was going to try to find them drugs." Bellinger testified that the first statement was thrown away by an officer. In the second statement, which Bellinger handwrote but did not sign, he included the drug information, but did not go into details about what occurred at the house. The third statement, which was given on March 10, 2001 and included the drug activity and all of the events occurring on March 8, was provided to Hutton's counsel, but the first two were not.

At trial, the Solicitor told the trial judge he was only aware of the statement given on March 10, and he had no knowledge of the other statement until Bellinger's testimony. The trial judge allowed appellant's counsel to cross-examine Bellinger outside the presence of the jury, so he could determine what was in the first statement and use that information to impeach Bellinger in front of the jury. Thereafter, appellant's counsel moved for a dismissal of the charges arguing, because the other statements Bellinger gave were not available, he could not effectively cross-examine him. The trial judge denied Hutton's motion, ruling that he had an opportunity to question Bellinger as to the content of the first two statements, and Bellinger

had admitted the information he provided was incorrect and gave the particulars of how it was incorrect. Appellant was found guilty on all charges and now appeals.

LAW/ANALYSIS

Hutton argues the trial court erred in denying his motion to dismiss because his counsel was not provided with the initial statement made by Bellinger, and therefore he was deprived of the opportunity to fully cross-examine a key State's witness.[1] We disagree.

Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479, 485 (1984). This standard requires criminal defendants be afforded a meaningful opportunity to present a complete defense. Id. The State does not, however, have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001). Furthermore, "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488. To establish a due process violation where the State fails to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. Cheeseboro, 346 S.C. at 538, 552 S.E.2d at 307.

There is no evidence the State destroyed the initial statement of witness Bellinger in bad faith. Bellinger testified the officer threw away the unfinished statement after Bellinger admitted it was not the complete truth,

[1]Appellant challenges only the failure of the State to provide the initial statement that was allegedly thrown away. He does not make any argument regarding the second statement given on the same date in which Bellinger stated he "told the truth about everything."

and the officer gave him another piece of paper and told him to "write the truth." There is simply no indication the officer who threw away the first statement did so in an effort to suppress exculpatory evidence, or with any other bad faith motive. Rather, it appears the officer considered the statement that Bellinger began to write as having no evidentiary value since Bellinger himself admitted to the deception by omission in the statement.

As to the second prong, we find nothing to indicate that the evidence possessed an exculpatory value that was apparent before the evidence was destroyed. Exculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt. State v. Jarrell, 350 S.C. 90, 107, 564 S.E.2d 362, 372 (Ct. App. 2002). Here, Bellinger testified the only difference in the statements was that he only included the robbery in the first one, and not the fact that he was going to help the appellant find drugs. There is nothing in this statement which would create a reasonable doubt as to appellant's guilt. Nor can we find appellant could not obtain other evidence of comparable value by other means. The trial court allowed trial counsel to thoroughly cross-examine Bellinger about the first statement he gave and its contents. Further, at best, the initial statement was of value to appellant in the impeachment of Bellinger. On cross-examination, Bellinger admitted he did not initially tell one of the officer's about the drugs, he knew that he was not being truthful, and he gave a second statement after an officer accused him of lying. Thus, counsel was able to thoroughly impeach Bellinger before the jury.

Finally, we see no prejudice to appellant as a result of the destruction of the unfinished statement. As noted, appellant was able to effectively impeach Bellinger regarding his inconsistent statements. See State v. Jones, 325 S.C. 310, 322, 479 S.E.2d 517, 523 (Ct. App. 1996) (appellants failed to demonstrate prejudice resulting from State's failure to reveal new statement of witness where counsel was able to impeach witness about new allegation by introducing prior statement and questioning witness about the discrepancy). State v. Gathers, 295 S.C. 476, 482, 369 S.E.2d 140, 143 (1988) (appellant failed to show prejudice from alleged non-disclosure of doctor's equivocation on whether wound was pre- or post-mortem where appellant effectively cross-examined doctor at trial and doctor conceded she

was unsure whether wound occurred before or after death); State v. Woods, 282 S.C. 18, 20, 316 S.E.2d 673, 674 (1984) (there was no merit to argument that appellant was denied adequate confrontation of witnesses against him based on missing medical records where treating psychiatrist testified and was fully cross-examined by appellant's trial counsel). Further, the other witnesses' testimony directly comports with Bellinger's testimony regarding the specific chain of events on March 8, 2001 and the identity of appellant as one of the perpetrators. Several of these witnesses were present as the crimes occurred, including Bellinger's wife and the other victims, who testified as to the events just as Bellinger did. We find the other witnesses' testimony provides overwhelming evidence of appellant's guilt. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the appellate court should not set aside a conviction because of insubstantial errors not affecting the result).

While we do not condone the destruction of any statements made by witnesses to the authorities, we consider dismissal of criminal charges a drastic remedy which should rarely be invoked as a sanction for the State's failure to preserve evidence. We still caution the prosecution and law enforcement authorities that the destruction of evidence will be highly scrutinized; however, we cannot find appellant was entitled to a dismissal based on the facts of this case. After considering the lack of evidence of bad faith on the part of the State in the destruction of the evidence, the importance of the missing evidence in light of the availability of evidence of comparable value, and the overwhelming sufficiency of the other evidence produced at the trial to sustain appellant's conviction, we find no error in the trial court's denial of appellant's motion to dismiss.

For the foregoing reasons, appellant's convictions are

AFFIRMED.

STILWELL, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John A. Hardin and Martha Hardin Curran, as Trustees of Marital Trust 2 under the Will of Martha S. Hardin, Deceased, Respondents,

v.

The South Carolina Department of Transportation, Appellant.

Appeal From York County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 3786
Heard April 8, 2004 – Filed April 26, 2004

AFFIRMED

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

David A. White, of Rock Hill, for Respondents.

ANDERSON, J.: John A. Hardin and Martha Hardin Curran (collectively, "Respondents") filed a complaint against the South Carolina Department of Transportation ("SCDOT") in inverse condemnation seeking

compensation for the loss in value to two[1] tracts of land they owned on the north side of Dave Lyle Boulevard on either side of its intersection with Baskins and Garrison Roads in Rock Hill, South Carolina, because of the construction of a median barrier in the center of Dave Lyle Boulevard. The trial was bifurcated. A bench trial was held on the sole issue of whether the median's construction deprived Respondents of a property right entitling them to just compensation. The trial judge ruled that a taking had occurred and ordered a separate trial to assess just compensation. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Completed in 1974, Dave Lyle Boulevard is a high-speed, divided, controlled-access, four-lane highway connecting Interstate 77 with downtown Rock Hill. Right of way for the highway was acquired from Respondents' predecessor in title in 1971. The highway was planned and constructed to permit no private entrances and a limited number of public road intersections in order to maintain a high level of service and safety.

Prior to construction of Dave Lyle Boulevard, two local roads, Baskins Road and Garrison Road, intersected in an "X" pattern. During construction of Dave Lyle Boulevard, these roads were joined on each side of the new highway to provide a shared single entry point. A break in the controlled-access line and in the highway median barrier accommodated the joined Baskins-Garrison entry point.

In 1992, the City of Rock Hill requested permission from the SCDOT for a new intersection about 1,000 feet east of the Baskins-Garrison/Dave Lyle intersection to accommodate a new road that would connect the Rock Hill Industrial Park with York Technical College. Because of the limitation on cross streets, the SCDOT responded that a new intersection would require that the existing Baskins-Garrison/Dave Lyle intersection be closed. Several area landowners, including Respondents, protested. A public hearing was held on the matter. After the hearing, SCDOT determined that, because right

[1] At trial, Respondents withdrew their claims as to three additional tracts of land.

turns were less disruptive than left turns, only the median would be closed, leaving the intersections on each side "right turns in and [right turns] out" only. In 1998, a median barrier was constructed across Dave Lyle Boulevard that prevents vehicular traffic from crossing over the highway at that point. This median barrier was erected in the middle of Dave Lyle Boulevard at the point which Baskins and Garrison Roads cross over the highway.

Respondents own two parcels of property that abut Baskins and Garrison Roads. Due to the newly erected barrier, eastbound travelers on Dave Lyle can no longer turn left across the highway to access Respondents' properties and travelers exiting Respondents' properties can no longer cross the highway to access the eastbound lane.

Respondents asserted they were entitled to just compensation for any loss in value of their properties caused by the median. The trial judge agreed and ruled:

> At the hearing in this case, Plaintiffs adduced convincing evidence that Plaintiffs' Tracts A and B were specially injured by the closing of Baskins and Garrison Roads, **because they possessed the unique characteristic of directly abutting the intersection of a controlled access highway.** I conclude that Plaintiffs' [sic] are entitled to a jury trial for the determination of just compensation due. (Emphasis added).

ISSUES

I. Did the trial court err in finding that Respondents had a valid property right infringed upon by the construction of the median barricade?

II. Did the trial court err in excluding the official highway plans for the project underlying the decision in Gray v. South Carolina Dep't of Highways & Pub. Transp.?

STANDARD OF REVIEW

The trial judge bifurcated the proceedings below and conducted a trial in equity solely to determine the question of whether Respondents were deprived of a property right entitling them to just compensation. We note that the issue of whether the proceeding conducted by the Circuit Court in a case of this type is equitable or legal is novel in South Carolina. We conclude that the proceeding is equitable in nature and adopt the reasoning of the Supreme Court of Florida in Palm Beach County v. Tessler, 538 So. 2d 846 (Fla. 1989). Tessler explicated:

> Actually, in an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.

Id. at 850. Accord Department of Pub. Works & Bldgs. v. Wilson & Co., 340 N.E.2d 12 (Ill. 1975); Brock v. State Highway Comm'n, 404 P.2d 934 (Kan. 1965); Guerard v. State, 220 N.W.2d 525 (N.D. 1974).

On appeal from an action in equity, the appellate court has authority to find facts in accordance with its own view of the preponderance of the evidence. Williams v. Wilson, 349 S.C. 336, 563 S.E.2d 320 (2002); Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

LAW/ANALYSIS

I. Valid Property Right

SCDOT argues the trial court erred in its holding that the erection of the traffic barricade at issue infringed on a valid property right of

Respondents and entitled them to a trial for the ascertainment of just compensation. We disagree.

We address the issue of when an action regarding the alteration of public thoroughfares may warrant just compensation to those owners whose property is negatively affected by the change.

Our analysis begins with the case of Cherry v. Fewell, 48 S.C. 553, 26 S.E. 798 (1897). In Cherry, the city of Rock Hill altered a road approximately 225 feet from plaintiff's home, but not directly adjoining his property. The plaintiff alleged he was entitled to compensation because this road closing required him "to take a more circuitous and difficult route, to his great inconvenience personally, and to the great damage to his said lot as a place of residence." Id. at 559, 26 S.E. at 800. The Supreme Court affirmed the Circuit Court's demurrer, finding a mere claim of inconvenience

> "in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the 'same kind' of damage that would be sustained by all other persons in the city that might have occasion to go that way, and although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action."

Id. at 563, 26 S.E. at 801 (quoting City of E. St. Louis v. O'Flynn, 10 N.E. 395 (Ill. 1887)) (emphasis added). The Court's holding was predicated on the fact that plaintiff's claim did not allege any other "special or peculiar injury, differing in kind, and not merely in degree, from that which the public generally sustain[s], which alone would entitle a private person to maintain an action . . . for damages." Cherry, 48 S.C. at 560, 26 S.E. at 800.

Cherry established the basic rule in South Carolina that an alteration of a public roadway adjoining plaintiff's property constitutes a taking of private property for public use within the constitutional prohibition. However, when this alteration takes place on a part of the roadway not abutting the citizen's property, that citizen must allege and prove "special or peculiar injury" to

receive compensation. Id. A mere allegation of greater inconvenience than the general public, without more, is not enough to prove this "special or peculiar injury." Id.

From the general holding of Cherry emerged the more specific rule of City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946). In Cothran, the city closed a portion of Laurel Street that, while not abutting appellants' property, was a portion of roadway on the same block (within one intersection) as appellants' property. This closing essentially transformed the street abutting appellants' property from a major thoroughfare directly connecting the property to the city's major traffic routes to a cul-de-sac. Cothran, 209 S.C. at 369, 40 S.E.2d at 244. The Court recognized the application of the Cherry rule, namely that, in this situation, the appellants were not entitled to compensation unless they had suffered a special injury. Id. at 368, 40 S.E.2d at 243.

The Cothran Court inculcated:

> The right of a landowner to recover damages because of the vacation of a street depends on the location of his land with reference to the street vacated, or the part of the street vacated, and the effect of such vacation on his rights as an abutting owner. It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears that there is a special injury, the owner may recover damages notwithstanding his property does not abut, as in this case, on the part of the street vacated, because this amounts to a 'taking.' McQuillin Munic. Corp., 2d ed., Vol. 4, Sec. 1525; Houston v. Town of West Greenville, 126 S.C. 484, 120 S.E. 236.
>
> **In the absence of special injury, no recovery will be allowed. The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which presents itself is whether one whose property does not abut immediately on the part of the street vacated—**

the part vacated being in the same block between his property and the next connecting cross street—is so specially injured as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

> We held in Houston v. Town of West Greenville, 126 S.C. 484, 120 S.E. 236, that the right of an abutting landowner to passage at least to the next intersection is a substantial property right; that such right is not conditioned on the use of the street in common with the public generally, and that the closing of the street was an interference with this right and a 'taking' of property within the meaning of the constitutional provisions.
>
> In the case of Cherry v. City of Rock Hill, 48 S.C. 553, 26 S.E. 798, it did not appear that the plaintiff's land was in the block along which a portion of the street was vacated; the inference to be drawn from that case, as reported, is that such was not the case. For that reason, the principal [sic] announced in the Cherry case has very little application here, where the appellants' property abuts upon a block a portion of which is vacated between it and the next street intersection. **It is not a question whether the land adjoins the vacated portion or not, but rather will its value be impaired if deprived of one of the immediate means of access to it.**

Id. at 368-69, 40 S.E.2d at 243-44 (emphasis added); see also Mosteller v. County of Lexington, 336 S.C. 360, 365 n.2, 520 S.E.2d 620, 623 n.2. (1999) (reaffirming the Cothran rule but finding it inapplicable to that case); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 151, 427 S.E.2d 899, 903 (Ct. App. 1992) (quoting Cothran, the "'right of a landowner to recover damages because of the vacation of a street depends on the location of his land with reference to the street vacated, or the part of the street vacated, and the effect of such vacation on his rights as an abutting owner.'").

It is undisputed that Respondents own properties that abut the joined Baskins and Garrison Roads. The median barrier erected by SCDOT altered the existing intersection. The construction of the barrier severely limits Respondents' access. The fact that Respondents have free passage to the westbound lane of Dave Lyle Boulevard is a factor to be considered in estimating the damages to be awarded and not in determining the existence of this valid property right. See Cothran, 209 S.C. at 370, 40 S.E.2d at 244.

According to SCDOT, a state may curtail, regulate, or altogether cease traffic on public roads and highways as a valid exercise of the State's police power without liability to any landowner or member of the public. See South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 561, 235 S.E.2d 127, 128 (1977) ("A landowner has no vested right in the continuance of a public highway . . . . [T]he State is under no duty to maintain a minimum level of traffic flow."); South Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 365, 175 S.E.2d 391, 394 (1970) ("[T]here is a distinction between the exercise of the police power and the exercise of the power of eminent domain; that just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power."). We are not persuaded by SCDOT's argument or cited authority. While the police powers of the State naturally allow a broad range of actions to ensure public safety which do not per se "require" that all negatively affected property owners be compensated, the exercise of police powers will never be allowed to violate Article I, section 13 of the South Carolina Constitution, which provides that private property shall not be taken for public use without just compensation. See Gray, 311 S.C. at 147, 427 S.E.2d at 901. Cothran is rooted in the principle that "the deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a taking as though the property was actually appropriated to the public use." Wilson, 254 S.C. at 366, 175 S.E.2d at 395. There is no distinction between taking and damaging and the least damage to property constitutes a taking within the purview of the Constitution. Id. "Any suggestion that most takings of property are not compensable merely because they have safety as a purpose would be untenable." Gray, 311 S.C. at 147, 427 S.E.2d at 901.

The erection of the median barrier is an interference with a valid property right of the Respondents protected by the Constitution. Respondents presented the testimony of two expert witnesses in regard to the "special injury" to Respondents' Tracts A and B by the closing of the median. Based on the testimony of the expert witnesses and the principles of law articulated in Cherry, Cothran, Mosteller, and Gray, we conclude Respondents suffered a constitutional taking. Concomitantly, the trial court did not err in granting Respondents a jury trial for the determination of just compensation due.

II. Consideration of Plans not Referenced in a Prior Published Opinion

SCDOT maintains the trial court erred in excluding as evidence the official highway plans for the project underlying the decision in Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992). SCDOT asserts that, since these documents are public records, they should have been admitted as an exception to the hearsay rule. See Rule 803(8), SCRE. We disagree.

SCDOT sought to enter the highway plans as evidence of the facts this Court considered when deciding Gray in 1992, ostensibly because "the actual decision is somewhat confusing." This evidentiary foundation drastically fails to establish the relevance of the plans at issue. There is no reference whatsoever to the offered plans in this Court's Gray opinion. Further, there was no evidentiary foundation presented on which to determine the plans accurately reflected the evidence considered by the Court in Gray or even the road conditions existing at the date of the taking in Gray.

It would be improper for the trial court to consider this extraneous evidence, not referenced on the record in Gray. A ruling under the purely speculative guise that this Court "must have" considered identical public records in reaching its decision would be erroneous. Extrinsic evidence not included in or clearly referenced by a prior appellate court opinion is not relevant evidence to a later case if it is presented merely to better explain that prior decision. Evidence that is not relevant to a case is not admissible. Rule 402, SCRE. The trial judge properly excluded the evidence.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Christopher Clarke Horton, **Appellant.**

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge

Opinion No. 3787
Submitted April 6, 2004 – Filed March 3, 2004

AFFIRMED

William G. Rhoden, of Gaffney, for Appellant.

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

ANDERSON, J.: Christopher Clarke Horton was indicted for felony driving under the influence causing death (felony DUI) and reckless

homicide. The jury returned a verdict of guilty of reckless homicide and not guilty of felony DUI. The trial judge sentenced Horton to ten years imprisonment. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On September 26, 2001, Gregory Thomas, fourteen years old, was struck and killed while walking with his family. Horton was driving the vehicle that struck Thomas.

At trial, the State presented the testimony of Suzie Thomas (Gregory's mother) and Geoffrey Thomas (Gregory's nineteen-year-old brother). Suzie stated that she, Gregory, and Geoffrey were walking down the left-hand side of a road near their home shortly after 6:30 p.m. Suzie professed that, as they saw a green car approaching, the three crossed the road. According to Suzie, even though all three of them looked both ways before crossing, Gregory was struck by a white car that was coming down the road "very fast." Suzie stated that, when she "looked to go across the road," she did not see the white car. Suzie and Geoffrey "made it to the side of the . . . road." Suzie said Gregory was "almost on the side of the road on the grass, but he had not made it to the side of the road." Suzie declared:

> And when I saw the car coming, I screamed "Gregory, get out of the road. Go to the side." And as I said that, Gregory's right leg went up like he was going to step on the grass. And when he did that, the car hit him and he flew up.

After striking Gregory, the white car proceeded down the street for approximately 275 feet. When Horton stopped and exited the vehicle, Suzie asked: "'Why did you hit my son?'" Horton responded: "'[B]ecause he wouldn't get out of my way.'"

On cross-examination, Suzie admitted she did not "tell any of the

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

police officers about" the green car. When queried as to whether she told the officers about Horton's statement that her "son wouldn't get out of the way," Suzie answered: "I don't remember. I don't think so . . . ." Suzie acknowledged she did not see Horton's car until it hit Gregory. The following colloquy occurred on cross-examination:

> Q. Well, I believe you said that you never saw the white car.
> A. No, I never saw the white car until we stepped over, but he was—that's how fast he came up on us.
> Q. So you only saw the white car just a split second before it hit your son?
> A. Right when it hit my son.
> Q. So that's the only time that you saw the white car?
> A. Yes. I heard him. I heard it and that's when I, you know, screamed for Gregory, and then he—before Gregory could step over onto the grass, he hit him.

Geoffrey corroborated Suzie's testimony regarding the facts leading up to the accident. Geoffrey testified he did not see the white car when they began to cross the road and did not "hear any brakes" or see any skid marks after the accident. Geoffrey did not testify that Horton made a statement after exiting the white car.

Officer David H. Burgess, with the South Carolina Highway Patrol, was the responding officer. Officer Burgess testified that, upon reaching the accident scene, he noticed there were no skid marks on the road. While sitting beside Horton in his patrol vehicle, Officer Burgess detected "an odor of alcohol." Although the officer did not perform any field sobriety tests and noted that Horton did not slur his speech or stagger, he opined that Horton was under the influence. Officer Burgess stated that Horton's attitude after the accident was unusual, commenting that Horton was "unemotional." The officer admitted he did not know "anything about [a] green car" until the day of trial.

Horton was given a Datamaster test at the Spartanburg County Detention Center. Horton registered a 0.03. Highway Patrol Officer Russell

Joye, who administered the test, testified Horton was cooperative, and that he did not smell an odor of alcohol on Horton's person. After the Datamaster test, Officer Joye drove Horton to the hospital for a urine test. Horton signed an implied consent form before a urine sample was collected. On direct examination, Sue Mobley, a nurse at the hospital who participated in the urine test, was asked if she smelled any alcohol on Horton. Mobley answered: "A slight smell."

Robert Michael Sears, a forensic toxicologist with SLED, later analyzed the urine sample. The results of the urine test indicated the presence of a tetrahydrocannabinol metabolite, hydrocodone, dihydrocodeine, and benzoylecgonine. Tetrahydrocannabinol, more commonly known as THC, is the "pharmacologically active component of marijuana." Hydrocodone and dihydrocodeine are opiates. Benzoylecgonine is a "major metabolite" of cocaine. A blood test was not performed. Sears declared that "what [he] found in the urine test, plus the alcohol that was in [Horton's] system," would "affect a person's ability to drive." According to Sears, urine tests show "a history of use," but "not necessarily [the] presence of drugs in the blood." On cross-examination, defense counsel posited the following question to Sears: "So without the blood test, we don't know whether or not Mr. Horton was under the effects of those drugs at the time of this accident, do we?" Sears answered: "That's correct." The following exchange occurred between defense counsel and Dr. David H. Eagerton, chief toxicologist at SLED:

> Q. All right. So by looking at this evidence here, this urine test, it doesn't tell you anything about what was in Mr. Horton's blood at the time of this accident, does it?
> A. At exactly the time of the accident, no, it doesn't. It only tells you what was in his blood within that three-day window.

Horton presented the testimony of Alison Cocoros, the chief investigator for the Spartanburg County Coroner's Office. Cocoros observed Horton at the accident scene. When asked by defense counsel if she "smell[ed] any odor of alcohol on Mr. Horton that evening when [she] talked to him," Cocoros answered in the affirmative. However, when queried

regarding whether Horton appeared to be impaired, she responded: "No, sir."

Cocoros spoke with Suzie and Geoffrey at the hospital on the night of the accident. She declared that neither Suzie nor Geoffrey mentioned a green car "coming in the opposite direction" or any statement made by Horton after the accident. Cocoros stated that Suzie and Geoffrey told her the following when explaining the events leading up to the accident:

> When I asked them what had happened, . . . [t]hey stated that they walked around the curve on Casey Creek Road, that the son Geoff and Ms. Thomas crossed to the right-hand shoulder. Gregory was in the middle of the left-hand lane. They said that they heard a car behind them. They started telling Gregory to get out of the road. Instead of crossing to the left this way, he crossed to the right towards them on this side of the road and a car came around the curve and hit him.

Kristin Rodgers was Horton's passenger on the night of the accident. She testified in his defense. Rodgers stated Horton had two beers at dinner and did not have any problems operating his car. Rodgers discussed the accident:

> We are going down the road. We starting to go around a curve and there is three people walking in the middle of the road, and [Horton] slowed down. A lady and a boy went to the right side of the road and another boy went to the left side of the road to let us through. So we starting to go through them and as we are starting to go through them, the boy from the left side of the road runs back on the right side of the road and that's when we hit him. . . . [I]t all happened in a matter of seconds.

Horton's testimony corroborated that of his passenger. He affirmed that he had two beers with dinner, but had drunk no other alcohol that day. Horton denied taking any drugs on the day of the accident. However, he admitted to smoking marijuana and snorting cocaine three days before, and taking a Lortab two days before the accident. Both Horton and Rodgers

testified they did not know of anything that Horton could have done to avoid the accident.

At trial, Horton moved to suppress the results of the urine test, arguing improper procedure, an incomplete chain of custody, and the urine test results were more prejudicial than probative under Rule 403, SCRE. The trial judge denied the motion. At the close of the State's case, Horton moved for a directed verdict on the charges of felony DUI and reckless homicide. This motion was denied. After he presented his case, Horton renewed his motion for a directed verdict, which was denied. The jury returned a guilty verdict as to reckless homicide and a not guilty verdict as to felony DUI.

ISSUES

I. Did the trial judge err in failing to grant Horton's motion for a directed verdict as to the reckless homicide charge?

II. Did the trial judge err in admitting the results of the urine test?

III. Did the trial judge err in allowing the State to present evidence that Horton lacked remorse?

LAW/ANALYSIS

I. Directed Verdict – Reckless Homicide

Horton argues the trial judge erred in denying Horton's motion for a directed verdict as to the reckless homicide charge. We disagree.

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). When ruling on a motion for a

directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Rosemond, 356 S.C. 426, 589 S.E.2d 757 (2003); State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003); see also State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001) (stating judge should deny motion for directed verdict if there is any direct or substantial circumstantial evidence which reasonably tends to prove accused's guilt, or from which his guilt may be fairly and logically deduced). On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); State v. McCluney, Op. No. 3742 (S.C. Ct. App. filed February 2, 2004) (Shearouse Adv. Sh. No. 6 at 63); State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct. App. 2003).

"When the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless homicide. . . ." S.C. Code Ann. § 56-5-2910(A) (Supp. 2003). Reckless homicide requires proof that the defendant (1) operated an automobile; (2) in reckless disregard for the safety of others; (3) the defendant's conduct proximately caused injury to the victim; and (4) within three years, the victim died as a result of these injuries. See State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002).

To convict an individual of reckless homicide, the State must prove the individual was driving a vehicle "in reckless disregard of the safety of others." State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997). Reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. Id.; see also McKnight, 352 S.C. at 645, 576 S.E.2d at 173 ("[I]n reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts."). It denotes a conscious failure to exercise due care or ordinary care or a

conscious indifference to the rights and safety of others or a reckless disregard thereof. Rowell, 326 S.C. at 315, 487 S.E.2d at 186.

We find the State presented sufficient evidence to submit the reckless homicide charge to the jury. Both Suzie and Geoffrey Thomas testified that Gregory looked both ways before crossing the street. The Thomases declared they did not see the white car that Horton was driving until it struck and killed Gregory. Officer Burgess's testimony that there were no skid marks on the road where the car struck Gregory supported the statement by the Thomases that Horton's car came upon them very quickly. Officer Burgess said that he detected "an odor of alcohol" on Horton's person and, although Horton was not slurring his speech or staggering, he believed Horton was under the influence. The officer indicated that his suspicions were strengthened by the fact that Horton was "unemotional" after the accident and that "[h]is attitude and behavior just didn't add up to [the] reality of what had just happened." The forensic toxicologist with SLED noted that, at the time of the accident, Horton had alcohol, THC, opiate derivatives, and cocaine metabolite in his system. A jury could conclude from these facts that, on the day in question, Horton operated his vehicle "in reckless disregard of the safety of others."

The State presented evidence reasonably tending to prove Horton's guilt of the offense of reckless homicide. Accordingly, the trial judge did not err in denying Horton's motion for a directed verdict on the charge of reckless homicide.

II. Urine Test

Horton contends the trial judge erred in admitting the results of his urine test. We disagree.

An in camera hearing was held to determine the admissibility of the urine test. Officer Joye testified that, after administering the Datamaster, he asked Horton to submit to a urine test. The officer drove Horton to the emergency room (ER) at Spartanburg Regional Medical Center. He filled out the implied consent form at the hospital. Horton signed the implied consent form. Because a male nurse was not available to go in the bathroom with

Horton while he was giving the sample, Officer Joye went into the "one unit bathroom" with Horton and observed him give the urine sample. The bathroom had a toilet but no stall. Horton handed the urine sample to Officer Joye. The officer then passed the sample to an ER staff nurse, Sue Mobley, who had observed from outside the partially open door. Mobley "labeled the kit, as far as putting the tape over the urine sample" and "put[ting] the identification information . . . on it." After Mobley signed, sealed, and labeled the urine sample, she returned the sample to Officer Joye. Officer Joye gave the urine sample to Officer Burgess for transport.

Officer Burgess witnessed Mobley sign the "specimen seal." Officer Burgess signed the outside of the box indicating that he had received the urine sample. The officer "kept the sample in his possession until [he] turned it in to the evidence locker at the patrol office." Officer Burgess stated he did not sign the sample in to the evidence locker until September 27. He could not recall at what time he placed the sample in the evidence locker. Further, he did not remember whether he stored the sample in his personal refrigerator prior to placing it in the evidence locker. When he placed the sample in the evidence locker, "[t]he bottle [was] sealed and [was] in plastic. And on the outside . . . of the box there [are] tabs . . . that are sealed and initialed."

Sergeant William Eugene Williford removed the urine sample from the evidence locker and transported it to SLED headquarters in Columbia. When Sergeant Williford arrived at SLED, the evidence technician removed the sample from the box and placed it in a plastic bag. Sergeant Williford sealed the bag, initialed it, and placed it in the SLED drop box. When asked on cross-examination what type of container the sample was contained in when he removed it from the evidence locker, Sergeant Williford responded: "A styrofoam-type container." He stated the urine sample was in a plastic container which was inside a sealed box which was inside a second sealed box. Robert Michael Sears, the SLED forensic toxicologist, confirmed that he removed Horton's sample from a sealed plastic bag prior to conducting his analysis of the urine sample. The trial judge denied Horton's motion to suppress the results of the urine test.

The admission or exclusion of evidence is left to the sound discretion

of the trial judge. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). 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. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

A. Collection of Urine Sample

Horton maintains the results of the urine test should have been suppressed because the urine sample was improperly collected.

"Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility." S.C. Code Ann. § 56-5-2950(a) (Supp. 2003).

Horton claims section 56-5-2950 was violated because Officer Joye was the individual who collected the urine sample. We find this argument is without merit. Because there were no male nurses available that evening to personally witness the production of the sample and immediately collect it, Mobley followed hospital policy and did not accompany Horton into the bathroom. However, while Mobley did not stand next to Horton while he gave his sample, she observed the situation from the partially open bathroom door. The only role played by Officer Joye was to place a lid on the sample and hand it to Mobley, who then signed the appropriate labels on the container and sealed it.

We find the trial judge did not err in finding that, as Mobley was in the "immediate proximity" of the test, the procedure followed was appropriate under the circumstances.

B. Chain of Custody

Horton avers the State failed to prove a complete and proper chain of custody in regard to the urine sample.

The State must prove a chain of custody for a urine sample from the time it is obtained until it is tested. See State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001) (case involving a blood sample); Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 565 S.E.2d 293 (2002). A complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is given to the final custodian by whom it is analyzed. Carter, 344 S.C. at 424, 544 S.E.2d at 837; State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992); Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957). Where the substance analyzed has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis. Benton, 232 S.C. at 33-34, 100 S.E.2d at 537.

Proof of chain of custody need not negate all possibility of tampering but must establish a complete chain of evidence as far as practicable. Carter, 344 S.C. at 424, 544 S.E.2d at 837; State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989); Benton, 232 S.C. at 33, 100 S.E.2d at 537. In applying this rule, our Supreme Court has found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the specimen was not established at least as far as practicable. Carter, 344 S.C. at 424, 544 S.E.2d at 837. On the other hand, where the identity of persons handling the specimen is established, the Supreme Court has found that evidence regarding its care goes only to the weight of the specimen as credible evidence. Id. In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility. Id.

In his brief, Horton cites testimony by Officer Burgess and Sergeant Williford in support of his contention that the State failed to adequately prove the chain of custody of the urine sample. Officer Burgess did not recall: (1) whether he received the urine sample from Mobley or Officer Joye; (2) at

what time he delivered the sample to the evidence locker; and (3) whether he stored the sample in his home refrigerator until he transported it to the evidence locker. Horton points to testimony by Sergeant Williford that, when he delivered the urine sample to SLED, the plastic container which held the urine sample was inside a Styrofoam container. Horton claims "[t]here was no testimony as to how the plastic container got into a styrofoam container."

Regardless, the identities of all persons handling Horton's urine sample were firmly established. See Carter, 344 S.C. at 424, 544 S.E.2d at 837. The persons who handled the evidence testified to a sufficient chain of custody. The State proved a continuous chain of custody through the testimony of all people who had control and possession of the evidence.

There is no missing link in the chain of custody. The trial judge did not abuse his discretion in finding a complete chain of custody and allowing the jury to consider the results of the urine test.

C. Rule 403 Analysis

Horton claims the results of the urine test were more prejudicial than probative and should have been excluded by Rule 403, SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). 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.

The toxicologist's report confirming the presence of alcohol, THC, opiate derivatives, and cocaine metabolite in Horton's urine was certainly damaging to his case. However, we find this evidence was more probative

than prejudicial in nature. The test results corroborate Officer Burgess's suspicion that, even though the Datamaster registered a legal alcohol level, Horton was under the influence. Furthermore, Horton was free to challenge the veracity of the test results. In fact, Horton advanced this argument at trial, eliciting testimony from two SLED toxicologists that it was impossible to determine whether Horton was under the influence of these drugs at the time of the accident.

Recently, the Court of Appeals, in Kennedy v. Griffin, ___S.C.___, 593 S.E.2d 512 (Ct. App. 2004), analyzed the admissibility of evidence of marijuana usage in an automobile collision scenario. Kennedy is inapposite to the facts of the case at bar. Here, there is a definite correlation between the ingestion of the drugs and alcohol and the toxicology analysis. In Kennedy, the evidence offered was inconclusive and indefinite in regard to the impact on the individual ingesting the substance. The test results in this case corroborated Officer Burgess's observation of Horton.

The trial judge did not abuse his discretion in allowing the admission of the results of Horton's urine test. The probative nature of this evidence, especially when viewed in conjunction with Officer Burgess's testimony, far outweighs any prejudice. We note the admission of the urine test did not restrict Horton's ability to present an adequate defense, as he was still able to attack the test results.

III. Lack of Remorse/Constitutional Right to Remain Silent

Horton asserts the trial judge erred in allowing the State to present evidence of Horton's lack of remorse. We disagree.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE; State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). "'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." Rule 401, SCRE. Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of the Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

The testimony in question concerns the following remarks by Officer Burgess:

> During my conversations with him, as far as asking phone numbers and things like that, insurance information, that's all I was getting from Mr. Horton, he sat there unemotional.
>
> . . . .
>
> He sat there unemotional, no response whatsoever. His attitude and behavior just didn't add up to [the] reality of what had just happened.

Horton frames the issue as an error in regard to evidence that Horton lacked remorse. However, Horton professes that Officer Burgess' testimony was an improper comment on Horton's right to remain silent. Citing State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002), Horton avers "this line of questioning was a comment on [Horton's] lack of remorse and therefore improper."

Reid edifies:

> It is a violation of due process for a State to permit comment on a defendant's post-arrest silence since the giving of Miranda warnings might induce silence by implicitly assuring a defendant his silence will not be used against him. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). See also State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986); State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986); State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985). References to a defendant's lack of

> remorse are also improper as violative of a defendant's Fifth, Eighth, and Fourteenth Amendment rights. State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), cert. denied, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992) (comments by the prosecution upon an accused's failure to express remorse invite jury to draw an adverse inference merely because the defendant did not appear penitent); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982). Here, the State was permitted to inquire both as to Reid's post-arrest silence and his lack of remorse; this inquiry was therefore clearly improper.

Id. at 78, 476 S.E.2d at 696.

Horton complains that the trial court should have suppressed Officer Burgess' observation and description of Horton at the accident scene. Horton sat in Officer Burgess' patrol vehicle approximately twenty to thirty minutes while the officer made an accident report. The officer noted a smell of alcohol about Horton's person. Horton appeared unemotional. Officer Burgess thought Horton was under the influence of something and arrested him. The State offered the officer's factual observations to support his opinion and conclusion that Horton was under the influence. "[I]t is well settled that a lay witness may testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him and that the weight of such testimony is for determination by the jury." State v. Ramey, 221 S.C. 10, 13-14, 68 S.E.2d 634, 635 (1952).

The testimony was not presented as evidence of Horton's lack of remorse or as a comment on Horton's post-arrest silence. Rather, the testimony was presented for the purpose of illustrating Horton's actions and attitudes after the accident, and how his unemotional response to the events led Officer Burgess to believe he was under the influence. The challenged testimony was clearly relevant and admissible to support the officer's decision to have Horton submit to both a Datamaster and urine test.

Concomitantly, the trial judge did not err in allowing Officer Burgess's testimony about Horton's attitude and behavior after the accident.

Based on our review of the record, we come to the ineluctable conclusion that the testimony of Officer Burgess is **NOT** a comment upon post-arrest silence nor an impermissible comment on the defendant's lack of remorse.

CONCLUSION

Based upon the foregoing, Horton's conviction and sentence for reckless homicide are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: Gene Frye Bail Bonds., Appellant,

In Re: The State, Respondent,

v.

Robert Husted, Defendant.

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

Opinion No. 3788
Submitted April 6, 2004 – Filed May 3, 2004

REVERSED

Robert T. Williams, of Lexington, for Appellant.

No Appearance by Respondent.

STILWELL, J.: In this case, we must decide whether the circuit court can order a bail bond company to return a portion of the money it collected from the defendant's family when the company is relieved as surety on a criminal bond. We hold the court may not issue such an order.[1]

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

BACKGROUND

Robert Husted was arrested in Lexington County and charged with several general sessions court offenses. Gene Frye Bail Bonds (GFB) acted as surety on a $60,100 bond and Husted was released from jail. Following Husted's arrest on additional charges and his failure to make a court appearance, GFB requested to be released as surety.

At a hearing on the motion, GFB asserted Husted's father asked to be relieved of his obligations as the bond's guarantor. The court asked GFB to reappear the next morning with Husted's father to determine the amount already paid on the bond. Following the second hearing, the court released GFB from further obligations on the bond but required it to return $4500 of the $6000 fee it had received from Husted's father.

DISCUSSION

GFB contends the circuit court erred by requiring it to repay a portion of its previously collected fee to Husted's father. We agree.

S.C. Code Ann. § 38-53-50 establishes the procedure to be followed when a surety seeks to be relieved from a bond:

> (A) A surety desiring to be relieved on a bond for "good cause" or the nonpayment of fees shall file with the court a motion to be relieved on the bond. A copy of the motion must be served upon the defendant, his attorney, and the solicitor's office. The court shall then schedule a hearing to determine if the surety should be relieved on the bond and advise all parties of the hearing date.
>
> (B) If the circumstances warrant immediate incarceration of the defendant to prevent imminent violation of any one of the specific terms of the bail bond, or if the defendant has violated any one of the specific terms of the bond, the surety may take the defendant to the appropriate detention facility for holding until

> the court orders that the surety be relieved. The surety must immediately file with the detention facility and the court an affidavit stating the facts to support the surrender of the defendant for good cause or the nonpayment of fees. When the affidavit is filed with the court, the surety must also file a motion to be relieved on the bond pursuant to subsection (A). A surety who surrenders a defendant and files an affidavit which does not show good cause or the nonpayment of fees is subject to penalties imposed for perjury as provided for in Article 1, Chapter 9 of Title 16.

S.C. Code Ann. § 38-53-50 (2002).

This version of section 38-53-50 became effective in 1998. See S.C. Code Ann. § 38-53-50 (2002) (history); see also Act No. 425, 1998 S.C. Acts 3134, 3138. Prior to the 1998 amendments, section 38-53-50(B) further provided the circuit court "may order the surety to refund to the defendant any fees paid toward the bail bond after deducting the surety's actual costs, reasonable expenses, and reasonable fees, as determined by the court." See S.C. Code Ann. § 38-53-50(B) (Supp. 1997). However, when section 38-53-50 was revised in 1998, this provision was deleted and the circuit court was granted no similar authority.

Clearly, section 38-53-50 gives the circuit court discretion in determining whether a surety should be relieved from a bond. See S.C. Code Ann. § 38-53-50(A) (After a surety files a motion to be relieved on a bond, "[t]he court shall then schedule a hearing to determine if the surety should be relieved on the bond.") (emphasis added). However, nothing in the statute vests the court with the discretion to require the surety return any portion of the fee the defendant paid for the bond. Although the circuit court previously had the power to require a return to the defendant of a portion of the fee, that authority did not survive the 1998 amendment to section 38-53-50.

We conclude the governing statute does not authorize the circuit court to require a bonding company to pay any portion of the fee back to the

defendant or his guarantor in order to be released from a bond. Accordingly, the challenged portion of the circuit court's order is

REVERSED.

HUFF, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael E. Upchurch, Respondent,

v.

Susan O. Upchurch, Appellant.

Appeal From Colleton County
Jane D. Fender, Family Court Judge

Opinion No. 3789
Heard April 6, 2004 – Filed May 3, 2004

DISMISSED

David L. DeVane and Gregory Samuel Forman, both of Charleston, for Appellant.

Kenneth A. Campbell, Jr. and Lucius Scott Harvin, both of Walterboro, for Respondent.

ANDERSON, J.: Michael E. Upchurch ("Husband") brought this action against Susan O. Upchurch ("Wife") seeking tuition and child support payments. The family court granted Husband's request for child support, ordering Wife to pay it retroactive to the filing of the summons and complaint. We find this court is without jurisdiction to review this case because the notice of appeal was not timely served.

FACTUAL/PROCEDURAL BACKGROUND

Husband and Wife were married in March 1981. They had three children, Sloane G. Upchurch, born September 19, 1984, Michael O. Upchurch, born October 25, 1985, and Catherine Ellis Upchurch, born May 29, 1989. Husband and Wife subsequently divorced on February 3, 2001.

At the time of their divorce, they had entered into a separation agreement, which was incorporated into the final divorce decree of February 3, 2001. Pursuant to the decree, Husband and Wife were awarded joint custody of the three children, with Husband serving as the primary custodial parent subject to Wife's right to reasonable visitation. With regard to child support, the decree ordered: "Due to the current financial situation of the parties, including the wife's establishment of a new household in Charleston, South Carolina, the husband waives child support. The husband and wife may decide to revisit the issue of child support should the financial situation of either party change drastically."

In September 2001, Husband brought the present action requesting that the family court order Wife to pay private school tuition and child support. At the hearing, Husband testified there had been a dramatic change in his financial circumstances. He claimed that his oldest daughter would be attending college soon, giving rise to substantial tuition and related expenses. Husband also testified that medical expenses for the children had increased due to injuries that were not covered by insurance and orthodontic treatment required for all three children. Wife did not object to this testimony. The only objection she raised concerned testimony regarding Husband's payment of their oldest daughter's college expenses, which would occur after the daughter had reached eighteen.

Wife's circumstances had also changed since the divorce. At the time of the original divorce decree, she had just purchased her own home in Charleston and had incurred substantial expense in establishing a new household there. Wife, however, subsequently sold her new home and moved to Savannah, Georgia. She received $31,000 profit from the sale.

The family court concluded Husband was entitled to receive child support. In its ruling, the court observed that because Wife had sold her home in Charleston and was no longer established in a new household, "[t]he reason for waiving support no longer existed." In determining the amount of child support owed, the court opined that it would apply the Child Support Guidelines, using financial declarations submitted by Husband and Wife. In setting the amount, the court noted Wife was currently unemployed but was receiving income from a severance package with her previous employer. The court found, because Wife held a master's degree, it was appropriate to impute to her a monthly income of $3,600. Based on these facts, the family court awarded Husband child support retroactive to the time he commenced the present action.

STANDARD OF REVIEW

In appeals from the family court, this Court has authority to find facts in accordance with our own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992); Charest v. Charest, 329 S.C. 511, 515, 495 S.E.2d 784, 786 (Ct. App. 1997). This broad scope of review, however, does not require us to disregard the findings of the court below. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). We are mindful that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. McAlister v. Patterson, 278 S.C. 481, 483, 299 S.E.2d 322, 323 (1982); Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981); Kisling v. Allison, 343 S.C. 674, 677, 541 S.E.2d 273, 275 (Ct. App. 2001).

LAW/ANALYSIS

As a threshold matter, Husband argues this court lacks jurisdiction to review this case because Wife's notice of appeal was not timely served. We agree.

Under the South Carolina Appellate Court Rules, a notice of appeal from a domestic relations action "shall be served on all respondents within

thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1) & (3), SCACR. An order becomes effective once the judge delivers it to the clerk of court. See Bayne v. Bass, 302 S.C. 208, 209, 394 S.E.2d 726, 727 (Ct. App. 1990) (holding that until a ruling is reduced to writing, signed by the judge, and delivered for recordation it is not binding on the parties). "The recording of the judgment or order is only to give notice and secure the safety of the record of the solemn acts of the courts." Genobles v. West, 23 S.C. 154, 160 (1885). "Any notice in writing which would convey to a losing party that judgment has been entered [i]s sufficient." Rosen, Rosen & Hagood v. Hiller, 307 S.C. 331, 335, 415 S.E.2d 117, 119 (Ct. App. 1992). "A person who knows of a thing has notice thereof. Stated differently, '[n]o one needs notice of what he already knows.'" Hannah v. United Refrigerated Servs., 312 S.C. 42, 47, 430 S.E.2d 539, 541 (Ct. App. 1993). Actual notice is synonymous with knowledge. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 63 n. 6, 504 S.E.2d 117, 122 n. 6 (1998). "Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him." Id.

In the present case, the presiding family court judge signed the order under appeal on May 30, 2002. The following day on May 31, 2002, the judge's administrative assistant mailed the original signed order to the Colleton County Clerk of Court. The cover letter enclosed with the order asked the clerk to file the order and forward copies to the parties' attorneys of record. The judge's administrative assistant also carbon copied both attorneys of record and included a copy of the family court's signed order. By letter dated August 23, 2002, Wife's attorney acknowledged receiving the copy of the signed order from the judge's administrative assistant, but noted that he did not consider the signed and dated, but as yet unfiled, copy of the order sufficient notice of its entry.

We find the letter and accompanying copy of the signed order from the family court judge's administrative assistant was sufficient "written notice of entry of the order or judgment" to begin tolling the thirty-day time limit for appeal under Rule 203(b)(1), SCACR. Though our courts have not addressed the question of when notice of written entry of judgment has occurred under

Rule 203(b)(1), this Court has addressed the application of a similar notice requirement in Rosen, Rosen & Hagood v. Hiller.

In Rosen, Rosen & Hagood, the plaintiff law firm sued one of its former clients for unpaid attorney fees. Prior to trial, the defendant moved for change of venue. After the defendant failed to appear at the call of the motions calendar, the chief administrative judge issued an order holding the change of venue motion had been abandoned, stricken, and denied. Id. at 332, 415 S.E.2d at 117. The law firm mailed a letter to defendant's counsel enclosing an unsigned, undated, and unfiled copy of the order. Id. at 332-33, 415 S.E.2d at 117. The defendant's attorney responded by letter in which he acknowledged receipt of the order, but noted that he did not consider the unsigned order sufficient notice of its entry. Id. at 333, 415 S.E.2d at 117. This court disagreed, finding the letter and unsigned, undated order provided sufficient notice that the order had been signed and entered. Id. at 335, 415 S.E.2d at 119.

In the present case, the notice provided to Wife's attorney was more substantial than that which was deemed minimally sufficient in Rosen, Rosen & Hagood. Here, unlike the situation in Rosen, Rosen & Hagood, Wife's attorney received a copy of the signed and dated order that was entered by the family court judge. Furthermore, the letter and order were received directly from the judge's chambers, not from opposing counsel or other party. We discern no reason why the rationale this court followed in Rosen, Rosen & Hagood does not compel a similar result in the instant case.

We find the notice of appeal in this case was not timely served. The present appeal is therefore

DISMISSED.

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