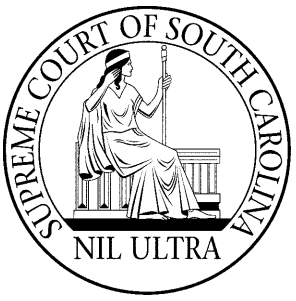

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
May 4, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Susan Tappeiner, Petitioner,

v.

State of South Carolina, Respondent,

Appellate Case No. 2013-001885

ON WRIT OF CERTIORARI

Appeal from Beaufort County
The Honorable Perry M. Buckner, III, Circuit Court Judge

Opinion No. 27632
Submitted March 15, 2016 – Filed May 4, 2016

REVERSED

Tara Dawn Shurling, of Law Office of Tara Dawn Shurling, PA, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, and Assistant Attorney General J. Rutledge Johnson, both of Columbia, for Respondent.

JUSTICE HEARN: A Beaufort County jury convicted Susan Tappeiner of criminal sexual conduct (CSC) with a minor, second degree.

Tappeiner withdrew her direct appeal and filed an application for post-conviction relief (PCR), asserting, *inter alia*, that her trial counsel was deficient in failing to object to the State's improper remarks during closing arguments. The PCR court denied her relief, finding that although trial counsel was deficient in failing to object, Tappeiner was not prejudiced by the deficient performance. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In February 2009, Victim informed his school resource officer that he was sexually assaulted by Tappeiner, his forty-two year old neighbor. Victim stated the assault happened in August 2008, approximately seven weeks before his fourteenth birthday.

According to Victim, on that August night, he went to Tappeiner's house with his sister and a neighbor to watch movies with Tappeiner, her husband, and their two daughters while his parents were out of town. Tappeiner and her husband were drinking alcohol during the movies, although neither was noticeably intoxicated. By the end of the last movie, all of the children except Victim had fallen asleep in front of the television, and Tappeiner's husband had gone upstairs to bed. Tappeiner briefly left the room where the children lay sleeping, then reentered and began fondling Victim's penis. When he resisted, Tappeiner pulled Victim upstairs into her daughter's bedroom, where she forced him to perform oral sex on her, as well as engage in vaginal intercourse. Although Victim stated he screamed for help, apparently no one heard him or woke up. Eventually, Victim was able to escape and return home.[1]

Tappeiner was arrested and indicted for CSC with a minor, second degree. From the outset of the trial, both parties acknowledged there was no physical

[1] During the police investigation into Victim's allegations, Tappeiner voluntarily went to the police station and made a statement in which she confessed she had sexual intercourse with Victim. However, after the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing the trial court granted Tappeiner's motion to suppress, finding the statement involuntarily-made based primarily on expert testimony that Tappeiner was heavily abusing alcohol and Klonopin, an antianxiety drug, at the time she made the statement. According to the testimony, Klonopin is a powerful tranquilizer that may cause side effects such as dizziness, nausea, blurred vision, poor judgment, lack of balance and coordination, sleep disturbances, amnesia, forgetfulness, fainting, or seizures.

evidence of the alleged crime, and therefore the case was entirely dependent on a credibility determination between Victim and Tappeiner. The State presented testimony from Victim, the school resource officer, two police officers, and a counselor at a local rape crisis center, who was qualified as an expert witness in forensic interviewing. Notably, although the rape crisis counselor interviewed Victim after he reported the assault, she did not testify as to that interview, instead merely addressing the solicitor's hypothetical questions as to why child victims of sex crimes may delay reporting the abuse. In an effort to corroborate Victim's story as to the details of the assault, the State introduced the dress and panties that Tappeiner allegedly wore during the attack because both articles of clothing were very distinctive. However, both items were clean and did not contain any DNA evidence.

In Tappeiner's defense, trial counsel called one witness—Tappeiner's husband. He testified that on the night in question, he accompanied his wife to bed at the end of the last movie, he slept with her all night, and she did not leave the bed for any reason. He stated his wife was "a little loopy" from the combination of her antianxiety medication and alcohol, and likely was not able to remember anything that occurred that night. However, he recalled that his wife was not wearing the clothing Victim described. Further, Tappeiner's husband asserted he was a light sleeper, and their house is small, such that he definitely would have heard Victim if he had yelled out, as alleged, that night. Moreover, Tappeiner's husband testified one of their dogs was "very protective and would have barked" at any loud noises, such as if Victim had shouted. Tappeiner's husband further stated that when he awoke the following morning, Victim was still sleeping in the living room with the other children, and when Victim awoke, he acted completely "normal," entering the kitchen to have breakfast with him. Finally, Tappeiner's husband testified that prior to Victim reporting the assault, several neighbors informed the couple that Victim and his sisters were using the Tappeiners' hideaway key to enter their home without their permission, which could explain how Victim was able to describe the articles of clothing in question.[2]

[2] According to Tappeiner's husband, at some point after the night of the alleged assault, Tappeiner hired Victim's sisters to babysit for her daughters after school and provided them with the location of her hideaway key. However, Tappeiner later fired the sisters after learning of the sisters' and Victim's entry into her house at times when the sisters were not babysitting.

During closing arguments, trial counsel asserted "[t]here's no scientific evidence here. There's no semen. There's no DNA." Citing repeatedly to Tappeiner's husband's testimony, trial counsel discussed the discrepancies between the version of events offered by Victim and the husband, such as Tappeiner not wearing the described clothing on the night in question, and that she slept with her husband all night after the last movie ended. Moreover, trial counsel pointed out that Victim's story was unlikely, as the house was small and someone would have heard him screaming; he remained in the house after the alleged assault and had breakfast with Tappeiner's husband the next morning like normal; and, given the disparity in sizes between Victim and Tappeiner, Tappeiner would have been unable to physically drag him upstairs if he was resisting. Trial counsel then criticized the rape crisis counselor's testimony, stating "she gave no information that was really specifically related to [V]ictim." Finally, trial counsel also reminded the jury that Victim had unauthorized access to the Tappeiner house via the hideaway key.

By contrast, the solicitor reiterated that this case centered on credibility. After stating to the jurors that "Victim looked [them] in the eye" to aid them in their credibility determination, the solicitor summarized the relevant testimony. First, the solicitor reminded the jury of the colloquy in which the solicitor explicitly asked the school resource officer if he believed Victim's story, to which the officer "said, yeah. Yes."[3] The solicitor then asserted the rape crisis counselor likewise interviewed Victim "face to face, eye to eye," and she believed his version of events as well. Specifically, the solicitor stated, "I think the expert told you that she has done over 200 forensic interviews. Folks, these are people who can detect when someone is making something up or if there is nothing there." The solicitor then reminded the jury that the police interviewed Tappeiner "face to face, eye to eye," and that she was charged the same day with CSC with a minor, second degree.

[3] Trial counsel objected to this line of questioning during trial, arguing that the testimony improperly bolstered Victim's testimony. However, he did not renew this objection when the solicitor reiterated this testimony during closing arguments. We note the trial court improperly admitted the initial testimony. *See State v. Kromah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013) (stating that in child sex abuse cases, "it is improper for a witness to testify as to his or her opinion about the credibility of a child victim").

In concluding, the solicitor repeatedly argued that Victim made consistent statements throughout his "eye to eye, [] face to face discussions" with the various witnesses, and that the jury should "think about the eye to eye, face to face interviews that victim has had with law enforcement and the expert[]." As her final statement to the jury, the solicitor asserted that in making their decision, the jurors should consider "would you let [Tappeiner] babysit your kids? Your grand kids [sic]? Nieces and nephews? I think the answer to that is why you should find her guilty."

Ultimately, the jury found Tappeiner guilty of CSC with a minor, second degree, and the trial court sentenced Tappeiner to ten years' imprisonment, suspended on the service of five years' imprisonment and three years' probation.[4] The trial court also informed Tappeiner she would be placed on the sex offender registry for life.

Tappeiner elected to abandon her direct appeal due to preservation problems and proceeded to post-conviction relief. PCR counsel then filed an application for PCR, asserting twenty-seven grounds for relief.

The PCR court denied relief on all counts. However, in its order, the court only made specific findings on four of the twenty-seven grounds, including, *inter alia*, that trial counsel was deficient in failing to object to the State's allegedly improper remarks during closing argument. However, the PCR court found that trial counsel's deficiencies did not prejudice Tappeiner.

The State and Tappeiner filed cross-motions to alter or amend pursuant to Rule 59(e), SCRCP. The State requested the PCR court reconsider its findings that trial counsel was deficient. Tappeiner argued, *inter alia*, that the PCR court failed to make factual findings or conclusions of law on twenty-three of her twenty-seven allegations of ineffectiveness as required by law, and requested that the PCR court make such findings. *See* S.C. Code Ann. § 17-27-80 (2014) (stating the PCR court must make specific findings of fact and rulings of law).

In response, the PCR court issued an amended order that was identical in all respects to the initial order, except at the end, it listed the allegations by number and inserted an identical paragraph under each allegation, stating:

[4] Thus, at the time of this appeal, Tappeiner is no longer in prison.

> [Tappeiner] fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance. Further, even if this [c]ourt were to find a deficiency in [trial counsel's] representation, any such deficiency did not prejudice the defense in that this [c]ourt does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

Tappeiner made a second motion to alter or amend, asserting the PCR court's order still did not comply with the requirements set forth in section 17-27-80. However, the PCR court denied the motion.

We granted Tappeiner's petition for a writ of certiorari to review the PCR court's decision.

ISSUE PRESENTED

Did the PCR court err in failing to find that trial counsel's failure to object during the State's closing argument constituted prejudicial error?

STANDARD OF REVIEW

In PCR actions, an appellate court will uphold the lower court's findings if there is any evidence of probative value that supports the findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, the Court will reverse the PCR court's decision if it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). "The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

Generally, in supporting any allegations of ineffective assistance of counsel, a PCR applicant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the applicant must demonstrate that trial counsel's performance was deficient. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625. "Under this prong, 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Id.* (quoting *Strickland*, 466 U.S. at 688) (internal alteration marks omitted); *see also Franklin v. Catoe*, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001) (stating that the applicant must

demonstrate that trial counsel's performance fell below an objective standard of reasonableness).

Second, the applicant must demonstrate that trial counsel's "deficient performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).[5]

Courts must strongly presume that trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689.

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[5] Upon reaching a decision, the PCR court is required to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented" in a PCR application, including whether the applicant satisfied his burden as to each prong of the *Strickland* test described above. S.C. Code Ann. § 17-27-80; *see also Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007) (per curiam); *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). Here, the PCR court failed to comply with these requirements, dealing with twenty-three of the twenty-seven grounds for relief in a summary fashion and making no factual findings on those issues whatsoever.

Ordinarily, when the PCR court makes inadequate factual findings, we remand the matter to the PCR court for a new hearing. *See Pearson v. Harrison*, 9 Fed. App'x 85, 87 (4th Cir. 2001) (per curiam) ("[T]he South Carolina Supreme Court has consistently vacated and remanded PCR court judgments that do not contain findings on issues presented to the PCR court . . . ." (collecting South Carolina Supreme Court cases) (citations omitted)). Here, however, we find the PCR court should have granted Tappeiner relief on one of the very few issues it did make specific findings on—trial counsel's failure to object during the State's closing argument. Thus, we find that a remand in this case is unnecessary.

LAW/ANALYSIS

Tappeiner argues trial counsel was ineffective for failing to object to the numerous instances in the State's closing argument in which the solicitor vouched for Victim's credibility by implying the police and rape crisis counselor believed Victim, and not Tappeiner. Tappeiner further contends trial counsel was ineffective for failing to object when the solicitor appealed to the jurors' emotions by asking them if they would want Tappeiner babysitting their own children and relatives. The PCR court found trial counsel's failure to object on both issues was deficient, but found these errors were not prejudicial to Tappeiner, stating only that it did "not believe from the evidence presented there exist[ed] a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." We agree counsel's performance was deficient, but find, contrary to the PCR court's conclusion, that these deficiencies prejudiced Tappeiner.

Generally, "[t]he assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)) (stating that a solicitor improperly vouches for a witness's credibility "by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony"); *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In keeping their closing arguments within the record, solicitors additionally must tailor their remarks "so as not to appeal to the personal biases of the jury" or "arouse the jurors' passions or prejudices." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Accordingly, solicitors should avoid comments that ask jurors to place themselves in the victim's—or another party's—shoes, because those types of comments tend to "'completely destroy all sense of impartiality of the jurors.'" *Brown v. State*, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914 (2009) (quoting *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)).

In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine "whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Vaughn*, 362 S.C. at 169–70, 607 S.E.2d at 75 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)); *Von Dohlen*, 360 S.C. at 609, 602 S.E.2d at 744; *cf. Dawkins v. State*, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (stating that testimony that improperly corroborates a child sex victim's testimony has a devastating impact because of the cumulative effect of repeating the victim's testimony, and thereby improperly bolstering the victim's credibility). As a result of this inquiry, courts may occasionally apply the "invited reply" doctrine, and find that although a solicitor's closing argument was inappropriate, it was responsive to statements or arguments made by the defense, and thus did not deny the defendant due process. *Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75.

Here, we find trial counsel's closing argument did not invite the solicitor to repeatedly assert that the State's witnesses all believed Victim's version of events after their "face to face, eye to eye" interviews with him. Rather, trial counsel's presentation pointed out inconsistencies in the stories, which could do no more than invite the solicitor to point out the contradictory aspects of Victim's story and the other witnesses' testimony.

Moreover, some of the solicitor's statements regarding Victim's credibility were not only damaging to Tappeiner, but misrepresented the evidence adduced at trial, such as the solicitor's statement that the rape crisis counselor personally interviewed Victim, and that she is someone "who can detect when someone is making something up or if there is nothing there." The rape crisis counselor *never testified in front of the jury that she interviewed Victim herself*.[6] Rather, she only answered the solicitor's hypothetical questions about why a child victim might delay reporting. Thus, the solicitor's statements were clearly improper and objectionable. *See Matthews*, 350 S.C. at 276, 565 S.E.2d at 768 ("Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction."). Accordingly, we find there is evidence in the record

[6] At best, during cross-examination, trial counsel had her read from her "report" that Victim testified that he yelled during the attack, but that no one heard him. However, it was never explained to the jury what this report was, or whether she had created it by actually talking to Victim herself.

to support the PCR court's finding that trial counsel was deficient in failing to object to the solicitor's repeated vouching for Victim's credibility.

Further, the solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record. *Cf. Brown*, 383 S.C. at 512, 517, 680 S.E.2d at 912, 915 (finding the solicitor improperly appealed to the jurors' emotions during closing argument when telling them to "speak up" for the child victim and "make sure that the perpetrator is punished"). Thus, we further find there is evidence in the record to support the PCR court's finding that trial counsel was deficient in failing to object to the solicitor's emotional appeal at the conclusion of its closing arguments.

The PCR court found neither of these deficiencies prejudiced Tappeiner, although it did not specify its reasoning, merely stating that the other evidence in the record supported Tappeiner's conviction. Indeed, in determining prejudice, we frequently consider whether there is other direct or circumstantial evidence supporting the conviction, notwithstanding trial counsel's deficient performance. *See Brown*, 383 S.C. at 518, 680 S.E.2d at 916 (finding that the solicitor's improper appeal to the jury's emotions was not prejudicial in light of the fact that there were four unrelated, adult witnesses to the defendant's rape of the child victim, as well as other direct evidence that a rape occurred); *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166 (stating that appellate courts must consider the impropriety of the solicitor's argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt).

Here, as the parties freely admitted during trial, the case was entirely dependent on a credibility determination between the prosecution's witnesses and the defense's witness. Given the dearth of evidence beyond Victim's assertions, we cannot say evidence of Tappeiner's guilt was overwhelming. Therefore, we find that but-for the improper vouching for Victim's credibility, there is a reasonable likelihood the outcome of the trial would have been different, and Tappeiner was thus prejudiced by trial counsel's failure to object. *Cf. State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94–95 (2011) ("There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless."); *Dawkins*, 346 S.C. at 157 n.7, 551 S.E.2d at 263 n.7 ("This strategy [of improperly corroborating Victim's

version of events] was inappropriate especially given the fact there was no overwhelming evidence that petitioner sexually abused Chambless.").[7]

Similarly, given the lack of physical evidence, the solicitor's emotional plea that Tappeiner was a bad actor and could not be trusted to watch the jurors' own family members is reasonably likely to have had a substantially stronger impact than would be the case in a trial where there was additional, independent evidence of the defendant's guilt. *See, e.g.*, *Brown*, 383 S.C. at 518, 680 S.E.2d at 916 (finding the improper appeal to the jurors' emotions was not prejudicial when other, overwhelming evidence supported the child victim's assertion that she was raped by the defendant).[8] As a result, we find it likely the emotional plea, particularly in conjunction with the solicitor's improper vouching for Victim's credibility, swayed the jurors' view of the facts and resolution of the contradictions in the witnesses' testimonies.

Accordingly, we find there is no evidence in the record to support the PCR court's conclusion that Tappeiner was not prejudiced by trial counsel's failures to object during the State's closing arguments. To the contrary, the solicitor's repeated vouching for Victim's credibility and her emotional plea to the jurors was incredibly prejudicial to Tappeiner because there was no other evidence beyond Victim's testimony of the events that allegedly occurred that August evening. We

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[7] *See also, e.g.*, *Vaughn*, 362 S.C. at 170, 607 S.E.2d at 75 ("Here, *if not for the lack of evidence*, we might agree that the solicitor was merely responding to the petitioner's argument." (emphasis added)); *Matthews*, 350 S.C. at 276–77, 565 S.E.2d at 768 ("The solicitor's summation led the jury to believe the government corroborated the witness'[s] testimony before trial and found it credible. *The solicitor did not support this vouching with anything within the record, such as corroboration by other witnesses or physical evidence.* The solicitor improperly vouched for the witness." (emphasis added)); *cf. State v. Chavis*, 412 S.C. 101, 110–11, 771 S.E.2d 336, 341 (2015) (finding a witness's bolstering of the child victim's testimony harmless because there were witnesses to and physical evidence of the rape, and therefore the case did not turn solely on the child victim's credibility (citations omitted)).

[8] Moreover, the emotional plea was the very last thing the jury heard before beginning its deliberations, and connected the jurors personally to the alleged abuse in the case. Thus, the comment was likely at the forefront of the jurors' minds when beginning their discussions.

therefore reverse the PCR court's finding that trial counsel's failure to object during closing arguments was not prejudicial, and grant Tappeiner a new trial due to ineffective assistance of counsel.[9]

CONCLUSION

Based on the foregoing, we reverse the PCR court and grant Tappeiner a new trial.

REVERSED.

PLEICONES, C.J., BEATTY, KITTREDGE and FEW, JJ., concur.

[9] Tappeiner raises two other issues on appeal, including whether the PCR court erred in failing to find prejudice in trial counsel's failure to object to the State's references to Tappeiner's suppressed confession, and whether the PCR court erred in failing to find trial counsel ineffective for failing to adequately prepare and present a defense on Tappeiner's behalf. However, because the closing argument issues are dispositive, we decline to address the remaining issues on appeal. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Melvin Presley Stukes, Petitioner.

Appellate Case No. 2015-000908

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 27633
Heard January 13, 2016 – Filed May 4, 2016

REVERSED AND REMANDED

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

Attorney General Alan M. Wilson, Assistant Attorney General Susannah R. Cole, Assistant Attorney General Mary W. Leddon, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

JUSTICE HEARN: Melvin P. Stukes appeals his conviction for criminal sexual conduct (CSC) and first degree burglary, arguing the court of appeals erred in affirming the trial court's jury instruction that Victim's testimony need not be corroborated by additional evidence or testimony pursuant to Section 16-3-657 of the South Carolina Code (2003).[1] We reverse and hold instructing the jury on this statute is an impermissible charge on the facts and therefore unconstitutional. We further overrule our precedent condoning this instruction.

FACTUAL/PROCEDURAL BACKGROUND

On the evening of May 10, 2004, Victim arrived at her friend Jaqueline Bruton's home and informed her she had been sexually assaulted that evening. Bruton encouraged Victim to seek medical care and brought Victim to the Lexington Medical Center for an exam. At the hospital, Victim underwent a sexual assault examination, which included an interview, the collection of her clothing, and a vaginal swab. Although there was no sign of pelvic or vaginal injury, Victim did display some redness on her face around her cheek and eye, as well as around her neck.

By January 2005, a DNA profile was developed based on a sample obtained from Victim's underwear, but no match was found. Then, in June 2007, the DNA profile was finally matched to an individual—Stukes. The police attempted to locate Victim, but did not discover her whereabouts until early 2010, when a cold case team began investigating the matter. Finally, in May 2010, police arrested Stukes. He denied knowing Victim after being shown a picture of her and stated he had only had sex with two white women, and she was not one of them. However, when confronted with the evidence of her DNA, he admitted he must have had sex with her. He was ultimately charged with CSC and burglary; the case proceeded to trial before a jury.

At trial, Victim testified that on the evening of the incident she was getting ready for work around 9:30 p.m. when she heard a knock at the door. Upon opening the door, a man grabbed her throat and punched her in the face, causing her to stumble and fall over the side of her couch. She believed she blacked out after falling, and the next thing she remembered was her face being shoved into the

[1] Section 16-3-657 provides, "[t]he testimony of the victim need not be corroborated in prosecutions [for criminal sexual conduct]."

pillows on her couch and a pain in her vaginal area as she was being raped. After blacking out again, Victim testified that once she regained consciousness, the man was gone and her clothes were down around her ankles. Victim stated she tried to call Bruton, but when she did not answer, she drove to Bruton's home. Victim could not identify the attacker, but denied ever having consensual sex with Stukes.[2]

Stukes testified in his own defense. He stated he met Victim at a friend's apartment in the complex where she lived. After flirting awhile, Stukes alleged Victim invited him back to her apartment, where they ultimately ended up having sex.

During the jury charge conference, Stukes objected to the instruction on section 16-3-657, arguing it violated his right to equal protection and amounted to an impermissible comment on the facts. The trial court denied the request and included this statement in its charge: "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence," in addition to the general charge on credibility determinations.

During the course of deliberations, the jury submitted a number of questions to the trial court, including: "the South Carolina law that the victim's testimony in CSC . . . does not need to be corroborated, . . . does that law imply that the victim's testimony must be accepted as being true?" In response, the court simply recharged the general law on credibility determinations. The jury almost immediately returned with a verdict, finding Stukes guilty of burglary and CSC. He was sentenced to twenty-five years.

On appeal, the court of appeals affirmed in an unpublished opinion. *State v. Stukes*, Op. No. 2015-UP-014 (S.C. Ct. App. filed January 14, 2015). This Court granted certiorari.

ISSUE PRESENTED

Did the court of appeals err in affirming the trial court's charge that a victim's testimony need not be corroborated by additional evidence?

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[2] When Victim was shown a photo lineup, she indicated that Stukes "looked familiar" but she could not say she knew him.

LAW/ANALYSIS

Stukes argues the trial court erred in charging section 16-3-657 on the basis that a victim's testimony need not be corroborated with additional evidence. We agree this constitutes an impermissible charge on the facts and overrule the precedent to contrary.

Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict. *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous. *Id.* When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial. *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013).

In *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), this Court affirmed the trial court's charge of section 16-3-657. In so holding, the Court considered not only the entirety of the jury charge, but also the legislative intent behind enactment of the statute. *Id.* at 117–18, 631 S.E.2d at 250. The Court initially opined that section 16-3-657 "prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated." *Id.* at 117, 631 S.E.2d at 250. However, the Court went further and held that in enacting section 16-3-657:

> the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in [CSC] cases to make abundantly clear—not only to the judge but also to the jury—that a defendant may be convicted solely on the basis of a victim's testimony.

Id. Accordingly, the Court held that while a trial court is not required to charge section 16-3-657, if it does, the charge is not reversible error provided this instruction is "not unduly emphasized and the charge as a whole comports with the law." *Id.* at 117–18, 631 S.E.2d at 250.

Then-Justice Pleicones dissented and would have found the charge reversible error. Under his view of the legislative intent, the statute is not the proper subject of a charge, but merely serves to guide trial and appellate courts in analyzing the sufficiency of evidence. *Id.* at 119, 631 S.E.2d at 251 (Pleicones, J., dissenting). Additionally, he noted this charge "has the potential for creating more problems than solutions, for it might cause confusion when read with the general charge on witness credibility." *Id.* at 120, 631 S.E.2d at 251 (internal citations omitted). Furthermore, he noted that placing this emphasis on the *victim's* testimony appeared to be a comment on the facts by the court. *Id.* at 120, 631 S.E.2d at 252.

We are persuaded by the dissent in *Rayfield* and conclude this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts. By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak.[3] Moreover, it is inescapable that this charge confused the jury. Specifying this

[3] Our holding is in accord with a number of other jurisdictions which have likewise determined this charge is improper. *See Gutierrez v. State*, 177 So. 3d 226, 231–32 (Fla. 2015) ("It cannot be gainsaid that any statement by the judge that suggests one witness's testimony need not be subjected to the same tests for weight or credibility as the testimony of others has the unfortunate effect of bolstering that witness's testimony by according it special status. The instruction in this case did just that, and in the process effectively placed the judge's thumb on the scale to lend an extra element of weight to the victim's testimony."); *Ludy v. State*, 784 N.E.2d 459, 462 (Ind. 2003) (finding charge overemphasized testimony of victim and was both confusing and misleading); *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000) *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008) (finding jury charge amounted to a comment on the weight of the evidence and was therefore improper). *But see Gaxiola v. State*, 119 P.3d 1225, 1232 (Nev. 2005) (upholding "no corroboration' instruction," and finding it "does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law").

qualification applies to one witness creates the inference the same is not true for the others. This confusion is illustrated by the jury's query as to whether our law implies a victim's testimony *must* be accepted as being true. In our view the trial court's decision to merely recharge credibility, as opposed to answer the question in the negative, did nothing to inform the jury on this issue.

Furthermore, we do not believe this case is amenable to a harmless error analysis. Our review of the record indicates this case hinged on credibility. Victim said it was rape; he said it was consensual. The jury was clearly confused as to whether it was required to accept Victim's testimony as truth. We therefore cannot say the error in this case was harmless beyond a reasonable doubt.[4]

CONCLUSION

Based on the foregoing, we overrule our precedent to the extent it condones the use of section 16-3-657 as a jury charge.[5] Additionally, we find the error here was not harmless and reverse and remand for a new trial.

PLEICONES, C.J., and BEATTY, J., concur. KITTREDGE, J., dissenting in a separate opinion in which Acting Justice James E. Moore, concurs.

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[4] While we appreciate the existence of conflicting facts as illuminated in the dissent, we would hesitate to call the evidence against Stukes overwhelming. The testimony highlighted by the dissent boils down to those witnesses' perception (i.e., credibility assessments) of Victim. Therefore, we disagree that the error in charging section 16-3-657 can be saved by analyzing the charge as a whole.

[5] This includes, but may not be limited to, *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006); *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011); and *State v. Orozco*, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011). Therefore, our ruling is effective in this case and those which are pending on direct review or are not yet final, but not in post-conviction relief.

JUSTICE KITTREDGE: I respectfully dissent. I would affirm the court of appeals in result.

I agree with the majority that we should no longer approve the no-corroboration charge, but I would find any error in the trial court's decision to give the charge in this case harmless. Contrary to the majority's portrayal, the evidence presented in this case was much more than "he said, she said." Multiple witnesses testified to the assault's physical and emotional impact on the victim. Jacqueline Bruton, the victim's friend, saw the victim shortly after the victim's encounter with Stukes. Bruton testified there was a handprint on the victim's face or neck after the attack, matching the victim's version of the attack. Bruton observed that the victim appeared "afraid." Investigator Brian Metz of the Richland County Sheriff's Department (the RCSD), who spoke with the victim at the hospital, described the victim's demeanor as "withdrawn." Donna Sharpe, the ER nurse who examined the victim with a rape kit, described the victim as "nervous and tearful." Sharpe testified the victim "would withdraw from any kind of touch" and was "anxious and gripping the bed and tearful" when she underwent a pelvic examination. Sharpe's notes also described a bruise and redness on the victim's face and what appeared to be a hand mark on the victim's neck. Finally, Sergeant Brian Godfrey of the RCSD testified that the victim was "visibly upset and crying" when he spoke with her about the incident in March 2010, nearly six years after it occurred. These witnesses' testimony is consistent with the victim's, in which she described a brutal assault that included being grabbed by the throat and punched in the face.

In addition to the evidence corroborating the victim's testimony, the jury was presented with Stukes's inconsistent statements. Stukes initially denied knowing the victim, much less having had sex with her. When pressed with the evidence, including the DNA match, Stukes remembered the victim and that they had consensual sex. Therefore, abundant evidence in addition to the victim's testimony was presented to the jury.

Also conspicuously absent from the majority opinion is the trial court's full jury charge on credibility. "[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (citing *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)).

In this case, the trial court charged the jury, in relevant part, as follows:

> The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence. Necessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.
>
> In determining the believability of witnesses who have testified in this case, *you may believe one witness over several witnesses or several witnesses over one witness*. You may believe a part of . . . the testimony of the witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety, or you may reject the testimony of a witness in its entirety.
>
> You may consider whether any witness has exhibited to you an interest, bias, prejudice, or other motives in this case. You may also consider the appearance and manner of a witness while on the witness stand.

(emphasis added). When the jury asked for clarification, the trial court instructed the jury that "you must determine the credibility of *all* witnesses who have testified in this case. . . . [Y]ou may believe one witness over several witnesses, or several witnesses over one witness." (emphasis added).

The trial court noted that its second charge made it clear the jury was to consider the credibility of every witness who testified, which necessarily included the victim. Therefore, when viewed in their entirety, the charges properly instructed the jury that it was to subject the victim's testimony to the same scrutiny as that of other witnesses. Thus, any error in giving the no-corroboration charge was cured by the full witness-credibility instructions.

In short, given the substantial corroborating evidence and the trial court's extensive credibility instructions, any error was harmless. The result reached by the court of appeals, and therefore Stukes's convictions and sentences, should be affirmed.

Acting Justice James E. Moore, concurs.

The Supreme Court of South Carolina

Re: Rule Amendments

Appellate Case Nos. 2015-001468; 2015-002219;
2014-002497; 2015-002643

ORDER

On January 28, 2016, the following orders were submitted to the General Assembly pursuant to Article V, § 4A of the South Carolina Constitution:

(1) An order amending Rule 267(d) of the South Carolina Appellate Court Rules and Rule 10(d) of the South Carolina Rules of Civil Procedure.

(2) An order amending Rule 11 of the South Carolina Rules of Civil Procedure.

(3) An order amending Rule 23 of the South Carolina Rules of Civil Procedure.

(4) An order amending Rules 1, 4, 20, 23, and 24 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
April 27, 2016

The Supreme Court of South Carolina

Re: Proposed Amendments to the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure

Appellate Case No. 2015-001468

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 267(d), South Carolina Appellate Court Rules, and Rule 10(d), South Carolina Rules of Civil Procedure, are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 28, 2016

Rule 267(d), South Carolina Appellate Court Rules, is amended to provide:

> **(d) Margins and Bindings.** Typewritten papers or reproductions must have a blank margin of one inch on all sides. If more than two sheets are used, they shall be securely fastened on the left margin. While petitions or motions need not be bound, Records on Appeal, Appendices in post-conviction relief matters and briefs must be bound in volumes not exceeding 250 sheets each. If staples or clasps are used to bind the volumes, the spines of the volumes shall be bound with heavy tape. One copy of every Final Brief, Record on Appeal, Supplemental Record, or Appendix filed with the appellate court shall be filed unbound.

Rule 10(d), South Carolina Rules of Civil Procedure, is amended to provide:

> **(d) Manner of Preparing Papers.** With the exception of court-approved forms, pleadings and other papers shall be on eight and one-half by eleven inches in size paper. They shall be plainly written with adequate spacing between lines or typewritten with not less than one and one-half spacing between lines, except for indented quotations or footnotes. Papers must have a blank margin of a minimum of one inch on all sides. Type for captions, text, and footnotes shall be a minimum size of twelve-point type. Each page shall be numbered consecutively and pages shall be fastened at the top so as to read continuously. Page numbers and document identification footers may appear in margins and sized smaller than twelve-point type. Plats, photographs, diagrams, documents, and other paper exhibits or copies thereof may be submitted in their actual size; they should be reduced if practicable to eight and one-half by eleven inches if such reduction does not impair legibility and clarity.

The Supreme Court of South Carolina

Re: Amendments to South Carolina Rules of Civil Procedure

Appellate Case No. 2015-002219

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 11 of the South Carolina Rules of Civil Procedure is hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 28, 2016

The first paragraph of Rule 11(a), South Carolina Rules of Civil Procedure, is amended to provide as follows:

RULE 11
SIGNING OF PLEADINGS; ATTORNEYS

(a) Signature. Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. An attorney or party may only utilize an electronic signature in pleadings, motions or other papers that are E-Filed in the SCE-File electronic filing system.

Note to 2016 Amendment:

This amendment clarifies that the electronic signature of an attorney or party may only be used in E-Filed pleadings, motions or other papers.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Rules of Civil Procedure

Appellate Case No. 2014-002497

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Rules of Civil Procedure are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 28, 2016

Rule 23, South Carolina Rules of Civil Procedure, is amended by adding Paragraph (e), which provides:

(e) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment, or approved compromise in a class action under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent of residuals must be distributed to the South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina. The court may disburse the balance of any residual funds beyond the minimum percentage to the South Carolina Bar Foundation to any other entity or entities for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive and procedural interests of members of the class.

Note to 2016 Amendment:

This amendment directs that a portion of any residual funds in a class action matter be distributed to the South Carolina Bar Foundation to promote access to the civil justice system for low income residents of South Carolina. However, the rule does not require that parties create residual funds as part of any class action settlement.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2015-002643

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 1, 4, 20, 23, and 24 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 28, 2016

Rule 1(a)(1) of the South Carolina Court-Annexed Alternative Dispute Resolution Rules (ADR Rules) is amended to provide:

Rule 1
Scope of Rules

These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply. These rules govern Alternative Dispute Resolution (ADR) processes in the courts of this State as follows:

(a) With the exceptions stated in Rule 3, these rules govern court-annexed ADR processes in South Carolina Circuit Courts in civil suits, and in South Carolina Family Courts in domestic relations actions:

(1) in all counties in South Carolina;[1]

(2) as required by statute; or

(3) as ordered by a court of competent jurisdiction.

. . .

[1] See Supreme Court Order dated November 12, 2015.

Rule 4(a) and (b), ADR Rules, is amended to provide:

Rule 4
Selection or Appointment of Neutral

(a) Eligibility. A neutral may be a person who:

(1) is a certified neutral under Rule 19; or

(2) is not a certified neutral but, in the opinion of all the parties is otherwise qualified by training or experience to mediate,

arbitrate or evaluate all or some of the issues in the action. If the person is not a certified neutral, he or she must disclose the lack of certification and obtain written consent from all parties to the ADR Conference on a form approved by the Supreme Court or its designee.

(b) Roster of Certified Neutrals. The Board shall maintain a current roster ("Roster") of neutrals certified under Rule 19 who are willing to serve in each county. The Board shall make the Roster available to the clerks of court for each county. A certified neutral shall notify the Supreme Court's Board of Arbitrator and Mediator Certification if the neutral desires to be added to or deleted from the Roster. The Board and clerk of court for each county shall make this roster available to the public.

Rule 20(b)(1)(A), ADR Rules, is amended to provide:

(A) A minimum of four (4) hours of substantive family law instruction, to include statutes, rules and practice concerning family and related law in South Carolina, including the law regarding custody, visitation, support, division of property and alimony;

Rule 23, ADR Rules, is amended to provide:

Rule 23
Local Rule-Making

These rules shall be uniform for all counties. Local rules may be allowed only upon approval of the Supreme Court. Unless otherwise specified by these rules, all motions related to ADR or to these rules should be directed to the Chief Judge for Administrative Purposes.

Rule 24, ADR Rules, is amended to provide:

Rule 24
Application of Rules

These rules shall apply to cases filed in circuit or family court on or after the effective date of any Supreme Court order designating that county or court as subject to these rules.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Pickens County. Effective May 3, 2016, all filings in all common pleas cases commenced or pending in Pickens County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Clarendon	Lee	Greenville
Sumter	Williamsburg	Pickens—Effective May 3, 2016

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

Columbia, South Carolina
April 26, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Mortuary Transport, Inc., Respondent,

v.

Knight Systems, Inc. and Robert L. Knight, Appellants.

Appellate Case No. 2014-001819

Appeal From Lexington County
James Randall Davis, Special Referee

Opinion No. 5402
Heard February 10, 2016 – Filed May 4, 2016

REVERSED AND REMANDED

Reginald I. Lloyd, of Lloyd Law Firm, LLC, of Camden, and Christopher Todd Hagins, of The Hagins Law Firm, LLC, of Columbia, for Appellants.

John Julius Pringle, Jr. and Lyndey Ritz Zwingelberg, both of Adams and Reese LLP, of Columbia, for Respondent.

WILLIAMS, J.: Knight Systems, Inc. (Knight Systems) and Robert L. "Buddy" Knight (collectively "Appellants") appeal the special referee's order ruling in favor of Palmetto Mortuary Transport, Inc. (Palmetto). Appellants argue the special referee erred in failing to find (1) the geographic restriction in the parties' covenant not to compete (the Covenant) is unreasonable and void, (2) the Covenant's

territorial restriction is unsupported by independent and valuable consideration, (3) the Covenant is void as a matter of public policy, and (4) the Covenant became void after any breach by Palmetto. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Knight Systems, owned and operated by Buddy, engaged primarily in the mortuary transport business until 2007. On January 5, 2007, Knight Systems entered into an asset purchase agreement (the Agreement) with Palmetto, a business owned by Donald and Ellen Lintal. Pursuant to the Agreement, Knight Systems sold various tangible assets, goodwill, and customer accounts—including body removal service contracts with Richland County, Lexington County, and the University of South Carolina—to Palmetto in exchange for a purchase price of $590,000. The Agreement also contained an exclusive sales provision that obligated Palmetto to purchase body bags at specified discounted prices from Knight Systems for ten years. The provision listed four types of body bags: heavy duty, lightweight, odor-proof, and water retrieval.

In addition to the Agreement, Palmetto executed the Covenant with Appellants. In consideration of $1,000, Appellants agreed not to provide mortuary transport services within 150 miles of their business—located in Lexington County—for ten years following the closing date of the sale.

The subject of dispute in the instant ligation began in June 2011, when Richland County issued a request for proposal (RFP) seeking mortuary transport services from a provider for a period of five years. At that time, Palmetto still held the services contract with Richland County as a result of the Agreement. Palmetto timely submitted a response to the RFP.

On June 16, 2011, one day before responses to the RFP were due, Buddy recorded a telephone conversation he had with Donald Lintal. In that conversation, Buddy accused Palmetto of breaching the Agreement by buying infant body bags from other manufacturers in 2008. Donald relayed that he did not believe these purchases were significant and he was "not trying to get around" the Agreement. Donald claimed the amount of bags Palmetto purchased from sources other than Knight Systems only totaled $884.97. This amount included thirty-one infant body bags at $192.75, four extra-large body bags at $213.72, six heavy duty body bags at $208.50, and six water retrieval body bags at $270.

Donald, however, asserted that because infant and extra-large body bags were not the type of bags Palmetto was required to purchase from Knight Systems pursuant to the Agreement, the total amount Palmetto paid for body bags falling within the exclusive sales provision was $478.50. In comparison, from January 2007 to June 2011, Palmetto purchased more than $45,000 worth of body bags from Knight Systems under the Agreement. Therefore, Donald contended the sales that allegedly violated the Agreement constituted less than 1% of Palmetto's overall purchases from Knight Systems.

After this telephone conversation, Buddy consulted with his attorney and submitted a response to the RFP on June 17, 2011. Buddy stated he felt Knight Systems would be "left out in the cold" by Palmetto's alleged breach of contract. After the RFP deadline passed, Buddy contacted an official at the Richland County Procurement Office, seeking a determination that Knight Systems be awarded the mortuary transport services contract because it was the only provider of odor-proof body bags required by the RFP. Buddy also informed the official that Knight Systems would be taking all of its odor-proof body bags off the market. Although Palmetto asserted its response to the RFP contained the lowest price for services and had the highest total of points from the Richland County Procurement Office, Richland County awarded Knight Systems the mortuary transport services contract for a five-year term.

On October 26, 2011, Palmetto filed a complaint against Appellants. On June 6, 2013, Palmetto amended its complaint and included causes of action for breach of contract, breach of contract accompanied by a fraudulent act, and intentional interference with prospective contractual relations. Palmetto alleged Appellants breached the Covenant by providing mortuary transport services within the restricted 150-mile radius of Lexington County. Palmetto also claimed Buddy intentionally made false representations to Richland County that Knight Systems had the exclusive ability to supply odor-proof body bags—as required by the RFP—because Knight Systems was obligated under the Agreement to sell the odor-proof bags to Palmetto.

Appellants answered and counterclaimed for breach of contract on July 2, 2013. According to Appellants, Palmetto first breached the Agreement by purchasing body bags from another source in violation of the exclusive sales provision. Appellants also contended the Covenant was unenforceable because it was not

supported by adequate consideration and contained unreasonable restrictions in duration and geographic scope.

By consent order, the case was referred to a court-appointed special referee and tried on December 18, 2013. In an order issued on July 22, 2014, the special referee ruled in favor of Palmetto. The special referee found the Covenant was supported by valuable consideration and reasonably limited in time and geographic scope. Further, the special referee held Appellants breached the Agreement by refusing to make the odor-proof bags available for purchase and violated the Covenant by submitting a response to the Richland County RFP. Lastly, the special referee found Palmetto's purchase of body bags from other manufacturers did not constitute a material breach of the Agreement that excused Appellants' performance of their contractual duties.

In light of his rulings, the special referee ordered Appellants to pay attorney's fees and damages of $373,264.54 in lost profits resulting from their wrongful competition with Palmetto. The special referee also ordered Palmetto to pay damages of $478.50 to Appellants for purchasing body bags in violation of the exclusive sales provision. Finally, the special referee issued a permanent injunction against Appellants, requiring them to comply with the terms of the Covenant for a term of five years and seven months following the date of his order, with the exception of their performance of the services contract with Richland County. This appeal followed.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, this court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006).

"A breach of contract action is an action at law." *Madden v. Bent Palm Invs., LLC*, 386 S.C. 459, 464, 688 S.E.2d 597, 599 (Ct. App. 2010). "[W]hen reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the [special referee]'s findings of fact as long as they are reasonably supported by the evidence." *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013) (alterations in original)

(quoting *Mazloom v. Mazloom*, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (Ct. App. 2009)). "[T]he interpretation of an unambiguous contract is a question of law, as is the question of whether a non-competition clause is reasonable." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013).

Actions for injunctive relief sound in equity. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). "In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Id.*

LAW/ANALYSIS

I. Geographic Scope

Appellants contend the special referee erred in finding the Covenant's territorial restriction of a 150-mile radius was reasonable and enforceable. We agree.

In South Carolina, our courts will generally uphold and enforce a covenant not to compete arising out of the sale of a business if it is (1) reasonably limited as to time and territory, (2) supported by valuable consideration, and (3) not detrimental to the public interest. *S.C. Fin. Corp. of Anderson v. West Side Fin. Co.*, 236 S.C. 109, 119, 113 S.E.2d 329, 334 (1960).

This court will uphold a geographic restriction in a covenant not to compete ancillary to the sale of a business if it is "reasonably restricted as to the place of territory" and is no "more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Metts v. Wenberg*, 158 S.C. 411, 415, 155 S.E. 734, 735 (1930). To determine whether a territorial restriction in a covenant not to compete is reasonable, the court must examine (1) the whole subject matter of the contract, (2) the kind and character of the business, (3) its location, (4) the purpose to be accomplished by the restriction, and (5) all circumstances showing the intentions of the parties in making the contract. *Reeves v. Sargeant*, 200 S.C. 494, 501, 21 S.E.2d 184, 188 (1942). Therefore, we must naturally decide each case on its own facts. *Id.* at 502, 21 S.E.2d at 188. South Carolina does not follow the "blue pencil" rule and, thus, "restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010).

Our supreme court previously addressed the validity of a similar territorial restriction in *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958). In *Somerset*, a silversmith in the retail business of selling silver, china, crystal, and jewelry sold his shop located in the Five Points area of Columbia, South Carolina, to a local competitor. 233 S.C. at 327–28, 104 S.E.2d at 345–46. As part of the sale, the seller covenanted not to engage in the business of selling silverware or jewelry in South Carolina for twenty years. *Id.* at 328, 104 S.E.2d at 346. Following the sale, the purchaser briefly employed the seller as manager of the shop but soon terminated his employment after about three months. *Id.* at 329, 104 S.E.2d at 346. The seller subsequently brought a declaratory judgment action, seeking a determination that, among other things, the geographic restriction was unreasonable and the covenant was void. *Id.* at 326, 104 S.E.2d at 345. The circuit court granted declaratory judgment, concluding the restriction was unreasonable and, thus, the covenant was void as against public policy. *Id.*

On appeal, our supreme court affirmed, finding no rational basis for the extent of the statewide restriction. *Id.* at 330, 104 S.E.2d at 347. The court noted the shop was a relatively small retail store, with its sales coming almost entirely from the greater Columbia area. *Id.* at 330, 104 S.E.2d at 346. Indeed, Columbia sales accounted for 95% of its revenue prior to the sale. *Id.* at 328, 104 S.E.2d at 345. Therefore, the court found that, to protect the purchaser's interest in the shop, it was not necessary to prohibit the seller from engaging in similar business in "Charleston, Spartanburg, Greenville[,] or numerous other cities in South Carolina." *Id.* at 330, 104 S.E.2d at 346. The court also rejected the purchaser's argument that the seller was estopped from attacking the validity of the covenant because the seller, who indicated he had no intention of going back into the business, told the purchaser during negotiations that he could make the restriction for the entire state. *Id.* at 330–31, 104 S.E.2d at 347. Likewise, the court declined to apply the "blue pencil" doctrine to redraw the scope of the restriction to make it reasonable because the covenant was "clearly indivisible" and "furnishe[d] no basis for dividing this territory." *Id.* at 332, 104 S.E.2d at 348.

Turning to the instant case, the special referee found the 150-mile restriction was reasonable based upon two pieces of testimony. First, the special referee noted Donald testified he wished to keep open the option of expanding Palmetto's business throughout other counties in South Carolina. The record, however, indicated Knight Systems—a small business located in Lexington County at the

time of the sale—only engaged in the mortuary transport business in Richland and Lexington counties prior to the sale to Palmetto. In fact, at the time of Palmetto's purchase, Knight Systems only had services contracts with Richland County, Lexington County, and the University of South Carolina in Columbia. We do not believe Palmetto's tentative desire to expand its business throughout the state—without more evidence of definitive planning, acquisitions, or other overt acts—supports a finding that the restriction is reasonable.

Second, the special referee relied upon Buddy's testimony that he did not intend to get back into the mortuary transport business after the sale to Palmetto. As suggested in *Somerset*, we do not believe Appellants' intention of not returning to the mortuary transport business is a relevant factor for analyzing whether a territorial restriction is reasonable. We also note Donald testified that Palmetto included the 150-mile restriction in the Covenant. Although Knight Systems, with the assistance of counsel, agreed to the territorial restriction in the Covenant, we believe no rational basis exists for enforcing a territorial restriction covering the entire state and parts of neighboring states that prohibits Appellants from engaging in the mortuary transport business. In our view, the 150-mile restriction was overly broad and did not protect the rights and interests of Palmetto in a reasonable manner. *See Metts*, 158 S.C. at 415, 155 S.E. at 735 (holding a territorial restriction must not be "more enlarged than essential for a reasonable protection of the rights of the purchasing party"). Accordingly, contrary to the special referee, we find the geographic restriction in the covenant is unreasonable and, therefore, is unenforceable.

Further, although the Covenant's enforceability clause invites us to "blue pencil" the territorial restriction to one we find reasonable if the 150-mile restriction is deemed unenforceable, our longstanding precedent provides this court cannot modify the restriction. *See, e.g.*, *Poynter Invs.*, 387 S.C. at 588, 694 S.E.2d at 18 (holding that "restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms"). In *Team IA, Inc. v. Lucas*, this court held that, while a nationwide territorial restriction in an employment non-compete agreement was overly broad and unreasonable, a smaller alternative restriction—or "step-down provision"—agreed to by the parties and contained in the contract could be valid and enforced by a court. 395 S.C. 237, 246, 717 S.E.2d 103, 107 (Ct. App. 2011). In the instant case, however, the Covenant contains no step-down provision. Thus, we find it would be impermissible for this court to redraw a smaller territorial restriction

because doing so would amount to rewriting the Covenant to add an arbitrary term upon which the parties did not negotiate or agree. *See Lowcountry Open Land Tr. v. Charleston S. Univ.*, 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2008) ("Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or make new contracts for the parties.").

II. Remaining Issues

In light of our finding that the Covenant's territorial restriction is unreasonable and void, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we hold the Covenant's 150-mile territorial restriction is unreasonable and unenforceable. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

LOCKEMY and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Virginia L. Marshall and Todd W. Marshall, Appellants,

v.

Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC, Georgia Roane, M.D., and Rheumatology Associates, P.A., Respondents.

Appellate Case No. 2014-001833

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

Opinion No. 5403
Heard February 11, 2016 – Filed May 4, 2016

REVERSED AND REMANDED

Blake A. Hewitt and John S. Nichols, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; J. Edward Bell, III, of Bell Legal Group, of Georgetown; and C. Carter Elliott, Jr., of Elliott & Phelan, LLC, of Georgetown, all for Appellants.

James B. Hood, Robert H. Hood, H. Cooper Wilson, III, and Deborah H. Sheffield, all of Hood Law Firm, LLC, of Charleston; and Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, of Charleston, for Respondents Kenneth A. Dodds, M.D. and Charleston Nephrology Associates, LLC.

James E. Scott, IV, D. Jay Davis, Jr., Perry M. Buckner, IV, Stephen L. Brown, and Russell G. Hines, all of Young Clement Rivers, LLP, of Charleston, for Respondents Georgia Roane, M.D. and Rheumatology Associates, P.A.

WILLIAMS, J.: In this medical malpractice case, Virginia and Todd Marshall (the Marshalls) appeal the circuit court's grant of summary judgment in favor of Dr. Kenneth A. Dodds; Charleston Nephrology Associates, LLC; Dr. Georgia Roane; and Rheumatology Associates, P.A. (collectively "Respondents"). The Marshalls argue the court erred in holding the statute of repose for a medical malpractice action begins to run after a medical professional's first alleged misdiagnosis. We reverse and remand.

FACTS/PROCEDURAL HISTORY

In February 2010, Virginia was diagnosed with Waldenström's macroglobulinemia—or lymphoplasmacytic lymphoma—a rare form of blood cancer. Prior to this diagnosis, Virginia was treated by two physicians, Dr. Dodds and Dr. Roane, both of whom she alleges committed medical malpractice by failing to diagnose her cancer on multiple occasions.

On September 15, 2004, Virginia visited Dr. Dodds, a nephrologist, after complaining of proteinuria, or increased protein levels in her urine. This visit marked the first time Dr. Dodds had evaluated Virginia since 1999. During this appointment, Dr. Dodds noted Virginia had a 24-hour urine test conducted on August 6, 2004, which revealed the protein levels in her urine were at 3.5 grams per day. At this point, Dr. Dodds did not order additional testing for Virginia's proteinuria. When Virginia visited Dr. Dodds again on November 14, 2004, she had no complaints and Dr. Dodds did not order additional testing for her proteinuria.

At a February 7, 2005 appointment, Dr. Dodds ordered that Virginia again receive a 24-hour urine test. On February 9, 2005, the test indicated Virginia's protein levels were at approximately 3.1 grams per day. Dr. Dodds did not order any further testing. During her last visit on September 5, 2005, Virginia's 24-hour

urine test indicated the protein levels in her urine had increased to 4.2 grams per day. Dr. Dodds continued treatment for proteinuria, but he did not administer any additional testing.

During the time she was seeing Dr. Dodds for her proteinuria, Virginia was also under the care of Dr. Roane, a rheumatologist. In 2000, Dr. Roane diagnosed Virginia with mixed connective tissue disease (MCTD) and treated her for the suspected MCTD from 2000 to 2007. On April 29, 2005, while Dr. Roane was continuing treatment for MCTD, Virginia presented symptoms including elevated sedimentation rates, enlarged lymph nodes, proteinuria, fever, and chills. At an appointment on September 29, 2005, a 24-hour urine test indicated Virginia's protein levels increased from 3.5 to 4.2 grams per day from the previous year. Dr. Roane, however, did not order further testing.

As a result of the alleged failures to diagnose Virginia's cancer during her treatments, the Marshalls pursued medical malpractice and loss of consortium actions against Dr. Dodds, Dr. Roane, and their respective practices. The Marshalls claimed Dr. Dodds was negligent in failing to recognize the signs and symptoms of elevated proteins in the urine and failing to order proper testing—including a urine protein electrophoresis test or a serum protein electrophoresis test—to determine if the type of protein in Virginia's urine was cancerous. Similarly, the Marshalls alleged Dr. Roane was negligent because she continued to misdiagnose Virginia's cancer as MCTD at the April 29, 2005 appointment. The Marshalls also claimed Dr. Roane failed to order further testing for Virginia's increased protein levels when she was no longer under the care of her nephrologist, Dr. Dodds, on and after the September 29, 2005 appointment.

On February 7, 2011, the Marshalls contemporaneously filed a notice of intent to file suit (NOI), two expert witness affidavits, and a summons and complaint against Dr. Dodds and Charleston Nephrology Associates, LLC. Subsequently, the Marshalls contemporaneously filed an NOI, an expert witness affidavit, and a summons and complaint against Dr. Roane and Rheumatology Associates, P.A. on April 8, 2011. The circuit court granted the Marshalls' motions to consolidate the two cases for purposes of discovery and trial.

After the parties participated in discovery, Respondents filed separate motions for summary judgment. Respondents argued the statute of repose for medical malpractice actions—section 15-3-545(A) of the South Carolina Code (2005)—

barred the Marshalls' claims because they brought their action more than six years after Dr. Dodds and Dr. Roane's first alleged negligent omissions in failing to diagnose her cancer. In their motion, Dr. Dodds and his practice asserted the alleged first misdiagnosis, on September 15, 2004, occurred more than six years prior to the commencement of the action against them. Likewise, Dr. Roane and her practice contended the Marshalls' own expert opined Virginia's cancer would have been discoverable by Dr. Roane as early as February 2002—nine years before the commencement of the malpractice action.

On May 1, 2014, the circuit court granted Respondents' motions for summary judgment, holding the Marshalls' complaints were untimely because the statute of repose began to run after the first alleged misdiagnoses by Dr. Dodds and Dr. Roane. In reaching its conclusion, the court found *Howell v. Zottoli*, 691 S.E.2d 564 (Ga. Ct. App. 2010), persuasive. In *Howell*, the Georgia Court of Appeals concluded "a later negligent act cannot serve as the new starting point of the statute of repose where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition." 691 S.E.2d at 566. The circuit court found the Marshalls pled multiple failures by Dr. Dodds and Dr. Roane to diagnose Virginia's cancer that was likely present throughout the course of their treatment. Therefore, relying upon *Howell*, the court reasoned Dr. Dodds and Dr. Roane's subsequent misdiagnoses were merely a continuation of their first misdiagnoses, not distinct acts of negligence that could serve as new trigger points for the statute of repose.

The Marshalls filed a motion to alter or amend judgment, and the circuit court denied their motion in a Form 4 order on August 7, 2014. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Determining the proper interpretation of a statute is a question of law, and th[e appellate c]ourt reviews questions of law de novo." *Lambries v. Saluda Cty.*

Council, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

LAW/ANALYSIS

The Marshalls argue the circuit court erred in holding the statute of repose for their medical malpractice claims began to run after Dr. Dodds and Dr. Roane's first alleged misdiagnoses. We agree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The [General Assembly]'s intent should be ascertained primarily from the plain language of the statute." *Ex parte Cannon*, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (quoting *Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003)). "Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). "If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose." *Ex parte Cannon*, 385 S.C. at 655, 685 S.E.2d at 821. "The construing court may additionally look to the legislative history when determining the legislative intent." *Id.*

"A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990)). "[A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Id.* (quoting *First United Methodist Church*, 882 F.2d at 866).

In South Carolina, medical malpractice actions are governed by a six-year statute of repose. Subsection 15-3-545(A) provides the following:

> [A]ny action, other than actions controlled by subsection (B), to recover damages for injury to the person arising

> out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from the date of discovery or when it reasonably ought to have been discovered, *not to exceed six years from date of occurrence,* or as tolled by this section.

(emphasis added). The statute's six-year period "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Hoffman v. Powell*, 298 S.C. 338, 339–40, 380 S.E.2d 821, 821 (1989).

Because the statute of repose does not explicitly define "occurrence," we believe a review of the legislative history is instructive. Prior to the enactment of section 15-3-545(A), all personal injury actions were subject to a six-year statute of limitations, requiring such suits be brought within six years "after the cause of action shall have *accrued*." Code of Laws of S.C. § 10-102, -143(5) (1962) (emphasis added). Nevertheless, a jurisdictional split began to emerge concerning the definition of "accrued" in various state statutes of limitations in the context of medical malpractice. *See, e.g.*, *Gattis v. Chavez*, 413 F. Supp. 33, 38 (D.S.C. 1976) (providing a discussion on the jurisdictional split). Some courts retained the traditional view that "accrued" meant the time of the medical professional's alleged negligent act or omission, while others steadily began to hold that, pursuant to the "discovery rule," it meant when the plaintiff discovered or should have discovered the injury that arose from such negligence. *See id.*

In *Gattis*, the U.S. District Court for the District of South Carolina held that, if faced with the question, our supreme court would judicially adopt the discovery rule. 413 F. Supp. at 39. The following year, the General Assembly adopted the discovery rule with a newly created statute of limitations for medical malpractice actions. *See* Act No. 182, 1977 S.C. Acts 453 (stating the action must be commenced "within three years from the date of the treatment, omission[,] or operation giving rise to the cause of action or three years from the date of discovery or when it reasonably ought to have been discovered"). However, because the discovery rule arguably would produce great uncertainty—allowing plaintiffs to bring actions against medical professionals at any time in the future—

the General Assembly also created a statute of repose, barring all causes of action brought more than six years following an "occurrence." *See id.*; *see also Hoffman*, 298 S.C. at 341–42, 380 S.E.2d at 822–23 (noting other states enacted statutes of repose to curtail the "long tail" exposure to malpractice claims brought about by the discovery rule).

Based upon the legislative history of the statute of repose and our precedents, we find that "occurrence"—for purposes of the statute—means the time of an alleged negligent treatment, omission, or operation by a medical professional. *See, e.g.*, *O'Tuel v. Villani*, 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct. App. 1995) (holding the occurrence that triggered the statute of repose was on the date of the child's birth, when a physician failed to perform a caesarean delivery, not seven years later when the parents discovered the child had learning disabilities), *overruled on other grounds by I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 423 & n.12, 526 S.E.2d 716, 725 & n.12 (2000); *Johnson v. Phifer*, 309 S.C. 505, 507, 424 S.E.2d 532, 534 (Ct. App. 1992) (concluding the statute of repose barred a patient's claim against a dentist filed in 1990 when the alleged negligent treatment occurred from 1974 to 1977).

Consequently, the statute of repose begins to run at the time of an alleged negligent act or omission by a medical professional upon which a plaintiff seeks to impose liability in a cause of action for malpractice. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 537, 725 S.E.2d 693, 696 (2012) ("A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to [the] plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." (emphasis omitted) (quoting *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002))). Therefore, we hold that when a plaintiff alleges a misdiagnosis or failure to diagnose a condition within the six-year period—which an expert witness opines to be a breach of the physician's duty of care[1]—the statute of repose does not bar the cause of action merely because the physician previously misdiagnosed the condition outside the repose period.

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[1] *See* S.C. Code Ann. § 15-36-100(B) (Supp. 2015) (providing that a plaintiff in a professional negligence action "must file[,] as a part of the complaint[,] an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit").

Turning to the facts of the instant case, the Marshalls concede they may not seek to impose liability on Dr. Dodds and Dr. Roane for negligent acts or omissions made outside the repose period. The Marshalls, however, alleged specific dates and appointments within the six-year repose period when Dr. Dodds and Dr. Roane failed to diagnose Virginia's cancer. The Marshalls' expert witnesses—Dr. Barry Singer and Dr. Robert Luke—opined that Dr. Dodds breached his duty of care at the February and September 2005 appointments, noting the protein levels in Virginia's urine were elevated from previous tests and, thus, should have signaled to Dr. Dodds that cancerous protein was present and further testing was required. Likewise, the Marshalls' other expert, Dr. Thomas Zizic, opined that Dr. Roane breached her duty of care at the April 29, 2005 appointment by prescribing potent immunosuppressants when Virginia did not have MCTD. Dr. Zizic also opined that Dr. Roane was negligent during and after the September 29, 2005 appointment—when Virginia was no longer under the care of Dr. Dodds—because she continued to misdiagnose Virginia's cancer as MCTD and was under a duty to perform further testing after learning Virginia's urine protein levels were elevated.

Additionally, the Marshalls properly alleged each element of their causes of action for medical malpractice: (1) Dr. Dodds and Dr. Roane owed a duty of care to Virginia; (2) they breached that duty in failing to diagnose her cancer; (3) Virginia suffered damages, including pain and suffering, lost wages, and medical expenses; and (4) Dr. Dodds and Dr. Roane's negligence proximately caused Virginia's damages. Therefore, we find the Marshalls' medical malpractice claims for alleged negligent acts occurring within six years of commencing the instant actions against Respondents are not barred by the statute of repose.

Nevertheless, Respondents contend Dr. Dodds and Dr. Roane's alleged subsequent misdiagnoses were merely a continuation of their first misdiagnoses, not new and independent negligent acts or omissions that "retrigger" the statute of repose. According to Respondents, South Carolina's statute of repose begins to run after a medical professional's first misdiagnosis. In making this argument, Respondents—like the circuit court—rely upon the Georgia Court of Appeals' decision in *Howell*.

In *Howell*, a patient was treated by a doctor in October 1996 after complaining of blood in his urine. 691 S.E.2d at 565. Although the patient never returned for in-office appointments, the doctor continued to provide him with several referrals and weight-loss prescriptions. *Id.* In 2001, the patient died of coronary heart disease,

and his wife subsequently sued the doctor in 2003 for medical malpractice. *Id.* The decedent's wife alleged the doctor failed to properly diagnose and treat her husband's multiple cardiovascular risk factors present during the course of his care, including "morbid obesity, smoking, high cholesterol, diabetes, high blood pressure, and a family history of coronary heart disease." *Id.* The trial court, however, granted summary judgment in favor of the doctor, holding Georgia's five-year medical malpractice statute of repose barred her suit. *Id.*

On appeal, the Georgia Court of Appeals affirmed, finding Georgia's statute of repose—which is based upon when the negligent act causing the patient's injury occurred—began to run on the date of the doctor's first misdiagnosis of the decedent's condition. *Id.* at 566–67. In reaching its decision, the court relied upon the Supreme Court of Georgia's directive that, in cases of a misdiagnosis or failure to diagnose a continuing condition, "[t]he misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis." *Kaminer v. Canas*, 653 S.E.2d 691, 694 (Ga. 2007) (quoting *Frankel v. Clark*, 444 S.E.2d 147, 149 (Ga. Ct. App. 1994)).[2]

We find Respondents' interpretation of subsection 15-3-545(A) is unduly expansive and their reliance upon *Howell* is misplaced. *See Sloan*, 371 S.C. at 499, 640 S.E.2d at 459 (stating courts must not resort to subtle or forced construction to expand a statute's operation). Our statute of repose differs from Georgia's because it solely focuses on the time of the medical professional's negligent act or omission, not the patient's injury. A patient's damages in the case of a prior misdiagnosis discovered later with a proper diagnosis often include death, pain and suffering, lost wages, and medical expenses. Unlike the Supreme Court of Georgia, we find a patient's injury and ensuing damages in these situations are not the misdiagnosis itself, but rather are a *result* of the misdiagnosis. A misdiagnosis is simply the negligent act or omission that gives rise to the cause of action for malpractice. Therefore, we find *Howell* unpersuasive. Accordingly, we reject Respondents' argument and hold the circuit court erred in relying upon Georgia

[2] In *Kaminer*, the court held Georgia's statutes of limitations and repose in most misdiagnosis cases "begin to run simultaneously on the date that the doctor negligently failed to diagnose the condition and, thereby, injured the patient." 653 S.E.2d at 694.

law to determine South Carolina's statute of repose begins to run after a medical professional's first misdiagnosis.

Respondents also argue our interpretation of South Carolina's statute of repose for medical malpractice actions would effectively be an adoption of the continuous treatment rule that was rejected by our supreme court in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003). Under the continuous treatment rule, when a patient's illness or injury imposes upon his doctor a duty to continue treatment, the statutes of limitation and repose do not begin to run until the termination of the doctor's treatment. *Id.* at 135, 580 S.E.2d at 112. The continuous treatment rule is a tolling mechanism that our supreme court found would run afoul of the General Assembly's objective to limit liability with the medical malpractice statutes of limitations and repose. *Id.* at 138, 580 S.E.2d at 114. Our interpretation, however, is entirely consistent with *Harrison* because we are not suggesting the statute of repose is tolled until the termination of a physician's course of treatment. To the contrary, we hold the statute begins to run at the time of a medical professional's alleged negligent act or omission for which the plaintiff seeks to impose liability without regard to when the course of treatment ended.

In our view, the first misdiagnosis rule advocated by Respondents would allow medical professionals to escape liability for subsequent acts of negligence—even when they clearly constitute a breach of the standard of care—only because they failed to properly diagnose the patient's condition in the past. It is possible for a patient to continually present symptoms, or even new or worsening symptoms, that should alert the physician to perform additional testing or reevaluate a prior diagnosis. *See Kaminer*, 653 S.E.2d at 698 (Hunstein, J., dissenting) ("[I]t is possible for a doctor to misdiagnose a patient more than once in the course of treatment, where new or more severe symptoms would, under the relevant standard of care, require a reassessment of the initial diagnosis."). Under the rule advocated by Respondents, however, physicians—to be immune from suit—could simply point to a time outside the limitations period when they examined the patient and should have diagnosed the condition. We do not believe the General Assembly intended such a result when it enacted the statute of repose for medical malpractice actions. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 (holding "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]").

CONCLUSION

Based on the foregoing analysis, we hold the circuit court erred in finding the statute of repose for medical malpractice actions begins to run after a medical professional's first alleged misdiagnosis. Therefore, we reverse the circuit court's grant of summary judgment in favor of Respondents and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

LOCKEMY and MCDONALD, JJ., concur.