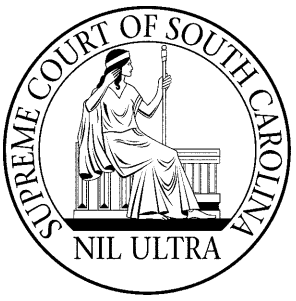

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 19, 2003

ADVANCE SHEET NO. 19

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

M.B. Kahn Construction Company, Inc., Petitioner,

v.

Three Rivers Bank & Trust Company, RSI Properties/Spartanburg, LLC; RSI, Inc., Orchard Place East at Spartanburg, Inc.; Bailey Heating & Controls, Inc.; Wellington Power; Charleston Fire & Safety, Inc.; TI Associates, Inc.; and Lewis Nursery & Farm, Inc., Defendants,

Of Whom

Three Rivers Bank & Trust Company is Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

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

Opinion No. 25651
Heard April 3, 2003 - Filed May 19, 2003

REVERSED

Robert T. Strickland, James R. Allen, and Andrea C. Pope, of Barnes, Alford, Stork & Johnson, L.L.P., of Columbia, for petitioner.

Wallace K. Lightsey, of Wyche, Burgess, Freeman & Parham, of Greenville; and Benjamin T. Zeigler, of Haynsworth Sinkler Boyd, P.A., of Florence, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' unpublished opinion affirming dismissal of this action. We reverse.

FACTS

Petitioner M.B. Kahn Construction Company (Contractor) appeals the dismissal of its causes of action against respondent Three Rivers Bank & Trust Company (Bank) for lack of personal jurisdiction. Bank is a Pennsylvania corporation with its principal place of business in that state. In 1997, Bank and RSI Properties/Spartanburg L.L.C. (Owner) entered a construction loan agreement to finance the building of an assisted living facility in Spartanburg. Under the agreement, loan proceeds of $7 million were to be disbursed as construction progressed and Owner would pay Contractor from these proceeds. To secure the loan, Owner gave Bank a mortgage on the Spartanburg property.

In 1999, Owner defaulted, giving rise to foreclosure actions and litigation involving various lienholders.[1] Contractor sued Bank on two causes of action for unjust enrichment and promissory estoppel. Essentially, Contractor asserted that despite the loan's default status,

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[1]We need not address the procedural complexities of that litigation in light of our disposition here.

Bank gave assurances of payment through its agent, causing Contractor to continue work that improved the property to Bank's benefit.

Bank moved to dismiss contending it had no contact with South Carolina other than the note and mortgage agreement with Owner and the related foreclosure action. In response, Contractor submitted the affidavit of its project director, William P. Edmonds. Edmonds stated that he dealt regularly with Bob McKain, an employee of Management Engineering Corporation, who was Bank's inspecting engineer at the project site in Spartanburg. The loan agreement between Owner and Bank provides the inspecting engineer was to perform services on behalf of Bank. Edmonds stated it was McKain who approved Contractor's pay requests and processed them for payment. Contractor relied on McKain's assurance of payment in continuing to work on the project. In addition, Edmonds's affidavit references "Contractor's Consents" executed by Contractor in South Carolina and Owner's assignment to Bank of the construction contract performed in South Carolina.

Bank in return submitted the affidavits of its vice-president, Vincent W. Locher, who stated McKain was not Bank's agent but was "an independent third-party inspecting engineer," and McKain who stated he served as "an independent third party contractor" in inspecting the site.

The trial court found Bank's contact with South Carolina was not sufficient to support long-arm jurisdiction and dismissed Contractor's causes of action.

ISSUE

Is long-arm jurisdiction proper under S.C. Code Ann. § 36-2-803 (2003)?

DISCUSSION

Section 36-2-803 provides:

> (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's
>
> (a) transacting any business in this State;
>
> . . . .
>
> (2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him. . . .

(emphasis added). Contractor's causes of action allege McKain was acting as Bank's agent transacting business on Bank's behalf in South Carolina.

At the pre-trial stage, only a prima facie showing is required to support jurisdiction. Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993). On a motion to dismiss for lack of personal jurisdiction, factual disputes arising by affidavit will be resolved in favor of the non-moving party. Brown v. Investment Management and Research, Inc., 323 S.C. 395, 475 S.E.2d 754 (1996). Where the non-moving party submits facts sufficient to make a prima facie showing of an agency relationship supporting long-arm jurisdiction under § 36-2-803, the motion to dismiss should be denied. *Id*.

Edmonds's affidavit and the loan agreement are sufficient here to make a prima facie showing that McKain was acting as Bank's agent when he gave false assurances of payment. Bank's contrary assertions do not defeat this showing. The fact that someone is employed as an independent contractor does not negate the fact that he may be acting as an agent. *See* Nelson v. Yellow Cab Co., 349 SC. 589, 564 S.E.2d 110 (2002) (where one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which the result is accomplished, he is not an independent contractor but an agent); Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982) (agency may be implied or inferred and may be circumstantially proved

by the conduct of the purported agent). We conclude at this pre-trial stage, the evidence of an agency relationship is sufficient to support long-arm jurisdiction under § 36-2-803(1)(a). Brown v. Investment Management, *supra.* Contractor still bears the burden of proving an agency relationship at a trial on the merits.

We hold the trial court erred in dismissing Contractor's causes of action for lack of personal jurisdiction. Accordingly, the opinion of the Court of Appeals is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Breeden, Jr.,
Employee, Respondent/Petitioner,

v.

TCW, Inc./Tennessee Express,
Employer, and Granite State
Insurance Co., Carrier, Petitioners/Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Gerald C. Smoak, Circuit Court Judge

Opinion No. 25652
Heard February 4, 2003 - Filed May 19, 2003

AFFIRMED IN PART; REVERSED IN PART

Stanford E. Lacy, of Collins & Lacy, of Columbia, for Petitioners/Respondents.

D. Michael Kelly, of Suggs & Kelly, P.A., of Columbia; Saunders Aldridge, of Hunter, Mclean, Exley & Dunn, of Savannah; and William B. Harvey, III, of Harvey & Battey, P.A., of Beaufort, for Respondent/Petitioner.

JUSTICE PLEICONES: Respondent/Petitioner James Breeden ("Breeden") was awarded workers' compensation benefits from petitioners/respondents TCW, Inc./Tennessee Express ("Employer") and Granite State Insurance Company ("Carrier") for injuries he sustained in an automobile accident. Breeden settled his claim against the tortfeasor and notified the Workers' Compensation Commission ("Commission") of the settlement. Breeden then moved the Commission to determine the amount of Carrier's lien and to determine the distribution scheme of any remaining settlement proceeds.

The Commission reduced Carrier's lien and ordered that the remaining settlement proceeds be placed in a trust account to pay future compensation. The Commission further found that "compensation" did not include future medical expenses. The trial court affirmed. The Court of Appeals affirmed in part, reversed in part, and remanded. Breeden v. TCW, Inc./Tennessee Express, 345 S.C. 201, 546 S.E.2d 657 (Ct. App. 2001). Breeden and Carrier each sought writs of certiorari, both of which were granted. We reverse in part, and affirm in part.

FACTS

On December 14, 1993, Breeden was injured when a truck owned by Piggly Wiggly crossed the center line and hit Breeden's truck head on. Breeden filed a workers' compensation claim.

On July 28, 1995, Breeden filed a Form 50[1] alleging he was totally disabled as a result of a traumatic physical brain injury and was awarded lifetime benefits pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2000). There was no appeal from this Order.

During this time, Breeden pursued a third party claim against Piggly Wiggly. Piggly Wiggly had $11 million in liability insurance coverage, and

[1] A Form 50 is an Employee's Notice of Claim and/or Request for Hearing.

the parties acknowledge liability was clear. Breeden alleged economic losses alone that were in excess of $9 million, including future medical expenses, and a range of total cognizable damages[2] from $18 to $25 million. The Commissioner held the total cognizable damages were $13.5 million. No lawsuit was filed, and Breeden's claim was settled for $4.2 million while his wife's loss of consortium claim was settled for $1.8 million. Breeden's attorney explained the claims were settled for such a low amount compared to the amount of insurance available because "[w]e had to. This family was coming apart at the seams."

After settling the third party claim against Piggly Wiggly, Breeden notified the Commission of the settlement and moved to have the Commission determine Carrier's lien and the balance remaining to be paid to Carrier under S.C. Code Ann. § 42-1-560(g) (1985). At the hearing, Breeden took the position that Carrier's lien should be reduced using the equitable reduction provision of S.C. Code Ann. § 42-1-560(f) (1985). Both sides introduced detailed life care plans projecting Breeden's future medical needs.

The Commission held that the probable future expenditures in § 42-1-560(g) were subject to the lien reduction provisions of § 42-1-560(f). The Commission also held that under § 42-1-560, the Carrier's lien "does not include future medical expenses which have not yet been incurred at the time of third party settlement. Rather, the lien includes compensation, both past and future, as defined by S.C. Code Ann. § 42-1-100, and those medical expenses paid, or incurred but not yet paid, at the time of the third party settlement." Finally, the Commission found that a reduction of Carrier's lien was equitable to all parties concerned, and reduced the lien by a factor of .31.[3]

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[2] The total cognizable damages are "those damages which are legally recoverable in the type of action in which [a] settlement occurs." Garrett v. Limehouse & Sons, Inc., 293 S.C. 539, 360 S.E.2d 519 (Ct. App. 1987).

[3] The formula in §42-1-560(f) applies if the settlement amount is less than employee's estimated total damages. The formula is: (third party settlement divided by total cognizable damages)lien – carrier's share of attorney's fees

The Court of Appeals agreed that the Carrier's lien should be reduced but held that the Commission misapplied the *Kirkland*[4] factors and the reduction formula and therefore may have ordered an excessive reduction. The Court of Appeals also held that the lien reduction subsection, § 42-1-560(f), applies to future compensation. Finally, it held that future medical expenses are to be considered in calculating the amount of Carrier's lien, and for the purpose of establishing a fund to pay future compensation benefits. The Court of Appeals remanded the case to the Commission to recalculate the value of the lien.

LAW

South Carolina Code Ann. § 42-1-560 is a subrogation statute. The injured employee may bring an action against a third-party tortfeasor in order to recover from the ultimate wrongdoer under § 42-1-560(b). If the employee recovers in that action, whether through a judgment, settlement or otherwise, "the carrier shall have a lien on the proceeds of any recovery…to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier…to the extent the recovery shall be deemed to be for the benefit of the carrier." S.C. Code Ann. § 42-1-560(b). If the employee enters into a settlement for an amount less than the employee's estimated total cognizable damages, then the Commission may reduce the amount of the carrier's lien in the proportion that the settlement bears to the Commission's evaluation of the employee's total cognizable damages at law, if the Commission finds that a reduction is equitable to all parties and serves the interests of justice. § 42-1-560(f). Once the lien and other specified expenses[5] are paid, any balance remaining is placed into a fund which shall be "applied as a credit against future compensation benefits

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and costs = recovery by carrier. In this case, the total cognizable damages were set at $13.5 million, and the settlement was for $4.2 million. 4,200,000/13,500,000=.3111. Therefore, the lien was reduced by a factor of .31.

[4] Kirkland v. Allcraft Steel, 329 S.C. 389, 496 S.E.2d 624 (1998).

[5] These expenses include reasonable and necessary expenses, including attorney's fees, incurred in effecting recovery. § 42-1-560(b).

for the same injury or death and shall be distributed as provided in subsection (g)." § 42-1-560(b).

The policy issues surrounding subrogation in a workers' compensation setting include imposing the burden of payment upon the actual wrongdoer, and avoiding double recovery for the injured employee. 12 *Larson's Workers' Compensation Law* §§ 110.01-110.02. The "central objective [of a subrogation statute] is to provide the mechanics that will achieve…the third party paying what it would normally pay if no compensation question were involved; the employer and carrier 'coming out even' by being reimbursed for their compensation expenditure; and the employee getting any excess of the damage recovery over compensation." Id. at §116.02.

Workers' compensation benefits do not include all the various types of damages that may be recovered in a personal injury suit against a third party tortfeasor. See, e.g., Garrett v. Limehouse & Sons, Inc., 293 S.C. 539, 360 S.E.2d 519 (Ct. App. 1987)(The total cognizable damages at law are "damages which are legally recoverable in the type of action in which the settlement occurs.") For example, in a personal injury suit, the "loss compensable in a personal injury action includes such elements as pain and suffering, disfigurement, medical expenses, and lost earning capacity." F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 555 (2d ed. 1997). The workers' compensation claimant's benefits, however, fall into two categories "benefits to the worker for physical injury, and benefits to the dependents in case of death. Benefits for physical injury, in turn, are of two kinds: wage-loss payments based on the concept of disability; and payment of hospital and medical expenses occasioned by any work-connected injury, regardless of wage loss or disability." *Larson's*, supra, § 80.01. Since a personal injury settlement with a third party tortfeasor includes elements that are not included in the workers' compensation benefits, it follows that the carrier's lien should not always be satisfied in full from the settlement proceeds. In Kirkland v. Allcraft Steel, 329 S.C. 389, 496 S.E.2d 624 (1998), this Court set out examples of factors to be considered by the Commission when deciding whether or not it is "equitable to all parties concerned and serve[s] the interests of justice" to reduce the carrier's lien. The four suggested factors included "strength of the claimant's case, likelihood of

third party liability, claimant's desire to settle, and whether carrier is unreasonably refusing to consent to the settlement." Kirkland, supra at 394, 496 S.E.2d at 626.

ISSUES

I. Did the Court of Appeals err in including future medical expenses in Carrier's lien under § 42-1-560(f)?

II. Did the Court of Appeals err in holding that the fund established under §42-1-560(g) is subject to the reduction formula in §42-1-560(f)?

III. Did the Court of Appeals err in its application of the *Kirkland* factors?

ANALYSIS

I. Future Medical Expenses and Carrier's Lien

One of the questions before us is whether the Carrier's lien, which can be discounted by subsection (f), includes medicals that have not yet been incurred, and whether "future compensation benefits" for which a fund is established under subsection (g), includes future medical expenses. We find the Commission properly held that the Carrier's lien includes only those medical expenses paid or accrued but not yet paid at the time of the third party settlement, and does not include future medical expenses. Rather, future medicals are to be included in the fund designated to pay future compensation benefits under subsection (g).

Breeden argues that the definition of compensation in the fund provided for in subsection (g) includes only future economic benefits and not future medicals because that subsection of § 42-1-560 only uses the term compensation.[6] While this argument is facially persuasive, we must decline to read the statute that way. If we were to accept Breeden's argument that

[6] The definition of "compensation" under § 42-1-100 is "the money allowance payable to an employee or to his dependents as provided for in this Title and includes funeral benefits provided in this Title."

'compensation' includes only that described in § 42-1-100, then there would be no reason for subsection (g) to exist.[7] Under § 42-1-560(b), the Carrier's lien includes "the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier...." (emphasis supplied). Pursuant to the statute the carrier's lien includes the "total amount of *compensation...paid or to be paid*." If we were to construe the language in subsection (b) to include compensation only as set forth in § 42-1-100, then the fund in subsection (g) would be unnecessary, as there would be nothing to put into that fund. This is because all of the compensation, including all future economic damages and medicals, would be folded into the Carrier's lien, leaving nothing for a fund under (g). We hold that the language in § 42-1-560(f) must be read to require the Carrier's lien to include those medical expenses paid, or accrued but not yet paid, at the time of the settlement and does not include medical expenses that have not yet accrued.

After the lien is calculated, and reduced if equitable, "…any balance remaining after payment of necessary expenses and satisfaction of the carrier's lien shall be applied as a credit against future compensation benefits for the same injury or death and shall be distributed as provided in subsection (g) of this section." S.C. Code Ann. § 42-1-560(b). We hold that "future compensation benefits for the same injury or death" includes future medicals in addition to economic compensation. It would be inequitable to allow the employee to recover damages based on future medicals, and then disallow recovery for the Carrier. "The 'compensation' expenditure for which the insurer is entitled to reimbursement includes not only wage benefits but hospital and medical payments as well; this is usually expressly stated, but is the correct result even if the reimbursement provision speaks only of 'compensation' paid…The obvious intention of the legislature in these [subrogation] statutes is to make the insurer whole, not to repay the insurer certain selected and stipulated parts of its compensation costs." *Larson's*, supra, § 117.03. While we reverse the Court of Appeals to the extent that it

[7] We must construe a statute to give effect to all of its provisions. Nexsen v. Ward, 96 S.C. 313, 80 S.E. 599 (1914). "[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." Id.

held future medicals are included in the Carrier's lien we affirm the decision that future medicals are to be included in establishing the amount of the fund under § 42-1-560(g).

II. Application of Lien Reduction to Future Compensation

We disagree with the Court of Appeals that the future compensation fund established pursuant to § 42-1-560(g) is subject to the lien reduction under § 42-1-560(f). Section 42-1-560(f) permits reduction of the Carrier's lien as defined by § 42-1-560(b). Subsection (g) specifically states that "[w]hen there remains a balance of five thousand dollars or more...*after*...*satisfaction of carrier's lien*...which is applicable as a credit against future compensation benefits for the same injury...the entire balance shall in the first instance be paid to the carrier by the third party." (emphasis supplied). The Carrier's lien is a separate pot of money that is not included in the same pool of money creating the fund under subsection (g). As we held above, future medicals are to be included in the fund under subsection (g), but are not included in the carrier's lien under subsection (f). Because the statute clearly separates the carrier's lien from the fund for future reimbursement, and because there is no provision for the fund under subsection (g) to be reduced under subsection (f), we reverse the Court of Appeals to the extent that it held subsection (g) was subject to the reduction provisions under subsection (f).

III. *Kirkland* Factors

In S.C. Code Ann. § 42-1-560(f), the General Assembly set out the formula for if and how a carrier's lien may be reduced. The Commission determines whether or not it is equitable to both parties and in the interest of justice to reduce the lien using, among other considerations, the four factors suggested in *Kirkland*. The Commission is not required to consider all of the factors, and is free to consider different factors than the ones listed in *Kirkland* if implicated by the facts. The Commission does not need to follow specific *Kirkland* factors in deciding whether or not it is equitable to reduce the carrier's lien, but instead the Commission should look at the policy behind subrogation, and judge whether or not a reduction is warranted on a

case-by-case basis. The Commission should be given wide discretion in deciding which factors to consider, and what weight to give each factor. The factors are to be used only to decide whether to reduce the lien and have no bearing on the *amount* of the reduction. Section 42-1-560(f) sets forth a specific formula[8] that should be followed if the Commission determines that the lien should be reduced.[9]

In this case, the Court of Appeals correctly held that the Commission erred in its application of some of the *Kirkland* factors. The four suggested factors include "strength of the claimant's case, likelihood of third party liability, claimant's desire to settle, and whether carrier is unreasonably refusing to consent to the settlement." Kirkland, supra at 394, 496 S.E.2d at 626. The likelihood of third party liability weighs against reduction of the lien because the employer should not have to shoulder an undue proportion of the liability for claimant's damages if there is clear third party liability. The strength of the claimant's case also weighs against reduction where the claimant has a strong case. The claimant's desire to settle relates to the settlement with the third party, not against the employer or carrier. This third factor weighs in favor of a reduction of the lien in this case because Claimant needed to settle for the benefit of his family. The fourth factor, whether the carrier is unreasonably refusing to consent to a settlement, weighs in favor of the equitable reduction of the lien, if the Carrier is unreasonably refusing to agree to the settlement.

The Commission also considered three additional factors: Carrier's conduct in fulfilling its statutory obligations; whether the Carrier has actual exposure[10]; and, the extent of the Claimant's injuries. The Court of Appeals

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[8] See supra note 3.

[9] The Court of Appeals incorrectly stated that the *Kirkland* factors should be considered "in deciding whether *or in what amount* to reduce the lien." Breeden, supra, at 208, 546 S.E.2d at 661 (emphasis supplied).

[10] In this case, there was evidence that the claim was re-insured by the Carrier.

held that the first two factors should not be considered, and that the third factor could be considered as a subset of the strength of the Claimant's case. We agree with the Court of Appeals that whether the Carrier has actual exposure should not be a factor in determining whether the lien should be reduced. A carrier should not be penalized for protecting its interests by buying re-insurance. However, the Court of Appeals erred in determining that the Commission should not have considered the carrier's conduct in fulfilling its statutory obligations, and the extent of the claimant's injuries. Once again, the Commission should apply only factors implicated by the evidence in the case before it, and apply these on a case-by-case basis.

Both the Commission and the Court of Appeals held that it was equitable to reduce the lien, after application of the *Kirkland* factors. We agree. Because we hold that the *Kirkland* factors only apply to the determination of whether to reduce the lien, and not to the amount by which to reduce it, we reverse the Court of Appeals to the extent that it remanded the case to the Commission to determine the percentage by which the lien should be reduced. However, we uphold the Court of Appeals' decision that a reduction in the Carrier's lien is warranted, and reinstate the Commission's determination that the lien should be reduced by a factor of .31.

CONCLUSION

We hold the *Kirkland* factors are a non-exclusive list, which can be applied to determine whether it is equitable to both parties and in the interests of justice to reduce the lien. Once it is determined that a reduction is appropriate, no decision is needed on the amount of the reduction, rather there is a mechanical application of the statute's formula. We hold that future medicals are not included in the carrier's lien under subsection (f), only those medicals which have already been paid or accrued but not yet paid at the time of the settlement. We also hold that future medicals are to be included in the future compensation fund under subsection (g), which is not subject to the lien reduction under subsection (f).

We reinstate the Commission's calculation of the Carrier's lien to include compensation, paid and accrued but not yet paid, and medical

benefits paid, or accrued but not yet paid. We also reinstate the Commission's determination of the factor by which the lien should be reduced. However, the Commission must recalculate the fund under subsection (g) to include future medical benefits. We remand this case to the Commission for proceedings consistent with this opinion.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles E. Feeley, Respondent.

Opinion No. 25653
Submitted April 14, 2003 - Filed May 19, 2003

DISBARRED

Henry B. Richardson, Jr., and Barbara M. Seymour, both of Columbia, for the Office of Disciplinary Counsel.

Charles E. Feeley, of Ladson, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent from the practice of law in this state.[1] The facts, as set forth in the agreement, are as follows.

[1] In October 1997, respondent was suspended for ninety days for failing to file a state income tax return. In the Matter of Feeley, 328 S.C. 165, 492 S.E.2d 790 (1997). Respondent also received a private reprimand in 1994.

Facts

In January 2002, respondent undertook the representation of a client for the purpose of attempting to obtain a bond reduction. The client's bond had been set at approximately $1,500,000. On February 14, 2002, respondent was successful in getting the bond reduced to $650,000. On that same date, the client posted the full amount of the bond in cash. Respondent's stated fee for this service was $5,000.

On February 2, 2002, respondent made an online payment to his personal Visa credit card account in the amount of $4,000, following specific instructions from the client and using an electronic check bearing a check number, payer bank, and account number provided by the client. When prompted by the computer to enter an account holder name, respondent inserted a name that the client had mentioned during respondent's conversations with him. The name used was not the client's name and was an individual unknown to respondent. Respondent and the client agreed that this would be the method of payment of respondent's fee for his representation of the client in the bond reduction matter. On February 8, 2002, the online payment to respondent's Visa account was reversed when the electronic check was not honored by the payer bank.

Between February 11, 2002, and February 13, 2002, respondent prepared four computer checks in varying amounts totaling $1,662,500 following the client's specific instructions. Respondent prepared the computer checks using check preparation software purchased for this purpose at the client's instruction. The check numbers, account holder name, payer bank, and account number on the computer checks were provided by the client. The party listed as the account holder on the computer checks was not the client and was unknown to respondent. Respondent delivered the computer checks to the client at the detention center. The client signed the checks using the listed account holder's name and not his own. Respondent deposited the computer checks into his trust accounts. Following the deposits of the computer checks, respondent wrote checks, obtained cash from his trust account, and purchased a number of cashier's checks made payable to

third parties. The computer checks were returned to respondent's bank when the payer bank refused to honor them, resulting in the recall of trust account checks respondent had previously written in connection with other client matters.

On February 14, 2002, respondent delivered a cashier's check in the amount of $650,000 to the clerk of the circuit court for the payment of the client's bond. The client was released shortly thereafter. Respondent met with the client following his release and gave him two cashier's checks payable to the client's father totaling $70,000, and cash in the amount of $9,950.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(d) (a lawyer shall not assist a client in conduct that the lawyer knows is criminal or fraudulent); Rule 1.2(e) (when a lawyer knows a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct); Rule 1.16(a) (a lawyer shall not represent a client or, where representation has commenced, shall withdraw from representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law); Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property and it shall be appropriately safeguarded); Rule 4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage

in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law). Finally, respondent has violated Rule 417, SCACR, which sets forth the requirements for financial recordkeeping.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Further, respondent shall, within thirty days of the date of this opinion, pay the costs of this proceeding ($160.76).

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Randy Gaskins and Linda Gaskins, Respondents,

v.

Southern Farm Bureau Casualty Insurance Company, South Carolina Farm Bureau Insurance Company and Timothy Brant, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25654
Heard March 18, 2003 - Filed May 19, 2003

AFFIRMED AS MODIFIED

Robert J. Thomas, of Rogers, Townsend & Thomas, of Columbia, for Petitioners.

Constance A. Anastopoulo, of the Anastopoulo Law Firm, of Charleston, for Respondents.

Thomas A. Pendarvis, of Lewis, Babcock & Hawkins, of Columbia, and J. David Flowers, of Greenville, for Amicus Curiae South Carolina Trial Lawyers Association.

JUSTICE BURNETT: We granted certiorari to review the decision of the Court of Appeals in Gaskins v. Southern Farm Bureau Casualty Insurance Company, 343 S.C. 666, 541 S.E.2d 269 (Ct. App. 2000). We affirm the decision as modified.

FACTUAL/PROCEDURAL BACKGROUND

Randy ("Randy") and Linda Gaskins (collectively "Gaskins") sued Southern Farm Bureau Casualty Insurance Company ("Southern Farm") for fraudulently inducing them to sign a claim's release. Gaskins' complaint alleges Randy's father accidentally shot him while hunting. Randy claims the shooting resulted in severe injuries and accrued medical bills in excess of $36,000.

The complaint alleges Southern Farm insured Randy's father. Further, the Gaskins allege a Southern Farm agent informed Randy's father the policy limit was $9,000 although it was actually $100,000.

The Gaskins complain they relied on the insurers erroneous information when they accepted $9,000 in compensation for Randy's injuries in exchange for releasing Southern Farm from any additional claims. Accordingly, the Gaskins seek to recover in tort against Southern Farm for fraudulently inducing them to settle the claim.

The trial court dismissed the Gaskins' fraud claim pursuant to Rule 12 (b)(6), SCRCP, citing Hopkins v. Fidelity Insurance Company, 240 S.C. 230, 125 S.E.2d 468 (1962). The Court of Appeals reversed, holding

Hopkins was a rule of pleading supplanted by the South Carolina Rules of Civil Procedure. The Court of Appeals found Hopkins did not bar the suit.

ISSUE

Did the Court of Appeals err in finding Hopkins inapplicable?

ANALYSIS

The Court of Appeals ruled Hopkins inapplicable because it did not involve applicable substantive law. We disagree.

In Hopkins a plaintiff sued an insurance company in tort for fraudulently inducing her to sign a release of all claims involving the death of her daughter. The trial court denied the defendant's demurrer.

On appeal, this Court relied upon three grounds to reverse the trial court's denial of the insurance company's demurrer. Importantly for the present case, we found the trial court erred in denying the demurrer because plaintiff suffered no damages as a result of the release.

Hopkins asserted she was barred by the release from suing the tortfeasor. Therefore, she argued she should be allowed to sue the insurance company for fraudulently obtaining the release. This Court disagreed and concluded if the tortfeasor was not found to be negligent of the underlying tort, then the plaintiff has suffered no damage because of the fraudulently obtained release. However, if the tortfeasor was found negligent for the child's death, then any fraudulently obtained release could not be enforced to bar plaintiff from recovering damages on the underlying tort.

The Hopkins decision enunciated a substantive rule, contrary to the Court of Appeals categorization of it as an outdated pleading requirement. See also Pilkington v. McBain, 274 S.C. 312, 314, 262 S.E.2d 916, 917 (1980).

South Carolina law prohibits an insurer from knowingly misrepresenting to third-party claimants "pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages." S.C. Code Ann. § 38-59-20 (1976). This general prohibition is instructive of legislative intent to prohibit such practices as complained of in this case. But see Masterclean, Inc. v. Star Ins. Co., 347 S.C. 405, 556 S.E.2d 371 (2001) (Claims Practice Act does not create a private cause of action).

Further, a majority of courts now recognize a tort against an insurance company for fraudulently obtaining a release.[1] A primary reason why courts recognize the tort is to discourage insurance companies from engaging in fraud. Phipps v. Winneshiek County, 593 N.W.2d 143, 146 (Iowa 1999). While the rationale of Hopkins is sound, its rule does not clearly deter insurance companies from fraudulently obtaining a release.

However, as noted in Hopkins, a plaintiff cannot maintain an action against an insurer for fraudulently obtaining a release until he proves the materiality of the false representation. To establish the materiality element of the tort of fraud, the plaintiff must demonstrate the insurer had an obligation to pay by alleging and proving the liability of the tortfeasor.

We modify Hopkins in order to deter insurance companies from attempting to defraud claimants while recognizing that a plaintiff must show the insurer's false representation was material. The Gaskins may sue Southern Farm in tort for fraudulently inducing them to sign a release.

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[1] See, e.g., Matsuura v. Alston & Bird, 166 F.3d 1006 (9th Cir. 1999) (allowing claim under Delaware law); DiSabatino v. United States Fidelity & Guar. Co., 635 F. Supp. 350 (D. Del. 1986) (same); Bilotti v. Accurate Forming Corp., 188 A.2d 24 (N.J. 1963) (same); Ponce v. Butts, 720 P.2d 315 (N.M. Ct. App. 1986) (same). But see, e.g.,Taylor v. Hopper, 276 P. 990 (Cal. 1929) (disallowing claim); Davis v. Hargett, 92 S.E.2d 782 (N.C. 1956) (same).

However, as a predicate to recovery, if any, Gaskins must first allege and prove that Randy's father was negligent in the underlying tort.

The trial court erred in dismissing the Gaskins complaint pursuant to Rule 12 (b)(6), SCRCP. While the Court of Appeals correctly reversed the trial court, it did so on a misunderstanding of the Hopkins decision. We, therefore, remand this matter to the trial court for further proceedings consistent with this opinion.

CONCLUSION

The Court of Appeals decision is **AFFIRM AS MODIFIED.**

TOAL, C.J., MOORE, J., and Acting Justices Marc H. Westbrook and John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Olmstead, Respondent,

v.

Shakespeare, Petitioner.

Joanna Olmstead, Respondent,

v.

Shakespeare, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Newberry County
John W. Kittredge, Circuit Court Judge

Opinion No. 25655
Heard March 6, 2003 - Filed May 19, 2003

AFFIRMED AS MODIFIED

Gray T. Culbreath, of Collins & Lacy, P.C., of Columbia, for Petitioner.

Daniel E. Henderson, of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Ridgeland, for Respondents.

CHIEF JUSTICE TOAL: Petitioner, Shakespeare, appeals from the Court of Appeals' decision finding that Respondent, Charles Olmstead ("Olmstead"), is not Shakespeare's statutory employee.

FACTUAL / PROCEDURAL BACKGROUND

Olmstead owned and operated a truck and trailer that he leased to his employer, Hot Shot Express ("Hot Shot"). Hot Shot dispatched Olmstead to various places to pick up and deliver goods and materials. Hot Shot paid Olmstead after he completed delivery based on the number of miles he had driven.

Hot Shot sent Olmstead to pick up a load of fiberglass utility poles from Shakespeare's plant in Newberry, South Carolina for delivery to Shakespeare's customer in Montana. On May 19, 1997, Olmstead arrived at Shakespeare and assisted Shakespeare's staff in loading and strapping the large poles onto Olmstead's flatbed trailer. After all the poles were loaded, Shakespeare instructed Olmstead that some of the poles needed to be removed because they would not meet quality control and would not be accepted by the customer in Montana. Olmstead began loosening the straps around the poles, and was injured when several of the poles fell off the trailer unexpectedly. At least one of the poles struck Olmstead.

Olmstead filed his original complaint against Shakespeare in September 1997. Shakespeare filed a motion to dismiss, alleging Olmstead was its statutory employee, and, therefore, that workers' compensation provided Olmstead's exclusive remedy. S.C. Code Ann. § 42-1-400 (1976 & Supp. 2002). At some point, Shakespeare withdrew its motion to dismiss, and Olmstead's complaint was dismissed pursuant to Rule 40(j), SCRCP.

Olmstead re-filed his complaint on May 14, 1999, along with Mrs. Olmstead's loss of consortium claim.[1] Shakespeare asserted statutory employment as a defense in its answer, and filed a motion to dismiss on the

[1] The two-year period for filing a workers' compensation claim expired on May 19, 1999. S.C. Code Ann. § 42-15-40.

same ground. After hearing arguments, the trial judge granted Shakespeare's motion to dismiss. The Court of Appeals reversed. *Olmstead v. Shakespeare,* 348 S.C. 436, 559 S.E.2d 370 (Ct. App. 2002). This Court granted Shakespeare's petition for certiorari on the following issues:

I. Did the Court of Appeals err in finding that Olmstead was not the statutory employee of Shakespeare based on this Court's decision in *Abbott v. The Limited,* 338 S.C. 161, 526 S.E.2d 513 (2000)?

II. Did the Court of Appeals err by indicating that the principles of workers' compensation may operate differently when exclusivity of the statute is asserted by the defendant as a shield to liability?

LAW /ANALYSIS

I. *Abbott*

Shakespeare argues that *Abbott* does not apply to this case. We disagree.

In *Abbott,* the plaintiff was employed by a common carrier. The carrier had contracted with the defendant retailer, The Limited, Inc., to deliver goods to the defendant retailer's stores. 338 S.C. at 162, 526 S.E.2d at 514. The plaintiff was injured when he slipped and fell while unloading boxes on the defendant retailer's premises. *Id.* The plaintiff received workers' compensation benefits from his common carrier employer and brought a negligence action against the defendant retailer. *Id.* The defendant retailer moved to dismiss on grounds that plaintiff was its statutory employee, and, therefore, that workers' compensation provided plaintiff's exclusive remedy under S.C. Code Ann. § 42-1-400. *Id.* The trial court granted the motion to dismiss, but this Court reversed, holding that "the mere recipient of goods delivered by a common carrier is not the statutory employer of the common carrier's employee." *Id.* at 514, 526 S.E.2d at 163.

The statutory employment concept is based on South Carolina Code Ann. § 42-1-400. That section provides,

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute *any work which is a* ***part of his trade, business or occupation*** and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (Supp. 2002) (emphasis added). In determining whether an employee is engaged in activity that is "part of [the owner's] trade, business, or occupation" as required under section 42-1-400, this Court has applied three tests. The activity is considered "part of [the owner's] trade, business, or occupation" for purposes of the statute if it (1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; ***or*** (3) has previously been performed by the owner's employees. *Glass v. Dow Chemical*, 325 S.C. 198, 482 S.E.2d 49 (1997). If the activity at issue meets even *one* of these three criteria, the injured employee qualifies as the statutory employee of "the owner." *Id.*

Applying these tests in *Abbott*, the Court found that "the fact that it was important to [defendant retailer] to *receive* goods does not render the delivery of goods an important part of [defendant retailer's] business." *Abbott,* 338 S.C. at 163, 526 S.E.2d at 514. The Court explained further, "'[t]he mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is a part or process of the business.'" *Id.* (quoting *Caton v. Winslow Bros. & Smith Co.,* 34 N.E.2d 638, 641 (Mass. 1941)). In so holding, the Court explicitly overruled two cases to the extent they could be read to hold otherwise: *Neese v. Michelin Tire Corp.,* 324 S.C. 465, 478 S.E.2d 91 (Ct.

App. 1996) (holding that plaintiff truck driver employed by common carrier who was injured transporting raw materials to and from Michelin pursuant to Michelin's contract with his employer qualified as the statutory employee of Michelin), and *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985) (finding plaintiff truck driver qualified as statutory employee of defendant car dealership when he was injured transporting cars to the dealership). *Abbott,* 338 S.C. at 164, 526 S.E.2d at 514, n. 1.

Shakespeare contends *Abbott* is distinguishable from the present case. Shakespeare argues that the delivery to the defendant retailer in *Abbott* was not an essential part of its business because plaintiff was delivering inventory that defendant retailer then had to sell. Conversely, Shakespeare argues delivery of the fiberglass poles in this case was essential to its business because the sale would be complete upon delivery. In Shakespeare's words, "[t]he distinction in this case is that Olmstead was delivering a product to Shakespeare's customer and without that delivery there would be no sale." (Pet. Br. at 5). Shakespeare also emphasizes that *Abbott* involved delivery of goods ***to*** the defendant while the present case involves delivery ***from*** the defendant.

The Court of Appeals refused to read *Abbott* so narrowly. The court agreed that *Abbott* involved the *receipt* of goods as opposed to *delivery* of goods, and, as such, noted it was unnecessary for the *Abbott* court to address the delivery of goods from a manufacturer to a customer because that factual issue was not presented in *Abbott*. 348 S.C. at 372, 559 S.E.2d at 339. Further, the Court of Appeals noted that neither the *Neese* nor the *Hairston* case, which this Court explicitly overruled, emphasized or even addressed delivery in this context. *Id.*

In our opinion, the Court of Appeals correctly interpreted this Court's decision in *Abbott.* We read their opinion as holding that *Abbott* is not limited to receipt of goods cases, but applies equally to delivery of goods cases as long as the transportation of goods is not the primary business of the company to whom or from whom goods are being delivered. Shakespeare manufactures fiberglass products and was shipping a finished product to a customer via a common carrier. As this Court noted in *Abbott*, "[t]he fact

that it was important to [defendant retailer] to *receive* goods does not render delivery of goods an important part of the [defendant retailer's] business" for statutory employment purposes. 338 S.C. at 163, 526 S.E.2d at 514. Likewise, the fact that it was important to Shakespeare to deliver its finished product to its customer in order to consummate a sale does not render the delivery of its products an important part of its business for purposes of statutory employment.

This Court has recognized that the construction of the statutory employment statute, and the tests established to interpret that statute, do not eliminate the need for an individualized determination of the facts of each case in which statutory employment is alleged. "Since no easily applied formula can be laid down for determining whether work in a particular case meets these tests, each case must be decided on its own facts." *Dow,* 325 S.C. at 201, 482 S.E.2d at 51 (citing *Ost v. Integrated Prods., Inc.,* 296 S.C. 241, 371 S.E.2d 796 (1988)). *Abbott* does not change the need for this case by case analysis; *Abbott* merely establishes that transportation of goods is important to nearly all businesses, and, that transportation of goods by a common carrier alone, without something more, does not qualify as "part of [the owner's] trade, business, or occupation" under any of the three established tests for statutory employment.

Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. All of the raw materials used to manufacture Shakespeare's products arrive at Shakespeare by common carrier and almost all of its finished products leave the plant by common carrier. Shakespeare's representative testified in his deposition that Shakespeare pays for delivery to its customer only when the order exceeds $3,000. Although delivery by common carrier was certainly important to Shakespeare's operation, it does not follow that such delivery was "'part or process'" of its manufacturing business. *See Abbott*, 338 S.C. at 164, 526 S.E.2d at 514 (quoting *Caton*, 34 N.E.2d at 641) (finding defendant manufacturer of wool was not statutory employer of driver employed by common carrier to transport wool to defendant's warehouse).

In our opinion, the Court of Appeals employed the correct analysis in finding that Olmstead was not Shakespeare's statutory employee and we affirm their decision. *Abbott* represents a change in this state's jurisprudence on what activity constitutes "part of [the owner's] trade, business or occupation" under section 42-1-400, and likely conflicts with cases other than the ones we explicitly overruled in footnote 1 of the *Abbott* opinion. As such, we now overrule all prior cases to the extent they are in conflict with our holding in *Abbott* and now in this case.

II. Exclusivity As A Shield

After the Court of Appeals concluded that Olmstead was not the statutory employee of Shakespeare, it went on to comment that the broad construction in favor of coverage normally employed in workers' compensation cases was not "as pertinent where the statutory employee definition and exclusive remedy provision are used as a shield to prevent recovery under another theory." *Olmstead,* 348 S.C. at 441, 559 S.E.2d at 372. This Court has not previously adopted a different standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory, and declines to do so now.[2]

CONCLUSION

For the foregoing reasons, we **AFFIRM AS MODIFIED** the decision of the Court of Appeals and overrule prior cases to the extent they conflict with our holding in this case and in *Abbott.*

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

[2] For instance, this Court made no such statement in *Glass v. Dow Chemical,* in which the defendant asserted statutory employment as a shield just as Shakespeare did in the present action. 325 S.C. 198, 482 S.E.2d 49.

The Supreme Court of South Carolina

In the Matter of Douglas A. Barker, Respondent

ORDER

Respondent was suspended on November 12, 2002, for a period of six months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law of this state.

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

May 20, 2003

The Supreme Court of South Carolina

In the Matter of Maria Reichmanis, Respondent.

ORDER

Upon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public or to the administration of justice, this Court may suspend the lawyer pending a final determination in any proceeding under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. Rule 17(b), RLDE. Based on evidence received this date at hearings on this matter and another matter involving respondent, we find respondent poses a substantial threat of serious harm to the public and to the administration of justice.

IT IS THEREFORE ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Michael A. Mann, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust

account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Mann shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Mann may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Michael A. Mann, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Michael A. Mann, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Mann's office.

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

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

May 15, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent

v.

Dana Dudley, Appellant

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3641
Heard March 19, 2003 – Filed May 14, 2003

VACATED

Assistant Appellate Defender Aileen P. Clare, of SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Druanne Dykes White, of Anderson, for Respondent.

CONNOR, J.: Dana Dudley appeals her convictions for trafficking in cocaine and conspiracy to traffic cocaine. Dudley, a Georgia resident, raises two issues on appeal: (1) whether South Carolina had jurisdiction to

prosecute her because any alleged criminal conduct took place outside the state; and (2) whether the trial judge erred in failing to direct a verdict of not guilty on the charge of conspiracy to traffic cocaine because there was no evidence she agreed to violate South Carolina law. We vacate her convictions.

Originally, a three-judge panel of this Court heard this case. In a divided opinion, the panel affirmed Dudley's conviction and sentence for trafficking in cocaine, and reversed her conviction for conspiracy to traffic cocaine. State v. Dudley, Op. No. 3579 (S.C. Ct. App. filed Dec. 9, 2002) (Shearouse Adv. Sh. No. 41 at 57). Pursuant to section 14-8-90(a)(2) of the South Carolina Code of Laws, the full Court voted to rehear the case en banc. S.C. Code Ann. § 14-8-90(a)(2) (Supp. 2002) ("The Court may sit en banc to hear cases upon . . . its own motion agreed to by six judges of the Court."). Section 14-8-90(b) requires six votes for a reversal of the judgment below. S.C. Code Ann. § 14-8-90(b) (Supp. 2002). On rehearing, six judges voted to vacate both of Dudley's convictions. Accordingly, the original panel opinion is hereby withdrawn, and the opinions of this Court are substituted.

FACTS

Earl Hale and Donald Stokes, admitted drug dealers, both resided in Roanoke, Virginia. Because Stokes and Hale were having some "dry spells" in Roanoke, they decided to go to Atlanta to make a "dope run." Dana Dudley, a resident of Atlanta, Georgia, was a long-time friend of Stokes. On numerous occasions, Stokes spoke with Dudley by telephone. Some time in the early part of September of 1997, Stokes called Dudley from Roanoke and told her that he was planning a trip to Atlanta and he would contact her when he arrived. On September 9, 1997, Stokes and Hale drove from Roanoke to Atlanta. Upon arriving, Stokes and Hale went to a nightclub and then returned to their hotel. The next morning, September 10th, Stokes called Dudley and asked her to come to his hotel room. Stokes asked Dudley if she could get them cocaine. Dudley took money from Stokes and Hale and left to purchase the cocaine. Within thirty to forty-five minutes, Dudley returned with the cocaine.

After purchasing the cocaine, Hale and Stokes proceeded to drive home to Roanoke via Interstate 85 north toward Virginia. Hale and Stokes intended to sell the cocaine in Virginia. As they were driving through Anderson County, Deputy Matthew Durham, employed with the Anderson County Sheriff's Department, signaled for them to stop after noticing Hale was weaving and making an improper lane change. Deputy Durham gave Hale a warning and asked whether he could search the vehicle. After Hale consented, Deputy Durham searched the vehicle and found the cocaine. At that point, Stokes attempted to flee while Hale was being arrested by Deputy James Littleton, Deputy Durham's partner. While Deputy Durham chased Stokes, Hale broke free in an attempt to retrieve the cocaine and dispose of it. Ultimately, the deputies apprehended Stokes and Hale.

After their arrest, Stokes and Hale identified Dudley as the person from whom they had purchased the cocaine. As part of a deal, Stokes and Hale agreed to assist the Drug Enforcement Agency in prosecuting narcotics cases in South Carolina and Virginia. Through a series of recorded telephone conversations, Stokes set up a controlled buy with Dudley. Dudley refused to meet Stokes in South Carolina, but agreed to meet him in Atlanta. Although Stokes met with Dudley just outside of Atlanta on September 15th, the purchase was not successful. Dudley, however, was arrested at this time for the prior transaction when Stokes and Hale were stopped in Anderson on September 10th.

An Anderson County grand jury indicted Dudley for trafficking in cocaine in an amount greater than 200 grams and less than 400 grams, and conspiracy to traffic cocaine.[1] A jury convicted Dudley of both charges. The

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[1] The indictment for trafficking in cocaine provided:

> That Dana Dudley, AKA Dana Wilson did in Anderson County, South Carolina on or about September 10, 1997 traffic in cocaine by aiding and abetting the bringing into this State of South Carolina 200 or more grams of cocaine.

The indictment charging Dudley with conspiracy to traffic cocaine stated:

trial judge sentenced her to twenty-five years imprisonment and payment of a $6,000 fine on both charges. The sentences were to be served concurrently. Dudley appeals.

DISCUSSION

I.

In her appeal, Dudley raises two distinct issues. First, Dudley argues South Carolina lacked jurisdiction to prosecute her for trafficking in cocaine given she is a Georgia resident who never entered Anderson County and never intended to commit any criminal act in South Carolina. Secondly, Dudley contends the trial judge erred in failing to direct a verdict of not guilty as to the charge of conspiracy because there was no evidence she agreed to violate South Carolina law.

In its analysis of these issues, the original panel thoroughly discussed several jurisdictional concepts. Specifically, all members of the panel found: (1) the circuit court was vested with subject matter jurisdiction by means of a valid indictment; and (2) Dudley consented to the circuit court's exercise of personal jurisdiction because she appeared at trial, defended her case, and failed to raise any objection. Because Dudley was a Georgia resident and never entered the State of South Carolina in conjunction with the two offenses for which she was charged, the panel concluded its jurisdictional analysis with a discussion of this State's exercise of extraterritorial jurisdiction over acts committed by Dudley outside the state.

Although neither Dudley nor the State specifically raised or argued extraterritorial jurisdiction,[2] the original panel implicitly recognized that

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> That Dana Dudley, AKA Dana Wilson did in Anderson County, South Carolina on or about September 10, 1997 to September 15, 1997 conspire with another to knowingly traffic in excess of 200 grams of cocaine.

[2] Other than a reference in her closing argument, Dudley never raised any jurisdictional challenge to the circuit court. On appeal, Dudley only challenged the lack of subject matter jurisdiction with respect to the charge of trafficking in cocaine. In contrast, the State argued there was no

extraterritorial jurisdiction is a theory under the general concept of subject matter jurisdiction. See Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) (stating issues involving subject matter jurisdiction may be raised at anytime, including for the first time on appeal); State v. Brown, 351 S.C. 522, 570 S.E.2d 559 (Ct. App. 2002) (stating issues related to subject matter jurisdiction can be raised at anytime, can be raised for the first time on appeal, and can be raised sua sponte by the Court).

During the rehearing en banc, the question arose concerning whether extraterritorial jurisdiction is actually a component of subject matter jurisdiction or whether it is more properly considered part of personal jurisdiction. This question is significant in several respects. If extraterritorial jurisdiction is a component of subject matter jurisdiction, this Court is required to address it in this case despite Dudley's failure to specifically argue it at trial or on appeal. If, on the other hand, extraterritorial jurisdiction is classified as part of personal jurisdiction, then this Court would be precluded from addressing this issue, given Dudley waived any challenge to personal jurisdiction. See Bakala v. Bakala, 352 S.C. 612, ___, 576 S.E.2d 156, 165 (2003) ("Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised."); State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964) (holding a defendant may waive any objection to personal jurisdiction by failing to object and going to trial on the merits).

To answer this question, we must analyze the general concept of jurisdiction and distinguish between the component parts of subject matter jurisdiction and personal jurisdiction.

A.

"[J]urisdiction of the offense charged and of the person of the accused is indispensable to a valid conviction." State v. Langford, 223 S.C. 20, 26, 73 S.E.2d 854, 857 (1953). Our Supreme Court has distinguished the types of jurisdiction as follows:

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jurisdictional issue before this Court. The State characterized Dudley's appeal as a question of personal jurisdiction, which Dudley waived by failing to raise this issue at trial.

> Jurisdiction is of two distinct kinds: (1) Jurisdiction of the subject or subject matter, and (2) jurisdiction of the person. In determining questions relating to each, different rules apply. Jurisdiction of the subject matter cannot be waived by any act or admission of the parties; but a party may confer jurisdiction over his person by consent, or may waive the right to raise the question.

Douglas, 245 S.C. at 87, 138 S.E.2d at 847. The Court has explained the theoretical underpinnings of subject matter jurisdiction as follows:

> [T]he question of [subject matter] jurisdiction cannot be waived by any act or admission of the parties, for the very obvious reason that the parties have no power to invest any tribunal with jurisdiction of a subject over which the law has not conferred jurisdiction upon such tribunal. Hence the common expression, 'Consent cannot confer jurisdiction.'

Langford, 223 S.C. at 27, 73 S.E.2d at 857 (quoting City of Florence v. Berry, 61 S.C. 237, 240, 39 S.E. 389, 390 (1901)). "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000).

A circuit court has subject matter jurisdiction over a criminal offense if: (1) there has been an indictment that sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser-included offense of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). An indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987); S.C. Code Ann. § 17-19-20 (2003) ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the

statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

The rule for personal jurisdiction, however, is very different. Our Supreme Court has stated:

> The party may, by consent, confer jurisdiction *over his person*, or may waive the right to raise the question, whether the proper steps prescribed by law for obtaining such jurisdiction have been taken, as is illustrated by the familiar instance of a party who, though not served with a summons, appears and answers, and is thereby precluded from afterwards raising the question as to whether the court had acquired jurisdiction of his person.

Langford, 223 S.C. at 27, 73 S.E.2d at 857 (quoting City of Florence v. Berry, 61 S.C. 237, 240, 39 S.E. 389, 390 (1901)).

"Generally, jurisdiction of the subject matter is satisfied when appropriate charges are filed in a competent court, while jurisdiction of the person is acquired when the party charged is arrested or voluntarily appears in court and submits himself to its jurisdiction." Douglas, 245 S.C. at 87, 138 S.E.2d at 847.

Applying these concepts to the instant case, South Carolina was vested with personal jurisdiction because Dudley appeared at trial and defended her case on the merits. With respect to subject matter jurisdiction, Dudley never challenged the validity of her indictments. The indictments are valid in that they sufficiently state the elements of the charged offenses. Thus, South Carolina was vested with subject matter jurisdiction to the extent provided by a valid indictment.

Even though these jurisdictional requirements are satisfied, the facts of this case require an additional level of jurisdictional analysis. Without question South Carolina has jurisdiction to prosecute crimes that occur within its borders. See S.C. Const. art. I, § 11 ("No person may be held to answer

for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . . ."); S.C. Code Ann. § 1-1-10 (Supp. 2002) ("The sovereignty and jurisdiction of this State extends to all places within its bounds . . . ."). Dudley's alleged criminal conduct, however, occurred entirely in Georgia. Therefore, we must determine whether South Carolina was vested with jurisdiction over these offenses.

B.

"[J]urisdictional limits are tied to the territorial reach of the particular government's power." 4 Wayne R. LaFave et al., Criminal Procedure § 16.1(a), at 458 (2d ed. 1999). More specifically, "[s]ubject matter jurisdiction is limited by the territorial reach of the courts." Rios v. State, 733 P.2d 242, 245 (Wyo. 1987). Common law has established "a territorial principle as the jurisdictional foundation for the reach of state laws. Under that principle, states have power to make conduct a crime only if that conduct takes place, or its results occur, within the state's territorial borders." 4 Wayne R. LaFave et al., Criminal Procedure § 16.1(a), at 459 (2d ed. 1999). "Conversely, there can be no territorial jurisdiction where conduct and its results both occur outside the state's territory." 4 id. § 16.4(c), at 572; see State v. Smith, 421 N.W.2d 315, 318 (Minn. 1988) ("[C]riminal jurisdiction has been premised on the concept of territorialism. Jurisdiction depends on where the crime was committed.").

> The Supreme Court of North Carolina explained this theory as follows: Under this theory, a state's jurisdiction over criminal matters cannot extend beyond its territorial boundaries. Under the historical strict territorial principle, a state court had jurisdiction only over those crimes which occurred entirely within that state's boundaries; if any essential element occurred in another state, neither possessed jurisdiction over the criminal offense. Under this view of jurisdiction, only one state could have jurisdiction over a particular crime.

State v. Darroch, 287 S.E.2d 856, 860 (N.C. 1982) (citations omitted); In re Vasquez, 705 N.E.2d 606, 610 (Mass. 1999) ("The general rule, accepted as

'axiomatic' by the courts in this country, is that a State may not prosecute an individual for a crime committed outside its boundaries.").

The United States Supreme Court expanded the concept of strict territorial jurisdiction in Strassheim v. Daily, 221 U.S. 280 (1911). In Strassheim, Daily, an Illinois resident, was indicted in Michigan for bribery and obtaining money from the State by false pretenses based on misrepresentations with respect to secondhand machinery he sold to the State of Michigan. The Governor of Illinois responded to Michigan's request for a warrant that extradited Daily to Michigan. Daily filed a petition for habeas corpus. At the hearing, Daily presented evidence that he was in Chicago, Illinois, when the money was obtained from Michigan and never entered the state until the fraud was complete. The person who received the funds, a warden in a Michigan prison, had agreed to assist Daily in defrauding the State. The district court granted the petition, finding the facts alleged in the indictment did not constitute a crime against the laws of Michigan. The Supreme Court reversed the order granting the petition. The Court held Michigan could prosecute Daily, reasoning "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." Id. at 285.

Decisions from other jurisdictions have repeatedly recognized the doctrine set forth in Strassheim. See, e.g., People v. Blume, 505 N.W.2d 843, 845 (Mich. 1993) ("The authority to exercise jurisdiction over acts that occur outside the state's physical borders developed as an exception to the rule against extraterritorial jurisdiction. That exception, however, is 'limited to those acts that are intended to have, and that actually do have, a detrimental effect within the state.'" (quoting Strassheim, 221 U.S. at 285)); Keselica v. Commonwealth, 480 S.E.2d 756, 758 (Va. Ct. App. 1997) (recognizing "Result Theory" enunciated in Strassheim); Rios, 733 P.2d at 249 (referencing Strassheim and stating "a state could criminalize acts which occurred outside the state if they produced an effect within the state"); In re Vasquez, 705 N.E.2d at 610 (recognizing "effects" doctrine established in Strassheim and stating "a State is not deprived of jurisdiction over every criminal case in which the defendant was not physically present within the

State's borders when the crime was committed"); see generally R.P.D., Annotation, Absence From State at Time of Offense as Affecting Jurisdiction of Offense, 42 A.L.R. 272 (1926).

Other states have adopted the Strassheim doctrine by enacting a jurisdictional statute. See 4 Wayne R. LaFave et al., Criminal Procedure § 16.4(c), at 579 (2d ed. 1999) ("A substantial majority of the states today have statutes that adopt an interpretation of the territorial principle substantially more expansive than the traditional common law position."); see, e.g., Ariz. Rev. Stat. Ann. § 13-108(A) (West 2001); Fla. Stat. Ann. § 910.005(1) (West 2001); 720 Ill. Comp. Stat. Ann. 5/1-5 (West 2002); Minn. Stat. Ann. § 609.025 (West 1987); Ohio Rev. Code Ann. § 2901.11(A) (Anderson 2002); Utah Code Ann. § 76-1-201 (1999).

Although states with a specific legislative enactment certainly more clearly define a state's jurisdictional power over criminal conduct outside of its territorial borders, the absence of a state jurisdictional statute is not dispositive. See Rios, 733 P.2d at 249 ("While Wyoming does not have a specific statute which permits the exercise of jurisdiction when extraterritorial conduct causes a result in this state, the concept articulated in *Strassheim v. Daily, supra*, does not depend upon the existence of such a statute."); In re Vasquez, 705 N.E.2d at 610 (holding, in the absence of a state jurisdictional statute, a state is not precluded from relying on rule in *Strassheim*, given "*Strassheim* Court itself made no reference to the need for such a statutory provision"). Thus, the absence of a South Carolina statute does not prohibit this State's prosecution of out-of-state criminal conduct.[3]

[3] We note the General Assembly has defined at least two limited situations extending the reach of South Carolina's criminal statutes. See S.C. Code Ann. § 17-21-30 (2003) ("When any person within the limits of this State shall inflict an injury on any person who at the time the injury is inflicted is beyond the limits of this State or when any person beyond the limits of this State shall inflict an injury on any person at the time within the limits of this State and such injury shall cause the death of the person injured, in either case the person causing such death shall be subject to be indicted, tried and punished in the first case in the county of this State where the person inflicting the injury was at the time when the injury was inflicted and, in the

In a case that pre-dates Strassheim, South Carolina addressed the concept of extraterritorial jurisdiction, particularly the "effects doctrine." State v. Morrow, 40 S.C. 221, 18 S.E. 853 (1893). In Morrow, the defendant was indicted pursuant to a South Carolina statute for the offense of procuring medicine for a woman with intent to cause an abortion. The defendant, a resident of Washington, D.C., procured the medication and mailed it to the woman in South Carolina. The woman's use of the medication resulted in an abortion, and ultimately the woman's death. Because the defendant's overt acts took place in Washington, D.C., the Supreme Court considered the question of whether South Carolina had jurisdiction for the charged offense.[4] The Court implicitly recognized the "effects doctrine," stating South Carolina would have jurisdiction over Morrow's acts in the District of Columbia "if the acts there done were intended to take effect in this State, and did there actually take effect . . . ." Id. at 237, 18 S.E. at 859. Although the Court acknowledged that courts of one state could not take jurisdiction of offenses committed in another state, it considered the question of whether Morrow's offense "was, in the eye of the law, committed within the limits of this State." Id. at 241, 18 S.E. at 860. Applying this analysis, the Court concluded Morrow committed an offense within South Carolina, given Morrow's acts

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second case, in the county in which it was received."); S.C. Code Ann. § 17-21-50 (2003) ("A person charged as an accessory before the fact may be indicted, tried and punished in the same court and county in which the principal felon might be indicted and tried, although the offense of counseling, hiring or procuring the commission of such felony is committed on the high seas or on land outside of the county either within or without the limits of this State.").

[4] Despite testimony that Morrow had acted and formulated his intent within South Carolina, which the Court believed was sufficient to establish jurisdiction in this State, the Court went on to consider Morrow's specific issue by assuming there were no overt acts in South Carolina. Thus, to the extent the Court's analysis could be construed as dicta, we reference Morrow for the sole purpose of establishing that our Supreme Court has recognized and applied the "effects doctrine."

"provided the effect thereby intended reached the person for whom it was intended while in this State." Id. at 238, 18 S.E. at 859.

In 1939, post-Strassheim, our Supreme Court again addressed this doctrine in State v. Farne, 190 S.C. 75, 1 S.E.2d 912 (1939). In that case, Farne was convicted of uttering a forged bank check and his co-defendant, Kennedy, was convicted of accessory before the fact. Kennedy moved to quash the indictment charging him with accessory before the fact, arguing the alleged offense was committed "both within and without the State." Id. at 82, 1 S.E.2d at 915. The indictment alleged the conduct for this charge occurred in Anderson County as well as Asheville, North Carolina, and Nashville, Tennessee. Kennedy asserted "if a person outside of this State procures a felony to be committed in this State by a criminal agent, he is an accessory before the fact, and should be tried in the State where he instigates the crime, and not in the State where such crime is committed by the principal." Id. at 83, 1 S.E.2d at 915. Our Supreme Court affirmed Kennedy's conviction. The Court found Kennedy's conduct took place beyond the limits of Anderson County but also in Anderson County where the crime was completed. Even though Kennedy was absent from South Carolina at the time of the offense, he counseled Farne with the intent that the offense be committed within South Carolina. The Court reasoned:

> Although the general rule is that a State or sovereignty cannot punish for offenses committed beyond its territorial limits, it may pass laws in regard to its own citizens which will be binding and obligatory on them when they are beyond such limits, and for the violation of which they may be punished in its Courts, whenever it can find them within its jurisdictions. Aside from this, where a person, being beyond the limits of a State or Country, puts in operation a force which produces a result and constitutes a crime within those limits, he is as liable to indictment and punishment, if jurisdiction can be obtained of his person, as if he had been within the limits of the State or Country when the crime was committed.

Farne, 190 S.C. at 83, 1 S.E.2d at 915 (citations omitted) (emphasis added).

Although the Strassheim doctrine has received limited application by our appellate courts, it has been recognized and adopted as a basis for jurisdiction over criminal conduct outside the territorial borders of South Carolina.

C.

As evident from the foregoing discussion, the concept of extraterritorial jurisdiction is applicable to the instant case. Dudley, however, did not raise this specific jurisdictional challenge to the circuit court or for that matter in her initial appeal. In light of this procedural defect, we must determine whether extraterritorial jurisdiction is a component of subject matter jurisdiction that can be raised sua sponte by this Court. Because our research reveals no South Carolina case directly addressing this issue, we are guided by decisions of other jurisdictions and the analysis of secondary authorities.

The Supreme Court of Massachusetts thoroughly analyzed this issue in a habeas corpus case. In re Vasquez, 705 N.E.2d 606 (Mass. 1999). Vasquez, a Massachusetts resident, was divorced in 1985 and ordered to pay child support for his two children. In 1987, Vasquez's ex-wife and two children relocated to Oregon without his knowledge. Vasquez never went to Oregon and failed to make child support payments. As a result, Vasquez's ex-wife filed a reciprocal support petition in Oregon under the Uniform Reciprocal Enforcement Support Act. Because authorities in Massachusetts were unable to locate Vasquez to compel payment, Oregon authorities obtained an indictment against him for non-support. Pursuant to a warrant issued by the Governor of Massachusetts, at the extradition request of the Governor of Oregon, Vasquez was arrested. Vasquez filed a petition for a writ of habeas corpus challenging the constitutionality of the restraint of his liberty pending extradition. Vasquez appealed the denial of his petition to the Supreme Court of Massachusetts.

On appeal, Vasquez primarily claimed the courts of Oregon did not have personal jurisdiction over him and, therefore, the Oregon indictment was invalid. Initially, the Court dismissed Vasquez's claim that the minimum contacts analysis applicable to personal jurisdiction in civil matters also governed criminal cases. The Court specifically found "[t]he cases dealing

with personal jurisdiction address issues quite inapposite to the context of a criminal case." Id. at 609. The Court reasoned:

> The leading cases, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed.2d 490 (1980), dealt with the question whether the courts of one jurisdiction could render a judgment that was valid and binding against a defendant everywhere and so could be carried to another State, where enforcement could be had under the full faith and credit clause of the United States Constitution. Art. IV, § I.

Id. Therefore, the Court concluded "[t]he jurisprudence of personal jurisdiction has no bearing on the question whether a person may be brought to a State and tried there for crimes under that State's laws." Id. The Court further stated, "[s]uch a claim is not barred by the fact of an individual's presence within the prosecuting State." Id.

Several other jurisdictions concur with the analysis of the Supreme Court of Massachusetts. See, e.g., Black v. State, 819 So. 2d 208 (Fla. Dist. Ct. App. 2002) (holding Florida acquired personal jurisdiction over out-of-state defendant for RICO offenses where defendant appeared at trial, and also analyzing the question of whether Florida had subject matter jurisdiction over the defendant's actions committed outside the State of Florida); State v. Amoroso, 975 P.2d 505 (Utah Ct. App. 1999) (recognizing, in case to prosecute a nonresident corporate defendant for violations of Utah's Alcohol Beverage and Control Act, the concept of minimum contacts has no application in criminal cases; holding Utah acquired personal jurisdiction through defendant's physical presence at the trial; concluding Utah had subject matter jurisdiction given defendant's conduct constituting an element of the offense occurred within the state); Rios, 733 P.2d at 244 (finding question of whether State of Wyoming had jurisdiction to prosecute out-of-state defendant for interfering with child custody in Wyoming was a question of subject matter jurisdiction and not personal jurisdiction given defendant appeared at trial; recognizing the concept of minimum contacts has no application in criminal cases).

We also note that several jurisdictions, including South Carolina, have implicitly recognized that an out-of-state defendant, who appears at trial, may still challenge a court's lack of subject matter jurisdiction. See, e.g., Morrow, 40 S.C. at 237, 18 S.E. at 859 (stating out-of-state defendant submits to personal jurisdiction in prosecuting state where he voluntarily returns, but State's subject matter jurisdiction over defendant's out-of-state conduct acquired where effect intended for the prosecuting state); Moreno v. Baskerville, 452 S.E.2d 653 (Va. 1995) (addressing for the first time in a petition for habeas corpus the issue of whether Virginia had jurisdiction to prosecute out-of-state defendant for crime of drug trafficking committed in Arizona).

Based on this authority, we conclude Dudley's jurisdictional challenge is properly viewed as one of subject matter jurisdiction and more specifically, as one of extraterritorial jurisdiction. Thus, it may be raised at any time, including for the first time on appeal. See 4 Wayne R. LaFave et al., Criminal Procedure § 16.4(d), at 591 (2d ed. 1999) ("[I]f the trial record establishes that the acts and consequences occurred at places that would put the crime outside of the state's jurisdiction, that object can first be raised on appeal or even in a habeas petition if the convicted defendant remains in custody.").

II.

Applying the concept of extraterritorial jurisdiction to the instant case, we find no evidence that would support South Carolina exercising jurisdiction over Dudley for either trafficking in cocaine or conspiracy to traffic cocaine.

In 1997, Dudley was charged with trafficking in cocaine pursuant to section 44-53-370(e)(2)(d), which provides:

> (e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or

> bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
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> (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
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> (d) two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars.

S.C. Code Ann. § 44-53-370(e)(2)(d) (Supp. 1996) (emphasis added). Dudley was also charged with conspiracy to traffic cocaine under this same code section.

Conspiracy is defined as the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). The gravamen of conspiracy is an agreement or combination. State v. Gunn, 313 S.C. 124, 133-34, 437 S.E.2d 75, 80 (1993). "The overt acts committed in furtherance of the conspiracy are not elements of the crime. Under South Carolina law, a conspiracy does not require overt acts." State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 867-68 (1993); see State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) (stating a conspiracy may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement). "To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." Buckmon, 347 S.C. at 323, 555 S.E.2d at 405. "It is

sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe his own benefits were dependent upon the success of the entire venture." State v. Barroso, 320 S.C. 1, 8-9, 462 S.E.2d 862, 868 (Ct. App. 1995), rev'd on other grounds, 328 S.C. 268, 493 S.E.2d 854 (1997).

In order for South Carolina to exercise jurisdiction over the two offenses, the critical determination is whether Dudley "intended a detrimental effect to occur *in this state*." Blume, 505 N.W.2d at 846. "The two key elements of that requirement are specific intent to act and the intent that the harm occur in [South Carolina]." Id.

Here, both Stokes and Hale were Virginia residents who telephoned Dudley in Georgia. The entire drug transaction took place in Georgia. In Hale's written statement, he noted he and Stokes left Georgia and "got on 85 north towards [Virginia]." In Stokes's statement, he admitted he normally purchased drugs from someone in Virginia, but contacted Dudley in Atlanta to make a "dope run" because of the "dry spells" in Virginia. Stokes also testified he and Hale left for Virginia the same day they purchased the cocaine in Georgia. Additionally, Hale specifically acknowledged he and Stokes intended to sell the cocaine in Virginia.

Although Dudley may have thought that Stokes and Hale would most likely travel through South Carolina on their way back to Virginia, any inference is speculative given there is no evidence of Dudley's knowledge of her co-conspirators' route. Furthermore, this inference or Dudley's mere knowledge is not sufficient to establish extraterritorial jurisdiction in this State. The prosecutor must have presented evidence that Dudley entered into the conspiracy and engaged in the sale with the intent to have a detrimental effect within South Carolina. See Blume, 505 N.W.2d at 844 ("[K]nowledge alone is not enough to exercise extraterritorial jurisdiction. The prosecutor must present evidence that defendant intended to commit an act *with the intent to have a detrimental effect within this state*.").

The officers' traffic stop and ultimate search of Hale's and Stokes's vehicle can only be construed as an intervening act, rather than an overt act necessary to establish extraterritorial jurisdiction. See State v. Palermo, 579

P.2d 718, 720 (Kan. 1978) ("[A] state does not have jurisdiction over an individual for a crime committed within that state when he was located outside the state, did not intend to commit a crime within the state, and could not reasonably foresee that his act would cause, aid or abet in the commission of a crime within that state."). To hold otherwise would vest any state along a co-conspirator's route, however circuitous, with jurisdiction over acts committed outside its state limits. This analysis would essentially eviscerate the "effects doctrine."

We find the only evidence is that Dudley, Stokes, and Hale conspired and conducted the drug transaction in Georgia. In terms of the conspiracy charge, the agreement itself constituted the crime, which was completed in Georgia. The financial benefit derived by Dudley was also completed in Georgia and was not dependent on the subsequent acts of Hale and Stokes. Furthermore, there is no evidence that Dudley intended for her acts to create a detrimental effect within South Carolina.[5] As such, South Carolina could not exercise jurisdiction over Dudley for conspiracy to traffic cocaine or trafficking in cocaine. See State v. McAdams, 167 S.C. 405, 166 S.E. 405 (1932) (holding in order for South Carolina to prosecute Georgia defendant for conspiracy entered into in Georgia, but completed in South Carolina, the State was required to prove that some overt act was committed in South Carolina by one of the conspirators pursuant to the conspiracy); see also State v. King, 211 S.C. 1, 43 S.E.2d 596 (1947) (concluding South Carolina was without jurisdiction to prosecute for swindling assignees of a contract for South Carolina land, who defaulted on the contract with vendor and thus did not own the property, where all parties to the contract were residents of North Carolina, the contracts were signed in North Carolina, all payments with one

[5] We recognize the record contains transcriptions of telephone conversations that Stokes made to Dudley from South Carolina. These conversations, however, did not culminate in the criminal conduct for which Dudley was indicted. The conversations took place after the September 10th drug transaction in Atlanta. Furthermore, the controlled buy that was set up from these conversations was unsuccessful and, more importantly, was attempted just outside of Atlanta. Thus, there is no evidence in the record that would support the exercise of jurisdiction in South Carolina.

exception were paid in North Carolina, and the only overt act in South Carolina was the parties viewing the premises prior to signing the contracts).

Furthermore, a review of the language of the statute under which Dudley was charged supports our conclusion. Both offenses under section 44-53-370(e)(2)(d) require a specific intent to bring cocaine "into this State." S.C. Code Ann. § 44-53-370(e)(2)(d) (Supp. 1996). In terms of the trafficking charge, Dudley must have intended to aid and abet the bringing of cocaine into South Carolina. See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) (stating "[i]n order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct"); Blume, 505 N.W.2d at 852 ("One who aids and abets the commission of a substantive crime that occurs in Michigan is not automatically subject to trial in Michigan. Defendant must have intended to aid and abet a crime in Michigan. Mere knowledge is not enough to exercise jurisdiction."). As to the conspiracy charge, Dudley must have knowingly conspired to bring cocaine into South Carolina. See Gunn, 313 S.C. at 134, 437 S.E.2d at 80-81 (holding in order to establish a conspiracy "'[w]hat is needed is proof they intended to act *together* for their *shared mutual benefit*-within the scope of the conspiracy charged'" (quoting United States v. Evans, 970 F.2d 663, 671 (10th Cir.1992))). There is no evidence that Dudley intended for the cocaine to be brought into South Carolina.[6]

Because there is no evidence that Dudley's conduct fits within the ambit of section 44-53-370(e)(2)(d), South Carolina was without jurisdiction to prosecute her. See State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002) (stating appellate courts are "bound to construe a penal statute strictly against the State and in favor of the defendant"); William Shepard

[6] We note the dissent finds the evidence sufficient to support extraterritorial jurisdiction for the offense of trafficking in cocaine, but not conspiracy to traffic cocaine. Regarding the trafficking offense, the dissent reasons "Dudley demonstrated specific intent to act and the intent that the harm occur in South Carolina." It is difficult to reconcile the contradictory result reached by the dissent given both offenses under section 44-53-370(e)(2)(d) require a specific intent to bring cocaine "into this State." S.C. Code Ann. § 44-53-370(e)(2)(d) (Supp. 1996).

McAninch & W. Gaston Fairey, The Criminal Law of South Carolina 94 (4th ed. 2002) ("Unless the defendant's conduct is encompassed within the reach of the statute under which he is charged, the court lacks subject matter jurisdiction to try him.").

This conclusion is consistent with other jurisdictions. See, e.g., Commonwealth v. Fafone, 621 N.E.2d 1178 (Mass. 1993) (finding Massachusetts lacked territorial jurisdiction over crime of accessory before the fact of trafficking in cocaine where alleged criminal acts took place in Florida and there was no evidence Florida defendant knew cocaine would be distributed within Massachusetts); Blume, 505 N.W.2d at 848-52 (concluding Michigan did not have extraterritorial jurisdiction to prosecute Florida defendant for conspiracy to deliver or possession with intent to deliver more than 650 grams of cocaine, and aiding and abetting the manufacture or possession with intent to manufacture or deliver more than 650 grams of cocaine, where entire sale to Michigan resident took place in Florida and there was no evidence defendant acted with intent to have a detrimental effect in Michigan); Moreno, 452 S.E.2d at 655 (concluding Virginia did not have jurisdiction to try defendant for drug trafficking committed in Arizona, even though drugs were eventually sold in Virginia, where sale of drugs in Virginia was not "immediate result" of distribution of drugs in Arizona); cf. State v. Chan, 935 P.2d 850 (Ariz. Ct. App. 1996) (finding Arizona had jurisdiction to prosecute out-of-state defendants for conspiracy to commit theft and attempted trafficking where in-state co-conspirator's overt actions of driving into and participating in the actual "sale" within the State of Arizona could be imputed to the defendants); Black, 819 So. 2d at 210-12 (holding Florida had subject matter jurisdiction to try out-of-state defendant for RICO offenses, communications fraud, and conspiracy to commit RICO offenses where out-of-state defendant made telephone sales calls and sent faxes to Florida county for purpose of defrauding county); People v. Govin, 572 N.E.2d 450 (Ill. App. Ct. 1991) (concluding charge of trafficking in cocaine properly brought in Illinois where Florida defendant acted with intent that cocaine be delivered in Illinois, and aided and abetted a transaction through an Illinois confidential informant by which cocaine was caused to be delivered in Illinois); State v. Campa, 2002 WL 471174 (Ohio Ct. App. 2002) (finding, in a drug-trafficking case, an offer to sell drugs over the telephone to a person in Ohio was sufficient to establish jurisdiction in Ohio even if the

person offering to sell the drugs was outside the state); see generally B.C. Ricketts, Annotation, Jurisdiction to Prosecute Conspirator Who was Not in State at Time of Substantive Criminal Act, For Offense Committed Pursuant to Conspiracy, 5 A.L.R.3d 887 (1966 & Supp. 2002).

Although we recognize this State's legitimate interest in protecting its citizens from the societal effects of drug trafficking, this alone is not sufficient to confer jurisdiction. We would note the absence of jurisdiction in South Carolina does not preclude the prosecution of Dudley's actions. Under the facts of this case, we believe either Georgia or Virginia would have jurisdiction. Cf. Marquez v. State, 12 P.3d 711 (Wyo. 2000) (holding Wyoming had jurisdiction to prosecute defendant for drug conspiracy where defendant entered into the conspiracy in New Mexico, was arrested pursuant to a traffic violation in Colorado, but intended for the conspiracy to have an effect within the State of Wyoming); see also S.C. Code Ann. § 44-53-410 (2002) ("If a violation of this article [Article 3, Narcotics and Controlled Substances] is a violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State.").

Because the circuit court lacked jurisdiction, we vacate both of Dudley's convictions.[7] See State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972) (stating "the acts of a court with respect to a matter as to which it has no jurisdiction are void").

CONCLUSION

South Carolina recognizes the common law concept of extraterritorial jurisdiction. Because extraterritorial jurisdiction is a component of subject matter jurisdiction, it may be raised for the first time on appeal or sua sponte by an appellate court. Based on the facts of this case, South Carolina lacked jurisdiction over Dudley for the offenses of trafficking in cocaine and

[7] In light of our disposition, we need not address Dudley's remaining issue concerning the denial of her directed verdict motion for the conspiracy charge.

conspiracy to traffic cocaine. Accordingly, we vacate both of her convictions.

VACATED.

HEARN, C.J., CURETON, J., HUFF, J., HOWARD, J. and SHULER, J., concur. ANDERSON, J. and GOOLSBY, J., dissent. STILWELL, J., concurs in part and dissents in part in a separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. I disagree with the reasoning and analysis of the majority. The holding of the majority misconstrues and misapplies the law extant in regard to: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) extraterritorial jurisdiction. I **VOTE** to **AFFIRM** the conviction for trafficking cocaine.

FACTS/PROCEDURAL BACKGROUND

On September 10, 1997, Officer Matthew Durham of the Anderson County Sheriff's Department noticed a vehicle weaving along Interstate 85 and making an improper lane change. Durham stopped the car and asked driver Earl Hale to exit the vehicle. Hale told Officer Durham that he was returning from a party in Atlanta. Passenger Donald Stokes told Durham that the two were returning from a funeral in Atlanta. After talking with Hale and giving him a warning, Durham asked Hale if he could search the vehicle. During his conversation with Hale, Durham allowed Stokes to exit the car. Hale gave Durham permission to search the vehicle. Deputy James Littleton spoke with Hale and Stokes while Durham proceeded with the search. Durham found in the trunk of the vehicle a paper bag containing a ziplock bag wrapped in a clear plastic bag. The ziplock bag contained cocaine. Hale and Stokes attempted to escape, but they were apprehended by the officers.

Hale and Stokes, who were both from Virginia, gave voluntary statements to the police. In Stokes' statement, he indicated he was acquainted with Dudley, who lived in Atlanta, and that Dudley knew where to obtain large amounts of cocaine. According to the statements of both men, Hale and Stokes traveled to Atlanta, partied at a gentlemen's club, and then

contacted Dudley the next morning. Dudley met with the two men, who gave her a total of $5,000 to take to her supplier. Thereafter, Dudley returned to Hale and Stokes' hotel to deliver the cocaine. Hale and Stokes were planning to sell the drugs in their home state of Virginia, but they were stopped in Anderson County, South Carolina, before they could make it home.

Hale and Stokes agreed to assist police officers in prosecuting narcotics cases in South Carolina and Virginia. They began working with the Drug Enforcement Agency. While agents were monitoring and recording the conversations, Stokes made several telephone calls to Dudley to set up another cocaine purchase. Stokes asked Dudley to meet him in South Carolina, but she refused. Dudley finally agreed to meet Stokes in Atlanta. She was arrested in Atlanta and charged for her actions in providing to Stokes and Hale the cocaine, which was confiscated in Anderson County.

Hale and Stokes both testified against Dudley at her trial. Hale stated that Dudley supplied the cocaine to him and he intended to resell it. Stokes declared that Dudley brought them nine ounces of cocaine to their hotel.

LAW/ANALYSIS

Dudley contends the Circuit Court lacked jurisdiction to prosecute her in South Carolina because she never entered the state. I disagree.

I. Subject Matter Jurisdiction

Dudley never entered South Carolina during her transaction with Hale and Stokes. The indictment charging Dudley with trafficking stated that Dudley "did in Anderson County, South Carolina on or about September 10, 1997 traffic in cocaine by aiding and abetting the bringing into the State of South Carolina 200 or more grams of cocaine."

Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong. City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). A Circuit Court acquires subject matter jurisdiction over a criminal matter if: (1) there has been an indictment which sufficiently states the offense; (2) the

defendant has waived presentment of the indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002); State v. Timmons, 349 S.C. 389, 563 S.E.2d 657 (2002); State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001).

Questions regarding subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court. State v. Brown, Op. No. 3549 (S.C. Ct. App. filed Sept. 9, 2002)(Shearouse Adv. Sh. No. 32 at 52); see also State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time). Furthermore, lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

An indictment is sufficient to confer jurisdiction if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer. Lynch, 344 S.C. at 639, 545 S.E.2d at 513; Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995). In South Carolina, an indictment "shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided." S.C. Code Ann. § 17-19-20 (1985). An indictment must: (1) enumerate all the elements of the charged offense, regardless of whether it is a statutory or common law offense; and (2) recite the factual circumstances under which the offense occurred. Id.; State v. Evans, 322 S.C. 78, 470 S.E.2d 97 (1996). Thus, an indictment passes legal muster if it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. State v. Reddick, 348 S.C. 631, 560 S.E.2d 441 (Ct. App. 2002).

To convey jurisdiction, an indictment must apprise the defendant of the elements of the offense intended to be charged and inform the defendant of the circumstances he must be prepared to defend. Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000); Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); see also Browning, 320 S.C. at 368, 465 S.E.2d at 359 (true test of sufficiency of indictment is not whether it could be made more definite and certain, but whether it contains necessary elements of offense intended to be charged and sufficiently apprises defendant of what he must be prepared to meet). An indictment phrased substantially in the language of the statute which creates and defines the offense is ordinarily sufficient. State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981). South Carolina courts have held that the sufficiency of an indictment must be viewed with a practical eye. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Dudley was charged in 1997 with trafficking cocaine pursuant to S.C. Code Ann. § 44-53-370(e)(2)(d) (Supp. 1996). This section provides:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
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> . . . .
>
> ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
>
> . . . .

> two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars.

(Emphasis added).

Dudley does not complain that her indictments were invalid. Here, the indictments gave the time, place, and manner of the events in which Dudley was accused of having participated. The indictments "charge[d] the crime[s] substantially in the language of the . . . statute prohibiting the crime[s]." S.C. Code Ann. § 17-19-20 (1985). The statute is broad and plenary. Additionally, the statute is imbued with specificity in regard to acts and conduct consisting of "otherwise aids, abets, attempts" and "bring into this State." Id.

Moreover, both indictments apprised Dudley of the charges against her and the circumstances she must be prepared to defend. Furthermore, the indictments contained the necessary elements of the offenses charged and informed the Circuit Court of the sentence to pronounce. Subject matter jurisdiction over these crimes attached when valid indictments were issued by the grand jury. Concomitantly, the indictments in the present case conferred subject matter jurisdiction on the Circuit Court to try Dudley.

II. Personal Jurisdiction

Although Dudley couched her issue on appeal as a question of subject matter jurisdiction, she actually complains that the Circuit Court lacked personal jurisdiction over her.

Generally, jurisdiction of the person is acquired when the party charged is arrested or voluntarily appears in court and submits himself to its jurisdiction. State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953). A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to

the lack of personal jurisdiction and by appearing to defend his case. See State v. Bethea, 88 S.C. 515, 70 S.E. 11 (1911); see also State v. Castleman, 219 S.C. 136, 138-39, 64 S.E.2d 250, 251 (1951) ("A defendant may, of course, waive his objection to the jurisdiction of the Court over his person . . ."); Town of Ridgeland v. Gens, 83 S.C. 562, 65 S.E. 828 (1909) (the court found no personal jurisdiction problem where the defendant appeared for his trial, was represented by an attorney, and defended his case on the merits).

In the instant case, Dudley appeared at trial and defended her case on the merits. She did not object to personal jurisdiction before the Circuit Court. As she consented to the Circuit Court's exercise of personal jurisdiction over her and did not raise any objection, Dudley failed to preserve this issue for review. See State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002) (issue must be raised to and ruled upon by trial judge to be preserved for appellate review). Because this issue was not preserved, it is improper for this Court to consider it on appeal.

III. Exercise of Extraterritorial Jurisdiction by South Carolina

Facially and legally, this Court has subject matter jurisdiction by virtue of a valid indictment under South Carolina precedent. That conclusion does not end the inquiry. It is essential to analyze the exercise of extraterritorial jurisdiction over acts committed outside the state by Dudley.

"It is elementary that before a court may exercise judicial power to hear and determine a criminal prosecution, that court must possess three types of jurisdiction: jurisdiction over the defendant, jurisdiction over the alleged crime, and territorial jurisdiction." State v. Legg, 9 S.W.3d 111, 114 (Tenn. 1999) (emphasis added).

The general rule is that a state may not prosecute an individual for a crime committed outside its boundaries. In re Vasquez, 705 N.E.2d 606 (Mass. 1999); see also People v. Blume, 505 N.W.2d 843 (Mich. 1993) (general rule is that jurisdiction is proper only over offenses as may be committed within the prosecuting state's jurisdiction). Yet, "blind adherence to a purely territorial concept of jurisdiction inadequately addresses the state's interest in protecting its citizens from the results of criminal activity." Blume, 505 N.W.2d at 845 n.6.

Despite the general rule, a state is not deprived of jurisdiction over every criminal case in which the defendant was not physically present within the state's borders when the crime was committed. Vasquez, 705 N.E.2d at 610. The authority to exercise jurisdiction over acts that occur outside the state's physical borders developed as an exception to the rule against extraterritorial jurisdiction. Blume, 505 N.W.2d at 845. That exception, however, is limited to those acts that are intended to have, and that actually do have, a detrimental effect within the state. Id.

The seminal case in this country elucidating the right of a state to exercise extraterritorial jurisdiction is Strassheim v. Daily, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735 (1911). Strassheim edifies:

> **Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.** We may assume, therefore, that Daily is a criminal under the laws of Michigan.
>
> Of course, we must admit that it does not follow that Daily is a fugitive from justice. On the other hand, however, we think it plain that the criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete, if not before.

Id. at 285, 31 S.Ct. at 560, 55 L.Ed. at 738 (citations omitted) (emphasis added); see also State v. Winckler, 260 N.W.2d 356 (S.D. 1977) (state jurisdiction properly lies when acts done outside its jurisdiction are intended to produce and do produce a detrimental effect within that jurisdiction).

An excellent academic explication of a state's extraterritorial criminal jurisdiction is In re Vasquez, 705 N.E.2d 606 (Mass. 1999). Vasquez inculcates:

> The general rule, accepted as "axiomatic" by the courts in this country, is that a State may not prosecute an individual for a crime committed outside its boundaries. See, e.g., Neilsen v. Oregon, 212 U.S. 315, 321, 29 S.Ct. 383, 53 L.Ed. 528 (1909); Huntington v. Attrill, 146 U.S. 657, 673, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); Commonwealth v. Booth, 266 Mass. 80, 84, 165 N.E. 29 (1929) (rule against extraterritorial application of criminal laws "is a general principle"); State v. Cochran, 96 Idaho 862, 864, 538 P.2d 791 (1975); Trindle v. State, 326 Md. 25, 31, 602 A.2d 1232 (1992); Blume, supra at 480, 505 N.W.2d 843; People v. Devine, 185 Mich. 50, 52-53, 151 N.W. 646 (1915); State v. Karsten, 194 Neb. 227, 229, 231 N.W.2d 335 (1975); State v. Hall, 114 N.C. 909, 911, 19 S.E. 602 (1894) (rule is a "general principle of universal acceptation"); Ex parte McNeely, 36 W.Va. 84, 92, 14 S.E. 436 (1892); 21 Am. Jur. 2d § 343 (1981) (rule is "fundamental"); Allen & Ratnaswamy, Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court, 76 J. Crim. L. & Criminology 801, 815 n. 144 (1985). The source of this rule is unsettled and has not been ascribed to any particular constitutional provision, see, e.g., State ex rel. Juvenile Dep't v. W., supra at 442 n.5, 578 P.2d 824, yet it has been called by one commentator "too deeply embedded in our law to require justification." Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 318 (1992).
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> **Despite this general rule, however, a State is not deprived of jurisdiction over every criminal case in which the defendant was not physically present within the State's borders when the crime was committed.** Two major exceptions to the territorial principle might permit Oregon to exercise jurisdiction over the defendant in this case, even though he has never been within its borders.

> **The "effects" doctrine provides that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect." Strassheim v. Daily, supra at 285, 31 S.Ct. 558. The jurisdictional basis provided by Strassheim has been utilized by a number of States to permit prosecution of individuals not within the State at the time they violated the State's law** . . . .

Id. at 610-11 (footnote omitted) (emphasis added).

The exception to the rule against extraterritorial jurisdiction requires a finding that the defendant intended a detrimental effect to occur in this state. Blume, 505 N.W.2d at 846. The two key elements of the requirement for exercising extraterritorial jurisdiction in the case sub judice are specific intent to act and the intent that the harm occur in South Carolina. See Blume, 505 N.W.2d at 846. Some states refer to this exception as the "effects doctrine." See Vasquez, 705 N.E.2d at 610. "Although some courts consider the effects doctrine to be an exception to the general rule against extraterritorial jurisdiction, others point out that it is not an exception at all, but a logical application of the general rule in that the crime occurs where the effect is felt, not where the offender is located." Id. at 611 n.4.

The proper analysis to determine whether extraterritorial jurisdiction can be exercised over trafficking in cocaine occurring in another state is to consider whether the trafficking charge could be established by the evidence. Blume, 505 N.W.2d at 846. Then, the Court must determine whether the trafficking was intended to occur in South Carolina. Id.

A crime is committed where the criminal act takes effect. Simpson v. State, 17 S.E. 984 (Ga. 1893). This is true even though the accused is never actually present within the state's jurisdiction. Winckler, 260 N.W.2d at 360. One who puts in force an agency for the commission of a crime is deemed to have accompanied the agency to the point where it takes effect. Id. The state is then justified in punishing the cause of the harm as if he were in fact

present at the effect should the state ever succeed in getting him within its power. Id.

This Court should not approve the exercise of jurisdiction over Dudley unless the State can prove that Dudley intended the crime to occur in South Carolina.

A thorough review of the testimony discloses that Dudley transferred over 200 grams of cocaine to Stokes and Hale that they intended to sell. Dudley played an integral part in providing the cocaine that was brought into South Carolina. Giving efficacy to the law of circumstantial evidence in this state, it is inferable that Stokes and Hale intended to possess or sell the cocaine somewhere. Dudley knew that Stokes and Hale were from Virginia and would most probably travel through South Carolina while in possession of the contraband.

At common law, criminal jurisdiction was based primarily on the territorial principle. Courts have created the doctrine of constructive presence in order to allow a state to punish an offender not located within the state when the offender set in motion the events which culminated in a harm in the prosecuting state. The doctrine is articulated in Simpson v. State, 17 S.E. 984 (Ga. 1893). In Simpson, the defendant, who had been standing in South Carolina at the time he shot at a person in Georgia, was convicted in Georgia. Simpson applied the doctrine of constructive presence by concluding that the act of the accused took effect in Georgia.

The exercise of legislative criminal jurisdiction is recognized by reference to statutory language identifying the proscribed conduct. This state in the statutory verbiage encapsulates an objective territorial effect and proscribes conduct that occurs outside of the state's physical borders.

Here, Dudley demonstrated specific intent to act and the intent that the harm occur in South Carolina.

CONCLUSION

The Circuit Court had personal jurisdiction, subject matter jurisdiction, and extraterritorial jurisdiction over Dudley. I **VOTE** to **AFFIRM** the conviction and sentence of Dudley for trafficking in cocaine.

GOOLSBY, J., concurs.

STILWELL, J.: (concurring in part and dissenting in part): I agree with the analysis and conclusions reached by both the majority opinion and Judge Anderson's dissent on the issues of basic subject matter and personal jurisdiction. However, because I am not convinced that extraterritorial jurisdiction is equivalent to subject matter jurisdiction, I respectfully dissent.

The fundamental issue is whether the defense that the State exceeded its territorial jurisdiction should have been raised to and ruled on by the trial court. Because it clearly was not, the only way this court can address it is to equate it to subject matter jurisdiction. This is a novel issue in South Carolina, and a review of the sparse case law from our state and the leading cases from other states convinces me it is not subject matter jurisdiction. Therefore, I believe this issue is not preserved and should not be addressed for the first time on appeal. See State v. Hicks, 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (issue must be raised to and ruled on by the trial court to be preserved for appellate review); Hendrix v. Eastern Dist., 320 S.C. 218, ___, 464 S.E.2d 112, ___ (1995) (unpreserved issue should not be addressed on appeal).

The limited number of cases from our supreme court shed no light on the question of whether extraterritorial or, as it is sometimes called "territorial," jurisdiction is equivalent to subject matter jurisdiction. However, it is instructive to note that in the two leading South Carolina cases on the subject, State v. Morrow, 40 S.C. 221, 230, 18 S.E. 853, 856 (1893) and State v. Farne, 190 S.C. 75, 82, 1 S.E.2d 912, 915 (1939), no error

preservation issues were present because objections to the court's jurisdiction were appropriately made in the trial court, fully argued, and ruled on. Therefore, our supreme court did not need to specify whether the issue was subject matter or some other type of jurisdiction. It was referred to simply as a question of "jurisdiction."

The same holds true for the cases from other jurisdictions cited in the majority opinion. In Re Vasquez, 705 N.E.2d 606 (Mass. 1999), is a case heavily relied on by the majority for the proposition that the issue involved is not personal jurisdiction. I do not agree, however, with the inference drawn therefrom that because it is not personal jurisdiction, it must be subject matter jurisdiction. There is no such holding in Vasquez. Indeed, the court specifically stated it was addressing solely the question of whether Vasquez' arrest pursuant to the Massachusetts Governor's Warrant was appropriate under the laws of Massachusetts. The court noted Vasquez' argument, which the court viewed as a claim the State of Oregon had no legislative jurisdiction to criminalize acts occurring outside Oregon's boundaries, could be made in the Oregon courts, and if he is dissatisfied with the determination made by the Oregon courts "and if he has properly preserved it there, he may petition the Supreme Court of the United States for a writ of certiorari." Id. at 610 (emphasis added).

Virtually all, if not all, of the other cases ruling on the subject of territorial jurisdiction did so after a hearing on the issue or a trial on the merits, and the ultimate conclusion turns on the evidence, or lack thereof, of the defendant's intent that the act have a detrimental effect in the state conducting the prosecution. The conclusion reached by the majority that South Carolina cannot exercise extraterritorial jurisdiction over Dudley hinges on its finding that there is no evidence Dudley intended for her act to create a detrimental effect within South Carolina. This is the identical result reached by a divided court in Michigan in People v. Blume, 505 N.W.2d 843 (Mich. 1993). The difference in this case and the Blume case, however, is that lack of territorial jurisdiction was raised to and ruled on by the trial court in the Blume case and was a proper subject for appeal. 505 N.W.2d at 845, 849 n.19.

Subject matter jurisdiction is generally determined as a matter of law, requiring little if any evidence, particularly evidence of the intent of the accused. I frankly do not know whether extraterritorial jurisdiction is a part of personal jurisdiction, or is a third kind of jurisdiction not yet clearly articulated as such by the courts of South Carolina. I am nevertheless convinced it is an issue that must be raised to and ruled on by the trial court, as well as properly briefed to this court to warrant our addressing it. Because Dudley did neither, I would affirm her conviction.