OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20

May 9, 2005

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3970-State v. Davis	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In re: Smith v. Moore	Pending
3978-State v. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
2005-UP-025-Hill v. City of Sumter et al.	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Denied 05/02/05
2005-UP-067-Chisholm v. Chisholm	Denied 05/05/05
2005-UP-110-State v. Dudley	Pending
2005-UP-121-State v. Delesline	Pending
2005-UP-141-Byrd v. Byrd	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-191-Woodall v. Williamson	Pending
2005-UP-192-Mathias v. Rural Comm. Ins.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-201-Brown v. McCray	Pending
2005-UP-203-Germeroth v. Thomasson Brothers	Pending
2005-UP-209-Lundstrom v. Lundstrom	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler	Pending
2005-UP-224-Dallas v. Todd et al.	Pending

2005-UP-237-Williams v. New Century Investigation	Pending
2005-UP-240-International Union v. Local 273	Pending
2005-UP-242-State v. Adams	Pending
2005-UP-255-Towne v. State Farm	Pending
2005-UP-282-State v. Irvin	Pending
2005-UP-285-State v. Montgomery	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3676-Avant v. Willowglen Academy	Pending
3684-State v. Sanders	Pending
3714-State v. Burgess	Pending
3717-Palmetto Homes v. Bradley et al.	Pending
3720-Quigley et al. v. Rider et al.	Pending
3724-State v. Pagan	Pending
3730-State v. Anderson	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending

3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending
3784-State v. Miller	Pending
3786-Hardin v. SCDOT	Pending
3787-State v. Horton	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending
3800-Ex parte Beard: Watkins v. Newsome	Pending
3802-Roberson v. Roberson	Pending

3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending
3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3841-Stone v. Traylor Brothers	Pending
3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending
3851-Shapemasters Golf Course Builders v. Shapemasters, Inc.	Pending
3852-Holroyd v. Requa	Pending

3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending
3865-DuRant v. SCDHEC et al	Pending
3866-State v. Dunbar	Pending
3871-Cannon v. SCDPPPS	Pending
3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending
3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
3890-State v. Broaddus	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3910-State v. Guillebeaux	Pending
3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending

3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3919-Mulherin et al. v. Cl. Timeshare et al.	Pending
3924-Tallent v. SCDOT	Pending
3926-Brenco v. SCDOT	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3943-Arnal v. Arnal	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-642-State v. Moyers	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-736-State v. Ward	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending

2004-UP-153-Walters v.Walters	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-215-State v. Jones	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-237-In the interest of B., Justin	Pending
2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-256-State v. Settles	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-306-State v. Lopez	Withdrawn 04/29/05
2004-UP-319-Bennett v. State of S. C. et al.	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending

2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-394-State v. Daniels	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-410-State v. White	Pending
2004-UP-422-State v. Durant	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Pending
2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-485-State v. Rayfield	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending
2004-UP-513-BB&T v. Taylor	Pending

2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending
2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-546-Reaves v. Reaves	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending
2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending
2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-607-State v. Randolph	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Pending

2004-UP-617-Raysor v. State	Pending
2004-UP-627-Roberson v. State	Pending
2004-UP-632-State v. Ford	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-654-State v. Chancy	Pending
2004-UP-657-SCDSS v. Cannon	Pending
2004-UP-658-State v. Young	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-002-Lowe v. Lowe	Pending
2005-UP-008-Mantekas v. SCDOT	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-039-Keels v. Poston	Pending
2005-UP-046-CCDSS v. Grant	Pending

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John B. Bowden, Respondent.

Opinion No. 25978
Submitted March 25, 2005 – Filed May 9, 2005

PUBLIC REPRIMAND

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

John P. Freeman, of Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the issuance of a letter of caution, admonition, or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was hired as an associate to manage the Greenville office of the Forquer Law Firm. Respondent worked under the supervision of Robert Forquer who is not licensed in South Carolina and who works in the firm's Charlotte, North Carolina, office.

When respondent learned it was the firm's practice to inflate government recording fees on HUD-1settlement statements, he questioned Mr. Forquer about the practice. Mr. Forquer assured respondent that the practice was ethical and legal.

Respondent has been informed by ODC that the Forquer Law Firm failed to maintain sufficient records of the recording fee charges and failed to identify and track client funds relating thereto in its accounts. No record of the actual amounts paid for recording fees were kept in the closing files and no accounting of the overcharges was made to clients. The funds obtained in excess of the actual recording fees were used for a variety of purposes including office expenses, correction of errors in closings, payroll or other payments to staff, and payments in various amounts to Mr. Forquer and a former partner, Mr. Green.

While respondent had signatory authority on the firm's bank accounts, he had no access to or responsibility for its financial records. Respondent knew that the management and recordkeeping of the firm's accounts was handled by Mr. Forquer in the firm's Charlotte office. Respondent was unaware that the firm was not complying with the requirements of Rule 417, SCACR, or that Mr. Forquer was using the excess recording fees for firm and personal expenses. Respondent did not profit in any way from the overcharges.

Respondent acknowledges that it was his responsibility 1) to inform his clients they were being charged more than the actual cost of the recording fees and 2) to ensure the accuracy of information contained in the HUD-1 forms in the closings he supervised. Respondent further acknowledges his ethical duty to ensure the firm's compliance with his obligation of safekeeping of funds and financial recordkeeping, particularly when those responsibilities were handled by non-lawyers or lawyers not licensed in South Carolina. Respondent acknowledges that, as office manager and supervisor of associates, he had additional responsibilities to ensure his staff's compliance with the Rules of Professional Conduct.

Respondent has fully cooperated with ODC's investigation.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (addressing lawyer's responsibility for safekeeping client funds); Rule 5.1 (lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if, with knowledge of the specific conduct, the lawyer ratifies the conduct involved); Rule 5.2 (lawyer is bound by the Rules of Professional Conduct notwithstanding lawyer acts at the direction of another person); and Rule 8.3 (lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as that lawyer's honesty, integrity, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority). In addition, respondent admits he failed to comply with Rule 417, SCACR (addressing financial recordkeeping). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Barry W. Bellino, Respondent.

Opinion No. 25979
Submitted March 25, 2005 – Filed May 9, 2005

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Barry W. Bellino, of Pensacola, Florida, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) 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 an indefinite suspension as provided by Rule 7(b)(2) , RLDE, Rule 413, SCACR. We accept the agreement and indefinitely suspend respondent from the practice of law in this state.

The facts, as set forth in the agreement, are as follows.

FACTS

On several occasions over the course of several years, respondent made or attempted to make social contacts with females who were clients or prospective clients. Under the circumstances and/or conditions,[1] the social contacts were inappropriate for attorneys and clients and constituted misconduct. Respondent does not admit the contacts were either illegal or immoral, but he does agree the social contacts constituted misconduct in violation of the Rules of Professional Conduct, Rule 407, SCACR, and that the social contacts constitute grounds for discipline under Rule 7(a)(1) and (5), RLDE, Rule 413, SCACR.

This Court has previously sanctioned respondent for misconduct involving female clients. In In the Matter of Bellino, 308 S.C. 130, 417 S.E.2d 535 (1992), respondent admitted that on two occasions he used unlawful or violent force against female clients with the specific intent to gratify his lust or sexual desires. Respondent was convicted of criminal charges, sentenced to a period of confinement, forfeited pay, and was dismissed from the Marine Corps. The Court imposed a six month suspension, in addition to the thirty-one month interim suspension, and required respondent to take and pass the Multistate Professional Responsibility Examination before applying for readmission. As specified in the order placing him on his current interim suspension, respondent's interim suspension stems from similar behavior with female clients. In the Matter of Bellino, 355 S.C. 82, 584 S.E.2d 119 (2003).

LAW

Respondent agrees his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.7 (addressing conflicts of interest); Rule 8.4(a) (lawyer shall not

[1] No description of the social contacts or attempted social contacts is provided in the Agreement.

violate Rules of Professional Conduct); Rule 8.4(c) (lawyer shall not engage in conduct involving moral turpitude); and 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not 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).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. We deny respondent's request to make the indefinite suspension retroactive to July 22, 2003, the date he was placed on interim suspension. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Gadson and Julia Gadson as personal representatives of the Estate of James Gadson, et al., Appellants,

v.

J. Gregory Hembree as successor in interest to Ralph Wilson, Solicitor for the Fifteenth Judicial Circuit, ex officio on behalf of the Georgetown County Sheriff's Office and the Georgetown Police Department, Respondents.

Appeal From Georgetown County
John L. Breeden, Circuit Court Judge

Opinion No. 25980
Heard March 16, 2005 – Filed May 9, 2005

AFFIRMED AS MODIFIED

Michael S. Church, of Turner, Padget, Graham & Laney, P.A., and Larry C. Smith, both of Columbia, for Appellants.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General T. Stephen Lynch, Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, and Lisa Marie Hatley, of Conway, for Respondents.

JUSTICE BURNETT: This is an action seeking return of property pursuant to the innocent owner provision of S.C. Code Ann. § 44-53-586 (2002). The trial court granted Respondents' motion for dismissal and summary judgment. This Court certified the case from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

James Gadson owned a lot and building in the City of Georgetown. He leased the building to Harriet Ann Singleton Evans. Evans operated the Winyah Grill, a bar and lounge, on the premises.[1] Ronald Lee McCants, an employee of Evans was arrested for distribution of crack cocaine inside Gadson's building.[2]

On May 4, 1993, Judge Shuler signed a seizure warrant authorizing the solicitor, on behalf of the Georgetown County Sheriff's Office and Georgetown City Police Department, to seize the property due to violations of the drug code. Judge Shuler also signed a notice of seizure on May 4, 1993.

On May 13, 1993, the State Law Enforcement Division (SLED) inspected the building and found numerous structural and electrical defects and also determined the fire exits were wholly inadequate. On May 17, 1993, the Resident Fire Marshal and Mayor of Georgetown signed a "notice of unsafe building." The notice provided that if remedial work was not completed by June 30, 1993, to correct the building, structural, and fire code deficiencies, the City of Georgetown would demolish the property.

---

[1] The bar is also referred to by other names such as "Shabazz," "The Elks Club," "Shabazz Grill," and "Shabazz Bar and Lounge."

[2] Between December 1992 and February 1993, undercover officers purchased controlled substances on at least twenty-six occasions. Between 1984 and 1993, the City's Police Department has responded to over 180 crime calls at this location.

Also on May 17, 1993, the special prosecutor filed a lis pendens giving notice of the forfeiture action based on the controlled substances violations. City Council revoked Evans' business license on May 24, 1993, due to the controlled substances sales, as well as, building and fire code violations.

In July 1993, the City of Georgetown demolished the building after Gadson failed to take corrective actions to resolve the building defects. On November 2, 1993, the City filed a demolition lien on the property in the amount of $16,292.50.

By motion dated April 28, 1994, Gadson requested the circuit court "restore" the property to him pursuant to the innocent owner provision of the forfeiture statute. See 44-53-586(b)(1) (2002). On May 20, 1994, Judge Sydney Floyd denied Gadson relief on his motions.

On December 7, 1994, Gadson filed a suit in federal court. On May 3, 1996, Judge Norton signed an order effecting the parties' agreement to voluntarily dismiss the federal suit. The parties agreed Gadson could re-file the federal action prior to the close of the 1996 calendar year. Gadson failed to re-file the federal lawsuit by December 31, 1996.

In late 1996, Gadson died. On June 20, 1997, the probate court appointed the personal representatives of Gadson's estate. On January 28, 1998, Gadson's estate filed a complaint seeking a declaratory judgment dissolving the seizure warrant and lien. On May 5, 1999, the circuit court dismissed the complaint because there was a prior pending action (this action) which provided Gadson's estate the exclusive remedy. The order allowed Gadson's estate to proceed with the April 1994 state court lawsuit.

On October 21, 2003, Appellants filed a motion for summary judgment requesting the seizure warrant and lis pendens placed on the property be dissolved and vacated. Appellants also allege they are entitled to the return of property still in possession of the Respondents, and recovery of the value of property demolished. The circuit court granted the Respondents' motion for dismissal and summary judgment, concluding (1) Appellants

failed to state a claim against the solicitor; (2) there is no genuine issue of material fact regarding Appellants' entitlement to damages under the forfeiture statute; and (3) Appellants have failed to state a claim for attorney's fees. This appeal followed.

ISSUE

Did the circuit court err in granting Respondents' motion for summary judgment?

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). Further, summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom. MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

LAW/ANALYSIS

Appellants argue the Georgetown City Police Department and the Georgetown County Sheriff's Office, acting through the Solicitor for the Fifteenth Judicial Circuit (hereinafter referred to as the "seizing agency"), had a duty to maintain the seized property after Judge Shuler signed the seizure warrant on May 4, 1993, authorizing the solicitor to seize the property due to controlled substances violations. Therefore, according to Appellants, the seizing agency violated its duty to take reasonable steps to maintain the property when the City of Georgetown demolished the property.

Furthermore, Appellants contend they could not be expected to defend against the demolition of the property because the seizing agency exercised control over the property once the seizure warrant was issued.

Initially, we agree with Appellants that a seizing agency has a duty to take reasonable steps to maintain property once a warrant is issued for seizure of the property. Section 44-53-520(i) (2002) provides:

> **Law enforcement agencies seizing property** [that is subject to forfeiture under this section] **shall take reasonable steps to maintain the property**. Equipment and conveyances seized must be removed to an appropriate place for storage. Any monies seized must be deposited in an interest bearing account pending final disposition by the court unless the seizing agency determines the monies to be of an evidential nature and provides for security in another manner.

(emphasis added).

The plain language of Section 44-53-520(i) unequivocally provides that agencies *seizing* property have an obligation to take reasonable steps to maintain the property. The circuit court held the duty to take reasonable steps to maintain the property did not arise in this case because a forfeiture action was never initiated under Section 44-53-530(a) (2002). We disagree.

S.C. Code Ann. 44-53-530(a) provides that forfeiture of the property is "accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized." However, a seizing agency may seize property until lawful disposition of the property is ordered and the property is declared forfeited by petition. Section 44-53-520(b) provides, in part, that property subject to forfeiture may be seized by the department having authority upon warrant issued by any court having jurisdiction over the property. Such warrant was issued in this case. A forfeiture action, however, was never initiated under Section 44-53-530(a).

The seizing agency's duty to take reasonable steps to maintain the property arises upon seizure pursuant to Section 44-53-520(b) and before forfeiture of the property is formally accomplished by petition pursuant to S.C. Code Ann. § 44-53-530(a).

Although, the seizing agency has a duty to take reasonable steps to maintain the property upon issuance of a seizure warrant, the seizing agency in this case did not violate its duty under the facts of this case. We decline to impose a duty on a seizing agency to commence legal action in an effort to protect property subject to a seizure warrant against a wholly independent legal process initiated by the City of Georgetown. The Georgetown City Police Department and the Georgetown County Sheriff's Office, acting through the Solicitor for the Fifteenth Judicial Circuit, as the lawful seizing agency, did not violate the duty to take reasonable steps to maintain the property because the City of Georgetown acted under lawful process in condemning the property based on independent violations of existing building and fire code standards. Forfeiture and condemnation proceedings are competing legal processes and, as such, the seizing agency acting pursuant to its forfeiture authority has no duty to defend against city's process.

Recognizing that legal actions of forfeiture and condemnation are distinct, we conclude any defenses Appellants may have asserted were against the City of Georgetown for the *condemnation* of the building. Therefore, the circuit court properly granted Respondents' motion for summary judgment because there is no genuine issue of material fact the seizing agency violated its duty to take reasonable steps to maintain the property. Finally, our resolution of this issue is dispositive and we need not address Appellants' remaining issues regarding whether the City of Georgetown was an indispensable party in this action, what remedies Appellants would be entitled to under the forfeiture statute, and Appellants' request for attorney's fees. Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive).

AFFIRMED AS MODIFED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Marc H. Westbrook, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Dillon County Magistrate
Frank D. Lee, Respondent.

Opinion No. 25981
Submitted April 5, 2005 – Filed May 9, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for The Office of Disciplinary Counsel.

Douglas Jennings, Jr., of Bennettsville, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a confidential admonition or public reprimand pursuant to Rule 7(b)(3) and (4), RJDE, Rule 502, SCACR. In addition, respondent agrees to neither seek nor accept any judicial position in South Carolina without permission of the Court and to neither seek nor accept Court permission without prior notice to Disciplinary Counsel.

The facts, as set forth in the agreement, are as follows.

FACTS

Respondent served as a magistrate in Dillon County for over forty years. On June 25, 2004, respondent engaged in inappropriate contact with a female magistrate court employee at work.

The employee reported the incident to law enforcement on the morning of the next business day, June 28, 2004. The incident became a subject of inquiry by other county officials on June 29, 2004. Respondent resigned by letter dated June 30, 2004, citing health reasons and mandatory retirement in one year as reasons for his resignation.

The incident was investigated by the State Law Enforcement Division (SLED). At the conclusion of the investigation, a warrant charging respondent with simple assault and battery was issued. On January 20, 2005, pursuant to a plea agreement, respondent pled guilty to battery and was fined $250.00 as resolution of the charge.

Respondent represents he meant no harm or offense to the employee, that he has a jovial and friendly personality, and that he is a frequent "jokester" with office personnel. Respondent represents he intended to engage in jovial activity with the employee and that he regrets his words and actions.

When questioned about this incident by SLED, other female magistrate court employees reported respondent was known to make comments of a sexual nature. The employees stated respondent sometimes made unwelcome physical contact.

Respondent represents that he did not realize the employees took exception to or were offended by what he intended to be jovial conduct and that he would not have engaged in the conduct had he known otherwise. Disciplinary Counsel does not contest this representation.

LAW

By his misconduct, respondent agrees he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1(A) (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); and Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). In addition, respondent agrees he has violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.[1] Hereafter, respondent shall neither seek nor accept any judicial office in this state, whether by appointment or election, without permission of the Court, and he shall neither seek nor accept permission of the Court without prior notice to Disciplinary Counsel. See Rule 7(b)(7) and (8), RJDE, Rule 502, SCACR. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

[1] A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Chesterfield County Magistrate
Harold T. Conway, Respondent.

Opinion No. 25982
Submitted April 5, 2005 – Filed May 9, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for The Office of Disciplinary Counsel.

Harold T. Conway, of Cheraw, pro se.

PER CURIAM: In this judicial disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, Respondent admits misconduct and consents to the imposition of a confidential admonition or public reprimand pursuant to Rule 7(b)(3) and (4), RJDE, Rule 502, SCACR. The facts as set forth in the agreement are as follows.

FACTS

On August 20, 2003, Defendant was arrested by Pageland police for failing to use a turn signal and stealing crops. Respondent

set Defendant's bond on these charges at $650.00. On or about August 21, 2003, Jane Doe paid $650.00 in cash to Respondent as bond for Defendant. Jane Doe reports she saw Respondent place the money in his pocket.

Defendant was released from jail after posting an amount equal to the fines for the charges. Defendant intended that the forfeiture of his money conclude the matter.

Defendant's charges came before another judge for trial on September 2, 2003. This judge had no paperwork concerning Jane Doe's payment of the $650.00. Defendant was tried in his absence, a bench warrant was issued, and a Non-Resident Violator Compact (NRVC) notice was sent to Respondent on the traffic offense.

After receiving the NRVC and learning that a local police officer with a bench warrant was looking for him, Defendant contacted the presiding judge who subsequently reported the matter to the Chief Magistrate. The Chief Magistrate examined Respondent's books and found no record of Defendant's bond. When questioned by the Chief Magistrate, Respondent acknowledged receiving the money but stated it was missing, that he could not find it, that he made a mistake, and that he would repay the money. The agreement represents Respondent repaid the $650.00 with funds borrowed from his mother-in-law. Respondent resigned from office on August 1, 2004.

Disciplinary Counsel examined Respondent's financial records for the months of August and September 2003 and found no record of a $650.00 deposit on or around the date Respondent received the money from Jane Doe. Respondent does not dispute that he placed the money in his pocket. Respondent informed Disciplinary Counsel that he sometimes did not complete all bond paperwork for evening bond hearings until the next day and, in accordance with this practice, surmises he may have taken the money home where it may have been commingled with personal funds on his dresser.

During Disciplinary Counsel's audit of Respondent's magisterial account, one overage was discovered. Respondent acknowledges depositing his personal money into his magisterial account due to his belief that there might be a shortage in the account.

Respondent acknowledges that his failure to receipt and deposit bond money and his failure to maintain accurate financial records violates the Chief Justice's Administrative Order of November 9, 1999 governing money handling and recordkeeping by summary court judges. In addition, Respondent admits his practices violated Canons 1, 1(A), 2, 2(A), 3, 3(A), and 3(C) of the Code of Judicial Conduct and Rules 7(a)(1) and (7) of the Rules for Judicial Disciplinary Enforcement.

LAW

By his misconduct, Respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1(A) (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3A (judicial duties of a judge take precedence over all the judge's other activities); and Canon 3C (judge shall maintain professional competence in judicial administration). In addition, Respondent has also violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct) and Rule 7(a)(7) (it shall be ground for discipline for judge to willfully violate a valid court order) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.[1] Hereafter, Respondent shall neither seek nor accept any judicial office in this state, whether by appointment or election, without permission of the Court, and he shall neither seek nor accept permission of the Court without prior notice to Disciplinary Counsel. See Rule 7(b)(7) and (8), RJDE, Rule 502, SCACR. Accordingly, Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

[1] A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Brennan Shay Jackson, Appellant.

Appeal From Calhoun County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 25983
Heard March 16, 2005 – Filed May 9, 2005

AFFIRMED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Salley W. Elliott; Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert D. Robbins, of Summerville, for Respondent.

JUSTICE WALLER: The appellant Brennan Shay Jackson (Jackson) was convicted of grand larceny and sentenced to ten years. He contends the trial court erred in admitting a photograph of him at a Halloween party when he was dressed as a prisoner and in refusing to allow him to introduce polygraph results in rebuttal after an insurance adjuster had testified that he

had asked Jackson whether he would be willing to take a polygraph. We affirm.

FACTS

Jackson is the nephew of Barbara and Bobby Ayer and the owner of a pawnshop. Jackson also cleaned and did odd jobs for the Ayers three days/week. The State alleged that sometime between June 1 and December 16, 2000, Jackson stole approximately $190,000-200,000 in old collectible coins and bills from the Ayer's two home safes. There was no sign of forced entry.[1]

Jackson testified Barbara paid him between $500-1,000 per week. Further, he testified Barbara gave him gold and silver coins and old money on many occasions. Barbara, however, testified she paid him only $100 per week and she never paid him with silver dollars or other old money. Over the years, Barbara had given Jackson large sums of money to help him purchase a car, a truck, and a cruise for Jackson's father, and open the pawnshop.[2]

Upon discovering that the coins and money were missing, Bobby called his insurance agent. Insurance adjuster Bill Spell investigated the theft. During his investigation, Spell interviewed Jackson and Stephen Phillips who had worked for the Ayers during the fall of 2000. At trial, Jackson admitted he sold some old paper money and coins worth several hundred dollars to John "Smokey" Dukes, Phillips' cousin, at a Halloween party. In fact, Jackson admitted some of the money that was sold to Smokey Dukes came from the Ayer's house. However, he testified his aunt had given him the money. Jackson also admitted he sold approximately $8,000 worth of Krugerrands to Carolina Gold and Silver and Baxley's Pawnshop. At trial, Phillips testified about Jackson's various cash expenditures between June and December 2000. He specifically testified Jackson spent $800 to hire a band to

[1]Two rings initially thought to also have been stolen were later discovered in the Ayer's home.

[2] Barbara had made a deathbed promise to her mother (Jackson's grandmother) to take care of Jackson and by all accounts had been extremely generous to Jackson over the years.

play at the farmer's market for a football game; bought some guns; and paid $2,000 in labor costs for Phillips to build him a dog kennel. He also testified Jackson bought a $13,000 boat in March 2000. Additionally, there was testimony Jackson paid $4,000 cash for a cruise in the fall of 2000.

ISSUES

1) Did the trial court err in admitting photographs of Jackson in a prisoner's costume at a Halloween party?

2) Did the trial court err in denying Jackson's request to introduce evidence that he had passed a polygraph test?

DISCUSSION

1) Photograph

During a pre-trial hearing, Jackson objected to the State's introduction of several photographs taken of appellant at a Halloween party held in 2000.[3] Appellant was dressed as a prisoner. The State later sought to introduce only one of the photographs to show appellant was at the party along with two State's witnesses who would testify that Jackson had sold them things stolen from the victims. Jackson contended the photograph was prejudicial because he was dressed in a prison uniform. He argued the photograph was more prejudicial than probative.

On appeal, Jackson contends the photograph gave the impression that he had a light-hearted attitude toward lawlessness and found criminal behavior amusing. Jackson contends the photograph was irrelevant to any

[3]When the State introduced the photograph during trial, Jackson asked the trial court to note his pre-trial objection to its admission. The State argues that Jackson failed to state his objection in terms of Rule 403, SCRE, and therefore is barred from arguing this rule on appeal. While Jackson did not argue specifically Rule 403, he clearly argued that the prejudicial value of the photo outweighed any probative value. Accordingly, Jackson properly preserved this objection.

issue. Further, he argues he never contested he was at the Halloween party and offered to stipulate he was there.

The State, however, has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation. State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). The relevancy, materiality, and admissibility of photographs are matters left to the sound discretion of the trial court. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). "[T]here is no abuse of discretion if the offered photograph serves to corroborate testimony." Johnson, 338 S.C. at 122, 525 S.E.2d at 523. However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997). To constitute unfair prejudice, the photographs must create "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Even if evidence was irrelevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991).

The State contends it introduced the photograph to show Jackson was at the party and had sold stolen items. While the photograph does not show any of the stolen items, Jackson testified that in the photograph he was selling some of the alleged stolen goods to Smokey Dukes. Thus, the photograph was clearly relevant.

Further, the photo would not cause the jury to reach a decision on an improper basis. The photo was taken prior to Jackson being identified as a potential suspect and, in fact, prior to the discovery of the crime. We find any prejudice from Jackson having on a prisoner's costume is outweighed by the photograph's probative value. Accordingly, we do not think that the admission of this particular photograph is reversible error.

2) Polygraph test results

Jackson contends the trial court erred in denying his motion to introduce evidence that he had passed a polygraph test given by a private polygrapher. Jackson contends the State opened the door and that he should have been allowed to reply. During the trial, the State presented a recording of a conversation that the insurance investigator Spell had taped with Jackson.[4] During this conversation, Spell asked Jackson whether he would be willing to take a polygraph.[5] Jackson answered he would be willing to take a polygraph. Jackson did not make any contemporaneous objection to the reference to a polygraph test. In fact, when the tape of the conversation was initially played, the trial court specifically asked Jackson if he had any objection to the tape being played and he stated no. Immediately after the tape was played, the State moved into evidence and Jackson again stated he had "[n]o objection at all."

Jackson then informed the trial court that he had a matter he wanted to take up with the court. Jackson stated that the State had opened the door for the admission of polygraph <u>results</u>.[6] The Solicitor responded that he did not believe the door had been opened and further he pointed out that the Sheriff had offered Jackson a polygraph to be administered by State Law Enforcement Division (SLED) but Jackson never took up his offer. The trial

[4]We note trial counsel was present at this meeting.

[5]The pertinent part of the conversation is as follows:

Spell: Would you be willing to take a polygraph?
Appellant: Yeah. That'd be fine.
Spell: Okay. You don't have any problem doing that?
Appellant: Unhuh. That's fine.

[6]Apparently, prior to trial Jackson had taken a private polygraph and passed. However, neither the results of this polygraph nor the questions asked during the test were proffered for the record.

court told Jackson he would have to hold a Council[7] hearing to determine if the polygraph results were admissible.

Jackson told the trial court he had not prepared for a Council hearing and after some discussion stated he would think about it overnight. The Solicitor reiterated that if Jackson presented any evidence of polygraph test results, the State "intend[ed] to call the Sheriff to say he was prepared to take [Jackson] to S.L.E.D. and [Jackson] did not take him up on it." The next morning trial counsel stated he had thought about it and decided that he would simply ask the witness whether Jackson had agreed to take a polygraph and whether one was administered and "leave it at that." Clearly, Jackson abandoned his motion to admit the polygraph test results.[8]

On appeal, Jackson contends that "while any potential Council issue was waived, the issue of rebuttal was clearly raised and ruled upon by the trial court." Jackson contends the State "opened the door . . . for evidence that [Jackson] took [a polygraph test] and passed it" and he should have been allowed to introduce polygraph evidence in rebuttal.

When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). However, here, Jackson waived any argument he had when he acquiesced the next morning and stated he would ask Spell if he had administered a polygraph and "leave it at that." Jackson did not note any objection. Jackson made a decision to not introduce any evidence of the polygraph test results in rebuttal. Accordingly, this issue is not preserved.

In any event, Jackson was not prejudiced. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (holding error without prejudice does not warrant

[7]State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)(holding the admissibility of polygraph tests must be analyzed under Rules 702 and 403, SCRE.).

[8]Spell later testified that he asked Jackson if he would be willing to take a polygraph and his response was "sure" but he never offered Jackson one.

reversal). The testimony before the jury was that Jackson stated he would be willing to take a polygraph and Spell testified he never offered him one. This would not leave the jury with the impression that Jackson had taken and failed a polygraph. Accordingly, based on the foregoing, Jackson's conviction and sentence are

AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Marc H. Westbrook, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Grace G. Pittman, Appellant,

v.

Keith Stevens, M.D., Respondent,

and

Franklin L. Pittman, Appellant,

v.

Keith Stevens, M.D., Respondent.

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

Opinion No. 25984
Heard March 1, 2005 – Filed May 9, 2005

AFFIRMED

James C. Cothran, Jr., of Spartanburg, and Michael L. Rudasill, of Lawrence & Rudasill, P.A., of Spartanburg, for Appellants.

Andrew F. Lindemann, of Davidson, Morrison & Lindemann, P.A., of Columbia; and Edwin Brown Parkinson, Jr., of Devlin & Parkinson, P.A., of Greenville, for Respondent.

JUSTICE WALLER: This case is a medical malpractice case. The jury returned a verdict for the doctor. The trial court denied the appellants' motion for a new trial on the ground the trial court's erroneously failed to charge two requested jury instructions. We affirm.

FACTS

In June 1998, appellant Franklin Pittman underwent back surgery. The respondent Dr. Keith Stevens was the anesthesiologist. The surgery required that Pittman, a morbidly obese diabetic, be placed in a prone position for approximately four hours. Because of a previous cervical surgery and Pittman's other health conditions, he was more at risk for developing lesions or ulcers at pressure points. To help relieve pressure points during the surgery, Dr. Stevens placed a gel pad under Pittman's face.

Following the surgery, however, Pittman developed a lesion on his forehead – similar to a blister. Although the skin lesion eventually healed, he alleges he suffered nerve damage. Pittman testified that he has constant headaches along with "lightning strikes" or very sharp pains and his head is very sensitive. He brought this action against Dr. Stevens alleging negligence. Pittman's wife brought a loss of consortium claim.

ISSUE

Did the circuit court err in failing to
charge two requested jury instructions?

DISCUSSION

At the jury charge conference, Pittman requested two jury instructions, referred to as requested charges Numbers 7 and 8:

Request to Charge No. 7

> While evidence of ordinary practice or the uniform custom of persons in similar circumstances is to be weighed and considered with other circumstances in determining whether ordinary care has been exercised, conformity to custom is not in and of itself the exercise of due care as a matter of law.
>
> Request to Charge No. 8
>
> If there is a great degree of danger present, then there is a greater duty of care to prevent injury to other persons. When there is a risk of substantial danger present, and the symptoms of the patient are considered with such a risk, then the physician has a duty to respond in proportion to the risk. The greater the risk of the condition to the patient, the greater the duty of the physician to respond appropriately and to provide the appropriate treatment.

The trial judge stated he would cover these requested charges. After the trial judge had charged the jury, the appellants informed the judge that the requested charge Numbers 7 and 8 had not been included. After commenting on the lack of specific authority to support these requested charges, the trial judge ruled that the charge as a whole was fair. After the jury returned a verdict for the doctor, the appellants moved for a new trial on the ground that the trial judge failed to charge the requested charges. The trial judge denied the motion and stated that he thought his general charge adequately covered the requested charges.

The trial judge is required to charge only the current and correct law of South Carolina. McCourt v. Abernathy, 318 S.C. 301, 305, 457 S.E.2d 603, 606 (1995). When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can

demonstrate prejudice from the refusal. Vogt v. Murraywood Swim & Racquet Club, 357 S.C. 506, 512, 593 S.E.2d 617 (Ct. App. 2004).

We first note that the appellants cite no case law either from South Carolina or any other jurisdiction to support either of these requested charges. The appellants cite to section 27-2 of Judge Ralph King Anderson Jr.'s *South Carolina Request to Charge.* As noted by the trial judge, the requested charges are two paragraphs out of a charge that covers 4½ pages in Judge Anderson's book. The entire charge is then followed by a list of authorities which purports to support the charge. It is not apparent which authorities support the specific paragraphs which the appellants requested the trial court charge.

As to Charge Number 7, the appellants do not cite to any South Carolina case law. In fact, there is actually a South Carolina case directly contrary to requested charge Number 7. In Doe v. Am. Red Cross Blood Serv., 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989), the Court answered several certified questions in a case involving the standards used by blood banks and the spread of HIV/AIDs through contaminated blood. One of the issues was whether the blood banks were negligent in failing to screen for HIV even though at that time the customary practice was not to screen. The Court held:

> in a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession. If the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, ***then the professional cannot be found liable as a matter of law.***

Id. at 435, 377 S.E.2d at 326 (emphasis added). The Court specifically deferred "to the collective wisdom of a profession, ***such as physicians***, dentists, ophthalmologists, accountants and any other profession which

furnishes skilled services for compensation." Id. (emphasis added).[1] Request Number 7 states "conformity to custom is not in and of itself the exercise of due care as a matter of law." Request Number 7 is directly contrary to the Court's holding in Doe. Accordingly, the trial judge did not err in failing to charge this proposed jury instruction.

As for Request Number 8, Dr. Stevens contends the issue is not preserved because the appellants alleged error only as to charge number 7 in their Amended Notice of Appeal. We disagree. In their Amended Notice of Appeal, the appellants specifically state they are appealing the trial court's denial of their "motion for a new trial and the court's order refusing the [appellants'] request to charge number 7." The appellants' motion for a new trial was made on the ground that the trial judge failed to charge both requested jury charges and the Statement of the Issue on appeal encompasses both requests. While the Amended Notice of Appeal does not specifically refer to charge Number 8, it complies with Rule 203(e), SCACR, and the example set out in the appendix[2] and clearly the appellants' notice was adequate to inform Dr. Stevens that the appellants were appealing the trial court's denial of the new trial motion. See Henson v. Int'l Paper Co., 358 S.C. 133, 142, 594 S.E.2d 499, 503 (Ct. App. 2004)(holding the issue statement encompassed the argument).

As to the merits, Request Number 8 is a general negligence law principle and there is no South Carolina case law supporting its application in a medical malpractice action. Furthermore, we found only one case from another jurisdiction discussing this issue, Hinkle v. Cleveland Clinic Found., 2004 WL 2914993 (Ohio App. 8 Dist. filed Dec. 16, 2004). In Hinkle, the court held the trial court's failure to charge the "greater danger" instruction

[1]Apparently, South Carolina is in the minority of the jurisdictions which have ruled on this issue. See Philip G. Peters, *The Quiet Demise of Deference to Custom: Malpractice Law at the Millenium*, 57 Wash. & Lee L. Rev. 163 (2000).

[2]The following is the entire body of the example notice set out in the appendix of Rule 203 (e): "Jane C. Roe appeals the order [judgment] of the Honorable George E. Brown dated September 1, 2000. Appellant received written notice of entry of this order [judgment] on September 3, 2000."

was not error.[3] The court also noted that it could "find no case law to support the proposed jury instruction in a medical malpractice case." Id. at 11.

This type of instruction has been questioned in general negligence actions because the amount of care in relation to the degree of danger is encompassed in the appropriate standard of care which is determined by the facts of each case. See Stewart v. Motts, 539 Pa. 596, 654 A.2d 535 (1995)(holding the highest degree of care practicable is simply another way of phrasing a standard of reasonable or ordinary care under the circumstances). Furthermore, this instruction is even more inappropriate in a medical malpractice case. Every medical decision encompasses varying degrees of danger. Thus, the trial court did not err in failing to charge the jury Request Number 8.

Based on the foregoing, we conclude the trial court did not err in failing to charge the jury the two requested instructions. We remind the bench and the bar that while treatises and other scholarly works are useful research tools, it is necessary to review controlling case law for the current and correct jury charges.

AFFIRMED.

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

[3]Although the Ohio instruction is not exactly like the proposed one in this case, it stands for the same principle. It reads, in pertinent part: "GREATER DANGER. The amount of care increases in proportion to the danger that reasonably should be foreseen." 1 OJI 7.10 (2004).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Phillip W. Preslar, **Appellant.**

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3987
Heard April 4, 2005 – Filed May 2, 2005

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David Spencer, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

ANDERSON, J.: Phillip Wayne Preslar appeals from his convictions and sentences for two counts of intimidation of a witness. He contends the trial court erred in allowing reference to the prior charges of criminal sexual conduct, the pending charge to which the victim of the intimidation was the victim and chief witness. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Preslar was charged with twelve counts of criminal sexual conduct (CSC) against his daughter, Melissa. While awaiting trial on the CSC charges, Preslar mailed two handwritten letters seeking to convince Melissa to drop the charges. The first letter was sent to "Melissa, Chris & new baby girl." The letter stated:

> [H]ow's your daughter? or my granddaughter if I may ask? I don't know her name or how much she weighed when born. Could you write me and let me know? [M]aybe send some pictures of you all!! I would be very greatful [sic]. . . . I know that you'll take really good care of her. Please do your best, and let her know that I love her, please do this for me Melissa. . . . .
>
> . . . I just talked with my lawyer and did not get very good news from him. Seems they want me to plead guilty to Criminal Sexual Conduct 2nd degree. It carries 15 years. Missy, that's a long time, and I probably won't make it out alive. Even if I do, I won't be able to survive, because I won't be able to work with a criminal record like the one I'll have. Maybe I should just ask for the Death Penalty because it's more or less what it will be. God, I don't know what to do now. What should I do now?
>
> I have to ask you this because you are the only one who can be happy with the results and outcome of this whole situation. I guess it comes down to what you want the Justice System to do to me, for <u>you</u>. I really want you to know that my life is in your hands at this time, and only you can do what's necessary to

change what happens to me. I keep hearing that you are going to drop the charges, but I just don't know. Melissa, if you have any part of my heart, please think about dropping the charges. I am not begging you to, just asking please. I just don't think I can make it in Prison again, especially 15 years. Missy, my lawyer says that I can take this to Trial, but I don't want to drag out all the shit that they will put any of us thru, if you know what I mean. They will drag out everyone's past by doing a trial and more indictments or warrants could and will come up on others involved.

I will try to keep from going to trial because I don't want them to antagonize you any more than they already have. Melissa, it is very important that you do whatever you do at your own free will, and I want you to know that in no way am I threatening you or anyone else. I just hope and pray that this time you'll save my life from this crooked Justice System. . . . Once again Melissa, [p]lease do what you can to drop these charges so we don't have to suffer any more heartache that the past is going to bring up. . . . I pray that you will help me Missy. (Emphasis in original).

In a second letter, addressed to Melissa's sister, Preslar wrote:

Mandy, tell your sister Missy, not to take this as a threat, or personal, or as an effort to get her to drop these charges, Mandy, by no means am I a snitch, but I will not stand by and give my life to SC's prison system for accusations given to NC, almost 7 years ago. Not when God, myself, and other people know about Chris and Missy's past which they explained to me and my friend just 14 months ago, (68 chev, late 1994?). I don't by no means want to see Melissa hurt by her past with Chris but God won't let me stand by and not bring this in to the open. You know, maybe its God's will that put me here to show this anyway since I never done anything about it back then when I should have and they were sleeping together in Indian Land. I am going to hold off talking with any detectives about this until after Jan. 10th, when

> Court starts back up here. Everything depends on whether this goes to trial or not. I truly believe that God is using me to bring other people out of their misery of their own hidden sins in which only God and themselves know of!! (God works in mysterious ways). Only God & Melissa have the power to change the outcome of this unforeseen travsety [sic] of all our lives. I Hope and Pray that God will touch Missy's heart just as he has mine.

Preslar was indicted for two counts of intimidation of a witness under section 16-9-340 of the South Carolina Code (2003). Prior to trial, Preslar moved to prohibit the State from presenting any evidence or mentioning the underlying CSC charges. Preslar's counsel alleged the mention of the CSC charges would be unduly prejudicial and would confuse the jury. The State maintained the underlying charges had to be identified in order to demonstrate why the two letters were so threatening to Melissa.

The court allowed the State to articulate that Preslar was charged with criminal sexual conduct without mentioning the number of charges or that he was currently incarcerated. Portions of the letters were redacted so only those sections specifically alleged to be intimidating were allowed into evidence.

During the trial, it was explained that Preslar was charged with CSC. The State informed the jury that Melissa was the alleged victim in the case and the primary witness if it should proceed to trial. Melissa professed that bringing the charges against her father scared her, "but on the other hand [made her] happy" because "he couldn't mess with [her] no more."

Melissa described in detail why the first letter was intimidating to her. As the alleged victim of Preslar's CSC charges, the references to her daughter made her very uneasy. Melissa stated she "didn't want him to know her or her to know him." She later addressed the threat: "Just my daughter period, don't want him to know her or have anything to do with her or see her or touch her or anything."

The references to "more indictments or warrants" made Melissa afraid for her husband. She announced to the jury that she and her husband had sexual relations when she was still a minor, at sixteen. Melissa testified she was "scared" Preslar would seek charges against her husband, Chris, even though the two married in 1997.

As to the second letter, Melissa's main concern was for her husband. The threats that Preslar would expose their relationship when she was only sixteen made her afraid her husband could go to jail. She articulated the claims by Preslar made her "[h]esitant on going forth." The jury found Preslar guilty on both counts of intimidating a witness.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); see also State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004)("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Davis, Op. No. 3970 (S.C. Ct. App. filed March 28, 2005) (Shearouse Adv. Sh. No. 16 at 55).

On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Staten, Op. No. 3955 (S.C. Ct. App. filed March 7, 2005) (Shearouse Adv. Sh. No. 12 at 22). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). In order for an error to warrant reversal, the error must result in prejudice to the appellant. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

LAW/ANALYSIS

Preslar contends the trial court erred in allowing testimony regarding the nature of his charges. He maintains it was unduly prejudicial for the jury to be told the underlying charges were for CSC, and the testimony should have been excluded as improper character evidence or as a reference to a prior bad act. We disagree.

I. INTIMIDATION OF A WITNESS

In South Carolina, intimidation of a witness is a statutory offense consisting of the following elements:

(1) an unlawful threat or force;

(2) to intimidate or impede a witness in the discharge of his duty;

OR

> to destroy, impede, or attempt to obstruct or impede the administration of justice in any court.

S.C. Code Ann. § 16-9-340(A) (2003).

II. RES GESTAE

The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Fletcher, __S.C.__, 609 S.E.2d 572 (Ct. App. 2005); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). Our supreme court discussed the res gestae theory in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996):

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged."

Id. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)). When evidence is admissible to provide this "full presentation" of the offense, there is "no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." State v. Sweat, 362 S.C. 117, 133, 606 S.E.2d 508, 517 (Ct. App. 2004) (internal quotations omitted). Under the res gestae principle, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. Fletcher, __S.C. at __, 609 S.E.2d at 585. Even if the evidence is relevant under this theory, prior to admission the trial judge should determine whether

its probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; Fletcher, __S.C. at __, 609 S.E.2d at 585.

Section 16-9-340 of the South Carolina Code provides:

> (A) It is unlawful for a person by threat or force to:
>
> > (1) intimidate or impede a judge, magistrate, juror, witness, or potential juror or witness, arbiter, commissioner, or member of any commission of this State or any other official of any court, in the discharge of his duty as such; or
> >
> > (2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court.

S.C. Code Ann. § 16-9-340 (2003).

In the case sub judice, the evidence was properly admitted under the res gestae theory. The underlying CSC charges were a necessary and integral part of the crime for which Preslar was charged. The nature of those crimes—the explanation that Preslar allegedly victimized his daughter Melissa—was inextricably interwoven in the fabric of the charge of intimidation of Melissa as the victim and primary witness in the case against Preslar.

In order for the jury to fully understand why Melissa would be threatened by Preslar's references to her baby girl, the jury had to understand what Melissa accused Preslar of doing to her. Without reference to the underlying CSC charges, the jury would not be able to discern the context in which the questions became threats. The reference to the CSC charges was necessary for a full presentation of the evidence to the jury. The explanation that Preslar was charged with CSC and Melissa was his victim is archetypical res gestae evidence. Moreover, the probative value of the evidence outweighed its prejudicial effect. See State v. Wood, 362 S.C. 520, 608

S.E.2d 435 (Ct. App. 2004). Concomitantly, the trial court did not abuse its discretion in admitting the evidence that Preslar was charged with CSC and Melissa was the victim and primary witness in the case.

III. RELEVANCE

For evidence to be admissible, it must be relevant. Rules 401 & 402, SCRE; State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE; State v. Gillian, 360 S.C. 433, 457-58, 602 S.E.2d 62, 75 (Ct. App. 2004) (internal quotations omitted).

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Pagan, 357 S.C. 132, 142, 591 S.E.2d 646, 651 (Ct. App. 2004). Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE.

The evidence of Preslar's charges for CSC was absolutely necessary and relevant for the jury to determine why the letters written to Melissa were threatening and intimidating. While the nature of the charges was prejudicial, as is any evidence against the defendant in a criminal trial, the evidence was essential to proving the elements of the crime for which Preslar is charged. The probative value of the evidence outweighed its prejudicial effect. Apodictically, the trial court properly allowed the testimony regarding Preslar's charges for CSC.

CONCLUSION

The testimony explaining Preslar's prior charges for CSC to the jury was necessary to explain the context or the res gestae of the crime of intimidating a witness under section 16-9-340. Additionally, the evidence was not unduly prejudicial so as to outweigh its probative value. The trial court did not abuse its discretion. Accordingly, Preslar's convictions and sentences are

AFFIRMED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elizabeth Murphy,	Appellant,
v.	
Jefferson Pilot Communications Company, WCSC, Inc., d/b/a WCSC Channel 5, and Donald M. Feldman, Defendants, of whom Jefferson Pilot Communications Company and WCSC, Inc., d/b/a WCSC Channel 5 are,	Respondents.

Christopher Murphy,	Appellant,
v.	
Jefferson Pilot Communications Company, WCSC, Inc., d/b/a WCSC Channel 5, and Donald M. Feldman, Defendants, of whom, Jefferson Pilot Communications Company and WCSC, Inc., d/b/a WCSC Channel 5 are	Respondents.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3988
Heard March 10, 2005 – Filed May 2, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John E. Parker and Ronnie L. Crosby, both of Hampton, for Appellants.

John J. Kerr, of Charleston, for Respondents.

STILWELL, J.: Elizabeth Murphy filed an action against Jefferson Pilot Communications Company (Jefferson Pilot), WCSC, Inc. d/b/a WCSC Channel 5 (WCSC), and Donald M. Feldman, alleging, inter alia, defamation and intentional infliction of emotional distress. Elizabeth's husband, Christopher Murphy, filed a companion claim alleging loss of consortium. The trial court directed verdicts in favor of WCSC and Jefferson Pilot. The jury returned a verdict against Feldman, awarding the Murphys substantial actual and punitive damages. The Murphys appeal. We affirm in part, reverse in part, and remand.

FACTS

Donald Feldman served as "Assistant VP News" for Jefferson Pilot and was the news director of WCSC, a Charleston television station and Jefferson

Pilot subsidiary. He reported directly to the general manager of Jefferson Pilot. Feldman met Sandra Senn, a local attorney, and convinced her to become a voluntary panelist on a political talk show broadcast by WCSC entitled "Carolina Gang." Senn, a former partner in the Stuckey Law Firm, had recently started her own firm. Elizabeth's father, James Stuckey, was the senior partner of the Stuckey Law Firm. Senn and the firm were involved in a dispute regarding business issues relating to Senn's departure from the firm, and Senn mentioned her frustrations springing from the dispute in casual conversations with Feldman.

On July 23, 1999, Feldman telephoned Senn and said that he had just arrived in Atlanta on a flight from Charleston. Feldman told Senn that Elizabeth was on his flight and, while very intoxicated, made slanderous remarks about Senn and WCSC.

A couple of days later, Feldman electronically mailed Senn stating:

> I have decided to take an ACTIVE roll [sic] in dealing with this woman. I have come up with my own plan to deal with her. . . . After thinking about it, I am determined not to let this woman attempt to destroy your reputation and my plan will scare the crap out of her. It was selfish of me to stay out of it.

Later the same week, Feldman told Senn he sent a letter (the Letter) to Elizabeth via courier. Feldman provided Senn with a copy of the Letter. The Letter was written on WCSC stationery and stated:

> Dear Ms. Stuckey:[1]
>
> After what I felt were disturbing and potentially Liable [sic] Statements aboard Delta Fight 852 from Charleston to Atlanta on July 23, 1999. [sic] There

[1] Elizabeth is referred to in the record as both Elizabeth Murphy and Elizabeth Stuckey. We refer to her as Elizabeth.

are several issues I am compelled to discuss with you.

Your unsubstantiated comments against Jefferson-Pilot Communications, WCSC News, Sandy Senn and Me are at the least tasteless and could force our company to take legal action against you and your law firm.

As you so clearly stated, Ms. Senn is a WCSC Air Personality. Therefore, WCSC has a moral as well as a financial interest in protecting her reputation and that of our News Department and its' [sic] programs. It is one thing to criticize an air personalities [sic] delivery, but it is quite another to loudly and publicly discuss their bedroom habits and personal disputes between you, your Law Firm, and her. I am also deeply disturbed that you would question my hiring practices and the motives behind them. I have been in Television News Management for thirty years and maintain WCSC's news as the highest rated and most respected in the market.

As a result, I have instructed a member of our staff to contact Delta Airlines to obtain the passenger manifest and the flight attendant service log for the flight we were on. Atlanta Passenger Service Agent Heath Hamrick will also be contacted. As you recall, he was the individual who repeatedly told you to keep your voice down after our late arrival in Atlanta.

I intent [sic] to use the passenger service manifest to determine which passengers, if any, heard your comments. I will then contact Frank Magid Associates, our research firm, and ask them to interview any Charleston area passengers to see if

> your statements will affect their perceptions and viewing habits of Channel Five and Carolina Gang. They will also ask if the perceptions of Ms. Senn have changed.
>
> The flight attendant service log will be used to determine how many bottles [sic] alcohol you were served on the flight.
>
> Once I have this information, I intend to turn to our legal department. They will advise me whether to tell Ms. Senn of the incident and whether our company should take legal action against you and your law firm. If you care to discuss this incident further, please contact me at 402-5740.
>
> In the end, this matter could become far more embarrassing for you and your law firm than for Jefferson Pilot Communications, Ms. Senn, or me.
>
> I would hope we can resolve this matter quickly before there is any more damage to the reputations of anyone.
>
> Sincerely,
>
> Donald M. Feldman
> Vice-President/News Director

Subsequently, Feldman told Senn that Elizabeth came to WCSC on two occasions to discuss entering into a civil agreement to refrain from any further defamation of Senn. Senn testified she assisted Feldman in the preparation of the agreement, but never saw a signed copy. At that time, Feldman told Senn that Elizabeth was on the plane with a man who was not her husband. On another occasion, Feldman told Senn he had the passenger manifest and the drink log from the flight.

In late September of 1999, Senn gave a copy of the Letter to Dale DuTremble, the attorney representing her in the dispute with the Stuckey Law Firm. Senn told DuTremble she wanted the airplane defamation incident resolved along with her other dispute with the Stuckey Law Firm. DuTremble met with Feldman at WCSC to discuss the Letter. At the meeting, Feldman repeated all the allegations he claimed occurred on the airplane and reiterated that Elizabeth was traveling with a man other than her husband. Feldman told DuTremble he had the passenger manifest and the drink log, but would not reveal them as he was protecting his source at Delta.

DuTremble informed Susan Wall, the attorney representing the Stuckey Law Firm in its dispute with Senn, of Elizabeth's alleged conduct on the airplane. Wall called Elizabeth. Elizabeth denied having any knowledge of the airplane incident and, subsequent to her conversation with Wall, realized she was attending a soccer game and birthday party in Charleston when the airplane incident allegedly occurred. Elizabeth did not see the Letter, supposedly sent to her in July, until November.

Elizabeth showed the Letter to Stuckey, who called Tom Waring, an attorney who represented WCSC. On November 16, Waring talked with Elizabeth and Stuckey and then contacted Rita O'Neill, WCSC's general manager. O'Neill called Feldman to find out what was going on. Feldman told her about the alleged incident on the airplane and stated Elizabeth attacked Senn and the "Carolina Gang." Feldman also told O'Neill that the former station manager, Chuck Wing, gave permission to write the letter, and that Wing edited the letter. Feldman indicated that Dan McAlister, general counsel for Jefferson Pilot, probably saw the Letter.

The next day, Waring went to WCSC and met with Feldman and O'Neill. Feldman produced a copy of the Letter and stated that he had disposed of the passenger manifest and drink log. Feldman told O'Neill and Waring it was his duty to respond to Elizabeth to protect the station, and he had permission from Wing to write the Letter.

DuTremble testified that beginning in either late 1999 or early 2000, Feldman's story began to unravel. All parties finally realized that Elizabeth was not on the flight as Feldman alleged, and obviously Feldman never had the manifest or log as he originally insisted. In November of 2000, Feldman was arrested on embezzlement charges and, at the time of trial, was incarcerated in federal prison. After his arrest, it became clear the entire incident involving Elizabeth never occurred and was entirely fabricated by Feldman.

As a result of Feldman's defamatory allegations, Elizabeth sought psychiatric treatment and was diagnosed with a major depressive episode, severe major depression, and severe anxiety. Elizabeth took a medical leave from the practice of law.

In 2001, the Murphys filed suit against Jefferson Pilot, WCSC, and Feldman. The Murphys alleged Feldman made slanderous statements about Elizabeth, which he published in the Letter and to Senn. The Murphys alleged Feldman's actions were performed within the scope of his employment with WCSC and as an agent for WCSC and Jefferson Pilot. In addition, they alleged Feldman's conduct amounted to intentional infliction of emotional distress.

The action was tried before a jury over an eight-day period. The trial court denied the Murphys' motions for directed verdicts on liability, and granted the directed verdict motions of WCSC and Jefferson Pilot based on "public policy." The trial court then submitted the case to the jury on only the issue of damages as to Feldman. The jury returned a verdict for Elizabeth of $3,009,268 in actual damages and $3,000,000 in punitive damages. The jury returned a verdict in favor of Christopher Murphy for $3,000,000 in actual damages due to loss of consortium.

The Murphys filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, and in the alternative a motion for a new trial, arguing the trial court erred in directing verdicts in favor of Jefferson Pilot and WCSC and in denying the Murphys' motion for directed verdicts. The trial court denied the post-trial motions. The Murphys appeal.

LAW/ANALYSIS

STANDARD OF REVIEW

In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Gilliland v. Doe, 357 S.C. 197, 199, 592 S.E.2d 626, 627 (2004). The court must determine the elements of the action alleged and whether any evidence existed on each element. First State Sav. & Loan v. Phelps, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989). An appellate court must apply the same standard when reviewing the trial judge's decision on such motion. See Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 514-15, 435 S.E.2d 864, 867 (1993) (stating standard for appellate court).

I. Directed Verdicts

The Murphys argue the trial court erred in directing verdicts for WCSC and Jefferson Pilot and erred by refusing to direct verdicts in favor of the Murphys. We find the trial court erred in granting WCSC and Jefferson Pilot directed verdicts but did not err in denying the Murphys' motion for directed verdicts.

The trial judge explained he had studied the law and general principles of vicarious liability but found this case "bizarre" and "unique" and "in the written history of the law there has never been another case like it." Without considering the evidence presented as to the vicarious liability of WCSC and Jefferson Pilot, the court concluded:

> To extend vicarious liability to the facts of this case would be beyond reason. If there is any principle guiding the common law, it is reason. There is no reason or public policy to extend the principle of vicarious liability to the facts of this case. I grant the motion for a directed verdict on behalf of WCSC [and Jefferson Pilot].

We find the trial court erred as a matter of law by granting WCSC and Jefferson Pilot directed verdicts based on public policy without considering the elements of the actions alleged and the evidence introduced at trial. See Phelps, 299 S.C. at 446, 385 S.E.2d at 824 (in reviewing the granting of a directed verdict, the court should determine the elements of the action alleged and whether any evidence existed on each element).

Although we concur with the trial court that the facts of this case are bizarre, we find the law governing vicarious liability should have been considered in reviewing the motions for directed verdicts. Clearly, there is legal authority that "a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority." Murray v. Holnam, Inc., 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001). "Under fundamental principles of South Carolina law, a master is liable for and is charged with knowledge of the acts and conducts of his servants operating within the scope of their employment." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 227, 317 S.E.2d 748, 753 (Ct. App. 1984). "If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986) (citations omitted). If there is doubt as to whether the servant was acting within the scope of his employment, the doubt will be resolved against the master at least to the extent of requiring the question to go to the jury. Id. at 116, 341 S.E.2d at 387.

"An agency relationship may be established by evidence of actual or apparent authority." Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). "The elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Graves v. Serbin Farms, Inc., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). An agency relationship need not be express, but may be implied from the conduct of the parties. Gathers, 282 S.C. at 226, 317 S.E.2d at 752.

There was conflicting evidence at trial regarding Feldman's actual or apparent authority and scope of employment. Neither this court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony and evidence when considering a motion for directed verdict. Collins v. Doe, 343 S.C. 119, 125, 539 S.E.2d 62, 64 (Ct. App. 2000), rev'd on other grounds, 352 S.C. 462, 574 S.E.2d 739 (2002). The issues of agency relationship and scope of employment are generally for the jury. Crittenden, 288 S.C. at 115, 341 S.E.2d at 387; Gathers, 282 S.C. at 226, 317 S.E.2d at 752.

As to Feldman's authority and scope of employment, O'Neill and Waring testified that Feldman told them Wing, the station manager at that time, gave Feldman the authority to write the Letter. Feldman also told O'Neill that Dan McAlister, counsel for Jefferson Pilot, likely previewed the Letter. The Letter was written on WCSC stationery and in it, Feldman purported to be motivated by a desire to protect Senn, the station, and Jefferson Pilot.

There was evidence in the record that Feldman had broad authority to speak on behalf of WCSC, enter contracts on behalf of WCSC, respond to viewer complaints, and defend the station in letters to newspaper editors or reporters. However, there was conflicting evidence that Feldman did not have authority. Senn testified that Feldman repeatedly told her that the matter was personal and not a WCSC matter. Wing denied he ever reviewed or edited the Letter.

Both Senn and DuTremble testified they believed Feldman had authority to act on WCSC's behalf. Senn believed Feldman's story regarding the incident on the plane and believed Feldman had the authority to write the Letter. "I didn't ever see him write letters, but I assume he would have the authority. He had the letterhead, but I -- you know, I don't know." Senn also testified after she received a copy of the letter she gave it to DuTremble. She then told DuTremble that she heard for years that Elizabeth talked badly about her, "But then I finally had something in writing on Channel 5 letterhead. So I gave it to my lawyer."

DuTremble's testimony also indicates he believed Feldman had authority to make the defamatory statements. DuTremble testified in camera:[2]

> When I went to see Don Feldman, I went to see him as a potential witness. I did not have in my mind anything to do with his position as news director.
>
> However, when you read [the Letter and the civil agreement], together, it's obvious that Don Feldman is acting in his position as news director, as an employee for the station, because to give effect ---
>
> [The Court]: No question that's what his job was.
>
> [DuTremble]: Exactly. To give effect to the civil agreement, he had to have that authority.

DuTremble later testified:

> I mean, Don Feldman was -- you know, he was a member of the community. He was -- he was known in the community. He was news director, a person of some authority apparently. So he carried some indicia of reliability with him . . . .

Acting on this belief, DuTremble wrote the October 4, 1999 letter to Wall, Elizabeth's attorney.

We find the questions of agency and scope of employment were issues for the jury to decide. Therefore, the trial court did not err in denying the

---

[2] The trial court denied the Murphys' request to enter this testimony into evidence. However, the Murphys challenge the trial court's ruling in this appeal and we find the trial court erred in excluding this testimony.

Murphys' motion for directed verdicts but erred in directing verdicts in favor of WCSC and Jefferson Pilot.

II. Ratification

The Murphys also argue WCSC and Jefferson Pilot's ratification of Feldman's acts warranted submission of the case to the jury. We find this issue is not properly preserved for our review. In order for an issue to be preserved for appellate review, with few exceptions, it must be raised to and ruled upon by the trial judge. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004). The Murphys did not assert the argument of ratification to the trial court or in their Rule 59(e) motion to alter or amend the judgment. Because the Murphys raised this argument for the first time on appeal, we find it is not properly preserved for our review.

III. Admission of Evidence

The Murphys argue the trial court erred in excluding the testimony of Dale DuTremble.[3] The decision whether or not to admit testimony into evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. Am. Fed. Bank v. Number One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996).

The trial court found DuTremble's testimony related to Feldman's authority at the time he met with DuTremble and Senn rather than Feldman's authority at the time he wrote the Letter. The court found the testimony relevant, but the admission of the testimony would confuse the jury, outweighing its probative value. Accordingly, after consideration of Rules 701 and 403, SCRE, the trial court excluded the testimony.

Rule 701, SCRE, states:

[3] We decline to address any other evidentiary issue on appeal. See Dixon v. Ford, 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005) (declining to address evidentiary issue in action remanded for new trial).

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 403, SCRE, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In this case, DuTremble was testifying as a fact witness. His testimony was relevant to his perceptions and helpful to a clear understanding of a fact in issue. We fail to see undue prejudice to the defendants. Accordingly, we find the trial court abused its discretion in excluding this portion of DuTremble's testimony.

CONCLUSION

For the foregoing reasons, the matter is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kwasi Roosevelt Tuffour, Appellant.

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

Opinion No. 3989
Heard March 9, 2005 – Filed May 9, 2005

REVERSED AND REMANDED

Katherine Carruth Link, of West Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

KITTREDGE, J.: Kwasi Roosevelt Tuffour was convicted and sentenced for trafficking in crack cocaine, 100 to 200 grams. Tuffour appeals claiming error in the admission at trial of prior bad act evidence, tape recordings, and impeachment evidence. We find the trial court erred in the admission of prior, unrelated alleged drug transactions under the common scheme or plan exception to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE. Based on the admission of this forbidden propensity evidence, we reverse and remand for a new trial.

FACTS

Anthony Rice was arrested by the Anderson County Sheriff's Office in December of 2001 and charged with conspiracy to traffic in crack cocaine. Rice cooperated with law enforcement as an "undercover operative," and, in an effort to "work off" his charge, he agreed "to set Kwasi [Tuffour] up."

On December 18, 2001, Rice's cell phone was "wired," and he called Tuffour, presumably to arrange a purchase of five ounces of crack cocaine. The conversation was recorded by law enforcement, but only Rice's voice is audible on the tape.[1] Following the conversation, Rice was "wired," and he drove to the Anderson County town of Belton. He stopped in a known drug area referred to as the "tree." Several officers with the sheriff's office conducted surveillance in the area.

Rice remained at the "tree" for approximately three hours and engaged in numerous conversations, none of which were recorded. The vehicle that Tuffour was driving[2] passed by the area, and Rice returned to his vehicle and followed Tuffour. The vehicles stopped at a nearby apartment complex. Rice exited his vehicle and approached the vehicle occupied by Tuffour and another person, later identified as a juvenile. The conversation which ensued was recorded, but the recording quality is poor. When Rice gave the prearranged signal to law enforcement, officers immediately approached the

[1] It appears the inability to hear both Rice and Tuffour may have been the result of improper installation of the recording equipment by law enforcement.

[2] There was evidence Tuffour was driving someone else's car.

vehicle. Tuffour and the other occupant were taken from the vehicle. Crack cocaine was found in the vehicle, and both Tuffour and the juvenile occupant were charged.

Based on the December 18th incident, Tuffour was indicted for trafficking in crack cocaine, 100 to 200 grams. The State succeeded in admitting, over Tuffour's objection, testimony from Rice that he had purchased crack cocaine—typically five ounces at a time—from Tuffour on numerous prior occasions. The State contended that this evidence concerning alleged prior drug sales was proper under the common scheme or plan exception to Lyle and Rule 404(b), SCRE. The State asserted that Tuffour would not have sold five ounces of crack cocaine to Rice without the prior relationship and transactions. The trial court additionally admitted evidence in connection with the tape recordings as well as a redacted version of Tuffour's criminal record to impeach his testimony. Tuffour was convicted and sentenced, and he now challenges these evidentiary rulings on appeal.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citation omitted). The trial court's ruling admitting evidence, including prior bad act evidence, is reviewed under an abuse of discretion standard. Id. at 6, 545 S.E.2d at 829.

DISCUSSION

Tuffour argues the trial court erred in admitting evidence that Rice, on several prior occasions, had purchased crack cocaine from him in unrelated transactions. Tuffour specifically asserts the admission of this evidence patently violates the rule in Lyle and Rule 404(b), SCRE. We agree.

Perhaps no tenet of evidence law in the context of "prior bad acts" is more firmly established than the principle that propensity or character evidence is inadmissible to prove the specific crime charged:

> That contention is grounded upon the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged . . . [p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence. It . . . 'raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it.'

Lyle, 125 S.C. at 415-16, 118 S.E. at 807 (internal citations omitted).

This rule of evidence is universally recognized in American jurisprudence and is necessary to ensure that the presumption of innocence is not relegated to an empty phrase:

> It is a well-established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other offenses at other times, even though they are of the same nature as the one charged in the indictment, is inadmissible for the purpose of showing the commission of the particular crime charged. This rule has been recognized and applied in cases involving prosecutions for the sale of narcotics, so that as a general rule, subject to the exceptions . . . , where the state charges a particular sale of narcotics, it is not proper to admit proof of other sales, for the purpose of establishing the particular sale charged.

A. Petry, Admissibility in Prosecution for Illegal Sale of Narcotics of Evidence of Other Sales, 93 A.L.R.2d 1097, § 3 (1964).

There are exceptions to the general rule of inadmissibility:

> [U]nder Lyle, evidence of these other bad acts **may** be admitted to prove the defendant's guilt if that evidence establishes: (1) motive; (2) intent; (3) absence of mistake or accident; (4) identity; or (5) **a common scheme or plan involving other crimes so closely related to the one charged that proof of one tends to prove** the other.

State v. Barroso, 328 S.C. 268, 271, 493 S.E.2d 854, 855 (1997) (emphasis in original).

In the present case, the trial court relied only on the common scheme or plan exception.[3] When this exception is invoked by the State, it is important to recognize that a close degree of similarity between the prior bad acts and the crime charged, by itself, does not satisfy Lyle. Indeed, the mere presence of similarity only serves to enhance the potential for prejudice. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).[4] The foundation for admissibility transcends mere similarity, for the admission of such evidence

[3] When a prior bad act is not the subject of a conviction, it must be established by clear and convincing evidence. State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). No issue is presented to us concerning this threshold determination.

[4] Similarly, in the area of impeachment under Rule 609, SCRE, courts are disinclined to admit prior similar convictions due to the unmistakable prejudice that would likely result. See Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 100-01 (2000) (noting that because prior convictions for the same or similar crimes are highly prejudicial, they should be admitted sparingly); State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000) (including "the similarity between the past crime and the charged crime" as a factor weighing against admissibility).

under the common scheme or plan exception requires a connection between the extraneous crimes and the crime charged so that proof of the former tends to prove the latter. Succinctly stated, prior bad act evidence must be relevant to prove the alleged crime. See State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997) ("The common scheme or plan [exception] concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (noting that "a general similarity . . . [is] insufficient to support the common scheme or plan exception"); State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498 U.S. 881 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged"); State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged."); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted."); State v. Wallace, Op. No. 3971 (Ct. App. filed Mar. 28, 2005) (Shearouse Adv. Sh. No. 17 at 30) (finding the trial court erred in admitting evidence of alleged prior bad acts merely because the prior acts were similar to the crime charged; holding instead that the trial court should look beyond mere close similarity to consider the connection between extraneous bad act and the crime charged); State v. Carter, 323 S.C. 465, 467, 476 S.E.2d 916, 917-18 (Ct. App. 1996) (noting that "[i]n the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue"; and further noting that "evidence of prior bad acts must be relevant to prove the alleged crime"); State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994) (holding that "the evidence of prior bad acts must be relevant to prove the alleged crime").

The appellate courts of this state have unwaveringly adhered to the rule of exclusion of prior bad act evidence to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence. **It bears reminder that Lyle and Rule 404(b) set forth a rule of exclusion, not inclusion.** The common scheme or plan exception is perhaps the most difficult exception to apply, for in the context of other exceptions to the rule (motive and identity, for example), the relevance (or lack of relevance) of the prior bad act is more easily discerned.[5] When assessing the purported relevance of prior bad act evidence to the crime charged, we find the analytical framework advanced in Lyle helpful:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is

[5] There are situations where the relevance between the prior bad act evidence and the crime charged is clearly perceived, often when the crime charged contains an element that is directly linked to the bad act evidence. In State v. Wilson, the court held that "evidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute." 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). In State v. Raffaldt, the defendant was indicted for trafficking in cocaine. 318 S.C. 110, 112, 456 S.E.2d 390, 391 (1995). The trial court allowed bad act evidence of "marijuana dealing" *during* the cocaine conspiracy. The supreme court affirmed the admission of this bad act evidence, finding "that the method of marijuana dealing between Raffaldt and [a co-conspirator] was quite similar to the cocaine conspiracy." Id. at 114, 456 S.E.2d at 392. In State v. Moultrie, the defendant was convicted of possession of marijuana with intent to distribute, and this court affirmed the admission of Moultrie's "involvement . . . in the drug trade," noting that "the challenged [bad act] testimony was clearly relevant to the question of whether Moultrie possessed drugs with the intent to distribute them on the night of his arrest." 316 S.C. 547, 554, 451 S.E.2d 34, 38-39 (Ct. App. 1994). The nature of the charges—and the related bad act evidence—in Wilson, Raffaldt and Moultrie present circumstances far removed from those before us today, for Tuffour's alleged single act of drug trafficking requires no showing of intent and is otherwise unrelated to his purported prior dealings with Rice.

> often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the Courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.

Lyle, 125 S.C. at 416-17, 118 S.E. at 807 (emphasis added).

We find instructive the case of State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994). Campbell was charged with and convicted of distribution of crack cocaine. A police informant, Timothy Bellamy, conducted a controlled purchase of crack cocaine from Campbell, resulting in the charged offense. Over Campbell's objection, the trial court allowed Bellamy to testify—pursuant to the common scheme or plan exception—that he had purchased crack cocaine from Campbell on prior occasions. This court reversed, stating:

> Here, the testimony is of prior drug sales utilizing a similar sales technique. However, this is not enough to satisfy Lyle. Campbell was tried on a single charge of distribution. The methodology of prior sales is not relevant to prove this transaction. Several

> police who were present at the transaction and arrest testified. The confidential informant also testified. By introducing the prior bad acts, the State was not trying to prove a common scheme but to convince the jury that because Campbell sold crack cocaine in the past, he was selling crack cocaine on this occasion. This is precisely the type of inference that Lyle prohibits.

Id. at 451, 454 S.E.2d at 901.

We reached the same result under strikingly similar facts in State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996). Gary Stamps was arrested for possession of crack cocaine on January 14, 1994, after leaving the home of the defendant, Charles Carter. Stamps claimed he purchased the drugs from Carter. Stamps agreed to cooperate with police and, four days later on January 18th, he made a controlled purchase from Carter. At Carter's trial for the January 18th incident, the trial court permitted the State to elicit testimony from Stamps concerning the January 14th purchase. On appeal, this court reversed, firmly rejecting the State's reliance on the common scheme or plan exception. The Carter court held "[t]here is no legal connection between these two purchases sufficient to come within the framework of the common scheme or plan exception." Id. at 468, 476 S.E.2d at 918.

Tuffour was charged with a single charge of trafficking. His alleged prior drug dealings have no relevance whatsoever to the charged offense. The State's argument that Tuffour would not have sold five ounces of crack cocaine to Rice in December without the "prior relationship" and transactions is specious, for the alleged first sale from Tuffour to Rice in August supposedly involved five ounces of crack cocaine. The crime here stands on its own, and "[t]he methodology of prior sales is not relevant to prove this transaction."[6] Campbell, 317 S.C. at 451, 454 S.E.2d at 901. The State here

[6] Rice testified in the in camera hearing that he "started out" by purchasing five ounces of crack cocaine from Tuffour; that he "just bought

"was not trying to prove a common scheme but to convince the jury that because [Tuffour] sold crack cocaine in the past, he was selling crack cocaine on this occasion. This is precisely the type of inference that Lyle prohibits." Id.

Applying these principles and precedent to the present case, we perceive no legal connection or relevance between the alleged prior drug sales and the crime charged. The prejudice in this testimony is manifest. We reverse and remand for a new trial.[7]

Because we reverse and remand this matter for a new trial due to the improper admission of Tuffour's alleged prior bad acts, we need not address the remaining evidentiary exceptions raised by Tuffour. See, e.g, Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining that the appellate court need not address remaining issues when disposition of prior issues is dispositive); Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (noting that appellate court need not address remaining issues when disposition of prior issue is dispositive); State v. Rivers, 273 S.C. 75, 79, 254 S.E.2d 299, 301 (1979) (declining to address additional errors raised by appellant in light of the court's decision to reverse and remand the case on a challenged evidentiary ruling).

CONCLUSION

Accordingly, we reverse Tuffour's conviction and remand for a new trial.

REVERSED AND REMANDED.

HEARN, C.J., and WILLIAMS, J., concur.

---

individually [from Tuffour] whenever [he] needed it;" that the purchases were not connected, for there was never an agreement to "buy more."

[7] The State makes no claim that the erroneous admission of this propensity evidence was harmless.