The Supreme Court of South Carolina

In the Matter of Kathryn K. Andrews, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 1984, Petitioner was admitted and enrolled as a member of the Bar of this State.

Petitioner was administratively suspended by the South Carolina Bar on March 1, 2006 and by the Court on April 5, 2006 for failing to pay her license fees. By way of a letter addressed to the Supreme Court of South Carolina, dated April 19, 2006, Petitioner submitted her resignation from the South Carolina Bar, requested that payment of her inactive bar dues be waived and that the administrative suspensions be lifted.

Petitioner's request to waive inactive bar dues and lift the administrative suspensions is granted. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Kathryn K. Andrews shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

May 24, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20

May 30, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26155 – State v. Bynum Rayfield 19

26156 – State v. William E. Downs, Jr. 33

26157 – Palmetto Princess v. Town of Edisto Beach 44

26158 – In the Matter of William B. Harper, Jr. 51

26159 – Ex Parte: Hearst-Argyle (Charles Williams) 53

26160 – Butler Contracting v. Court Street LLC 64

Order – In the Matter of Samantha Farlow 77

Order – In re: Amendments to Rule 4(f), Rule 5(b), and Rule 19(c) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR 80

Order – In re: Amendments to Rule 4(f)(4), Rule 5(b), and Rule 19(c) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR 82

Order – In re: Amendments to Rule 501, Canon 4, SCACR 84

UNPUBLISHED OPINIONS AND ORDERS

2006-MO-023 – Nathan Harding v. Carolina Adjustments
(Richland County – Judge Reginald I. Lloyd)

Order – Christopher Holroyd v. Michael R. Requa

Order – Teresa Shadwell v. James Craigie, M.D.

PETITIONS – UNITED STATES SUPREME COURT

26042 – The State v. Edward Freiburger Denied 5/22/2006

26051 – The State v. Jesse Waylon Sapp Pending

26071 – The State v. Marion Bowman, Jr. Pending

26087 – The State v. Brad Keith Sigmon Pending

PETITIONS FOR REHEARING

26132 – SC State Ports Authority v. Jasper County Denied 05/25/2006

26133 – Linda Erickson v. Jones Street Publishers Denied 5/24/2006

26134 – Anthony Law v. South Carolina Department of Corrections	Denied 5/24/2006
26135 – Donald Brandt v. Elizabeth Gooding	Pending
26136 – Collins Entertainment v. Coats and Coats	Denied 5/24/2006
2006-MO-016 – Giles Page v. SC Dept of Corrections	Denied 5/24/2006

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

4115-Tom Smith v. NCCI, Inc. as Employer, and Liberty Insurance Corporation as Carrier 86

UNPUBLISHED OPINIONS

2006-UP-247-The State v. Samuel Junior Hastings
(Oconee, Judge J. C. Buddy Nichohlson, Jr.)

2006-UP-248-Harold Doe v. Shirley Doe
(Orangeburg, Judge Nancy Chapman McLin)

2006-UP-249-The State v. Latesha Fleming
(Newberry, Judge James W. Johnson, Jr.)

2006-UP-250-The State v. Robert Lee Isom, Jr.
(Charleston, Judge Deadra L. Jefferson)

2006-UP-251-Ben Rabon and Cynthia Rablon v. S.C. Department of Highways and Public Transportation, South Carolina Insurance Reserve Fund, and American Southern Insurance Company
(Richland, Judge Alison Renee Lee)

2006-UP-252-Richard F. Lyons v. Gale M. Lyons
(Richland, Judge Walter B. Brown, Jr.)

2006-UP-253-The State v. Damon Rice
(Union, Judge Paul E. Short, Jr.)

2006-UP-254-Horace Reynolds, Jr. v. Diane Reynolds
(Richland, Judge George M. McFaddin, Jr.)

2006-UP-255-George Larry Thomas v. Kimberly C. Thomas, David Alan Aldridge, and Baby Boy David
(Florence, Judge A. E. “Gene” Morehead III)

2006-UP-256-Furman Edward Fulmer, Jewel F. Oxner, Carolyn F. Garner, Sandra F. Metts and Faye F. Cannon v. Janette R. Cain and Jewel Oxner as the personal representative of the estate of Mary F. Fulmer, deceased, v. Janette F. Cain
(Newberry, Judge Wyatt T. Saunders)

2006-UP-257-S.C. Department of Social Services v. Gerald Lancaster
(Richland, Judge Roger E. Henderson and Judge H. Bruce Williams)

2006-UP-258-S.C. Department of Social Services v. Sharon Smith, Adam Turkvant, Kenneth Grant, John Doe, and Desmond Smith, DOB 6-3-93, John Smith DOB 9/21/89
(Orangeburg, Judge Anne Gue Jones)

2006-UP-259-S.C. Department of Social Services v. Loretta Henry, Richard Howard, Jr. and Tommie Thornton
(Greenville, Judge Stephen S. Bartlett)

2006-UP-260-The State v. John Tamorris McClure
(York, Judge Lee S. Alford)

2006-UP-261-Premier Resorts International v. Sands Resorts Holdings, LLC
(Horry, Judge John L. Breeden)

2006-UP-262-Elaine Norton, Employee v. Wellman Inc.-Palmetto Plant, Self Insured Employer
(Florence, Judge J. Michael Baxley)

2006-UP-263-Joseph Richardson, Katherine Mosley Morrison and William E. Mosley Plaintiffs, of whom Joseph Richardson is Appellant v. Fairfield County, by and Through the Fairfield County Coucil
(Fairfield, Judge John C. Few)

2006-UP-264-MIT, Inc. v. IGT aka IGT-North America and Collins Music Company
(Jasper, Special Referee James S. Gibson)

PETITIONS FOR REHEARING

4040-Commander Healthcare v. SCDHEC — Pending

4043-Simmons v. Simmons — Pending

4078-Stokes v. Spartanburg Regional	Denied	05/18/06
4093-State v. J. Rogers	Denied	05/18/06
4094-City of Aiken v. Koontz	Denied	05/18/06
4095-Garnett v. WRP Enterprises et al.	Denied	05/18/06
4096-Auto-Owners v. Hamin et al.	Denied	05/18/06
4100-Menne v. Keowee Key	Denied	05/18/06
4101-Queens Grant v. Greenwood Dev.	Pending	
4102-Cody Discout Inc. v. Merritt	Denied	05/18/06
4104-Hambrick v. GMAC	Pending	
4106-Kelley v. Kelley	Pending	
4108-Middleton v. Johnson	Pending	
4109-Thompson v. SC Steel	Pending	
4111-LandBank VII v. Dickerson	Pending	
2006-UP-006 Martin, H. v. State	Denied	05/23/06
2006-UP-084-McKee v. Brown	Denied	05/18/06
2006-UP-115-Brunson v. Brunson	Denied	05/18/06
2006-UP-122-Young v. Greene	Denied	05/18/06
2006-UP-150-Moody v. Marion C. Sch. Dist.	Denied	05/23/06
2006-UP-151-Moyers v. SCDLLR	Denied	05/23/06
2006-UP-172-State v. L. McKenzie	Denied	05/18/06
2006-UP-180-In the matter of Bennington	Denied	05/18/06

2006-UP-190-State v. J. Green	Denied 05/23/06
2006-UP-191-State v. N. Boan	Pending
2006-UP-199-N. Jones v. State	Denied 05/18/06
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-218-Luther Smith v. State	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex Parte: Van Osdell In re: Babb v. Graham	Pending
2006-UP-235-We Do Alterations v. Powell	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3787-State v. Horton	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending

3935-Collins Entertainment v. White	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep’t of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3982-LoPresti v. Burry	Pending
3983-State v. D. Young	Pending

3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4006-State v. B. Pinkard	Pending
4011-State v. W. Nicholson	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending

4028-Armstrong v. Collins	Pending
4032-A&I, Inc. v. Gore	Dismissed 05/24/06
4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending
4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending

4065-Levine v. Spartanburg Regional	Pending
4068-McDill v. Mark's Auto Sales	Pending
4070-Tomlinson v. Mixon	Pending
4074-Schnellmann v. Roettger	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4092-Cedar Cove v. DiPietro	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-487-State v. Burnett	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	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-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Granted 05/08/06
2004-UP-617-Raysor v. State	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2004-UP-658-State v. Young	Denied 05/24/06

2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-002-Lowe v. Lowe	Denied 05/24/06
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm'n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-165-Long v. Long	Pending

2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-222-State v. E. Rieb	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending

2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-506-Dabbs v. Davis et al.	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending

2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-556-Russell Corp. v. Gregg	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending
2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-592-Biser v. MUSC	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-599-Tower v. SCDC	Denied 05/24/06
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending

2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-065-SCDSS v. Ferguson	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bynum Rayfield, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26155
Heard November 3, 2005 – Filed May 30, 2006

AFFIRMED

Jack B. Swerling, of Columbia, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor John R. Justice, of Chester, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Rayfield, 357 S.C. 497, 593 S.E.2d 486 (Ct. App. 2004). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Bynum Rayfield (Petitioner) was convicted of three counts of first-degree criminal sexual conduct (CSC) with a minor, three counts of committing a lewd act upon a child, and one count of contributing to the delinquency of a minor. Petitioner was sentenced to concurrent terms of imprisonment of thirty years for CSC, fifteen years for lewd acts, and three years for contributing to delinquency.

During the initial jury selection, Petitioner exercised peremptory challenges against five members of the jury venire: five white females, one of whom was a potential alternate, and one white male. The petit jury selected was composed of nine males and three females. The alternates were one male and one female.

After the jury was selected, the State moved the court pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to find that Petitioner had exercised his peremptory challenges based on gender.[1] The State's main argument was that Petitioner had discriminatorily challenged female jurors, but the State also argued that Petitioner had discriminatorily challenged one male juror, the only male he challenged.

The trial judge found no Batson violation with respect to the female jurors. The trial judge did find a violation with respect to the one male, Juror # 70; therefore, the judge granted the State's motion and redrew

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[1] Batson actually prohibits only race-based strikes. J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), is the case prohibiting gender-based strikes. Both types of strikes are popularly referred to as Batson violations.

the jury. None of the jurors initially challenged by Petitioner was selected for the second jury. No Batson motion was made, and the second jury served at trial.

Later, during the hearing on requests to charge, Petitioner objected to the trial judge charging the jury that under South Carolina Code Ann. § 16-3-657 (2003), "the testimony of a victim need not be corroborated in prosecutions" for CSC with a minor. Petitioner argued that the charge improperly implies that the alleged victim's testimony is more credible than other witnesses' testimony. The trial judge disagreed and gave the charge.

After the jury returned with guilty verdicts, Petitioner moved for a new trial based both on the trial judge's redrawing of the jury and on the charge to the jury. The judge court denied the motion on both grounds.

Petitioner appealed the convictions and the Court of Appeals affirmed. The Court of Appeals held that the trial judge had erred in granting the State's Batson motion, because "no gender based discrimination was associated with the striking of" the one male juror. Rayfield, 357 S.C. at 503, 593 S.E.2d at 490. The Court of Appeals further held, however, that the trial judge's error was harmless because none of the jurors whom Petitioner excused from the original jury served on the trial jury. *Id.* at 504, 593 S.E.2d at 490. According to the Court of Appeals, its holding was required under our opinion in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). *Id.*

With respect to the jury charge, the Court of Appeals held that the trial judge had committed no error. The Court of Appeals noted that the no-corroboration charge withstood appellate scrutiny in State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Rayfield, 357 S.C. at 505, 593 S.E.2d at 491. The Court of Appeals held that the charge as a whole was proper. *Id.*

ISSUES

I. Did the Court of Appeals err in holding that the trial judge, in granting a groundless Batson motion by the State, committed

harmless error in quashing the original jury and drawing a new one?

II. Did the Court of Appeals err in holding that the trial judge properly charged Section 16-3-657 to the jury?

LAW AND ANALYSIS

I. BATSON MOTION

Petitioner argues the Court of Appeals erred in holding that, although the trial judge erred in granting the State's groundless Batson motion, Petitioner failed to demonstrate he was prejudiced by the error. Allowing the State to pursue a meritless Batson motion as a strategic ploy to draw a jury more to its liking is inconsistent with the State's duty to ensure that justice is done even while striving vigorously to obtain a conviction. Petitioner contends he was unfairly prejudiced due to the improper advantage gained by the State and, in any event, he should not be required to demonstrate prejudice in this instance because any remedy short of a new trial rewards the State for using an improper trial tactic.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "The purposes of Batson and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." State v. Haigler, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. Georgia v. McCollum, 505 U.S. 42, 58, 112 S.Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).

We set forth the proper procedure for a Batson hearing in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing Purkett v. Elem, 514

U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. Adams, 322 S.C. at 123-24, 470 S.E.2d at 371-72; Haigler, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

The Court of Appeals correctly held that the trial judge erred in granting the State's meritless Batson motion and redrawing the jury. The record contains no evidence Petitioner struck the male juror based on gender. During the Batson hearing, Petitioner gave a gender-neutral explanation for the strike: the juror had a conservative appearance and was retired. *E.g.* State v. Wilder, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991) (party may strike potential juror based on demeanor and disposition); Haigler, 334 S.C. 632, 515 S.E.2d at 92 (lack of employment or place of employment may be neutral reason for strike). The record does not reveal a pattern of striking male jurors or any other evidence to support a finding that Petitioner's explanation was a pretext. Petitioner struck only one out of ten prospective male jurors. As the Court of Appeals observed, the State took a "disjointed and moving-target approach to its Batson motion." Rayfield, 357 S.C. at 503, 593 S.E.2d at 489. We agree with Petitioner that it appears the State willfully made a meritless Batson motion for the sole purpose of seeking a second chance to draw a jury which might look more favorably upon the State's case.

Nevertheless, we conclude the Court of Appeals correctly held the trial judge's error was harmless. In Adams, we held that when the trial judge improperly quashes a jury panel, no juror's equal protection rights are violated because no Batson violation has occurred. Adams, 322 S.C. at 125-26, 470 S.E.2d at 373. We further held that if the jury which actually serves at trial is not tainted by an erroneous Batson ruling in favor of the prosecution, then the defendant's right to a fair trial is not violated because a

defendant does not have a right to be tried by any particular jury. Consequently, we held that the judge's erroneous Batson ruling was harmless error. *Id.* at 126, 470 S.E.2d at 373; see also State v. Wright, 304 S.C. 529, 534, 405 S.E.2d 825, 828 (1991) (concluding there was no prejudice to defendant when, despite earlier erroneous rulings by trial judge, he received what Batson was intended to provide).

We have held that a defendant need not always show actual prejudice for an erroneous Batson ruling to be reversible. Unlike Adams and the present case, however, those cases involved erroneous Batson rulings which actually tainted the jury which served at trial. See State v. Ford, 334 S.C. 59, 63-66, 512 S.E.2d 500, 503-04 (1999) (defendant was not required to show actual prejudice stemming from judge's erroneous granting of State's Batson motion because, during selection of second jury, defendant was wrongfully denied the right to exercise a peremptory challenge against one or more jurors he previously had struck for racially neutral reasons); State v. Short, 333 S.C. 473, 476-78, 511 S.E.2d 358, 360-61 (1999) (applying same principle under similar facts); State v. Floyd, 353 S.C. 55, 58-59 & n. 5, 577 S.E.2d 215, 216 & n. 5 (2003) (defendant was not required to show actual prejudice stemming from judge's erroneous excusal of juror who refused to take a religious oath). Prejudice is presumed in such cases because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged. Short, 333 S.C. at 476-77, 511 S.E.2d at 360.

In the present case, the second jury was not tainted by the trial judge's erroneous Batson ruling. No juror whom Petitioner challenged in the initial drawing was selected to serve on the trial jury. The Court of Appeals properly held this case is controlled by Adams, and Petitioner must show actual prejudice for the trial judge's error to be reversible. Petitioner may not have received the jury he wanted, but as we held in Adams, a defendant has no right to a particular jury. For these reasons, we conclude the trial judge's erroneous quashing of the original jury and the drawing of a new one constitutes harmless error.

In reaching our conclusion, we emphasize it is improper for a party to assert a groundless Batson motion as a tactic to gain a second shot at selecting another jury panel which the party believes might look more favorably upon his case. We admonish counsel for the State that abuses such as the meritless motion in this case are looked upon with disfavor and will not be countenanced in the future. The solicitor and defense counsel are officers of a court of law, and are expected and required to have lawful and reasonable bases for motions presented to the trial judge. Moreover, a solicitor

> should bear in mind that he is an officer of the court, who represents all the people, including [the] accused, and [he] occupies a quasi-judicial position, whose sanctions and traditions he should preserve. It is his duty to see that justice is done. He must see that no conviction takes place except in strict conformity with the law, and that [the] accused is not deprived of any constitutional rights or privileges. However strong the prosecuting attorney's belief may be of the prisoner's guilt, it is his duty to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, . . . and not say or do anything which might improperly affect or influence the jury or [the] accused's counsel.

State v. King, 222 S.C. 108, 119, 71 S.E.2d 793, 798 (1952). "This Court, on numerous occasions, has held that the duty of a solicitor is not to convict a defendant, but to see that justice is done. At the same time, the solicitor should prosecute vigorously." State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975); accord Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) (federal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

II. JURY INSTRUCTION

Petitioner argues the trial judge erred in charging South Carolina Code Ann. § 16-3-657 (2003) to the jury because the charge constitutes an impermissible comment on the facts of the case, it improperly emphasizes the testimony of one witness, and it carries a strong possibility of unfairly biasing the jury against the defendant. Petitioner contends the Court of Appeals erred in relying on State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) to find the instruction was permissible. We disagree and conclude the Court of Appeals properly relied on Schumpert in holding the trial judge did not err in charging the jury that the victim's testimony need not be corroborated by other testimony or evidence.

Petitioner was charged with three counts of first-degree criminal sexual conduct with a minor, in violation of S.C. Code Ann. § 16-3-655 (2003). A related statute, § 16-3-657, provides "[t]he testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." These statutes prohibit various forms of criminal sexual conduct. In Schumpert, we held it was not error to charge § 16-3-657 as long as the charge as a whole comports with the law. Schumpert, 312 S.C. at 509, 435 S.E.2d at 863.

The trial judge in the present case instructed the jury in accordance with the statute, stating "§ 16-3-657 of our code of laws provides that the testimony of a victim need not be corroborated in prosecutions under this section." The trial judge charged the jury the State had the burden of proving Petitioner was guilty of the charged offenses beyond a reasonable doubt. The trial judge further instructed the jury:

> In every case tried in this court before a jury, the jury becomes the sole and exclusive judges of the facts of the case. You, the ladies and gentlemen of this trial jury, are the sole and exclusive judges of the facts in this case. The constitution of the state of South Carolina has declared that a trial judge shall not intimate, state, comment upon, or make any statement to a trial jury about the facts in a case.

Since you are the sole and exclusive judges of the facts in this case, ladies and gentlemen, you are not to infer anything that I have said during the progress of this trial in ruling upon the admissibility of the evidence or from anything that I now say to you during the course of my charge to you that I have an opinion about the facts in this case. Ladies and gentlemen, the law does not permit me to have an opinion about the facts in this case. That is a matter solely for you, the ladies and gentlemen of the trial jury, to determine.

As jurors, then, it is your duty to determine, as I have stated to you, the effect, the value, the weight, and the truth of the evidence presented during the course of this trial. Necessarily, then, ladies and gentlemen, you must assess the credibility of the witnesses who have testified in this case. Credibility is simply a legalistic word which means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and to determine that evidence which convinces you of its truth.

I charge you in determining the question of the credibility or the believability of the witnesses, you may believe one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or you may reject the testimony of a witness in its entirety.

You may consider whether any witness has exhibited any interest, any bias, or any prejudice in this case. And, ladies and gentlemen, you may consider the demeanor of a witness, that is, the appearance of the witness on this witness stand during the trial of this case, and you may consider the opportunity for knowledge concerning those things about which a witness has testified.

> These considerations you do not exercise arbitrarily, but if, in your good judgment, there is sound reason in the record of this case for so doing, because your objective, ladies and gentlemen, is to find the truth, whether it come from witness or witnesses for the state of South Carolina or from witness or witnesses for the defendant, and in so doing, in exercising your mental processes and in determining what you consider to be true, ladies and gentlemen, our law simply requires that you exercise your good, common sense, your good judgment, your sense of logic and reason, and your experiences in life.

It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – not only to the judge but also to the jury – that a defendant may be convicted solely on the basis of a victim's testimony.

A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law. The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses. The trial judge in this case, as shown in the above portions of the charge, fully and properly instructed the jury on these principles.

CONCLUSION

We conclude the Court of Appeals correctly held that the trial judge erred in granting the State's meritless Batson motion and redrawing the jury. While we conclude the error was harmless because the second jury was not tainted by the erroneous Batson ruling, we emphasize it is improper for a party to assert a groundless Batson motion as a tactic to gain a second shot at selecting another jury panel which the party believes might look more favorably upon his case. We further conclude the Court of Appeals properly held the trial judge did not err in charging the jury that the victim's testimony need not be corroborated by other testimony or evidence.

AFFIRMED.

TOAL, C.J., and WALLER, J., concur. PLEICONES, J., concurring in part, dissenting in part in a separate opinion in which Acting Justice Stephen S. Bartlett, concurs.

JUSTICE PLEICONES: I concur in the majority opinion's holding that the circuit court's Batson ruling constituted harmless error under State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). I respectfully dissent from the majority opinion's holding that the circuit court committed no error in charging the jury. In my opinion, the circuit court committed reversible error, and Petitioner is entitled to a new trial.

Petitioner was charged with three counts of first-degree CSC with a minor, in violation of South Carolina Code section 16-3-655.[2] Another statute, section 16-3-657,[3] provides that "[t]he testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." The circuit court charged the jury the above quoted language of section 16-3-657. This was reversible error.

"In general, the trial court is required to charge only the current and correct law of South Carolina. ... A jury charge is correct if it contains the correct definition of the law when read as a whole." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) (citations omitted). Some principles of law, however, are not to be charged to a jury. See, e.g., State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (holding that although evidence of a defendant's flight is admissible as circumstantial evidence of guilt, it is improper for the trial judge to instruct the jury on the law of flight, because such an instruction "oftentimes has the potential for creating more problems than solutions," as it "places undue emphasis upon that part of circumstantial evidence").

Contrary to the majority opinion, we did not hold in Schumpert that this no-corroboration charge was proper. Rather, "[t]aking the charge as a

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[2] S.C. Code Ann. § 16-3-655 (2003).

[3] S.C. Code Ann. § 16-3-657 (2003).

whole, we [found] no reversible error." 312 S.C. at 509, 435 S.E.2d at 863.[4] We observed that the trial judge, in addition to charging the jury under section 16-3-657, had charged "the jury it could believe any single witness over several, it was the sole judge of the facts, [the trial judge] had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt." Id.

I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration. Although section 16-3-657 contains current and correct law, it is not a proper subject of a jury charge. Section 16-3-657 prevents courts, either on a dispositive motion at the trial level or on appellate review, from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated. See James Cranston Gray, Jr., *Criminal Law–Rape Reform in South Carolina*, 30 S.C. L. Rev. 45, 55-60 (1979) (discussing the no-corroboration rule as governing judicial review of the sufficiency of the evidence); cf. Ludy v. State, 784 N.E.2d 459, 463 (Ind. 2003) (holding that the no-corroboration rule is a legal standard for a court reviewing a conviction). Charging this rule does not assist the jury in fulfilling its function of deciding the facts and determing whether the state has proved the charged offense beyond a reasonable doubt. In fact, it "has the potential for creating more problems than solutions,"[5] for it might cause confusion when read with the general charge on witness credibility.[6]

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[4] We cited Lottie v. State, 406 N.E.2d 632 (Ind. 1980), to support this holding. Lottie was recently overruled in Ludy v. State, 784 N.E.2d 459, 462 & n.2 (Ind. 2003).

[5] Grant, 275 S.C. at 408, 272 S.E.2d at 171.

[6] According to the majority opinion, the General Assembly "has decided it is reasonable and appropriate" to instruct the jury that an alleged CSC victim's testimony need not be corroborated. I can find no indication in section 16-3-657 or elsewhere that the legislature intended this no-corroboration rule to be charged to the jury.

More important, charging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need be corroborated. By specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and "appears to express an opinion on her credibility." State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting); see also S.C. Const. art. V, § 17 (providing that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law"). I would therefore hold that charging a jury on the contents of section 16-3-657 constitutes error.

Further, I would overrule the holding in Schumpert that the charge as a whole can render this no-corroboration charge harmless. Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony.

Furthermore, this case is different from Ludy, supra, in which the Supreme Court of Indiana held that although the trial court had erred in giving the no-corroboration charge, the error was harmless because: "[T]he testimony of the victim was not uncorroborated. ... [A]side from the victim's testimony there was substantial probative evidence establishing the elements of the charged offenses." 784 N.E.2d at 463. Here, the only evidence of Petitioner's committing CSC was the testimony of the alleged victims. The jury had to determine whether it believed the purported victims or Petitioner.

For these reasons, I would hold that the circuit court committed reversible error in charging the jury. I would therefore reverse the decision of the Court of Appeals and remand the case to the circuit court for a new trial.

Acting Justice Stephen S. Bartlett, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William E. Downs, Jr., Appellant.

Appeal From Aiken County
L. Casey Manning, Circuit Court Judge

Opinion No. 26156
Submitted April 19, 2006 – Filed May 30, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, for respondent.

JUSTICE MOORE: We are asked to decide whether appellant, who has been sentenced to die for murder, is mentally competent to waive his

right to challenge his conviction and death sentence and be executed. We conclude appellant is competent.

PROCEDURAL FACTS

Appellant pled guilty to the crimes of murder, kidnapping, and criminal sexual conduct with a minor. A hearing was then held to determine whether he was guilty but mentally ill (GBMI). An expert, Dr. Everett Kuglar, testified appellant was mentally ill. However, two other experts, Dr. Jeffrey Musick and Dr. Pamela Crawford, testified appellant was not mentally ill. After considering the evidence, the court ruled appellant failed to prove he was GBMI. Appellant was subsequently sentenced to death and the sentence was affirmed in State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004).

Appellant's counsel filed a petition for a stay of execution to allow him to file a petition for a writ of certiorari with the United States Supreme Court. The stay petition was granted. Subsequently, appellant notified this Court that he wished to dismiss his appeals and be executed. We remanded this case to the trial court for a competency hearing. Meanwhile, the United States Supreme Court denied counsel's motion, on appellant's behalf, for leave to proceed *in forma pauperis*. *See* Downs v. South Carolina, 544 U.S. 972 (2005).

In February 2005, the first evidentiary hearing was held. Counsel requested more time to allow their psychiatric experts an opportunity to review materials and evaluate appellant. The hearing judge ruled the State would be allowed to offer Dr. Pamela Crawford and Dr. Jeffrey Musick at the hearing, and that the defense would be able to cross-examine those doctors at a later date.

A second evidentiary hearing was held in March 2005. At the beginning of this hearing, counsel moved for a continuance so that Dr. Margaret Melikian, who had met with appellant only once, could treat appellant and see him at least twice more. The court, after hearing evidence, denied the motion.

Following closing statements, the court ruled appellant was competent to be executed under the Singleton v. State[1] standard and that his decision to waive his right to challenge his conviction and death sentence was knowing and voluntary.

ISSUES

I. Did the lower court abuse its discretion by refusing to grant a continuance of the hearing until appellant could be further evaluated?

II. Is appellant competent to waive any challenges to his conviction and death sentence?

DISCUSSION

The standard for determining whether an appellant is mentally competent to be executed is set forth in Singleton, *supra*, and states:

> The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.

Singleton v. State, 313 S.C. at 83, 437 S.E.2d at 58 (emphasis added).

At the February hearing, appellant informed the court he did not want to appeal and wanted to have his competency hearing completed as soon as possible.

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[1] 313 S.C. 75, 437 S.E.2d 53 (1993).

At the hearing, Dr. Pamela Crawford, a court-appointed expert in forensic psychiatry, testified she had evaluated appellant for a GBMI determination on six prior occasions from May 2001 to June 2002. Pursuant to this Court's order, she also evaluated appellant for competency, along with Dr. Jeffrey Musick, on February 11, 2005. Dr. Crawford summarized her record review and indicated she learned appellant had attempted suicide while incarcerated. She opined appellant had mild depression that was not sufficient to be diagnosed as major depression. She testified appellant was competent to waive his appeals and be executed under the Singleton standard. Her diagnoses included pedophilia, paraphilia, substance abuse, and antisocial personality disorder. She stated none of these diagnoses impacted on appellant's ability to understand the proceedings or communicate with his counsel.

Specifically, on the cognitive prong of Singleton, Dr. Crawford stated appellant clearly articulates an understanding of the appeals process, the consequences of waiving his appeals, that he prefers lethal injection, and that he does not have any delusional thoughts about death. On the assistance prong, she opined appellant communicates clearly and that he was willing to work with an attorney who would further his goal of being executed but did not want to work with an attorney who did not want to help further that goal. Dr. Crawford stated there was no evidence appellant had a deteriorating mental disorder and that his status was the same as when he was evaluated in 2001 and 2002.

Dr. Jeffrey Musick, testified he had been involved in the 2002 evaluations of appellant. For purposes of this competency hearing, he stated he met with appellant twice. At the second meeting, he administered several psychological tests. Dr. Musick found appellant had mild depression, but did not have a major disorder. He stated that, during the evaluation, appellant was cooperative, friendly, laughed at the appropriate times, and had rational and coherent speech. He found no evidence of delusions and appellant informed him he thought the legal process had been fair.

Dr. Musick opined appellant met the Singleton requirements for competency. Regarding the cognitive prong, Dr. Musick stated appellant understood the proceedings, what he was tried for, and stated his punishment fit the crime. Appellant was able to relate that it was possible that existence stops when you die and said that would be preferable to living in prison. Appellant stated he hoped for better things after death and that he preferred lethal injection because it was peaceful. Regarding the assistance prong, Dr. Musick testified appellant was able to express himself and understand others. Appellant informed Dr. Musick that he was happy to work with an attorney who had his same goals, *i.e.* that he be executed. Dr. Musick did not see any potential of appellant's mental state deteriorating in the future.

On cross-examination, Dr. Musick admitted appellant may have suffered a major depressive episode in the past and that he has been unhappy all his life. Dr. Musick indicated he was aware of appellant's suicide attempts while incarcerated and of his attempt to commit suicide when he was about ten years old. Dr. Musick stated those facts did not change his opinion that appellant was competent under Singleton.

Dr. Donna Schwartz-Watts, a forensic psychiatrist, testified appellant was very cooperative during her evaluation. She stated appellant had mild depression. As for major depression, she stated he met only four of the five criteria and therefore, was not diagnosed with major depression. She stated that diagnosis could change in the future.

Dr. Schwartz-Watts opined appellant was competent under both prongs of Singleton. She testified appellant met the cognitive prong because he understood the proceedings, his punishment, and that he was able to communicate that he desired lethal injection. She stated he wants to be free but otherwise he wants to be executed instead of being imprisoned. She testified that he does not suffer from delusions and that he hopes for something better in the afterlife. Regarding the assistance prong, Dr. Schwartz-Watts testified appellant met this prong because he could communicate with counsel and that, because he was sometimes irritated with counsel, he chose not to cooperate. She stated her diagnoses were that appellant has depression, not otherwise specified; post-traumatic stress

disorder, paraphilia, pedophila, and substance abuse. She opined that none of these diagnoses affect either prong of Singleton. She testified he has a mild form of depression that does not prevent him from doing the things he needs to do and that he could have depression and still be competent under Singleton. She stated that depressive people can function on a day-to-day basis and that it just depends on the severity of the depression.

James Whittle, the attorney who represented appellant for his plea, testified appellant did not wish to contest his guilt and wanted to die. He stated appellant forbade him from offering mitigation evidence but that he was able to seek a guilty but mentally ill finding by telling appellant his case could help others. Whittle felt appellant had significant mental health issues and that he was depressed. Whittle testified he felt appellant was competent to stand trial and had the ability to rationally communicate with him. He stated appellant did not appear to be very different since the time when he was representing appellant.

Dr. Margaret Melikian, a forensic psychiatrist, testified she met with appellant once for a four-hour evaluation on February 28, 2005. She stated appellant was guarded but cooperative during the meeting. She testified regarding her knowledge of appellant's numerous suicide attempts. Dr. Melikian testified appellant met the cognitive prong of Singleton. However, regarding a diagnosis of appellant, she stated she did not have enough information to rule out a diagnosis of a major depressive episode. Dr. Melikian testified appellant met some of the criteria for being diagnosed with major depression.

Dr. Melikian testified appellant's wish to waive his appeals process may be a rational decision or a product of his depression. She opined he should be offered treatment for depression and then have his competency reevaluated. For that reason, she stated she could not offer an opinion on his competency. She wanted to see if treatment would cause him to change his mind. She stated appellant told her he would take anti-depressants if the court ordered him to do so.

Dr. Melikian stated appellant does not suffer from any delusions or psychosis. She stated appellant can communicate but she was unsure if he could "rationally" communicate as stated in the assistance prong of the Singleton standard. She agreed that one could meet the criteria of major depression but still be competent under Singleton. However, she had no opinion on appellant's competency at the time of the hearing. She recommended medication so that a more accurate evaluation could be completed. Significantly, she stated she was unsure if appellant chose not to take drugs voluntarily whether she could form an opinion on the Singleton assistance prong. She stated she would like to see him additional times but she did not know if she would be able to form an opinion.

During closing arguments, counsel for appellant reasserted his request for a continuance so that Dr. Melikian could provide appellant with medication, or at the very least if appellant refused the medication, so that she could meet with appellant at least twice more. The motion for continuance was denied.

Appellant personally addressed the hearing judge. He did not feel Dr. Kuglar (from his previous GBMI evaluation) and Dr. Melikian could state that he was incompetent or depressed given they did not conduct a full mental evaluation. Appellant concluded by asking the judge, if he decides competency is proven, to impose an injunction on appellant's counsel so that he would not file any more motions or other documents in his case because appellant wished to fire him.

In his order, on the cognitive prong of Strickland, the judge found it is evident from the communication appellant had during his recent evaluations that there is a plethora of evidence to support a finding of competency on each factor within that prong. On the assistance prong, the judge found appellant possesses sufficient mental capacity or ability to rationally communicate with counsel. The judge found that, in discussions with himself and each of the evaluators, it was without question that appellant had the mental capacity and ability to express ideas, analyze options, understand the facts and law, and intelligently convey his thoughts and ideas to others. The judge noted the record is void of any evidence that appellant cannot

understand any communication with counsel or others due to any mental impairment or that he cannot make himself understood. The judge stated the record indicates appellant's responses to inquiries have always been rational.

The judge stated he did not share Dr. Melikian's hesitation on the assistance prong. He stated that, although her desire to treat appellant with medication and see what develops may be well-intentioned, the delay was unnecessary for the court to render its opinion because appellant clearly satisfies the assistance prong. The judge stated, "It is difficult to recall a defendant more attentive and more observant than [appellant.]" The judge specifically found appellant did not have a present wish to commit suicide or die, but that he has maintained he prefers death to being locked up for the rest of his life. In conclusion, the judge found appellant competent to waive post-conviction proceedings under the Singleton standard.

In appellant's *pro se* response, he states he has repeatedly asked counsel not to file any appeals on his behalf. Regarding Dr. Melikian's belief that appellant should be placed on anti-depressants, appellant states he has been placed on anti-depressants since the time of the hearing. For various reasons, he had to cease taking the medications. While on medication, appellant states he did not at any point think of changing his mind about dropping his appeals. He states he knows he will be in prison for the rest of his life and that he has been sentenced to be executed. He foresees nothing productive coming from being on death row. He concludes, "I want to go ahead with my execution A.S.A.P."

I. Motion for Continuance

Counsel for appellant argues the hearing judge erred by denying the motion for a continuance and that this case should be remanded with an order allowing Dr. Melikian additional time to possibly medicate appellant and further evaluate him so that she can have a final opinion under the second prong of the Singleton standard.

The hearing judge did not err by refusing counsel's motion for a continuance. The judge appropriately determined that more time was not

needed to determine appellant's competency. Three experts testified appellant was mildly depressed but that this condition did not affect his capacity on either prong of Singleton. Dr. Melikian testified appellant met the cognitive prong, but stated she could not come to a conclusion on the assistance prong. She also was uncertain whether appellant suffered from major depression, rather than mild depression. However, Dr. Melikian admitted that one could meet the criteria of Singleton even if that person suffered from major depression. Most importantly, Dr. Melikian testified that, even if she was allowed to treat appellant with medication and/or see him more times, she was unsure whether she could ever form an opinion on the Singleton assistance prong. The hearing judge gave the proper weight to Dr. Melikian's testimony when deciding whether a motion for a continuance should be granted. Accordingly, the judge did not abuse his discretion in denying the motion for a continuance. *Cf.* State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002) (trial judge's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion).

II. Competency

A capital defendant may not waive his appellate or PCR rights unless this Court first determines the defendant is competent. *See* Hughes v. State, 367 S.C. 389, 626 S.E.2d 805 (2006) (Court will issue execution notice if person, who is determined by Court to be mentally competent, knowingly and voluntarily waives appeals and post-conviction relief); State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994) (waiver may not be found unless Court first determines defendant is competent and his decision is knowing and voluntary).

In making a determination on the competency of a convicted defendant to waive his appellate or PCR rights, we are not bound by the circuit court's findings or rulings, although we recognize the circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony. *See* Hughes v. State, *supra*. It is this Court which must finally determine whether a particular appellant is mentally competent to make a knowing and voluntary waiver of his appellate or PCR rights. *Id.* In deciding the issue of an appellant's competency, we

carefully and thoroughly review the appellant's history of mental competency; the existence and present status of mental illness or disease suffered by the appellant, if any, as shown in the record of previous proceedings and in the competency hearing; the testimony and opinions of mental health experts who have examined the appellant; the findings of the circuit court which conducted a competency hearing; the arguments of counsel; and the appellant's demeanor and personal responses to any questions at oral argument regarding the waiver of appellate and PCR rights. *Id.*

As noted previously, the standard for determining whether an appellant or PCR applicant is mentally competent to waive the right to a direct appeal or PCR includes a cognitive prong and an assistance prong under Singleton. The failure of either prong is sufficient to warrant a stay of execution and a denial of the convicted defendant's motion to waive his right to appeal or pursue PCR. Hughes v. State, *supra*.

We find appellant is competent and comprehends his circumstances, such that the waiver of his appeals and PCR is knowing and voluntary. Although appellant has been diagnosed as having mild depression, this diagnosis does not affect appellant's capacity on either the cognitive or assistance prong of Singleton.

At the hearing, the two State experts: Drs. Crawford and Musick, and one of the defense experts, Dr. Schwartz-Watts, all testified that appellant suffered from mild depression and not major depression. The doctors all testified appellant was competent to waive his appeals under Singleton. On the cognitive prong of Strickland, the doctors, including Dr. Melikian, testified appellant met this prong. They all testified appellant had an understanding of the appeals process, the consequences of waiving his appeals, and an understanding of his death sentence and the finality of that sentence.

Drs. Crawford, Musick, and Schwartz-Watts also testified appellant met the assistance prong of Singleton. Dr. Crawford testified appellant can communicate clearly and was able to discuss his desires and that he was

willing to work with an attorney who would further his goal of being executed but that he did not wish to work with an attorney who would hinder that goal. Dr. Musick and Dr. Schwartz-Watts gave similar testimony.

Appellant's former counsel, James Whittle, testified that, while he felt appellant had significant mental health issues and was depressed, appellant was competent to stand trial and had the ability to rationally communicate with him. Whittle stated appellant's condition did not seem to have changed since the time he represented appellant. Therefore, at this point in the hearing, the only evidence presented was that appellant was competent.

The defense expert, Dr. Melikian, however, felt she needed more time to make a proper diagnosis of appellant's depression and whether he was competent to waive his appeals. Dr. Melikian's testimony, however, does not prevent a finding of competency in light of the other expert testimony. The other experts clearly found appellant competent and that he had met each prong of Singleton. Further, the fact Dr. Melikian was unsure she could ever reach an opinion on the assistance prong is significant. Finally, on the point of Dr. Melikian's wish that appellant be medicated, appellant, himself, wrote to this Court and stated he had been placed on anti-depressants after the hearing. While on medication, appellant stated he did not think of changing his mind about dropping his appeals. He stated, as he has consistently stated throughout the proceedings, that he wishes to proceed with his execution as soon as possible.

Accordingly, we find appellant is competent to waive his appeals and be executed. Further, his decision to waive is knowing and voluntary. Therefore, the hearing judge's findings are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Palmetto Princess, LLC, Respondent,

v.

Town of Edisto Beach, Appellant.

Appeal From Colleton County
Howard P. King, Circuit Court Judge

Opinion No. 26157
Heard January 4, 2006 – Filed May 30, 2006

AFFIRMED

Marvin C. Jones and R. Clenten Campbell, both of Bogoslow, Jones, Stephens & Duffie, of Walterboro, for appellant.

Heath Preston Taylor, of Moore, Taylor & Thomas, P.A., of West Columbia, for respondent.

JUSTICE MOORE: This is an appeal from a circuit court order granting respondent's (Palmetto Princess's) motion for summary judgment. We affirm.

FACTS

On February 23, 2003, Palmetto Princess applied for a business license from appellant, the Town of Edisto Beach (Edisto). Palmetto Princess intended to operate one or more gaming vessels on cruises originating within the waters and municipal boundaries of Edisto. The plan was for the vessels to travel beyond the three mile territorial waters of the State of South Carolina, at which point games such as black jack, roulette, and craps would be hosted for Palmetto Princess's customers. These gambling cruises are known as "cruises to nowhere." The cruises would conclude, and debarkations take place, within Edisto's municipal boundaries.

Edisto denied Palmetto Princess's application. Edisto based its denial on the Town of Edisto Beach Code § 58-138. Section 58-138 specifically prohibits the possession of a gambling device on a vessel within the waters of the municipal boundaries of Edisto operated for the purposes of conducting a day cruise.

Palmetto Princess commenced a declaratory judgment action seeking to set aside Town of Edisto Beach Ordinance § 58-138 based partly on the grounds that: (1) Edisto did not have the power to enact the ordinance because the Johnson Act, 15 U.S.C.A. § 1171, *et seq.*, restricts the prohibition of gaming activity to states or possessions of the United States; that is, that the Johnson Act preempts the local legislation embodied in the ordinance; and (2) § 58-138 violates article VIII, § 14, of the South Carolina Constitution. Both parties filed motions for summary judgment.

The circuit court held Edisto's ordinance is not preempted by the Johnson Act.[1] However, the court granted Palmetto Princess's motion for

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[1]The circuit court's ruling regarding preemption is not before the Court. However, for edification, the Johnson Act generally prohibits the use or possession of any gambling device on a United States flag vessel. One exception is that the possession or transport of a gambling device within state

summary judgment based on the alternative ground that Edisto's ordinance violates the South Carolina Constitution. The court found that because § 58-138 prohibits an activity otherwise legal within the state, § 58-138 violates the state constitution. Citing Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997), the court stated that the drafters' intent for article VIII, § 14, was to prevent local government's making an act a crime that was not a crime under state law. Accordingly, the court granted summary judgment to Palmetto Princess on its declaratory judgment action.

ISSUE

> Did the circuit court err by finding Town of Edisto Beach Ordinance § 58-138 violates article VIII, §14, of the South Carolina Constitution?

DISCUSSION

Edisto argues the circuit court erred by finding its ordinance, § 58-138, violates article VIII, §14, of the South Carolina Constitution.

South Carolina Code Ann. § 5-7-30 (2004) provides: "Each municipality of the State . . . may enact . . . ordinances, not inconsistent with the Constitution and general law of this State, . . . for preserving health, peace, order, and good government in it . . . ." (Emphasis added).

South Carolina Const. art. VIII, § 14 provides: "In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: . . . (5) criminal laws and the penalties and sanctions for the transgression thereof . . . ."

As stated previously, Ordinance § 58-138 specifically prohibits the possession of a gambling device on a vessel within the waters of the

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territorial waters is not a violation of the prohibition if the device remains on board the vessel and is used only outside those territorial waters. 15 U.S.C. § 1175(b)(1).

municipal boundaries of Edisto operated for the purposes of conducting a day cruise. This ordinance was enacted in 1999. However, subsequently, we held that "cruises to nowhere" are not unlawful. Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001). Therefore, at the time Edisto's ordinance was enacted and Palmetto Princess had requested a business license to operate a gambling day cruise, a gambling day cruise was a legal activity allowed by the State.[2]

Because a gambling day cruise was a legal activity allowed by the State, Edisto's ordinance is unconstitutional because it makes a legal activity unlawful. *See* Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (where ordinance proscribed conduct which was not unlawful at the time the ordinance was enacted under state criminal laws governing the same subject, town exceeded its power in enacting ordinance); and Diamonds v. Greenville County, *supra* (same). Where the General Assembly has occupied the field in a particular area, *i.e.* gambling, by describing what is and what is not proscribed, local governments are not free to alter the standards established by the General Assembly. *Cf.* Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000) (ordinance upheld where there was no relevant state law governing conduct in question).

CONCLUSION

Because Edisto exceeded its power in enacting the ordinance in question, the circuit court properly granted summary judgment to Palmetto Princess. *See* Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003) (summary judgment appropriate only if there is no genuine issue of material fact and moving party is entitled to judgment as matter of law). Therefore, the decision of the circuit court is

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[2]Subsequent to the circuit court's order issued in this case, the General Assembly's Gambling Cruise Prohibition Act was signed into law by the governor with an effective date of June 1, 2005. Section 3-11-200(A) of this Act specifically allows the type of ordinance enacted by Edisto.

AFFIRMED

TOAL, C.J., PLEICONES, J. and Acting Justice Ralph King Anderson, Jr., concur. BURNETT, J., dissenting in a separate opinion.

BURNETT, J.: I respectfully dissent. In my opinion, Edisto did not exceed its power in enacting Ordinance § 58-138 because the Ordinance did not set aside any statewide criminal laws.

South Carolina Constitution Article VIII, § 14, provides: "In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: . . . (5) criminal laws and the penalties and sanctions for the transgression thereof . . . ."

When construing the Constitution, the Court applies rules similar to those relating to the construction of statutes. Davis v. County of Greenville, 313 S.C. 459, 463, 443 S.E.2d 383, 385 (1994). In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992).

As I explained in Diamonds v. Greenville County, 325 S.C. 154, 161, 480 S.E.2d 718, 721 (1997) (Burnett, J., dissenting):

> Article VIII, § 14 does not **require** statewide uniformity of general law provisions regarding "criminal laws and the penalties and sanctions for the transgression thereof." Instead, the preamble to Article VIII, § 14, provides "general law provisions applicable to the following matters shall not be **set aside.**" (emphasis added). The plain meaning of this provision requires local enactments "set aside" some existing provision of the general law before a constitutional violation occurs.

In my opinion, Article VIII, § 14 of the South Carolina Constitution does not prohibit local governments from criminalizing conduct which is not unlawful under state law. Until the Gambling Cruise Prohibition Act was enacted, there was no legislative action that made a gambling day cruise a legal activity. Further in Stardancer Casino, Inc. v. Stewart, 347 S.C.

377, 387-91, 556 S.E.2d 357, 362-64 (2001) (Burnett, J., dissenting), I would have held “boats located within South Carolina and its territorial waters are subject to the same laws concerning gambling as any other premises in this state.” I therefore disagree with the majority’s conclusion that gambling day cruises are lawful. Ordinance § 58-138 could not and did not set aside any statewide criminal laws.

The majority also relies on Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) for the proposition that conduct which is not unlawful under state laws cannot be made unlawful by local enactment. In my opinion the Connor Court erred because the Court effectively held all conduct is lawful unless made unlawful by enactment of the General Assembly. Article VIII, § 14 does not yield to such an interpretation. I would overrule Connor to the extent it holds that local governments may not criminalize conduct which is not unlawful under statewide criminal law.

Edisto’s Ordinance § 58-138 does not set aside any criminal laws enacted by the state because the ordinance is not inconsistent with any state law. Therefore, I would hold Edisto did not exceed its power in enacting Ordinance § 58-138. I conclude the circuit court improperly granted summary judgment to Palmetto Princess.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William B. Harper, Jr., Respondent.

Opinion No. 26158
Submitted March 28, 2009 – Filed May 30, 2006

DEFINITE SUSPENSION

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

William A. Coates, of Greenville, for respondent.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR. The facts are set forth below.

Respondent is licensed to practice law in South Carolina and Florida. He resides in Florida.

In April 2004, respondent pled guilty to misprision of felony in violation of 18 U.S.C. § 4 in the United States District Court for the District of South Carolina. He received a two (2) year probationary sentence and fine.

Respondent reported the matter to the Commission on Lawyer Conduct. The Court placed respondent on interim suspension. In the Matter of Harper, 359 S.C. 554, 598 S.E.2d 717 (2004).

On November 10, 2005, the Supreme Court of Florida issued an order suspending respondent from the practice of law in that state for two years, effective nunc pro tunc, August 6, 2004.

Pursuant to Rule 29(b), RLDE, the Clerk provided the Office of Disciplinary Counsel (ODC) and respondent with thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline was not warranted. Both ODC and respondent filed responses stating the Court should impose the same discipline as imposed by the Supreme Court of Florida.

After thorough review of the record, we hereby suspend respondent from the practice of law in this state for two (2) years, retroactive to the date of his interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex parte:

Hearst-Argyle Television, Inc., d/b/a WYFF TV-4, and The Greenville News, a division of the Gannett Pacific Corporation, Intervenors-Appellants,

In Re:

The State,

v.

Charles Christopher Williams,

Both of Whom are Respondents.

Appeal from Greenville County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26159
Heard May 3, 2006 – Filed May 30, 2006

REVERSED

Carl F. Muller and Wallace K. Lightsey, both of Wyche Burgess Freeman & Parham, of Greenville, and Rivers S.

Stilwell, of Nelson Mullins Riley & Scarborough, of Greenville, for Appellants.

Assistant Appellate Defender Robert M. Dudek, of Columbia, and Solicitor Robert M. Ariail, Deputy Solicitor Betty C. Strom, and Assistant Solicitor Andrew Burke Moorman, all of Greenville, for Respondents.

CHIEF JUSTICE TOAL: Hearst-Argyle Television and The Greenville News (collectively "Appellants") appeal the trial court's decision closing the courtroom during a pre-trial suppression hearing in a capital murder case. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of Charles Christopher Williams' (Defendant's) trial for the murder of his former girlfriend (Victim). In July of 2003, Defendant assaulted Victim as she left her job at a Greenville grocery store. Police arrested Defendant and charged him with assault and battery with intent to kill (ABIK). While out of jail and awaiting trial on the ABIK, Defendant entered Victim's workplace with a shotgun and held her hostage for several hours. The incident ended when police stormed the grocery store and found Victim dead. Police arrested Defendant at the crime scene, and an autopsy revealed that Victim had been shot four times with a shotgun.

Prior to trial, issues arose regarding statements Defendant made to police. Specifically, Defendant gave police a lengthy confession immediately after his arrest and a forensic psychiatrist interviewed Defendant for several hours immediately thereafter. Defendant's testimony to the psychiatrist yielded incriminating information and also led police to discover a journal Defendant kept which contained additional incriminating evidence. One week prior to selecting the jury for Defendant's trial, Defendant moved to suppress the journal and the statements he made to the psychiatrist.

Immediately, this case received a great deal of media attention. Several television stations broadcast live from the grocery store during the hostage standoff, and Appellant Greenville News published at least thirty-eight news and opinion articles either exclusively devoted to this case or addressing the case in the broader context of "the domestic violence problem in South Carolina."

The trial court held most of the pre-trial proceedings in Anderson in hopes that the media would not attend. Prior to the hearing on Defendant's motion to suppress, this strategy was successful. In fact, until the suppression hearing, the media did not attend any of the pre-trial proceedings. Appellants sent reporters to the suppression hearing however, and after these reporters identified themselves to the trial court, the court announced its intention to close the courtroom.[1]

Appellants requested a hearing to allow their attorneys to present arguments opposing closing the courtroom. While Appellants phoned their attorneys, the court asked the parties if limiting the hearing to legal arguments regarding suppression might allow Appellants to remain present. Defendant voiced strong opposition to the presence of the media, expressing concern about not being able to prevent witnesses from discussing substantive facts in their answers.

After Appellants' attorneys arrived, the court conducted a hearing on closing the courtroom. Relying on precedent of this Court and the United States Supreme Court, the trial court held that a courtroom may be closed only upon specific findings showing "a substantial probability of prejudice from publicity that closure would prevent and [that] there's no reasonable alternatives." Relying on the fact that this case involved the "hot button" issue of domestic violence, an issue which had played prominently in the

[1] The court initially stated that if Defendant did not move to close the proceeding, the court would do so *sua sponte*. Later, Defendant made an oral motion to close the proceeding.

media's coverage of the case, and because this case also involved sensitive racial issues, the court closed the suppression hearing.

Though not relevant to the merits of this appeal, the trial court denied Defendant's motion to suppress. The trial proceeded, and a jury convicted Defendant and sentenced him to death. This appeal followed,[2] and Appellants raise the following issues for review:

I. Did the trial court close the courtroom without sufficient justification?

II. Did the trial court violate Appellants' procedural due process rights in closing the courtroom?

LAW/ANALYSIS

Although both the suppression hearing and the criminal trial in this case have concluded, we review the case despite its mootness because, as courts have generally held in these cases, closing the courtroom is a wrong "capable of repetition yet evading review." *See In re S.C. Press Ass'n*, 946 F.2d 1037, 1039 (4th Cir. 1991); *and Ex parte Columbia Newspapers, Inc.*, 286 S.C. 116, 118, 333 S.E.2d 337, 338 (1985) (citing *Gannett v. DePasquale*, 443 U.S. 368 (1983) and *Steinle v. Lollis*, 279 S.C. 375, 307 S.E.2d 230 (1983)).

I. Justification for Closure

Appellants argue the trial court closed the suppression hearing without sufficient justification. We agree.

[2] Although this appeal does not involve the merits of Defendant's conviction or sentence, the appeal came directly to this Court because Defendant's trial resulted in a death sentence. *See* Rule 203(d)(1)(A), SCACR (stating that an appeal in a death penalty case is heard in this Court). Defendant's direct appeal to this Court is currently pending.

The rights of the public and the press to attend criminal trials are guaranteed by the South Carolina Constitution and the United States Constitution. Because the majority of "closed courtroom" cases focus largely on the federal constitutional analysis and jurisprudence, we begin there.

United Stated Supreme Court has interpreted the guarantees of free speech and freedom of the press found in the First Amendment to the United States Constitution to include a constitutional guarantee of open and public courts. *Richmond Newpapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). Because the court views the rights of the public and press as constitutionally guaranteed, the First Amendment analysis applies a strong presumption favoring open criminal proceedings. *In re Charlotte Observer*, 882 F.2d 850, 852 (4th Cir. 1989); *In re Knight Publishing Co.*, 743 F.2d 231, 234 (4th Cir. 1984). This presumption may only be overcome by an overriding interest based on specific findings that closure is necessary to preserve "higher values," and the closure must be narrowly tailored to serve that interest. *In re Charlotte Observer*, 882 F.2d at 852-53 (citing *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 13-14 (1986) (*Press Enterprise II*)); *In re Knight Publishing Co.*, 743 F.2d at 234 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press Enterprise I*)).

When the alleged "higher value" justifying closure is protecting the defendant's Sixth Amendment right to trial by an impartial jury, the courtroom may be closed only if specific findings are made that (1) there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity, (2) there is a substantial probability that closure would prevent that prejudice, and (3) reasonable alternatives to closure could not adequately protect the defendant's rights. *In re S.C. Press Ass'n*, 946 F.2d at 1041; *In re Charlotte Observer*, 882 F.2d at 853. Additionally, the trial court must list specific findings justifying closure so an appellate court may review the decision and determine its correctness. *In re Knight Publishing Co.*, 743 F.2d at 234. Courts have generally interpreted this requirement as establishing a *de novo* standard of review. *In re Charlotte Observer*, 882 F.2d at 853 (citing *In re Washington Post*, 807 F.2d 383, 381 (4th Cir. 1986)).

Although South Carolina, like the federal courts, has a rich jurisprudential history in the area of courtroom closure, the origins of the state and federal guarantees of open courtrooms are quite different. Our Constitution parallels the United States Constitution in numerous ways. For example, article I, § 2 of the South Carolina Constitution is strikingly similar to the First Amendment to the United States Constitution. Also, article I, § 14 of the South Carolina Constitution provides the equivalent of the Sixth Amendment's guarantee of a speedy and public trial to a criminal defendant. Arguably, the difficulty the federal courts experienced in the early stages of closed courtroom jurisprudence involved finding a constitutional basis for the guarantee of open courtrooms.[3] As we have explained, the federal courts eventually interpreted the First Amendment in such a manner as to provide this guarantee, and the federal law in this area has largely become well-settled.

In South Carolina, however, our Constitution contains a particular provision that has no parallel at the federal level. Specifically, our Constitution provides "[a]ll courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." S.C. Const. art. I, § 9.[4]

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[3] *Compare Gannett v. DePasquale*, 443 U.S. 368, 391-92 (1978) (holding that the members of the public have no constitutional rights under the Sixth and Fourteenth Amendments to attend criminal trials, and assuming *arguendo* that the First Amendment guarantees the public a right to attend pre-trial criminal proceedings, the trial court heard arguments in objection to the closure and adequately "balanced the 'constitutional rights of the press and public' against the 'defendants' right to a fair trial.'"), *with Richmond Newpapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (stating "that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials . . . important aspects of freedom of speech and 'of the press could be eviscerated.'").

[4] In *State v. Lagerquist*, 254 S.C. 501, 506, 176 S.E.2d 141, 143 (1970), we declined to interpret the latter portion of this provision as guaranteeing a right to a speedy appeal in a criminal case. Additionally, we clarified that the latter portion applies only to civil proceedings. *Id.* (stating that construing

While federal case law was still in considerable flux, our jurisprudence recognized article I, § 9's independent constitutional guarantee of open courts and held "[e]xclusion of the press and public from judicial proceedings is a drastic measure calling for a careful weighing of interests affected." *Steinle v. Lollis*, 279 S.C. 375, 376-77, 307 S.E.2d 230, 231 (1983). As both federal and state law evolved, we clarified that a judge's decision to close any proceeding must be supported by specific findings explaining the balancing of the interests at stake and the need for closure. *Ex parte Island Packet*, 308 S.C. 198, 201, 417 S.E.2d 575, 577 (1992) (explicitly adopting *Press Enterprise II*'s test); *Ex parte Columbia Newspapers*, 286 S.C. at 118-19, 333 S.E.2d at 338 (relying on *Steinle* and article I, § 9 of the South Carolina Constitution, as well as *Gannett*).

Although the state and federal constitutional origins of these rights are substantially different, we now hold that the test for reviewing the propriety of closing a courtroom under the South Carolina Constitution is identical to the First Amendment analysis of the issue. This holding is grounded in the fact that this Court's earliest precedent closely mirrors the current First Amendment analysis of this issue, and in the fact that this Court has continually relied on both state and federal precedent in analyzing these cases.[5]

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the provision to apply to criminal trials would render article I, § 14's guarantees superfluous). These interpretations are not relevant to this case, however, because they have no bearing on the unqualified language at the beginning of the section.

[5] Arguably, our analysis begins by determining whether the particular type of proceeding has historically been open and whether public scrutiny plays a significant role in the functioning of the proceeding. *Ex parte Island Packet*, 308 S.C. at 201, 417 S.E.2d at 577 (citing *Press Enterprise II*). This inquiry is unnecessary in this case because this Court has recognized the public's right of access to pre-trial suppression hearings. *See In re Greenville News*, 332 S.C. 394, 396, 505 S.E.2d 340, 341 (1998) (citing *Waller v. Georgia*, 467 U.S. 39, 47 (1984)). Again, this proposition is strengthened by the South Carolina Constitution's unqualified language guaranteeing open courtrooms.

In the instant case, the trial court relied on concerns about racial issues and the "hot button" issue of domestic violence in closing the pre-trial suppression hearing. Though these concerns were no doubt genuine, closing the courtroom could not possibly have alleviated either of them. As the record demonstrates, closing the courtroom had no effect on Appellants' abilities to publish or disseminate news about Defendant's case. Though the trial court had the ability to prevent the press from attending the suppression hearing, the court did not have the ability to prevent the press from speaking on the subject matter. Indeed, preventing the press from attending the suppression hearing had no impact on the press' ability to further publicize Defendant's race, crime, or any issue related to his case. Thus, assuming there was a substantial probability that pre-trial publicity would prejudice Defendant, closing the courtroom could not have prevented that prejudice.

Additionally, it is helpful to discuss another of the trial court's concerns involving the media's presence at the suppression hearing, though it was not specifically articulated in the court's justifications for its decision. In this case, the trial court was concerned that details of Defendant's confession to the psychiatrist might be revealed in the hearing and subsequently published by the media. Similar, however, to the justifications offered above, this concern would also fail to support closure. We believe the trial court's original suggestion to limit the hearing to legal arguments addressing suppression would be sufficient to alleviate this fear. Additionally, we take this opportunity to reiterate that jury *voir dire* is the preferred and generally accepted tool that protects a defendant from the prejudicial effects of pre-trial publicity. *In re Charlotte Observer*, 882 F.2d at 855.

Because closing the courtroom had no effect on preventing additional publicity regarding Defendant's case, the case as it related to the issue of domestic violence in South Carolina, or any racial issues involved in the trial, we reverse the trial court's decision closing the pre-trial suppression hearing.[6]

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[6] Although we reverse the trial court's ultimate decision, we are satisfied that the trial court applied the proper legal standard in considering this issue.

II. Procedural Due Process

Appellants allege the trial court closed the courtroom in violation of their procedural due process rights. Specifically, Appellants allege the trial court closed the hearing *sua sponte* and without giving Appellants adequate notice and a meaningful opportunity to be heard. We disagree.

First, we note that the trial court, in this case, did not close the courtroom on its own motion. Although the court stated its intention to close the hearing on its own motion if Defendant did not make a motion first, the record clearly indicates that Defendant made an oral motion to close the courtroom. Therefore, the argument that the court closed the courtroom *sua sponte* is without support in the record.

If, however, the trial court had closed the courtroom *sua sponte*, the distinction would not be significant. In *In re S.C. Press Ass'n*, the fourth circuit upheld the trial court's decision closing *voir dire* after the trial court *sua sponte* issued a notice that it would hold a closure hearing. 946 F.2d at 1039. Because the court raised the issue on its own motion, no formal notice was docketed prior to the hearing. *Id.* The fourth circuit upheld the trial court's decision, and in doing so, the court held that this process gave the press and public adequate notice and opportunity to voice opposition to the court's decision. *Id.*

Appellants' argument, "that a court cannot, in some circumstances, raise matters on its own motion," overstates the case and ignores the critical balance at work in closed courtroom cases. Although the public and the press

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Though the court initially referred to the case of *Gannett v. DePasquale* and to Rule 605(f)(iii), SCACR (governing media coverage of court proceedings), as the relevant authority in this area, the court's articulation of the test, that there be "a substantial probability of prejudice from publicity that closure would prevent and [that] there's no reasonable alternatives," is a proper restatement of the constitutional analysis mandated by the *Island Packet* and *Press Enterprise II* decisions.

have constitutionally guaranteed rights in the courtroom, those rights are not absolute and will sometimes compete with and obstruct a criminal defendant's constitutionally secured right to receive a fair trial. In criminal cases, the trial court has a duty to protect a defendant's constitutional right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966). We decline to take such a view of these cases as to, with one hand, charge the trial court with the duty of protecting both the defendant's and the public's constitutional rights, and with the other hand, hamstring the court by requiring it to refrain from considering these issues until asked to do so. If closing the courtroom is the only available option to prevent the substantial probability that publicity would prejudice the defendant's right to a fair trial, the trial court may raise the issue on its own motion, conduct the required hearing, and issue a ruling.

Regarding notice and an opportunity to be heard, in this case, the trial court identified Appellants' presence in the courtroom, announced his intention to close the courtroom, and asked Appellants if they had any comment. Appellants requested a hearing during which they could argue against closing the courtroom, and the trial court held a hearing on closure where both Appellants were represented by legal counsel.

In closed courtroom cases, individual notice is not required. *In re Knight Publishing Co.*, 743 F.2d at 235. Generally, notifying the persons present in the courtroom "reasonably in advance of deciding the issue" is appropriate. *Id.*[7] Here, the trial court alerted Appellants' representatives of its intentions, and the court allowed Appellants' attorneys a meaningful opportunity to be heard on the issue. Appellants provided the trial court with the relevant authority on the issue, and each presented skillful arguments. In our view, it would indeed take a skewed view of the record to conclude that the trial court's decision making process in this case violated Appellants' procedural due process rights.

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[7] Appellants rely on *In re Knight Publishing Co.*, and argue that the trial court had already made his decision before he held the hearing. The record does not support this argument; particularly in light of the trial court's statements before and during the hearing.

CONCLUSION

Although we are satisfied that the trial court in this case paid careful consideration to Appellants' due process rights and applied the proper legal standard, we hold that the reasons offered in support of closing the courtroom were insufficient to justify infringing upon the state and federal constitutional guarantees of open courts. We believe the trial court's justifications are accurately re-characterized as concerns regarding additional pre-trial publicity and its possible effect on being able to draw an impartial jury. Because closing the suppression hearing had no effect on preventing additional publicity of the trial, we reverse.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Butler Contracting, Inc., Respondent/Appellant,

v.

Court Street, LLC; Morris Construction Co.; and Central Carolina Bank, Defendants,

Of whom Court Street, LLC, and Morris Construction Co. are Appellants/Respondents.

Appeal from Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 26160
Heard April 19, 2006 – Filed May 30, 2006

AFFIRMED IN PART; REVERSED IN PART

Thomas E. Dudley, III, and John T. Crawford, Jr., both of Kenison & Dudley, LLC, of Greenville, for Appellants/Respondents.

Craig H. Allen, of Greenville, for Respondent/Appellant.

CHIEF JUSTICE TOAL: This appeal raises issues relating to whether a mechanic's lien was timely perfected and the denial of prejudgment interest to the prevailing party. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Butler Contracting, Inc. (Subcontractor) signed a contract with Morris Construction Co. (Contractor) to provide labor and materials for interior walls and ceilings in a commercial renovation project. Court Street, LLC (Owner) hired the companies to transform and expand a former church site in Greenville into condominiums. The original contract amount between Subcontractor and Contractor was $493,156.[1] Including additional work and change orders, Subcontractor asserted it was owed a total of $713,364, of which Contractor paid $536,363, leaving a balance due of $177,001.

Henry Holseberg, a principal owner of both Owner and Contractor who apparently controlled both companies, did not dispute the original contract amount, the various amounts for additional work and changes asserted by Subcontractor, or the amount still owed to Subcontractor. Owner, however, filed a counterclaim seeking an offset for $94,878 in damages allegedly caused by delays attributable to Subcontractor and work which Subcontractor failed to timely or properly perform.[2]

During construction, Owner or Contractor apparently began having financial difficulties and fell behind in payments to various companies working on the project. Contractor did not prepare contemporaneous records of tasks Subcontractor allegedly failed to perform or provide detailed back-

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[1] We have rounded off dollar amounts.

[2] Owner purchased a surety bond pursuant to S.C. Code Ann. § 29-5-110 (Supp. 2005) to release the lien against the real property.

charges to Subcontractor as the project progressed. Instead, Contractor declined to pay Subcontractor's invoices in full. After Subcontractor filed a notice of mechanic's lien and a lawsuit seeking to enforce the lien, Contractor reviewed past records such as time and material sheets in an attempt to document the proper amount of back-charges allegedly owed by Subcontractor. Contractor's staff made these calculations during or after Holseberg's deposition; some two years after the project was completed.

Holseberg testified the work Subcontractor failed to do included work in the church basement, repairing areas damaged by other subcontractors, completing changes requested by owners who had purchased units, and completing "punch lists" of minor problems in finished units. Contractor eventually hired a drywall finisher fired by Subcontractor to help complete the necessary work. There apparently was some degree of miscommunication and disagreement between the parties regarding changes and repairs, with Subcontractor insisting it properly performed the work and objecting to potential back-charges due to confusion about which company had performed repairs.

Subcontractor provided labor and materials at the project on a regular basis from mid-1999 until December 2000, although it apparently was not constantly at the jobsite due to delays caused by asbestos removal and the work of other subcontractors. Danny Hodge testified Subcontractor was supposed to perform additional work in the church basement after December 2000, and was ready, willing, and able to do so, but Contractor never asked Subcontractor to complete the work.

In early 2001, Subcontractor, at the request of Contractor's supervisor, delivered one box of ceiling tiles to replace tiles at the project which had been damaged by water leaks. Hodge testified the ceiling tiles were surplus materials from the project stored at Subcontractor's warehouse. Subcontractor routinely included the cost of replacing some damaged ceiling tiles in its estimates, and often provided replacement tiles even though it was not explicitly required to do so by a particular contract. A project foreman for Contractor signed a form accepting delivery of the tiles. Holseberg

testified the tiles were not needed, although he was uncertain whether they were used.

Subcontractor filed a notice and certificate of its mechanic's lien in circuit court approximately one month after delivering the ceiling tiles. About two months later, Subcontractor filed a lawsuit in circuit court against Owner and Contractor, asserting causes of action based in contract, the mechanic's lien statute, and quantum meruit. Subcontractor sought the balance due of $177,001, attorney's fees, prejudgment interest, and foreclosure and sale of the real property to satisfy its lien.

The case was referred with finality to a master-in-equity. After a bench trial, the trial court found the mechanic's lien had been timely served and recorded as required by statute. The trial court awarded $152,001 to Subcontractor, which represented a reduction of $25,000 from the original demand stemming from delays attributable to Subcontractor. The trial court did not offset any damages claimed by Contractor for work it allegedly performed that was Subcontractor's responsibility. Subcontractor requested payment of attorney's fees of $43,529 as the prevailing party, and the trial court separately awarded $35,000 in attorney's fees. The trial court denied Subcontractor's request for prejudgment interest.

Owner and Contractor appealed and Subcontractor cross-appealed. We certified this case from the court of appeals pursuant to Rule 204(b), SCACR, and the parties present the following issues for review:

I. Did the trial court err in ruling Subcontractor timely served and recorded its mechanic's lien?

II. Did the trial court err in ruling Subcontractor was not entitled to prejudgment interest on the balance due?

STANDARD OF REVIEW

A proceeding for the enforcement of a statutory lien, such as a mechanic's lien, is legal in nature. *Willard v. Finch*, 123 S.C. 56, 116 S.E. 96

(1923); *Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. Partnership*, 308 S.C. 298, 301, 417 S.E.2d 634, 636 (Ct. App. 1992). In an action at law, when a case is tried without a jury, the trial court's findings of fact will be upheld on appeal when they are reasonably supported by the evidence. Stated another way, the trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law. The trial court's findings in such a case are equivalent to a jury's findings in a law action. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); *Willard*, 123 S.C. at 58, 116 S.E. at 96; *Stoudenmire*, 308 S.C. at 301, 417 S.E.2d at 636.

LAW/ANALYSIS

I. Perfection of Mechanic's Lien

Owner argues the trial court erred in ruling that Subcontractor timely served and recorded a mechanic's lien within the statutory ninety-day deadline. Owner asserts that Subcontractor's "unilateral, unsolicited delivery" of one box of ceiling tiles to the jobsite did not revive Subcontractor's expired right to file a mechanic's lien. The delivery of "surplus materials" was not required by the contract, and the materials were "merely provided as a gratuity or an act of friendly accommodation." In fact, the delivery was nothing more than "a contrived effort to revive lien rights." We disagree.

"A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate," by virtue of an agreement with or with the consent of the owner or his agent, shall have a mechanic's lien upon the real property to secure payment of the debt. S.C. Code Ann. § 29-5-10(a) (Supp. 2005). The right to a lien arises inchoate; i.e., when the labor is performed or material is furnished, the right exists but the lien has not been perfected. *Preferred Sav. and Loan Assn., Inc. v. Royal Garden Resort, Inc.*, 301 S.C. 1, 3, 389 S.E.2d 853, 854 (1990); *Wood v. Hardy*, 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959); *Williamson v. Hotel Melrose*, 110 S.C. 1,

30, 96 S.E. 407, 409 (1918). When the person claiming the lien was employed by someone other than the owner, such as a contractor, he must notify the owner of the furnishing of labor or material in order for the lien to attach to the property. S.C. Code Ann. § 29-5-40 (1991); *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 629, 93 S.E.2d 855, 860 (1956); *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 26-27, 336 S.E.2d 488, 490-91 (Ct. App. 1985).[3]

In order to perfect and enforce a mechanic's lien, the person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information "within ninety days after he ceases to labor on or furnish labor or materials for such building or structure"; (2) must commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for such real property; and (3) must file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials for such real property. S.C. Code Ann. §§ 29-5-90 and 29-5-120 (1991 & Supp. 2005); *Preferred Sav. & Loan Assn.*, 301 S.C. at 3-4, 389 S.E.2d at 854; *Franke Associates by Simmons v. Russell*, 295 S.C. 327, 329, 368 S.E.2d 462, 463 (1988); *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 235 S.E.2d 133 (1977); *Crystal Pools, Inc. v. Old Claussen's Bakery Partners*, 303 S.C. 68, 399 S.E.2d 5 (Ct. App. 1990). If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt. On the other hand, if he fails to take any one of these steps, the lien

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[3] Section 29-5-40 does not contain a time limit for providing written notice to the owner when the person asserting the lien is employed by someone other than the owner. *Wood*, 235 S.C. at 138, 110 S.E.2d at 160; *Lowndes Hill Realty Co.*, 229 S.C. at 629, 93 S.E.2d at 860; *see also Stovall Bldg. Supplies, Inc. v. Mottet*, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (Ct. App. 1990) (reversing foreclosure on mechanic's lien because material supplier, which had contract with subcontractor, failed to give required notice of lien to homeowner before homeowner paid general building contractor in full).

against the property is dissolved pursuant to Sections 29-5-90 and 25-9-120. The failure to perfect a mechanic's lien does not preclude an action on the debt. *Shelley Constr. Co.*, 287 S.C. at 27, 336 S.E.2d at 490.

The time limits run from the same event: the certificate of lien must be filed within ninety days, and the foreclosure suit (and accompanying notice of pending action) must be commenced within six months after the person asserting the lien ceases to furnish labor or materials. The effect of these provisions is that the six-month limitations period for enforcing the lien necessarily commences no later than the date the certificate of lien is filed. If suit is not commenced within six months after the date the certificate of lien is filed, title examiners may assume that the mechanic's lien is dissolved.[4] *Preferred Sav. & Loan Assn.*, 301 S.C. at 4-5, 389 S.E.2d at 854-55. A mechanic's lien is purely statutory. Therefore, the requirements of the statute must be strictly followed. *Lyles*, 268 S.C. at 578, 235 S.E.2d at 134.

In *Wood*, a residential contractor abandoned the construction of a house midway through the job. The materials provider had not been paid by the contractor. The materials provider agreed to furnish the rest of the materials, and the provider and homeowner agreed to hire others to complete the house. The homeowner moved into the house upon completion. Approximately one month later, the materials provider, acting upon a complaint by the homeowner, sent a plumber to properly complete the kitchen drain line by

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[4] As we have explained:

> If the certificate of lien is filed on the date that labor ceases, suit must be brought within six months thereafter. For each additional day between the date of cessation of labor and the date of filing, the time between filing and commencement of suit is reduced by one day. Thus, if the certificate were filed on the 90th day after cessation of labor, suit must be commenced three months after the filing.

Preferred Sav. & Loan Assn., 301 S.C. at 4 n.1, 389 S.E.2d at 855 n.1.

installing two pieces of pipe costing about $4. The materials provider subsequently served and filed a notice of mechanic's lien within ninety days of effecting the minor plumbing repair, but not within ninety days of the provision of any other material or labor. *Wood*, 235 S.C. at 133-36, 110 S.E.2d at 157-59.

The homeowner argued the minor plumbing repair was so "trivial or inconsequential" that it was insufficient to extend the time for serving a mechanic's lien beyond the date the bulk of materials and labor had been provided. This Court disagreed, noting, as other courts had in similar cases, that the statute does not specify any particular amount of materials or labor which must be furnished. *Wood*, 235 S.C. 136-40, 110 S.E.2d at 159-61.

"[W]here a claimant, after a contract is substantially completed, does additional work or furnishes additional material which is necessary for the proper performance of his contract, and which is done in good faith at the request of the owner or for the purpose of fully completing the contract, and not merely as a gratuity or act of friendly accommodation, the period for filing the lien will run from the doing of such work or the furnishing of such materials, irrespective of the value thereof." *Wood*, 235 S.C. at 140, 110 S.E.2d 157 at 161. The deadline to serve and record a mechanic's lien begins running from the date the last material was furnished or work performed, regardless of whether such material or work is insignificant and regardless of whether the final work is delayed, provided the reason for the delay is not to improperly extend the period for perfecting the lien. *Id.*; *accord Crystal Pools*, 303 S.C. at 68, 399 S.E.2d at 5 (warranty work performed by carpeting contractor five months after initial installation of carpeting, which was necessary to complete performance under the contract, constituted furnishing of labor or materials and extended time for perfecting mechanic's lien).

The position adopted in *Wood*, as reflected in foreign precedent cited in that 1959 opinion, has not changed substantially in more recent cases from other courts. "[W]hen an unreasonable period of time has elapsed since substantial completion of the work, the performance of trivial services or the furnishing of trivial materials generally will not extend the time for filing the certificate past the date of substantial completion. . . . If, however,

subsequent to the date of substantial completion, trivial services or materials are provided at the request of the owner, rather than at the initiative of the contractor for the purpose of saving a lien, the furnishing of such work or material will extend the commencement of the period for filing a certificate of mechanic's lien." *F.B. Mattson Co. v. Tarte*, 719 A.2d 1158, 1161 (Conn. 1998) (holding that, although roofing project had been substantially completed more than a month earlier, deadline to file mechanic's lien began to run upon removal of scaffolding and roofing brackets from property at request of owner); *accord Franklin Bldg. Supply Co. v. Sumpter*, 87 P.3d 955, 959-61 (Idaho 2004) (deadline to file mechanic's lien began to run when builder purchased a sheet of cedar and locking door handle for house, not when certificate of occupancy was issued several weeks earlier; although dollar value of items was minimal, they were actually used in constructing and repairing the home, were reasonably necessary to complete construction and punch list according to terms of contract, were not merely trivial or insubstantial, and purchases were not intended to extend time for filing lien); *Interstate Elec. Servs. Corp. v. Cummings Props., LLC*, 825 N.E.2d 1059, 1063-64 (Mass. App. 2005) (mere delay in completing contract and performance of trifling items of work have never been held under Massachusetts statute fatal to maintenance of a mechanic's lien when work was done in good faith and was necessary to a complete performance of the contract); *Security Ben. Life Ins. Corp. v. Fleming Companies*, 908 P.2d 1315, 1321-22 (Kan. App. 1995) (for purposes of mechanic's lien filing deadline, store checkout system installer last performed work on date it set up direct store delivery system and trained employees on its use; although other work was completed earlier, work performed on that date was necessary to comply with terms of contract); 53 Am.Jur.2d *Mechanics' Liens* § 211 (1996).

In the present case, Contractor asked Subcontractor to provide a single box of ceiling tiles to replace water-damaged tiles. As shown by a delivery form signed by Contractor's supervisor, Subcontractor provided the tiles in early 2001. The trial court correctly ruled that Subcontractor, in this instance, furnished additional materials which were necessary for the proper performance of the contact, and did so in good faith at the request of Contractor or for the purpose of fully completing the contract. Subcontractor

did not provide the materials merely as a gratuity or an act of friendly accommodation; nor did Subcontractor provide the materials merely to improperly extend the period for perfecting its lien.

Subcontractor routinely provided such materials on its projects to properly complete the job and foster a good reputation. Although it was not explicitly required by contract to leave surplus tiles on site or replace tiles damaged by others during the construction process, the parties implicitly considered the provision of such materials necessary to comply with the contract and fulfill the duty of good faith and fair dealing which is an implied term of every contract. *E.g. Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970) ("There exists in every contract an implied covenant of good faith and fair dealing.").

The trial court's ruling that the deadline for Subcontractor to file a mechanic's lien began to run upon delivery of the box of ceiling tiles to the jobsite at the request of Contractor is reasonably supported by the evidence. Accordingly, we affirm the trial court's decision that Subcontractor timely perfected its mechanic's lien pursuant to Sections 29-5-90 and 29-5-120.

II. Prejudgment Interest

Subcontractor contends the trial court erred in denying its request for prejudgment interest because the amount owed was certain or capable of being reduced to certainty upon demand for payment. We agree.

The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. *Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005); *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993); *Ancrum v. Slone*, 29 S.C.L. (2 Speers) 594 (1844). Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. Prejudgment interest is not allowed on an unliquidated claim in the absence

of an agreement or statute. *Babb*, 310 S.C. at 350, 426 S.E.2d at 791; *Builders Transport, Inc. v. S.C. Prop. & Cas. Ins. Guar. Assn.*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992); *Wayne Smith Constr. Co. v. Wolman, Duberstein, and Thompson*, 294 S.C. 140, 146-47, 363 S.E.2d 115, 119 (Ct. App. 1987).

The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. *Smith-Hunter Constr. Co.*, 365 S.C. at 128, 616 S.E.2d at 421; *Babb*, 310 S.C. at 353, 426 S.E.2d at 791; *Wayne Smith Constr. Co.*, 294 S.C. at 146-47, 363 S.E.2d at 119. The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 88-89, 572 S.E.2d 298, 302 (Ct. App. 2002); *Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985).

A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor's money beyond the date payment was due. *Sears v. Fowler*, 293 S.C. 43, 45-46, 358 S.E.2d 574, 575 (1987). In South Carolina, prejudgment interest is set by statute at annual rate of 8¾ percent, although parties are free to agree, within legal limits, on a higher rate of interest. S.C. Code Ann. § 34-31-20(A) (Supp. 2005); *Turner Coleman, Inc. v. Ohio Constr. & Engr., Inc.*, 272 S.C. 289, 292, 251 S.E.2d 738, 740 (1979).

In the present case, the trial court denied Subcontractor's claim for prejudgment interest because there was a "good faith dispute by [Owner and Contractor] as to the amount due." This ruling conflicts with established law and it is not reasonably supported by the evidence.

The parties do not dispute the amount of the original contract. Including additional work and change orders, Subcontractor asserted it was

owed a total of $713,364, of which Contractor paid $536,363, leaving a balance due of $177,001. Contractor did not dispute the various amounts for additional work and changes asserted by Subcontractor, or the amount still owed to Subcontractor. Contractor, however, filed a counterclaim seeking an offset for $94,878 in damages allegedly caused by delays attributable to Subcontractor and work which Subcontractor failed to timely or properly perform.

We hold the trial court erred in denying the award of prejudgment interest because Subcontractor asserted a claim for liquidated damages. The amount Contractor owed Subcontractor was a certain sum or capable of being reduced to a certainty based on contractual provisions regarding the amount of the original contract, the amount of change orders approved by Contractor, and payments made by Contractor. In this case, the trial court should have awarded prejudgment interest to Subcontractor after determining the amount Contractor owed Subcontractor. Furthermore, Contractor's assertion of a counterclaim seeking an offset does not prevent an award of prejudgment interest because it is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.

We reverse the trial court's order refusing to award prejudgment interest to Subcontractor and remand this case for calculation of prejudgment interest on the sum of $152,001 from the date Subcontractor filed its notice and certificate of mechanic's lien in circuit court.

CONCLUSION

We affirm the trial court's decision that Subcontractor timely perfected its mechanic's lien and the verdict awarding damages to Subcontractor. We reverse the trial court's order refusing to award prejudgment interest to Subcontractor and remand this case for the calculation of such interest.

We affirm the rulings of the trial court on the remaining issues raised by Owner and Contractor pursuant to Rule 220(c), SCACR, and the following authorities: Issues II, III, and IV: *Willard v. Finch*, 123 S.C. 56, 116 S.E. 96 (1923); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81,

86, 221 S.E.2d 773, 775 (1976); *Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. Partnership*, 308 S.C. 298, 301, 417 S.E.2d 634, 636 (Ct. App. 1992).

MOORE, WALLER, PLEICONES, JJ., and Acting Justice R. Knox McMahon, concur.

The Supreme Court of South Carolina

In the Matter of Samantha D. Farlow, Respondent.

ORDER

Respondent pled guilty to one count of accommodation distribution of marijuana in violation of 21 U.S.C. § 841(b)(1)(D) and § 841(b)(4) and one count of possession of methylenedioxymethamphetamine hydrochloride, also known as MDMA or "ecstasy," in violation of 21 U.S.C. § 844(a).

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and to appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Michael P. Horger, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s),

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

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

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

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

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

May 25, 2006

The Supreme Court of South Carolina

In re: Amendments to Rule 4(f)(4), Rule 5(b), and Rule 19(c) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR, are hereby amended as follows:

(1) Rule 4(f)(4) shall state: "declare a matter closed, but not dismissed prior to the filing of formal charges and, after proper notice, to reopen a matter that has been previously closed but not dismissed.";

(2) "and," shall be deleted from the end of Rule 5(b)(6);

(3) Rule 5(b)(7) shall be renumbered as Rule 5(b)(8);

(4) Rule 5(b)(7) shall state: "dismiss a matter where a judge subject to a pending complaint dies prior to an agreement for discipline by consent or report of the hearing panel being submitted to the Supreme Court; and,";

(5) Rule 19(c)(4), (5), and (6) shall be renumbered as Rule 19(c)(5), (6), and (7); and

(6) Rule 19(c)(4) shall state: "Upon issuance of an order of interim suspension by the Supreme Court, disciplinary counsel may dispense with the usual requirement in Rule 19(b)(1) of requesting an initial response from the judge so suspended and the matters referenced in the petition for interim suspension shall be deemed in full investigation and a notice of that investigation shall be served and a response thereto made in accordance with the provision of Rule 19(c)."

These amendments shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

May 26, 2006

The Supreme Court of South Carolina

In re: Amendments to Rule 4(f)(4), Rule 5(b), and Rule 19(c) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, are hereby amended as follows:

(1) Rule 4(f)(4) shall state: "declare a matter closed, but not dismissed prior to the filing of formal charges and, after proper notice, to reopen a matter that has been previously closed but not dismissed.";

(2) Rule 5(b)(8), (9), and (10) shall be renumbered as Rule 5(b)(9), (10), and (11);

(3) Rule 5(b)(8) shall state: "dismiss a matter where a lawyer subject to a pending complaint dies prior to an agreement for discipline by consent or report of the hearing panel being submitted to the Supreme Court.";

(4) Rule 19(c)(4), (5), and (6) shall be renumbered as Rule 19(c)(5), (6), and (7); and

(5) Rule 19(c)(4) shall state: "Upon issuance of an order of interim suspension by the Supreme Court, disciplinary counsel may dispense with the usual requirement in Rule 19(b)(1) of requesting an initial response from the lawyer so suspended and the matters referenced in the petition for interim suspension shall be deemed in full investigation and a notice of that investigation shall be served and a response thereto made in accordance with the provision of Rule 19(c)."

These amendments shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

May 26, 2006

The Supreme Court of South Carolina

In re: Amendments to Rule 501, Canon 4, of the South Carolina Appellate Court Rules

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ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 501, Canon 4(F), South Carolina Appellate Court Rules, is hereby amended to read as follows:

> **F. Service as Arbitrator or Mediator.** A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.* However, a retired judge may act as an arbitrator or mediator and remain available for assignment as a judge by the Chief Justice of the Supreme Court, provided the judge is disqualified: (1) from mediation and arbitration in matters in which the judge served as judge; and (2) as a judge from matters in which the judge participated as mediator or arbitrator.

The amendment is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

May 25, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tom Smith, **Claimant/Respondent,**

v.

NCCI, Inc. as Employer, and Liberty Insurance Corporation, as Carrier, **Defendants/Appellants.**

Appeal From Richland County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4115
Heard May 8, 2006 – Filed May 22, 2006

AFFIRMED

Vernon F. Dunbar, of Greenville, for Appellants.

Preston F. McDaniel, of Columbia, for Respondent.

ANDERSON, J.: NCCI appeals the trial court's order affirming the decision of the appellate panel of the workers' compensation commission (appellate panel). NCCI argues the trial court erred in finding (1) Tom Smith's mental injury was caused by unusual and extraordinary conditions of employment with NCCI; (2) Smith's physical injury to his back arose out of and in the course of employment with NCCI; (3) Smith's injuries were aggravated by his employment with NCCI; (4) Smith was entitled to disability benefits beginning March 19, 1999; (5) NCCI was not entitled to credit for short- and long-term disability benefits received by Smith; and (6) Smith's claim was not barred by the statute of limitations. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In April 1991, Smith began working with NCCI as a supervisor for the Test Audit Department of NCCI's Atlantic Division. Before working with NCCI, Smith worked as auditor with two other companies for a total of thirteen years. Smith commuted from Tampa to Boca Raton during his time as a supervisor. In 1993, Smith voluntarily stepped down from his supervisor position and became a senior auditor in Tampa.

As an auditor in Florida, Smith conducted test audits of insurance policies from both the voluntary market and the assigned risk market. A test audit is a process in which an insurance company's audits are checked to determine whether the premiums being charged are sufficient for the coverage being provided. Smith primarily worked in the area around Tampa and generally worked between forty and fifty hours a week. Smith usually met NCCI's weekly production requirements of nine audits. During this time, NCCI recognized Smith as one of its best test auditors in Tampa. In fact, Smith received a couple of awards in recognition of his production and work quality.

At some point, NCCI made various operational changes. First, NCCI changed its fee structure. NCCI changed from an assessment-based system,

wherein NCCI would simply assess the insurance companies for all of the services the company requested and the various insurance commissions required, to a fee-for-services-based system, wherein NCCI charged an individual fee for the services performed. In addition, NCCI had a change in management. The new management heavily focused on production and meeting production goals. As part of the change in management, NCCI placed a new vice-president, Steve Axleray, in charge of its auditing divisions. In the summer of 1995, Axleray met with NCCI's auditors, chastised them for their lack of production, and informed them the new management expected increased production. Axleray informed the auditors that a voluntary severance package could be taken by anyone that did not wish to continue working with the newly-structured NCCI.

In June 1995, shortly after NCCI's operational changes went into effect, NCCI asked Smith to move to South Carolina and continue working as a test auditor. Smith had extensive knowledge of the South Carolina Test Audit Program because he authored the program. Based on this knowledge and his understanding that the program focused on quality audits as opposed to production, Smith decided to stay with NCCI and turn down the severance package. Smith replaced NCCI's sole auditor in South Carolina, Elizabeth Crosby, whom he had hired to start the program.

The South Carolina test audit program was unique. The program focused specifically on the assigned risk market. Test audits on the assigned risk market are generally more time consuming and difficult than audits on the voluntary market. The assigned risk market, unlike the voluntary market, typically consists of smaller and newer companies that have disorganized or incomplete records. In addition, companies in the assigned risk market are usually in hard-to-find locations.

When Smith arrived in South Carolina, his job as a test auditor was very different from both his Florida job and from what he had envisioned and designed. First, Smith's work was dispersed across the entire state and consisted of very few local assignments. As a result, Smith was consistently driving six hundred miles or greater every week even though the job description called for driving only two to three hundred miles per week.

Second, despite the program's design, Smith discovered NCCI management was more concerned with the quantity of the audits conducted than quality of the audits. Throughout Smith's time in South Carolina, NCCI constantly pressured Smith about meeting production goals. Third, although the job description provided for a forty-hour work week, Smith routinely worked over seventy hours per week and habitually worked on weekends. Further, Smith regularly stayed in hotels two to four nights a week when the job description provided that overnight stays should average one to two nights per week.

In October 1995 Smith took medical leave from work. Smith testified he took leave because the demands of the South Carolina job were "just nothing close to what [Smith] was told it was going to be." During this period, Smith was treated by Dr. Roger Deal. Deal's records indicate Smith had been demonstrating symptoms of depression, bi-polar disorder, and obsessive compulsive disorder (OCD) in the year preceding July 1995, and Smith was still dealing with OCD and depression at the time of their initial visit. Deal's notes indicate Smith was taking assorted prescription drugs when they first met. Deal prescribed various medicines to assist Smith in his recovery. In March 1996, Smith was able to return to work.

In February 1999, NCCI changed Smith's company car from a full-size Ford Taurus to a smaller, subcompact Saturn. Smith began complaining of back pains immediately thereafter. Within a couple of months NCCI provided Smith with a raise to allow him to purchase a new, bigger car.

Smith visited Dr. Eleanay Ogburu-Ognonnaya for treatment of his back pain in March 1999. Ogburu-Ognonnaya's records from March 1999 indicate Smith specifically noted his new company car had no lumbar support, was very uncomfortable, and limited leg movement. Smith averred Ogburu-Ognonnaya advised him to reduce his driving and that the kind of driving required for Smith's work would make Smith's back worse.

In May 1999, Smith took leave from work and filed for short-term disability benefits. In his request for short-term disability, Smith stated his last day of work was May 26, 1999. Smith noted the symptoms that led him

to cease working were (1) excessive stress and fatigue, which he listed as an illness, and (2) an injury to his lower back. Smith provided March 8, 1999 as the date of onset of the symptoms for excessive fatigue, and the week of February 15-19, 1999 as the first onset of symptoms for the back injury.

On June 1, 2000, Smith filed a workers' compensation claim alleging injuries to the "back, legs, psychological/whole person" culminating on May 27, 1999. Hearings were conducted in this matter on August 23, 2001; February 28, 2002; and March 11, 2002. NCCI alleges Smith withdrew his original claim after NCCI filed a Form 51 and filed another claim raising the same allegations on November 11, 2000, which was again withdrawn without prejudice by consent on March 13, 2001. NCCI asserts Smith refiled his claim on March 19, 2001, making identical assertions. The record evidences neither Smith's withdrawal of the original claim nor the filing of subsequent claims. Nevertheless, whether Smith filed in June 2000 or in March 2001 is irrelevant because the allegations and issues are the same.

The hearing commissioner found Smith suffered a compensable mental or psychological injury due to unusual and extraordinary conditions of his employment. The commissioner further found Smith sustained a compensable back injury as a result of his work activity requiring Smith to drive extremely long distances in a subcompact vehicle. The commissioner awarded Smith temporary total disability compensation benefits and medical benefits. The commissioner denied NCCI credit for short- and long-term disability benefits paid to Smith.

NCCI appealed the commissioner's decision to the appellate panel. The appellate panel determined that all of the commissioner's findings of fact and rulings of law were correct and adopted the commissioner's order in its entirety. NCCI appealed to the circuit court, and the circuit court affirmed the appellate panel.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of an administrative agency." Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). Section 1-23-380(A)(6) of the South Carolina Code (2005) establishes the substantial evidence rule as the standard of review. See also Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law, but may only reverse or modify an agency's findings of fact if they are clearly erroneous. See S.C. Code Ann. § 1-23-380(A)(6)(d) and (e) (2005).

"On appeal, this court must affirm an award of the Workers Compensation Commission in which the circuit court concurred if substantial evidence supports its findings." Peoples v. Henry Co., 364 S.C. 123, 127, 611 S.E.2d 527, 528-29 (Ct. App. 2005); see also Frame v. Resort Servs. Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004) ("It is not within our province to reverse findings of the Commission which are supported by substantial evidence."). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." Baggott v. S. Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998). "Quantitatively, substantial evidence is something less than the weight of the evidence." Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the commission's findings from being supported by substantial evidence." Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 188, 564 S.E.2d 694, 697 (Ct. App. 2002).

ISSUES

I. Are NCCI's issues on appeal properly preserved for our review?

II. Did Smith suffer a compensable mental injury caused by unusual and extraordinary conditions of employment with NCCI?

III. Did Smith suffer a compensable physical injury to his back caused by conditions of employment with NCCI?

IV. Did the appellate panel err in finding that Smith's injuries were aggravated by his employment conditions with NCCI?

V. Did the appellate panel err by awarding temporary total disability benefits commencing on March 19, 1999?

VI. Did the appellate panel erroneously deny NCCI credit for short- and long-term benefits received by Smith?

VII. Did the appellate panel err in finding Smith's claim is not barred by the statute of limitations?

LAW/ANALYSIS

I. Preservation

Initially, Smith argues each of NCCI's issues are not preserved for review. When a trial court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

The circuit court considered all of the issues raised and affirmed the appellate panel's order. NCCI's Notice of Intent to Appeal to Circuit Court

specifically raises each of the issues presented for appeal to this Court. Accordingly, we find each of the issues presented for appeal was properly preserved for our review.

II. Mental Injury

NCCI contends the appellate panel erred in finding Smith suffered a compensable mental injury under the Workers' Compensation Act because Smith's employment conditions were not extraordinary and unusual and did not cause Smith's mental injury. We disagree.

A compensable injury under the Workers' Compensation Act is defined by section 42-1-160, which states:

> "Injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment . . .
>
> Stress arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury is not a personal injury unless it is established that the stressful employment conditions causing the mental injury were extraordinary and unusual in comparison to the normal conditions of the employment.
>
> Stress arising out of and in the course of employment unaccompanied by physical injury is not considered compensable if it results from any event or series of events which is incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, except when these actions are taken in an extraordinary and unusual manner.

S.C. Code Ann. § 42-1-160 (Supp. 2005).

In order to recover workers' compensation benefits for a mental injury, the claimant must prove both: (1) that he was exposed to unusual and

extraordinary conditions in his employment; and (2) that these unusual and extraordinary conditions were the proximate cause of his mental breakdown. Doe v. S.C. Dep't of Disabilities and Special Needs, 364 S.C. 411, 418, 613 S.E.2d 785, 789 (Ct. App. 2005). The requirement of "unusual or extraordinary conditions in employment" refers to conditions to the particular job in which the injury occurs, not to conditions of employment in general. Shealy v. Aiken County, 341 S.C. 448, 457, 535 S.E.2d 438, 443 (2000).

As the finder of fact, the appellate panel found the conditions of Smith's employment were extraordinary and unusual for a test auditor. The panel specifically found the unique requirements of conducting the South Carolina test audit program made the application of the general standards for a test auditor "unattainable, unreasonable, and unusual." The appellate panel further found NCCI's unreasonable expectations and production goals, the continual and unrelenting criticism and pressure to meet these unattainable production goals, and Smith's extremely long work hours all contributed to cause Smith's mental injury.

A. Extraordinary and Unusual Conditions

There is substantial evidence in the record to support the appellate panel's finding that Smith, as a test auditor in South Carolina, was exposed to unusual and extraordinary conditions in his employment.

First, experts in the auditing industry opined that Smith's employment conditions were extraordinary and unusual.

Second, Smith worked in the South Carolina test audit program, a unique program that focused specifically on the assigned risk market. As a result, meeting production goals in South Carolina was more difficult than meeting production goals in other states that tested both the assigned risk market and the voluntary market.

Third, Smith was unlike other auditors with NCCI in that he mainly conducted test audits. NCCI guidelines allowed test auditors to conduct some variation of inspections to help satisfy the production requirement of

nine test audits per week. Bowles, a test auditor with NCCI in South Carolina from 1995 through 1999, testified his job involved conducting test audits <u>and</u> less time consuming inspections while Smith focused "just about 100% on the test audits."

Fourth, Smith's employment conditions in South Carolina were unusual because his assignments were dispersed throughout South Carolina and required significant amounts of driving. Smith testified he typically drove in excess of six hundred miles per week despite the job description calling for only two to three hundred miles per week. Other NCCI test auditors averaged well below six hundred miles of driving per week.

Finally, NCCI constantly and continuously harassed Smith about production. Smith testified he received a "steady flow" of memos, "at times every day," informing him NCCI needed more production. While the record indicates NCCI pressured all of its auditors, the pressure on Smith was exacerbated because the constant demands were being made despite Smith's unique situation. In addition, the testimony provides that other companies did not pressure auditors to the extent NCCI did. The pressure imposed on Smith was not "incidental to normal employer/employee relations" because of the constant and continuous nature of the demands and because of Smith's unique position. <u>See</u> S.C. Code Ann. § 42-1-160 (Supp. 2005).

Substantial evidence in the record supports a finding that Smith's employment conditions were extraordinary and unusual.

B. Cause of Mental Injury

There is substantial evidence in the record supporting the appellate panel's finding that the extraordinary and unusual conditions of Smith's employment caused his mental injury.

First, doctors' opinions and records indicate Smith's condition was linked to stress from his job. Dr. Franklin J. Klohn, Jr., in an answer to an interrogatory, opined that Smith's psychological condition was most probably caused by the stressors of his job. In late February 1999, Smith visited Dr.

Rex Rawls and complained of "Chronic fatigue syndrome, worsening over the last eight years." Rawls provided Smith with a note stating that he may need a week off to try to recover from the excessive fatigue. Rawls' notes from a visit in May 1999 provide that Smith was requesting disability "so he won't have to continue with his high stress job."

Second, Smith's testimony and actions lend further support to the finding that Smith's employment conditions caused his mental injury. Smith testified that he took medical leave from work from October 1995 through March 1996 because the demands of the South Carolina job were "just nothing close to what [Smith] was told it was going to be." Further, when Smith filed for short-term disability in May 1999 he cited excessive stress and fatigue as one of the reasons for the request and listed March 8, 1999 as the date of the onset of the symptoms.

Third, another auditor, Chris Bowles, testified he developed health problems as a result of the stresses accompanied by working with NCCI. Specifically, Bowles testified he was diagnosed with Barrett's esophagus (a pre-cancerous condition) and ulcers of the esophagus, which he attributed to the employment conditions with NCCI.

The record provides substantial evidence to support a finding that NCCI's employment conditions caused Smith's injury.

Admittedly, the record indicates Smith had numerous non-employment stressors that may have contributed to or caused his mental injury. The record provides that during the course of Smith's employment (1) he had trouble selling his home; (2) he was diagnosed with bi-polar disorder and depression prior to moving to South Carolina; (3) he was involved in a lawsuit regarding the construction of his South Carolina home; (4) he received a couple of speeding tickets; (5) his daughter had numerous medical problems; (6) he was involved in a lawsuit stemming from a 1995 motor vehicle accident; and (7) he had various medical problems including an esophagus problem and two angioplasty surgeries or treatments. However, "[t]he findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Kearse v. State Health & Human

Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). Moreover, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338-39, 513 S.E.2d 843, 845 (1999). Thus, because there is substantial evidence in the record to support the finding of the appellate panel, the contrary evidence is inconsequential.

C. Proximate Cause

NCCI next asserts the appellate panel's order failed to address the issue of proximate cause of Smith's mental injury, and therefore, this Court should remand the case and allow the appellate panel the opportunity to make a finding of cause. We disagree.

South Carolina Code Annotated section 1-23-350 (2005) provides, in relevant part, that "[i]f . . . a party submitted proposed findings of fact, [an agency] decision shall include a ruling upon each proposed finding." The findings of fact made by the appellate panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). When an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings. Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1995).

The appellate panel made sufficient findings of fact regarding the proximate cause of Smith's mental injury. The appellate panel adopted the commissioner's order in its entirety. The commissioner's order specifically states:

> [Smith's] psychological condition was as a result of unusual and/or extraordinary conditions in [Smith's] employment specifically unreasonable expectations and production goals from his employer, continual and unrelenting stress on [Smith]

> including criticism and pressure to meet those unattainable goals and extremely long hours in excess of 70 hours per week put in by [Smith] in an effort to try to reach those goals.

Therefore, the appellate panel's findings of fact are sufficiently detailed regarding the proximate cause of Smith's mental injury.

III. Physical Injury

NCCI alleges the appellate panel erred in finding Smith suffered a compensable injury to his back. Specifically, NCCI argues the appellate panel committed error in disregarding the report of ergonomist Elizabeth Neal Miall and in finding Smith's excessive driving led to his injury because he had been driving long distances for years. We disagree.

For an injury to be compensable, it must arise out of and in the course of employment. S.C. Code Ann. § 42-1-160 (Supp. 2005). "The phrase 'arising out of' refers to the origin of the cause of the accident." Clade v. Champion Labs., 330 S.C. 8, 10, 496 S.E.2d 856, 857 (1998). "'An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury.'" Rodney v. Michelin Tire Corp., 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (quoting Owings v. Anderson County Sheriff's Dep't, 315 S.C. 297, 299, 433 S.E.2d 869, 871 (1993)).

"The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Clade, 330 S.C. at 11, 496 S.E.2d at 857. However, injured employees are not required to prove their injuries were caused by specific events in order to recover workers' compensation benefits. Id. at 12, 496 S.E.2d at 858.

The appellate panel found Smith's back injury arose out of and in the course of his employment with NCCI. There is substantial evidence in the record to support this finding. First, Smith complained of neck and lower back pain immediately after receiving the smaller company car. Smith testified that his back began hurting him the very first day he drove the subcompact Saturn. Smith further professed his doctor instructed him to take time off from work because the extensive driving required by Smith's job made his back injury worse. In addition, the record provides that in June 1999, Dr. Donald Johnson, with the Carolina Spine Institute, opined Smith "needs to be out of the work place" because driving exacerbates Smith's lower back pain. Further, Dr. Ogburu-Ognonnaya's records indicate that in March 1999, Smith specifically noted his new company car had no lumbar support, was very uncomfortable, and limited his leg movement. Finally, a memo from Bailey to NCCI indicates Bailey experienced similar discomforts with the smaller company car.

The record contains evidence suggesting Smith's back injury may not have been caused by his employment conditions. In 1995 Smith's back and neck were injured in a car accident, and, over the years, Smith sometimes informed various doctors of minor back pains and persistent headaches. NCCI presented an ergonomic analysis from Miall stating there were no appreciable differences between the ride, suspension, and measurements of the two cars, and "you could determine [Smith's] back pain was not caused by the use of the Saturn SL 2." However, when a conflict in the evidence exists, the findings of fact of the administrative agency are conclusive. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338-39, 513 S.E.2d 843, 845 (1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. Cf. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989).

Because there is substantial evidence in the record to support the appellate panel's findings, we affirm the circuit court's decision.

IV. Aggravation of Injuries

NCCI next argues the appellate panel did not make sufficient findings of fact to support its ruling that Smith's employment conditions aggravated Smith's mental and physical injuries. We agree.

"The right of a claimant to compensation for aggravation of a pre-existing condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury." Anderson v. Baptist Med. Ctr., 343 SC 487, 493, 541 S.E.2d 526, 528 (2001). "Aggravation of pre-existing psychiatric problems is compensable if that aggravation is caused by a work-related physical injury." Id.

The appellate panel's ruling on this issue is insufficient. The findings of fact made by the appellate panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings. Cf. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). When an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings. Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1995). The appellant panel's order makes no specific finding that Smith's injuries were aggravated by his employment conditions; the only reference to the aggravation of a pre-existing condition is that one of the cases that specifically controls this case is Anderson, 343 SC 487, 541 S.E.2d 526. The appellate panel's order is not sufficiently detailed to enable a review by this Court; nevertheless, because we affirm on other grounds we do not need to remand for a proper finding of fact on this issue.

V. Payment of Benefits

NCCI asserts the appellate panel erred in awarding disability benefits and medical treatment beginning on March 19, 1999, prior to the date of the alleged accident and disability. We disagree.

Sections 42-9-200 and -230 of the South Carolina Code Annotated (1985 and Supp. 2005) provide that compensation for disability shall be allowed from the date of disability. Section 42-15-60 states that medical benefits shall be provided "for a period not exceeding ten weeks from the date of injury . . . and for such additional time as in the judgment of the Commission will tend to lessen the period of disability[.]" Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement (MMI) and post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Hendricks v. Pickens County, 335 S.C. 405, 414 n.2, 517 S.E.2d 698, 703 n.2 (Ct. App. 1999).

The record indicates Smith's injury began prior to the date the commission awarded medical benefits. When Smith filed for short-term disability, he listed March 8, 1999 as the date of onset of the symptoms for excessive fatigue and the week of February 15-19, 1999 as the first onset of symptoms for the back injury. Thus, the circuit court did not err in affirming the award of medical benefits commencing March 19, 1999.

VI. Credit

NCCI next contends the appellate panel erred in finding NCCI is not entitled to a credit for payment of short- and long-term disability benefits received by Smith. Specifically, NCCI asserts it is entitled to a credit for benefits paid because Smith received short-term disability benefits from October 1995 through March 1996 and was awarded long-term disability benefits prior to May 27, 1999, the date Smith's injury admittedly culminated. We disagree.

Initially we note this issue may not be preserved for our review. Only issues raised and ruled upon by the commission are cognizable on appeal. See

e.g., TNS Mills, Inc. v. S.C. Dep't of Rev., 331 S.C. 611, 503 S.E.2d 471 (1998). The appellate panel's order does not specifically address this issue.

Although we find preservation tenuous at best, we nevertheless proceed to the merits. Section 42-9-210 provides:

> Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

S.C. Code Ann. § 42-9-210 (1985). "In order for payments to be deductible, they must have been made with reference to liability under the provisions of the Act and intended to be in lieu of compensation." Muir v. C.R. Bard, Inc., 336 S.C. 266, 298, 519 S.E.2d 583, 599 (Ct. App. 1999).

The record is devoid of evidence suggesting any short-term or long-term disability benefits received by Smith were made with reference to liability under the Act and in lieu of compensation. Accordingly, we find the appellate panel did not err in finding that NCCI is not entitled to a credit for any short-term or long-term benefits paid to Smith.

VII. Statute of Limitations

Finally, NCCI alleges Smith's claim is barred by the statute of limitations prescribed in section 42-15-40 of the South Carolina Code (Supp. 2005). We find this argument manifestly without merit.

Section 42-15-40 provides "[t]he right to compensation . . . is barred unless a claim is filed with the commission within two years after an accident[.]" Smith's mental and physical injury culminated in disability on May 27, 1999. Smith filed his original Form 50 to initiate this claim on June 1, 2000. Accordingly, we find Smith's claim is not barred by the statute of

limitations. Even if Smith filed on March 19, 2001, as asserted by NCCI, his claim still falls inside the two-year statute of limitations.

CONCLUSION

We conclude substantial evidence in the record supports the appellate panel's finding that Smith suffered a mental injury caused by unusual and extraordinary employment conditions with NCCI, and that Smith suffered a physical injury to his back arising out of and in the course of his employment with NCCI. The appellate panel did not err in awarding benefits commencing March 19, 1999, and in denying NCCI a credit for benefits received by Smith. We hold Smith's claim is not barred by the statute of limitations. Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C. J., and GOOLSBY, J. concur.