The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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N O T I C E

IN THE MATTER OF THOMAS D. BROADWATER, PETITIONER

Thomas D. Broadwater, who was definitely suspended from the practice of law for a period of two (2) years, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 15, 2007, at Noon, in the second floor conference room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 17, 2007

The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF DAVID B. GREENE, PETITIONER

David B. Greene, who was definitely suspended from the practice of law for a period of nine (9) months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 15, 2007, at Noon, in the second floor conference room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
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N O T I C E

IN THE MATTER OF KENNETH B. MASSEY, PETITIONER

Kenneth B. Massey, who was definitely suspended from the practice of law for a period of two (2) years, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

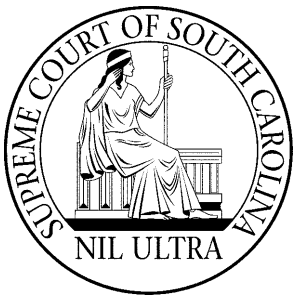
The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 15, 2007, at Noon, in the second floor conference room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 17, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20

May 21, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Fredrick Antonio Evins, Appellant.

Appeal from Spartanburg County
Edward W. Miller, Circuit Court Judge

Opinion No. 26329
Heard March 8, 2007 – Filed May 14, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, and Appellate Defender Aileen P. Clare, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: Appellant Fredrick Antonio Evins ("Evins") was convicted of murder, first degree criminal sexual conduct (CSC), and grand larceny. He was sentenced to death for the murder, thirty years imprisonment for CSC, and five years for grand larceny. This appeal

consolidates his direct appeal with the mandatory review provisions of S.C. Code Ann. §16-3-25 (1985). We affirm the convictions and sentences.

FACTUAL/PROCEDURAL BACKGROUND

The victim in this case, Rhonda Ward ("Ward'), was the manager of a convenience store in Spartanburg. One early morning in February 2003, Evins approached Ward in the parking lot of the store on her way into work. Ward spoke to Evins briefly before he lead her back to her car where she got in the driver's side and he got into the passenger side. Surveillance cameras at the store captured the exchange between Ward and Evins. Two days later, Ward's naked body was found face down in an apple orchard. She had been sexually assaulted and stabbed twelve times.

After police discovered Evins had been driving Ward's car on the day of the murder, he was arrested and subsequently confessed to Ward's murder. Initially, Evins denied having had sex with Ward; instead, he claimed another man was with him in the woods and insisted that Evins kill Ward. However, upon being taken to the hospital for DNA testing, Evins admitted he had had sex with Ward on the day of her death. At trial, Evins claimed he and Ward had been engaged a long-term, consensual sexual relationship. He testified that on the day of her death, he and Ward were engaged in sexual intercourse outside in an apple field, when Ward became angry with him for refusing to leave his girlfriend. According to Evins, Ward wielded a knife, and wound up getting stabbed.

The jury convicted Evins of murder, kidnapping, first degree CSC, and grand larceny. After a separate sentencing phase, Evins was sentenced to death for murder, thirty years for CSC and five years for grand larceny. Evins raises the following issues for this Court's review:[1]

> I. Did the trial court err in denying Evins' motion for a change of venue based on pre-trial publicity?

[1] We have re-framed the seven issues raised by Evins.

II. Did the trial court err in ruling the state's exercise of peremptory challenges did not violate Batson v. Kentucky?

III. Did the trial court err in excusing three African-American potential jurors for cause?

IV. Did the trial court err in admitting certain photographs of the victim's body at sentencing?

LAW/ANALYSIS

I. Pre-trial Publicity- Change of Venue

In September 2002, approximately five months prior to the murder in this case, the body of a woman named Demaris Huff was found near a creek beside a walking trial near a park in Spartanburg. She had been strangled and was nude except for a pair of socks. DNA testing revealed that semen found on Huff matched that of Evins. The case remained unsolved until Evins' subsequent arrest for the February 2003 murder of Ward. At that time, after DNA testing, authorities also charged Evins with Huff's murder. The Huff murder charges were pending at the time of Evins' trial for the murder of Ward.

Evins moved for a change of venue based upon extensive pre-trial publicity, much of which linked Evins to both murders. The trial court ruled in a pre-trial hearing that it would allow Evins latitude in the *voir dire* of potential jurors to determine if they had any prior knowledge of Evins and/or the Huff murder. At the conclusion of *voir dire*, the defense renewed its motion for a change of venue, indicating that a total of thirty-nine people out of the jury pool of sixty-eight had heard something about the case. By defense counsel's count, seven of the twelve jurors seated had some knowledge of the case. The trial court declined to change venue, concluding that all of the jurors who had any prior knowledge of the case had indicated they could set aside any information and would not consider it. The court also noted the defense had used only nine of its ten peremptory challenges to

remove potential jurors. Evins now contends the denial of his motion to change venue constituted an abuse of discretion. We disagree.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997) (finding trial court abused discretion by granting the State's motion to change venue based on pretrial publicity because no evidentiary facts supported finding of actual juror prejudice towards the State). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate *voir dire* examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). When jurors have been exposed to pretrial publicity, a denial of a change of venue is not error where the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); Manning, 329 S.C. at 1, 495 S.E.2d at 191. Therefore, mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Id. The relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. Id. It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. Caldwell, 300 S.C. at 494, 388 S.E.2d at 816.

In Rideau v. Louisiana, 373 U.S. 723 (1963), the United States Supreme Court found reversible error in a trial court's refusal to grant a motion for a change of venue due to the effect of pretrial publicity. There, the Court found that the people of Calcasieu Parish in Lake Charles, Louisiana, were "exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged." Id. The Court noted that three members of the jury which convicted Rideau had seen and heard Rideau's televised "interview" in which he confessed to the sheriff, and that two members of the jury were deputy sheriffs of Calcasieu Parish. Id. The Court found Rideau's due process

rights had been compromised by such a procedure. Id. The present case is clearly inapposite.

We find Evins has demonstrated no prejudice from the denial of his motion. Both the trial court and defense counsel conducted a thorough *voir dire* of the jury pool. Additionally, all members of the jury who had any knowledge of Evins or the Huff murder due to pre-trial publicity indicated they could put that knowledge aside. Further, the defense used only nine of its peremptory challenges. Evins contends, however, that one juror had read about both crimes and connected them mentally such that "she could not be expected to disregard the image created by the articles." Evins' depiction of the juror's response is overstated. The juror testified on *voir dire* that the only thing she had heard was that the crime had taken place; she specifically testified that she knew no details, did not know the location, she had formed no opinion, could put aside what she had heard, and could be fair and impartial. This is simply not akin to the situation in Rideau.

We find this case more akin to Sheppard, 357 S.C. at 646, 594 S.E.2d at 462, in which the defendant claimed he was entitled to a change of venue due to extensive pretrial publicity where, out of eighty-seven potential jurors, all but five had been exposed to pretrial publicity. Noting our holdings in Manning and Caldwell, we found the defendant had not met his burden of demonstrating actual juror prejudice as a result of the publicity. Sheppard, 357 S.C. at 655, 597 S.E.2d at 468. We held, "[m]ere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead, the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." Id.

Moreover, Evins concedes that evidence of the Huff murder was properly admitted at the sentencing phase of trial. Accordingly, Evins' complaint regarding pretrial publicity is necessarily limited to the guilt phase of his trial. Given the overwhelming evidence presented during that phase of trial, and the fact that Evins actually admitted to stabbing Ward, we find Evins has suffered no prejudice. Accordingly, the trial court's denial of the motion to change venue is affirmed.

II. Batson Motion

Evins next asserts the trial court erred in denying his Batson[2] motion and ruling that two of the State's peremptory challenges were not racially motivated. We disagree. We find the solicitor's stated reasons for striking the jurors were race-neutral.

There were a total of twelve African-American venire members out of the pool of sixty-three potential jurors. During jury selection, the state exercised a total of seven peremptory challenges, striking three African American and four white potential jurors. The jury was ultimately comprised of eleven white jurors, one black juror, and one each white and black alternate. Evins complains that two of the African-Americans were struck in violation of Batson.[3] We disagree.

In response to Evins' Batson motion, the solicitor explained that he struck Juror #78 because she had recently lost two sons in a felony DUI, for which the perpetrator had received only a six-year sentence. The solicitor was concerned that the juror would weigh the sentence given to the defendant of a felony DUI in which her sons were killed with the potential death sentence she would be considering in Evins' case. Additionally, he addressed the fact that the solicitor's office prosecuted the case and the public defender's office defended the defendant. The trial court ruled the solicitor's explanation satisfied the test required in Batson.

As to the other juror, Juror #399, the solicitor argued that the juror was "beyond vacillation on the death penalty. He is clearly life prone. And that's why we struck him." The trial court ruled the solicitor's reason was race-neutral, specifically stating, "I do agree with his assessment that [the juror] did appear to have – was one of the jurors with the largest

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[2] Batson v. Kentucky, 476 U.S. 79 (1986).

[3] Evins does not contest the strike of Juror # 154 on appeal.

problems with finding – would have one of the hardest times finding death. So I do agree with that."

Evins asserts the solicitor's stated reasons were mere pretext. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the striking of a venire person on the basis of race or gender. State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). The proper procedure for a Batson hearing is set forth in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing Purkett v. Elem, 514 U.S. 765 (1995)). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. 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 that 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. The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999).

"Typically, the decisive question becomes whether counsel's race-neutral explanation for a peremptory challenge should be believed. . . . [T]here is seldom much evidence in the record bearing on that issue, and the trial court's findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Therefore, those findings are given great deference and will not be set aside unless clearly erroneous." State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006) *citing* State v. Guess, 318 S.C. 269, 457 S.E.2d 6 (Ct.App. 1995).

As this Court held in Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998), the right to serve on a jury and not to be discriminated against because of race or gender belongs to the potential juror, not a litigant. This is so because a defendant has no right to trial by a particular jury. Adams, 322 S.C. at 126, 470 S.E.2d at 373.

We find the record supports the trial court's finding that the state's explanation for its peremptory challenges of these two jurors were race-neutral. The fact that Juror #78 had had two sons killed in a felony DUI, and the perpetrator had received only six years imprisonment was sufficient reason for the solicitor to believe that this juror might be reluctant to impose a death sentence. Moreover, when initially questioned by the trial court as to whether she could be a fair and impartial juror, she responded, "well, your Honor, I done been through this before, so it would be kind of hard for me to, you know. . ." When questioned further as to whether she could find a defendant either guilty or not guilty depending on what she heard, she went on to state, "Well, to be truthful, I don't know. . . .Your Honor, I still – I can't make up my mind. I don't know what happened to my two sons, and I haven't got over it yet." Although she ultimately testified that she would honor her oath if selected to be a fair and impartial juror, she nonetheless maintained when asked if she knew any reason why she could not serve on this jury that serving would be difficult for her. In sum, although her answers varied somewhat, we simply cannot say the solicitor's proffered reason for striking Juror #78 was not race-neutral or that the solicitor's stated reasons were pretext.

As for Juror #399, the solicitor's stated reason for striking him was that he was likely the most pro-life person in the jury venire. When asked whether he could serve as a fair and impartial juror, he responded, "Possibly, I could, but I don't know." When questioned about whether he could sentence someone to death, he repeatedly stated, "That's a tough one. . . . Well, like I said, I never really thought about it, but that would still be just like killing somebody. I mean, that's basically, the same thing to me. . . . That's just what I – that's just he way I feel right now, you know. Like I say, I never really thought about it. . . . So, I mean, death is death.. . . " When the trial court asked, "So, are – you don't – what you're telling me is that you don't believe in killing; is that right?," the juror responded, "Well, I like life better than death. That's a tough one, I'm going to tell you." When told by the trial court that they need to know where he stood, the juror concluded, "I probably could. But then again, I hear this little voice saying, you know, it's not right, but I probably could."

Vacillating responses to *voir dire* questions regarding the death penalty will support the use of a peremptory strike against a Batson challenge. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990); State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989). Where the Solicitor perceives a person will have difficulty imposing the death penalty, he may exercise a peremptory challenge against that juror upon this ground as a racially neutral reason. Bell. 305 S.C. at 15, 406 S.E.2d at 168.

Here, the juror's vacillation and reluctance to impose a death sentence is quite evident. Further, although Evins now points to several white jurors who were seated on the jury who also vacillated in their responses regarding a sentence of death, Evins did not raise this point at the time of his Batson challenge during the trial and therefore failed to meet his burden of demonstrating pretext to the trial court. In any event, the four white jurors cited by Evins on appeal simply did not vacillate in their responses to the same degree as Juror #399. None of these jurors were nearly as equivocal in their responses concerning the death penalty. Accordingly, the trial court properly ruled the solicitor's stated reason for striking him was race-neutral, and Evins' Batson motion was properly denied.

III. Juror Disqualification

Evins next contends the trial court erred in disqualifying three African American venire members from serving on the jury. Juror #258 was disqualified because of her reluctance to impose a sentence of death; Juror #182 was disqualified due to her predisposition to impose a sentence of death; and Juror #134 was disqualified due to both his reluctance to impose a death sentence and the fact that he had charges pending against him for which he was being prosecuted by the solicitor, and represented by the Public Defender's office (which also represented Evins). Evins asserts these jurors were improperly disqualified. We disagree.

A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance

of his duties as a juror in accordance with his instructions and his oath. S.C.Code Ann. § 16-3-20(E) (2003) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law); State v. Lindsey, Op. No. 26268, (S.C. Sup. Ct. filed Feb. 20, 2007) (Shearouse Adv. Sh. No. 6 at 68); State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005) (*citing* Wainwright v. Witt, 469 U.S. 412 (1985)). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire *voir dire*. Id. The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. Id. A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). Deference must be paid to the trial court who sees and hears the juror. Id. There will be situations where a trial court is left with definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to a trial court who sees and hears the juror. Wainwright v. Witt, 469 U.S. 412 (1985).

As discussed below, we find the trial court properly disqualified these jurors under Wainwright.

A. Juror # 258

Juror #258 originally testified that she could not give the death penalty because she did not feel that it was her right to give a man death. Juror #258 then indicated she could impose a sentence of death under certain circumstances. When asked thereafter if she could sign her name to a verdict form imposing a sentence of death, Juror #258 replied, " No." She explained the reason for this as being that given her job in the public, she could be a target for anybody, so she wouldn't want to sign her name. When the trial court indicated her name would be protected, she indicated she could sign a verdict form for death. When questioned by the solicitor, Juror #258

vacillated between being opposed to the death penalty, and appearing to believe it would be appropriate for most murders. Ultimately, however, when asked by the solicitor if she had a choice between life in prison or death, the juror answered that she would always pick life in prison.

Given the variations in Juror #258's responses and statement that she would *always* pick life in prison over death, the trial court did not abuse its discretion in disqualifying her because it appears she could not have discharged her duties in accordance with the law. Id.

B. Juror #182

During *voir dire*, Juror #182 stated she was a Type 3 juror who would hear all the evidence before deciding upon an appropriate sentence. On examination by the solicitor, however, Juror #182 strongly indicated that she would always give the death penalty to anyone who intentionally kills another. Upon further examination, Juror #182 explained that she would give life only to someone who unintentionally kills another, like self-defense. Juror #182 ultimately concluded that "if you intentionally kill somebody, you know what you were doing, death penalty, but self-defense, life sentence."

Again, it is clear this juror was predisposed to recommend a sentence of death in the case of an intentional killing such that there is a reasonable basis from which the trial court could have concluded she would not have been able to faithfully discharge her responsibilities as a juror under the law. We find she was properly disqualified under Wainwright. See also State v. Sapp, 366 S.C. at 283, 621 S.E.2d at 883.

C. Juror # 134

When asked whether, after considering all of the aggravating and mitigating circumstances, he could return a sentence of death, Juror #134 testified that he was not in favor of the death penalty and that he "really would have to be persuaded" to give the death penalty. Thereafter, when asked if he could sign his name to a death verdict, Juror #134 responded that, depending on the facts, he could sign a death verdict form. However, he

subsequently described himself as a Number 2 juror – a juror who would not give the death penalty. Upon further inquiry by the solicitor regarding the death penalty, Juror #134 responded: "I've just always been the type that when I see it on TV or something about the death penalty, I'm always against it. There hasn't been one case yet where I said he deserves it."

We find the record supports the trial court's disqualification of Juror #134.[4] Wainwright, 469 U.S. at 412 (holding that where trial court is left with definite impression that prospective juror would be unable to faithfully and impartially apply the law, it is within his discretion to disqualify a potential juror); see also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (ultimate consideration of the judge concerning juror qualification is that the juror be unbiased, impartial and able to carry out the law as explained to him).

IV. Sentencing Phase Photographs

Lastly, Evins asserts the trial court committed error at sentencing in admitting seven photographs of the victim, contending they served no legitimate purpose and served only to inflame the jury. In particular, Evins contests the admission of Exhibit numbers 70 and 71, which reveal that the victim had defecated on herself. We find the photographs were properly admitted.

The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court, and the trial court's ruling on

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[4] In addition to Juror #134's views on the death penalty, the solicitor also explained to the court that Juror #134 had charges pending against him for which he was being prosecuted by the solicitor's office and represented by the public defender's office. The solicitor argued that the combination of the juror's views on the death penalty and the pending charges disqualified Juror #134. Because we find that Juror #134 was properly disqualified on the basis of his views on the death penalty, we decline to address the issue of whether he was properly disqualified because of the pending charges.

such issues will be disturbed only upon a showing of an abuse of discretion. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996), cert. denied, 520 U.S. 1200 (1997). The purpose of the sentencing phase in a capital trial is to "direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender." State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091 (1989). Photographs may be offered as evidence in extenuation, mitigation, or aggravation. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003). In the sentencing phase, the scope of the probative value of such photos is much broader than at the guilt or innocence phase. Id. See also State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002); State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995). In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). There is no abuse of discretion if the offered photograph serves to corroborate testimony. State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000).

Exhibit 70 is a 4" x 6" photograph of the victim's body, taken from a distance of several feet away. It reveals the victim lying in a grassy field, naked and face down, with her right arm stretched up over her head, and her left arm bent and stretched out to the left. Upon close inspection, a small amount of feces is visible. Exhibit 71 is a photograph of victim's body taken from a further distance away, and was taken from an angle above the victim's head. The feces is not clearly visible in Exhibit 71. We find the photographs were properly admitted to show the victim in substantially the same condition as Evins left her, and to corroborate the testimony that the victim had defecated on herself. The photographs are not unnecessarily gruesome or disturbing. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

PROPORTIONALITY REVIEW

We have conducted the proportionality review as required by S.C. Code Ann. § 16-3-25(C), and we find the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a

review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) (death sentence warranted where defendant was convicted of murder, kidnapping, and first-degree criminal sexual conduct with a minor); State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) *cert. denied* 528 U.S. 1050 (1999); State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995) *cert. denied* 516 U.S. 1080 (1996).

CONCLUSION

For the foregoing reasons, we affirm Evins' convictions and sentences.

AFFIRMED.

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jimmy Hill, Respondent,

v.

Eagle Motor Lines, Employer and Alabama Truckers Association C/O Attenta, Carrier, Appellants.

Appeal from Marlboro County
Paul M. Burch, Circuit Court Judge

Opinion No. 26330
Heard November 15, 2006 – Filed May 21, 2007

AFFIRMED IN PART; REVERSED IN PART

R. Mark Davis and William Thomas Bacon, IV, both of McAngus, Goudelock & Courie, of Charleston, for Appellants.

Steve Wukela, Jr., of Wukela Law Firm, of Florence, for Respondent.

CHIEF JUSTICE TOAL: In this workers' compensation case, Eagle Motor Lines and Alabama Truckers Association c/o Attenta (collectively, "Appellants") argue that the South Carolina Workers' Compensation

Commission did not have jurisdiction over the claim of Jimmy Hill ("Respondent"), and that Respondent's injuries are not compensable under the South Carolina Workers' Compensation Act. We affirm in part and reverse in part, holding that the South Carolina Workers' Compensation Commission had jurisdiction over Respondent's claim and that Respondent suffered compensable injuries.

FACTUAL/PROCEDURAL BACKGROUND

Respondent, a resident of South Carolina, completed an application for employment as a truck driver with Appellant Eagle Motor Lines ("Employer"). Thereafter, Employer's recruiting manager telephoned Respondent at his home in South Carolina and requested Respondent travel to Employer's headquarters in Alabama to complete an employee screening process. Respondent traveled to Alabama where he completed a drug screening test, a driving test, and other orientation procedures before being assigned a truck. During the course of his employment, Respondent's driving route traversed several states along the east coast.

In 2001, Respondent suffered a brain injury and a broken rib when his truck overturned while driving through Virginia. As a result, Respondent is disabled and unable to return to work as a truck driver. Respondent claimed entitlement to medical and compensation benefits. Appellants initially paid Respondent's medical bills and disability benefits, but terminated benefits after Respondent suffered a stroke allegedly caused by a confrontation with a nurse who was handling Respondent's workers' compensation case.

Respondent filed a Form 50 and Appellants denied Respondent's claim. Following a hearing before the South Carolina Workers' Compensation Commission ("Commission"), the single commissioner found the Commission had jurisdiction over Respondent's claim because: (1) Respondent was hired in South Carolina during a telephone conversation with Employer's recruiter; (2) Employer was not exempt from the South Carolina Workers' Compensation Act because it had four or more employees in South Carolina; and (3) Employer subjected itself to the Workers' Compensation Act by filing for workers' compensation coverage in South

Carolina. The commissioner also found Respondent suffered compensable injuries and ordered Appellants to continue providing benefits to Respondent.

On appeal, the Commission's appellate panel affirmed the decision of the single commissioner. On appeal to the circuit court, the court affirmed the appellate panel on all grounds of appeal except the issue of jurisdiction, which the court remanded to the Commission for reconsideration.

This case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR. Appellants raise the following issues for review:

I. Did the circuit err in failing to decide whether the Commission had jurisdiction over Respondent's workers' compensation claim?

II. Did the circuit err in failing to find that the Commission did not have jurisdiction over Respondent's claim because Respondent was not hired in South Carolina?

III. Did the circuit court err in failing to find that the Commission did not have jurisdiction over Respondent's claim because Employer did not have four or more employees in South Carolina?

IV. Did the circuit court err in affirming the Commission's findings that Respondent's physical brain injury, stroke, and psychological illness were compensable?

STANDARD OF REVIEW

The Administrative Procedures Act (APA), S.C. Code Ann. § 1-23-310 *et. seq.* (2005 & Supp. 2006), governs appellate review of a final decision from an administrative agency. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Under the APA, this Court must determine whether the findings of fact of the Commisson's appellate panel are

supported by substantial evidence in the record and whether the panel's decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006); *Baxter v. Martin Bros., Inc.*, 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006).

When the jurisdiction of the Commission is at issue, the reviewing court is not bound by the Commission's findings of fact upon which jurisdiction is dependent. *Gray v. Club Group, Ltd.*, 339 S.C. 173, 181, 528 S.E.2d 435, 439 (Ct. App. 2000). If the factual issue before the Commission's appellate panel involved a jurisdictional question, this Court's review is governed by the preponderance of the evidence standard. *Id.* "In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion." *Wilson v. Georgetown County*, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994).

LAW/ANALYSIS

I. The circuit court's remand of the jurisdictional issue.

Appellants argue the circuit court erred in failing to rule on whether the South Carolina Workers' Compensation Commission had jurisdiction over Respondent's workers' compensation claim. We agree.

The circuit court has both the power and duty to review the entire record in order to find the jurisdictional facts without regard to the conclusion of the Commission on the issue of jurisdiction. *White v. J. T. Strahan Co.*, 244 S.C. 120, 125, 135 S.E.2d 720, 723 (1964). Accordingly, the court must decide the jurisdictional question in accord with the preponderance of the evidence, bearing in mind that the basic purpose of the Workers' Compensation Act is to include, rather than exclude, employers and employees within its coverage. *Id.* Here, the geographical facts and circumstances of Respondent's hiring and employment were determinative of whether the Commission had jurisdiction over Respondent's claim. Therefore, the circuit court had the power and duty to decide the

jurisdictional issue and erred by remanding the issue to the Commission for reconsideration.

II. Jurisdiction in the state where an employee is hired

Appellants argue that the South Carolina Workers' Compensation Commission did not have jurisdiction over Respondent's claim because Respondent was neither hired nor employed in South Carolina. We disagree.

An employee covered by the provisions of the South Carolina Workers' Compensation Act is authorized to file his claim under the laws of the state where he is hired, the state where he is injured, or the state where his employment is located. S.C. Code Ann. § 42-15-10 (1976). The parties' central dispute concerns where Respondent was hired.

The employer-employee relationship is the jurisdictional foundation upon which workers' compensation is awarded; the existence of a contract, not the commencement of work, establishes the employer-employee relationship. *O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 256, 305 S.E.2d 241, 243 (1983). Accordingly, the situs of the contract determines where an employee was hired for purposes of determining jurisdiction under § 42-15-10. *Moore v. N. Amer. Van Lines*, 310 S.C. 236, 238-39, 423 S.E.2d 116, 118 (1992). The place of contracting is where the minds of the parties meet or the place where the final act occurred which made a binding contract. *Id.* Where acceptance is given over the telephone, "the place of contracting is where the acceptor speaks his acceptance." *O'Briant*, 279 S.C. at 256, 305 S.E.2d at 243.

The single commissioner relied on *O'Briant v. Daniel Construction Co.* in finding that Respondent was hired in South Carolina. In *O'Briant*, the employee, a construction worker, initially filled out an employment application with a construction company at its Georgia office. The employee was not offered a job at the time, but the construction company later contacted him by telephone at his home in South Carolina offering him employment on a construction site in Georgia. The employee accepted the

job offer over the telephone. 279 S.C. at 255-56, 305 S.E.2d at 242. The Court found that although the employee signed his application and enrollment card in the Georgia office, was hired to work at a job site in Georgia, was paid in Georgia, and received his fatal injuries in Georgia, the final act which created a binding contract occurred when the employee verbally accepted the job over the telephone in South Carolina. *Id*. at 256, 305 S.E.3d at 243. Therefore, the Court held that the employee was hired in South Carolina and the Commission had jurisdiction under § 42-15-10.

We find the present case to be indistinguishable from *O'Briant*. Pursuant to another employee's recommendation,[1] Respondent called Employer at its office in Alabama and spoke with the recruiting manager about being hired as a driver. The recruiting manager mailed Respondent an employment application to his home in South Carolina, which Respondent filled out and returned to Employer's office in Alabama. After filling out the application and sending it in, Respondent received a telephone call from the recruiting manager a few months later informing Respondent that his application had been approved and that Employer had a position open for him. The recruiting manager informed Respondent that he needed to travel to Alabama for drug screening and a road test; to attend orientation; and to receive his truck assignment. Employer promised to provide, and in fact did provide, Respondent's travel and lodging expenses for this trip. Once in Alabama, and after drug screening and a road test, the recruiting manager certified Respondent for driving and gave Respondent his first assignment and a $150 advance for road expenses. Respondent left Alabama with a truck and headed towards his first delivery destination.

Appellants argue that the purpose of the phone interview and employment application was to pre-screen potential employees before bringing them to Alabama for the last steps of the hiring process. We find this argument to be unpersuasive. Based on the facts, we agree with the Commission that any drug tests, road tests, and paperwork completed by

[1] This employee received a $500 referral bonus from Employer for recruiting Respondent.

Respondent in Alabama were simply incidental to the hiring of Respondent.[2] Clearly a meeting of the minds had to occur *before* Respondent traveled to Alabama to meet Employer, and *before* Employer promised to finance such a trip. We therefore find that Employer hired Respondent during the telephone conversation in which Employer notified Respondent that there was a job opening for him and arranged for Respondent to travel to Alabama and commence work. Accordingly, the situs of the contract was in South Carolina and the Commission has jurisdiction over Respondent's claim.

Respondent finds additional support for the Commission's jurisdiction under § 42-15-10 because his place of employment was in South Carolina. In order to determine where a claimant's employment is located for purposes of § 42-15-10, South Carolina has adopted the "base of operations" rule. *Voss v. RAMCO, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997) (citing *Holland v. W.C.A.B. (Pep Boys)*, 586 A.2d 988 (Pa. Commw. Ct. 1990)). Under the base of operations rule, "the worker's employment is located at the employer's place of business to which he reports, from which he receives his work assignments, and from which he starts his road trips, regardless of where the work is performed." *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 346, 428 S.E.2d 889, 892 (Ct. App. 1993).

Although transient employees such as Respondent do not always fit squarely within the base of operations test, we find that based on the specific facts and circumstances of this case, Respondent's employment was located in South Carolina. Respondent received his work assignment from dispatch at his South Carolina home; started his road trips from his home; used drop

[2] Employer argues that Respondent could not have been hired over the phone because the Department of Transportation (DOT) prohibits hiring truck drivers before the administration of a drug test. This argument is misapplied. Although the federal government requires a person seeking to drive a commercial vehicle to pass a drug test and a road test before *driving* a commercial vehicle, there is no obligation on an employer to perform these tests before *hiring* a truck driver employee. 49 C.F.R. § 391.41 (2006). *See also* 49 C.F.R. § 382.301(a) (requiring that drug testing be done "prior to the first time a driver performs safety-sensitive functions for an employer").

yards in South Carolina; kept his truck at his home on the weekends; and received his paycheck at his home in South Carolina. Although Respondent was required to call the Alabama office at the end of each delivery in order to find out where to pick up his next load, he was not required to report to the Alabama office for duty or return to Alabama after completing each assignment. Employer also did not require Respondent to maintain and wash the truck at the Alabama terminal. Additionally, Employer's trucks were not licensed in Alabama, but Oklahoma. *Cf. Holman*, 311 S.C. 341, 428 S.E.2d 889 (holding that an employee truck driver who lived in South Carolina was nevertheless employed in Georgia for purposes of jurisdiction under § 42-15-10 because Georgia is where he reported for duty each day; picked up and returned his company truck; received work assignments; reported to dispatch; was required to call in during the course of work; maintained and washed his truck; filed trip logs; and received his paycheck).

Moreover, based on the testimony of Employer's officers, retaining drivers in states located throughout Employer's shipping areas benefited Employer in several ways. Primarily, it saved Employer money by reducing the number of miles required by drivers to complete jobs and by decreasing the amount of "dead head" time due to the drivers' proximity to the pick-up locations of their cargo. Officers of Employer also testified that this system served to attract potential employees who would be enticed by the idea of spending weekends at home. In our opinion, and in keeping with general concepts of due process, Employer should not be permitted to retain the benefits of employing South Carolina residents in this capacity without submitting to jurisdiction under the South Carolina Workers' Compensation Act. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (stating that a court's exercise of jurisdiction requires some act by which a defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws).

Accordingly, we hold the Commission correctly exercised jurisdiction over Respondent's claim because Respondent was hired in South Carolina and his employment was located in South Carolina.

III. Jurisdiction when an employer has four or more employees in South Carolina.

Appellants argue that even if Respondent was authorized to file his claims in South Carolina under § 42-15-10, Appellants are nevertheless exempt from the South Carolina Workers' Compensation Act because Employer did not have any employees in South Carolina. We disagree.

An employer is exempt from the South Carolina Workers' Compensation Act if the employer has less than four employees in this State. S.C. Code Ann. § 42-1-360(2) (1976).

There are numerous facts that lead this Court to conclude that Employer has at least four employees in South Carolina. First, Employer is required to file with the South Carolina Employment Security Commission when it employs South Carolina drivers. According to Employment Security Commission reports, Employer had more than four employees in South Carolina during each fiscal quarter of 2001 and the first quarter of 2002. Employer also files income taxes with the South Carolina Department of Revenue for South Carolina employees. Additionally we note that Employer's out-of-state drivers are not permitted to exercise an election to file their income tax withholding or unemployment security benefits with the State of Alabama.

Employer claims that it has no employees in South Carolina because it has no offices, facilities, or office staff in South Carolina. Employer also argues that the South Carolina income tax and unemployment filings are merely formalities required by law. However, given that the crux of Employer's business requires the mobility of its employees, we will not, as Employer suggests, limit our interpretation of § 42-1-360(2) to traditional jurisdictional notions of a "principal place of business." *See Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999) ("Workers' compensation statutes are to be construed in favor of coverage; any exception to workers' compensation coverage must be narrowly construed.").

Under the facts and circumstances of this case, we find that Employer regularly employed more than four employees in the same business in South Carolina at the time of Respondent's accident. Accordingly, Employer is not exempt from jurisdiction under the Workers' Compensation Act.

IV. Compensability of Respondent's injuries

Appellants argue that Respondent's injuries are not compensable under the South Carolina Workers' Compensation Act. We disagree.

Injuries are covered by the South Carolina Workers' Compensation Act when they arise out of and in the course of employment and when they naturally and unavoidably result from the accident in question. S.C. Code Ann. § 42-1-160 (1976). In our opinion, there is substantial evidence in the record to support the Commission's finding that Respondent sustained a brain injury and a stroke (transient ischemic attack), and developed a psychological condition stemming from an accident arising out of and in the scope of his employment.

Following the accident, an emergency room CT scan indicated Respondent had a post-trauma subarachnoid hemorrhage[3] in the right parietal region of his brain. At a follow-up appointment the following day, a neurosurgeon assessed Respondent and noted a closed head injury with post-traumatic subarachnoid hemorrhage and probable post-concussive syndrome. During the following month, Respondent complained to the neurosurgeon of dizziness, vertigo, and light-headedness, at which point the doctor referred Respondent to neurologist Dr. R. Joseph Healy ("Dr. Healy") for a formal neurological evaluation. Dr. Healy also diagnosed Respondent as having a closed head injury with post-traumatic subarachnoid hemorrhaging and post-concussive syndrome. Although Respondent had no previous history of high blood pressure, the doctor also prescribed medication for treatment of

[3] Respondent's neurologist explained that subarachnoid hemorrhaging occurs when there is bleeding between the middle membrane covering of the brain and the brain itself.

hypertension. As Respondent continued under the care of Dr. Healy, he continued to complain of sleeplessness, numbness in his left hand, and hearing loss.

On Respondent's third visit, Dr. Healy overheard a confrontation between Respondent and his workers' compensation nurse about whether the nurse would remain in the examination room during Respondent's exam. When Dr. Healy entered the room to begin the exam, he observed that Respondent was very agitated and had extremely high blood pressure.[4] During the exam, Respondent's blood pressure remained at an elevated level. Respondent complained of a headache, dizziness, and left arm numbness; the doctor also noted high blood sugar. Concerned that Respondent's symptoms were related to his high blood pressure, Dr. Healy listed Respondent as suffering from a transient ischemic attack[5] and admitted him to the hospital that day.

Respondent continued under Dr. Healy's care and, with medication and modifications in his diet, Dr. Healy found that Respondent's conditions were improving. However, based on the poor results from Respondent's sleep study and Respondent's decreased ability to focus and perform tasks, Dr. Healy did not yet believe that Respondent was fit to return to work as a truck driver, and requested neuropsychological testing. The neuropsychological examination revealed that Respondent suffered from depression, mainly due to his head injury, and partly due to marital problems.

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[4] Additionally, we note Dr. Healy's efforts to settle the matter between Respondent and the workers' compensation nurse. Although the nurse claimed a need to stay in the room during the doctor's visit in order to "gather information," Dr. Healy informed the nurse that by law, the patient had the right to see the doctor alone. Dr. Healy noted in his office records, "The Workman's Comp is very confrontational which I think is very inappropriate."

[5] Respondent's neurologist described a transient ischemic attack as a condition indicating the patient has nearly had a stroke.

According to Dr. Healy, Respondent's underlying medical problems were exacerbated by Respondent's closed head injury and the confrontation with the workers' compensation nurse. Dr. Healy also explained that it was his opinion that the changes in Respondent's lifestyle resulting from his inability to work ultimately led to Respondent's depression.

Whether there is any causal connection between employment and an injury is a question of fact for the Commission. The Commission's decision must be affirmed if the factual findings are supported by substantial evidence in the record. *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 159-60, 519 S.E.2d 102, 105 (1999). Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached. *Id.* at 160, 519 S.E.2d at 105. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence. *Id.*

Based on Respondent's medical records, the opinion of Respondent's treating neurosurgeon, and reports of Respondent's confrontation with the workers' compensation nurse, we find that there is substantial evidence in the record to support the Commission's conclusion that Respondent sustained a physical brain injury, stroke, and developed a psychological condition in conjunction with an accident arising out of and in the scope of his employment. Accordingly, we affirm the circuit court's finding that Respondent's injuries are compensable under the South Carolina Workers' Compensation Act.

CONCLUSION

For the foregoing reasons, we hold that the circuit court erred in failing to decide the issue of jurisdiction over Respondent's workers' compensation claim. Furthermore, we affirm the Commission's findings and hold that the Commission had jurisdiction over Respondent's workers' compensation claim. Finally, we affirm the decision of the circuit court finding that

Respondent suffered compensable injuries under the South Carolina Workers' Compensation Act.

MOORE, WALLER, JJ., and Acting Justice G. Thomas Cooper, concur. PLEICONES, J., concurring in part, dissenting in part in a separate opinion.

JUSTICE PLEICONES: I agree that the circuit court erred in failing to address the jurisdictional issue, but would hold there is no evidence that Respondent was hired in South Carolina. The drug testing, road testing, and orientation conducted in Alabama were not "simply incidental" to Respondent's hiring, but in fact the determinative acts. Had Respondent failed either test, or failed to complete orientation, he would not have been hired. In fact, he was not hired, until his successful completion of these tasks. Moreover, in determining whether the "base of operations" is in South Carolina, the focus is the employer's base, not the employee's. By focusing on the employee's residency, the majority ignores the legislative decision in adopting S.C. Code Ann. § 42-15-10 (1985) to reject the "domicile and employment" rule. See Holman v. Bulldog Trucking Co., 311 S.C. 341, 346 428 S.E.2d 889, 892 fn. 2 (Ct. App. 1993).

Accordingly, I would hold that South Carolina lacks jurisdiction over Respondent's workers' compensation claim.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dwight Oxendine, Respondent,

v.

Christine Davis, d/b/a Johnny Davis Construction Company, Employer, and Travelers Property & Casualty Co. of America, Carrier, Appellants.

Appeal from Marion County
James E. Lockemy, Circuit Court Judge

Opinion No. 26331
Heard November 15, 2006 – Filed May 21, 2007

AFFIRMED

F. Reid Warder, Jr., and Jason A. Williams, both of Wood, Porter & Warder, of Charleston, for Appellants.

James C. Rushton, III, of the Hyman Law Firm, of Florence, for Respondent.

CHIEF JUSTICE TOAL: In this workers' compensation case, the single commissioner determined that the South Carolina Workers'

Compensation Commission ("the Commission") had jurisdiction over Dwight Oxendine's ("Respondent's") workers' compensation claim because his employment was located in South Carolina. This ruling was affirmed on appeal. Respondent's employer, Christine Davis d/b/a Johnny Davis Construction Company, and the employer's insurance carrier (collectively "Appellants") argue this conclusion was incorrect. We disagree and affirm the circuit court's decision.

FACTUAL/PROCEDURAL BACKGROUND

Respondent was injured in an accident arising out of his employment with Johnny Davis Construction Company ("Employer"). Respondent resided in Rowland, North Carolina. During the four to six years preceding his injury, Respondent framed houses for Employer during warm months and performed sheetrock work for other employers during cold months. Employer was based at a home/office in Mullins, South Carolina, and nearly all of Respondent's work for Employer was performed in South Carolina. Respondent was most often paid by Employer while at jobsites, but Respondent occasionally went to Employer's home office in Mullins to receive payment. Respondent often received work assignments at Employer's home office and was always accountable to Employer.

In the spring of 2004, Respondent ran into Employer at a barbeque in North Carolina. Employer offered him a job framing a house in Ocean Isle, North Carolina. Respondent started work the following Monday and was injured six weeks later when he fell and sustained an ankle fracture which required surgery. Employer took Respondent to the emergency room, and then transported him to Employer's home in Mullins.

During the six-week period prior to his injury, Respondent worked only on the house in North Carolina. Respondent's co-worker transported him to and from his residence and the jobsite, both located in North Carolina. However, Respondent visited Employer's home in South Carolina for social purposes and to help Employer fix his water pump, a task for which

Respondent was not paid. Respondent also traveled to Employer's home to receive payment at least once during this period.

Respondent filed a workers' compensation claim in North Carolina and was denied coverage. Respondent then filed for medical and compensation benefits under the South Carolina Workers' Compensation Act.[1] Appellants denied entitlement to benefits. At a hearing before the single commissioner, the primary issue was whether Respondent met the statutory requirement for filing a worker's compensation claim in South Carolina; specifically, whether Respondent was hired in South Carolina, injured in South Carolina, or whether his employment was located in South Carolina. *See* S.C. Code Ann. § 42-15-10 (1976).

Both parties agree that Respondent was hired and injured in North Carolina. The parties disagree, however, on the location of Respondent's employment. Respondent argued the Commission had jurisdiction because his employment was located in South Carolina. The single commissioner agreed. Both the full commission and the circuit court affirmed, and this appeal followed. We certified this case for review pursuant to Rule 204(b), SCACR, and Appellants raise the following issue for review:

> Did the circuit court err in affirming the Commission's holding that Respondent's employment was located in South Carolina?

STANDARD OF REVIEW

Appellate review of workers' compensation decisions is governed by the Administrative Procedures Act. *Shealy v. Aiken County*, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); *see also Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). The Full Commission is the ultimate fact finder. *Shealy*, 341 S.C. at 455, 535 S.E.2d at 442. Under S.C. Code Ann. § 1-23-380(A)(5) (Act. No. 387, 2006 S.C. Acts 387, eff. July 1, 2006), a reviewing court determines whether the Full Commission's findings of fact are supported by substantial evidence in the record and whether the panel's

[1] S.C. Code Ann. §§ 42-1-10 to 42-19-50 (1976 & Supp. 2005).

decision is affected by an error of law. *Baxter v. Martin Bros., Inc.*, 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006).

When the Commission's jurisdiction is at issue, this Court's review is governed by a preponderance of the evidence standard. *Gray v. Club Group, Ltd.*, 339 S.C. 173, 181, 528 S.E.2d 435, 439 (Ct. App. 2000); *see also Wilson v. Georgetown County*, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994) ("[W]hen the Commission's jurisdiction is at issue, as in this case, the reviewing court is not bound by the Commission's findings of fact upon which jurisdiction is dependent."). "In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion." *Wilson*, 316 S.C. at 94, 447 S.E.2d at 842 (citing *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720 (1964)).

LAW/ANALYSIS

Appellants argue the Commission did not have jurisdiction because Respondent's employment was located in North Carolina. We disagree.

An employee covered by the provisions of the South Carolina Workers' Compensation Act is authorized to file his claim under the laws of the state where he is hired, the state where he is injured, or the state where his employment is located. S.C. Code Ann. § 42-15-10 (1976). In order to determine where a claimant's employment is located, South Carolina has adopted the "base of operations rule." *Voss v. RAMCO, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997); *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 428 S.E.2d 889 (Ct. App. 1993). Under the base of operations rule, "the worker's employment is located at the employer's place of business to which he reports, from which he receives his work assignments, and from which he starts his road trips, regardless of where the work is performed." *Holman*, 311 S.C. at 346, 428 S.E.2d at 892 (citing *Holland v. W.C.A.B. (Pep Boys)*, 586 A.2d 988 (Pa. Commw. Ct. 1990)).

In *Holman*, our court of appeals held a truck driver's employment was located in Georgia. The driver resided in South Carolina and worked out of a flatbed trailer terminal in Savannah, Georgia. *Id*. at 343, 428 S.E.2d at 890. The driver was both hired and injured in Georgia. The driver argued that under § 42-15-10, an employee's employment could be located in more than one state when the employee travels into other states and conducts substantial business there. *Id*. at 345, 428 S.E.2d at 892. The court disagreed and held the driver's employment was located in Georgia because that is where the driver "reported to his employer's place of business for duty, where he picked up and returned his company truck, where he received his work assignments and from which he was dispatched, where he called in during the course of his work, and where he returned weekly when he had completed his work." *Id*. at 346-47, 428 S.E.2d at 893.

In *Voss*, the court of appeals held a traveling salesman's employment was located in South Carolina. The salesman, a Texas resident, was hired in Dallas by a representative for a South Carolina company. *Voss*, 325 S.C. at 563, 482 S.E.2d at 583. The company shipped equipment to the city in which the salesman was located and the salesman would negotiate sales requiring him to call the company office in South Carolina two to five times a day. *Id*. at 564, 482 S.E.2d at 584. The salesman was paid by either retaining a portion of the sales price or by receiving payment sent by the company. *Id*. at 565, 482 S.E.2d at 584. The salesman never sold equipment in South Carolina and traveled to this State only once. *Id*. He was injured in Washington.

The *Voss* analysis was based on *Holman*'s proposition that the employee's place of employment can only be in one state. *Id*. at 570, 482 S.E.2d at 589. The court distinguished *Holman* because it applied the base of operations rule in order to fit "neatly within the employment ritual of the employee truck driver in that case." *Id*. Under the *Holman* base of operations analysis, the *Voss* salesman would have no place of employment because he did not report to any place of business, nor did he receive work assignments from a particular place, or start his road trips from a particular locale. In light of the legislature's intent to broaden the South Carolina

Workers' Compensation Act by amending S.C. Code Ann. § 42-15-10 in 1974,[2] the court reasoned that a person's employment must be located in some state. *Id*. at 572, 482 S.E.2d at 588. The court determined the *Voss* salesman was principally employed in South Carolina because it was the only state in which he had any base of operation. *Id*. The court noted that although this situation did not fit squarely within the base of operations test, South Carolina was the state where the salesman was employed considering the high degree of control exerted over him by his superiors who were located in South Carolina. *Id*.

Like the *Voss* salesman, Respondent's situation does not fit squarely within the base of operations test. Respondent received his work assignment in North Carolina and began his road trips from his North Carolina residence. His work-related contact with Employer's South Carolina home/office was limited during the six-week employment period prior to his injury. Despite this, we believe the following factors are illustrative: (1) Respondent regularly worked for Employer in South Carolina during warm months for a number of years; (2) Respondent went to Employer's home/office in South Carolina on occasions to be paid, including at least once during the last interval of his work; (3) Respondent often met co-workers at the place of employment to go to jobs; and (4) Respondent performed work at Employer's home immediately before his injury. Respondent was also taken back to Employer's home/office in South Carolina immediately following his injury. Although none of these factors are individually determinative, they all lend support to the conclusion that South Carolina was the location of Respondent's employment. This conclusion is underscored by the amount of

[2] Prior to the 1974 amendment to § 42-15-10, an employee injured outside the State could file a claim in South Carolina only if (1) his contract of employment was made in this State; (2) the employer's place of business was in this State; (3) the employee's residence was in this State; and (4) the contract of employment was for services to be performed not exclusively outside this State. The amended statute liberalizes the requirements by making the conditions for filing alternative rather than conjunctive. *See Holman*, 311 S.C. at 345, 428 S.E.2d at 891-92.

control exerted over Respondent by Employer who was located in South Carolina. *See Voss*, 325 S.C. 560, 482 S.E.2d 582.

In reaching this conclusion, we look not only at Respondent's six-week employment term, but also at his broad employment history with Employer. Respondent's regular and recurring employment with Employer for several years prior to his injury was nearly entirely based in South Carolina. The fact that Respondent was working in North Carolina on this particular occasion does not transport the Employer's base of operations from South Carolina to North Carolina.

Appellants contend the base of operations rule does not apply to this case because Respondent is not a transient worker like the truck driver in *Holman* or the salesman in *Voss*. We disagree. This case presents a classic example of nomadic employment. Respondent, an itinerant construction worker, did not work at a single location. Rather, he traveled to jobsites wherever he was needed.

Appellants also argue that if the base of operations rule applies, the relevant base of operation was North Carolina because it is the employee's base, and not the employer's base, that should be considered. Appellants' reasoning directly contradicts both *Voss* and *Holman*; cases which apply the base of operations rule to determine the location of nomadic employment based on the employer's place of business, "regardless of where the work is performed." *Holman*, 311 S.C. at 346, 428 S.E.2d at 892. In the instant case, Employer clearly operated his business out of his home in South Carolina. Therefore, Employer's base of operation was in South Carolina.

CONCLUSION

Applying the base of operations rule, we find Respondent's location of employment was South Carolina. Therefore, we hold that the South Carolina Workers' Compensation Commission has jurisdiction over Respondent's workers' compensation claim. The decision of the circuit court is affirmed.

MOORE, WALLER, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Arcadian Shores Single Family Homeowners Association, Inc., Appellant,

v.

Miriam R. Cromer, Respondent.

Appeal from Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4223
Submitted March 1, 2007 – Filed March 26, 2007
Withdrawn, Substituted and Refiled May 17, 2007

AFFIRMED

C. Scott Masel, of Myrtle Beach, for Appellant

Robin S. Cromer, of Anderson, for Respondent.

SHORT, J.: Arcadian Shores Single Family Homeowners' Association, Inc., (the Association) appeals the master's refusal to issue a permanent injunction requiring Miriam R. Cromer to comply with certain restrictive covenants. The Association contends the master erred in (1) refusing to find Cromer had actual or constructive knowledge of the 1985 Regulations; (2) failing to hold Cromer's motor home violated the intent and purpose of the 1965 Declaration; (3) finding Cromer's motor home did not violate the plain language of the 1985 Regulations; (4) holding the Association abandoned its right to enforce the restrictive covenants; (5) denying its claim for injunctive relief; and (6) awarding Cromer the costs of complying with a temporary injunction. We affirm.[1]

FACTS

On March 11, 1965, Ocean Lakes Investment Company (Developer) adopted and recorded a declaration of restrictions (the 1965 Declaration) applying to lots 5 through 97 of the Arcadian Shores Subdivision (the Subdivision). The 1965 Declaration provides, in pertinent part:

> 4. . . . No building, outbuilding, addition, or fencing shall be constructed without first submitting plans and specifications to and obtaining the written approval of the plans by the Developer, which approval will not be unreasonably withheld.
>
> . . . .
>
> 7. . . Lot owners will comply with such reasonable regulations as the Developer may make as to the location of fixtures or appliances . . . and as to parking or storage of commercial vehicles, boats or machinery on the premises.

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

> 8. Except as incidental and necessary to permanent building construction . . . no mobile home, temporary structure or garage apartment shall be erected upon the lot.

On June 14, 1982, the Developer's trustee executed and recorded a corrective quit-claim deed in favor of the Association, purporting to convey all of its rights in the Subdivision, particularly the following:

> All of the [Developer's] rights under recorded restrictions applicable to [the Subdivision] to enforce any and all such restrictions . . . to approve or disapprove plans and specifications . . . to make regulations permitted by the Subdivision restrictions and to enforce same . . . .[2]

On January 15, 1985, the Association attempted to enact a set of regulations applicable to the Subdivision (the 1985 Regulations).[3] The 1985 Regulations specify, in detail, the applicable fencing limits and plainly prohibit motor homes and travel trailers from being parked where they are visible from the street. The 1985 Regulations were also recorded.

On March 24, 2000, the homeowners in the Subdivision elected to create a Special Tax District. Although the Association assigned and delegated many of its rights and duties to the Special Tax District, it retained

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[2] This recorded deed corrected a prior quit claim deed which did not include the specific rights enumerated.

[3] Fifteen days later, the Association adopted a second declaration which neither party uses to justify relief on appeal. The Association refers to this second declaration as "1985 restrictions" and the first declaration as the "1985 regulations." The master referred to these declarations collectively as the "1985 documents." Both parties agree the 1985 restrictions are invalid.

all of its rights to enforce recorded restrictions, approve or disapprove plans and specifications, and make regulations.

On July 2, 2003, Cromer obtained title to Lot 96 in the Subdivision. After she purchased Lot 96, she sought to park a motor home on the property.[4] In addition, she submitted plans and specifications to the Association in order to get approval for a fence and other building modifications on the property. The plans called for a three foot high masonry lattice wall in the front yard of Lot 96. The Association approved these plans. However, Cromer built a three foot high solid stucco wall instead.

On January 23, 2004, the Association filed a complaint against Cromer, seeking to enjoin her from parking her motor home in a place where it would be visible from the street and to require Cromer to remove her fence. Cromer answered, denying her motor home or fence violated the applicable restrictive covenants. The Association sought and obtained a temporary injunction requiring Cromer to comply with the 1985 Regulations with respect to her motor home. As a precondition to issuing this injunction, the circuit court required the Association submit a $10,000 surety bond to reimburse Cromer should the injunction later be overruled.

After an order of reference, the master held a hearing and ultimately denied the Association's requests regarding both the motor home and the fence. Of consequence to the present appeal, the master made the following findings and conclusions: (1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed; (2) the 1965 Declaration does not prohibit Cromer's motor home; (3) the Association abandoned its right to approve of fencing; and (4) Cromer should receive $9,000 of the surety bond for reimbursement of expenses associated with the temporary injunction. This appeal followed.

[4] A trailer attached to Cromer's motor home made the total length equal seventy feet. Although the Association refers on appeal to Cromer's seventy foot motor home, they do not appeal the master's finding that Cromer was allowed to park the trailer on her property. Therefore, we address only the issue of parking the motor home on the property.

STANDARD OF REVIEW

"An action to enforce restrictive covenants by injunction is in equity." Seabrook Is. Prop. Owners Ass'n v. Marshland Trust, Inc., 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004). In equitable actions, the appellate court may make findings of fact in accordance with its own view of the preponderance of the evidence. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). However, the appellate court is not required to ignore the findings of the master when the master was in a better position to evaluate the credibility of the witnesses. Siau v. Kassel, 369 S.C. 631, 638, 632 S.E.2d 888, 892 (Ct. App. 2006).

LAW/ANALYSIS

I. The Motor Home

The Association contends the master erred in refusing to order Cromer to comply with the 1985 Regulations regarding the parking of her motor home. Specifically, the Association argues (1) Cromer had actual or constructive notice of the 1985 Regulations; (2) the 1985 Regulations prohibit the parking of Cromer's motor home in an area visible from the street; (3) alternatively, the motor home violated the intent and purpose of the 1965 Declaration; (4) the Association did not waive its right to enforce the motor home restrictions; and (5) as a consequence of the above, the master erred in refusing to issue the injunction and finding Cromer entitled to $9,000 of the surety bond.

A. The Law of the Case

We are in agreement with the master's finding that the Association's argument contending that "a portion of the 1985 documents are 'regulations,' not restrictions, which the Association made pursuant to the developer's

authority in the 1965 restrictions" is not a valid argument. We concur in the master's finding that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions and that such a change would require a document signed and acknowledged by the majority of lot owners. Further, we recognize the master ruled the 1985 Regulations were invalid because they were improperly signed, acknowledged, and indexed. While the Association appealed the issue of whether it properly indexed the 1985 Regulations, nothing in the Association's appellate brief addresses whether the master erred in finding the 1985 Regulations were not validly signed or acknowledged. Because the Association did not appeal this ruling, it is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (recognizing an unappealed finding of the master, right or wrong, is the law of the case and should not be considered by this court).

In addition, based on this conclusion, we need not address the issue of whether Cromer had actual or constructive notice of the 1985 Regulations, whether the 1985 Regulations prohibited the parking of the motor home, or whether the Association waived its right to enforce the motor home restriction. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (holding when a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case). Accordingly, we proceed to consider whether the 1965 Declaration, standing alone, precludes the parking of Cromer's motor home in an area visible from the street.

B. The 1965 Restrictions

The Association claims the 1965 Restrictions prohibit the parking of Cromer's motor home in an area visible from the street. We disagree.

"Restrictive covenants are contractual in nature." Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The language in a restrictive covenant shall be construed according to the plain and ordinary meaning attributed to it at the time of execution. Seabrook, 358 S.C. at 661, 596

S.E.2d at 383. "A restriction on the use of property must be created in express terms or by plain and unmistakable implication and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citations omitted). The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998) (citations and quotations omitted).

The Association points to the following provisions of the 1965 Declaration in arguing it prohibits the parking of motor homes in an area visible from the street:

> 7. . . Lot owners will comply with such reasonable regulations as the Developer may make as to the location of fixtures or appliances . . . and as to parking or storage of commercial vehicles, boats or machinery on the premises.
>
> 8. Except as incidental and necessary to permanent building construction . . . no mobile home, temporary structure or garage apartment shall be erected upon the lot.

The first provision gives the Developer the power to enact regulations with respect to the parking or storage of commercial vehicles, boats, or machinery. Assuming Cromer's motor home is a commercial vehicle or machinery, this provision does not contain any affirmative prohibition or limitation on its parking or storage.

With respect to the second provision, the Association contends motor homes were largely unknown at the date of execution of the 1965 Declaration and the prohibition on erecting a mobile home shows an intent or purpose to

regulate the parking of a motor home. While the Supreme Court of South Carolina initially agreed with this contention in Nance v. Waldrop, 258 S.C. 69, 187 S.E.2d 226 (1972), it subsequently rejected that line of thinking in Taylor, which overruled Nance.

In Nance, restrictions adopted in 1938 provided, in pertinent part: "No house shall be erected thereon [on any lot] costing less than Four Thousand Five Hundred ($4,500.00) Dollars." 258 S.C. at 71, 187 S.E.2d at 227. A subsequent purchaser placed his mobile home on the lot, and his neighbors sought an injunction enforcing the covenant. Id. at 71-72, 187 S.E.2d at 227. The master and circuit court held the mobile home violated the restriction and issued an injunction. Id. at 72, 187 S.E.2d at 227.

On appeal, the Supreme Court noted the mobile home had been "virtually unknown" at the time the covenant was adopted. Id. at 72, 187 S.E.2d at 228. The Court ultimately concluded "[t]he circumstances surrounding the inception of the restrictions and the developments subsequent thereto enforce the argument that the restrictions as drawn were designed and intended to prevent uses such as the defendant is making of his lot." Id. at 74-75, 187 S.E.2d at 229.

In Taylor, a restrictive covenant provided, in relevant part: "No residence to cost less than $10,000.00 shall be erected on said lots . . . ." 332 S.C. at 3, 498 S.E.2d at 863. To prevent defendant from placing mobile homes on his lots, his neighbors sought an injunction pursuant to this covenant. Id. This court reversed the master's refusal to grant the injunction, and the Supreme Court granted certiorari. Id. The Supreme Court questioned "how the parties in Nance could have intended to prohibit mobile homes which were non-existent when the restrictive covenant was drafted" and thereby overruled Nance. Id. at 4, 498 S.E.2d at 864. In addition, the Court explained: "Here, the restrictive covenant was written in the 1960s when mobile homes were prevalent. Therefore, if the grantor had wanted to restrict mobile homes, he could have done so." Id. at 5, 498 S.E.2d at 864.

Applying Taylor, we hold the Developer did not intend to prohibit the parking of a motor home when it adopted the 1965 Declaration. Moreover,

because the 1985 Regulations are not valid, no provision prohibits Cromer from parking her motor home on her property. Therefore, we hold the master did not err in refusing to grant the Association's injunction. Because of this conclusion, we also affirm the master's decision with respect to the surety bond.

II. The Fencing

The Association maintains the master erred in refusing to order Cromer to tear down her fence. In particular, the Association asserts (1) Cromer had actual or constructive notice of the Association's right to approve of fencing; (2) the Association did not waive this right; and (3) as a consequence, the master erred in failing to grant the injunction. We find it necessary only to address the issue of whether the Association waived its right to approve of Cromer's fence.

A. Waiver

The Association contends the master erred in holding it waived its right to approve of fencing. We disagree.

Initially, we reiterate our holding that the master found the 1985 Regulations were invalid and this ruling is the law of the case. As a result, we consider only the 1965 Declaration in determining whether the Association waived its right. The 1965 Declaration provides, in relevant part:

> No building, outbuilding, addition, or fencing shall be constructed without first submitting plans and specifications to and obtaining the written approval of the plans by the Developer, which approval will not be unreasonably withheld.

Waiver has been defined as the intentional relinquishment of a known right. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). "Neither the restricting of every lot within the area covered, nor absolute identity of restrictions upon different lots is essential to the existence of a neighborhood scheme." Pitts v. Brown, 215 S.C. 122, 130, 54 S.E.2d 538, 542 (1949). However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. Id.

In this case, testimony revealed some people did not submit plans or specifications for certain projects to the Association and that the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures. In fact, the Association's current president testified the Association's board was "fine with the fence," and that Cromer's husband "could have submitted a variance and it could've been approved by the board if he would've been hospitable, but he took it on himself to do whatever." Additionally, we defer to the master's ability to observe the witnesses and emphasize that the master visited the Subdivision and was in the best position to determine the existence, if any, of a neighborhood scheme. Accordingly, we hold a preponderance of the evidence supports the master's conclusion that the Association waived its right to approve of plans and specifications with respect to Cromer's fence.

CONCLUSION

We hold the master's ruling that the 1985 Regulations are invalid is the law of the case. In addition, we find the 1965 Declaration does not prohibit the parking of Cromer's motor home on her property. Consequently, we need not address the Association's other contentions with respect to the motor home and affirm the master's decision with respect to the surety bond.

Regarding Cromer's fence, we hold a preponderance of the evidence supports the master's conclusion that the Association waived its right to require approval. As a result, we find the master did not abuse his discretion

in denying the Association's request for injunctive relief. Based on the foregoing, the master's decision is

AFFIRMED.

ANDERSON, J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Omar Sharitt Gentile, Appellant.

Appeal From Charleston County
Thomas A. Russo, Circuit Court Judge

Opinion No. 4244
Submitted April 2, 2007 – Filed May 8, 2007

REVERSED

Chief Attorney Joseph L. Savitz, III, Commission of Indigent Defense, of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

BEATTY, J.: A circuit court judge, during a bench trial, convicted Omar Gentile of trafficking in cocaine and possession with intent to distribute cocaine within proximity of a school. Gentile asserts the judge erred in denying his motion to suppress the drug evidence on the ground the search warrant was not supported by probable cause. We reverse.[1]

FACTS

At approximately 9:45 p.m. on July 10, 2004, officers with the narcotics division of the Charleston Police Department forcibly executed a search warrant for Gentile's residence in Charleston. Pursuant to the search, the officers seized one plastic bag containing 24.34 grams of cocaine and $988 in cash from Gentile's person. The officers also discovered six plastic bags containing 2.14 grams of cocaine. Gentile ultimately admitted that the drugs belonged to him. As a result, a Charleston County grand jury indicted Gentile for trafficking in cocaine and possession with intent to distribute cocaine within proximity of a school.

Prior to his bench trial, Gentile filed a written motion to suppress all evidence seized from his residence. In his motion, Gentile argued there was no probable cause to support the issuance of the search warrant. During the trial, the court reviewed the search warrant and accompanying affidavit and heard testimony from the officers involved in the search.

The affidavit in support of the search warrant provided in pertinent part:

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

> Investigators recieved [sic] information of narcotic activity at 23 Cleveland ST Apartment A. Investigators conducted periodic surveillance on 23 Cleveland ST and observed a black male enter the residence. Black male subject was observed leaving the residence. Subject was stopped by narcotic investigators and recovered approximately 4.0 grams of marijuana. Subject made no stops from time of leaving residence until stopped by investigators. Based on above information, there is probable cause to believe narcotics (marijuana) and proceeds from narcotic sales to be stored inside 23 Cleveland ST Apartment A., Charleston, South Carolina.

Officer George Bradley, the officer who procured the warrant from the magistrate, testified regarding his affidavit as well as the oral testimony he gave to the magistrate. According to Bradley, the Charleston Police Department received citizen complaints regarding suspected narcotics traffic at Gentile's residence. Bradley testified the citizens claimed to have witnessed heavy foot traffic "in and out of the residence, later in the afternoon up until the wee morning hours." As a result of these tips, Bradley and Officer Steven Sierko conducted surveillance of the residence. Bradley testified they observed "several black males entering and leaving the residence, walking in, being in there less than five minutes." Bradley alerted officers in a nearby unmarked patrol car regarding one particular visitor. Corporal Andre Jenkins followed the visitor's vehicle as it left the residence and then conducted a traffic stop for an obstructed license plate. Jenkins arrested the driver of the vehicle after he refused to produce his driver's license and then engaged in a physical altercation. A search of the driver's person revealed two bags of marijuana.

After this arrest, Corporal Jenkins contacted Bradley to inform him that he believed there was probable cause for a search warrant based on the officers' observations regarding the traffic at the residence and the subsequent arrest of one of the visitors. Jenkins also testified that he established his belief on the citizen tips regarding the traffic at

the residence as well as the complaint of one citizen who claimed she smelled marijuana in the vicinity of the residence.

Based on the citizen tips, his observations during the surveillance, the arrest of one of the visitors, as well as his experience, Bradley believed narcotics transactions were being conducted at Gentile's residence. Bradley testified he presented this information to the magistrate who ultimately signed the warrant for the search of Gentile's residence.

At the conclusion of the suppression hearing testimony, Gentile's counsel reiterated his motion to suppress. He asserted the search warrant was invalid because there was no probable cause. Specifically, he claimed there was no independent verification of what transpired within Gentile's residence. Instead, counsel averred the citizen complaints, the officers' observations, and the arrest were a series of unrelated events that did not support a finding of probable cause. The judge denied the motion, finding the search warrant was properly issued based on the totality of the circumstances. Although the judge recognized that there was no "indication with regards to the reliability of the informant information," he found the officers did not seek a warrant solely on this information. Instead, the judge found significant that the warrant was procured based on the officers' "own investigation, through their own observations . . . which through their experience as narcotics officers for several years have proven to indicate the presence of drug activity."

The judge convicted Gentile of trafficking in cocaine and possession with intent to distribute cocaine within proximity of a school. He sentenced Gentile to twenty-five years imprisonment for the trafficking offense and a concurrent, ten-year sentence for the other offense. Gentile appeals his convictions and sentences.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). "A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause." State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005).

DISCUSSION

Gentile argues the judge erred in denying his motion to suppress because the search warrant was not supported by probable cause. We agree.

The Fourth Amendment guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. Forrester, 343 S.C. at 643, 541 S.E.2d at 840.

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). "The affidavit must contain sufficient underlying

facts and information upon which the magistrate may make a determination of probable cause. The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citations omitted).

In discussing the specific requirements for issuing a search warrant, our supreme court has explained:

> The General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record . . . ." S.C. Code Ann. § 17-13-140 (1985). Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987).

State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000).

In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). "In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

Reviewing this case within the above-outlined parameters, we find the affidavit and the supplemental oral testimony were insufficient to provide the magistrate with a substantial basis for which to find probable cause to issue the search warrant for Gentile's residence.

Although we are cognizant that our decision should be based on the totality of the circumstances, for analytical purposes we find it necessary to separately address each piece of evidence presented to the magistrate.

The narcotics officers' decision to investigate Gentile was precipitated primarily by the receipt of citizen complaints regarding a high volume of traffic at Gentile's residence. Even though the officers verified the pattern of traffic at Gentile's residence, this, without additional investigation into the residence, was not sufficient to establish that narcotics activity was taking place. See State v. Hunt, 562 S.E.2d 597, 601-02 (N.C. Ct. App. 2002) (reversing trial court's decision denying defendant's motion to suppress drug evidence and stating "[a]ll that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The citizens only reported heavy vehicular traffic to the house. The officer verified the traffic. His verification, as the trial court found, was not a conclusion."); Bailey v. People, 15 Cal. Rptr. 2d 17, 19-20 (Cal. Ct. App. 1992) (finding information from an anonymous informer and an unidentified citizen regarding heavy foot traffic at defendant's residence, without investigation, was insufficient to establish probable cause for the issuance of a search warrant; stating "'heavy foot traffic' does not necessarily engender criminal behavior. True, under certain circumstances, such activity might raise suspicions, or be one indicator of possible narcotics transactions.").

Next, we consider the single citizen claim that she smelled marijuana in the vicinity of Gentile's residence. Initially, we question whether the magistrate was privy to this information. Based on our review of the record, we are unable to find where Bradley, the officer

who obtained the warrant, testified regarding this information. Instead, the only reference to this tip was through the testimony of Corporal Jenkins. Furthermore, there is no mention in the affidavit regarding this tip. Therefore, it is questionable whether it was communicated to the magistrate.

Even if we conclude that Bradley communicated to the magistrate the citizen's tip, we find it was insufficient to establish probable cause. First, the tip is vague in that there is no indication of how many times the citizen may have smelled marijuana or that she could readily identify that the odor was emanating from Gentile's residence. Secondly, there was no indication that the citizen was knowledgeable about the smell or marijuana. Significantly, there was no independent verification by the narcotics officers regarding this tip.[2]

[2] Because the narcotics officers did not verify the citizen tip regarding the odor of marijuana, we find the instant case distinguishable from State v. Ford, 323 S.E.2d 358 (N.C. Ct. App. 1984), a case relied upon by the State at trial and on appeal. In Ford, the defendant was convicted of trafficking in marijuana based on a search of his residence which revealed 10,000 pounds of marijuana. On appeal, Ford challenged the trial court's denial of his motion to suppress the drug evidence on the ground the supporting affidavit failed to show sufficient probable cause to justify the issuance of the search warrant. Id. at 361. The North Carolina Court of Appeals affirmed the trial court's decision, finding that evidence presented to the magistrate regarding unusual traffic at a residence in conjunction with the surveillance officer's detection of marijuana odors coming from within a mobile home, which was identified as belonging to Ford, was sufficient to constitute probable cause. Id. at 361-62. In the instant case, unlike in Ford, the surveillance officers did not verify the citizen's vague claim regarding the smell of marijuana. Without further investigation by the narcotics officers, we do not believe the citizen's general claim was sufficient to establish probable cause.

Finally, the arrest of one of Gentile's visitors did not support a finding of probable cause to search the residence.[3] According to the testimony and the affidavit, the officers discovered marijuana in the possession of the driver after he left Gentile's residence. The officers, however, had no knowledge of whether the driver purchased the marijuana from Gentile. Neither the driver nor his vehicle was searched prior to going to Gentile's residence. Furthermore, without surveillance within Gentile's residence, there was no verification that the driver in fact purchased marijuana from Gentile. Additionally, it is

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[3] At trial, the State relied on two cases decided by this court for the proposition that an arrest, which yields the presence of narcotics, is sufficient to establish probable cause for the issuance of a search warrant for the location of where the arrestee came from prior to the arrest. See State v. Keith, 356 S.C. 219, 225, 588 S.E.2d 145, 148 (Ct. App. 2003) (affirming decision of trial court to admit drug evidence seized pursuant to a search warrant for defendant's residence where the following facts established probable cause: informants' tips regarding drug transactions at the defendant's home; surveillance by law enforcement; and a traffic stop of the defendant after leaving his residence which revealed the presence of a marijuana "bud" and a pipe in the defendant's vehicle); State v. Scott, 303 S.C. 360, 362-63, 400 S.E.2d 784, 785-86 (Ct. App. 1991)(affirming defendant's convictions for trafficking in cocaine and unlawfully transporting drugs in a motor vehicle and finding affidavit in support of search warrant was sufficient to establish probable cause where affidavit was based on information from surveillance officers who followed defendant leaving his residence and ultimately arrested him and searched his vehicle which revealed the presence of twenty grams of cocaine).

These cases are clearly distinguishable from the instant case. In both Keith and Scott, the defendant was arrested and searched after leaving his residence. Here, Gentile was not arrested. Instead, the surveillance officers followed and arrested a third party. This person, a visitor at Gentile's residence who had not been searched prior to his arrival, was not a target of their surveillance.

important to note that the officers' search of Gentile's residence revealed cocaine and not marijuana.

Based on the foregoing, we hold the search warrant was invalid under the totality of the circumstances, and thus, the circuit court judge erred in admitting the drug evidence.

We find support for our decision in the factually similar opinion of People v. Titus, 880 P.2d 148 (Colo. 1994)(en banc). In Titus, the defendant was charged with possession of marijuana with intent to distribute or sell and possession of marijuana. The drug evidence was discovered at Titus's residence pursuant to the execution of a search warrant. The Colorado Springs Police Department procured the warrant based on the following information: 1). a first-time anonymous informant alleged defendant was engaged in selling marijuana at his residence, there was unusual traffic at defendant's residence, and that she had smelled the odor of burning marijuana coming from the residence; 2). the informant gave police a list of the license plate numbers of those that visited the defendant's residence; 3). police officers' verification of the license plate numbers and the traffic at the defendant's residence; 4). an attempted controlled buy of narcotics from defendant; and 5). the fact that the defendant was self-employed and operated a telephone repair business out of his home.

Prior to trial, the court granted the defendant's motion to suppress the drug evidence found at his residence on the ground the affidavit underlying the search warrant did not establish probable cause. Id. at 149. The prosecution appealed the decision. On appeal, the Colorado Supreme Court, sitting en banc, affirmed the trial court's ruling. In reaching this decision the court found "the police had no indication, apart from the anonymous informant's suspicions and the police informant's conversation with Titus, that Titus was engaged in criminal activity." Id. at 151. In terms of the high volume of traffic at the defendant's residence, the court stated "[t]he fact that a large number of people visit a residence in a one-month period does not establish that illegal activity is taking place." The court also relied on the fact that there was nothing in the affidavit to suggest that "any of the [visiting]

vehicles belonged to known drug offenders, or were used in the furtherance of any illegal activity." Id. Finally, the court rejected the prosecution's reliance on the anonymous informant's claims that she smelled the odor of burned marijuana coming from the defendant's residence on several occasions. Id. at 152. The court found that "[u]nder no circumstances do [the claims] support the conclusion that Titus was *selling* marijuana out of his home." Id. In reaching this conclusion, the court found significant the fact that:

> [t]he affidavit does not state the circumstances under which the informant smelled the odor of burned marijuana. Nor does it disclose how many times she smelled it. Most importantly, however, it does not disclose when these olfactory experiences took place. There is no indication that the police officer attempted to determine whether the informant had smelled marijuana burning recently, or whether the event was remote in time.

Id.

As in Titus, we find the warrant to search Gentile's home was not supported by probable cause. The narcotics officers' decision to obtain the search warrant was based on citizens' tips regarding high volume traffic at Gentile's residence, which was not necessarily indicative of illegal activity at the residence. Additionally, the citizen claim regarding the smell of marijuana in the vicinity of Gentile's residence was vague and not corroborated by the officers' surveillance. Finally, as previously discussed, the officers' arrest of a visitor to Gentile's residence adds nothing to the probable cause determination. Without more, we find the evidence in the affidavit and the oral testimony was insufficient to support a finding of probable cause.

Accordingly, Gentile's convictions and sentences are

REVERSED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John R. Sheppard and
William J. Sheppard, Respondents,

v.

Justin Enterprises, a South
Carolina General Partnership,
Russ Pye and Lee Pye, Appellants.

Appeal From Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4245
Heard April 10, 2007 – Filed May 14, 2007

AFFIRMED

Bonnie Travaglio Hunt and Michael A. Timbes, both of Charleston, for Appellants.

G. Thomas Hill, of Ravenel, for Respondents.

STILWELL, J.: Russ Pye, Lee Pye, and Justin Enterprises (collectively Appellants) relocated an easement appurtenant to property now owned by John R. and William J. Sheppard. On appeal, we affirm the circuit

court's order requiring Appellants to restore the easement to its original location.

FACTS

Appellants and the Sheppards own adjacent tracts of land, which were both derived from a larger tract known as Encampment Plantation. The Sheppards' tract (the dominant estate) includes a right of ingress and egress across Appellants' tract (the servient estate). This easement originated in a deed conveying to John Carlton Fox the tract the Sheppards now own. The deed conveyed "the right to the use and enjoyment of the Avenue leading from Highway #17 to the property above described . . . for the use of all present and future owners of said property . . . ."

The deed to Fox also references an attached plat that shows the "Avenue." Prior to the easement's relocation, access to the dominant estate required one to turn from Highway 17 onto the avenue and continue straight until reaching a cul-de-sac on the servient estate. At that point, one would turn left onto an old dirt road, then almost immediately turn right onto a separate access road, crossing other property before arriving at the dominant estate.

In September 2001, Appellants blocked the access to the old dirt road from the cul-de-sac and created a new road between the avenue and the access road. Consequently, when attempting to access the dominant estate, the Sheppards must turn onto the avenue from Highway 17 and make a slight left turn onto the new road. The new road connects with the old dirt road at a point closer to the access road. From the new road, the Sheppards must turn left onto the old dirt road. The right turn from the old dirt road onto the access road remains the same.

On May 16, 2002, Developments Unlimited, LLC, the Sheppards' immediate predecessor in title, filed suit against Appellants, requesting the circuit court require Appellants to remove their obstructions to the original access point and restore this portion of the easement to its previous condition. The Sheppards were substituted as plaintiffs when they purchased the

dominant estate from Developments Unlimited. After a hearing on the merits, the circuit court granted the relief the Sheppards requested.

STANDARD OF REVIEW

The determination of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). Accordingly, this court may review the circuit court's findings de novo. Hardy v. Aiken, 369 S.C. 160, 164-65, 631 S.E.2d 539, 541 (2006).

LAW/ANALYSIS

I. Restatement (Third) of Property: Servitudes § 4.8

Appellants contend the circuit court erred in refusing to apply the Restatement (Third) of Property: Servitudes § 4.8 (2000 & Supp. 2006) (the Restatement) to allow them to unilaterally relocate the easement. We disagree.

Traditionally, the location of an easement, once selected or fixed, cannot be changed by the owner of the servient estate without the express or implied consent of the owner of the dominant estate. Goodwin v. Johnson, 357 S.C. 49, 53, 591 S.E.2d 34, 36 (Ct. App. 2003). The Restatement, however, provides, in pertinent part:

> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows . . . . (3) [u]nless expressly denied by the terms of an easement . . . the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner

> of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

In Goodwin, this court adopted the Restatement with respect to easements created by necessity. Goodwin at 57-58, 591 S.E.2d at 38. However, the Goodwin court recognized "it should be more difficult to relocate an express easement, as it is akin to a contract and is bargained for by the parties." Id. at 55, 591 S.E.2d at 37 (emphasis in original). Moreover, we find no indication by our appellate courts that South Carolina would adopt the Restatement with respect to easements acquired by express grant.

Even if the Restatement could afford relief in a case involving an easement created by grant, we hold Appellants' case is not one in which the rule should be applied. Specifically, James H. Southard, Jr., the owner of Developments Unlimited, testified that, prior to September 2001, he used the easement to access the dominant estate with his tractor-trailer. After September 2001, he would not attempt to traverse the relocated easement with his heavy equipment. In addition, he complained he was forced to make four turns instead of two, and the turns came closer together, which prevented larger vehicles from making the turns.

Nevertheless, Appellants contend that because the Sheppards purchased the dominant estate after the relocation had occurred they cannot claim any right to the original easement. However, we see no reason why the Sheppards should be unable to claim the full extent of the easement rights conveyed to them, which were the same rights given to Fox and Developments Unlimited. Although the purchase agreement between Developments Unlimited and the Sheppards indicates the property is being sold "AS IS," the agreement also acknowledges the existence of the ongoing litigation concerning the easement giving the Sheppards an expectation that the easement could be returned to its original location. Moreover, Appellants agree the easement is appurtenant to the dominant estate and not a mere personal privilege. See e.g., Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) (distinguishing between an easement appurtenant and one in gross). Consequently, the proper analysis is to

examine whether the relocation increased the burden on the dominant estate, not just the current owners.

We find, as did the trial court, that Appellants' actions increased the burden on the dominant estate. Therefore, there was no error in refusing to apply the Restatement rule.

II. Implied Consent

Appellants also argue Southard impliedly consented to the relocation of the easement. We disagree.

"Any action which would tend to deceive or mislead may constitute sufficient grounds for a court to find acquiescence or an implied consent to [a] relocated easement." Henning v. Neisz, 268 N.E.2d 310, 316 (Ind. Ct. App. 1971). Here, Appellants presented testimony that Southard asked them to relocate the easement. C. C. Harness, III, an attorney representing Appellants, attempted to negotiate a relocation with the attorney for Southard, but Harness testified no agreement was reached. Russ Pye explained he relocated the easement at the request of Southard, but acknowledged the path of the new road was chosen more by forces of nature (lightning eliminating trees) than by any human choice. Southard specifically testified he did not consent to the relocation of the easement. We find a preponderance of the evidence supports the circuit court's decision that Southard did not, impliedly or otherwise, consent to the easement's relocation.

CONCLUSION

We hold the circuit court properly refused to apply the Restatement to provide relief to Appellants. More particularly, we find the relocation increases the burden on the dominant estate. In addition, a preponderance of the evidence supports the circuit court's ruling that Southard did not impliedly consent to the relocation. Therefore, the circuit court's decision is

AFFIRMED.

GOOLSBY, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elenita R. Duckett, **Appellant,**

v.

Ronald R. Goforth and Frank Raymond Greenhough, **Defendants,**

Of Whom Ronald R. Goforth is **Respondent.**

Appeal from Greenwood County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 4246
Submitted May 1, 2007 – Filed May 15, 2007

REVERSED AND REMANDED

Matthew P. Turner and J. Michael Turner, Sr., both of Laurens, for Appellant.

Ronald R. Goforth of Fayetteville, Arkansas, Pro Se Respondent.

ANDERSON, J.: Elenita R. Duckett ("Duckett") initiated an action in Greenwood County Family Court to determine paternity and adjudicate custody and child support in regard to Ronald R. Goforth ("Goforth"). The family court found it lacked jurisdiction to address Duckett's petition and dismissed the action. We reverse and remand.[1]

FACTUAL/PROCEDURAL BACKGROUND

The minor child "H.J." was allegedly conceived as the result of a relationship between Duckett and Goforth while they were in the Philippines. Duckett was married to Frank Raymond Greenhough (Greenhough) who, according to Duckett, was in Australia at the time of H.J.'s conception. In June 1994, Duckett learned she was pregnant and informed Goforth. Because she was frightened of having a child on her own, Duckett asked Greenhough for his assistance and they reconciled. Both agreed that Greenhough would serve as H.J.'s father. On February 1, 1995, Duckett gave birth in the Philippines. In 1997, Duckett and Greenhough moved from the Philippines to Australia.[2]

On February 1, 2000, Duckett filed an application for dissolution of the marriage and designated H.J. as a child of the marriage, but on March 30, 2000, Duckett submitted an affidavit in which she averred that Goforth was H.J.'s biological father.

On March 27, 2000, the Australian family court issued a Decree Nisi of Dissolution of Marriage between Duckett and Greenhough. The decree incorporated previously issued orders awarding Duckett custody, assigning joint financial responsibility for H.J., and providing Greenhough with visitation rights. The tribunal declared it was satisfied that H.J. was the only child of the marriage and proper arrangements for her welfare had been made. In addition, a restraining order remained in place to prevent either party from removing H.J. from the Western State of Australia without written consent.

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

[2] At some point, Duckett became an Australian citizen.

On June 4, 2001, Duckett and H.J. left Australia without the Australian court's permission and traveled to the United States, where they have remained for the last five years. Duckett settled in Greenwood County and remarried.

On December 14, 2001, Duckett petitioned the Washington County Family Court in the State of Arkansas, where Goforth resided, to determine paternity and award child support. Duckett named Goforth as the father but did not name Greenhough as a party or notify him of the proceedings. Goforth moved to dismiss, alleging Arkansas was not H.J.'s home state and the Arkansas court lacked jurisdiction. Ultimately, the Arkansas Supreme Court ruled the Washington County Court did not have jurisdiction to hear the petition because Arkansas was not the home state of the child.

On August 27, 2002, Greenhough filed an application in accordance with the Hague Convention for H.J.'s return to Australia. Two days later, Greenhough filed an application, pursuant to the Hague Convention, for the enforcement of the Australian visitation order. On March 4, 2004, Greenhough filed an application in Australia seeking the return of H.J. The application was dismissed following a hearing on January 24, 2005.

Duckett instituted this action in the Greenwood County Family Court requesting a finding of paternity, child support and other related relief. Goforth moved to dismiss, arguing the family court lacked subject matter jurisdiction by virtue of the prior rulings of the Australian and Arkansas courts and the on-going litigation in Australia. Additionally, he alleged the family court lacked personal jurisdiction. He pled res judicata as a defense. The family court issued the following order:

> 24. This Court finds that it does lack subject matter jurisdiction. It is clear that the child was born during the marriage of the Plaintiff [Duckett] and husband [Greenhough]. There is a presumption that the husband is the father. It is noted that the divorce decree of the Plaintiff and husband made findings in relation to visitation, support and custody of the child between

the husband and Plaintiff, and that neither party appealed that ruling.

25. Further, that the Plaintiff's subsequent conduct of applying to the Australian Court for both the divorce and permission to remove the child from Australia reinforces to this Court the continuing effect of that Australian Court's order and jurisdiction.

24.[3] The Court also finds that since there is a presumption that a child born during the marriage is a product of the husband and wife, Plaintiff must first establish that the husband is not the father of the child before she can bring an action to declare another person (Goforth) as the father. This Court has been provided no proof that this child born of the marriage is not the child of the father. Without such evidence, this Court lacks personal jurisdiction over the Defendant pursuant to SCRCP 12(b)(2).

25. Next, Goforth argues that this matter should be dismissed as this Court must acknowledge and recognize the Australian decrees. . . . Since there has been an adjudication of these matters and recent pending litigation in the Australian Courts, this Court declines to exercise jurisdiction in this instance.

26. Finally, Goforth argues that this matter has been litigated and appealed to the highest Court of the State of Arkansas. Additionally, the issue of paternity has been litigated in Australia, and that court has ruled that this is a child of the marriage. These orders have never been contested or appealed and are final. Specific rulings and findings have been issued, and this Court must give full faith and credit to those orders and findings. This Court agrees.

[3] Numbering error is exactly as it appears in the record.

Duckett filed a Rule 59(e), SCRCP, motion for reconsideration, which the family court denied.

ISSUES

I. Did the family court err in concluding it lacked subject matter jurisdiction when South Carolina is the home state of the minor child?

II. Did the family court err in concluding it did not have personal jurisdiction over Goforth?

III. Did the family court err in concluding it was without jurisdiction because of a prior Australian decree?

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005) (citing Emery v. Smith, 361 S.C. 207, 213, 603 S.E.2d 598, 601 (Ct. App. 2004)). However, this broad scope of review does not require this court to disregard the family court's findings. Lacke v. Lacke, 362 S.C. 302, 307, 608 S.E.2d 147, 149 (Ct. App. 2005) (citing Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002)); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App 1999). Nor must we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003) (citing Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E. 2d 154, 157 (1996)). However, our broad scope of review does not relieve the appellant of the burden of convincing this court the family court committed error. Nasser-Moghaddassi, 364 S.C. at 190, 612 S.E.2d at 711 (citing Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979)).

LAW/ANALYSIS

I. Uniform Child Custody Jurisdiction Act (UCCJA)

A. Subject Matter Jurisdiction

Duckett contends South Carolina is the home state of the child and the family court erred in finding it lacked subject matter jurisdiction. We agree. Additionally, Duckett maintains the family court erred in concluding this matter should be dismissed because the court must recognize the Australian decree in accordance with section 20-7-830 of the South Carolina Code (1985). We agree.

"The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." Badeaux v. Davis, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999). Because Duckett's amended complaint included a request for custody, the jurisdictional question requires analysis under the Uniform Child Custody Jurisdiction Act (UCCJA).[4]

The UCCJA was enacted to:

> (1) avoid jurisdictional competition and conflict with courts in other states in matters of child custody . . . ; (2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child; (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available. . . .

S.C. Code Ann. § 20-7-784 (1985) (emphasis added).

[4] The UCCJA was adopted in South Carolina in 1981 and codified in the South Carolina Code of Laws sections 20-7-782 through 830 (1985). See Sinclair v. Albrecht, 287 S.C. 20, 21, 336 S.E.2d 485, 486 (Ct. App. 1985).

Under the UCCJA, a state has jurisdiction to make an initial or change in custody determination if

> (1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or
> (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training and personal relationships; or
> (3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
> (4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3) of subsection (a), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child and (ii) it is in the best interest of the child that this court assume jurisdiction.

S.C. Code Ann. § 20-7-788 (a)(1985); Charest v. Charest, 329 S.C. 511, 518, 495 S.E.2d 784, 787 (Ct. App. 1997); see also § 20-7-788 (b) (suggesting that when another state has declined jurisdiction, physical presence in this state of the child, or of the child and one of the contestants, may be sufficient to confer jurisdiction on a court of this state to make a child custody determination).

South Carolina is unquestionably the home state of this child. "Home state" means the state where the child lived with a parent for at least six consecutive months immediately preceding the time of the action. S.C. Code Ann. § 20-7-786(5) (1985); Charest, 329 S.C. at 518, 495 S.E.2d at 788. H.J. has resided with her mother in Greenwood County since June 2001, well over the six consecutive months preceding commencement of this action. Indeed, by the time of this appeal, H.J. will have lived nearly half of her life in South Carolina. Williams v. Williams, 285 S.C. 270, 272, 329 S.E.2d 751, 751 (1985) (holding where mother and child had lived in South Carolina for seven years prior to the action, South Carolina was the home state and the more convenient forum under UCCJA).

Additionally, H.J. has attended the same school in Greenwood County since entering the first grade. All records pertaining to her schooling are in Greenwood County. H.J.'s medical care has been provided in Greenwood County since she was six years old. Substantial evidence concerning H.J.'s present or future care, protection, training, and personal relationships is available only in South Carolina. Moreover, the Arkansas Supreme Court declined to exercise jurisdiction over the matter, acknowledging that Arkansas was not H.J.'s home state.

Goforth considers Australia the "decree state." A South Carolina court may not modify a decree from another state unless: "(1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this subarticle or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction." S.C. Code Ann. § 20-7-810(a) (1985). The UCCJA defines "state" as "any state, territory or possession of the United States, the Commonwealth of Puerto Rico and the District of Columbia." S.C. Code Ann. § 20-7-786(10) (1985).

Concomitantly, Goforth suggests that section 20-7-830 requires South Carolina courts to recognize the continuing jurisdiction of the Australian tribunal. This section applies UCCJA provisions relating to the recognition and enforcement of decrees issued by other states "to custody decrees and decrees involving legal institutions similar in nature to custody, rendered by appropriate authorities of other nations if reasonable notice and opportunity

to be heard were given to all affected persons." S.C. Code Ann § 20-7-830 (1985). [5]

The parties dispute whether a foreign country is the same as another state under the UCCJA. We need not reach that determination. Even if Australia were recognized as the "decree state," it no longer retains jurisdiction under jurisdictional prerequisites substantially in accordance with the UCCJA. § 20-7-810(a)(1), supra.

Although more than one state may meet the jurisdictional requirements under the UCCJA, once a custody decree has been entered, the continuing jurisdiction of the decree state is exclusive. Charest v. Charest, 329 S.C. 511, 518, 495 S.E.2d 784, 788 (Ct. App. 1997) (citing Sinclair v. Albrecht, 287 S.C. 20, 336 S.E.2d 485 (Ct. App. 1985)). Jurisdiction continues if one parent resides in the decree state and substantial evidence remains there, even though another state has become the child's home state. Id. A court may exercise continuing jurisdiction when "there are sufficient contacts with the child and his parent(s) to justify legitimate state interest in the outcome of the dispute, and if sufficient evidence is available to enable the court to make a fair determination of custody based upon the best interest of the child." Widdicombe v. Tucker-Cales, 366 S.C. 75, 87, 620 S.E.2d 333, 340 (Ct. App. 2005) (quoting Cullen v. Prescott, 302 S.C. 201, 206, 394 S.E.2d 722, 725 (Ct. App. 1990)).

On the other hand, if connection with the decree state ends because all parties involved have moved away or contact with the decree state has become slight, another state may assume jurisdiction to modify the decree. Knoth v. Knoth, 297 S.C. 460, 463, 377 S.E.2d 340, 342 (1989) (explaining

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[5] In order to invoke section 20-7-830, all parties affected by the Australian proceeding must have been afforded reasonable notice and opportunity to be heard on the issue of paternity, assuming, as Goforth claims, that paternity was actually litigated. As the putative biological father Goforth was an affected party. Yet, nothing in the record indicates he received any notification of the proceeding. Therefore, Goforth's reliance on section 20-7-830 to have the Australian decree recognized and enforced by the South Carolina family court is misplaced.

that jurisdiction of the decree state is exclusive and continues unless the state no longer meets the jurisdictional requirements or declines to exercise jurisdiction) (emphasis added). The South Carolina family court may obtain jurisdiction if it is in the best interest of the child because (1) the child and his parents, or the child and at least one contestant, have a significant connection with the state and (2) substantial evidence is available in the state concerning the child's present or future care, protection, training, and personal relationships. S.C. Code Ann. § 20-7-788 (a)(2) (1985) (emphasis added).

"Courts will exercise jurisdiction based upon these criteria if there are sufficient contacts with the child and his parent(s) to justify legitimate state interest in the outcome of the dispute, and if sufficient evidence is available to enable the court to make a fair determination of custody based upon the best interest of the child." Cullen v. Prescott, 302 S.C. 201, 206, 394 S.E.2d 722, 725 (Ct. App. 1990).

In Cullen, 302 S.C. at 205, 394 S.E.2d at 724, we reversed the family court's conclusion that it did not have jurisdiction to modify a Georgia custody decree. We found section 20-7-788(a)(2) provides South Carolina courts may assume jurisdiction of a custody dispute upon a finding that it is in the best interest of the child to do so, if the child and a parent have significant connection with this state and substantial evidence is available in the state concerning the child's present or future care, protection, training and personal relationships. Cullen, 302 S.C. at 205, 394 S.E.2d at 724.

Our reasoning in Cullen applies to the circumstances in the case sub judice. H.J. has not lived in Australia since 2001 but has lived in South Carolina with her mother nearly half of her life. Evidence concerning her present and future welfare is available only in South Carolina. Moreover, contact with Australia has become so slight that it no longer meets jurisdictional requirements under section 20-7-788(a). Because the Australian tribunal no longer has jurisdiction over the matter, South Carolina has jurisdiction and can modify the prior custody decree as the home state. It is in H.J.'s best interest that the question of paternity be resolved. To ensure that custody litigation takes place where H.J. has the closest connection, the South Carolina family court should adjudicate the issues in this case.

Furthermore, South Carolina has a legitimate interest in the outcome of this dispute where it affects welfare and protection of its young citizenry. The legislature has granted the family court broad and comprehensive authority in providing for children in this State. 21 S.C. Jur. Children and Families, § 153. To that end, the family court has exclusive jurisdiction to hear and determine proceedings to compel the support of a child; to include in the requirements of an order for support the providing of necessary shelter, food, clothing, care, medical attention, expenses of confinement, both before and after the birth, the expense of educating his or her child and other proper and reasonable expenses; to require persons able to provide support to pay a fair and reasonable sum on a periodic basis; to make orders for support until the child is eighteen years of age or is emancipated or where there are physical or mental disabilities; to determine the manner in which child support is paid, that is, directly or through the court; to require a person ordered to support another to give security; to hold those persons who violate court orders with regard to child support in contempt and to sentence them appropriately; to modify or vacate any order; and to make any order necessary to carry out and enforce the provisions of the Code, all without the intervention of a jury. Id. (citing S.C. Code Ann. § 20-7-420 (Supp. 2006)).

"The only limitation upon the court's power to provide for the maintenance of children, including security therefor, is that such provision shall be just and equitable, considered in the light of the circumstances of the parties, the nature of the case, and the best interests of the children." Id. (citing Fender v. Fender, 256 S. C. 399, 408, 182 S. E. 2d 755, 759 (1971)).

B. Venue

Duckett asserts that South Carolina is the proper venue to determine the issues in this case. We agree.

"Even if South Carolina has jurisdiction to consider a custody issue, the Family Court in its discretion may decline to exercise jurisdiction if it finds that it is an inconvenient forum to make a custody determination under the circumstances and another State is a more appropriate forum." Charest v Charest, 329 S.C. 511, 519, 495 S.E.2d 784, 788 (Ct. App. 1997).

> In determining whether it is an inconvenient forum, the UCCJA provides a court should consider whether it is in the child's interest that another state assume jurisdiction by evaluating the following factors, among others: (1) If another state is or recently was the child's home state; (2) If another state has a closer connection with the child and his family or with the child and one or more of the contestants; (3) If substantial evidence concerning the child's present or future care, protection, training and personal relationships are more readily available in another state; (4) if the parties have agreed on another forum which is no less appropriate;(5) If the exercise of jurisdiction by a court of this State would contravene any of the purposes state in § 20-7-784.

Id. (citing S.C. Code Ann. § 20-7-796(c) (1985)).

As H.J.'s home state for nearly one-half of her life, South Carolina has the most significant connections with her present and future welfare. No other State or country has a closer connection to H.J. and her mother. Substantial evidence of H.J.'s care, protection, training and personal relationships are NOT more readily available in another state. Accordingly, under these circumstances we rule South Carolina is not an inconvenient forum in which to adjudicate the issues in this action.

C. Personal Jurisdiction

Duckett argues the trial court erred in determining the family court did not have personal jurisdiction over Goforth. We agree.

The UCCJA establishes that personal jurisdiction of an out of state resident may be obtained if the following requirements are satisfied:

> (a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:
>
> (1) by personal delivery outside this State in the manner prescribed for service of process within this State;

> (2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;
> (3) by any form of mail addressed to the person to be served and requesting a receipt;
> (4) as directed by the court, including publication, if other means of notification are ineffective.
>
> (b) Notice under this section shall be served, mailed or delivered, or last published, at least twenty days before any hearing in this State. Provided, however, that in proceedings pursuant to § 20-7-788 (a) (3) above, upon a showing by the moving party that an emergency or abandonment situation exists within the meaning of § 20-7-788 (a) (3) so as to place the child in jeopardy, the court may shorten the notice period to such period as it may deem to be in the best interests of the child.
>
> (c) Proof of service outside this State may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.
>
> (d) Notice is not required if a person submits to the jurisdiction of the court.

S.C. Code Ann. § 20-7-792 (1985).

Service on Goforth was properly effected at least twenty days prior to the April 11, 2005 hearing on his motion. Importantly, Goforth appeared for the purpose of contesting jurisdiction in his motion to dismiss, indicating he had actual notice of the proceedings. Duckett satisfied the service of process requirements under the applicable law of this State to give the family court personal jurisdiction over Goforth. Accordingly, we hold the family court erred in finding it lacked personal jurisdiction.

The family court, nonetheless, determined it lacked personal jurisdiction over Goforth because no evidence existed to rebut the presumption that Greenhough was H.J.'s father.

"The presumption of legitimacy, although rebuttable, is one of the strongest known to law." Hudson v. Blanton, 282 S.C. 70, 75, 316 S.E.2d 432, 434 (Ct. App. 1984) (citing Barr's Next of Kin v. Cherokee, Inc., 220 S.C. 447, 68 S.E.2d 440 (1951). "Every child born in wedlock is presumed to be legitimate." Id. (citing Tarleton v. Thompson, 125 S.C. 182, 118 S.E. 421 (1923)). The presumption of a husband's access to his wife "must be overcome by the clearest evidence that it was impossible for him, by reason of impotency or imbecility, or entire absence from the place where the wife was during the period of conception," to have fathered the child. Id. at 75, 316 S.E.2d at 435 (citations omitted).

It strains the imagination to conceive of a more persuasive record rebutting the presumption of paternity. Admittedly, Greenhough signed H.J.'s birth certificate at Duckett's request and agreed to be H.J.'s father because Duckett feared raising a child on her own. However, Greenhough's January 12, 2000 affidavit indicated he and Duckett understood Greenhough was not H.J.'s biological father. Greenhough claimed he was infertile and he never acknowledged paternity. Shortly after filing her 2001 petition for divorce in Australia, Duckett named Goforth the putative biological father. Her affidavit of April 11, 2005 alleged Greenhough was unable to father a child and was not H.J.'s biological father. Additionally, Duckett explained she believed Goforth was the biological father because they were sexually involved when H.J. was conceived, and she was not having a sexual relationship with her husband at the time of conception. Significantly, Greenhough was physically located in Australia when H.J. was conceived in the Phillipines.

The testimony of a husband and wife as to "any relevant matter" is admissible on the issue of paternity, including testimony regarding parentage and marriage. Roy T. Stuckey, Marital Litigation in South Carolina 359 (3d ed. 2001) (citing S.C. Code Ann. § 20-7-956 (A)(8) (1976). Although irrelevant to the determination that the family court had personal jurisdiction

over Goforth, we conclude Duckett's evidence sufficiently rebutted the presumption of Greenhough's paternity.

II. Res judicata

Duckett claims the family court erred in finding custody, child support, and paternity had been litigated in Australia and in affording full faith and credit to the Australian tribunal's ruling. We agree.

Though not specifically referring to the doctrine of res judicata in its order, it appears the family court intended to rule that either res judicata or collateral estoppel barred litigation of the issues in the present action.

Res judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action. S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 249, 551 S.E.2d 274, 278 (Ct. App. 2001) (citation omitted). The doctrine flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). "Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." Nelson v. QHG of S.C., Inc., 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003) (quoting James F. Flanagan, South Carolina Civil Procedure 642 (2d ed. 1996)) rev'd in part on other grounds, 362 S.C. 421, 608 S.E.2d 855 (2005). A party seeking to preclude litigation on the grounds of res judicata must show: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue on the merits in the former suit by a court of competent jurisdiction. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

Res judicata does not bar the present litigation. The parties to the Australian litigation were Duckett and Greenhough; Goforth and Duckett are parties in the present litigation. The subject of the Australian proceeding was adjudication of custody, child support, visitation, and other related issues

between Duckett and Greenhough. The action here is for determination of paternity, an award of custody, and child support between Duckett and Goforth. The issues of custody and child support have never been litigated between Duckett and Goforth. Moreover, the issue of paternity was not fully and finally adjudicated by the Australian tribunal.[6]

"Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 698 (2006).

> A party may assert nonmutual collateral estoppel to prevent relitigation of a previously litigated issue unless the party sought to be precluded did not have a fair and full opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue.

Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 688 (Ct. App. 1998). However, collateral estoppel is an affirmative defense which must be pled and because Goforth never raised the defense, he may not invoke the defense on appeal. Jordan v. Jordan, 284 S.C. 342, 346, 326 S.E.2d 416, 418 (Ct. App. 1985) (holding defensive collateral estoppel is an affirmative defense and thus, must be plead).

Notwithstanding this procedural roadblock, collateral estoppel would not preclude Duckett from asserting a paternity claim against Goforth. Paternity was not "actually and necessarily litigated and determined" in the prior Australian proceeding. The family court erred in concluding the Australian decree constituted a determination of paternity.

Paternity is defined as "the state or condition of a father; the relationship of a father." Black's Law Dictionary 1126 (6th ed. 1990). Determining parentage is inextricably linked to this State's strong interest in

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[6]The Arkansas Supreme Court determined it lacked subject matter jurisdiction and dismissed Duckett's action, thus never reaching the merits. Accordingly, res judicata based on the Arkansas litigation does not bar the present action.

the protection of its children and provision for their welfare. Sections 20-7-952 through 958 of the South Carolina Code (Supp. 2006) encapsulate the legislature's policies in this regard:

> An action to establish the paternity of an individual may be brought by:
> (1) A child;
> (2) The natural mother of a child;
> (3) Any person in whose care a child has been placed;
> (4) An authorized agency, including, but not limited to, the Department of Social Services, pursuant to the provisions of Chapter 5 of Title 43, and any other person or agency pursuant to the provisions of §§ 20-7-435 and 20- 7-840; or
>
> (5) A person who claims to be the father of a child.

S.C. Code Ann. § 20-7-952 (C) (Supp. 2006).

> As soon as practicable after an action has been commenced, the court, upon its motion or that of an interested party, may order the natural mother, the putative father, and the child to submit to genetic tests such as red blood cell antigen testing, human leukocyte antigen (HLA) testing, electrophoresis, or other tests which have been developed for the purpose of proving or disproving parentage and which are reasonably accessible. . . .
>
> For all child support cases not administered under Title IV-D of the Social Security Act, the child and all parties in a contested paternity case, upon the request of any party to the action, must be ordered by the court to submit to the genetic testing, as provided for in subsection (A), to determine paternity.

S.C. Code Ann. § 20-7-954 (A), (C) (Supp. 2006).

> Upon a finding that the putative father is the natural father of the child, the court must issue an order designating the putative father as the natural father. The order also shall set forth the

> social security numbers, or the alien identification numbers assigned to resident aliens who do not have social security numbers, of both parents. The order shall establish a duty of support and provide for child support payments in amounts and at a frequency to be determined by the court. The order also shall provide for other relief which has been properly prayed for in the pleadings and which is considered reasonable and just by the court. Upon a finding that the putative father is not the father of the child, the court shall issue an order which sets forth this finding.

S.C. Code Ann. § 20-7-957 (Supp. 2006).

The Australian tribunal found that H.J. was a "child of the marriage" in the context of issuing the divorce decree. As Duckett points out in her brief on appeal " 'child of the marriage' for the purposes of use in a[n Australian] Decree Nisi for dissolution of marriage is defined as child (including an ex-nuptial child of either the husband or the wife, a child adopted by either of them or a child who is not a child of either of them) is a child of the marriage, if the child was treated by the husband and wife as a child of their family at the relevant time.' " Appellant's Brief on Appeal (citing Australian Family Law Act § 55A(3) Part VI (1975)). Notably, a "child of the marriage" in Australia may include children who are not the biological progeny of either spouse.

In South Carolina, a paternity determination for the purposes of child support relates to the natural or biological relationship between father and child. See S.C. Code Ann §§ 20-7-952 through 958 (Supp. 2006). While a child born during a marriage is the presumed legitimate child of the husband, that presumption may be rebutted by a paternity determination. Douglass ex rel. Louthian v. Boyce, 344 S.C. 5, 8, 542 S.E.2d 715, 716-17 (2001) (interpreting S.C. Code Ann. § 20-7-952 (E) (1985)). Treating a child as a child of the family during the marriage does not rise to the level of a paternity determination in South Carolina. Accordingly, it is incumbent on the family court to address the question of Goforth's paternity in order to assure H.J. is supported in a manner consistent with South Carolina's legislative mandate.

CONCLUSION

We hold that South Carolina is unquestionably the home state of the minor child and the proper venue for adjudication of the issues presented herein. The Australian tribunal no longer satisfies jurisdictional requirements under the UCCJA to retain jurisdiction over matters involving H.J.'s interests. We rule personal jurisdiction over Goforth was properly obtained according to the applicable provisions of the UCCJA. Neither res judicata nor collateral estoppel bars this action. The prior Australian proceeding involved different parties and the issue of paternity was never fully and finally litigated.

Accordingly, the order of the family court dismissing this action is

REVERSED and REMANDED.

HUFF and BEATTY, JJ., concur.

The South Carolina Court of Appeals

Raymond C. Harrison,
#316664, Appellant,

v.

Sherry Diane Harrison, Defendant.

The Honorable Robert N. Jenkins, Sr.
Anderson County
Trial Court Case No. 2007-DR-04-0000B

ORDER

Raymond Harrison, Appellant, is currently incarcerated. He sought to file for a divorce from his wife. He filed a summons and complaint with the county clerk of court, as well as a motion and affidavit to proceed in forma pauperis. He did not include any filing fees with his summons and complaint or the motion. The motion to proceed in forma pauperis was denied. Appellant then filed a motion for reconsideration. He received from the Chief Deputy Clerk of Court for Anderson County a letter that read:

> We forwarded your Motion for Reconsideration to the Honorable Robert N. Jenkins, Jr., who had denied your Motion for In Forma Pauperis. Judge Jenkins returned your Motion for Reconsideration to our office and states he will not amend his decision.

Appellant filed this appeal with a caption that reads Ex Parte Raymond Harrison v. The State, In re Raymond Harrison v. Sherry Diane Harrison.[1] Appellant also has filed a motion to proceed in forma pauperis in this court in which he indicates he has no means of earning an income while incarcerated and has no assets with which he can pay the filing fees.

In Lakes v. State, 333 S.C. 382, 510 S.E.2d 228 (Ct. App. 1998), this court found the order denying Lakes' request to proceed in forma pauperis effectively discontinued the action because Lakes' only means of bringing the action was in forma pauperis, and therefore, the order was immediately appealable. In Ex Parte: Martin v. State, 321 S.C. 533, 471 S.E.2d 134 (1995), the supreme court addressed when an inmate may proceed in forma pauperis. The supreme court held: "In the absence of a statutory provision allowing the general waiver of filing fees, we conclude motions to proceed in forma pauperis may only be granted where specifically authorized by statute or required by constitutional provisions." Id. at 535, 471 S.E.2d at 134-35 (citations omitted). The supreme court went on to state: "Further, where certain fundamental rights are involved, the Constitution requires that an indigent be allowed access to the courts. Id. at 535, 471 S.E.2d at 135 (citing as an example Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (an indigent must be given access to courts in divorce action)).

The United States Supreme Court stated in Boddie: "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie, 401 U.S. at 377. The court summarized its position by stating:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and

[1] The State filed an informal return indicating it was not a party to the underlying action and had no interest on appeal.

> the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

Id. at 374.

The facts of this case indicate Appellant is indigent and seeks access to this court to appeal the denial of his motion to proceed in forma pauperis in the family court. Boddie clearly requires Appellant be allowed to proceed in forma pauperis both in this court and in the family court.

Appellant's motion to proceed in forma pauperis in this appeal is granted. Additionally, we reverse the family court's order and remand this case to the family court to allow Appellant to proceed in forma pauperis in his family court action.

AND IT IS SO ORDERED.

C. Tolbert Goolsby, Jr., J.

John W. Kittredge, J.

Jasper M. Cureton, A.J.

Columbia, South Carolina

5/21/2007

cc: Raymond C. Harrison
Sherry D. Harrison