Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

June 21, 2021

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

The term of office currently held by the Honorable Kaye G. Hearn, Justice of the Supreme Court, Seat 4, will expire July 31, 2022.

A vacancy will exist in the office currently held by the Honorable James E. Lockemy, Judge of the Court of Appeals, Seat 5, upon his retirement on or before December 31, 2021. The successor will serve the remainder of the unexpired term, which expires June 30, 2027.

The term of office currently held by the Honorable David Garrison "Gary" Hill, Judge of the Court of Appeals, Seat 9, will expire June 30, 2022.

A vacancy will exist in the office currently held by the Honorable Edgar Warren Dickson, Judge of the Circuit Court, First Judicial Circuit, Seat 1, upon his retirement on or before June 30, 2022. The successor will serve a new term of that office, which will expire June 30, 2028.

The term of office currently held by the Honorable Diane Schafer Goodstein, Judge of the Circuit Court, First Judicial Circuit, Seat 2, will expire June 30, 2022.

The term of office currently held by the Honorable Courtney Clyburn Pope, Judge of the Circuit Court, Second Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Ralph Ferrell Cothran Jr., Judge of the Circuit Court, Third Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Paul M. Burch, Judge of the Circuit Court, Fourth Judicial Circuit, Seat 1, will expire June 30, 2022.

A vacancy will exist in the office currently held by the Honorable L. Casey Manning, Judge of the Circuit Court, Fifth Judicial Circuit, Seat 2, upon his retirement on or before December 31, 2022. The successor will serve the remainder of the unexpired term, which expires June 30, 2024.

The term of office currently held by the Honorable Brian M. Gibbons, Judge of the Circuit Court, Sixth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Frank R. Addy Jr., Judge of the Circuit Court, Eighth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Perry H. Gravely, Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Alex Kinlaw Jr., Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 4, will expire June 30, 2022.

The term of office currently held by the Honorable Steven H. John, Judge of the Circuit Court, Fifteenth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable William Angus McKinnon, Judge of the Circuit Court, Sixteenth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Daniel Dewitt Hall, Judge of the Circuit Court, Sixteenth Judicial Circuit, Seat 2, will expire June 30, 2022.

A vacancy will exist in the office currently held by the Honorable William J. Wylie Jr., Judge of the Family Court, First Judicial Circuit, Seat 2, upon his retirement on or before June 30, 2022. The successor will serve a new term of that office, which expires June 30, 2028.

A vacancy exists in the office formerly held by the Honorable Nancy Chapman McLin, Judge of the Family Court, First Judicial Circuit, Seat 3, upon her retirement on June 4, 2021. The successor will serve a new term of that office, which expires June 30, 2028.

The term of office currently held by the Honorable Vicki Johnson Snelgrove, Judge of the Family Court, Second Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Thomas Murray Bultman, Judge of the Family Court, Third Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Cely Ann Brigman, Judge of the Family Court, Fourth Judicial Circuit, Seat 1, will expire June 30, 2022.

A vacancy exists in the office formerly held by the Honorable Michael S. Holt, Judge of the Family Court, Fourth Judicial Circuit, Seat 3, upon his election to the Circuit Court, Fourth Judicial Circuit, Seat 2. The successor will serve the remainder of the unexpired term, which expires June 30, 2026.

The term of office currently held by the Honorable C. Vance Stricklin Jr., Judge of the Family Court, Fifth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Gwendlyne Young Jones, Judge of the Family Court, Fifth Judicial Circuit, Seat 4, will expire June 30, 2022.

The term of office currently held by the Honorable Usha J. Bridges, Judge of the Family Court, Seventh Judicial Circuit, Seat 3, will expire June 30, 2022.

The term of office currently held by the Honorable Mindy Westbrook Zimmerman, Judge of the Family Court, Eighth Judicial Circuit, Seat 2, will expire June 30, 2022.

The term of office currently held by the Honorable Daniel E. Martin Jr., Judge of the Family Court, Ninth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Michèle Patrão Forsythe, Judge of the Family Court, Ninth Judicial Circuit, Seat 3, will expire June 30, 2022.

A vacancy will exist in the office currently held by the Honorable Jack A. Landis, Judge of the Family Court, Ninth Judicial Circuit, Seat 6, upon his retirement on or before June 30, 2022. The successor will serve a new term of that office, which expires June 30, 2028.

A vacancy exists in the office formerly held by the late Honorable Edgar H. Long, Judge of the Family Court, Tenth Judicial Circuit, Seat 1. The successor will serve the remainder of the unexpired term, which expires June 30, 2025.

The term of office currently held by the Honorable Karen F. Ballenger, Judge of the Family Court, Tenth Judicial Circuit, Seat 2, will expire June 30, 2022.

The term of office currently held by the Honorable William Gregory Seigler, Judge of the Family Court, Eleventh Judicial Circuit, Seat 1, will expire June 30, 2022.

A vacancy will exist in the office currently held by the Honorable Jerry D. Vinson Jr., Judge of the Family Court, Twelfth Judicial Circuit, Seat 3, upon his election to the Court of Appeals, Seat 8. The successor will serve a new term of that office, which expires June 30, 2028.

The term of office currently held by the Honorable Katherine Hall Tiffany, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 3, will expire June 30, 2022.

The term of office currently held by the Honorable Karen Sanchez Roper, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 4, will expire June 30, 2022.

The term of office currently held by the Honorable Jessica Ann Salvini, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 6, will expire June 30, 2022.

The term of office currently held by the Honorable Douglas L. Novak, Judge of the Family Court, Fourteenth Judicial Circuit, Seat 2, will expire June 30, 2022.

The term of office currently held by the Honorable Melissa J. Buckhannon, Judge of the Family Court, Fifteenth Judicial Circuit, Seat 2, will expire June 30, 2022.

A vacancy will exist in the office formerly held by the Ronald R. Norton, Judge of the Family Court, Fifteenth Judicial Circuit, Seat 3, upon his retirement on or before December 31, 2022. The successor will serve the remainder of the unexpired term, which expires June 30, 2026.

The term of office currently held by the Honorable Thomas H. White, Judge of the Family Court, Sixteenth Judicial Circuit, Seat 1, will expire June 30, 2022.

The term of office currently held by the Honorable Milton G. Kimpson, Judge of the Administrative Law Court, Seat 2, will expire June 30, 2022.

The term of office currently held by the Honorable Walter Sanders Jr., Master-in-Equity, Allendale County, will expire December 31, 2022.

The term of office currently held by the Honorable Steven Coleman Kirven, Master-in-Equity, Anderson County, will expire June 30, 2022.

The term of office currently held by the Honorable Mikell R. Scarborough, Master-in-Equity, Charleston County, will expire December 24, 2022.

The term of office currently held by the Honorable Joseph King Coffey, Master-in-Equity, Clarendon County, will expire June 30, 2022.

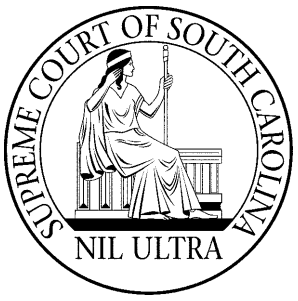
The term of office currently held by the Honorable James E. Chellis, Master-in-Equity, Dorchester County, will expire June 30, 2022.

A vacancy will exist in the office currently held by the Honorable Cynthia Graham Howe, Master-in-Equity, Horry County. The successor will serve the remainder of the unexpired term, which will expire June 30, 2027.

The term of office currently held by the Honorable Michael M. Jordan, Master-in-Equity, Sumter County, will expire December 31, 2022.

In order to receive application materials, a prospective candidate, including judges seeking re-election, must notify the Commission in writing of his or her intent to apply. Note that an email will suffice for written notification. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

Erin B. Crawford, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
ErinCrawford@scsenate.gov or (803) 212-6689



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OF

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AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
June 23, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Paul Traywick, Respondent.

Appellate Case No. 2021-000021

Opinion No. 28037
Heard May 25, 2021 – Filed June 18, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Kelly B. Arnold, both of Columbia, for the Office of Disciplinary Counsel.

Allyson Haynes Stuart and Nathan M. Crystal, of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of any sanction ranging from a confidential admonition to a definite suspension of six months, and agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct in investigating and prosecuting this matter. We accept the Agreement and suspend Respondent from the practice of law in this state for six months.

I.

Beginning in June 2020, ODC received complaints from forty-six separate individuals regarding statements Respondent made on his Facebook page. At that time, Respondent maintained a personal Facebook account with a privacy setting of "public," meaning his posts were visible to anyone, not just his Facebook "friends," and even if the person did not have a Facebook account. In his Facebook profile, Respondent identified himself as a lawyer and referenced his law firm.

On June 12, 2020, this Court placed Respondent on interim suspension. *In re Traywick*, 430 S.C. 364, 844 S.E.2d, 674 (2020).

II.

ODC identified twelve statements Respondent made in Facebook posts ODC believes tended to bring the legal profession into disrepute and violated the letter and spirit of the Lawyer's Oath. *See* Rule 402(h)(3), SCACR (requiring lawyers to "maintain the dignity of the legal system"). Respondent admits these public statements tended to bring the legal profession into disrepute and acknowledges that through his statements, he violated the Lawyer's Oath. Respondent also admits his misconduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(5) (conduct tending to bring the courts or the legal profession into disrepute) and 7(a)(6) (violation of the Lawyer's Oath).

III.

All twelve of Respondent's statements are troubling. Nevertheless, we focus our analysis on only two of them. We do this mindful of Respondent's right to freedom of speech under the First Amendment to the United States Constitution. Importantly, however, Respondent does not raise a First Amendment challenge to discipline. His attorney wrote the Court after oral argument stating, "We do not think it is necessary for the Court to address First Amendment issues." For this reason, we will not analyze the impact of the First Amendment.

On April 5, 2020, Respondent posted an offensive comment regarding tattoos to his Facebook page. In the comment, he challenged his readers, "Prove me wrong. Pro

tip: you can't." A reader wrote back suggesting Respondent prove he was right regarding his theory about tattoos. Respondent then stated,

> The general statement has exceptions, such as for bikers, sailors, convicts or infantry. But these college educated, liberal suburbanites. No, the rule was written for these boring mother fuckers. And they are everywhere. Fuck em. Especially these females, Jesus Christ!

On May 25, 2020, George Floyd—a black man—was murdered by a white police officer in Minneapolis, Minnesota. The racially-charged atmosphere that resulted from Mr. Floyd's murder is well-known. On June 3, 2020, at the height of this racially-charged intensity, Respondent posted the following to his Facebook page,

> Here's how much that shitstain's life[1] actually mattered: Stock futures up. Markets moved higher Monday and Tuesday. Fuck you. Unfriend me.

We find these two comments warrant a six-month suspension. These comments are not expressive; they are expressly incendiary. Both are statements by a lawyer on his social media account identifying him as such and listing the name of his law firm. The statements were intended to incite, and had the effect of inciting, gender and race-based conflict beyond the scope of the conversation Respondent would otherwise have with his Facebook "friends." The fact Respondent is a lawyer exacerbated this effect.

We are particularly concerned with the statement regarding Mr. Floyd. We find this statement was intended to incite intensified racial conflict not only in Respondent's Facebook community, but also in the broader community of Charleston and beyond. We hold this statement in particular tended to bring the legal profession into disrepute, violated the letter and spirit of the Lawyer's Oath, and constitutes grounds for discipline under Rules 7(a)(5) and 7(a)(6), RLDE, Rule 413, SCACR.

Accordingly, we accept the Agreement and suspend Respondent from the practice of law in this state for six months. The suspension is retroactive to Respondent's

[1] Respondent was referring to Mr. Floyd.

interim suspension on June 12, 2020.[2] We further impose the following conditions to which Respondent consented in the Agreement or at oral argument: (1) within one year from the date of this Opinion, Respondent shall complete at least one hour of diversity education approved by the Commission on Continuing Legal Education and Specialization; (2) within three months from the date of this Opinion, Respondent shall complete a comprehensive anger management assessment with a licensed mental health doctor or therapist; (3) also within three months, Respondent shall undergo an evaluation through the Lawyers Helping Lawyers program of the South Carolina Bar; (4) for a period of one year from the date of this Opinion, Respondent shall comply with any and all recommendations from these assessments, including treatment; (5) for a period of one year from the date of this Opinion, Respondent shall report quarterly to the Commission, including submitting an affidavit of compliance and a statement from the provider of any recommended treatment; and (6) within thirty days of the end of the one-year period beginning with the date of this Opinion, Respondent shall file with the Commission a final report from any treatment provider, including a complete assessment of Respondent's mental health status and specifically addressing Respondent's compliance with the recommended course of treatment. The report must also contain the treatment provider's recommendations for future treatment, if any.

Within thirty days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan with the Commission to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[2] Pursuant to Rules 2(o) and 17(b), RLDE, Rule 413, SCACR, interim suspension is automatically lifted upon this "final determination" of disciplinary proceedings.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Gary White, III, Respondent.

Appellate Case No. 2021-000029

Opinion No. 28038
Submitted June 3, 2021 – Filed June 23, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Deputy Disciplinary Counsel Carey Taylor Markel, both of Columbia, for the Office of Disciplinary Counsel.

William Gary White, III, of Leesville, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of any sanction contained in Rule 7(b), RLDE, Rule 413, SCACR, and agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (Commission) in investigating and prosecuting this matter. We accept the Agreement and suspend Respondent from the practice of law in this state for three years.

I.

Matter A

On March 7, 2011, Respondent filed a summons and complaint in state court on behalf of Client A. Respondent did not serve the summons and complaint on behalf of his client. On that same date, this Court suspended Respondent from the practice of law in this state for a period of ninety days. *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011). On March 11, 2011, this Court appointed Ian McVey to serve as an attorney to protect the interests of Respondent's clients, including assuming responsibility for Respondent's client files. In this role, McVey discovered that Client A had written three letters to Respondent on April 12, 2011, April 19, 2011, and April 20, 2011.

On April 27, 2011, McVey wrote to Client A, informing him of Respondent's suspension and that Respondent therefore could not represent Client A. McVey also informed Client A that he would file a motion to stay the proceedings in the lawsuit Respondent had filed on Client A's behalf. On May 11, 2011, McVey filed a motion requesting that the circuit court stay the pending action until it could be "transferred to other counsel or the end of [Respondent's] suspension whichever comes first." At the time of Respondent's suspension, Client A was incarcerated.

On June 11, 2011, Respondent was reinstated to the practice of law in this state and thereafter remained counsel of record for Client A. Over a year and a half after Respondent was reinstated to the practice of law, he had taken no further action on behalf of Client A in the prosecution of Client A's case. Indeed, Respondent failed to serve the summons and complaint or prosecute Client A's case. On December 4, 2012, the circuit court dismissed the lawsuit with prejudice pursuant to Rule 5(d), SCRCP, stating "over a year and a half after [Respondent's] suspension ended, it appears that no further action has been taken towards the prosecution of this action."

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.3 (diligence) and Rule 1.4 (communication).

Matter B

In September 2013, Respondent secured the court-reporting services of Southern Reporting, Inc., for four depositions. Southern Reporting produced and delivered the transcripts Respondent requested. On September 12, 2013, Southern Reporting invoiced Respondent for its deposition services in the amount of $752.95. Respondent did not remit payment. After multiple inquiries from Southern Reporting requesting that Respondent pay the invoices, Respondent emailed Southern Reporting on February 5, 2014, stating "I [will] start getting you caught up." On April 3, 2014, Southern Reporting submitted a complaint to ODC regarding Respondent's failure to pay for its services. Respondent did not pay Southern Reporting for its services until June 2015.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 4.4 (respect for rights of third persons) and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Matter C

Respondent represented Client C as a plaintiff in a lawsuit in federal court. The defendants in the lawsuit served written discovery requests on Respondent; however, Respondent provided only partial and incomplete responses and failed to complete standard interrogatories required by the local civil rules. Additionally, Respondent and his client failed to appear at Client C's duly noticed deposition. Thereafter, the defendants in the lawsuit moved to dismiss the action based on Respondent's failure to comply with the discovery rules. In his response to the motion to dismiss, Respondent referred to himself as a "semi-retired attorney with no staff or resources." The federal court denied the motion to dismiss and ordered Respondent to pay $3,015 of the defendants' legal fees as a sanction for Respondent's failure to comply with the court's discovery rules. This sum was payable within thirty days. Respondent did not move to reconsider or modify the order sanctioning him.

Respondent failed to pay the sum ordered, and the defendants again moved to dismiss. At the hearing, Respondent admitted he violated the sanctions order and had not represented his client competently but offered no substantive explanation for his repeated failure to adhere to court rules. Respondent requested a payment

plan, and the case was permitted to proceed. However, several months later, the federal court granted summary judgment in favor of the defendants. Notably, the evidence Respondent cited in opposition to the motion for summary judgment could not be considered because Respondent had not disclosed it in discovery.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); Rule 3.4(d) (failing to make reasonable efforts to comply with a legally proper discovery request); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (conduct prejudicial to the administration of justice.)

II.

Respondent admits his conduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules of Professional Conduct); Rule 7(a)(5) conduct tending to pollute the administration of justice); and 7(a)(7) (willful violation of a valid court order). Respondent also agrees that within thirty days of the imposition of discipline, he will pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

In terms of the appropriate sanction, we note Respondent's disciplinary history includes three published opinions from this Court. *See In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011) (imposing a ninety-day definite suspension and citing Rule 1.1 (competence), Rule 4.4 (respect for rights of third persons), and Rule 8.4(e) (conduct prejudicial to the administration of justice), RPC, Rule 407, SCACR); *In re White*, 378 S.C. 333, 663 S.E.2d 21 (2008) (imposing a six-month definite suspension citing Rule 1.1 (competence), Rule 1.2 (consulting with client and abiding by client's decisions), Rule 1.4 (communication), Rule 1.5 (properly concluding contingent fee matters), Rule 1.15 (safeguarding client property and rendering full accounting regarding client property), Rule 8.4(d) (conduct involving dishonesty), and Rule 8.4(e) (conduct prejudicial to the administration of justice), RPC, Rule 407, SCACR); and *In re White*, 328 S.C. 88, 492 S.E.2d 82 (1997) (publicly reprimanding Respondent for violating Rule 1.15(a) (comingling funds), Rule 1.16(d) (persistent refusal to return client file at the conclusion of representation), and Rule 3.5 (ex parte communication with the court), RPC, Rule 407, SCACR).

Respondent also received an admonition in 2001 citing Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 3.1 (frivolous proceeding), Rule 3.2 (expediting litigation), Rule 3.4 (fairness to opposing party and counsel), and Rule 5.3 (responsibilities regarding non-lawyer assistants), RPC, Rule 407, SCACR. *See* Rule 7(b)(4), RLDE, Rule 413, SCACR ("[A]n admonition may be used in subsequent proceedings as evidence of misconduct solely upon the issue of sanction to be imposed."). Additionally, from 1998 to 2012, Respondent received four letters of caution citing various Rules of Professional Conduct, Rule 407, SCACR, including Rule 1.3 (diligence), Rule 1.4 (communication), and Rule 8.4 (misconduct), all of which are implicated in the current matter. *See* Rule 2(s), RLDE, Rule 413, SCACR (a letter of caution may be considered in a subsequent disciplinary proceeding against the lawyer if the caution or warning contained therein is relevant to the misconduct alleged in the proceedings).

III.

In light of Respondent's lengthy disciplinary history and pattern of misconduct, we find a three-year definite suspension is appropriate. We accept the Agreement and suspend Respondent from the practice of law in this state for a period of three years. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. Within thirty days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Ontario Stefon Patrick Makins, Respondent.

Appellate Case No. 2020-000024

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 28039
Heard March 24, 2021 – Filed June 23, 2021

REVERSED

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, of Columbia; and Solicitor William W. Wilkins III, of Greenville, for Petitioner.

Appellate Defender Taylor Davis Gilliam, of Columbia, for Respondent.

JUSTICE JAMES: Ontario Stefon Patrick Makins was indicted for lewd act upon a minor, third-degree criminal sexual conduct (CSC) with a minor, and first-degree CSC with a minor.[1] He was convicted by a jury of third-degree CSC with a minor. The court of appeals reversed the conviction, holding a therapist's affirmation she treated the minor victim (Minor) improperly bolstered Minor's credibility. *State v. Makins*, 428 S.C. 440, 835 S.E.2d 532 (Ct. App. 2019). We granted the State's petition for a writ of certiorari.

Background

The State presented evidence at trial that Makins sexually abused Minor on several occasions when Minor was between the ages of five and eight. Minor was ten at the time of trial. After the allegations were made, Minor was treated by Kristin Rich, a childhood trauma therapist. Minor and Rich were the primary prosecution witnesses. The State called Rich both as an expert in the treatment of child trauma and child sexual abuse dynamics and as Minor's treating therapist. Rich's testimony as treating therapist is the basis of Makins's appeal. As Minor's treating therapist, Rich gave limited testimony about certain disclosures Minor made to her during therapy sessions. We address one primary issue in this appeal: by testifying both as an expert in characteristics of child trauma and child sexual abuse dynamics and as Minor's treating therapist, did Rich imply she thought Minor was truthful, thereby improperly bolstering Minor's credibility?

The trial court and the parties discussed vouching extensively throughout the trial. Before the jury was impaneled, the trial court expressed reservations about allowing certain portions of Rich's testimony:

> This is my concern about this witness and why I'm somewhat circumspect. We have a long line of cases which discuss expert witnesses buttressing the credibility of minor witnesses. And although I think that most of what [Rich] talked about in a vacuum is okay, my

[1] Third-degree CSC with a minor is codified in S.C. Code Ann. § 16-3-655(C) (2015). Conduct that would now qualify as third-degree CSC with a minor was formerly known as lewd act upon a minor and was codified in S.C. Code Ann. § 16-15-140 (repealed 2012). The effective date of the repeal of section 16-15-140 and its replacement with subsection 16-3-655(C) was June 18, 2012. The indictment range in this case began on June 17, 2012, and ended on March 20, 2015, so Makins was indicted for both lewd act and third-degree CSC with a minor.

> concern is that [Rich] begins to talk about the specific treatment and discussions with [Minor] and without saying "that makes her believable," [Rich] is suggesting that that makes [Minor] believable. And I want to make sure that what we're not doing is an end run around forensic interviewers being qualified as expert witnesses and thereby buttressing the credibility of witnesses. . . . [T]he question is, what opinion will be offered and how close are we going to get to [Rich] saying, "I talked to [Minor]. I diagnosed [Minor] as being a victim of childhood sexual trauma and all of her answers were consistent with my diagnosis for childhood sexual trauma."

The trial court continued:

> And when and if [Rich] gets to the point that says anything that suggests -- and I understand that she's not going to say it verbatim and she's not going to articulate it very, very clearly. But anything that suggest [sic] that "I diagnosed this girl and because she shows all of these signs, she's telling the truth," that's where we can't go.

Later in the pre-trial process, the trial court clarified:

> I don't think I have any issue with [Rich] saying that she talked to [Minor], and that [Minor] exhibits symptoms of post-traumatic stress disorder. Beyond that, I'm concerned that if [Rich] starts matching up her testimony with [Minor's] symptoms, we are essentially establishing a circumstance where she is vouching for the credibility of the witness. If that happens, I don't think that I have any choice but to declare a mistrial and I don't want to get there. You can put her in the -- on the stand to testify as a fact witness without any vouching for the credibility. And then use a blind witness if you want to. Or you can use a blind witness. But don't get to the point where she's vouching for the credibility, okay?

Before the jury, Rich testified about her training in and her use of "trauma-focused cognitive behavioral therapy, which is particularly related to childhood trauma." She defined trauma as:

> . . . a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them. And generally, it's

> shocking in nature where somebody feels helpless or terrorized or horrified. . . . It's something that tragically shifts your life.

Rich testified to her specialized trauma training, particularly for children who have disclosed sexual abuse. Rich estimated she had provided therapy to approximately 500 children over the course of her career and between 120 to 150 of those children had experienced trauma as a result of sexual abuse. After the trial court qualified her as an expert, Rich testified to the symptoms children exhibit that are associated with trauma and, more specifically, symptoms of sexual abuse trauma. She also explained delayed disclosure and why children often disclose such abuse in a piecemeal fashion over time.

At this juncture, the State said, "I want to move a little more specifically. Have you provided therapy to the victim in this case, [Minor]?" Rich replied, "[y]es." Defense counsel objected, the jury was excused, and defense counsel moved for a mistrial.

Defense counsel argued the combination of Rich's testimony about treating trauma victims, the focus on sexual abuse symptoms and trauma treatment, and her statement that a sizeable portion of her clients have suffered sexual abuse equated to Rich testifying, "'Every child I work with or every person I work with has suffered some trauma. That's why I provide counseling to them, is they are my clientele.'" Defense counsel argued Rich vouched for Minor's credibility by "saying in essence 'if she didn't suffer trauma, I wouldn't be working with her.'" He further argued, "she is saying, 'I believe Minor has suffered a trauma.'" To be clear, these comments by defense counsel were not quotes of Rich's actual testimony, but rather were defense counsel's summary of the practical impact of Rich's testimony upon the jury.

The State argued Rich's testimony had so far been the equivalent of blind expert testimony, and Rich had not stated she believed Minor. The State reiterated the limitations the trial court had placed on Rich's testimony and argued adopting defense counsel's position would preclude the State from using experts in this context.

Stating this is "definitely an issue on appeal," the trial court concluded Rich had testified as a blind witness up to that point and had not yet gotten to the point of vouching. The trial court denied the motion for mistrial. After a recess, the trial court further limited Rich's testimony to whether she treated Minor, whether Minor disclosed sexual abuse, and the circumstances of the disclosure:

> I think, after having heard the testimony and heard what [Rich] said, I think that once [Rich] starts to say that "I was the attending physician and I diagnosed this and I treated this," then we are right back where the Supreme Court told us not to go and that's vouching for the credibility of the witness. Now, I recognize that [Rich] wouldn't expressly say that [Minor is] truthful. But I think it ultimately serves the same end.

The jury returned to the courtroom. Rich testified Minor disclosed to her that she had been sexually abused but did not want to talk about it. Rich testified she asked Minor about "the worst time," and Minor drew a picture to illustrate. The drawing depicted an act that would constitute first-degree CSC with a minor. When Rich asked who the people in the picture were, Minor identified herself and Makins. Rich testified, "[i]t wasn't until the second session that [Minor] would say [what she saw] because part of the therapy is to be able to say the things that you're scared of." Rich stated Minor disclosed the abuse started when she was five and ended around ages seven or eight, and it always happened at her sister Toi's house. Toi is Makins's girlfriend, and they have two children together.

Minor testified Makins forced her to perform oral sex multiple times (first-degree CSC with a minor) and touched her inappropriately (lewd act and third-degree CSC with a minor). She testified Makins made her touch his penis with her hand (lewd act and third-degree CSC with a minor), and she said he showed her sexually-oriented websites on his phone. Minor testified she did not know this was wrong until she attended a school presentation on "tricky people" and child molesters. The State presented no direct physical evidence of sexual abuse.

The jury acquitted Makins of first-degree CSC with a minor and lewd act but convicted him of third-degree CSC with a minor. The court of appeals reversed the conviction, holding Rich's testimony she treated Minor implied she believed Minor was telling the truth and improperly bolstered Minor's credibility. *State v. Makins*, 428 S.C. 440, 449-50, 835 S.E.2d 532, 537 (Ct. App. 2019). This Court granted the State a writ of certiorari to review the court of appeals' decision.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court. *State v. Dawkins*, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989). The trial court's decision will not be overturned on appeal absent an abuse of discretion

resulting in prejudice to the defendant. *Id.* Granting a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. *State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998).

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *Id.* "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

Discussion

The standard of review is critical to our analysis of both the trial court's denial of the mistrial motion and its evidentiary rulings. If the standard of review were de novo, an appellate court could simply rule on the evidentiary and mistrial issues in accordance with its own view of the dynamic faced by the trial court. However, under the deferential standard applicable here, an appellate court cannot disturb the trial court's rulings unless they lacked evidentiary support or were controlled by an error of law. In their briefs, the parties cited the correct standard of review but did not tailor their arguments to it. The court of appeals cited the standard of review but did not articulate how its holding took this standard into account. As we will explain, this is a difficult case, and our holding largely turns on the application of this deferential standard to the trial court's rulings.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). While experts can testify to their opinion, they are precluded from offering an opinion about the credibility of other witnesses. *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Id.* at 358-59, 737 S.E.2d at 500. "A witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017).

In *State v. Anderson*, the Court recognized the expertise of child abuse assessment experts, who testify to the behavioral characteristics of sex abuse victims, but cautioned:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015). In *Briggs*, this Court reiterated it had not created any new law or standard regarding admissibility in *Kromah* or *Anderson* but instead applied the general rule that a witness cannot bolster the credibility of another witness because doing so invades the province of the jury. 421 S.C. at 328, 806 S.E.2d at 719.

In the instant case, the court of appeals held as follows:

> We find Rich's opinion testimony addressing the various manifestations of child sexual abuse, followed immediately by her affirmative response that she treated [Minor], implied she believed [Minor] was telling the truth with respect to her allegations of sexual abuse. If Rich believed [Minor] had not been telling the truth, Rich would have not needed to treat her. As the circuit court warned, Rich's testimony implied she was treating [Minor] for sexual trauma because [Minor] had suffered such trauma.

Makins, 428 S.C. at 448-49, 835 S.E.2d at 537.

The State argues the court of appeals erred in ruling Rich's testimony that she treated Minor implied she believed Minor. The State argues Rich gave permissible blind expert testimony and testified to the time, date, and circumstances of her meeting with Minor. The State further argues that while Rich testified she treated Minor and that Minor disclosed abuse to her, Rich did not testify about Minor's diagnosis, state she suffered from trauma, provide an opinion, or make conclusions or findings in her testimony. The State argues no improper bolstering occurred because Rich did not comment directly or indirectly on Minor's credibility.

This case is distinguishable from precedent cited by the parties because Rich's alleged improper bolstering was not direct. Rich's simple affirmation that she provided therapy to Minor also differs from previous indirect vouching cases in which expert witness testimony was more extensive. *See Briggs*, 421 S.C. at 329, 806 S.E.2d at 720 (ruling forensic interviewer's testimony she made the

determination the child understood the difference between the truth and a lie "indirectly revealed she believed the subsequent disclosure . . . was the truth"); *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015) (holding forensic interviewer's testimony that child victim should "not be around [Appellant] for any reason" improperly bolstered the child victim's credibility); *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (ruling forensic interviewer's testimony about "a compelling finding of child abuse" was the equivalent of her stating the child was being truthful); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (concluding there was no other way to interpret the language in the forensic interviewer's reports that each child had "provide[d] a compelling disclosure of abuse by [appellant]" than to mean she believed the children were truthful).

Whether Rich's testimony constituted improper bolstering is a close question. As a result of the limitations the trial court placed on her testimony, Rich never testified she advised Minor about the importance of being truthful, never testified directly as to Minor's truthfulness, and never opined Minor's behavior indicated truthfulness. While Rich was allowed to confirm she treated Minor, she was not allowed to explain why she was treating Minor, detail her treatment of Minor, or testify as to her diagnosis of Minor. Rich only addressed the circumstances of Minor's disclosure of abuse and the drawing Minor produced in therapy.

The court of appeals referenced the timing and manner in which Rich affirmed she treated Minor, noting Rich's opinion testimony on the "various manifestations of child sexual abuse" was "followed immediately" by her response that she treated Minor, therefore implying Rich believed Minor's allegations. *Makins*, 428 S.C. at 448-49, 835 S.E.2d at 537. While we do not reject outright the notion that circumstances, such as timing and manner, could possibly contribute to improper bolstering, this Court has typically focused on the content of the expert's testimony. *See, e.g.*, *Briggs*, 421 S.C. at 324, 806 S.E.2d at 717 (explaining the general rule governing bolstering is "a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim"). We see no reason to abandon our prior approach based upon the facts of this case. To suggest Rich's simple affirmation that she provided therapy to Minor can singularly constitute improper bolstering is a bridge too far. In this specific context, Rich's "yes" alone, without more, did not convey to the jury that Rich believed Minor.

The State further argues the court of appeals' holding on bolstering is too broad. We agree. As noted above, the court of appeals concluded, "[i]f Rich believed [Minor] had not been telling the truth, Rich would not have needed to treat

her." The exclusion of Rich's testimony on this ground goes beyond this Court's warning in *Anderson* against having one expert testify as a general characteristics expert and as a treating expert. The application of such an overly broad rule would mean the testimony of a child's treating therapist—even when there was a blind characteristics expert—always indirectly and improperly bolsters the child's credibility. In practical terms, the court of appeals' ruling would require the exclusion of treating experts' testimony in general—a result Makins acknowledged he is seeking but one he struggled to defend during oral argument. This Court and the court of appeals have generally allowed the testimony of treating experts in this context. *See State v. White*, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (holding treating psychotherapist's testimony that adult victim's symptoms were consistent with those of someone who recently suffered trauma was probative to refute defendant's contention the sex was consensual and to prove a sexual assault occurred); *Dawkins*, 297 S.C. at 394, 377 S.E.2d at 302 (considering testimony of the minor's treating psychiatrist); *State v. Dempsey*, 340 S.C. 565, 572, 532 S.E.2d 306, 310 (Ct. App. 2000) (addressing testimony of the minor's treating therapist); *State v. Berry*, 413 S.C. 118, 131, 775 S.E.2d 51, 57 (Ct. App. 2015) (concluding treating psychotherapist's testimony about minor victim's symptoms was based on personal observations and was admissible), *aff'd as modified on other grounds*, 418 S.C. 500, 795 S.E.2d 26 (2016).

Furthermore, the court of appeals also erred in appearing to create a bright line rule where this Court has refused to do so. While *Anderson* cautioned the better practice is to use a separate witness for general characteristics testimony, it did not forbid the practice of calling a dual expert. 413 S.C. at 218-19, 776 S.E.2d at 79. The court of appeals appears to leave no room for the treating individual to do both. The mere fact that Rich testified as a dual expert is not improper bolstering per se.

Rich's testimony served valid evidentiary purposes. Rich's testimony as Minor's treating therapist was required to lay the foundation for introducing Minor's graphic drawing into evidence. Minor's drawing and her disclosure to Rich were the basis of the most serious charge against Makins—first-degree CSC with a minor. Therefore, Rich's testimony served a purpose other than to vouch for Minor's credibility. *Contra Briggs*, 421 S.C. at 329, 806 S.E.2d at 720 (stating the witness's testimony was improper where there was no other purpose for it than to bolster the victim's credibility).

The trial court's limitations on Rich's testimony achieved their purpose—her testimony contained no direct or indirect bolstering discernible to this Court. The

trial court deftly navigated the issue and protected the proceeding from improper bolstering. We find no abuse of discretion in the trial court's decisions to deny Makins's motion for mistrial or to admit Rich's limited testimony.[2]

While we find no improper bolstering occurred in this case, we repeat our warning in *Anderson* about dual experts. Using one witness as both a characteristics expert and the treatment witness is a risky undertaking. This issue might have been avoided completely had the State called a blind characteristics expert, a path the trial court repeatedly encouraged the State to follow. Instead, the State chose to proceed with Rich acting as a dual expert. While we rule in the State's favor on these facts, this opinion should not be construed as a retreat from our warning in *Anderson*.

Conclusion

For the foregoing reasons, we reverse the court of appeals and reinstate the conviction.

REVERSED.

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

[2] We note defense counsel used the trial court's rulings to his advantage during closing arguments when he argued no one testified why Rich was treating Minor or if Minor suffered symptoms due to the alleged abuse. This was the very evidence the trial court excluded after defense counsel's objections.

The Supreme Court of South Carolina

In the Matter of Drelton A. Carson, Jr.

Appellate Case No. 2021-000621

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent has filed a return.

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

s\Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
June 18, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charleston Development Company, LLC, Charleston Housing Company, LLC and NotSo Hostel, LLC,
Appellants,

v.

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Daniel Baker, Marie Baker, Matthew and Christina Bare, Andre Bauer, Peter Bierce, Brandon Blount, Barbara Brass, Richard T. Brewer, Sigrid Anne Eilertson, Reginald P. Brown, IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Christina Cross, Darryl J. Damico, Labar Daniel, Stephen Darwak, Lindsay Davenport, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Timnah Giller, Virginia Geller, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, Shaun Halsor, Josephine Rex, Arthur Halvorson, Andrew Halvorson, Linda Hancock, Laura Hyatt, Mike Hartel, Nathan Herring, James Hicks, Jr., Laurie Hicks, Preston G. Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Mandi Walters, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Benjamin Levitt, Richard Levitt, Jesse Lutz, Nikou Manouchehri, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Amanda Lee Raymer, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Inderjit Singh, Avtar Singh, Alecia Stevens, Lee Stevens, Justin Swan, Merrick Teichman, John Van Vlack, Jr., William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, AJB Trust, Anthony & Jacqueline Bradley,

Trustees, Hartshorn Family Trust, Helene Kenny/Bridget Kenny Revocable Trust, Wilhelmina M. Wieters Life Estate Childrens Trust, 33 Bogard Street LLC, 249 Cumming, LLC, 253 Coming Street LLC, 259 East Bay LLC, 259 East Bay 10 B LLC, 272 D Coming St. LLC, Café International, Inc., Corner At Old Canton, LLC, Geer Interests LLC, Kit Properties LLC, Lambert-Weiss LLC, The Naws LLC, New Lease Capital LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC, Defendants,

Of whom Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Andre Bauer, Peter Bierce, Brandon Blount, Reginald P. Brown, IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Darryl J. Damico, Stephen Darwak, Lindsay Davenport, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, Shaun Halsor, Josephine Rex, Laura Hyatt, Nathan Herring, James Hicks, Jr., Laurie Hicks, Preston G. Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Jesse Lutz, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Alecia Stevens, Justin Swan, Merrick Teichman, John Van Vlack, Jr., William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, Helene Kenny/Bridget Kenny Revocable Trust, 259 East Bay LLC, 259 East Bay 10 B LLC, Corner At Old Canton, LLC, Kit Properties LLC, The Naws LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC, are the Respondents.

Appellate Case No. 2018-001766

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

Opinion No. 5826
Heard April 15, 2021 – Filed June 23, 2021

AFFIRMED

Sean Kevin Trundy, of Sean Kevin Trundy, LLC, of Charleston, for Appellants.

Mallary Lauren Scheer, of Mallary L. Scheer, Attorney at Law, LLC, of Charleston; Michael Ashley Whitsitt, of The Whitsitt Law Firm, of Mount Pleasant; Nancy Bloodgood, of Bloodgood & Sanders, LLC, of Mount Pleasant; Lucy Clark Sanders, of Bloodgood & Sanders, LLC, of Mount Pleasant; Mary Lee Briggs, of Briggs & Inglese, LLC, of North Charleston; Gregory Kenneth Voigt, of Voigt Murphy, LLC, of Charleston; David B. Marvel, of Marvel Et Al, LLC, of Charleston; Christopher L. Murphy, of Murphy Law Offices, LLC, of Charleston; Daniel Carson Boles, of Boles Law Firm, LLC, of Charleston; and Stafford John McQuillin, III, of Haynsworth Sinkler Boyd, PA, of Charleston, all for Respondents.

THOMAS, J.: This appeal arises from multiple lawsuits against property owners in Charleston alleging the owners' illegal short-term rental businesses damaged the legal short-term rental businesses of Charleston Development Company, LLC,

Charleston Housing Company, LLC, and NotSo Hostel, LLC, (collectively, Appellants). Appellants appeal the trial court's grant of summary judgment to all defendants (some of whom are Respondents), arguing the trial court erred in granting summary judgment against their (1) claim under City of Charleston Ordinance § 54-905; (2) claim for violation of the South Carolina Unfair Trade Practices Act (SCUTPA); and (3) nuisance claim. They also argue they are entitled to the video-taped depositions of Respondents. We affirm.

FACTS

In 2012, the City of Charleston created a special overlay zone district to allow for short-term rentals via Ordinance § 54-120 and Ordinance § 54-202.[1] Most other areas of the City prohibit short-term rentals. The City's zoning ordinance defines a short-term rental as a lease in duration between 1 and 29 days.

Appellants filed four lawsuits in 2015 alleging Respondents violated the City's zoning ordinance regarding short-term rentals. Appellants asserted Respondents' unlicensed businesses damaged Appellants because Respondents competed unfairly with Appellants' businesses and other legally-operating short-term businesses, which cost Appellants income. They asserted the unlicensed businesses displaced residents and drove up the cost of housing. Appellants further asserted Respondents' businesses constituted a nuisance because they deprived Appellants of the full financial enjoyment of their properly-licensed properties.

After being transferred to the Business Court Pilot Program, the court granted summary judgment to Respondents in all four cases based on Appellants' lack of standing and allowed Appellants to amend and consolidate their complaints. Appellants filed an amended complaint, alleging causes of action for nuisance, unjust enrichment, and violations of the City's zoning ordinance and the SCUTPA.[2]

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[1] According to Appellants, prior to 2012 "no non-hotel private property owners, with the exception of a few bed & breakfast operators, were allowed to rent out their property for less than 30 days at a time."

[2] Appellants do not appeal the grant of summary judgment on their unjust enrichment cause of action.

Respondents filed a joint motion for summary judgment. After a hearing, the trial court granted summary judgment to Respondents on all of Appellants' causes of action. The trial court found Appellants had not appealed any decision of the City of Charleston Zoning Administrator to the City of Charleston Board of Zoning Appeals. The court also found there was no contractual relationship between the parties, Appellants were not affected in any personal and individual manner, and Appellants were not damaged any more than any other property owner who legally rented their property on a short-term basis. Further, the court found Appellants lacked standing to sue because none of them were adjacent or neighboring property owners to Respondents.

Appellants' motion for reconsideration was denied without a hearing. This appeal followed.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004). Our supreme court has established "[t]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007) (alteration in original) (quoting *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)).

LAW/ANALYSIS

I. Ordinance § 54-905

Appellants argue the trial court erred in granting Respondents' motion for summary judgment on Appellants' claim under the City's Ordinance § 54-905. We disagree.

The City's Zoning Ordinances are developed pursuant to state law. *See* S.C. Code Ann. § 6-29-340(B)(2)(a) (2004) (providing "[i]n the discharge of its responsibilities, the local planning commission has the power and duty to: . . . (2) prepare and recommend for adoption to the appropriate governing authority or authorities as a means for implementing the plans and programs in its area: (a) zoning ordinances to include zoning district maps and appropriate revisions thereof . . . ."). The South Carolina Local Government Comprehensive Planning Enabling Act (the "Planning Act") states in pertinent part:

> In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land.

S.C. Code Ann. § 6-29-950(A) (2004). "In short, under section 6-29-950 a specially damaged, adjacent or neighboring property owner can bring an action for an injunction based on an alleged violation of a zoning ordinance." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 79, 753 S.E.2d 846, 852 (2014).

There are two sections of the City's Zoning Ordinance that reflect and implement this state statute, Ordinance § 54-904 and Ordinance § 54-905. Ordinance § 54-904, titled "Procedure when enforcement or interpretation questioned; appeals to court," states:

> It is the intent of this Chapter that all questions arising in connection with the enforcement or interpretation of this Chapter, except as otherwise provided, shall be presented to the Board of Zoning Appeals, and, that from decisions of the Board of Zoning Appeals, recourse shall be to the courts as provided by law.

Ordinance § 54-905, titled "Remedies for violations," states:

> Whenever a building or structure is demolished, erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this Chapter, the city engineer or any other appropriate authority, or any property owner, who would be damaged by such violations, in addition to other remedies, may institute injunction, mandamus, or other appropriate action in proceeding to prevent the violation in case of such building, structure or land.

In *Carnival*, several citizens groups filed suit against Carnival, a cruise ship operator, alleging nuisance and zoning claims and seeking an injunction. 407 S.C. at 71, 753 S.E.2d at 848. The plaintiffs' claims were based on alleged violations of the City of Charleston's ordinances, including violations of the City's noise ordinance, sign ordinance, height limitations, and impermissible use, as well as violations of the South Carolina Pollution Control Act. *Id.* at 73, 753 S.E.2d at 849. Our supreme court, in its original jurisdiction, unanimously dismissed the plaintiffs' complaint in its entirety. *Id.* at 81, 753 S.E.2d at 853. The court held the plaintiffs lacked standing to sue because the plaintiffs, including two nearby historic neighborhood associations and a non-profit organization, were not specially damaged nor were they adjacent or neighboring property owners. *Id.* at 78-79, 753 S.E.2d at 852. The court, interpreting S.C. Code Ann. § 6-29-950, thus enunciated a two-part test to determine standing in the context of claims based on alleged zoning violations. *Id.* at 79, 753 S.E.2d at 852. First, a plaintiff must be "specially damaged" and second, a plaintiff must be "an adjacent or neighboring property owner." *Id.* A plaintiff is "specially damaged" when it has suffered a particularized injury distinct from that suffered by the public generally. *Id.* A particularized harm occurs when the allegations "affect the [p]laintiff in a personal and individual way." Id. at 75, 753 S.E.2d at 850.

The trial court found the facts in this case were similar to *Carnival*. It then found Appellants failed both parts of the two-part standing test set forth in *Carnival*. First, Appellants were not "specially damaged" because the damages alleged in their complaint were not particular to Appellants, and there was no evidence Appellants suffered damages separate and apart from the public. The court stated, "No facts have been produced by [Appellants] to support the contention that they have been damaged differently from any other short-term rental businesses, including hotels and bed & breakfasts, or property owners in general, that may be affected by the alleged conduct of [Respondents]." In fact, the court found there was no evidence in the record of any damages at all. Bob Holt, the Trustee of Global Real Property Trust and the Chairman of each of the Appellants, testified he had not yet hired an expert to determine the damages and he did not know how an expert would determine damages. Further, Holt had not had any recent appraisals done of Appellants' properties. The court stated, "At the time [Appellants] filed suit, during the last three years, and currently, [Appellants] cannot ascertain their damages other than [Holt]'s belief that it is 'reasonable' to assume [Respondents'] actions have caused [Appellants'] damages." Thus, the court held "Holt's conjecture [was] insufficient as a matter of law to establish damages," and "[t]here [was] simply no evidence in the record of any nexus between [Appellants'] allegations of damages and any act on the part of any named [Respondent]." The court concluded, "A [c]ourt cannot possibly provide complete relief to these parties if [Respondents] would be subject to suits for damages by neighboring property owners, bed and breakfast[] businesses, other short term rental businesses or hotels even after the termination of the present litigation. Therefore, the damages alleged to have been suffered by [Appellants] (assuming arguendo they could ever be proven with any specificity) are not particular to [Appellants] and are not separate and apart from generalized damages that affect the community at large so [Appellants] have no standing."

Second, the trial court found none of the Appellants were "adjacent or neighboring property owners," and Appellants admitted they are not adjacent property owners to Respondents. The court noted Appellants contended they were "neighboring properties," but found this argument failed as a matter of law. Appellants did not allege in their amended complaint that any of their short-term rental property was "neighboring" to any of Respondents' properties. Holt testified in his deposition that everyone who lives on the peninsula of Charleston are neighbors, and he had no idea if any of Respondents' properties were located within 100 yards of any of

Appellants' properties. The court noted the term "neighboring property" is not defined in the City's Zoning Ordinance. However, Ordinance § 54-904 states, "It is the intent of this Chapter that all questions arising in connection with the enforcement or interpretation of this Chapter, except as otherwise expressly provided, shall be presented to the Board of Zoning Appeals . . . ." The court stated Holt testified in his deposition he did not appeal to the City Board of Zoning Appeals. Therefore, the court found Holt's personal belief as to what the term "neighboring property" means was irrelevant, and there was no evidence in the record that any of Appellants' properties were a neighboring property to any of Respondents' properties.

Additionally, the trial court found the public importance exception to standing did not apply in this case to grant Appellants standing. "For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). "The key to the public importance analysis is whether a resolution is needed for future guidance." *Id.* "It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Id.* Holt testified this case was a matter of public importance because "the wholesale ignoring of the zoning ordinances is not good for society." The trial court stated there was nothing of public importance about Appellants' contention that they were damaged by illegal short-term renters unfairly competing with them. Further, the court found Appellants did not allege and offered no evidence indicating the court's decision regarding the City's failure to enforce its short-term rental ordinance was a matter that must be decided to provide future guidance to the court.

Finally, the trial court found Appellants had not exhausted their administrative remedies because they had not appealed any decision of the Zoning Administrator to the Board of Zoning Appeals. Ordinance § 54-904 requires a person aggrieved to seek enforcement of a zoning ordinance first through the Zoning Administrator, with an appeal to the Board of Zoning Appeals and then to Circuit Court. Appellants asserted they were relying on § 54-905, which permits persons damaged by another person's use of their property to seek injunctive relief. However, the trial court found Appellants could not rely on § 54-905 to address enforcement of a zoning violation because enforcement of the zoning ordinance is governed by § 54-904, not § 54-905. Appellants admitted they were asking the

court to enforce the short-term rental ordinance because the City was not enforcing it. Thus, the court held Appellants "cannot circumvent the exhaustion of administrative remedies requirement by seeking to challenge the enforcement of a zoning ordinance under [§] 54-905 rather than [§] 54-904[,] which is the ordinance that addresses enforcement." Furthermore, the court found even if § 54-905 could be used by Appellants to challenge the enforcement of the short-term rental ordinance, the only relief afforded to them by this section is injunctive relief and a necessary element of injunctive relief is irreparable harm. Holt testified in his deposition that he was not sure if any irreparable injury was suffered by Appellants, and he also asserted Appellants were entitled to monetary damages. Because Appellants admitted they were not sure if they had irreparable damages and they were seeking monetary damages, the court found they were not entitled to injunctive relief and could not prevail under § 54-905.

We find Appellants failed to present evidence of their damages. Holt was deposed and testified he was the person most knowledgeable about the allegations in the lawsuit. Appellants assert Holt's testimony about the value of Appellants' properties and the diminution in their value was admissible because he is the chairman of each of the Appellants. In his deposition, Holt stated, "We know what has occurred at our property and we have an idea of what has occurred at [Respondents'] properties, but we do not know as a matter of certainty. And that is absolutely necessary for us in order to calculate and determine our damages." Holt testified, "[I]t is my hope that the expert that we hire appraises the property as is today and then says, [h]ere is what the property would be worth if there were not all these illegals, if [Respondents] were not doing what [Respondents] were doing. That is my hope." He testified the only property owners in the City that were damaging Appellants were the illegal short-term renters, not the legal short-term renters. Appellants' attorney asked Holt, "Sitting here today, you cannot give me a number as to the diminution of the value of any of [Appellants'] property due to the alleged actions of [Respondents], correct?" Holt responded, "The number is greater than zero and I do not know the precise number greater than zero." Appellants' attorney then asked Holt, "And you also cannot give me the lost profits that [Appellants] have suffered?" Holt answered, "The lost profits would be — would closely approximate whatever that number is above zero that I cannot give you definitively. So that is correct."

However, Holt stated in an affidavit submitted a month after his deposition that in his personal opinion, the total diminution in value of all the Appellants' properties

was $2,200,000 as a result of illegal competition by Respondents. The trial court stated it did not rely on Holt's affidavit because he was not identified as an expert witness, it failed to indicate any nexus between Respondents' actions and Appellants' damages, failed to state any evidence that Respondents' actions were the proximate cause of any of Appellants' damages, and failed to offer evidence that any damage Appellants contend they suffered was caused by any specific Respondent.

"No peculiar ability or specialized training is required to enable a witness to testify as to his opinion of the value of property with which he is acquainted." *S.C. State Highway Dep't v. Hines*, 234 S.C. 254, 259, 107 S.E.2d 643, 645 (1959). The "[d]ecision as to his competency in such a matter rests largely in the discretion of the trial judge, the extent of his experience going not so much to his competency as to the weight of his testimony." *Id.* "For people other than the owner of real property to give their opinion as to the value of real property, it must be shown they are competent." *Oaks at Rivers Edge Prop. Owners Ass'n v. Daniel Island Riverside Devs., LLC*, 420 S.C. 424, 448, 803 S.E.2d 475, 488 (Ct. App. 2017). "[T]he source of his knowledge must be revealed to remove his opinion from the realm of mere conjecture. A bare declaration of his knowledge of the value of the property is insufficient." *Rogers v. Rogers*, 280 S.C. 205, 209, 311 S.E.2d 743, 746 (Ct. App. 1984). "The fact finder must determine the weight to be accorded the testimony of the witnesses, and accept or reject their valuations." *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 181, 463 S.E.2d 636, 640 (Ct. App. 1995).

Viewing the evidence in the light most favorable to Appellants, we find Appellants failed to present evidence of their damages. Although Holt may testify to the value of property, he provided no explanation for how he determined what the approximate value of the property would be if there was no illegal competition. Therefore, the trial court did not err in granting Respondents' motion for summary judgment on Appellants' claim under Ordinance § 54-905.

II. SCUTPA

Appellants argue the trial court erred in granting Respondents' motion for summary judgment on Appellants' claim for violation of the SCUTPA. We disagree.

"An action for damages may be brought under SCUTPA for 'unfair methods of competition and unfair or deceptive acts or practices' in the conduct of trade or

commerce." *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993) (quoting S.C. Code Ann. § 39-5-20(a) (1985)). "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. § 39-5-140(a) (1985).

The trial court found Holt testified there was no sum certain amount of money owed to Appellants as damages for their claim under the SCUTPA. Holt testified none of the Appellants' properties have decreased in value because they are all located in downtown Charleston. The trial court also found Appellants produced no evidence that any of the Respondents' actions were the proximate cause of any damage to any of the Appellants.

Viewing the evidence in the light most favorable to Appellants, we find Appellants failed to present evidence of their damages. Therefore, the trial court did not err in granting Respondents' motion for summary judgment on Appellants' claim for violation of the SCUTPA.

III. Nuisance Claim

Appellants argue the trial court erred in granting Respondents' motion for summary judgment on Appellants' private nuisance claim. We disagree.

"A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. It produces damage to but one or two persons, and cannot be said to be public."[3] *Deason v. Southern Ry. Co.*, 142 S.C. 328, 334, 140 S.E. 575, 577 (1927); *see also Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 138, 747 S.E.2d 468, 473 (2013) (stating a nuisance is a real injury to a man's lands and tenements and a private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another); *Blanks v. Rawson*, 296 S.C. 110, 113, 370 S.E.2d 890, 892 (Ct. App. 1988) ("A nuisance has been defined as 'anything which works hurt, inconvenience, or damages; anything

[3] According to Black's Law Dictionary, a tenement is "a house or other building used as a residence" and a hereditament is "real property; land." *Black's Law Dictionary* (7th ed. 1999).

which essentially interferes with the enjoyment of life or property.'" (quoting *Strong v. Winn-Dixie Stores*, 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962))). "Generally, a private nuisance is that class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, personal or real." *O'Cain v. O'Cain*, 322 S.C. 551, 561, 473 S.E.2d 460, 466 (Ct. App. 1996).

"[A] use of property which does not create a nuisance cannot be enjoined or a lawful structure abated merely because it renders neighboring property less valuable." *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 164, 130 S.E.2d 363, 369 (1963) (citation omitted). "If there is no public or private nuisance created in the use of property, no recovery of damages can be allowed for the diminution in value of the property by reason of the lawful use of such property made by a near-by owner." *Id.*; *see also Strong*, 240 S.C. at 257, 125 S.E.2d at 634 ("The trial court found that the value of the plaintiffs' property for residential purposes will be depreciated. Such findings, standing alone, and not supported by other findings showing that the defendant is maintaining, or is about to maintain, a nuisance, will not support the judgment. In many instances in populous neighborhoods the property of one person is depreciated by the near proximity of the property of another. Such burdens are ordinary incidents to residence and ownership in a city." (quoting *Dean v. Powell Undertaking Co.*, 203 P. 1015, 1018 (Cal. Dist. Ct. App. 1921))).

The trial court found Holt testified at his deposition that Appellants' ability to make money is the enjoyment of their property, and the Respondents' rentals which affected their income is the damage they suffered under their nuisance cause of action. The court found there was no evidence in the record to support any nexus between Respondents' actions and Appellants' argument that their land would be worth more today were it not for Respondents' actions. Thus, the court found Appellants' private nuisance claim failed.

Viewing the evidence in the light most favorable to Appellants, we find Appellants failed to present evidence of their damages. Appellants claimed their properties were worth less money because of the Respondents' short-term rentals; however, Appellants presented no evidence to support their argument. Therefore, the trial court did not err in granting Respondents' motion for summary judgment on Appellants' claim for a private nuisance.

IV. Video-Taped Depositions

Appellants argue they are entitled to the video-taped depositions of Respondents. We decline to address this issue.

Appellants filed a motion to compel video-taped depositions of Respondents. After a hearing, the trial court granted summary judgment to Respondents, on all causes of action, without ruling on Appellants' motions to compel discovery responses and to compel the video-taped depositions of Respondents. The trial court denied Appellants' motion for reconsideration without a hearing. Appellants state the trial court held in abeyance Appellants' motion to compel discovery responses from Respondents. That motion has not been ruled upon by the trial court.

Appellants request this court, in the interest of judicial economy, rule they are entitled to take video-taped depositions of Respondents because if this court reverses the trial court's order, this video-tape deposition issue will arise again. Because we affirm the trial court's grant of Respondents' motion for summary judgment, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Francisco Cedano Ramirez, Employee, Appellant,

v.

May River Roofing, Inc., Employer, and American Zurich Insurance Co., Carrier, and Cedano Roofing, Employer, and Travelers Property & Casualty Co., Carrier,

Of which May River Roofing, Inc., American Zurich Insurance Co., and Travelers Property & Casualty Co. are Respondents.

Appellate Case No. 2018-000652

Appeal From The Workers Compensation Commission Appellate Panel

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Opinion No. 5827
Heard November 12, 2020 – Filed June 23, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Joseph DuBois, of Liberty Oak Law Firm, LLC, of Hilton Head Island, for Appellant.

Lee E. Dixon, of Hedrick Gardner Kincheloe & Garofalo, LLP, and Nikole Deanna Haltiwanger, of Holder,

Padgett, Littlejohn & Prickett, LLC, both of Columbia,
for Respondents.

HEWITT, J.: Francisco Cedano Ramirez appeals the Workers' Compensation Commission's decision denying his claim for benefits. He argues the Commission erred in ruling he elected to be excluded from the policy he purchased from Travelers Insurance for his sole proprietorship. He also appeals the Commission's denial of his alternative claim that he was either a direct employee or a statutory employee of May River Roofing; a company with which he had a years-long continuous relationship. There is also an issue about average weekly wage, but the "compensability" issues are the core of this appeal.

The Commission correctly ruled Ramirez was not covered under the Travelers policy and was not May River's statutory employee. However, we reverse the ruling that Ramirez was not May River's direct employee based on our analysis of the four-factor employment test when applied to these facts. We also reverse the Commission's ruling that the parties stipulated to Ramirez's average weekly wage.

FACTS

Ramirez earned a living as a roofer in Beaufort County and was the sole proprietor of Cedano Roofing. When he started the business, he purchased a general liability and workers' compensation insurance policy from Travelers. Ramirez did not elect to cover himself as an employee under the workers' compensation portion of the policy. Doing so would have significantly raised his insurance premium.

Ramirez began working with May River about a year after he started Cedano Roofing and worked continuously and exclusively with them for about three years. In January 2016, Ramirez was working on a job for May River when he fell approximately sixteen feet from the roof to the ground below. He sustained significant injuries to his back, neck, shoulders, chest, ribs, lungs, and upper extremities as a result of the fall.

Ramirez filed two workers' compensation claims arising from the accident. In one, he claimed he was May River's direct or statutory employee. In the other, he claimed he was covered under the Travelers policy he purchased for Cedano Roofing.

The Single Commissioner found Ramirez was not covered under the Travelers policy because he had elected not to cover himself. The Single Commissioner also found Ramirez was not May River's direct or statutory employee because he was an independent contractor. The Single Commissioner further found the parties stipulated to Ramirez's average weekly wage.

Ramirez filed a Form 30 requesting review of the Single Commissioner's decision. After oral argument, an appellate panel affirmed the Single Commissioner's findings with little to no changes. This appeal followed.

ISSUES

1. Whether Ramirez was excluded from coverage under the Travelers policy.

2. Whether Ramirez was May River's statutory employee.

3. Whether Ramirez was May River's direct employee.

4. Whether the parties stipulated to Ramirez's average weekly wage.

STANDARD OF REVIEW

An appellate court normally owes deference to the Commission's factual findings because the Administrative Procedures Act mandates that those findings will stand unless they are clearly erroneous in the view of the reliable, probative, and substantial evidence on the record as a whole. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132-35, 276 S.E.2d 304, 305-06 (1981). But the question of whether an individual is an employee or independent contractor for the purposes of workers' compensation is jurisdictional; therefore, this court may take its own view of the preponderance of the evidence. *See Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995).

COVERAGE UNDER THE TRAVELERS POLICY

Ramirez argues he is covered under the Travelers policy because the policy's plain language lists him as the "insured." He also argues the policy is the only evidence

the Commission should have considered on this issue and that the Commission erred in looking outside the policy to Ramirez's application for coverage.

"Insurance policies are subject to the general rules of contract construction." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). "An insurer's obligation under [an insurance policy] is defined by the terms of the policy and cannot be enlarged by judicial construction." *S.C. Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E.2d 471, 474 (Ct. App. 1990). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc.*, 334 S.C. at 535, 514 S.E.2d at 330.

The Travelers policy has clear and unambiguous language stating that it is subject to the workers' compensation laws of South Carolina. The law hinges a sole proprietor's inclusion in his business's coverage on whether he notified his insurance company of an election to include himself as one of the business's employees. S.C. Code Ann. § 42-1-130 (2015); *see also Smith v. Squires Timber Co.*, 311 S.C. 321, 324-25, 428 S.E.2d 878, 880 (1993). The policy obligates Travelers to "pay promptly . . . the benefits required of you by the workers' compensation law." In plain English, the policy makes clear its purpose was not to protect Ramirez if he was injured. The policy protected him and his business by obligating Travelers to pay if someone else was injured and brought a claim against them.

The fact that the Travelers policy lists Ramirez as the "insured" has no bearing on whether the policy protected him in the event that he was hurt at work. As noted above, for the purpose of this policy, that question is controlled by whether Ramirez notified Travelers of his election to be included as one of the business's employees. Nothing in the policy bolsters Ramirez's argument that he elected to include himself. His application for coverage plainly reveals he chose to be excluded.

STATUTORY EMPLOYEE

Ramirez argues he was May River's statutory employee. *See* S.C. Code Ann. §§ 42-1-400, -410, & -420 (2015) (the "statutory employment" provisions). Ramirez also cites the "certificate of insurance" statute as supporting his position. *See* S.C. Code Ann. § 42-1-415(A) (2015) (allowing upstream businesses to protect themselves against liability to statutory employees by securing proof that a subcontractor has workers' compensation insurance).

Settled law commands that Ramirez's "statutory employee" argument must fail. A sole proprietor's employees may be the statutory employees of another business, but the sole proprietor may not be a statutory employee. In *Smith v. T.H. Snipes & Sons, Inc.*, our supreme court said there were situations when a sole proprietor could be a statutory employee. 306 S.C. 289, 411 S.E.2d 439 (1991). Two years later, the court limited *Snipes* to its facts and held a subcontractor must elect coverage in order to be considered a statutory employee. *Squires Timber Co.*, 311 S.C. at 325 n.3, 428 S.E.2d at 880 n.3. Based on this binding precedent, South Carolina law does not support a finding that Ramirez was May River's statutory employee.

The "certificate of insurance" statute is also a dead end as far as compensability is concerned. *See* S.C. Code Ann. § 42-1-415(A) & (B) (2015). Even if May River failed to comply with this statute and did not properly secure proof Cedano Roofing had workers' compensation coverage, that failure would not turn May River into Ramirez's statutory employer. The effect of May River straying from the statute would be that May River could not transfer liability for a statutory employee's claim to the Uninsured Employers' Fund. The certificate of insurance statute controls who pays a statutory employee's claim. It has no bearing on who is (or is not) a statutory employee.

DIRECT EMPLOYEE

Ramirez argues the Commission erred in finding he was not May River's direct employee. "Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work." *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702. "In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire." *Id.* As already noted, our standard of review on this issue is de novo. *Id*.

1. Right or Exercise of Control

Here, there are facts that weigh both for and against a finding that May River exercised control over Ramirez. In terms of regular supervision, there appears to be conflicting testimony. Ramirez says the owner of May River supervised his work and would sometimes give him directions. May River contends Ramirez had no

supervision other than May River verifying his work once he completed a job. This dispute aside, everyone concedes Ramirez is a skilled roofer who did not need day-to-day supervision. To sum, there is little direct evidence May River controlled the finer points of how Ramirez went about his work as a roofer.

Some aspects of this relationship lend themselves to the view that Ramirez had a great deal of autonomy. Ramirez set his own schedule, did not punch a time clock, and was free to negotiate for additional payment when he arrived at a job site or choose to decline the job. Ramirez was also free to enlist others if the job was too big for him to handle. He had the discretion to hire people to assist with his work and did not need May River's approval.

Still, there are also facts that show May River directly controlling Ramirez. Ramirez was required to wear May River branded t-shirts and display a magnetic May River decal on the side of his truck. May River claimed they gave the shirts out to everyone as a marketing strategy, but they also specifically required all "subcontractors" like Ramirez to wear May River shirts while at a jobsite.

The exclusivity of Ramirez's relationship with May River also weighs in favor of an employment relationship. Ramirez worked with May River continuously for roughly three years, and May River ceaselessly provided Ramirez with all of his work throughout their relationship. Ramirez believed he was not allowed to work with any other roofing companies. May River disputed this, but admitted it preferred workers like Ramirez to only accept jobs from May River. The apparent exclusivity of this relationship weighs in favor of finding May River exercised control over Ramirez. The fact that Ramirez relied on May River for work suggests May River had the right to control Ramirez by withholding work.

These features—an exclusive relationship and controlling Ramirez's clothing—may seem trivial, but we think they are not. An independent contractor is someone who is hired "to do a piece of work according to his own methods" and is not subject to anyone's control except as to the result of his or her work. *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). There is no disputing May River directly exercised control over Ramirez's appearance and, thus, was controlling more than would be found in a true independent contract relationship. The exclusivity of this arrangement also suggests Cedano Roofing was less an "independent" business, and more an extension of May River. *Cf. Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986) (agency between oil company and service station

employee not established when employee was permitted to wear clothing with oil company's emblem, when service station merely sold oil company's products, and when there was no evidence oil company controlled station operations).

There is a previous appellate case involving roofers, but it is meaningfully distinguishable. In *Marlow v. E. L. Jones & Son, Inc.*, our supreme court found a roofer was an independent contractor for the purposes of workers' compensation. 248 S.C. 568, 569-71, 151 S.E.2d 747, 747-48 (1966). That claimant worked a full-time job in a textile mill and "moonlighted" with other members of his family as a roofer. *Id.* Although there are some similarities between *Marlow* and the present case, we believe the control May River exercised by being the exclusive provider of work in his full time profession and by controlling Ramirez's appearance while working distinguishes this case from that one.

Based on the facts discussed above, we find May River had the right to and exercised control over Ramirez in a manner consistent with an employment relationship. Accordingly, we find this factor weighs in Ramirez's favor.

2. Furnishing Equipment

An owner who purchases and supplies equipment tends to retain the right to control how the equipment is used. The inference of control in this situation "is a matter of common sense and business." *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 479, 753 S.E.2d 416, 421 (2013) (quoting 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 61.07[2] (2013)).

The furnishing of equipment prong weighs in favor of an employment relationship. May River provided Ramirez with all of the materials he used for roofing jobs. While Ramirez provided his own tools and vehicle, May River's complete assumption of the material costs suggests May River retained the right to direct how the materials were used and is direct evidence of control over Ramirez.

May River would also occasionally lend Ramirez equipment and assisted Ramirez financially when he purchased some of his own equipment. And, as mentioned above, May River provided Ramirez with a branded t-shirt and magnetic decal for his truck. Given that May River provided Ramirez with clothing, marketing materials, and the materials necessary to complete each roofing job, we find the furnishing equipment factor weighs in favor of an employment relationship.

3. Method of Payment

Payment based on time tends to show employment. *Id*. at 480, 753 S.E.2d at 421. Payment on the basis of a completed project tends to show the worker is an independent contractor. *Id*.

The method of payment factor weighs in favor of an independent contractor relationship. Though Ramirez was paid by the hour for repair work, most of his work was compensated "per roofing square;" as apparently is common in the roofing industry. In other words, for most of his work, Ramirez's compensation depended on how much work he did. It did not depend on the amount of time he spent working.

4. Right to Fire

The right to fire prong does not favor either party. Apparently there were individual contracts for each roofing job. These were typically executed before multi-day projects but after smaller, single day projects. The only sample contract in the record between Ramirez and May River was bare bones and of no help to our review of this issue.

The right to unilaterally and immediately end the relationship without future liability is a hallmark of an employment relationship. *Id*. at 481, 753 S.E.2d at 422. An independent contractor, however, typically has the right to complete the job unless the parties' agreement provides otherwise. *Id*. Nothing in this record points decisively in either direction.

It is possible to view Ramirez's continuous relationship as tending to show employment since it seems May River could stop offering jobs to Ramirez at any moment, for any reason, and leave Ramirez without recourse. Even so, we find this factor does not favor either party. There is little to nothing in the record suggesting what right May River had to terminate Ramirez from a job, what right Ramirez had to quit, and what claims (if any) the parties had against each other in those circumstances.

***

The modern bellwether case on the employment test is *Wilkinson*. There, our supreme court found a sole proprietor working with a trucking company was an independent contractor. 382 S.C. at 300-04, 676 S.E.2d at 702-04. The trucking

company had some drivers who were employees and other drivers with written independent contractor arrangements. Our supreme court examined and discussed the trucking company's entire operation in the course of finding the trucking company legitimately used the two categories of workers and that the company did not exercise sufficient control over the sole proprietor to indicate an employment relationship. *Id.*

Here, as there, we believe it is instructive to examine the putative employer's entire operation. Unlike the trucking company in *Wilkinson*, May River has no employees who perform roofing work other than the occasional repair. Unlike the trucking company in *Wilkinson*, there was no written and detailed independent contractor arrangement between Ramirez and May River. And, unlike the trucking company in *Wilkinson*, there was no requirement that Ramirez purchase coverage protecting himself against the risk he would be hurt in a workplace accident.

According to the record, May River switched some years ago from roofers who were admittedly employees to a roofing workforce consisting entirely of people purportedly classified as independent contractors. May River claims to have made this change for a variety of reasons, including that it found workers more motivated and responsible when they were paid more money as independent contractors and paid by the job rather than by the hour.

We do not doubt May River's sincerity or motivation. Still, the undisputed purpose of the Workers' Compensation Act is to protect workers, owners, and businesses by requiring a business covered by the Act to insure its workforce against the cost of industrial accidents. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980); *Marchbanks v. Duke Power Co.,* 190 S.C. 336, 362, 2 S.E.2d 825, 836 (1939). This structure was designed to build the costs of industrial accidents into the cost of goods and services and to ultimately pass those costs to the consumers whose demand for the goods and services brought about the conditions that led to the claimant's injury. *Marchbanks,* 190 S.C. at 362, 2 S.E.2d at 836; *see also* 5 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 60.05[1] (2020).

We see this case as meaningfully different from *Wilkinson*, especially for the reasons noted above. If the record—as in *Wilkinson*—contained a detailed independent contractor agreement requiring Ramirez to protect himself against the cost of being hurt at work, we would likely feel differently. As it stands, we lean in favor of

coverage based on the facts of this case and in order to serve the Act's beneficent purpose. *See James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010) ("[T]he general rule [is] that workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage are to be strictly construed.").

AVERAGE WEEKLY WAGE

Ramirez argues the Commission erred in finding the parties stipulated to his average weekly wage. There is no doubt the parties did not enter such a stipulation. The parties mentioned their diverging views at the beginning of the Single Commissioner's hearing. There is no evidence those views ever changed.

May River argues this issue is not preserved for our review. We respectfully disagree. Ramirez specifically raised the issue to the Commission in his addendum to his Form 30. He also discussed it in his brief to the appellate panel. Although it is fair to note he mentioned this in his argument on the "method of payment" factor of the employment test, one cannot come away from the brief believing Ramirez agreed with the Single Commissioner's finding on his average weekly wage.

CONCLUSION

Based on the foregoing, we affirm the Commission's finding that Ramirez was not covered under the Travelers policy. However, we reverse the Commission's compensability finding as to Ramirez's claim against May River. We also reverse the finding that the parties stipulated to the compensation rate. The case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THOMAS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mickey Markell Johnson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-001292

Appeal From Sumter County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5828
Submitted March 1, 2021 – Filed June 23, 2021

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson and Senior Assistant Deputy Attorney General Megan Harrigan Jameson, both of Columbia, for Respondent.

HILL, J: A jury convicted Mickey M. Johnson of pointing and presenting a firearm, unlawfully carrying a pistol, criminal conspiracy, and accessory before the fact of murder. We granted Johnson's petition for certiorari for this belated review of his direct appeal pursuant to *White v. State,* 263 S.C. 110, 208 S.E.2d 35 (1974). In his belated appeal, Johnson claims the trial court

abused its discretion by admitting evidence of his involvement with a gang known as 135 Piru. We affirm.

I.

On the afternoon of March 22, 2011, several young men returning from a funeral on Bowman Street in Sumter stopped to visit acquaintances at a nearby apartment complex, congregating near Apartment 50. Johnson, the leader of the Sumter chapter of 135 Piru, was outside the complex working out with Bryan Bradley, John Wesley Stamps, Rasheed Brandon (all subordinate members of 135 Piru) and William Morgan (who was not a member of 135 Piru). Observing the gathering near Apartment 50, Johnson concluded the visitors were members of the rival Folk Nation gang. Johnson approached the visitors and advised them the complex was 135 Piru territory. Words were exchanged; the visitors departed. Around thirty minutes later, several cars arrived at the complex, and a large group (comprised of the earlier visitors and others) gathered in the street. One member of the group brandished a pistol. Johnson and his entourage moved towards the group. Morgan pulled a pistol from his waistband and pointed it at the group. More words were exchanged. Johnson grabbed the gun from Morgan and fired three shots into the group. Fire was returned. No one was hit. Everyone scattered.

Johnson drove off with his cohorts, except Stamps, who remained at the complex. Stamps testified a car soon pulled up, a passenger got out and entered Apartment 7 (or 17, he could not remember). The passenger soon returned to the car, which then sped off while one of the occupants shot at Stamps. Stamps promptly phoned Johnson and reported this latest assault. Johnson told Stamps to meet him at the home of Garnett Davis, Johnson's second in command.

Johnson phoned the national leader of 135 Piru and asked for "shooters." He was instructed to call the 135 Piru leader in Florence, South Carolina. When his call was not answered, Johnson devised a different plan. He and Davis drove Stamps, Bradley, and Brandon back to the complex. Johnson gave Brandon a 9mm pistol and told him to knock on the door of Apartment 7 and shoot whomever answered the door, but not to shoot any females. If no one answered, Brandon was to proceed to Apartment 50 and follow the same instructions. Stamps accompanied Brandon, while Bradley stayed behind as the getaway driver. When Bradley expressed hesitation, Johnson responded "be loyal or die." Johnson and Davis left the scene and returned to Garnett Davis' house.

After no one answered Brandon's knock at Apartment 7, he knocked on the door of Apartment 50. Annesia Allen answered the door. Brandon said "how you doing" and then fired a single shot, killing Allen's boyfriend, Adrian Davis (Victim), who was sitting at a desk just inside the door. Brandon, Bradley, and Stamps then drove to Garnett Davis' home where Johnson promoted them in gang rank and sent them out for beer.

Allen later identified Brandon as the shooter from a photographic line-up, and after further investigation, Brandon, Bradley, Stamps, and Johnson were arrested and charged with various offenses related to Victim's murder.

Johnson was tried alone. Before trial, he objected to the presentation of any evidence of his gang affiliation on the ground it constituted evidence of other crimes or bad acts prohibited by *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), and was unduly prejudicial. The trial court overruled Johnson's objection, stating the gang evidence was relevant and its probative value was not substantially outweighed by any prejudicial effect. The trial court acknowledged Johnson's objection was continuing, and Johnson periodically renewed his general objection during trial.

At trial, a Sumter police detective and a SLED agent were qualified as experts in gang investigations. Both testified about 135 Piru's structure, rituals, and characteristics, as well as Johnson's role as leader of the Sumter chapter. Dontae Crayton, a former member, explained how Johnson alone held power over gang promotions, demotions, and discipline. Bradley and Stamps—who had pled guilty to lesser charges—testified about 135 Piru's rules, Johnson's firm leadership, the confrontations with the Folk Nation group the afternoon of March 22, and Johnson's order to his subordinates to execute the random hit that resulted in Victim's murder. Johnson did not testify or present evidence. The jury deliberated less than three hours and found him guilty of all charges except accessory after the fact.

II.

A. Gang evidence and Rule 404(b), SCRE

No previous South Carolina case has squarely addressed whether evidence of a defendant's gang affiliation is admissible in a criminal trial. Johnson claims the extensive gang-related testimony admitted over his objection constituted improper character evidence prohibited by Rule 404(b), SCRE, and *Lyle*. We disagree.

We start with the familiar rule that, in general, evidence of a person's character is not admissible to prove the person acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. We say in general because Rule 404(a) sets forth three exceptions that tell us when character evidence of an accused, a victim, or a witness is allowed. None of the three exceptions are in play here. Rule 404(b) commands that just as a person's general character is off limits unless it fits one of Rule 404(a)'s exceptions, evidence of a person's "other crimes, wrongs, or acts" is likewise inadmissible "to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Such evidence—commonly referred to in our state as "prior bad act" or *Lyle* evidence—is not admissible unless its proponent can demonstrate it has a legitimate purpose, i.e. the evidence does something more than prove a person has a propensity to commit crimes. Rule 404(b), SCRE, recognizes only five legitimate purposes for prior bad act evidence: to prove "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

Our supreme court addressed the proper approach to Rule 404(b) admissibility in *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." *Lyle*, 125 S.C. at 417, 118 S.E. at 807. If, after applying the logical relevancy test with "rigid scrutiny," the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct (and that purpose is one of the five listed in Rule 404(b)), then the evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; *see Perry*, 430 S.C. at 44, 842 S.E.2d at 665. If the prior bad act did not result in a criminal conviction, the State also bears the burden of proving the prior bad act by clear and convincing evidence. *State v. Smith*, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989).

Without question, the testimony about Johnson's gang affiliation was prior bad act evidence. Prior bad act evidence "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475–

76 (1948) (footnote omitted). The law's disdain of character evidence draws from notions of basic fairness tied together by the "golden thread"—the presumption of innocence—so one is rightly judged by whether the government has proven what it has charged, regardless of who it has charged. That is, after all, the spirit of the rule of law.

Rule 404(b) bars the use of prior bad act evidence to prove character, deeming it useless to the factfinder, for such use does not make any legitimate fact at issue more or less probable. Proof that a defendant was a member of a gang, without more, generally proves nothing of consequence at a criminal trial and may even implicate First Amendment rights. *Dawson v. Delaware*, 503 U.S. 159, 168 (1992) (State may not use defendant's membership in Aryan Brotherhood as evidence in sentencing hearing when there is no connection between membership and any issue relevant to sentencing; First Amendment prevents state from "employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried").

The State maintains it offered evidence of 135 Piru's structure, Johnson's command, and 135 Piru's rivalry with Folk Nation not to prove Johnson's criminal propensity but to prove motive and intent, as authorized by Rule 404(b). We agree this evidence was essential to explain the motive and intent behind the otherwise senseless shooting of the innocent Victim. Much of the gang evidence admitted demonstrated Johnson's iron grip on his gang underlings, enforced by physical intimidation, and how Brandon, Bradley, and Stamps were beholden to him and 135 Piru. The trial court was well within its discretion in finding this evidence was logically relevant to prove criminal conspiracy and accessory before the fact of murder. The evidence of Johnson's leadership of Sumter 135 Piru and his ordering of the random hit was probative—if not essential—to establish the reason why Brandon killed Victim and that he did so intentionally and maliciously. While motive is not an element of any of the crimes Johnson was charged with, the gang evidence was probative to the conspiracy and accessory charges, both of which invite proof of planning and agreement. This evidence therefore cleared, with room to spare, *Perry*'s hurdle that prior bad act proof serve some purpose other than parading Johnson's propensity for criminal conduct. *Perry*, 430 S.C. at 44, 842 S.E.2d at 665.

Our holding that in appropriate cases, Rule 404(b) authorizes admissibility of logically relevant gang evidence to prove motive and intent aligns with the decisions of numerous state and federal appellate courts. *See, e.g.*, *United States v. Jackson*, 918 F.3d 467, 483 (6th Cir. 2019) (gang evidence admissible to show motive and to

explain how defendant ordered subordinate gang members to commit carjacking so stolen car could be used in retaliatory attack on rival gang); *United States v. Dillard*, 884 F.3d 758, 766 (7th Cir. 2018) (discussing probative value of gang membership evidence in conspiracy cases); *Armstrong v. State*, 852 S.E.2d 824, 830–32 (Ga. 2020) (evidence of defendant's gang membership relevant, admissible, and not unduly prejudicial because it explained motive actuating otherwise senseless shooting); *Smith v. Commonwealth*, 454 S.W.3d 283, 286–88 (Ky. 2015) (gang evidence relevant and not unduly prejudicial when it "offered a possible motive for what would otherwise appear to be an inexplicable massacre"); *State v. Legere*, 958 A.2d 969, 981–82 (N.H. 2008) (same); *State v. Nieto*, 12 P.3d 442, 450 (N.M. 2000) (same); *Commonwealth v. Reid*, 642 A.2d 453, 461 (Pa. 1994) (gang evidence admissible to prove motive and conspiracy); *Utz v. Commonwealth*, 505 S.E.2d 380, 384–86 (Va. Ct. App. 1998) (affirming expert evidence about gang affiliation and culture as probative of motive and intent; collecting cases).

However, in so holding, we caution that cases where prior bad act evidence of gang affiliation may be admitted to prove "motive" or "intent" will be uncommon, and these terms "are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." *United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974); 1 *McCormick on Evidence* § 190.5 (8th ed. 2020) (motive exceptions inapplicable "when 'motive' or 'intent' is just another word for propensity").

B. Gang evidence, unfair prejudice, and Rule 403

Having decided the evidence of Johnson's leadership and control of 135 Piru in Sumter met the narrow criteria of Rule 404(b), we next address whether the trial court acted within its discretion in concluding Rule 403 did not require exclusion. In undertaking its Rule 403 analysis, the trial court had to decide whether Johnson met his burden of showing the probative value of his gang affiliation was substantially outweighed by the danger of unfair prejudice. *State v. King*, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018). In criminal cases, the term "unfair prejudice" "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). "So, the Committee Notes to Rule 403 explain, 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id*. (internal quotations omitted). The experienced trial judge hit his mark, and we affirm the Rule 403 ruling. Our holding concerns

only the unfair prejudice component of Rule 403 as Johnson did not invoke any other aspect of the Rule. *See State v. Phillips*, 430 S.C. 319, 329, 844 S.E.2d 651, 656 (2020) (noting review of unfair prejudice is separate from other Rule 403 concerns).

Evidence of gang affiliation demands careful handling because of its power to distract the fact finder from its rational task of deciding the facts from objective evidence, luring their attention to the lurid, raising the risk that they will decide the case on an improper or subjective (often an unduly emotional) basis. The rules of evidence recognize verdicts are still rendered by human hands, not the artificial workings of algorithms, and emotion has its place. Rule 403 ensures emotion stays in its place. Probative evidence always prejudices the opposing party by building a case against them; however, Rule 403 only forbids "unfair prejudice," and its balancing test enables the trial court to temper the risk that evidence will exert such a pull on the jurors' emotions that it overwhelms their ability to rationally and impartially weigh the evidence and apply the law to the facts. Mention of gangs summons a stigma of lawlessness, and Rule 403 requires exclusion of gang evidence if the prejudicial risk substantially outweighs the evidence's probative value. But the criminal docket is not crowded with cherubs, and the rules of evidence are not designed to airbrush all of human nature out of the picture presented to juries. *See United States v. Gartmon*, 146 F.3d 1015, 1021 (D.C. Cir. 1998) ("Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone.").

While the trial court's admission of Johnson's affiliation with 135 Piru was not unduly prejudicial, the State came close to overplaying its hand in several respects. As we have held, evidence of the gang structure and culture passed Rule 404(b)'s logically relevant test, but we question why the jury needed to be repeatedly told the same thing about the same gang. The proverb may be true that judges, knowing nothing, need to be told the same thing three times, but juries do not, and Rule 403's bar against cumulative evidence empowers the trial judge to exclude the repetitive. Further, some of the testimony about Johnson and 135 Piru was so explosive that it may have implicated other Rule 403 concerns, including evidence that:

- Johnson previously led a gang known as "Sex Money Murder," whose members gained rank by "beating people, robbing, stealing, and selling drugs."

- Crayton's nickname was "Homicide."
- 135 Piru's national leader, known as "Machete," once visited Sumter and declared that certain locals who were "false-claiming" to be 135 Piru members should be forced to join or be killed.
- Johnson arranged for subordinate members to commit crimes at times he was not present.

This and other worrisome testimony surrounded the evidence admitted regarding 135 Piru and the events of March 22, 2011, but we have only been presented with Johnson's general unfair prejudice challenge to the admission of "gang evidence."

To sum up, we hold the trial court did not abuse its discretion in admitting the gang evidence as it was logically relevant to show motive and intent as authorized by Rule 404(b) and not unduly prejudicial within the meaning of Rule 403. We emphasize that even when gang evidence passes the Rule 404 and Rule 403 tests, trial courts must be vigilant in limiting its scope to the essential. In appropriate cases and upon appropriate request, a trial court may need to address the gang evidence issue in voir dire; control its presentation with measures authorized by Rule 611, SCRE; and deliver limiting instructions consistent with Rule 105, SCRE, that tell the jury the purpose for which they may use the gang-related evidence and for what purposes they may not.

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

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.