The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who were administratively suspended from the practice of law on April 1, 2007, under Rule 419(b)(2), SCACR, and remain suspended as of June 1, 2007. Pursuant to Rule 419(e)(2), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by July 1, 2007.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule

419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

June 6, 2007

ATTORNEYS SUSPENDED FOR NON-COMPLIANCE
FOR THE 2006-2007 REPORTING PERIOD
AS OF JUNE 1, 2007

Brian P. Bilbrey
PO Box 2093
Clarkesville, GA 30523

Jessica R. Boney
PO Box 1060
Union, SC 29379
(INTERIM SUSPENSION BY COURT)

John E. Carbaugh, Jr.
11100 Kings Cavalier Court
Oakton, VA 22124
(SUSPENDED BY BAR 2/1/07)

Blaine T. Edwards
PO Box 17678
Greenville, SC 29606
(INTERIM SUSPENSION BY COURT)

Kristine L. Esgar
2719 Kennedy Street
Columbia, SC 29205
(60-DAY SUSPENSION BY COURT)

Michael S. Fahnestock
1010 Timrod Street
Columbia, SC 29203

Samantha D. Farlow
PO Box 82
Orangeburg, SC 29116
(INTERIM SUSPENSION BY COURT)

David H. Hanna
PO Box 5496
Spartanburg, SC 29304
(INTERIM SUSPENSION BY COURT)

Tiffiny B. Hattaway
4459 Northside Parkway, NW, Apt. 368
Atlanta, GA 30237
(SUSPENDED BY BAR 2/1/07)

H. Dewain Herring
460 Alexander Circle
Columbia, SC 29206
(INTERIM SUSPENSION BY COURT)

Michael T. Hursey, Jr.
Hursey Law Firm
PO Box 3678
Myrtle Beach, SC 29578
(INTERIM SUSPENSION BY COURT)

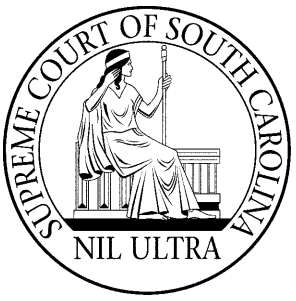
Aaron Christian Low
Stott Hollowell Palmer & Windham, LLP
401 E. Franklin Blvd.
Gastonia, NC 28054

Alex J. Newton
4 McKenna Commons Court
Greenville, SC 29615
(INTERIM SUSPENSION BY COURT)

Alan Rosenblum
PO Box 19110
Alexandria, VA 22320

James L. Thorne
The Electric Cooperatives of SC
808 Knox Abbott Drive
Cayce, SC 29033
(SUSPENDED BY BAR 2/1/07)

Harriet E. Wilmeth
PO Box 1139
Hartsville, SC 29551
(INTERIM SUSPENSION BY COURT)



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23

June 12, 2007
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 Eduardo Curry, Respondent.

Opinion No. 26340
Heard April 3, 2007 – Filed June 11, 2007

DEFINITE SUSPENSION

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

Coming B. Gibbs, of Charleston, for Respondent.

PER CURIAM: This is an attorney discipline case involving two separate instances of misconduct by respondent. The Commission on Lawyer Conduct Full Panel (Panel) adopted the report of the sub-panel, which recommended the following sanctions: (1) 30 day suspension; (2) respondent be required to obtain the services of a certified public accountant and an attorney to review compliance with Rule 417, SCACR; (3) respondent must submit affidavits from the CPA and attorney every six months for a period of three years to show compliance with Rule 417, SCACR; and (4) respondent be ordered to pay costs of proceedings.

The Office of Disciplinary Counsel (ODC) appeals and asks for a harsher sanction, contending the Panel erred in its findings on respondent's alleged Rule 403, SCACR, violations and in its consideration of certain mitigating circumstances. We agree with ODC and impose a six month suspension and the other conditions recommended by the Panel.

FACTS

This proceeding involves two separate matters arising out of a complaint filed with the Commission in 2002. An investigative panel authorized formal charges in November 2004. The hearing before the sub-panel was held in April 2005, and due to delay in receiving the transcript, the report of the sub-panel was not issued until July 2006. In September 2006, the Panel adopted the report.

Matter A

This matter arises from a prior disciplinary action that ended in 2001 with a deferred disciplinary agreement (DDA). The DDA concerned respondent's failure to obtain Rule 403 certification. A complaint had been filed against respondent for appearing in court without Rule 403 certification, but respondent asserted in 2001 that he had complied with the rule. However, no certification could be found in the Court's files.

The DDA prevented respondent from appearing in court without meeting the requirements of Rule 403. It did not order respondent to obtain the trial experiences and certification required by Rule 403, but if he did, respondent was required to file an affidavit and a copy of his compliance certificate with ODC. This agreement was accepted by the Commission on July 20, 2001.

We must now determine whether respondent's conduct after 2001 violated the terms of his DDA and Rule 403. In an attorney disciplinary proceeding, this Court gives great deference to the recommendation of the Panel. In re Myers, 355 S.C. 1, 584 S.E.2d 357 (2003). However, we exercise de novo review of the Panel's findings of fact and conclusions of law. Id.

Rule 403(a), SCACR, provides:

> [A]n attorney shall not appear as counsel in any hearing, trial, or deposition in a case…until the

> attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved by this rule…and the other attorney is present throughout the hearing, trial, or deposition.

Furthermore, we have previously disciplined an attorney for, among other ethical violations, appearing in court without proper certification under Rule 403. In re Moore, 345 S.C. 144, 546 S.E.2d 651 (2001). We noted in Moore that, absent Rule 403 certification, a lawyer is not entitled to "appear alone in courts of record in South Carolina." Id. at 149, 653.

After the complaint was filed in 2002, ODC reviewed respondent's file and found no affidavit or certificate of compliance with Rule 403. Upon written inquiry by ODC, respondent responded that he had not completed his Rule 403 requirements and that he had not appeared alone in a trial. Respondent did inform ODC that he was in the process of obtaining certification. However, respondent later admitted that he appeared alone at depositions.

Upon investigation, ODC alleged ethical violations in respondent's efforts to obtain Rule 403 certification. Several attorneys testified at the sub-panel hearing in regards to this matter.

Attorney A testified that he worked as co-counsel with respondent in two cases. However, Attorney A was not aware that respondent lacked Rule 403 certification, that respondent considered his presence to be for the purpose of Rule 403 compliance, nor did respondent ever ask Attorney A to appear specifically as Rule 403 counsel.

Attorney B testified that he appeared with respondent at one or two hearings, two or three guilty pleas, and one deposition. Attorney B was not aware that respondent lacked Rule 403 certification and did not consider his presence to be for respondent's compliance with Rule 403.

Attorney C, respondent's law partner, testified that he attended numerous hearings, trials, and depositions with respondent for the purpose of acting as respondent's Rule 403-certified co-counsel. However, Attorney C testified that he sat in the audience and did not participate in the proceedings. He also acknowledged that there were occasions where respondent asked him to go to court and he was not available.

The Panel then identified four different circumstances involving respondent that potentially violated Rule 403 and respondent's DDA.

The first circumstance identified by the Panel was respondent's appearance at depositions without a Rule 403-certified attorney. Respondent admitted to appearing alone at depositions but indicated he relied upon the DDA language which only prohibited solo appearances "in court." The Panel noted that respondent was required to comply with Rule 403, and his failure to insure strict compliance violated the rule. This finding is not in dispute.

The second circumstance was respondent's appearance alone at status and pre-trial conferences, roll calls, and roster meetings. The Panel concluded that respondent's conduct did not violate Rule 403 and the DDA. Citing the ambiguity between pre-2000 Rule 403 ("actual conduct and trial of a case"), post-2000 Rule 403 ("hearing, trial, or deposition"), DDA ("will not appear in court"), and In re Moore ("courts of record"), the Panel found that Rule 403 did not specifically prohibit appearances at these types of hearings.

ODC objects to this finding of the Panel. ODC posits that no ambiguity exists because appearances at pretrial and status conferences are appearances in court, which are prohibited by the DDA, Moore, and Rule 403.[1] In addition, ODC contends that even if the rule were unclear, the DDA clearly prohibited appearances in court. We agree with ODC.

Rule 403 ("hearings") and the DDA ("will not appear in court") clearly encompass respondent's appearance at pretrial and status conferences. The

[1] We agree with ODC that the pre-2000 version of Rule 403 that was in effect prior to the DDA and prior to the appearances that are at issue in this action is not relevant to our analysis.

appearances at these official court proceedings were prohibited by the language of the DDA and Rule 403, and respondent violated the rule and the DDA by appearing in these situations.

The third questionable action identified by the Panel was respondent's appearances with Rule 403-certified co-counsel. ODC asserted that attendance by co-counsel does not satisfy Rule 403 if the certified counsel is unaware that he is present for purposes of Rule 403. The Panel decided that neither Rule 403 nor prior case law require knowledge by the certified co-counsel of the uncertified attorney's lack of Rule 403 certification. The Panel found that it could not rewrite the rule or the DDA to require knowledge by the accompanying attorney, and it concluded that the mere appearance of a certified attorney met respondent's requirements.

ODC objects to this finding, arguing that the purpose of Rule 403 is defeated if certified co-counsel is unaware that he is considered present pursuant to Rule 403. We agree.

Respondent admitted he did not inform the attorneys who accompanied him that their presence was needed for compliance with Rule 403. This defeats the purpose of Rule 403. The rule allows an attorney to gain trial experiences by actively participating in court proceedings while in the presence of a certified attorney who is available to assist when necessary. A certified attorney's "presence" means more than mere physical presence; he must be aware of his reason for being present so that he is prepared to aid the uncertified attorney. We find the Panel erred in failing to find respondent in violation of Rule 403 for these appearances when certified counsel was not made aware of the reason for their presence.

The final circumstance involved respondent's appearances with Attorney C, who knew his presence was for respondent's compliance with Rule 403. Attorney C admitted that on several occasions he had occupied himself with his own clients' business while respondent was in court. The Panel found that Attorney C's presence and ability to provide guidance if needed, along with his knowledge that he was respondent's certified co-counsel, complied with the rule and the DDA.

ODC objects to this finding, arguing that the requirement of a Rule 403-certified counsel to be present throughout the proceeding means more than physical presence. ODC argues that if Attorney C occupied himself with his own business, respondent did not have a certified attorney "present" in the mental sense. We agree.

Much like the certified attorney who is less prepared to assist because he is unaware the attorney is attempting to acquire Rule 403 certification, a certified attorney who tends to his own business is not "present" for purposes of Rule 403.

We find that respondent's actions in these four situations constituted a willful violation of his prior DDA and Rule 403.

Matter B

This matter arises from a complaint filed by Doctor A, a chiropractor, who treated several of respondent's clients for injuries related to personal injury claims. Doctor A alleged that respondent failed to pay medical bills on behalf of clients following successful resolution of their cases.

Upon receiving notice of Doctor A's grievance, respondent issued checks from his trust account for the amounts claimed by Doctor A for each client. Respondent did not review his client files or trust account records before writing the checks. In two cases, respondent issued checks on behalf of clients, yet no funds were held in his trust account for those clients.

In two other instances, respondent had not sent checks to Doctor A even though his client ledgers and settlement statements showed that the checks had been written. Additionally, in the nine to ten months between the time respondent allegedly wrote the checks and the time he actually sent the checks to Doctor A, respondent's trust account balance dropped numerous times below the amount he was holding on behalf of these clients. Respondent claimed he paid Doctor A out of fees earned for other clients but not yet withdrawn from his trust account. After investigation, ODC found numerous violations involving respondent's trust account and recordkeeping. The findings by the Panel in regards to Matter B are not in dispute.

Upon the commencement of formal proceedings against respondent, he admitted the following: (a) he failed to reconcile his trust account on a monthly basis; (b) he failed to withdraw fees from his trust account when earned; (c) he failed to keep records of earned fees remaining in his trust account; (d) he routinely paid law firm expenses, including payroll, from his trust account; (e) he routinely paid personal expenses, including credit card and phone bills, from his trust account; (f) he failed to maintain an accurate and current accounting journal; and (g) he routinely advanced litigation costs for clients from his trust account when no funds were deposited for that purpose.

Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR, with regard to Matter B: Rule 1.15(a) (lawyers must hold client funds separately and maintain a complete record of those funds); Rule 1.15(b) (possession of funds in which a third party has an interest); Rule 1.3 (diligence); Rule 4.4 (respect for rights of third persons); Rule 5.1 (responsibilities of partner or supervisory lawyer); Rule 5.3 (responsibilities regarding nonlawyer assistants); and Rule 8.1 (misrepresentation in disciplinary matter). The Panel also found violations of Rule 417, SCACR, for respondent's financial recordkeeping deficiencies.

Mitigating Circumstances

In 2002, the Internal Revenue Service (IRS) improperly levied on just over $5,000 from respondent's trust account for failure to pay quarterly payroll taxes. The IRS should have levied respondent's operating account. Respondent could not recall when the money was returned.

The Panel noted that respondent had no control over an IRS levy against his trust account, and the Panel viewed the IRS levy as mitigating evidence. ODC objects to this finding, arguing that the negative client balances in the trust account for two of respondent's clients occurred before the IRS levy and continued after the money was returned. In addition, the IRS levy resulted from respondent's own failure to pay taxes, and ODC alleges that respondent failed to discover the levy because he did not reconcile his trust account. Finally, ODC contends that respondent should

have immediately replenished the missing funds from his trust account with his personal funds.

We believe the erroneous levy by the IRS on respondent's trust account was unexpected and unpreventable. We keep it in mind when determining a proper sanction.

The Panel also noted the substantial delay in the disciplinary proceedings as evidence of mitigation. The grievance was filed and investigation began in 2002, formal proceedings began in 2004, and the hearing was held in 2005. Due to delays in obtaining the transcript, the sub-panel report was not issued until July 2006.

ODC objects to the finding of a substantial delay in the proceedings and challenges the use of such a factor in mitigation. ODC cites the fact that problems concerning respondent's trust account did not appear until after the investigation had begun into Doctor A's complaint. ODC also noted that respondent's assurances that he was still in compliance with the DDA prevented investigation of Matter A until 2004. Furthermore, ODC contends that much of the delay was due to respondent's failure to supply adequate financial records and ODC's difficulty in reconstructing trust account transactions. ODC acknowledges the delay in obtaining the transcript of the hearing and in drafting the sub-panel report but maintains such delay is not attributable to either party.

We agree with ODC that the substantial delay in the proceedings is not attributable to respondent or to ODC. We do not consider the delay to be an aggravating or a mitigating circumstance.

CONCLUSION

ODC objects to the Panel's recommendation of a thirty day suspension. Citing past cases, ODC seeks a harsher sanction for respondent's misconduct. We are not bound by the Panel's recommendation but rather administer the sanction we deem appropriate after a thorough review of the record. In re Strickland, 354 S.C. 169, 580 S.E.2d 126 (2003).

Although we are aware of respondent's good reputation and positive achievements, we cannot overlook the serious violations that have occurred. Accordingly, we adopt all sanctions recommended by the Panel and increase respondent's suspension from the practice of law to six months. Within sixty (60) days of the filing of this opinion, respondent shall pay costs associated with this proceeding in the amount of $2645.11. Within fifteen (15) days of the filing of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Stone Craven, Respondent.

Opinion No. 26341
Submitted May 14, 2007 – Filed June 11, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

James Stone Craven, of Greenville, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension from the practice of law of not less than six (6) months or more than two (2) years. Respondent requests the suspension be made retroactive to the date of his interim suspension. We accept the Agreement and impose a two year suspension from the practice of law. The suspension shall not be made retroactive to the date of respondent's interim suspension. See In the Matter of Craven, 371 S.C. 393, 639 S.E.2d 150 (2006). The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent was admitted to the South Carolina Bar in 2001. His practice primarily involved trademark and copyright law.

Respondent asserts that he began using cocaine in an attempt to deal with the death of a loved one and other personal problems. Respondent's use of cocaine increased until it became a severely debilitating condition which contributed to his divorce, the dissolution of his law firm, the eviction from his law office building, the inability to properly represent his clients, and a virtual abandonment of his law practice for a short period of time. Respondent now recognizes that, at least for a short period of time during the later stages of his addiction, he was unable to provide competent, diligent representation to several of his clients and he did not adequately communicate with some of his clients about matters he had undertaken to handle for them.

Respondent sought help from Lawyers Helping Lawyers and voluntarily entered a detoxification facility. The director of Lawyers Helping Lawyers advises that respondent has been fully compliant with his recommendations, appears to be free from the use of cocaine, and that he expects respondent to abstain from the use of cocaine indefinitely.

During the period of his addiction, respondent made numerous deposits to and withdrawals from his trust account which should have been deposited into and drawn out of his operating account. On numerous occasions respondent negotiated checks on his trust account which should have been negotiated out of his operating account or his personal bank account. These checks included, but are not necessarily limited to, a refund of a retainer to a client which respondent had already expended as an earned fee, payment to a restaurant for a meal, payment of a credit card statement, payments directly to himself, and five checks payable to a liquor store for cash.

On several occasions in March 2006, there were overdrafts and/or negative balances in respondent's trust account.

Respondent did not reconcile his trust account in accordance with the requirements of Rule 417, SCACR. He did not maintain ledger records so as to be able to readily determine the amount held in the trust account for each client and did not keep other records required by the rule.[1]

Respondent received $275 for filing fees from a client related to a trademark application. Respondent represents he completed the initial portion of the work for the client but should have been holding the sum for other filing fees for additional work that was contemplated between respondent and the client. When respondent's trust account obtained a negative balance as a result of checks written on the account for respondent's personal purposes, respondent effectively used the $275 for purposes other than intended. Respondent represents he has subsequently repaid this client.

Respondent represents that, with the exception of the $275, the money spent from the trust account actually belonged to himself. However, he agrees that in withdrawing the funds in the manner stated, respondent could not readily identify the source of the monies withdrawn. Respondent acknowledges it constituted misconduct to use the $275 for purposes other than intended, to commingle his personal monies with the monies of others in his trust account, to use his trust account as a personal checking account, to write checks to himself and/or for cash, and to fail to comply with the recordkeeping and money handling provisions of the Rules of Professional Conduct and Rule 417, SCACR.

[1] Respondent represents that, due to the nature of his practice, there were rarely any large sums of money in his trust account. ODC has no basis to dispute this representation.

On at least one occasion after being placed on interim suspension, respondent contacted a client, gave the client a closed file to demonstrate he had in fact completed his legal services to that client prior to his suspension and to support his request to the client for the payment of a $500 fee (computed by respondent to be the balance due for an earned fee on the matter). Respondent now recognizes that, once placed on interim suspension, his client files and earned fees became the responsibility of the attorney appointed by the Court to protect the interests of respondent's clients. See Rule 31, RLDE, Rule 413, SCACR.

In accordance with the terms of the Agreement, respondent agreed as follows: 1) to make arrangements for random drug tests by Lab Corp (or some other facility the parties would agree upon in writing)[2] no less frequently than every 90 days;[3] 2) to continue to submit to random drug testing during the period of suspension imposed by the Court and, should he be reinstated to the practice of law, for a period of one year after his reinstatement; 3) to pay all costs associated with the drug tests when due; and 4) to cause all test reports to be sent directly from the testing facility to ODC, if the drug testing facility will do so and, if not, to forward the original of all reports within fifteen (15) days of receipt of the reports by respondent.

In addition, respondent agreed that his failure to strictly comply with the testing provisions in the Agreement or the indication of the use of illegal drugs in any report shall be grounds for additional disciplinary proceedings. Further, respondent agreed that, if he is reinstated to the practice of law and, thereafter, fails to strictly comply with the testing provisions in the Agreement or should any report indicate the use of illegal drugs, he would be subject to interim

[2] The random drug tests shall be for standard reportable percentages of cocaine, marijuana, opiates, and other common illegal drugs routinely included in such a test.

[3] Respondent agreed to make the arrangements with a drug testing facility within fifteen (15) days of the date of the Agreement.

suspension from the practice of law upon presentment of any report, copies thereof, or an affidavit of lack of receipt of the reports by ODC as required by the Agreement.

Respondent and ODC stipulated and agreed that the drug testing reports or copies thereof shall be presumed admissible in any and all proceeding before the Commission on Lawyer Conduct, the Committee on Character and Fitness, and the Court without the necessity of ODC having such reports identified and/or authenticated by any personnel of the testing facility. While respondent shall be entitled to challenge any test results he deems inaccurate, the reported results shall be presumed accurate and the burden of proof shall be on respondent to demonstrate the inaccuracy of any report by the clear and convincing standard.

Finally, prior to filing a Petition for Reinstatement, respondent agrees to pay $182 to the court reporter who transcribed his on-the-record, under oath interview.

Respondent has no prior disciplinary history. To the best knowledge and belief of ODC, respondent has fully cooperated with inquiries into this matter, including voluntarily submitting to an on-the-record, under oath interview, waiving the formalities of time and notice and doing so without requiring prior notice of matters to be addressed in the interview. The director of Lawyers Helping Lawyers advises respondent continues to work closely with the program and to follow his recommendations. Respondent recognizes that the use of or addiction to mind altering substances is not a defense to disciplinary proceedings and offers information related thereto only as an admission of that misconduct and in mitigation of other misconduct.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional

conduct of lawyers), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office), and Rule 7(a)(7) (it shall be a ground for discipline for a lawyer to willfully violate a valid court order issued by a court of this state). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall safekeep client property); Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and Rule 8.4(c) (it shall be professional misconduct for a lawyer to engage in conduct involving moral turpitude). Further, respondent admits he has violated the financial recordkeeping provisions of Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a two year definite suspension from the practice of law. Respondent's request that the suspension be applied retroactively to the date of his interim suspension is denied. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Steve Gillian, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26342
Heard April 4, 2007 – Filed June 11, 2007

AFFIRMED AS MODIFIED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, of Columbia, and Solicitor Warren Blair Giese, of Columbia, for respondent.

JUSTICE MOORE: Petitioner was convicted of murder and sentenced to life imprisonment without parole. The Court of Appeals affirmed. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). We now affirm as modified.

FACTS

The body of the victim, Jason Ward, was found about 8:30 a.m. on January 28, 2001, behind the Boozer Shopping Center. Richland County police investigated Ward's death initially by tracing his activities in the days leading up to his death. The police determined Ward was with petitioner from approximately midnight on January 28 until his death.

Around midnight, petitioner, Jeremiah Page, and several friends, most of whom had been drinking, met at Michael Glenn's home. Shortly after arriving at Glenn's home, petitioner left and brought Ward back to the party. Subsequently, petitioner and Ward left the party and drove to the apartment of one of Ward's co-workers.

After petitioner and Ward left the party, Page acted violently and was forcefully removed from the house. Once he calmed down outside, Page asked if he could reenter the residence and use the phone to secure a ride home. Once inside, Page telephoned petitioner and informed him of the previous altercation. Petitioner and Ward returned to the party at the Glenn residence approximately ten minutes after petitioner spoke with Page.

Upon arriving at the Glenn residence, petitioner physically attacked at least four people, including breaking one person's nose by head-butting him. Petitioner demanded to see the two men who had thrown Page out of Glenn's house. He asked the men why they attacked Page and threatened to beat them up for attacking Page. After questioning them, petitioner turned his anger upon Page for misleading him. Petitioner beat Page, who was crying and trying to cover his face.

At this point, Ward, who had been sitting quietly at the kitchen table, confronted petitioner about his behavior. A guest at the party testified Ward stated: "Why are you messing with these kids, man? They are scared of you. They don't want to fight you." Petitioner then directed his anger toward Ward, who calmly refused to fight petitioner despite several minutes of attempted instigation and taunting. Ward eventually responded to petitioner's threats by quickly punching him a few times and pinning him to the floor. After petitioner agreed to calm down, Ward allowed him to stand up, but the threats continued.

Around 5:30 a.m., Ward agreed to leave the party with petitioner, despite another party guest warning Ward not to leave with petitioner. Before leaving, petitioner stated, "You will see this in the newspaper tomorrow."

Around 6:30 a.m., residents of an area close to the Boozer Shopping Center heard gunshots. Ward's body was later found behind the shopping center, with four bullet wounds to the head and one to the neck. The wounds were caused by .38 caliber copper-jacketed bullets. Markings on the recovered bullets were consistent with bullets fired from a .38 caliber handgun manufactured by the Taurus Company, as well as seven other manufacturers. The murder weapon was never recovered.

Petitioner arrived at his parents' home around 8:30 a.m. on Sunday morning and entered his brother's bedroom. Petitioner confessed to his brother that he had shot Ward several times and that he did not feel remorse. He told his brother to watch the news because the murder would be on the news.

Around 9:00 a.m., petitioner walked over to his cousin's house. The cousin testified petitioner, who was drunk, told him he had gone to a party and beat up several people. Petitioner also told him he killed someone, explaining that he lured the victim behind the jewelry store he had once robbed under the guise of showing the victim how he broke into the store. He told his cousin he might see it in the newspaper.

Dems Jewelry Store, in the Boozer Shopping Center, reported a break-in and a resulting loss of 34 women's Tag Heuer watches in July of 2000. Steven Livingston, the owner and manager of the jewelry store, testified as to the details of the break-in. Page and petitioner's cousin stated that petitioner had previously told them that he had robbed a jewelry store and had taken several watches. Another witness, Dustin Johnson, testified that upon petitioner's directions he had pawned twelve Tag Heuer watches.

The weapon that killed Ward was never found. However, in investigating petitioner's connection to Ward's death, officers linked petitioner and five men to a residential burglary in Lexington County. All five of the men testified at trial as to the details of the burglary, and the testimonies of all five men were essentially in accordance with one another. The solicitor also presented testimony from Kevin Collins, the detective with the Lexington County Sheriff's Department who investigated the robbery, and from the resident, Ronnie Muller. The purpose of the testimony was to place the alleged murder weapon in the hands of petitioner around the time of the murder.

Testimony revealed petitioner planned the burglary which took place on January 26, 2001. Petitioner obtained a map of the inside of the home and copied keys that allowed entry to the home.[1] Petitioner recruited the five men to actually enter the house for him. While the five men entered the home, petitioner waited at a nearby gas station. A five shot Taurus .38 caliber revolver was one of the items taken from the home.

The men met petitioner following the burglary. Petitioner was furious at the group's failure to steal any items of value. However, Page testified petitioner was enthusiastic about the theft of the gun, which he placed in his car, stating he intended to use it to "do some dirt." One participant, Jessie Boot, testified the gun was a black revolver with a brown handle. Another participant, David Grice, testified the gun was a brown-handled, black metal .38 that said Taurus on it. Petitioner, along with a few of the men, then

[1]There is a Walmart video showing petitioner and Page having the keys copied.

returned to the home to steal additional items, some of which were taken to a wooded area near petitioner's parents' home. Several of the men testified they saw petitioner place the gun in a brown paper bag and place it inside his car.

The following day, petitioner contacted an associate in the music industry to purchase bullets for the gun, but the man refused. Thereafter, Dustin Johnson reluctantly agreed to purchase the bullets from a local Wal-Mart. Both Johnson and petitioner were identified on store security video purchasing the bullets on January 27.

Prior to the start of the trial, defense counsel moved to have evidence of the two burglaries excluded under Rules 403 and 404(b), SCRE, and under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The trial judge ruled evidence of the burglaries was admissible. Before the residential burglary testimony began, the trial judge issued a limiting instruction to the jury that they could consider the evidence for intent and identity, but not as a comment on petitioner's character. At the close of the State's evidence, defense counsel's motion for a mistrial based on the prior bad act evidence regarding the residential burglary was denied.

ISSUES

I. Did the Court of Appeals err by upholding the trial court's decision to admit evidence of two prior burglaries committed by petitioner?

II. Did the Court of Appeals err by upholding the trial court's decision not to admit evidence of a police ruse designed to coerce petitioner into confessing?

DISCUSSION

I. Evidence of Prior Burglaries

Regarding both burglaries, the Court of Appeals held that evidence of the Dems jewelry store burglary and the residential burglary was admissible under the *res gestae* theory.

We find the Court of Appeals erred because neither burglary furnishes part of the context of the crime nor are they necessary for a full presentation of the case. *See* State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (one of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case). Neither burglary is needed to complete the story of the crime of murder. *See id.* (evidence of other crimes is admissible where that evidence is needed to complete the story of the crime on trial by proving its immediate context or the *res gestae*). Accordingly, the Court of Appeals erred by finding the evidence of both burglaries was admissible as part of the *res gestae* of Ward's murder. *See, e.g.*, State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (evidence of an escort's assault and robbery is not admissible as part of the *res gestae* of the murder of another escort because the murder occurred nearly two days after the assault and robbery; further, the crimes were not so intertwined that one cannot be proven without mention of the other).

The Court of Appeals also found the State presented clear and convincing evidence that petitioner committed the burglaries. The Court of Appeals further found the evidence was admissible as tending to establish petitioner's identity as Ward's murderer pursuant to Rule 404(b), SCRE.

Evidence of other crimes is not admissible to prove the character of a person in order to show action in conformity therewith. Rule 404(b), SCRE. The evidence may, however, be admissible to show identity. *Id.* If the defendant was not convicted of the prior crime, evidence of the prior bad act

must be clear and convincing. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006).

A. Evidence of Dems jewelry store burglary

The Dems burglary evidence is clear and convincing and falls into the identity exception. The evidence served to show the identity of the murderer given petitioner's confession to his cousin that he lured the victim behind the jewelry store he had once robbed and given that Ward's body was found in the vicinity of the Dems store. Consequently, evidence regarding the Dems burglary was relevant and probative on the issue of identity. *See, e.g.,* State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) (by his own actions, Bell linked the two murders together and consequently the evidence of the taped telephone conversations between Bell and the victim's family was probative of his conduct).

Although the evidence is admissible to show identity, it must also be determined whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364, *cert. denied,* 498 U.S. 881 (1990).

The amount of evidence regarding the specifics of the Dems burglary was unnecessary. We find, however, that the admission of the evidence was harmless given that petitioner's guilt has been proven by competent evidence such that no other rational conclusion can be reached. *See* State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached); *see also* State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991) (appellate courts will generally not set aside convictions due to insubstantial errors not affecting the result).

Other competent evidence established petitioner's guilt beyond a reasonable doubt. There was ample testimony regarding petitioner's altercation with Ward and his veiled threat towards Ward only hours before the murder. The evidence also showed that petitioner was the last one seen with Ward immediately prior to the murder and that he confessed the murder to his brother and cousin. Therefore, although the quantity of testimony about the Dems burglary was inappropriate, any error in allowing the evidence was harmless.

B. Evidence of the residential burglary

Evidence that petitioner was involved in the residential burglary was clear and convincing. Several witnesses were able to testify to his involvement. Further, petitioner conceded the evidence was clear and convincing.

The burglary evidence was presented in an effort to show the identity of the perpetrator by showing that petitioner was in possession of a stolen gun that was consistent with the type of weapon used to kill the victim. The evidence showed petitioner placed the stolen .38 caliber Taurus five-shot revolver in his car and later purchased .38 caliber bullets. Other evidence showed that the victim had been shot five times and that the recovered bullets were consistent with those fired by a Taurus revolver. Accordingly, the evidence was properly admissible to show identity. *See* State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994)[2] (evidence that Southerland stole the shotgun used to kill the victim from a trailer two weeks before the murder and that he traded the shotgun for drugs the day after the murder was admissible to prove identity).

However, even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Pagan, *supra*. Proving the identity of petitioner as the perpetrator was an important issue in the trial. Allowing the State to present evidence of

[2]*Cert. denied*, 513 U.S. 1166 (1995).

the burglary in an effort to show the alleged murder weapon was in petitioner's hands immediately prior to the murder was highly probative.

We find, however, that the trial court should have limited the quantity of the evidence presented about the burglary. Not all of the evidence was necessary. For example, one of the State's witnesses, Dustin Johnson, testified about the burglary but did not testify that he saw a gun stolen from the house or that petitioner had the gun around the time of the burglary. Another witness, Brandon Cannon, did not give a description of the gun. Accordingly, the State did not need Cannon's or Johnson's testimony about the burglary in their effort to show petitioner was in possession of the type of gun that was used in the murder.

Further, there was an extensive amount of evidence presented about the burglary that was unrelated to the gun; for instance: what other items were stolen, where other stolen items were discarded, the fact petitioner led the others in committing the burglary, and the fact petitioner ransacked the house after learning the others did not find money on their first visit. Considering the volume of the testimony about the residential burglary, petitioner was prejudiced by the admission of that amount of extraneous testimony.

However, we conclude the admission of the extraneous evidence was harmless given that petitioner's guilt has been proven by competent evidence such that no other rational conclusion can be reached. *See* State v. Bailey, *supra*. Although the trial court erroneously allowed the State to provide extraneous testimony about the burglary, other competent evidence, as previously discussed, established petitioner's guilt beyond a reasonable doubt. Therefore, the court's error in allowing the extraneous burglary evidence was harmless. *See* State v. Bailey, *supra*; State v. Sherard, *supra*.

II. Evidence of the police ruse

At trial, defense counsel was not allowed to elicit testimony from Lieutenant Smith about a ruse the police used in an attempt to convince petitioner to confess to the crime. In testimony proffered outside the jury's presence, Smith admitted police falsified aerial photographs to show

petitioner's vehicle at the rear of the Boozer Shopping Center around the time of the shooting. The ruse was used in an interview with petitioner to obtain a confession; however, petitioner did not confess.

Defense counsel also attempted to show during the proffered testimony that Smith omitted details of the ruse from his report on the investigation. Defense counsel argued this information should have been presented to the jury both to show the lack of confidence the police had in their case and the possible lack of integrity in the investigation based on lack of documentation of the ruse. The trial judge ruled evidence of the ruse was not relevant because there was no other indication the State had manufactured other evidence or done anything else improper. The judge further ruled that the admission of the evidence would confuse the jury because there were no "fruits" obtained from the ruse. The Court of Appeals found the trial judge did not err by refusing to admit the evidence.

Evidence is relevant if it tends to make more or less probable a fact in issue. Rule 401, SCRE; State v. Huggins, 336 S.C. 200, 519 S.E.2d 574 (1999).[3] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE. The relevancy of evidence is an issue within the trial judge's discretion. State v. Huggins, *supra*.

There is no abuse of discretion here. Evidence that the ruse failed to elicit a confession is not relevant to the circumstances of Ward's death. It is also not relevant because there is no suggestion by petitioner that the State manufactured any evidence or engaged in any other improprieties in investigating the case. Therefore, the Court of Appeals correctly ruled that the trial judge properly excluded the evidence.

Petitioner argues that, pursuant to Frazier v. Cupp, 394 U.S. 731 (1969), and State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689, *cert. denied*, 519 U.S. 972 (1996), evidence of the ruse should have been admitted so that

[3] *Cert. denied*, 528 U.S. 1172 (2000).

the jury could have considered how it reflected on the strength of the State's case. The Court of Appeals properly found that these cases are inapplicable because they involve determining whether a confession was voluntarily given after examining all the circumstances surrounding the confession. Here, there is no confession and no statements for the jury to determine how they were given and if they were voluntary.

Accordingly, the trial judge properly excluded testimony regarding the ruse. *See* State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006) (the admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice).

CONCLUSION

We find the Court of Appeals erred by holding evidence of the burglaries was admissible as *res gestae* evidence. Regarding both burglaries, we find the evidence was probative to the issue of identity; however, the amount of evidence should have been limited by the trial judge. Given the overwhelming evidence of guilt, however, the admission of the extraneous evidence regarding the burglaries was harmless error. We further hold the trial judge properly excluded testimony regarding the ruse the police used in an effort to obtain petitioner's confession. Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Tony T-juan Sweet, Appellant.

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

Opinion No. 26344
Heard April 18, 2007 – Filed June 11, 2007

REVERSED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Robert M. Ariail, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: A jury found Tony T-Juan Sweet ("Appellant") guilty for offenses related to the distribution and possession of crack cocaine within the proximity of a school. On appeal, Appellant alleges that the trial court erred in admitting evidence with a defective chain of

custody, and commenting on the facts of the case in the presence of the jury. We reverse Appellant's distribution convictions and remand.

FACTUAL/PROCEDURAL BACKGROUND

In June 2003, the Greenville police department arranged for a confidential informant to purchase drugs from Appellant at a local motel. Police officers searched the informant and his car for drugs before following him to the motel where the officers maintained video surveillance of the motel parking lot. The officers also wired the informant so that the transaction could be monitored. Officers watched as the informant met Appellant outside the motel and then accompanied Appellant inside a motel room. Although they did not visually witness what occurred inside the motel room, the officers testified to hearing only the informant's and one other voice through the informant's wire. Likewise, video surveillance did not observe anyone entering or exiting the motel room during that time.

When the confidential informant left the motel, officers followed him back to the police station where he handed over 0.21 grams of crack cocaine from the apparent drug purchase. Meanwhile, back at the motel, waiting officers arrested Appellant when he exited the room and attempted to leave on his bicycle. Upon searching Appellant, officers found a plastic bag containing 4.27 grams of crack cocaine.

At trial, the State sought to admit both the drugs received from the informant and the drugs seized in the search of Appellant. Appellant objected to the introduction of the evidence, arguing that since the informant was unavailable to testify at trial, the State had not established a proper chain of custody. The trial court overruled Appellant's objection, stating that the evidence showing the drugs came from Appellant was "circumstantial . . . [a]t a minimal.[1]" The court denied Appellant's subsequent motion for a mistrial based on this remark.

[1] Neither party disputes that from the context of this remark, the word "minimum" was the appropriate/intended usage.

A jury convicted Appellant of distribution of crack cocaine, distribution of crack cocaine within the proximity of a school,[2] possession of crack cocaine with intent to distribute, and possession of crack cocaine with intent to distribute with in the proximity of a school. The trial court sentenced Appellant to consecutive sentences of fifteen years and five years for the distribution charges, and concurrent sentences of fifteen years and ten years on the possession charges. This appeal followed.

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

I. Did the trial court err in admitting drug evidence obtained from the informant because the chain of custody was defective?

II. Did the trial court err in failing to direct a mistrial after commenting in the presence of the jury that the State had established by "circumstantial evidence at a minimum" that Appellant sold the drugs being offered into evidence?

STANDARD OF REVIEW

Decisions regarding the admissibility of evidence and whether to grant or deny a mistrial are within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (2005). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265.

[2] The drug transaction took place at a motel that was within one-half mile of Bob Jones University.

LAW/ANALYSIS

I. Chain of custody

Appellant argues that the trial court erred in admitting evidence of drugs purchased by an unknown confidential informant because the chain of custody was defective. We agree.

As a preliminary matter, the State argues that this issue is not preserved for appeal because Appellant did not renew his objection to this evidence at the time the evidence was introduced. To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

In this case, the State sought to admit two pieces of drug evidence at trial: the drugs that the informant allegedly purchased from Appellant and turned over to the police upon arriving back at the station (State's Exhibit No. 2); and the drugs which police seized from Appellant incident to his arrest in the motel parking lot (State's Exhibit No. 1). The State's first attempt to admit drug evidence came during the testimony of the officer who received the drugs from the informant back at the police station. When the State moved to admit these drugs, i.e., State's Exhibit No. 2, defense counsel objected on the grounds that the State had not revealed an adequate chain of custody to satisfy admissibility requirements. Based on the defective chain of custody, the trial court declined to admit the drugs at that time.

Later in the trial, the State attempted to simultaneously admit both State's Exhibit No. 1 (the drugs found on Appellant after his arrest) and State's Exhibit No. 2 (the drugs received from the confidential informant) during the testimony of the forensic chemist. At this point, defense counsel objected to the admissibility of State's Exhibit No. 1 on the grounds that the State failed to establish an adequate chain of custody. Specifically, defense counsel stated, "[T]here is no evidence that this is attributed to the defendant or came in from any source. The officer claims, you know, he got it from somewhere. And that there's no connection between the defendant and this

substance." The State now argues that defense counsel's failure to specifically object to State's Exhibit No. 2 prevents Appellant from raising the issue to this Court.

We find that Appellant's failure to renew his objection to State's Exhibit No. 2 does not amount to a failure to preserve the issue. The grounds for defense counsel's objection to State's Exhibit No. 1 clearly refer to the absence of testimony from the informant with respect to State's Exhibit No. 2, the drugs received from the informant. Conversely, the drugs marked as State's Exhibit No. 1 were retrieved directly from Appellant's front pocket incident to arrest and an objection to their admissibility based on a gap in the chain of custody would have been nonsensical. Because Appellant's objection clearly refers to the drugs received from the confidential informant, Appellant should not be penalized for an apparent misstatement in referring to the exhibit number of the objectionable evidence. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector."). Therefore, we find that the issue has been properly preserved for appeal.

Turning to the merits, this Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. *Benton v. Pellum*, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957). Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. *Id.* at 33-34, 100 S.E.2d at 537. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive. *State v. Taylor*, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004).

Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility. *Id.* at 27, 598 S.E.2d at 739. Where other evidence establishes the identity of

those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness. *See State v. Williams*, 297 S.C. 290, 376 S.E.2d 773 (1989) (upholding the admissibility of a blood test even though a nurse who drew the blood from the defendant did not testify at trial; hospital forms completed by the absent nurse and testimony from the other evidence custodians sufficiently established a chain of custody).

In the instant case, we find that without the testimony of the confidential informant, the State's proof fails to establish a complete chain of custody. None of the chain of custody witnesses testified to seeing inside the motel room in order to establish who was in the room making the alleged transaction. Additionally, none of the witnesses who heard only "one other voice" over the informant's body wire could affirmatively identify this voice as being that of Appellant. Although Greenville police officers testified to a brief search of the informant both before and after the incident, and that they observed no other individuals enter or exit the room during their surveillance, this circumstantial evidence does not show how the informant came into possession of the drug evidence and in what condition he received it. *See State v. Chisolm*, 355 S.C. 175, 584 S.E.2d 401 (Ct. App. 2003) (holding that the names and signatures of two evidence technicians on the evidence bag did not sufficiently prove chain of custody where the two technicians were not present at trial to testify to receiving the evidence). Because the officers' testimony does not fill the gap in the chain of custody left by the unavailable informant, the trial court erred in admitting the drug evidence received by the confidential informant.

The State argues that the officers' knowledge of the confidential informant's name establishes his identity and therefore, the issue in this case is merely a question of the credibility of the drug evidence rather than its admissibility. This argument is based on the longstanding rule that proof of the chain of custody need not negate all possibility of tampering so long as the party seeking to admit the evidence has established a complete chain of custody at least as far as practicable. *Benton*, 232 S.C. at 33, 100 S.E.2d at 537. In applying this rule, this Court has held that where a party has established the identity of each person in the chain of custody, issues

regarding the care of the evidence only go to the weight of the specimen as credible evidence, and not its admissibility. *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001).

We find that the State's argument is misapplied in the instant case. The rules upon which the State relies require the State in the first instance to have established a complete chain of custody at least as far a practicable. As discussed above, in the absence of testimony from the confidential informant, the State's proof of chain of custody is incomplete because it fails to establish the identity of each custodian and the manner of handling of the evidence. *Cf. id.* (holding that where all custodians of a blood sample testified, the chain of custody was complete and therefore, evidence regarding a discrepancy in the handling of the blood sample went to the weight of the sample as credible evidence and not its admissibility). Furthermore, although the unavailability of the confidential informant made it impracticable to produce him as a witness at trial, the State could have taken a sworn statement from the informant before he left the station and produced the statement at trial under the procedures of Rule 6(b), SCRCrimP.[3] *See Chisolm*, 355 S.C. at 180, 584 S.E.2d at 404 (finding drug evidence inadmissible where "it would not have been impracticable for the State to have called each custodian to testify or for the State to have submitted sworn statements from the custodians under . . . Rule 6(b), SCRCrimP."). In other words, the State simply did not present proof of the chain of custody as far as practicable. For these reasons, the informant's possession of the drug evidence may not be reduced to an issue of mere credibility based solely on the officers' knowledge of the informant's name.

Although our courts have been willing to fill in gaps in the chain of custody where other evidence reasonably demonstrates the identity of each individual in the chain of custody and the manner of handling of the evidence, such circumstances are not present here. Accordingly, we hold that

[3] Rule 6(b), SCRCrimP, allows for the admission of sworn statements to prove chain of custody in lieu of the appearance of a chain of custody witness.

the trial court erred in admitting evidence of drugs allegedly purchased from Appellant by the informant.

II. Remark by the trial court in the presence of the jury.

Because our decision regarding the chain of custody is dispositive in this case, we decline to address Appellant's argument that the trial court erred in refusing to grant a mistrial based on the court's remark that the State had established by "circumstantial evidence at a minimum" that the drugs came from Appellant. *See Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). (providing that an appellate court need not address additional issues if the resolution of another issue is dispositive).

CONCLUSION

For the foregoing reasons, we reverse Appellant's distribution convictions and remand the case for a new trial on these charges.

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

The Supreme Court of South Carolina

In the Matter of
John Plyler Mann, Jr., Petitioner.

ORDER

On October 24, 2003, petitioner was placed on interim suspension. In the Matter of Mann, 356 S.C. 227, 588 S.E.2d 588 (2003). On June 1, 2004, the Court indefinitely suspended petitioner from the practice of law. In the Matter of Mann, 359 S.C. 134, 597 S.E.2d 789 (2004).

In September 2006 petitioner filed a Petition for Reinstatement and the matter was referred to the Committee on Character and Fitness (CCF). The CCF has filed a Report and Recommendation in which it recommends the Court grant the petition subject to the condition that petitioner fully repay the Lawyers' Fund for Client Protection (Lawyers' Fund) for claims paid on his behalf. Neither petitioner nor the Office of Disciplinary Counsel (ODC) filed any exceptions to the CCF's Report and Recommendation.

The Court grants the Petition for Reinstatement subject to the condition that petitioner fully repay the Lawyers' Fund for all claims paid on his behalf within one (1) year of the date of his reinstatement.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

June 6, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hardaway Concrete Company, Inc., Respondent,

v.

Hall Contracting Corporation, Principal and Contractor; and Travelers Casualty & Surety Company of America, Surety, Defendants,

Of whom Hall Contracting Corporation, Principal and Contractor is Appellant.

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 4252
Heard January 9, 2007 – Filed June 8, 2007

AFFIRMED IN PART,
REVERSED IN PART,
AND MODIFIED.

M. Alan Peace and Donald W. Tyler, Jr., both of Columbia, for Appellant.

David M. Ratchford and Brian C. Gambrell, both of Columbia, for Respondent.

BEATTY, J.: In this breach of contract action, Hall Contracting Corporation (Hall) appeals the master-in-equity's finding for Hardaway Concrete Company, Inc. (Hardaway) and awarding Hardaway attorney's fees. We affirm in part, reverse in part, and modify.

FACTS

The South Carolina Public Service Authority (Santee Cooper) sought bids for suppliers and contractors in the construction of a new power plant in Cross, South Carolina. Initially, Santee Cooper sought bids from suppliers of the materials to be used in the construction process. Hardaway submitted a successful bid to become the concrete supplier and entered into a contract with Santee Cooper. The contract provided that Hardaway set up two on-site concrete plants: a primary plant with a rated capacity of 150 cubic yards of concrete per hour and a backup plant with a rated capacity of 100 cubic yards of concrete per hour. The contract specified the concrete be delivered to the jobsite in a "timely and continuous manner." Hardaway would be paid by the concrete placement contractor, not Santee Cooper, according to the cubic yards agreed to on the batch tickets. Further, the contract required Hardaway to furnish "[i]ce making and cooling equipment for temperature control during hot weather concrete placement" and provided for the price per pound of ice Hardaway would receive.

After accepting Hardaway's bid, Santee Cooper sought bids for concrete placement contractors for the foundation of the chimney. Hall submitted the lowest bid at $1,746,652. The other bids were higher than Hall's by at least $200,000. Ultimately, Hall received the contract for the concrete placement work. Hall's contract provided that it would pay for the concrete by the cubic yards agreed to on the batch tickets.

Hall sent Hardaway a facsimile (First Facsimile) stating, "Hall Contracting agrees to the unit rates, terms and conditions listed in Santee Cooper contract . . . (see attached copy)." The attached copy of the contract contained Hardaway's right to charge for ice. On March 17, 2003, Hall sent Hardaway a purchase order regarding the first pour, specifying how long the pour would take and stating it would be "using two pump and requires a minimum of 200 [cubic yards] per hour (100 [cubic yards] to each pump)." Although the purchase order contained a space for Hardaway to sign, Hardaway never signed the purchase order. Hall sent Hardaway a purchase order before each of the five pours, purporting to set out a specific schedule for the rate of the concrete. Hardaway never signed any of these purchase orders.

After the completion of the project, Hardaway billed Hall for the supplied concrete. Hall paid all but $45,123.84 and sent Hardaway a letter informing Hardaway that Hall was due a credit in that amount from Hardaway. Hardaway brought suit against Hall for breach of contract for failure to pay the $45,123.84. Hall answered and counterclaimed that it and Hardaway entered into an enforceable agreement to supply concrete at a minimum rate of 200 cubic yards per hour. Hall alleged Hardaway breached the contract and asked for damages of $45,123.84.

At trial, David Russell, a senior vice-president at Hall, testified that during the bid process, Hall contacted Hardaway to confirm the capacity of the concrete plants and learned the capacities Hall had been given were "rated capacities and not actual production capacities" and Hall could expect a maximum of 200 cubic yards year hour. He testified that Hall based a lot of its pricing on that information. Russell testified that Hall lost around $60,000 on the Santee Cooper job and probably made an error in estimating. Further he testified the error was made by an estimator who was fired, in part, for his mistakes in estimating.

The master found Hall was a third-party beneficiary in the contract between Hardaway and Santee Cooper, and Hardaway was a third-party beneficiary of the contract between Hall and Santee Cooper. Further, the

master found Hardaway and Hall also formed a contract in the First Facsimile. The master determined Hardaway produced and delivered the concrete as contemplated in the agreements and accordingly, Hall owed Hardaway the remainder of $45,123.84. Further, it found Hall fraudulently, and in bad faith, generated a list of back charges. Additionally, the master granted Hardaway's motion to amend its complaint to include a claim for attorney's fees under section 27-1-15 of the South Carolina Code (1991).

On January 5, 2006, the master held a separate hearing on attorney's fees. The master found that Hardaway had met its burden of showing Hall had not conducted a fair and reasonable investigation and was thus entitled to attorney's fees under section 27-1-15. Accordingly, the master awarded Hardaway attorney's fees of $53,592.56. This appeal followed.

STANDARD OF REVIEW

On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The rule is the same whether the trial court's findings are made with or without reference. Id. The trial court's findings are equivalent to a jury's findings in a law action. Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). This court must determine whether any evidence reasonably supports the factual findings of the trial court. Townes Assocs., Ltd., 266 S.C. at 86, 221 S.E.2d at 776. Additionally, the appellate court can correct errors of law. Okatie River, L.L.C. v. Se. Site Prep, L.L.C. 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003). "This scope of review is equally applicable to the factual determinations of a master when, as in the present case, he enters final judgment." Wigfall v. Fobbs, 295 S.C. 59, 61, 367 S.E.2d 156, 157 (1988).

LAW/ANALYSIS

I. Interpretation of the contract

Hall argues the master erred in awarding judgment in favor of Hardaway. Specifically, Hall contends the master erred in finding: (1) Hardaway was not bound by the concrete production rates provided in the purchase orders and pour specifications; and (2) Hardaway was entitled to charge for ice.

A. Pour Rate

Hall argues the master erred by not finding Hardaway was bound by the pour specifications requested by Hall. Hall argues the sale of concrete is a transaction of goods, and therefore, Article 2 of the U.C.C. governed the transaction.[1] Hall argues Hardaway was aware of the specifications and knew that Hall was relying on Hardaway to provide concrete consistent with those provisions.

However, Hall proceeded solely under a contract theory at trial. It did not raise the U.C.C. issue in its answer or in arguments during trial. Because the issue was not raised before the master, the master did not get the opportunity to rule upon the question of whether Hardaway's actions violated the U.C.C. Accordingly, this issue is not preserved for our review and we may not address it. In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d

[1] Hall further contended in its brief that even if the contract was not governed by the U.C.C., Hardaway was estopped from objecting to the specifications in the purchase order and pour specifications. However, at the oral argument of this case, Hall's attorney informed this court that it was specifically waiving its estoppel argument and was proceeding solely on the U.C.C. argument. Thus, we need only address the U.C.C. argument.

712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

B. Ice

Hall argues the master's finding that it was responsible for $1,874.50 in ice charges was not supported by the evidence. Hardaway argues this issue is not preserved. At oral argument, Hardaway alternately argued that it is irrelevant that its original contract with Santee Cooper was later altered to disallow ice charges because Hall sent Hardaway a fax adopting the original contract between Hardaway and Santee Cooper. We agree with Hall.

The elements required for formation of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("[I]n order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement."); Rushing v. McKinney, 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006) (holding that for a contract to arise, there must be a meeting of the minds of the parties involved). Generally, a third person not in privity of contract with the contracting parties does not have a right to enforce the contract. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994).

We first address Hardaway's argument that this issue is not preserved. Hardaway admits in its brief that Hall raised the ice issue below. However, Hardaway argues the master failed to address these specific arguments in its order. In fact, the master reviewed the evidence and the arguments of both

parties and determined that Hardaway was entitled to charge for ice based on the first contract and the fax between the parties. Because Hall raised the issue of whether Hardaway was entitled to charge for ice and the master determined Hardaway was entitled to do so, the issue was raised to and ruled upon by the master. Accordingly, the issue is preserved for appellate review.[2] Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that matters must be raised to and ruled upon by the trial court in order for the matter to be preserved for appellate review).

On the merits, this case presents the situation where Santee Cooper contracted with both Hall and Hardaway for services related to the construction of the power plant, but where neither Hall nor Hardaway contracted with each other. The master found that Hall was the third party beneficiary of the contract between Hardaway and Santee Cooper. This finding is unappealed, and thus, it is the law of the case. ML-Lee Acquisitions Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unchallenged ruling, right or wrong, is the law of the case).

With that understanding in mind, we believe the evidence does not support the master's finding that Hardaway was entitled to charge Hall for ice. The original contract with Santee Cooper provided that Hardaway was responsible for "[i]ce making and cooling equipment for temperature control during hot weather concrete placement" and that Hardaway could bill Hall for "supplemental ice" as necessary for cooling the concrete. Hall faxed a letter to Hardaway indicating it accepted the rates and terms of Hardaway's contract with Santee Cooper. However, Hardaway's contract with Santee

[2] Hardaway also asserted for the first time at oral argument that the ice issue was not preserved for review because Hall's U.C.C. and estoppel arguments were not ruled upon by the trial judge and constitute the "only basis for appeal." Although Hall raises U.C.C. and estoppel arguments with regard to pour specifications in its brief, it is clear from the separate ice argument that Hall is only referring to the wording of the underlying contracts. The contract matter was ruled upon by the master, and it is preserved for our review.

Cooper was later amended to disallow ice charges. A Santee Cooper employee testified at trial that the contract was amended so that Santee Cooper would pay Hardaway a lump sum to provide all the cooling equipment including supplemental ice. Hardaway also sent a letter to the project manager indicating that Hardaway would provide the cooling system and that the "the cost for supplemental ice, if required, is also included." The record also includes an email from the project manager to Hardaway stating that Hardaway was responsible for all the cooling equipment, including supplemental ice. Because Hall was the third-party beneficiary of Hardaway's modified contract with Santee Cooper, Hardaway was not entitled to charge Hall for ice.

Accordingly, there was no substantial evidence to support the master's finding that Hardaway was entitled to charge Hall $1,874.50 for the provision of ice, and Hardaway's award shall be modified to reduce it by this amount.

II. Attorney's Fees

A. Amending Complaint

Hall contends the master erred by allowing Hardaway to amend its complaint to add a claim for attorney's fees under section 27-1-15 of the South Carolina Code (1991). We disagree.

A party normally may amend his pleadings once as a matter of course within thirty days of the time a responsive pleading has been served. Thereafter, however, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15, SCRCP. A motion to amend is addressed to the trial court's sound discretion and the burden of establishing prejudice rests on the party opposing the motion. Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002). "In considering potential prejudice to the opposing party, the court should consider whether the opposing party 'has had the opportunity to prepare for the issue now being raised formally.'" Soil & Material Eng'rs, Inc. v. Folly Assocs., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987)

(quoting H. Lightsey & J. Flanagan, South Carolina Civil Procedure at 291 (1985)).

Hall admitted knowing of Hardaway's intention to seek attorney's fees under section 27-1-515 two weeks before trial began. Hardaway contends Hall had more notice than two weeks, because Hardaway sent letters to Hall informing it of its intention to assert the section on June 27, 2005, and the trial did not actually begin until August 29, 2005.[3] The master noted that Hall ably argued two motions on the motion to amend and even presented the master with the only case substantively discussing the attorney's fee statute. Accordingly, Hall did not demonstrate prejudice, and the master did not abuse his discretion in allowing Hardaway to amend its complaint.

B. Denial of Motion to Dismiss

Hall asserts the master erred in denying Hall's Rule 41(b), SCRCP, motion to dismiss the claim for attorney's fees. We disagree.

Rule 41(b), SCRCP, provides:

> After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.
>
> The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a

[3] The actual letters are not included in the record.

> dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(emphasis added).

Hall argues the master erred in waiting until the close of all evidence to decide the motion because Hardaway did not present any evidence regarding an investigation. As Rule 41(b) specifically states, a court may wait until the close of evidence to render judgment. Because of the unusual manner in which the parties chose to present evidence in order to have a more efficient trial, the master chose to wait. Accordingly, the master did not err in waiting until the close of evidence to rule on the motion. The master determined that Hardaway met its burden of showing Hall had not conducted a fair and reasonable investigation because Hall fraudulently, and in bad faith, generated a list of back charges. The evidence supports the master's finding that Hall did not conduct a fair and reasonable investigation. Accordingly, the master did not err in denying Hall's motion to dismiss.

C. Fair and Reasonable Investigation

Hall argues the master erred in awarding attorney's fees under section 27-1-15. Hall contends it conducted a fair and reasonable investigation before withholding payment. We disagree.

This section provides:

> Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty

> of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

S.C. Code Ann. § 27-1-15 (1991). The party seeking an award of attorney's fees and interest under the statute has the initial burden of presenting prima facie evidence that the opposing party did not make a fair and reasonable investigation. Moore Elec. Supply, Inc. v. Ward, 316 S.C. 367, 374-75, 450 S.E.2d 96, 100 (Ct. App. 1994). Whether a party's steps taken were "reasonable and fair" is a question of fact. Id.

The master determined not only had Hall not made a fair and reasonable investigation, it further "intentionally refused to pay [Hardaway] its rightful charges in contravention of the agreement between the parties." In support of this finding, the master cited: (1) Hall's admissions regarding the amount of concrete delivered; (2) Hall's admissions regarding amount of offsetting overtime; and (3) Hall's attempts to vary the terms of the contract after the project was completed. We find the evidence in the record supports the master's finding that Hall acted in bad faith and did not make a fair and reasonable investigation.

D. Amount of Attorney's Fees

Hall argues the master erred in determining the amount of attorney's fees. We agree in part.

Generally, attorney's fees are not recoverable unless authorized by contract or statute. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989). "The determination of whether statutory attorney fees should be awarded is treated as one in equity." Kilcawley v. Kilcawley,

312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994). Accordingly, in reviewing the award, we may take our own view of the preponderance of the evidence. Kelly v. Peeples, 294 S.C. 63, 65, 362 S.E.2d 636, 637 (1987). "Even where this court may find facts in accordance with its own view of the preponderance of the evidence, we are not required to disregard the factual findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility and demeanor." Kilcawley, 312 S.C. at 427, 440 S.E.2d at 893.

"Our case law and court rules make clear that when a contract or statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record for each of the required factors to be considered." Griffith v. Griffith, 332 S.C. 630, 646, 506 S.E.2d 526, 534-35 (Ct. App. 1998). The factors a trial court should consider in determining reasonable attorney's fees are:

> (1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained.

Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). "[A]bsent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact." Id. at 494, 427 S.E.2d at 661.

Hall raises several issues regarding the amount of attorney's fees. We will address Hall's specific reasons why the master erred in awarding attorney's fees below.

1. Fees Relating to Counterclaims

Hall maintains that Hardaway's fees for defending Hall's counterclaims are not recoverable. We disagree.

In Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 483, 458 S.E.2d 431, 438-39 (Ct. App. 1995), the defendant alleged the amount of the award of attorney's fees was improper because some of the fees were attributable to defending counterclaims and some were previously awarded in the initial action. This court found the distinction to be "specious." Id. at 484, 458 S.E.2d at 439. We held "[t]he trial court clearly found that the facts and issues surrounding the promissory note were intertwined with those of the counterclaims which required extensive discovery and transformed a normally uncomplicated action . . . into complex litigation." Id. at 483-84, 458 S.E.2d at 439. Further, this court agreed with the trial court and found the trial court did not abuse its discretion in awarding attorney's fees for the counterclaim. Id. at 484, 458 S.E.2d at 439.

In the case at hand, the issues presented in Hall's counterclaims were intertwined with Hardaway's causes of action. Accordingly, the master did not abuse his discretion in allowing Hardaway to recover attorney's fees for defending Hall's counterclaims. See Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 175, 467 S.E.2d 439, 443 (1996) (holding that attorney's fees could be awarded for defending counterclaims where the counterclaims were intertwined with the issue of the bank's ability to proceed on a note).

2. Reasonable Fees

Hall argues the attorney's fees the master awarded are not reasonable and only reasonable fees may be recovered. We disagree.

Hardaway's attorney submitted an affidavit requesting $53,592.56 in attorney's fees, including $5,377.50 related to the motion for sanctions. The master awarded all of the fees Hardaway's attorney stated in his affidavit that he incurred. The master issued a twenty-two page order on the determination of attorney's fees. While the master did a thorough job of determining whether Hardaway had met its burden under the statute authorizing fees, the order only contains one paragraph on the actual amount of attorney's fees. This paragraph is the last paragraph in the order but is the first time the actual

amount of attorney's fees is addressed. The master awarded Hardaway attorney's fees in the amount of $53,592.26, specifically finding:

> This amount includes $48,215.06 for the litigation of the . . . case, including trial preparation fees and costs on two separate occasions. In addition, the total amount includes attorney's fees $5,377.50 for fees and costs associated with a motion for sanctions which [the master] previously denied. Although, [the master] denied the motion for sanctions, [the master] hereby found that [Hardaway] incurred those attorney's fees and costs in the course of the litigation, and those fees and costs are properly payable.

While the master was required to make findings with regard to all six factors in Blumberg in awarding attorney's fees, Hall focuses only on the necessary "time and labor" factor and the "beneficial results obtained" factor in its argument. The master's order did not make specific findings with regard to these to factors in the analysis. However, with the exception of the motion for sanctions and certain costs which we will discuss below, we can glean evidence from the record on these two factors that would support the master's award. Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 435 (Ct. App. 2005) ("On appeal an award of attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor.").

Accordingly, we find, except for the motion for sanctions, the record supports the master's award of attorney's fees to Hardaway.

3. Fees for Motion for Sanctions

Hall argues the master erred in awarding $5,377.50 in fees for the motion for sanctions because Hardaway lost the motion, and therefore, the fees were not recoverable. We agree.

Nothing in the record supports the master's award of attorney's fees for the motion for sanctions, which Hardaway lost. Hardaway's attorney's did not obtain beneficial results from this particular motion, and nothing in the master's order supports the reasonableness of this fee. Accordingly, we find the master erred in awarding $5,377.50 in attorney's fees for the lost sanctions motion. The attorney's fees award shall be reduced by that amount.

4. Fees for Repreparing for Trial

Hall contends that Hardaway's fees for repreparing for trial were not recoverable. We disagree.

We find no error in awarding attorney's fees for repreparing for trial. The trial occurred approximately two months after it was to originally begin, not simply a few days. This court finds it reasonable that counsel would need to refresh himself pending such a period of time.

5. Fees Limited to Evidence Presented at Trial

Hall maintains that the attorney's fees should have been limited to evidence presented at trial and the affidavit submitted after trial should not have been considered. We disagree.

Hall alleges Hardaway should be limited to the $35,762.17, the amount specified in its damages summary as its attorney's fees and costs "estimated through trial." However, on January 5, 2006, when the master reopened the matter to hold a hearing to determine attorney's fees, Hardaway's attorney submitted an affidavit stating that Hardaway incurred fees of $53,592.56 including attorney's fees of $5,377.50 for the motion for sanctions. The additional hearing on attorney's fees was not anticipated in the original estimation of attorney's fees. The revised estimate for attorney's fees included many charges for services after the trial, including researching and preparing the order.

"A judge may not, after all testimony has been taken, receive additional contested evidence without reopening the case." Johnson v. Johnson, 288

S.C. 270, 274, 341 S.E.2d 811, 814 (Ct. App. 1986). However, in the case at hand, the case was already re-opened to hold a hearing on attorney's fees. Hall had the opportunity to contest the affidavit and did. Although the charges were presented after the trial, we find it appropriate in the current situation to allow them.

6. Non-Attorney Services

Hall complains that $125 in charges allowed to Hardaway were unrecoverable. Specifically, Hall complains about the time spent: (1) copying depositions; (2) reorganizing case file; (3) faxing documents; (4) picking up attorneys and the owner of Hardaway; and (5) printing orders.[4] We disagree.

Initially, we address Hardaway's contention that because these charges were for the services of law clerk, "drs," Hall is arguing that all charges billed by law clerks are not allowed as attorney's fees. However, Hall only complains about five specific charges by "drs" and does not challenge any of the other charges by "drs." Thus, it does not appear that Hall is arguing that law clerk charges, in general, are unrecoverable as attorney's fees, and we decline to address this question.

In any event, we do not believe Hall preserved this argument for appellate review. Hall sent a memorandum to the master that, among other complaints, specifically raised the issue of the five charges for "drs" and whether the five specific charges were recoverable "non-attorney services." However, the master did not address this argument in the final attorney's fees order, and Hall did not file a Rule 59(e), SCRCP, motion for reconsideration of the matter. Because the matter was not ruled upon, it is not preserved for appellate review. Staubes, 339 S.C. at 412, 529 S.E.2d at 546 (holding that matters must be raised to and ruled upon by the trial court in order for the matter to be preserved for appellate review). Further, Hall does not cite to

[4] Hall specifically references $125 of fees charged for the services of "drs." Although nothing in the record indicates who "drs" is, Hardaway alleges that "drs" refers to its attorney's law clerk.

any supporting authority for its argument, rendering the issue abandoned on appeal. Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 192-93, 534 S.E.2d 1, 9-10 (Ct. App. 2000) (noting that the failure to provide argument or supporting authority for an issue renders it abandoned).

CONCLUSION

The evidence in the record supports the master awarding judgment in favor of Hardaway and ordering Hall to pay the outstanding amount of $45,123.84 minus $1,874.50 for the provision of ice. The master correctly awarded attorney's fees. However, we find the master erred in awarding attorney's fees for the lost sanctions motion and reduce the attorney's fees award by $5,377.50. Accordingly, the order of the master is

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.

ANDERSON and HUFF, JJ., concur.