The Supreme Court of South Carolina

In the Matter of Paul W. Nevill, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Nevill and the interests of Mr. Nevill's clients.

IT IS ORDERED that Dale Ernest Akins, Esquire, is hereby appointed to assume responsibility for Mr. Nevill's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Nevill may have maintained. Mr. Akins shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Nevill's clients and may make disbursements from Mr. Nevill's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Paul W. Nevill, Esquire, shall serve as notice to the bank or other financial institution that Dale Ernest Akins, Esquire, has been duly appointed by this Court.

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

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

Columbia, South Carolina
June 4, 2008

The Supreme Court of South Carolina

In the Matter of Sandra Lee Randleman, Petitioner.

ORDER

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

By way of a letter addressed to the Clerk, South Carolina Supreme Court, dated April 22, 2008, Petitioner submitted her resignation from the South Carolina Bar. She has notified the Court that she cannot locate her Certificate of Admission. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. In the event she should locate her Certificate of Admission, she shall immediately forward it to the Court.

The resignation of Sandra Lee Randleman shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

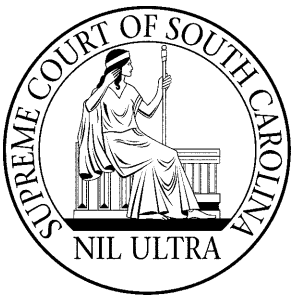
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Waller, J., not participating

Columbia, South Carolina

June 5, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23

June 9, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sonoco Products Company, Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appeal From Darlington County
John M. Milling, Circuit Court Judge

Opinion No. 26502
Heard May 6, 2008 – Filed June 9, 2008

REVERSED

Ronald W. Urban, Joe S. Dusenbury, Carol I. McMahan, all of South Carolina Department of Revenue, of Columbia, for Appellant.

Frank W. Cureton, of Haynsworth Sinkler Boyd, of Columbia, for Respondent.

JUSTICE BEATTY: In this property tax assessment case, the South Carolina Department of Revenue (the Department) appeals the circuit court's order which reversed the Administrative Law Court's

(ALC) order. The circuit court held that Sonoco Products Company's (Sonoco's) office and order fulfillment center buildings are not contiguous to its plant site and, thus, should be assessed at a 6 percent ratio as opposed to a 10.5 percent ratio. This Court certified the case from the Court of Appeals. We reverse the decision of the circuit court.

FACTUAL/PROCEDURAL HISTORY

Sonoco operates a manufacturing facility in Hartsville, South Carolina. At this location, Sonoco owns four buildings which serve as its international headquarters and order fulfillment center. The three corporate headquarters buildings are located across a public road, Novelty Avenue/Woodmill Street, and a railroad track from the majority of the manufacturing plant. Sonoco owns a fee simple interest in the road, which is subject to a public right-of-way for use as a public road in favor of the South Carolina Highway Department. Sonoco also owns the land traversed by the railroad tracks; however, Seaboard Coast Line Railroad has been granted a right-of-way and easement to a portion of the track. The buildings are located between the manufacturing plant and the order fulfillment center. The order fulfillment center, or customer service center, is located across Novelty Avenue, the railroad tracks, and Calhoun Street from the manufacturing plant. There are no intervening landowners between the manufacturing plant and the buildings at issue.

Of the three buildings comprising the corporate headquarters, two of the buildings were built in 1969 and 1978, respectively. The third building was constructed in 1989. The 1969 and 1978 buildings were used in support of the manufacturing facility and, at the time of their construction, were assessed at a 10.5 percent ratio as manufacturing-related property. The 1989 building, the corporate headquarters, was attached to the two other administrative buildings and was also assessed at a 10.5 percent ratio as manufacturing-related property. The

order fulfillment center was built in 1997 and was also assessed at a 10.5 percent ratio.[1]

On July 2, 1997, Sonoco filed a written protest with the Department in which it submitted that the Office Buildings were not contiguous to its plant site because they were separated from the plant site by a public street and, thus, should be assessed at a 6 percent ratio rather than 10.5 percent. In its protest, Sonoco requested a tax refund for the property tax years of 1997 and 1998.

On September 23, 2003, the Department issued its final agency determination. In its report, the Department stated "[t]he sole issue for the [the Department's] determination is whether railroads and public streets destroy contiguity for purposes of S.C. Code Ann. Section 12-43-220 (2000)."[2] The Department rejected Sonoco's argument and

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[1] Both parties stipulated that the buildings constitute "office buildings" as defined in section 12-43-220(a) of the South Carolina Code. S.C. Code Ann. § 12-43-220(a) (2000).

[2] Section 12-43-220 provides in relevant part:

Except as otherwise provided, the ratio of assessment to value of property in each class shall be equal and uniform throughout the State. All property presently subject to ad valorem taxation shall be classified and assessed as follows:

> (a) All real and personal property owned by or leased to manufacturers and utilities and used by the manufacturer or utility in the conduct of the business must be taxed on an assessment equal to ten and one-half percent of the fair market value of the property.
>
> * * *
>
> Real property owned by or leased to a manufacturer and used primarily as an <u>office building</u> is not considered used

> by a manufacturer in the conduct of the business of the manufacturer for purposes of classification of property under item (a) of this section if the office building is not located on the premises of or **contiguous** to the plant site of the manufacturer.
>
> * * *
>
> (e) All other real property not herein provided for shall be taxed on an assessment equal to six percent of the fair market value of such property.

S.C. Code Ann. § 12-43-220(a), (e) (2000) (emphasis added). In 1984, the Legislature amended section 12-43-220(a) to give manufacturers a tax reduction. The amendment provided that an office building of a manufacturer would not be considered "used by a manufacturer in the conduct of the business," and thus subject to the 6 percent assessment ratio, if the office building was "not located on the premises of or contiguous to the plant site" of the manufacturer. Act No. 419, 1984 S.C. Acts 1850.

A "plant site" is defined as:

> A plant site shall consist of all land contiguous to a plant which is related to the overall manufacturing operation. It shall include all land on which personal property is located including but not limited to the following: parking lots, manufacturing areas, buildings, landscaping, piping, railroad siding, docking, water sheds, ditching, pollution control facilities, pumping stations, wells, roads, water tanks, areas for ingress and egress, water storage facilities, and all other lands directly related to manufacturing. When possible, a plant site will be one contiguous parcel using legal and or natural boundaries.

27 S.C. Regs. 117-124.4 (1976) (emphasis added). Effective June 25, 2004, this regulation was repealed and reorganized and is now cited as

denied its request for a refund. In reaching this decision, the Department found our applicable state statutes and regulations "indicate that intervening roads, rights-of-way, and railroad tracks do not destroy contiguity." In reviewing these statutes and regulations, the Department believed the Legislature has "repeatedly expressed its reluctance to destroy contiguity when two tracts are separated by a street, railroad track, or other public way." In addition to this statutory support, the Department also relied upon several appellate court decisions to find that Sonoco's "headquarters facility is contiguous to the plant site and should remain assessed for property tax purposes at 10½ %."

In response to the Department's decision, Sonoco contested the final agency determination before the ALC. Prior to the hearing, the parties entered into a stipulation of facts. Based on these stipulations and the evidence presented at the hearing, the ALC affirmed the Department's determination and held that "Sonoco's headquarters office buildings and order fulfillment center are contiguous to the plant site and all property taxes computed thereon should be calculated using a 10½ % assessment ratio."

Sonoco appealed the ALC's decision to the circuit court. After hearing oral arguments, the circuit court issued its written order reversing the ALC and holding that Sonoco's office buildings are entitled to a 6 percent assessment ratio. In reaching this decision, the circuit court specifically found that "[w]hen the taxpayer's office building and plant site are separated by a public road, there is a clearly defined, intervening land area with legal boundaries demarcating the two land areas, and the plant site and the office building may be readily distinguished."

The Department appealed the circuit court's order to the Court of Appeals. This Court certified the appeal from the Court of Appeals.

117-1700.7. The text of the regulation, however, has not been amended. Therefore, we cite to the version of the regulation that was in effect throughout the proceedings of this appeal.

The parties stipulate the amount at issue before this Court is a refund of $866,580.44 with interest, plus an additional refund reflecting a 6 percent assessment ratio on the land surrounding the buildings.

DISCUSSION

The Department raises three issues with multiple subparts; however, we believe the sole issue is whether the circuit court erred in finding Sonoco's office buildings, which are separated from its manufacturing plant by a public road and railroad, are not contiguous to the plant site.

In reaching its decision that the presence of a public road between Sonoco's plant site and office buildings destroyed contiguity, the circuit court found the ALC erred in the following respects: (1) in construing section 12-43-220(a) to mean that a manufacturer's office buildings and its plant site on opposite sides of a public right-of-way are "contiguous" when the manufacturer owns the fee simple interest underlying the public right-of-way; and (2) in interpreting section 12-43-220(a) by ruling that contiguity "jumps" over a public right-of-way.

For several reasons, we find the circuit court's analysis was erroneous and the ALC correctly decided the issue. The ultimate decision in this case is dependent upon the Court's determination of the term "contiguous" within the meaning of section 12-43-220(a).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). "We will

reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

As the parties and the presiding courts recognized, the specific statute at issue, section 12-43-220(a), does not define the term contiguous. Therefore, we have tried to glean an appropriate definition by reviewing secondary sources, our state statutes, and our state appellate decisions which deal with the concept of contiguity.

In terms of secondary sources, "contiguous" commonly means, "being in actual contact: touching along a boundary or at a point; adjacent; next or near in time or sequence." Webster's New Collegiate Dictionary 243 (1981). In the legal field, it has been defined as: "[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by." Black's Law Dictionary 290 (5th ed. 1979).

Although not directly on point, other South Carolina statutes are instructive in determining how the Legislature views this term. Clearly, when the Legislature promulgated section 12-43-220(a) it was aware of the use of the term "contiguous" in other statutory schemes. Thus, we believe a review of these statutes provides guidance in the instant case. See S.C. Code Ann. § 12-43-232(2) (2000) ("For tracts not used to grow timber as provided in item (1) of this section, the tract must be ten acres or more. Nontimberland tracts of less than ten acres which are contiguous to other such tracts which, when added together, meet the minimum acreage requirement, are treated as a qualifying tract. For purposes of this item (2) only, contiguous tracts include tracts with identical owners of record separated by a dedicated highway, street, or road or separated by any other public way.") (emphasis added); see also S.C. Code Ann. § 5-3-305 (2004) ("For purposes of this chapter, 'contiguous' means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another;

however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does **not** destroy contiguity.") (emphasis added); S.C. Code Ann. § 34-28-160(3) (1987) (outlining financial institutions and stating: "With prior written notification to the Board, and in order to relieve some of the burdens on the public caused by congestion of public streets, roadways, and parking facilities, promote safety of pedestrians on public ways, or otherwise serve the needs or convenience of the public, an association may operate facilities providing services to customers. It is not necessary that any facility be a part of, or physically connected to, the main structure of the home office or branch if the facility is located on the property on which the main structure of the home office or branch is situated or on property contiguous thereto. Property which is separated from the property on which the main structure of the home office or branch is situated only by a street and one or more walkways and alleyways is, for the purpose of this subsection, considered **contiguous**.") (emphasis added).

We believe the text of these statutes reflects an intention by the Legislature to broadly construe and apply the term "contiguous." In each of the cited statutes, contiguity was not destroyed or defeated by an intervening dedicated road or public right-of-way.

Additionally, the preference for a broad construction is illustrated by the text of the Department's regulation which defines "plant site," and states in pertinent part, "[w]hen possible, a plant site will be one contiguous parcel using legal and or natural boundaries." 27 S.C. Regs. 117-124.4 (1976) (emphasis added). We believe the above-quoted text indicates a predilection for sections of a plant site to be contiguous unless there is a clear obstruction or barrier which operates to disconnect parcels of land.

Our state appellate decisions also appear to broadly interpret the term contiguous. See, e.g., Kizer v. Clark, 360 S.C. 86, 90-91, 600 S.E.2d 529, 532 (2004) (citing section 5-1-30 of the South Carolina

Code and recognizing that marshlands and creeks do not defeat town's contiguity for annexation purposes); Mosteller v. County of Lexington, 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999) (explaining, in a constitutional taking of property case, the term "contiguous" and stating "'[a]but' means to be contiguous . . . [h]owever, 'abut' does not always mean there must be actual contact;" "property may still be deemed to abut a road when there is some intervening, natural barrier like a stream or river"); Glaze v. Grooms, 324 S.C. 249, 253, 478 S.E.2d 841, 844 (1996) (recognizing basic proposition that "contiguity is not destroyed by water or marshlands which separate parcels of highland," but finding town lacked requisite contiguity to incorporate where waters/wetlands it sought to use to establish contiguity had already been annexed by another municipality); Bryant v. City of Charleston, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988) (affording "contiguous" its ordinary meaning of "touching," within context of annexation to municipal corporation pursuant to section 5-3-150 of the South Carolina Code, and finding code section only required annexed area to share a common boundary with annexing municipality; holding "contiguity is not destroyed by water or marshland within either the annexing municipality's existing boundaries or those of the property to be annexed merely because it separates the parcels of highland involved"); Tovey v. City of Charleston, 237 S.C. 475, 485, 117 S.E.2d 872, 876-77 (1961) (finding, in municipal annexation case, presence of Ashley River did not destroy contiguity between boundaries of two areas at issue); Beaufort County v. Trask, 349 S.C. 522, 527, 563 S.E.2d 660, 662 (Ct. App. 2002) (holding, in annexation case, that presence of state-owned river between city and property did not defeat contiguity); St. Andrews Pub. Serv. Dist. v. City Council of the City of Charleston, 339 S.C. 320, 324-25, 529 S.E.2d 64, 66 (Ct. App. 2000) ("To achieve contiguity, actual physical touching of the properties is not required. The Supreme Court has rejected an argument that the annexed parcels must have the additional qualifications of unity, substantial physical touching, or a common boundary. However, the Supreme Court has never held that non-adjacent properties not incidentally separated by a road, railway, or waterway are in fact contiguous.") (citation omitted), reversed by, 349 S.C. 602, 605-06, 564 S.E.2d 647, 649 (2002) (reversing Court of Appeals on issue of

standing, but affirming general contiguity analysis in municipal annexation case); Pinckney v. City of Beaufort, 296 S.C. 142, 147, 370 S.E.2d 909, 912 (Ct. App. 1988) (holding, in case involving annexation of land by city, the fact that access from city to annexed area required crossing a bridge and traversing of unannexed property in the county did not preclude finding of requisite contiguity).

As evidenced in the above-cited cases, our appellate courts have repeatedly found an intervening boundary that is neither a barrier nor an obstruction does not operate to destroy contiguity. Stated another way, an incidental separation between properties should not serve to negate otherwise contiguous property.

To the extent Sonoco attempts to distinguish the above-listed cases on the ground they deal with annexation and not taxation, we find its argument unavailing. Although Sonoco is correct that the cases involve annexation, they nevertheless establish the generally applicable proposition that a right-of-way or easement merely provides a means of access over a road and does not convey property ownership which would operate to defeat contiguity. See Douglas v. Med. Investors, Inc., 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971) ("An easement is a right which one person has to use the land of another for a specific purpose and gives no title to the land on which the servitude is imposed. An easement is therefore not an estate in lands in the usual sense.")(citations omitted); Hoogenboom v. City of Beaufort, 315 S.C. 306, 315, 433 S.E.2d 875, 882 (Ct. App. 1992) ("Ordinarily, when a municipality lays out a street over privately owned property, it acquires only a right of way over the property, not fee simple title to it."); see also City of Augusta v. Allen, 438 A.2d 472, 478 (Me. 1981) (finding fact that property was of the same character and usage, was contiguous but for a public road running through it, had a single owner and was acquired and conveyed by single metes and bounds description showed assessors could reasonably tax it as a single parcel); Reiling v. City of Eagan, 664 N.W.2d 403, 408 (Minn. Ct. App. 2003) (recognizing synonymy of terms "abutting" and "contiguous" and concluding contiguity is not affected by the presence of a public thoroughfare for purposes of city's redevelopment tax-increment financing district);

Appeal of Susquehanna Collieries Co., 6 A.2d 831, 832 (Pa. 1939) (stating that, where "contiguous tracts of land, separately assessed in the hands of different owners, are acquired by a single owner and used in the conduct of a single operation, they need not be assessed separately, but may be consolidated in a single assessment"); see generally M.C. Dransfield, Annotation, Different Parts or Parcels of Land in Same Ownership As Single Unit or Separate Units for Tax Assessment Purposes, 133 A.L.R. 524 (1941 & Supp. 2008) (establishing general proposition that where lots or lands are contiguous and in one ownership they may be assessed as a unit).

Furthermore, we disagree with Sonoco's assertion that the annexation cases are inapposite because "in all of those cases, the waterway was also part of the annexing municipality." Sonoco's contention actually weakens its overall argument. By the same token that a waterway is part of the annexing municipality, Sonoco is the fee simple owner of the road at issue and the adjoining property. As previously stated, the right-of-way does not diminish Sonoco's ownership of this road. Thus, as in the annexation case, there is no intervening landowner in this case that would destroy contiguity.

Applying the foregoing to the facts of the instant case, we hold the ALC was correct in finding that the Office Buildings are contiguous to Sonoco's plant site. First, there is no barrier or well-defined land area that separates the Office Buildings from the manufacturing plant. See Tovey, 237 S.C. at 485, 117 S.E.2d at 877 (stating in municipal annexation case that "[t]he river does not constitute a barrier to complete amalgamation of the communities upon its opposite banks"). Secondly, there are no intervening landowners. As the parties stipulated, Sonoco owns a fee simple interest in the roads and railroad that separates the Office Buildings from the manufacturing plant. Finally, the presence of the public right-of-way and easement for Novelty Avenue and the railroad should not operate to defeat viewing the plant site as a unified area. Significantly, the circuit court recognized this fact when it stated, "[c]ertain portions of the Plant Site are located across additional public streets (for example, the Spiral Division and the Bleachery are located across the Patrick Highway

[also known as Miller Avenue] and the Machine Manufacturing building is located across Third Avenue)." We would also note that plant employee and tractor trailer parking are located on the same side of Novelty Avenue as the Office Buildings. Thus, Sonoco's plant site is not limited to the immediate area surrounding the manufacturing plant, but instead, expands significantly beyond the confines of the plant over the adjoining roads.

As previously stated the Legislature, our state appellate courts, and the Department each have broadly construed the term "contiguous." However, even under Sonoco's narrow interpretation, which requires an actual "touching" of the parcels to establish contiguity, that definition would be satisfied in the instant case. Because Sonoco owns the fee simple interest in the property and there are no intervening landowners, the parcels on which the Office Buildings are located are "touching" the plant site and, thus, are contiguous. Furthermore, although the roads at issue allow for public use, which Sonoco contends defeats contiguity, the primary purpose of these roads is to provide ingress and egress to the manufacturing plant. Obviously, as Sonoco points out, there is no actual manufacturing on the road at issue. However, the transportation of raw materials and the finished product sufficiently relates to manufacturing. Thus, the roads are "directly related to manufacturing," as required by Regulation 117-124.4 to be considered part of the "plant site." Additionally, the Office Buildings themselves are not separate entities from the manufacturing plant. Arguably, the Office Buildings and the manufacturing plant are inextricably linked by the fact that the items produced in the manufacturing plant would not be distributed but for the operations in these administrative and customer service buildings. To find that a road owned by a manufacturer on its plant site, but used by the public, defeated contiguity under section 12-43-220, we believe would be in contravention of what the Legislature intended.

The Legislature amended section 12-43-220 to provide for a reduced 6 percent tax assessment ratio in order give a tax break to manufacturers for office buildings that are used or leased for purposes clearly unrelated to manufacturing. Illustrative of this point is the

testimony of one of the Department's employees, Charles McLean. McLean testified before the ALC that Sonoco has several offices in Hartsville that are assessed at the lower 6 percent ratio. These buildings include an office leased by a law firm, a YMCA, and an industrial property. McLean testified these buildings were at least one-half mile away from Sonoco's manufacturing plant and there were several intervening landowners between the plant and these office buildings.

In order to effectuate the intent of the Legislature, we find the word "contiguous" within the context of section 12-43-220 should be broadly construed. To read it narrowly would provide manufacturers a tax reduction which is neither warranted nor intended by the Legislature. We do not believe the Legislature contemplated that a manufacturer could defeat contiguity in order to receive the reduced tax assessment ratio merely by granting a right-of-way for a road located on its plant site. Because Sonoco owns the property which separates the office buildings from the plant site, we do not believe the presence of the public right-of-way over Novelty Avenue/Woodmill Street or the easement for the railroad operates to destroy contiguity. Thus, we believe the circuit court erred in reversing the order of the ALC.

Accordingly, the decision of the circuit court is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marty K. Cole and Tracy S. Cole, as co-administrators of the Estate of Kyle Austin Cole, and Tracy S. and Marty K. Cole, individually, Respondents,

v.

Pratibha P. Raut, M.D., and Dr. Raut & Associates, P.A., Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26503
Heard February 21, 2008 – Filed June 9, 2008

REVERSED

Robert H. Hood, Robert H. Hood, Jr., and Deborah Harrison Sheffield, of counsel, all of Hood Law Firm, of Charleston, for Petitioners.

Charles L. Henshaw, Jr., of Furr, Henshaw & Ohanesian, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: In this medical negligence case, the court of appeals reversed the trial court's general verdict in favor of Petitioner doctor, holding that the trial court erred in instructing the jury on the defense of assumption of the risk. This Court granted certiorari to review the decision of the court of appeals. We reverse the decision of the court of appeals and reinstate the general jury verdict for Petitioner.

FACTUAL/PROCEDURAL BACKGROUND

Before delivering her son in February 1997, Respondent Marty Cole ("Cole") discussed the various delivery options with her obstetrician, Petitioner Dr. Pratibha Raut ("Dr. Raut"). Cole had previously delivered a baby by caesarian section (or C-section), but Dr. Raut recommended that Cole undergo a "vaginal birth after caesarian section," known as a VBAC. At the time, VBAC was the recommended method of delivery despite the risk that the uterine scar from Cole's previous C-section could rupture and cause the baby to suffer harm from oxygen deprivation.

Dr. Raut discussed the risks of a VBAC delivery with Cole and her husband during a prenatal visit two days before giving birth, and the next day, Cole informed Dr. Raut that she wanted to attempt a VBAC. Because she was two weeks past her due date, Dr. Raut scheduled Cole to have labor induced the following day at Chester Memorial Hospital. When Cole reported to the hospital the following day, the nurse obtained Cole's written informed consent before beginning the labor and delivery process. The consent form documented Cole's consent to a VBAC delivery, induction of labor through medication, and augmentation of labor with medication, and also indicated Cole's authorization to delivery by C-section if necessary. Specifically, the form provided:

> I recognize that during the course of the operation, unforeseen conditions may necessitate additional or different procedures or

> services that [sic] those set forth above and I further authorize and request that the above named surgeon . . . perform such procedures as are, in his professional judgment, necessary and desirable.

Dr. Raut induced labor at 8:00 a.m. intending to deliver Cole's baby by VBAC, yet retaining a surgical crew on-call in case an emergency C-section became necessary.[1] Labor progressed slowly and at 1:30 the following morning, the fetal heart monitor began indicating changes in the baby's heart rate. These changes did not appear abnormal to the nursing staff. However, by 2:00 a.m., further changes in the baby's heart rate prompted nurses to administer oxygen to Cole and to summon Dr. Raut, who was already present at the hospital, to the delivery room. When she viewed the baby's heart rate monitor, Dr. Raut became concerned and attempted to notify the on-call surgical crew, which had already been summoned to the hospital to attend to another emergency, that it needed to remain there. Because the on-call crew was still operating on the emergency patient, Dr. Raut's initial call to the operating room went unanswered, and it was not until 2:10 a.m. that the operating room received formal standby notice.

At 2:15 a.m., Cole began to complain of abdominal pains, indicating that her uterine wall had ruptured, and at 2:20 a.m., Dr. Raut formally ordered an emergency C-section for Cole. The C-section began at 2:42 a.m. and son Kyle was born at 2:45 a.m. Kyle suffered from brain damage and related problems, including cerebral palsy, developmental delays, and a seizure disorder. As a result of these conditions, Kyle died in August 2003.

The Coles brought a medical negligence action in their individual capacities and on behalf of Kyle against Dr. Raut and her medical practice. The Coles alleged that Dr. Raut's delay in ordering the emergency C-section

[1] At the time of Kyle's birth, Chester Memorial Hospital contained two operating rooms with in-house surgery crews available daily to perform scheduled procedures during set hours of operation. Outside of the regular hours of operation, a single standby surgical crew remained available on an on-call basis in the event that a surgical emergency arose during this time.

and failure to deliver Kyle in a timely manner by C-section resulted in fetal oxygen deprivation causing Kyle's various medical conditions and his ultimate death. At trial, expert witnesses for the Coles testified that Dr. Raut was negligent in failing to order a C-section at 2:00 a.m. when the heart rate monitor first indicated troublesome variables in Kyle's heart rate. The Coles' expert obstetrician further testified that in accordance with American College of Obstetrics and Gynecology standards, the surgical team should have been able to deliver Kyle in this manner by 2:30 a.m. at the latest, and that in his opinion, delivery by no later than 2:33 a.m. would have resulted in a neurologically healthy baby. This testimony differed slightly from that of the Coles' expert witness on neonatalogy who opined that permanent brain damage had almost certainly occurred by 2:30 a.m. Conversely, expert witnesses for the defense testified that Dr. Raut did not deviate from the standard of care with respect to ordering Kyle's delivery by C-section because there was nothing to indicate an emergency until 2:20 a.m., at which time Dr. Raut promptly ordered the C-section. The defense also emphasized that the hospital had only one operating crew available at this hour, and that this crew was performing an emergency procedure on another patient when Dr. Raut first expressed concern.

At the close of evidence, the trial court granted Dr. Raut's earlier motion to amend her pleadings to include assumption of the risk as an affirmative defense, but denied the doctor's request for a special verdict form. The trial court instructed the jury on the law of negligence followed by a charge on the doctrine of assumption of the risk, and the jury returned a general verdict in favor of Dr. Raut. The Coles moved for a new trial on the grounds that the court erroneously charged the jury on the doctrine of assumption of the risk because Cole had not assumed the risk of a delayed C-section. The trial court denied the Coles' motion and the Coles appealed.

The court of appeals initially affirmed the trial court's judgment in favor of Dr. Raut based on the application of the two-issue rule. After the Coles' petitioned for rehearing, the court of appeals reversed the case and remanded, finding that that the trial court's erroneous charge on assumption of the risk prejudiced the Coles and that the two-issue rule did not apply to uphold the jury verdict. *Cole v. Raut*, 365 S.C. 434, 617 S.E.2d 740 (Ct.

App. 2005). This Court granted certiorari, and Dr. Raut raises the following issue for review:

> Did the court of appeals err in finding that the trial court's jury instructions on the defense of assumption of the risk constituted reversible error?

STANDARD OF REVIEW

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. *Id.*

LAW/ANALYSIS

Dr. Raut argues that the court of appeals erred in finding that the trial court's jury instructions on the defense of assumption of the risk constituted reversible error, and we agree.

As a primary matter, we find that the court of appeals correctly held that the trial court erred in charging the jury on assumption of the risk. A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial. *State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000). In order for the doctrine of assumption of the risk to apply in a particular case, the injured party must have freely and voluntarily exposed himself to a known danger which he understood and appreciated.[2] *Faile v. Bycura,* 289 S.C. 398, 399, 346 S.E.2d 528, 529 (1986).

[2] This Court effectively abolished the affirmative defense of assumption of the risk in *Davenport v. Cotton Hope Plantation*, holding that the doctrine had been largely subsumed by the law of comparative negligence. 333 S.C. 71, 88, 508 S.E.2d 565, 574 (1998). However, the cause of action in the

In this case the assumption of the risk charge was improper because even if Cole assumed the risk with respect to the VBAC procedure by signing the consent form, Cole did not simultaneously assume the risk of any danger specifically associated with a delayed C-section delivery, which is the basis for the Coles' medical negligence claim. The court of appeals found, and we agree, that the record does not indicate that Cole recognized any danger posed by a delay between the doctor's observation of the warning signs indicating the need for a C-section delivery and actual commencement of a C-section delivery. Furthermore, Cole was not aware of the possible circumstances under which such a delay might occur. Accordingly, Cole could not understand and appreciate the nature and extent of the danger of a delay. Therefore, the court of appeals correctly found that the trial court erred in charging assumption of the risk.

An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). From this premise, the majority writing for the court of appeals found that the jury charge on assumption of the risk constituted reversible error because the charge "had the potential to confuse the jury concerning the underlying factual basis of the Coles' claims and availed Raut with a defense that was not supported by the evidence." *Cole*, 365 S.C. at 443, 617 S.E.2d at 744. We disagree with this conclusion.

An examination of the jury charges is instructive in this matter. After giving the charge on negligence and the doctrine of assumption of the risk, the trial court concluded with the following explanation:

> I charge you, if you find that the plaintiff freely and voluntarily exposed herself to a known danger and understood and appreciated the danger, then in such circumstance your verdict would be for the defendant. However, I charge you, on the other

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instant case arose prior to *Davenport* and the validity of the defense in that regard is not challenged on appeal.

> hand, if you find that the plaintiff's injuries and negligence were the result of the defendant's negligence, then in such circumstance, your verdict would be for the plaintiff.

Considering the entire jury charge in light of the evidence and issues presented at trial, we conclude that the erroneous charge on assumption of the risk was not prejudicial to the Coles. In this matter, the parties set forth two very clear and very distinct theories of the case: the Coles argued that Dr. Raut was negligent in failing to order the C-section by 2:00 a.m., while Dr. Raut maintained that her actions were not negligent and that under the particular hospital conditions, she did everything in her power to timely deliver a healthy baby. Therefore, although erroneous, we believe that the assumption of the risk charge had little effect on the jury's consideration of the evidence presented under either party's theory of the case.

Furthermore, the trial court clarified any potential confusion resulting from the erroneous charge by definitively establishing that the jury should find for the Coles if Kyle's injuries resulted from Dr. Raut's negligence. *See Proctor v. Dep't of Health and Envt'l Control*, 368 S.C. 279, 319, 628 S.E.2d 496, 518 (Ct. App. 2006) ("If the [jury] charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error."). It would be far too speculative on the part of this Court to find prejudicial error given the evidence presented at trial on the apparent insufficiency of available staff and facilities in this small hospital at this early hour, as well as testimony from medical experts explaining that Dr. Raut was not negligent in ordering Cole's C-section when she did. Accordingly, without a more specific argument showing how the Coles were prejudiced, we hold that the erroneous charge on assumption of the risk does not amount to reversible error.

We turn next to the court of appeals' analysis of the two-issue rule. Under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed. *Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985). The application of the

two-issue rule is separate and distinct from a prejudicial error inquiry, and operates to uphold a jury verdict that is sustained by the facts of the case. The rule is consistent with the established notion that the appellate courts in this State "exercise every reasonable presumption in favor of the validity of a general verdict." *Id.* at 282, 333 S.E.2d at 73.

In this case, applying the two-issue rule in a secondary analysis creates additional sustaining grounds for our holding that the trial court's charge on assumption of the risk is not reversible error. Here, the jury rendered a general defense verdict after hearing a properly submitted negligence claim and an erroneous charge on assumption of the risk.[3] As described in the prejudice analysis above, we find there was ample evidence at trial from which a jury could have concluded that Dr. Raut was not negligent in rendering medical assistance during Cole's labor and delivery. Accordingly, the general verdict for Dr. Raut may be sustained because it is independently supported by the negligence claim which was properly submitted to the jury. *See also Dropkin v. Beachwalk Villas Condominium Assn.*, 373 S.C. 360, 644 S.E.2d 808 (Ct. App. 2007) (affirming a general defense verdict under the two-issue rule where plaintiff alleged error in the trial court's denial of a directed verdict on the issue of negligence, but where the record contained evidence supporting a defense verdict on the issue of proximate cause); *Bryant v. Waste Management, Inc.*, 342 S.C. 159, 536 S.E.2d 380 (Ct. App. 2000) (applying the two-issue rule to determine that an erroneous instruction on negligence per se was not prejudicial to the defendant where there existed other theories of liability supported by ample evidence in the record upon which the jury could have based its verdict for the plaintiff); *Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992) (applying the two-issue rule to affirm a general jury verdict for the plaintiff where the trial court erred in submitting the issue of abuse of process to the jury but the defendant alleged no error in submitting the plaintiff's remaining claim to the jury).

[3] Neither party disputes that the negligence claim was properly submitted to the jury.

Additionally, we find that the court of appeals misinterpreted this Court's opinion in *Anderson v. S.C. Dept. of Highways & Public Transportation*, 322 S.C. 417, 472 S.E.2d 253, 254 (1996), in rejecting the applicability of the two-issue rule in the instant case. In *Anderson*, the plaintiff sued the South Carolina Department of Transportation (SCDOT) alleging negligent maintenance of a sidewalk on which she fell and injured herself. *Id.* at 419, 472 S.E.2d at 254. The plaintiff moved for a directed verdict as to liability, but the trial court deferred ruling on the motion and submitted the case to the jury on the issues of general negligence and contributory negligence. *Id.* After the jury returned a general verdict for SCDOT, the trial court granted the plaintiff's motion for a directed verdict on the issue of negligent maintenance of the sidewalk, and subsequently granted a new trial on the basis that it was impossible to determine whether the jury reached its verdict based on the plaintiff's failure to prove improper maintenance, the plaintiff's failure to prove proximate cause, or SCDOT's success in proving contributory negligence. *Id.*

On appeal, the court of appeals reversed the trial court's grant of a new trial on the grounds that the trial court should have sustained the jury's verdict pursuant to the two-issue rule. This Court granted certiorari and affirmed in result, but declined to adopt the court of appeals' "unusual application" of the two-issue rule. *Id.* at 421, 472 S.E.2d at 255. The Court reasoned that first, the two-issue rule is utilized by appellate courts, and not trial courts; second, the rule is a procedural tool for upholding, not reversing decisions; and third, the practical effects of the court of appeals' analysis – which essentially required a trial court to invoke the two-issue rule whenever necessary to uphold a jury's verdict – would discourage trial courts from correcting errors at the trial level. *Id.* Accordingly, the Court rejected the court of appeals' application of the two-issue rule to the facts of *Anderson*.

The facts of the instant case do not implicate the limitations of the two-issue rule articulated by the Court in *Anderson*. First, in the instant case, this Court is examining the application of the two-issue rule in the context of appellate review. Next, the Court is applying the rule in this case to uphold the judgment of the trial court. Finally, application of the rule in the context of this case does not discourage trial courts from correcting errors, but rather,

functions in the exact capacity for which the rule was intended. For these reasons, applying the two-issue rule to the erroneous jury charge in the instant case would not be "unusual." Conforming to the court of appeals' analysis of *Anderson* in the decision below, in our view, would effectively abolish the two-issue rule in South Carolina.

Furthermore, nothing in this Court's jurisprudence suggests, as the dissent would, excluding cases presented on a single theory of liability and a single affirmative defense from the ambit of the two-issue rule. To the contrary, in what appears to be the very first case in this State to set forth the basic tenets of the two-issue rule, this Court observed that "a general finding for the plaintiff is sufficient to dispose of the issues both on the petition and on the [defendant's] counterclaim." *Hussman Refrigerator & Supply Co. v. Cash & Carry Grocer, Inc.*, 134 S.C. 191, 196, 132 S.E. 173, 174 (1926). *See also Anderson v. West*, 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978) ("[W]here a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed."). Accordingly, and because we find that any error in charging assumption of the risk was not prejudicial to the Coles in the first instance, we decline to place further limitations on the scope of the two-issue rule in our decision today.

Therefore, the general jury verdict for the defense may be affirmed because the jury charge on assumption of the risk did not amount to prejudicial error, or in the alternative, pursuant to the two-issue rule.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals and reinstitute the trial court's judgment in favor of Dr. Raut.

MOORE, WALLER, JJ., and Acting Justice Aphrodite K. Konduros, concur. PLEICONES, J dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent, and would hold that the erroneous assumption of the risk charge prejudiced the Coles, and therefore would affirm the decision of the Court of Appeals. Moreover, as explained below, in my view the majority's discussion of the "two issue rule" is fundamentally flawed.

I agree with the majority of this Court that the trial judge erred in charging the jury on the defense of assumption of the risk. In my view, the Coles were prejudiced by this charge which instructed the jury that it must return a defense verdict if it found "the plaintiff freely and voluntarily exposed herself to a known danger and understood and appreciated the danger" in light of the two "informed consent" forms which were introduced into evidence. In my opinion, we need not engage in speculation and evidence weighing to determine this charge constituted reversible error.

I am also concerned because the opinion invokes the two issue rule to affirm this appeal despite the rule's inapplicability. The two issue rule holds that where a lower court's general verdict rests on two independent grounds, only one of which is challenged on appeal, the appellate court will affirm. The rule is simply one expression of the fundamental appellate philosophy of our courts: to affirm the decision of the lower court if possible. It also serves a second appellate goal, that is, to conserve scarce appellate resources by allowing courts to forgo analyzing "pointless … exceptions" which cannot alter the outcome. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 171 S.E.2d 544 (1970). These policies are reflected in situations other than challenges to a general verdict. See e.g. Brading v. County of Georgetown, 327 S.C. 107, 490 S.E.2d 4 (1997)(failure to argue all grounds for ruling below requires affirmance); Buckner, *supra* (same); S.C. Prop. and Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001)(same).

I agree with the majority that the two issue rule is properly applied where a general verdict for the plaintiff rests on more than one theory of liability, not all of which are challenged on appeal, or where a defense verdict

rests on multiple theories, at least one of which is not challenged.[4] Here, we have a defense verdict, but only one liability theory and one defense. As I understand the majority opinion, it is applying the two issue rule to preclude appellate review of a defense verdict where the "two issues" are the defendant's challenge to the plaintiff's proof, and an (admittedly inapplicable) affirmative defense. This new rule would mean, for example, that in an automobile wreck case where the plaintiff testified the light was green and the defendant testified the light was red, neither party could appeal the charging of inapposite liability theories or defenses following a general jury verdict because a "general verdict for [either party] may be sustained because it is independently supported by the negligence claim which was properly submitted to the jury." I cannot join in the creation of this new rule.

The two issue rule has no application, in my view, where as here there is one liability theory (negligence) and the defense theories are "not proven" and "assumption of the risk." That the jury may have returned a defense verdict upon a finding that Dr. Raut was not negligent rather than on the erroneous assumption of the risk defense should not affect the Coles' right to an appeal and a reversal. Since the appellate court has no basis upon which to determine whether the defense verdict rests on the jury's decision that the Coles failed in their proof or upon a finding that Mrs. Cole assumed the risk, in my view, the Coles have demonstrated the requisite prejudice entitling them to a new trial. The majority, I fear, has unwittingly resurrected the same perversion of the "two issue rule" that it soundly rejected in Anderson

[4] Unlike the majority, I do not read Hussman Refrigerator & Supply Co. v. Cash & Carry Grocer, Inc., 134 S.C. 191, 132 S.E.173 (1926) as involving the application of the two issue rule, but rather as holding that where a party interposes no timely objection, a general verdict for the other party disposes of all claims and counterclaims. Huffman is not a case where a party failed to challenge on appeal all the grounds upon which the jury's verdict might rest, but rather one where a party's failure at trial to timely object to the form of the verdict precluded further relief. Anderson v. West, 270 S.C. 184, 241 S.E.2d 551 (1978), also cited by the majority, actually supports my view that the rule is properly invoked only where the appellant fails to challenge all the theories upon which the jury verdict might rest.

v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 421, 472 S.E.2d 253, 255 (1996)(rejecting Court of Appeals' misapplication of the two issue rule, in part "because [if] the jury's general verdict could potentially be upheld anytime it was susceptible of two or more constructions, there would be no incentive for trial courts to correct such errors. . . . ").

Since I believe the Coles established the requisite prejudice from the improper assumption of the risk and since the "two issue rule" does not apply, I would affirm the decision of the Court of Appeals reversing and remanding the matter for a new trial.

The Supreme Court of South Carolina

In the Matter of John A. Pincelli, Petitioner.

ORDER

By opinion dated June 25, 2007, petitioner was suspended from the practice of law in this state for two years, retroactive to August 10, 2005, the date of his interim suspension. In the Matter of Pincelli, 374 S.C. 156, 648 S.E.2d 578 (2007). Petitioner filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be denied. We disagree with the recommendation of the Committee on Character and Fitness and hereby reinstate petitioner to the practice of law in this state.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Waller, J., not participating

Columbia, South Carolina

June 2, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Hercules E. Mitchell, Appellant.

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

Opinion No. 4395
Heard April 8, 2008 – Filed May 22, 2008

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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 Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

THOMAS, J.: Hercules E. Mitchell appeals his convictions for murder, attempted armed robbery, and possession of a firearm during the

commission of a violent crime, arguing the trial judge made several erroneous evidentiary rulings. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

The victim, David Martin, lived close to his father, Nathaniel Martin, in a mobile home and ran Nathaniel's farm for a living. There was evidence that David sold marijuana and cocaine out of his mobile home.

On March 2, 2003, around 11:00 p.m., Thomas Anthony, a family friend who was staying with David at the time, knocked on Nathaniel's window and told him David had been shot. Nathaniel and his wife went to David's mobile home, where they found him lying on the floor. Unable to elicit any response from David, they called 911.

According to Nathaniel, Anthony, who was deceased when the matter came to trial, informed him three persons were involved in the incident. Two of the participants were males wearing masks, neither of whom Anthony could identify. Anthony did, however, identify the third participant as Bridgett Darby. Darby used to rent the mobile home where David was residing at the time of his death.

Officers then located and arrested Darby. On March 3, 2003, at 1:33 p.m., Darby gave a written statement implicating herself and naming Kelvin Johnson and Terrance James.[1] In the statement, Darby said the three "talked about getting together to do to David Martin's house to rob him." Darby further stated the three only intended to take marijuana from David and then flee the scene without injuring him. She further maintained the shooting was an accident and she learned about it only after the three later met at her home. In addition to giving the written statement, Darby also told police that both Kelvin Johnson and Terrance James were from Columbia.

[1] Although Darby's statement refers to her co-participants as "Kelvin and Terrance James," there appears to be no dispute that she was referring to Kelvin Johnson.

Darby then accompanied police officers to Columbia to help them find Kelvin Johnson and Terrance James. Officers consulted Richland County authorities, but were still unable to locate either individual. They then confronted Darby about the accuracy of her information. At 8:00 p.m. the same day, Darby gave a second statement, this time naming Mitchell instead of Terrance James as the third accomplice.

Police apprehended seventeen-year-old Kelvin Johnson during the early morning hours of March 4, 2003. About eight or nine hours later, Johnson gave a written statement in which he admitted he had panicked and shot David when he saw David reach for a gun. In the statement, Johnson also implicated Mitchell, specifically noting (1) Mitchell had helped in supplying the guns that they used to rob David; (2) following the incident, he, Darby, and Mitchell checked into the Southern Lodge; and (3) the three divided the money they had seized from David during the robbery. Two days later, Mitchell voluntarily submitted to police custody.

In October 2004, the Orangeburg County Grand Jury indicted Mitchell for the offenses of murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. A jury trial in the matter commenced December 13, 2005.

At trial, Darby testified for the State, giving information consistent with her second statement and acknowledging she was serving sentences for accessory after the fact and armed robbery because of her participation in the incident. She testified she and Mitchell worked together, were romantically involved, and had discussed robbing David Martin before the incident took place. Darby also admitted a rifle used in the incident belonged to her uncle; however, she also stated she did not know how a pistol believed to be the murder weapon was acquired.

The State then called Johnson to the stand. Johnson had previously pled guilty to and was sentenced for murder, armed robbery, and possession of a weapon during the commission of a violent crime. Outside the presence of the jury, Johnson complained to the trial judge that the solicitor's office

had "forced" him to appear at Mitchell's trial and threatened him with additional time in prison if he did not "come up here and make this man be guilty." In response, the trial judge advised Johnson that (1) both the State and the defense had the right to subpoena witnesses and any witnesses who refused to answer questions while on the stand could be held in contempt of court and sentenced to six months; (2) untruthful answers could result in perjury charges, for which the sentence could be five years; and (3) when Johnson pled guilty to the charges for which he was sentenced, he gave a statement under oath adopting the statement that he had previously given to the police about the incident.

When the jury returned to the courtroom, Johnson, after some prodding, affirmed to tell the truth. When the solicitor began to question him, Johnson was uncooperative, giving unresponsive answers and again accusing the State of forcing him to appear in court. When Johnson persisted in refusing to answer the solicitor's questions, even after the trial judge warned him of the consequences, the trial judge sentenced him for contempt and ordered officers to remove him from the courtroom.

The State moved to introduce Johnson's statement through its next witness, Captain Rene Williams of the Orangeburg County Sheriff's Office. During an in camera hearing, the trial judge, over objections from the defense, found Johnson had given his statement freely and voluntarily. When the State asserted the statement was admissible as a prior inconsistent statement as a result of Johnson's denying it on the stand, defense counsel argued the prejudicial effect would outweigh the probative value of the statement and cross-examination was not possible because Johnson had already been removed from the proceedings. Counsel further asserted: "They're asking us to admit a blanket statement that says that there's some culpability of my client, and I have no opportunity to test the credibility other than to ask the officers who assisted in getting the statement."

The solicitor then asserted Johnson's statement was admissible under Rules 804(a)(2) and (b)(3) of the South Carolina Rules of Evidence, which permit the admission of a statement against interest as an exception to the hearsay rule when a witness persists in refusing to testify despite a court

order to do so. In response, defense counsel stated he stayed with his objection. The trial judge accepted the State's argument and allowed the solicitor to publish Johnson's statement through Captain Williams.

After Williams testified, the State called Kenny Kinsey, who at the time of the incident was a sergeant in the Central Investigative Division of the Orangeburg County Sheriff's Office. Kinsey testified he interviewed Darby after she was arrested. He also noted that although Darby initially implicated Johnson and Terrance James as well as herself, she later revealed that Johnson and Mitchell were her accomplices.

On cross-examination, Kinsey claimed Terrance James "was a fictitious name" that Darby had given authorities to protect Mitchell. Defense counsel then attempted to refer to an Orangeburg telephone directory, prompting the solicitor to request an in camera hearing. During this hearing, Kinsey explained on cross-examination that after previous attempts to locate Terrance Johnson in Richland County proved futile and both Darby and Johnson named Mitchell as the third participant, he did not check Orangeburg County sources, including the local telephone book, to determine if anyone by the name of Terrance James could be found in the area. Upon further cross-examination, Kinsey acknowledged there was a directory listing for a "Terrance A. James" in Springfield, a town in Orangeburg close to the crime scene, as well as various listings for "Terry James" and "T.A. James" in Lexington and Richland Counties.

The solicitor argued against allowing the jury to hear evidence about the telephone book listings, contending this was impermissible evidence of third-party guilt that would only confuse the jury. The trial judge agreed and did not allow the defense to introduce either the telephone books or "any evidence that there's somebody somewhere named Terrance James." The trial judge, however, did allow defense counsel to question Kinsey about what he did and did not do during the course of his investigation.

On December 15, 2005, the jury convicted Mitchell of all three offenses, and the trial judge sentenced him accordingly. This appeal followed.

LAW/ANALYSIS

I. Admission of Kelvin Johnson's Statement

Mitchell first contends the trial judge committed error in admitting the statement Johnson made to law enforcement while in police custody. We agree.

The Confrontation Clause of the Sixth Amendment of the United States Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In South Carolina, not only is this right applicable to state prosecutions under the Fourteenth Amendment, it is specifically mandated by the State Constitution. State v. Green, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977) (citing S.C. Const. art. I, § 14).

In 1987, the South Carolina Supreme Court noted the Confrontation Clause did not prevent the use of hearsay evidence in criminal trials "where the evidence bears significant 'indicia of reliability.' " State v. Cooper, 291 S.C. 351, 355, 353 S.E.2d 451, 454 (1987) (quoting Lee v. Illinois, 476 U.S. 530, 539 (1986)). Two years later, however, in State v. Pfirman, the court appeared to take a decidedly more restrictive view toward allowing hearsay evidence against a criminal defendant. Under Pfirman, although a prior inconsistent statement implicating an accused may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination, "[w]hen . . . the declarant refuses to admit the statement imputed to him, the accused is denied effective cross-examination in violation of his confrontation rights." State v. Pfirman, 300 S.C. 84, 86, 386 S.E.2d 461, 462 (1989).

In 2004, the United States Supreme Court, in Crawford v. Washington, reversed an assault and battery conviction, holding the trial court should have suppressed a statement to law enforcement given in conjunction with the

investigation because state privilege law prevented the prosecution from calling the declarant to testify against the defendant. Although the statement was admissible as a hearsay exception under the applicable rules of evidence, the court held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 68 (2004).

We see no reason why the rule in Crawford and similar South Carolina cases should not apply to the present dispute. Although the trial judge ultimately ruled Johnson's statement admissible as a statement against interest from an unavailable declarant rather than as a prior inconsistent statement, Mitchell had no opportunity to cross-examine Johnson about the statement because Johnson had already been removed from the courtroom when the State moved to admit it.

The State argues Mitchell did not preserve this issue for appeal because his trial attorney never explicitly raised the issue of due process. The State further contends Mitchell did not adequately present a Crawford objection in his brief to this Court. We reject these arguments.

There is persuasive authority for the State's position that an assignment of error under Crawford requires more than a standard hearsay objection. See Mencos v. State, 909 So. 2d 349, 351 (Fla. Dist. Ct. App. 2005) ("An objection specifically based on Crawford serves to focus the trial court's attention on the salient inquiry required by that decision, i.e., whether the evidence is 'testimonial,' whether the witness is 'unavailable,' and whether there was a 'prior opportunity for cross-examination.' ") (quoting Crawford, 541 U.S. at 68). Nevertheless, even though Mitchell's attorneys did not cite Crawford during trial or explain on appeal why this decision is applicable, we hold Mitchell presented a sufficient basis for an assertion of reversible error.

At trial, defense counsel argued the statement at issue was "a blanket statement that there's some culpability of my client" and he had "no opportunity to test [Johnson's] credibility." Even without a citation to Crawford, these assertions were sufficient to direct the trial judge's attention

to the problems attendant to admission of an incriminating statement when the declarant is unavailable for cross-examination by the accused. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302-03, 641 S.E.2d 903, 907 (2007) (holding an objection, though not phrased "in the exact terms used in the issues on appeal" "provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue").

In the recent case of State v. Ladner, the South Carolina Supreme Court noted that although "[t]he Crawford Court declined to comprehensively define 'testimonial,' " it included within a " 'core class of "testimonial" statements' " (1) "custodial examinations" and (2) "statements that were made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial." State v. Ladner, 373 S.C. 103, 112, 644 S.E.2d 684, 688-89 (2007) (quoting Crawford, 541 U.S. at 51-52). Here, defense counsel argued Johnson's statement inculpated his client, the only reasonable inference being that an objective witness would expect the statement could be used at a later trial.

We further hold the objections presented at trial concerning the defense's inability to cross-examine Johnson, together with the arguments Mitchell presented on appeal, sufficiently preserved for our review the issue of whether he was denied his Sixth Amendment right of confrontation. See State v.McNinch, 12 S.C. 89, 96-97 (1879) ("But the right to cross-examine is one which must remain inviolate. To take it away would render almost valueless the constitutional right 'to meet the witnesses against him face to face.' ") (citing S.C. Const. art. 1, § 11 [now section 14]), overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991). The State suggested during oral argument that the arguments by the defense against admission of Johnson's statement were presented in a context that would have more readily suggested an assertion of prejudice than one of the loss of the right to confront a witness. We hold, however, defense counsel's complaint about his inability to cross-examine Johnson were sufficient to preserve for our review the issue of his client's right to confront witnesses. Counsel's contention that he had "no opportunity to test the credibility other than to ask the officers who assisted in getting the statement" went directly to the heart of confrontation, namely, the requirement that "a

witness . . . testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 449, 602 S.E.2d 62, 71 (2006).[2]

Finally, we disagree with the State's argument that we should uphold the admission of Johnson's statement because Mitchell's brief to this Court focused on a general denial of due process rather than on the specific complaints expressed during the trial about his Sixth Amendment right of confrontation under Crawford. Although defense counsel never expressly mentioned due process at trial, his assertions about the right to confront adverse witnesses regarding incriminating statements raised due process concerns. See Dangerfield v. State, 376 S.C. 176, ___, 656 S.E.2d 352, 354 (2008) (including "the right to confront and cross-examine adverse witnesses" as one of the requirements of "[t]he procedural component of the state and federal due process clauses").

The State further argues there was no denial of fundamental fairness because Johnson took the stand and gave evidence favorable to Mitchell. We disagree. As noted in Crawford, "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 541 U.S. at 68. In the present case, although Johnson took the stand, he refused to answer the solicitor's questions, was found in contempt, and was removed from the courtroom while still on direct examination and before his statement was introduced. We are simply at a loss to understand how Mitchell ever had the opportunity to cross-examine Johnson about his statement. See Douglas v. Alabama, 380 U.S. 415, 416-19 (1965) (holding a defendant's Sixth Amendment rights were improperly denied by allowing the prosecutor to read, "under the guise of cross-examination to refresh [the witness's] recollection" a statement from a witness who persisted in relying on self-incrimination grounds to avoid answering questions even after the trial court advised the witness that such a privilege was not available); Simpkins v.

[2] The supreme court affirmed this Court's decision in Gillian, but modified it on grounds not related to the issues relevant to this appeal. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007).

State, 303 S.C. 364, 368, 401 S.E.2d 142, 143-44 (1991) (holding that admission of hearsay testimony from a child victim's guardian ad litem unfairly denied the defendant the right of cross examination even though the victim had testified in court); cf. State v. Blue, 717 N.W.2d 558, 566 (N.D. 2006) ("A witness's mere appearance at a preliminary hearing is not an adequate opportunity for cross-examination for purposes under the Confrontation Clause."). Moreover, the trial judge's decision to admit the statement under Rule 804 of the South Carolina Rules of Evidence suggests at least a tacit understanding that the declarant was "unavailable."

Finally, the State argues any error in admitting Johnson's statement after his removal from the courtroom should be considered harmless. In support of this argument, the State suggests that cross-examination by the defense would have served no useful purpose, pointing out that Johnson testified on direct examination that he had nothing to do with the crimes, that the prosecution was threatening him to make him say things that were not true in order to convict Mitchell, that the State had tried to brainwash him, and that he had been forced to appear at Mitchell's trial. We disagree that Johnson's conduct while he was on the stand warrants a finding of harmless error.

The supreme court has recently stated that "[a] violation of a defendant's Sixth Amendment right to confront witnesses is not *per se* reversible error" and that the appellate court "must determine whether the error was harmless beyond a reasonable doubt." State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). The court further explained that although the particular circumstances of a case should be considered in determining whether an error it harmless, "[e]rror is only harmless 'when it "could not have affected the result of the trial." ' " Id. at 181-82, 638 S.E.2d at 63 (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1986)) (internal citation omitted).

Even if Johnson's conduct on the stand was helpful to the defense, the State failed to explain in its brief how his behavior and evasive answers would inevitably lead to a determination by this Court that the admission of his statement did not contribute to the verdict beyond a reasonable doubt. In

the statement, Johnson did more than corroborate the State's allegations; he also gave specifics about Mitchell's involvement that were not provided by any other witnesses, including assertions that Mitchell helped to obtain the weapons used to attack the victim and shared in the spoils of the crime. We are also concerned about the acknowledged lack of physical evidence linking Mitchell to the incident and the fact that Darby, the only eyewitness who provided any substantive testimony at the trial, implicated Mitchell only after authorities confronted her about the truth of her initial statement. Considering the record as a whole, then, we cannot say that admission of Johnson's statement could not reasonably have affected the result of Mitchell's trial. See State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (Ct. App. 2001) ("It is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.") (citing U.S. v. Hasting, 461 U.S. 499, 509 (1983)), overruled on other grounds by State v. Gentry, 363 S.C. 93, 107, 610 S.E.2d 494, 502 (2005).

II. Exclusion of Evidence of Third-Party Guilt

Mitchell next argues the trial judge erred in refusing to allow him to submit into evidence telephone directories with listings similar to the name Darby initially gave to authorities. He argues this evidence was admissible because it was probative on the issues of third-party guilt, Darby's credibility, and the thoroughness of the police investigation. Based on the record before us, we find no error.

We decline to address the issue of whether the telephone directory listings were admissible as evidence of Darby's credibility or lack of it. Defense counsel, in arguing for admission of the directories, pointed out only that Darby's statements to police had been inconsistent, but never argued that admission of the directories would affect the jury's determination as to whether she was a believable witness. Absent an argument at trial that this evidence was necessary to impeach Darby's overall credibility, Mitchell cannot raise this argument on appeal. See State v. Bryant, 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007) (holding that, because an objection to the exclusion of certain testimony was not made to and ruled on by the trial

judge, the issue was not preserved for appeal), cert. denied, 128 S. Ct. 245, 169 L. Ed. 2d 169 (2007).

We further hold the trial judge correctly excluded the telephone books as evidence of third-party guilt under State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941).

In Gregory, the supreme court held " '[e]vidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.' " Id. at 104, 16 S.E.2d at 534 (quoting 16 C.J. 560). See also State v. Rice, 375 S.C. 302, 317, 652 S.E.2d 409, 416 (Ct. App. 2007) ("Our state supreme court has imposed strict limitations on the admissibility of testimony indicating third-party guilt.").

Although the United States Supreme Court recently addressed the issue of the admissibility of evidence of third-party guilt in Holmes v. South Carolina, 547 U.S. 319 (2006), that decision overruled the application of the limits on such evidence only to the extent that these limits rely on the prosecution's evidence against the defendant rather than on the strength of the evidence proffered by the defendant to establish third-party guilt. In the present case, there is nothing in the record suggesting the trial judge even considered the strength of the State's evidence against Mitchell in refusing to admit the telephone books into evidence. The fact that the directories may have contained listings of individuals with names that were either identical or similar to the name Darby initially gave to the police is simply not evidence that any of these individuals was involved in the incident.

Furthermore, we hold no prejudice resulted from the exclusion of the evidence insofar as it was proffered to demonstrate the police were not thorough in investigating the matter. See Rule 103(a), SCRE ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."). Although the trial judge prohibited the defense from introducing directory listings of similarly named individuals without evidence to connect such persons with the crime, he allowed the defense to ask what law enforcement did and did not do in their

attempt to locate Terrance James, including whether the police checked the National Crime Information Center records, what police did to "flush out" Terrance James, and whether police looked for such a person in the local area. We have found nothing in Mitchell's brief explaining why this line of questioning would not be sufficient to cover the issue of the adequacy of the police investigation.

CONCLUSION

We hold the trial judge committed reversible error in admitting Kelvin Johnson's statement to the police, Mitchell's objection to the statement and arguments on appeal were sufficient to preserve the matter for our review, and Mitchell is entitled to a new trial on this ground. Based on the record before us, we further hold the trial judge correctly excluded evidence submitted by the defense of third-party guilt.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie L. Jones, Personal Representative of the Estate of Chad Jones, Appellant,

v.

Leon Lott, Linn Pitts, Gilbert Gallegos, and Clark Frady, Individually and in their official capacities with the Richland County Sheriff's Department, Respondents.

Appeal From Richland County
Roger M. Young, Circuit Court Judge

Opinion No. 4396
Heard May 8, 2008 – Filed May 28, 2008

AFFIRMED

Hemphill P. Pride, II, of Columbia, for Appellant.

Andrew F. Lindemann, William H. Davidson, II, Robert D. Garfield, all of Columbia, for Respondents.

HEARN, C.J.: Chad Jones was killed when he was shot in the head as he attempted to escape after being taken into custody by Richland County Sheriff's deputies. His estate appeals the circuit court's grant of directed verdict in favor of Sheriff Leon Lott in his official capacity. We affirm.

FACTS

Two members of Richland County Sheriff's Department, Corporal Linn Pitts and Deputy Gilbert Gallegos, attempted to pull over Jones when he failed to use a turn signal. Jones refused to stop and the officers pursued him. Eventually, Jones' vehicle struck an air conditioning unit at the Waverly Street Apartments, and Jones fled on foot, ultimately dropping a .22 caliber revolver. The officers found Jones in the laundry room of a nearby house, and after a brief struggle, he was subdued and apprehended. The officers found a clear plastic container that, at the time, they believed contained crack cocaine.[1] Jones was put in handcuffs and placed in the rear of Pitts' police cruiser, while the officers began preparing the paperwork accompanying the arrest.

Ultimately, Jones was arrested for ten criminal and traffic offenses.[2] At the time he was arrested, Jones identified himself to the officers as "Lavaris Richardson," although a Columbia Police Department officer on the scene identified his true identity. A quick check revealed Jones also had outstanding arrest warrants for attempted burglary, assault with intent to kill, and assault and battery with intent to kill.

At some point while the officers were working on their paperwork, Pitts and Gallegos observed Jones fidgeting in the back seat of the cruiser.

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[1] Police tested and later determined the white powder was washing detergent.

[2] These included: failure to use a turn signal; leaving the scene of an accident; failure to stop for blue lights and siren; driving without a driver's license; possession of a stolen vehicle; possession with intent to distribute crack cocaine; unlawful carrying of a pistol; possession of a pistol under the age of 21; resisting arrest; and possession with intent to distribute crack cocaine within a half mile of school.

Gallegos and a third deputy who had arrived with a paddy wagon to transport Jones, Deputy Clark Frady, removed Jones from the cruiser, and conducted a pat down search. Finding nothing, they again secured Jones in the back of the cruiser with his hands handcuffed behind his back and his seat belt fastened. Because it was an unusually warm day in November, Pitts left the engine of the cruiser running so that the air conditioning would be operating, and left the Plexiglas window in the cruiser open in order to let the air reach Jones. Initially, the windows of the cruiser were also open, but the officers closed them when Jones continued to yell out to passersby. The officers then continued their paperwork on the hood of the cruiser.

Thereafter, Jones apparently maneuvered his handcuffed hands to the front of his body, and squeezed through the open Plexiglas window into the driver's seat of the cruiser, locking the doors. The officers noticed Jones in the front seat when they heard the sound of him turning the key to the already-running vehicle. The officers yelled to Jones to stop and unlock the doors, and Gallegos unsuccessfully attempted to break the front driver's side window with his baton. Gallegos then retreated to his own cruiser in anticipation of a second pursuit, while Pitts tried to unlock the passenger side door with his key.

Meanwhile, Jones had placed the cruiser in reverse and backed up approximately twenty feet. Both Pitts and Frady repositioned themselves in front of the cruiser, and shouted instructions for Jones to stop the vehicle and turn off the ignition. Jones ignored these instructions, instead slumping in the driver's seat, placing the cruiser back in drive, and eventually stepping on the accelerator. The cruiser first cut left toward Pitts, who moved out of the way and fired a shot hitting the rear hubcap. The cruiser then turned and came directly at Frady, who fired twice into the vehicle. One of Frady's shots struck Jones in the back of the head, killing him.

Jones' estate brought a wrongful death and survival action against Sheriff Leon Lott, Linn Pitts, Gilbert Gallegos, and Clark Frady, individually and in their official capacities with the Richland County Sheriff's Department, based on allegations of negligence and civil conspiracy. Defendants filed a motion for summary judgment, which Judge Allison Lee

granted with respect to all the individual defendants, but allowed the case to proceed against Lott in his official capacity as to the gross negligence claim. The circuit court ultimately granted Lott's motion for a directed verdict at the close of Jones' case. This appeal follows.

STANDARD OF REVIEW

On a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. Id. at 434-35, 629 S.E.2d at 648.

LAW/ANALYSIS

Jones contends the circuit court erred in granting Lott's motion for a directed verdict on the following grounds: (1) Richland County deputies had no duty to Jones with respect to the manner in which they confined and secured him upon taking him into custody; (2) the use of deadly force by the deputies was objectively reasonable as a matter of law; and (3) Jones' attempted escape outweighed any negligence on the part of the deputies in failing to secure him.

The circuit court granted Lott's motion for directed verdict on four grounds: (1) Sheriff's Department deputies did not owe a duty to Jones to secure him in the back of the police cruiser in a manner that made it impossible to escape; (2) any negligence on the deputies' part in securing Jones in the cruiser was outweighed as a matter of law under our comparative negligence standard by Jones' actions in his escape attempt; (3) the use of deadly force by the deputies in that situation was objectively reasonable as a matter of law; and (4) the Sheriff's Department was entitled to immunity under Section 15-78-60(6) of the South Carolina Code (2005) for the method

of providing police protection. As illustrated by Jones' contentions on appeal listed above, Jones failed to appeal the circuit court's grant of a directed verdict on the issue of Lott's immunity under section 15-78-60(6). Consequently, the circuit court's ruling on Lott's immunity is the law of the case and warrants our affirmance of the directed verdict under the two issue rule. See Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 254 (1996) (finding when a general verdict can be supported by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals all causes of action). In Anderson, the supreme court explained that the two issue rule is also applicable in situations not involving a jury:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Id. at 420 n.1, 472 S.E.2d at 255 n.1. See also Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Moreover, Lott maintains on appeal that an additional sustaining ground exists under Section 15-78-60(21) of the South Carolina Code (2005). We agree.

Section 15-78-60(21) provides:

> The governmental entity is not liable for a loss resulting from . . . the decision to or implementation of release, discharge, parole, or furlough of any persons in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client or the escape of these persons.

(emphasis supplied). This argument was presented to the circuit court; however, it was not a ground upon which the court orally granted Lott's motion for directed verdict. Nevertheless, this court may consider any ground present in the record to affirm the circuit court's judgment. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (finding when a circuit court rules in favor of one party, it is not necessary for preservation purposes for the winning party to ask the court to revisit its decision in order to rule on the remaining issues and arguments it put forth). Therefore, we find section 15-78-60(21) provides Lott immunity from the loss resulting from the escape attempt of Jones, who, having already been arrested, was in custody and a prisoner.

Accordingly, the circuit court's grant of a directed verdict to Lott is

AFFIRMED.

SHORT, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Lee Brown, Appellant,

v.

Gina Marie (Stiles) Brown, Respondent,

and

Gina Marie (Stiles) Brown, Third Party Plaintiff,

v.

Myron L. Brown & Carol J. Brown, Third Party Defendants.

Appeal From Greenville County
Aphrodite K. Konduros, Family Court Judge

Opinion No. 4397
Submitted March 1, 2008 – Filed May 28, 2008

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Oscar W. Bannister, of Greenville, for Appellant.

Kenneth C. Porter, of Greenville, for Respondent.

PER CURIAM: In this divorce action, Thomas Lee Brown (Husband) appeals the family court's failure to find Gina Marie Brown (Wife) committed adultery, thus barring her from receiving alimony. Additionally, Husband appeals the family court's inclusion of certain items as marital property and the assessment of Wife's attorney's fees against him. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife (collectively the Browns) married in Ohio on November 27, 1982. They had five children together during their marriage. In 1985, the Browns moved to Greenville, South Carolina. In 1989, Husband purchased a house with several acres of property in Travelers Rest, South Carolina, but the Browns continued to reside in a house they were renting in Greenville, South Carolina. In 1995, Husband and Wife built a new home on the property in Traveler's Rest where they resided throughout the remainder of the marriage.

Chris Craft (Craft) sold and installed the windows in the Browns' new home. A few months later, Craft and his wife began socializing with the Browns. Around Christmas of 1996, Husband took the children to church while Wife remained at home with their baby. Husband returned home and unexpectedly discovered Craft there. In explaining Craft's presence, Wife told Husband Craft had stopped by to look at their Christmas lights.

Wife and Craft became close and began having lunch without either of their spouse's knowledge. On several occasions, Craft and Wife met in a remote part of a restaurant's parking lot and fondled each other in Wife's car. In 1998, Husband discovered Craft and Wife were having lunch together. After confronting Wife, she temporarily ceased contact with Craft but admitted to subsequently resuming their relationship. Additionally, Craft and Wife frequently talked on the phone. In late 2000, Husband discovered Wife had a cell phone for which she had the bill sent to her mother's address, and

Husband testified Wife had called Craft several dozen times from Wife's cell phone.

Wife admitted her relationship with Craft was sexual in nature. Over the course of their relationship, Wife admitted to kissing Craft "a couple of dozen times," permitting him to grope her breasts, and allowing him to fondle her genital area. Wife stated she was in love with Craft and discussed marriage with him. Furthermore, Wife agreed her relationship with Craft was "sexual to a degree," and while not admitting to engaging in sexual intercourse, she stated both she and Craft desired sex with each other.

On November 14, 2000, Husband filed for divorce on the grounds of adultery. However, the action was administratively dismissed, and Husband filed a new action in 2002. Thereafter, Wife filed an answer denying she committed adultery and a third-party complaint against Husband's parents. Wife alleged Husband's parents were necessary parties to the divorce action because Husband and his parents had "common financial interests," and Wife believed they might claim an interest in a house in Husband's name as well as property surrounding the marital residence. Pursuant to a consent order, Wife's action against Husband's parents was consolidated with the divorce action.[1]

Following a hearing on the matter, the family court found Wife had not committed adultery, but her behavior with Craft did not aid in the preservation of the marriage. The family court further found Husband's predilection towards online pornography did not aid in the preservation of the marriage.

[1] Following the final hearing, the family court found Husband's parents had no interest in the house. Husband's parents appealed this decision and the family court's assessment of attorney's fees against them in a separate appeal. Brown v. Brown, Op. No. 2008-UP-051 (S.C. Ct. App. filed Jan. 14, 2008) (unpublished opinion).

Finding Wife had never worked, the family court awarded Wife alimony of $3,197 per month. The family court found Husband's net monthly income was $6,136.48 with an annual earning capacity of $150,000. The family court also noted Husband's ability to make several personal expenditures, such as buying two expensive motorcycles and flying lessons, while he was paying temporary unallocated support of $5,000 a month.

The parties agreed Wife would retain custody of the minor children. The family court awarded Wife child support of $1,743 per month. The family court equally divided the marital property, awarding each party approximately half the value of the marital estate.

Furthermore, the family court ordered Husband to pay a total of $58,895.76 in Wife's attorney's fees, which included $27,000 previously paid pursuant to a temporary order and $3,000 previously paid to Wife during the pendency of the action. The family court also ordered Husband pay $5,006.50 of Wife's expert witness fee. Additionally, the family court ordered Husband's parents to pay $5,006.50 of Wife's expert witness fee and $5,000 of Wife's attorney's fees. This appeal follows.

STANDARD OF REVIEW

On appeal from a family court order, this Court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). When reviewing decisions of the family court, we are cognizant of the fact the family court had the opportunity to see the witnesses, hear "the testimony delivered from the stand, and had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character." DuBose v. DuBose, 259 S.C. 418, 423, 192 S.E.2d 329, 331 (1972). When the evidence is conflicting and susceptible of different inferences, the family court has the duty of determining not only the law of the case, but the facts as well, because it had the benefit of observing the witnesses and determining how much credence to give each witness's testimony. Anders v. Anders, 285 S.C. 512, 514, 331 S.E.2d 340, 341 (1985).

LAW/ANALYSIS

I. Adultery

Husband contends the family court erred in failing to find Wife committed adultery, and thus, Wife should be barred from receiving alimony. We agree.

A family court may not award alimony to a spouse who commits adultery before the earliest of (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties. S.C. Code Ann. § 20-3-130(A) (Supp. 2007).

Proof of adultery as a ground for divorce must be "clear and positive and the infidelity must be established by a clear preponderance of the evidence." McLaurin v. McLaurin, 294 S.C. 132, 133, 363 S.E.2d 111, 111 (Ct. App. 1987). A "preponderance of the evidence" is evidence which convinces as to its truth. DuBose, 259 S.C. at 424, 192 S.E.2d at 331. Because of the "clandestine nature" of adultery, obtaining evidence of the commission of the act by the testimony of eyewitnesses is rarely possible, so direct evidence is not necessary to establish the charge. Fulton v. Fulton, 293 S.C. 146, 147, 359 S.E.2d 88, 88 (Ct. App. 1987).

Accordingly, adultery may be proven by circumstantial evidence that establishes both a disposition to commit the offense and the opportunity to do so. Hartley v. Hartley, 292 S.C. 245, 246-47, 355 S.E.2d 869, 871 (Ct. App. 1987). Generally, "proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed." Loftis v. Loftis, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985). Evidence placing a spouse and a third party together on several occasions, without more, does not warrant the conclusion the spouse committed adultery. Fox v. Fox, 277 S.C. 400, 402, 288 S.E.2d 390, 391 (1982).

Our courts have not specifically stated what sexual acts constitute adultery. Panhorst v. Panhorst, 301 S.C. 100, 104, 390 S.E.2d 376, 378 (Ct. App. 1990). In Nemeth v. Nemeth, 325 S.C. 480, 486, 481 S.E.2d 181, 184 (Ct. App. 1997), this Court noted South Carolina has rejected the argument equating adultery with intercourse. In Nemeth, the wife took a cruise and stayed in a cabin with a man other than her husband. Id. at 484, 481 S.E.2d at 183. The wife denied she committed adultery and introduced evidence she had chronic pain that made intercourse difficult for her. Id. at 485, 481 S.E.2d at 184. This Court found adultery, stating sexual intercourse is not required to establish adultery; sexual intimacy is enough. Id. at 486, 481 S.E.2d at 184.

Additionally, in Panhorst, the wife was accused of adultery and sought to testify her alleged paramour was impotent and thus was incapable of performing intercourse. 301 S.C. at 104, 390 S.E.2d at 378. This Court found "her assertion that she has first hand knowledge and experience of [her paramour's] sexual abilities, if the family court had considered it, would have supported the court's finding of adultery." Id.

In McElveen v. McElveen, 332 S.C. 583, 598, 506 S.E.2d 1, 8 (Ct. App. 1998), this Court declined to find the wife committed adultery because "there [was] virtually no evidence of a romantic or sexual relationship between the [wife and her paramour]." This Court noted without evidence to support a romantic relationship, including love letters, romantic cards, hand-holding, hugging, kissing, or any other romantic demonstrations or actions between the wife and her paramour, adultery was not adequately established. Id.

This Court reiterated in McLaurin, 294 S.C. at 133-34, 363 S.E.2d at 111, that circumstantial evidence indicating opportunity and inclination is sufficient to sustain a finding of adultery. In McLaurin, we affirmed the family court's finding the husband committed adultery when the only evidence of adultery was the wife's testimony that her husband admitted committing adultery and a process server's statement that the divorce pleadings were served on the husband at the alleged paramour's residence

where the paramour answered the door "comfortably clothed," but the husband came to the door fully dressed. Id. at 135, 363 S.E.2d at 112. Noting the husband's presence in the paramour's house without more was not enough to establish adultery, this Court found the incident was "some evidence that [the husband and his paramour] had the opportunity and disposition" to commit adultery. Id.

Husband has the burden of proving Wife committed adultery. See McElveen, 332 S.C. at 598, 506 S.E.2d at 8-9 ("[The] [h]usband bore the burden at trial, as he does on appeal, of convincing the court that [the] [w]ife committed adultery."). While Husband is not required to show direct evidence of the actual act, he must demonstrate Wife's inclination and opportunity to commit adultery. Fulton, 293 S.C. at 147, 359 S.E.2d at 88.

The family court determined Wife and Craft may have had the opportunity to commit adultery at two locations: (1) in the Browns' home around Christmas when Husband was at church and (2) in the car in a parking lot at lunchtime. Despite these apparent opportunities, the family court noted Wife's strict moral upbringing regarding sexual activity supported Wife's position that she and Craft had not had sexual intercourse.

We agree that Craft and Wife's presence in the Browns' home, without more, is not sufficient to establish adultery. See Fox, 277 S.C. at 402, 288 S.E.2d at 391 (finding evidence that a spouse and a third party were together on several occasions, without more, does not warrant a finding of adultery).

However, we disagree with the family court's finding that Wife and Craft's continued and secretive meetings in various parking lots did not provide sufficient evidence to establish an opportunity to commit adultery. The family court found Craft and Wife met approximately twenty-four times over a four to five year period. While the admitted meetings were during the daytime in a car parked in public parking lots, Wife's and Craft's admissions to the conduct that occurred while in the car are circumstantial evidence that adultery was committed.

Furthermore, Wife's and Craft's own admissions establish they were inclined to commit adultery. Craft testified the activities he and Wife engaged in were sexual in nature. Wife and Craft admitted that when they would meet for lunch, they would often kiss in Wife's car. Craft also touched Wife's breast and removed her bra. Both Wife and Craft touched one another below the waist, outside of their clothing. Wife also admitted Craft touched Wife "under her panties" once or twice. Additionally, Wife stated she was in love with Craft and that she discussed marriage with him. Further, she admitted their relationship was sexual to a degree, and she desired to have sexual intercourse with Craft.

Their admissions to meeting for one-on-one lunches, calling each other frequently, kissing, and fondling indicate a "romantic relationship" existed, which also supports a finding of adultery. Wife acknowledged she ceased talking to and seeing Craft for a period of time after Husband confronted her, showing Wife knew her actions were wrongful and inappropriate for a married woman. While we defer to the family court on issues of credibility, sufficient direct and overwhelmingly circumstantial evidence is present in the record to clearly prove Wife committed adultery. The evidence here of opportunity and inclination is too compelling to be brushed aside on the basis of Wife's "strict moral upbringing" and her claims that the romantic rendezvous always stopped short of sexual intercourse.

Therefore, based on the evidence Husband presented, we hold Husband met his burden in proving Wife committed adultery. Accordingly, the family court erred in failing to find Wife committed adultery and consequently in awarding Wife alimony.

II. Equitable Division

Husband contests several decisions of the family court regarding the distribution of the marital estate, specifically the assessment of the value of the parties' timeshare solely against Husband and the family court's determinations that a backhoe and a gun collection were marital property. We address each argument in turn.

Marital property includes all real and personal property the parties acquired during the marriage and owned as of the date of filing or commencement of marital litigation. S.C. Code Ann. § 20-7-473 (Supp. 2007). The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner which fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership. Johnson v. Johnson, 296 S.C. 289, 298, 372 S.E.2d 107, 112 (Ct. App. 1988). The division of marital property is within the family court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Craig v. Craig, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). The appellate court looks to the overall fairness of the apportionment. Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004). "The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership." Mallett v. Mallett, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996). "Upon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title." Id.

A. Timeshare

Husband argues the family court erred in assessing the entire value of the Hilton Head timeshare against him because it found he was at fault in allowing the timeshare to go into default. We agree.

The Browns owned a Hilton Head timeshare valued at $27,500 at the commencement of the divorce proceedings. However, the timeshare had gone into default by the time of the divorce decree. The family court found no credible evidence of an outstanding mortgage and stated Husband allowed the "timeshare to go into default quite possibly for spite."

For purposes of equitable distribution, marital property is typically valued at the time of the commencement of the marital litigation. Mallett v. Mallett, 323 S.C. 141, 151, 473 S.E.2d 804, 810 (Ct. App. 1996). Often, "the value of marital assets . . . change, sometimes substantially, between the time the action was commenced and its final resolution." Dixon v. Dixon, 334

S.C. 222, 228, 512 S.E.2d 539, 542 (Ct. App. 1999). "[B]oth parties are entitled to share in any appreciation or depreciation that occurs to marital property after separation but before divorce." Arnal v. Arnal, 363 S.C. 268, 293, 609 S.E.2d 821, 834 (Ct. App. 2005). However, this Court has previously held when one party is at fault in causing the diminishment in value of the property, that depreciation may be assessed against the at-fault party. Dixon, 334 S.C. at 228, 512 S.E.2d at 542.

In the present case, both parties were at fault in the time share's diminishment in value. Both knew the payment was due and refused to pay. The temporary order was silent as to who was responsible for the payments. Either party could have sought the family court's assistance in determining which party should pay. Both Husband and Wife had the ability to pay because Wife was receiving temporary unspecified support at the time the payment was due. Accordingly, both were at fault in allowing the timeshare to fall into foreclose, and the family court erred in assessing the value of the timeshare solely against Husband instead of equally against both parties.

B. Backhoe

Husband maintains the family court erred in including a John Deere backhoe as marital property and including it in Husband's distribution because Husband's company actually owned the backhoe. We disagree.

The burden to show property is not subject to equitable distribution is upon the one claiming that property acquired during the marriage is not marital. Brandi v. Brandi, 302 S.C. 353, 356, 396 S.E.2d 124, 126 (Ct. App. 1990). In the instant case, Husband failed to sustain his burden of proving the backhoe was non-marital property. While Husband claimed the backhoe belonged to his company, the receipt for the backhoe was in his name instead of the company's name. Further, the backhoe was not listed on the company's tax returns, and the company had not taken depreciation on the backhoe. Husband provided no documentation the backhoe belonged to the company, and the backhoe was even parked at the Browns' residence. Accordingly, the family court did not err in finding the backhoe constituted marital property. See Pool v. Pool, 321 S.C. 84, 89, 467 S.E.2d 753, 756-57

(Ct. App. 1996) (holding equipment purchased using marital funds that was listed on couple's joint tax return was marital property despite exclusive use at husband's business).

C. Gun Collection

Husband contends the family court erred in finding Husband acquired guns during the marriage with a total value of $12,500 because Wife presented insufficient evidence to identify the guns, their value, and their marital character. We agree.

"[A] spouse claiming an equitable interest in property upon dissolution of the marriage has the burden of proving the property is part of the marital estate." Carroll v. Carroll, 309 S.C. 22, 26, 419 S.E.2d 801, 803 (Ct. App. 1992).

Wife testified Husband owned ten or fourteen guns. She further testified Husband told her the entire collection of guns was worth approximately $15,000. On cross-examination, Wife could not name any of the guns but testified "there were a couple, though, that he had gotten after we were married." She further testified Husband received a collection of guns from his father before they married. Wife testified she did not know how much Husband paid for the guns bought during the marriage.

Wife had the burden of showing the guns were marital property. Her testimony was vague regarding how many guns Husband owned and acquired during the marriage and gave no indication of the value of the guns obtained during the marriage. She simply gave an estimate for the entire collection as told to her by Husband several years ago. We find this testimony alone is insufficient to establish Husband had acquired guns during the marriage or to specifically indicate their value. Accordingly, the family court erred in including Husband's gun collection in the marital estate.

III. Attorney's Fees

Finally, Husband asserts the family court erred in ordering Husband to pay all of Wife's attorney's fees because Wife's conduct caused the fees to be excessive. In light of our decision to reverse the family court's finding on the adultery and equitable distribution issues, we similarly reverse the award of attorney's fees and remand the issue for reconsideration. See Sexton v. Sexton, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney's fees for reconsideration when the substantive results achieved by trial counsel were reversed on appeal).

CONCLUSION

The family court erred in failing to find Wife committed adultery because Husband met his burden of proving Wife had both the inclination and the opportunity to commit adultery such that an award of alimony to Wife was improper. Further, the family court erred in assessing the value of the timeshare solely against Husband when both parties were equally at fault in allowing it to enter into default. Conversely, the family court did not err in determining the backhoe was marital property because the Husband failed to prove it was non-marital property. Further, the family court erred in classifying Husband's gun collection as marital property because Wife did not meet her burden in proving the guns were marital property. In light of these decisions, we modify the family court's distribution of the marital estate to be consistent with this opinion. Further, we reverse and remand the issue of attorney's fees against Husband for reconsideration. Therefore, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.[2]

HUFF, KITTREDGE, and WILLIAMS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dexter Antonio Williams, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Richland County
L. Casey Manning, Circuit Court Judge
Alison Renee Lee, Post-Conviction Relief Judge

Opinion No. 4398
Submitted May 1, 2008 – Filed June 5, 2008

AFFIRMED

Assistant Appellate Defender M. Celia Robinson, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Brian T. Petrano, of Columbia, for Respondent.

WILLIAMS, J.: Dexter Antonio Williams (Williams) appeals the Post-Conviction Relief (PCR) judge's finding that Williams' trial counsel was not ineffective for failing to move to exempt Williams from sexual offender status and for not advising Williams he would be required to register as a sexual offender unless the trial court ordered otherwise. We affirm.

FACTS

Williams pled guilty to kidnapping, two counts of armed robbery, possession of a stolen motor vehicle, failure to stop for a blue light, and possession of a gun by a person under the age of twenty-one. Pursuant to section 23-3-430(C)(15) of the South Carolina Code (2007), a defendant over the age of eighteen who pleads guilty to kidnapping will be classified as a sexual offender unless the trial court makes a finding on the record that the kidnapping did not include a criminal sexual offense. Williams' trial counsel did not ask the trial court to make a determination as to the nature of the kidnapping.

Subsequent to Williams' guilty plea, Williams filed a PCR application claiming ineffective assistance of counsel. A PCR hearing was held, and Williams argued his trial counsel was ineffective for failing to ask the trial court to make a finding of fact on the record that Williams' participation in the kidnapping was not sexual in nature, which would relieve Williams of having to register as a sexual offender upon his release from prison. The PCR judge held registration on the sexual offender registry was a collateral consequence of Williams' sentence, and Williams' application was dismissed. Williams then filed a petition for writ of certiorari, which this Court granted.[1] This appeal follows.

[1] In granting Williams' petition, we requested the parties to brief whether the PCR court was correct for finding Williams' counsel was not ineffective for failing to move to exempt Williams from sexual offender status and whether the PCR court was correct for finding Williams' counsel was not ineffective for failing to advise Williams that he would be required to register as a sexual

STANDARD OF REVIEW

"This Court will sustain the PCR judge's factual findings and conclusions regarding ineffective assistance of counsel if there is any probative evidence to support those findings." Hutto v. State, 376 S.C. 77, 80, 654 S.E.2d 846, 847 (Ct. App. 2007).

LAW/ANALYSIS

Williams argues his trial counsel was ineffective: (1) for failing to move to exempt Williams from sexual offender status because the kidnapping charge against him was not sexual in nature; and (2) for failing to advise Williams he would be required to register as a sexual offender unless the trial court ordered otherwise. We disagree.

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove trial counsel's performance was deficient, and due to this deficient representation, the applicant was prejudiced. Strickland v. Washington, 466 U.S. 668, 687 (1984). This same standard applies to a guilty plea. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

"The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is *not* informed of the collateral consequences." Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991) (emphasis in original). Thus, a defendant need not be advised of all collateral consequences of his or her plea in order for the plea to withstand constitutional scrutiny. Id.; see also Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1365-66 (4th Cir. 1973) ("[B]efore pleading, the defendant need not be advised of all collateral consequences of his plea . . . ."). "[A]side from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief *only when the applicant mounts a collateral attack*

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offender unless the trial court ordered otherwise. These issues are our sole appellate considerations.

challenging the validity of his conviction or sentence . . . ." Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (emphasis in original).

The pivotal question of whether Williams' counsel was ineffective for failing to ask the trial court to make a finding on the record that Williams' kidnapping charge was not sexual in nature, therefore, depends on whether registration on the sexual offender registry is a collateral consequence of sentencing. If registration is a collateral consequence of sentencing, Williams' trial counsel cannot be viewed as ineffective for failing to advise Williams of the registration requirement, and by implication, trial counsel cannot be deemed ineffective for failing to move to exempt Williams from sexual offender status.

"The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell, 475 F.2d at 1366. Therefore, a consequence that the defendant must be informed of is one which impacts the sentence imposed on the defendant, and as such, is a direct consequence. See State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating the defendant must be apprised of the direct consequences, which are the direct and immediate results, of his guilty plea).

Registration on the sexual offender registry has no effect on the range of Williams' punishment. Registration is not intended to punish sex offenders, but rather the purpose of requiring registration is "to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). The South Carolina Sex Offender Registry Act (the Act) was created to be a non-punitive act, and our Supreme Court has found that "the Act is not so punitive in purpose or effect as to constitute a criminal penalty." Id. Thus, the consequence of registering as a sexual offender pursuant to the Act is regulatory in nature and is imposed to promote public safety. Accordingly, we agree with the PCR judge's finding that registration on the sexual offender registry is a collateral consequence of Williams' sentencing. Consequently, Williams' trial counsel was not ineffective for

failing to request the trial court to make a determination as to whether the kidnapping was sexual in nature.

CONCLUSION

Based on the foregoing, the decision of the PCR judge is

AFFIRMED.[2]

SHORT, J., and CURETON, AJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nathaniel K. Pelzer, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Richland County
Thomas W. Cooper, Circuit Court Judge
Alison Renee Lee, Post-Conviction Relief Judge

Opinion No. 4399
Submitted June 1, 2008 – Filed June 5, 2008

AFFIRMED

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

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Brian T. Petrano, all of Columbia, for Respondent.

ANDERSON, J.: Nathaniel K. Pelzer ("Pelzer") appeals the circuit court's summary dismissal of his application for post-conviction relief (PCR) for failure to file within the applicable statute of limitations. We affirm.[1]

FACTUAL / PROCEDURAL BACKGROUND

On June 4, 2001, Pelzer pled guilty to first degree criminal sexual conduct and kidnapping in Richland County. Two twenty year, concurrent sentences were imposed. Pelzer's direct appeal was withdrawn on August 31, 2001.

Pelzer filed an application for post-conviction relief on September 16, 2002. Included in his application were arguments based on (1) ineffective assistance of counsel, (2) lack of subject matter jurisdiction, (3) involuntary plea, and (4) violation of due process. The State filed a return and motion to dismiss dated July 25, 2003, and a hearing was held July 27, 2004. The State asserted Pelzer failed to comply with the one-year statute of limitations for filing post conviction relief applications. Additionally, the State moved for summary judgment on Pelzer's claim that the court lacked subject matter jurisdiction over his preliminary hearing.

The record indicates Pelzer's application was notarized August 30, 2002, and Pelzer asserts it was mailed the same day. However, he admits it was incorrectly sent to the South Carolina Office of Appellate Defense who then forwarded the application on September 5th to the proper recipient, the Richland County Clerk of Court.

The circuit judge issued an order denying and dismissing Pelzer's application for failing to comply with the one-year statute of limitations. His claim of lack of subject matter jurisdiction was likewise dismissed. A petition for writ of certiorari dated April 11, 2005, was filed. Pursuant to Rule 227(1), SCACR, the South Carolina Supreme Court transferred the case to this court.

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

STANDARD OF REVIEW

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b)-(c) (2003); State v. Leamon, 363 S.C. 432, 611 S.E.2d 494 (2005). "When considering the State's motion for summary dismissal of an application for PCR, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant." Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000)). Likewise, this court must view the facts in the same fashion when reviewing the appropriateness of a dismissal. Leamon, 363 S.C. at 434, 611 S.E.2d at 494.

LAW / ANALYSIS

Pelzer requests his case be remanded for a full hearing arguing the statute of limitations should be equitably tolled because he filed his application in the wrong venue.

The statute of limitations for filing an application for PCR is one year. Section 17-27-45(A) of the South Carolina Code provides:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

Mailing does not constitute filing. State v. Gary, 347 S.C.627, 629, 557 S.E.2d 662, 663 (2001). "When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer." Gary, 347 S.C. at 629, 557 S.E.2d at 663 (citing Fox v. Union-Buffalo Mills, 226 S.C. 561, 86 S.E.2d 253 (1955)). "Under S.C. Code Ann. § 17-27-40 (1985), the application must be filed with clerk of the court in which the conviction took place." Id.

Pelzer's remittitur is dated August 31, 2001. One year after was August 31, 2002, and adding one day pursuant to Rule 6(a), SCRCP, Pelzer's last day to file his application was September 1, 2002. Because September 1st was a Sunday and Monday, September 2nd, was Labor Day, the period runs until the end of the next day that is neither a Saturday, Sunday, nor a holiday. Rule 6(a), SCRCP. Thus, the period expired Tuesday, September 3, 2002.

Pelzer admits the application was not "technically" filed within one year. However, statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system. Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (citing C.S.J. Limitations of Actions § 2 (1989)).

> Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Id.

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct. App. 2008). "Equitable tolling is reserved for extraordinary circumstances." Id.; see, e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989) (holding statute of limitations equitably tolled for workers' compensation claim during reliance period in which employer represented to

employee that claim compensable and would be taken care of without employee filing claim). The doctrine of equitable tolling can be summarized:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.
>
> Equitable tolling has been deemed available where—
>
> — extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> — the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
>
> — the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

51 Am. Jur. 2d Limitation of Actions § 174 (2007); see also Hooper, 377 S.C. at 232, 659 S.E.2d at 221.

Here, Pelzer has not alleged any wrongdoing by the State. Rather, Pelzer relies on our Supreme Court's decision in Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001), to demand equitable tolling. We find this reliance misplaced. Pelzer states Gary held "that the statute of limitations should be equitably tolled when an application is simply filed in the wrong venue." In Gary, the applicant claimed he had mailed his PCR application within the one-year limitation period but to the wrong place. The period had run when the application came back. Our Supreme Court did not address his equitable tolling argument finding it was not preserved. A footnote specifically clarified, "[w]e express no opinion on the validity of this defense to the statute of limitations." Id. at 629, 557 S.E.2d at 663, n. 2.

At the dismissal hearing, Pelzer's counsel contended Pelzer's misunderstanding of where to file was "understandable given his status as a layman and his lack of knowledge of the law." We disagree that his error resulted from any lack of legal skill rather than simple neglect. Pelzer's PCR application, which was filled out by hand and signed, clearly instructs: "When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted." Three lines below this directive, the applicant is asked to name the location of the court which imposed his sentence. Pelzer answered "Richland County." Under these facts, the narrow window by which Pelzer's application missed the statute of limitations cannot be construed as so exceptional a circumstance as to warrant equitable tolling. The reasoning of the Court of Appeals for the Fourth Circuit in denying equitable tolling to a party is particularly illuminating:

> [A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity

> must be reserved for those rare instances where--due to circumstances external to the party's own conduct--it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (holding habeas petitioner's missing filing deadline due to erroneous advice from counsel not extraordinary circumstance requiring equitable tolling).

For the foregoing reasons, we affirm the circuit court's grant of summary dismissal of Pelzer's PCR application.

AFFIRMED.

HUFF, J., and CURETON, A.J., concur.