Judicial Merit Selection Commission

Erin B. Crawford, Chief Counsel
Emma Dean, Counsel

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

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

June 26, 2018

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

A vacancy will exist in the office currently held by the Honorable Dana A. Morris, Judge of the Family Court, Fifth Judicial Circuit, Seat 3, upon his retirement on or before June 30, 2019. The successor will serve a new term of that office, which expires June 30, 2025.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

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

or

Lindi Legare, JMSC Administrative Assistant at (803) 212-6623 or LindiLegare@scsenate.gov.

The Commission will not accept applications after 12:00 noon on Wednesday, July 25, 2018.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the Commission website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php.

Judicial Merit Selection Commission

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

June 25, 2018

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

A vacancy will exist in the office currently held by the Honorable Paul E. Short Jr., Judge of the Court of Appeals, Seat 1, upon his retirement on or before December 31, 2019. The successor will serve the remainder of the unexpired term, which expires June 30, 2023.

The term of office currently held by the Honorable John D. Geathers, Judge of the Court of Appeals, Seat 3, will expire June 30, 2019.

The term of office currently held by the Honorable Paula H. Thomas, Judge of the Court of Appeals, Seat 4, will expire June 30, 2019.

The term of office currently held by the Honorable DeAndrea Gist Benjamin, Judge of the Circuit Court, Fifth Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable J. Derham Cole, Judge of the Circuit Court, Seventh Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable Deadra L. Jefferson, Judge of the Circuit Court, Ninth Judicial Circuit, Seat 1, will expire June 30, 2019.

A vacancy will exist in the office currently held by the Honorable Kristi Lea Harrington, Judge of the Circuit Court, Ninth Judicial Circuit, Seat 2. The successor will serve the remainder of the unexpired term, which expires June 30, 2024.

The term of office currently held by the Honorable Rivers Lawton McIntosh, Judge of the Circuit Court, Tenth Judicial Circuit, Seat 1, will expire June 30, 2019.

A vacancy will exist in the office currently held by the Honorable R. Markley Dennis Jr., Judge of the Circuit Court, At-Large, Seat 2, upon his retirement on or before December 31, 2019. The successor will serve the remainder of the unexpired term, which expires June 30, 2021.

The term of office currently held by the Honorable R. Keith Kelly, Judge of the Circuit Court, At-Large, Seat 14, will expire June 30, 2019.

The term of office currently held by the Honorable Maite Murphy, Judge of the Circuit Court, At-Large, Seat 15, will expire June 30, 2019.

The term of office currently held by the Honorable Donald Bruce Hocker, Judge of the Circuit Court, At-Large, Seat 16, will expire June 30, 2019.

The term of office currently held by the Honorable Anne Guè Jones, Judge of the Family Court, First Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable Angela W. Abstance, Judge of the Family Court, Second Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Angela R. Taylor, Judge of the Family Court, Third Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Gordon B. Jenkinson, Judge of the Family Court, Third Judicial Circuit, Seat 3, will expire June 30, 2019.

The term of office currently held by the Honorable Salley Huggins McIntyre, Judge of the Family Court, Fourth Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Michelle Manigault Hurley, Judge of the Family Court, Fifth Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Dana A. Morris, Judge of the Family Court, Fifth Judicial Circuit, Seat 3, will expire June 30, 2019.

The term of office currently held by the Honorable Coreen B. Khoury, Judge of the Family Court, Sixth Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable Phillip K. Sinclair, Judge of the Family Court, Seventh Judicial Circuit, Seat 1, will expire June 30, 2019.

A vacancy will exist in the office currently held by the Honorable James F. Fraley Jr., Judge of the Family Court, Seventh Judicial Circuit, Seat 2, upon his retirement on or before June 30, 2019. The successor will serve a new term of that office, which expires June 30, 2025.

The term of office currently held by the Honorable Matthew Price Turner, Judge of the Family Court, Eighth Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable Joseph Collins Smithdeal, Judge of the Family Court, Eighth Judicial Circuit, Seat 3, will expire June 30, 2019.

The term of office currently held by the Honorable Alice Anne Richter, Judge of the Family Court, Ninth Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Wayne M. Creech, Judge of the Family Court, Ninth Judicial Circuit, Seat 4, will expire June 30, 2019.

The term of office currently held by the Honorable Edgar H. Long, Judge of the Family Court, Tenth Judicial Circuit, Seat 1, will expire June 30, 2019.

A vacancy will exist in the office currently held by the Honorable Tommy B. Edwards, Judge of the Family Court, Tenth Judicial Circuit, Seat 3, upon his retirement on or before June 30, 2019. The successor will serve a new term of that office, which expires June 30, 2025.

The term of office currently held by the Honorable Huntley Smith Crouch, Judge of the Family Court, Eleventh Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Robert E. Newton, Judge of the Family Court, Eleventh Judicial Circuit, Seat 3, will expire June 30, 2019.

The term of office currently held by the Honorable Timothy H. Pogue, Judge of the Family Court, Twelfth Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable FitzLee Howard McEachin, Judge of the Family Court, Twelfth Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Rochelle Y. Conits, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable William Marsh Robertson, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 2, will expire June 30, 2019.

A vacancy exists in the office formerly held by the Honorable Alex Kinlaw Jr., Judge of the Family Court, Thirteenth Judicial Circuit, Seat 6, upon his election to the Circuit Court, Thirteenth Judicial Circuit, Seat 4. The successor will serve the remainder of the unexpired term, which expires June 30, 2022.

The term of office currently held by the Honorable Gerald Smoak Jr., Judge of the Family Court, Fourteenth Judicial Circuit, Seat 1, will expire June 30, 2019.

A vacancy will exist in the office currently held by the Honorable Peter L. Fuge, Judge of the Family Court, Fourteenth Judicial Circuit, Seat 2, upon his retirement on or before December 31, 2019. The successor will serve the remainder of the unexpired term, which expires June 30, 2022.

The term of office currently held by the Honorable Deborah Ann Malphrus, Judge of the Family Court, Fourteenth Judicial Circuit, Seat 3, will expire June 30, 2019.

The term of office currently held by the Honorable Jan B. Bromell Holmes, Judge of the Family Court, Fifteenth Judicial Circuit, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable David Glenn Guyton, Judge of the Family Court, Sixteenth Judicial Circuit, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable Kelly Pope-Black, Judge of the Family Court, At-Large, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable Tony M. Jones, Judge of the Family Court, At-Large, Seat 2, will expire June 30, 2019.

The term of office currently held by the Honorable James G. McGee III, Judge of the Family Court, At-Large, Seat 3, will expire June 30, 2019.

The term of office currently held by the Honorable Monet S. Pincus, Judge of the Family Court, At-Large, Seat 4, will expire June 30, 2019.

The term of office currently held by the Honorable Randall E. McGee, Judge of the Family Court, At-Large, Seat 5, will expire June 30, 2019.

The term of office currently held by the Honorable David E. Phillips, Judge of the Family Court, At-Large, Seat 6, will expire June 30, 2019.

The term of office currently held by the Honorable Ralph King "Tripp" Anderson III, Judge of the Administrative Law Court, Seat 1, will expire June 30, 2019.

The term of office currently held by the Honorable Curtis G. Clark, Master-in-Equity, Abbeville County, Eighth Circuit, will expire June 30, 2019.

The term of office currently held by the Honorable M. Anderson Griffith, Master-in-Equity, Aiken County, Second Circuit, will expire June 30, 2019.

The term of office currently held by the Honorable Joe M. Crosby, Master-in-Equity, Georgetown County, Fifteenth Circuit, will expire January 1, 2019.

The term of office currently held by the Honorable Jeffrey M. Tzerman, Master-in-Equity, Kershaw County, Fifth Circuit, will expire July 1, 2019.

The term of office currently held by the Honorable Stephen B. Doby, Master-in-Equity, Lee County, Third Circuit, will expire December 31, 2019.

The term of office currently held by the Honorable James O. Spence, Master-in-Equity, Lexington County, Eleventh Circuit, will expire January 1, 2019.

A vacancy exists in the office formerly held by the late Honorable Richard L. Booth, Master-in-Equity, Sumter County, Third Circuit. The successor will serve the remainder of the unexpired term, which expires December 31, 2022.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

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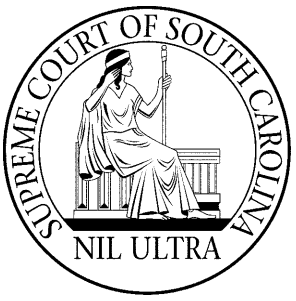

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
June 27, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Melissa Spalt, Respondent,

v.

South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety, Defendants,

of whom South Carolina Department of Motor Vehicles is the Petitioner.

Appellate Case No. 2017-000545

Appeal from the Administrative Law Court
Harold W. Funderburk Jr., Administrative Law Judge

Opinion No. 27817
Heard May 24, 2018 – Filed June 27, 2018

APPEAL DISMISSED

Brandy Anne Duncan, Frank L. Valenta Jr., Philip S. Porter, all of Blythewood, for Petitioner.

Michael Vincent Laubshire, of Columbia, for Respondent.

JUSTICE FEW: The court of appeals dismissed the South Carolina Department of Motor Vehicles' appeal on the ground the order on appeal was not a final decision of the administrative law court (ALC). We affirm.

Melissa Spalt was arrested on April 5, 2015, for driving under the influence of alcohol. When she refused to submit to a breath test, the arresting officer issued a "notice of suspension" of her driver's license pursuant to subsection 56-5-2951(A) of the South Carolina Code (2018). Spalt requested a hearing before the South Carolina Office of Motor Vehicle Hearings (OMVH) to challenge her suspension, as permitted by subsection 56-5-2951(B)(2). The OMVH scheduled a hearing for June 23, 2015, at 9:00 a.m. On June 18, Spalt's attorney notified the OMVH he was scheduled to be in general sessions court at that time. The OMVH rescheduled the hearing for August 11, 2015, at 9:00 a.m.

On Friday August 7, Spalt's attorney notified the OMVH in writing he was scheduled to appear in magistrates court on August 11 at 9:30 a.m. on behalf of another client in a different county from the OMVH hearing. The letter was scanned and attached to an email delivered to the OMVH at 12:30 p.m. on August 7. The email also included a scanned copy of a "Summary Court Summons" signed by the magistrate judge setting the client's case for a "date certain" jury trial. On Monday August 10, the OMVH notified Spalt's attorney by email the hearing officer had refused to reschedule the hearing. Twice on August 10, Spalt's attorney emailed the OMVH and the hearing officer in an attempt to reschedule the hearing. The arresting officer also emailed the OMVH on August 10 indicating he consented to the request. There is no indication in the record that the OMVH hearing officer responded to any of the August 10 emails.

Spalt's attorney appeared in magistrates court on August 11 and did not attend the OMVH hearing. The hearing officer entered an "Order of Dismissal" on August 12, finding, "Neither [Spalt] nor her counsel appeared at the hearing and therefore waived the right to challenge the pending suspension." The hearing officer did not conduct a hearing on the merits of the suspension. Spalt appealed to the ALC, which reversed and remanded to the OMVH for a hearing on the merits.

The Department of Motor Vehicles appealed the ALC's order to the court of appeals, which dismissed the appeal on the basis the ALC's order is not immediately appealable. *Spalt v. S.C. Dep't of Motor Vehicles*, Op. No. 2016-UP-475 (S.C. Ct. App. Nov. 9, 2016). We granted the Department's petition for a writ of certiorari to review the court of appeals' decision. We affirm the dismissal of the appeal.

In *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), we held the Administrative Procedures Act permits an appeal only from "a *final* decision of the ALC." *See* 387 S.C. at 266, 692 S.E.2d at 894 (applying subsection 1-23-610(A)(1) of the South Carolina Code (Supp. 2017) to an appeal from a contested case tried at the ALC); *see also* S.C. Code Ann. § 1-23-380 (Supp. 2017) ("A party . . . who is aggrieved by a final decision in a contested case is entitled to judicial review . . . ."). In this case, the ALC remanded the case to the OMVH for a hearing on the merits. Therefore, the ALC's order was not a final decision. *See Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 894 ("If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is" not final); 387 S.C. at 267, 692 S.E.2d at 895 ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.").

Despite *Charlotte-Mecklenburg*, the Department makes several arguments in support of the immediate appealability of the ALC's interlocutory order. First, the Department argues the fact the ALC wrote the words "Final Order" in the caption of its order renders the order final for purposes of immediate appealability. The argument requires little response. Whether an order is final depends—as we explained in *Charlotte-Mecklenburg*—on the substance of the order: whether it "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." 387 S.C. at 267, 692 S.E.2d at 895. The label given to the order is not determinative of its immediate appealability.

Second, the Department argues the fact the OMVH dismissal of Spalt's challenge to her suspension would have been final had it been upheld renders the ALC's order final, despite the fact the ALC's order remands the case for a hearing on the merits. This is the same circumstance we faced in *Charlotte-Mecklenburg*. In that case, the agency approved one party's application for a certificate of need, but denied all other applications. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, ___ S.C. ___, ___, 813 S.E.2d 719, 720 (2018) (describing the procedural history of *Charlotte-Mecklenburg*[1]). Two of the losing applicants appealed to the ALC.

[1] As we explain in *Amisub*, it is the same case as *Charlotte-Mecklenburg*. *Amisub*, ___ S.C. at ___ n.2, 813 S.E.2d at 720 n.2.

Amisub, ___ S.C. at ___, 813 S.E.2d at 720. If the ALC had upheld the agency's decision, it would have been a final decision. However, finality is determined by the disposition at the ALC, not by the disposition in the agency order on appeal. In *Charlotte-Mecklenburg* and in this case, the ALC reversed the agency decision and remanded for further proceedings. In both cases, the ALC's remand order left "some further act which must be done by the court prior to a determination of the rights of the parties." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 894. Therefore, as in *Charlotte-Mecklenburg*, the ALC's order in this case is not a final decision. If there was any doubt remaining after *Charlotte-Mecklenburg*, we now clarify that when a party seeks review of an order of the ALC—pursuant to section 1-23-380 or section 1-23-610—the court of appeals will not entertain an appeal from an order that leaves "some further act which must be done."[2]

Third, the Department argues that denying an immediate appeal from the ALC's interlocutory order in this case "would encourage piecemeal litigation and limit the Department's appellate remedies," quoting and relying on this Court's post-*Charlotte-Mecklenburg* decision in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). *Morrow*, however, was an appeal from the circuit court, and therefore governed by section 14-3-330 of the South Carolina Code (2017). 412 S.C. at 537-38, 773 S.E.2d at 145-46. As we explained in *Charlotte-Mecklenburg*, "[section] 14-3-330 . . . is inapplicable in cases where a party seeks review of a decision of the ALC." 387 S.C. at 266, 692 S.E.2d at 894. Appeals from the ALC are governed by the Administrative Procedures Act. *Morrow*, therefore, is inapplicable.

Fourth, the Department argues the ALC's interlocutory order is immediately appealable because the order is wrong. In making this argument, the Department has taken several novel positions of law that we find we should address. The first position is that the OMVH has superior priority to magistrates court under Rule 601(a) of the South Carolina Appellate Court Rules. Rule 601(a) provides, "In the event an attorney of record is called to appear simultaneously in actions pending in two or more tribunals of this State, the following list shall establish the priority of

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[2] Section 1-23-380 contains an exception—not applicable in this case—that permits an immediate appeal "if review of the final agency decision would not provide an adequate remedy."

his obligations to those tribunals: . . . ." This provision is followed by thirteen subsections listing various courts and tribunals in the order of priority to be given to each. "Magistrates and Municipal Courts" are listed in subsection (12), and "Other Administrative Bodies or Officials" are listed in subsection (13). The Department argues, however, "the OMVH is part of the ALC," and thus should be included in subsection (9). *See* S.C. Code Ann. § 1-23-660(A) (Supp. 2017) ("There is created within the Administrative Law Court the Office of Motor Vehicle Hearings."). We disagree. Subsection (9) contains only "The Administrative Law Court." The OMVH is a separate tribunal and has last priority as an "Other Administrative Bod[y] or Official[]" in subsection (13).

The Department's second novel position is that Spalt's attorney was not entitled to Rule 601(a) priority to attend the magistrates court trial because he waited too late to notify the OMVH of his scheduling conflict. Rule 601(c) provides, "An attorney who cannot make a scheduled appearance because of the priority established by paragraph (a) of this rule shall notify the affected tribunals as soon as the conflict becomes apparent." The Department interprets this subsection to require an attorney to immediately notify both tribunals as soon as he receives notice there may be a conflict. In some instances—such as when the attorney receives notice of a conflict shortly before the hearings—immediate notification is required. However, as explained below, we do not read Rule 601(c) to require the attorney to "immediately" notify the tribunal of a scheduling conflict in all circumstances.

The Department's third novel position is that Spalt's attorney did not comply with the OMVH rules regarding requests for "continuance." Our first response to this position is that an attorney need not rely on the rules of the OMVH when he is entitled to relief under the South Carolina Appellate Court Rules. The Appellate Court Rules supersede any conflicting procedural rule of an agency. Our second response is that Spalt's attorney did not need a "continuance." When a tribunal with lower priority under Rule 601(a) is advised that an attorney summoned to appear before it has been called to appear simultaneously in a tribunal with higher priority, Rule 601(a) requires the tribunal with lower priority to yield. While Rule 601(c) and the general obligation of respect and candor an attorney owes any tribunal require the attorney to notify the tribunal of the conflict, Rule 601(a) itself "establish[es] the priority of his obligations," and therefore resolves the conflict. When Rule 601(a) sets the priority, the attorney may appear in the tribunal with higher priority—and is

excused from appearing in the tribunal with lower priority—without the permission of the lower priority tribunal.

This case illustrates the frustrations that can arise when attorneys unnecessarily delay notifying tribunals of Rule 601 conflicts, and when hearing officers and judges are not cooperative with the attorney. The magistrates court notified Spalt's attorney on July 15 of the jury trial that created his conflict for August 11. However, the attorney contends he did not realize there was a conflict until the day he wrote the OMVH—August 7. We recognize there are valid reasons an attorney would choose not to immediately notify a tribunal of a scheduling conflict, such as the expectation that one of the hearings or trials may be canceled or rescheduled for other reasons.[3] Any such delay, however, should be based on a valid reason. Here Spalt's attorney contends he simply did not realize he had a conflict, despite having received written notice of both obligations at least three weeks before. We understand the difficulties lawyers face in maintaining hectic schedules. However, not keeping an up-to-date calendar is not a good reason for failing to provide the OMVH notice of the scheduling conflict for over three weeks after receiving the notice.

On the other hand, the OMVH hearing officer does not have the authority to ignore Rule 601. When an attorney demonstrates to a tribunal with lower priority that he has been called to appear simultaneously in a tribunal with higher priority, Rule 601(a) requires the tribunal with lower priority to yield. By automatic operation of the Rule—without the permission of the lower priority tribunal—the attorney is

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[3] To illustrate the point that there are times an attorney might not be required to immediately provide notice of the conflict, we turn to the text of Rule 601(c). "An attorney who cannot make a scheduled appearance . . . shall notify the affected tribunals as soon as the conflict becomes apparent." Rule 601(c), SCACR. In many instances—despite the potential of a scheduling conflict—the attorney is not in a situation where he "cannot make a scheduled appearance" because the attorney is reasonably certain one of the proceedings will not take place as scheduled. In that event and in others like it, Rule 601(c) does not require the attorney to immediately notify the tribunal. Rule 601(c) requires the attorney to notify the lower priority tribunal as soon as it "becomes apparent" he cannot attend the proceeding in that tribunal. This language tolerates some delay during which the attorney attempts to work out the conflict or see if it will resolve on its own.

excused from appearing in the lower priority tribunal. This is true even if the judge or hearing officer reasonably believes the attorney has not adequately complied with Rule 601(c). As we will discuss, trial judges have a variety of options to deal with attorneys who do not comply with Rule 601(c), or who otherwise abuse the privileges Rule 601(a) provides, but dismissing the action in the lower priority tribunal simply because the attorney is attending a proceeding in a higher priority tribunal—as Rule 601(a) specifically permits—is not one of the options.

Rule 601 was promulgated in recognition of the reality that practicing law in different courts in different parts of the state puts a heavy burden on a lawyer who can be in only one place at a time. However, this case demonstrates that Rule 601 requires more from attorneys and judges than merely to resort to the technical provisions of the Rule. A tribunal's failure to accommodate the scheduling demands of an attorney can result in the unlawful denial of a litigant's right to be heard, as happened here. On the other hand, an attorney's failure to promptly provide notice of scheduling conflicts creates difficult challenges for courts in fulfilling their duty to maintain current dockets. Also, we are well-aware that a very small number of attorneys intentionally abuse the privileges given to them by Rule 601, not only to enable their own disorganization or lack of diligence, but in some instances even to gain strategic advantage for their clients.[4]

To minimize these problems, we recommend attorneys, trial judges, and hearing officers employ the following approach to accommodate the scheduling conflicts addressed by Rule 601. First, attorneys and courts should work together as far as practicable to avoid scheduling conflicts in the first place. Second, when potential scheduling conflicts do arise, attorneys should notify all affected tribunals reasonably promptly. In instances where the attorney recognizes a reasonable possibility the conflict may resolve itself, the attorney should consider communicating that fact to the tribunal. This information will alert the lower priority tribunal that a hearing may have to be rescheduled, but permit the hearing to go forward as scheduled if the conflict resolves. Third, attorneys and tribunals should show flexibility. In some instances, attorneys should consider asking the higher priority tribunal to be flexible. For example, our experience is that family courts hearing matters that will be short in duration (Rule 601(a)(4) or (a)(7)), general

[4] We find no evidence of any such abuse in this particular case.

sessions courts hearing guilty pleas (Rule 601(a)(5)), common pleas courts hearing motions (Rule 601(a)(8)), and others, are willing to move a scheduled hearing around in a day or a week to accommodate an attorney who is simultaneously called to appear in a lower priority tribunal such as the ALC (Rule 601(a)(9)) or magistrates court (Rule 601(a)(12)) when rescheduling the proceeding in the lower priority tribunal poses problems. These suggestions are not intended to be mandatory nor to be exclusive. We are confident attorneys and tribunals will devise additional ways to minimize scheduling problems and accomplish the purposes of Rule 601. In all instances, attorneys and tribunals should attempt to resolve conflicts without significant delays in any proceedings.

Finally, trial judges and hearing officers who suspect that attorneys are abusing the privileges granted by Rule 601 should confront the suspected abuse. In many instances, a judge who suspects abuse who contacts the attorney within the limits of ex parte communications will discover the suspicion arose from a misunderstanding. The mere knowledge that judges are alert to potential abuse will deter attorneys from engaging in it. In the rare case in which actual abuse is discovered, such a conversation is likely to keep it from happening again. If a judge "receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct," the judge "should take appropriate action" as set forth in Canon 3D(2) of the Code of Judicial Conduct. Rule 501, SCACR. In extreme cases—and only where appropriate under the law—a judicial branch court may use its contempt power after notice and an opportunity to be heard.

In conclusion, as we held in *Charlotte-Mecklenburg*, an order of the ALC remanding to the agency is not an immediately appealable order. Because the order of the ALC in this case remanded the case to the OMVH for further proceedings, the court of appeals was correct to dismiss the Department's appeal.

APPEAL DISMISSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amy Elizabeth Williams, as the Personal Representative of the Estate for deceased minor; and Amy Elizabeth Williams, individually, Plaintiffs,

v.

Quest Diagnostics, Inc., Athena Diagnostics, Inc., and ADI Holdings, Inc., Defendants.

Appellate Case No. 2017-000787

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Margaret B. Seymour, Senior United States District Judge

Opinion No. 27818
Heard February 14, 2018 – Filed June 27, 2018

CERTIFIED QUESTION ANSWERED

Bradford W. Cranshaw, Trevor M. Hughey, G. Robert DeLoach, III, Matthew M. McGuire, and James Ervin, all of Columbia, for Plaintiffs.

John C. Moylan, III, and Alice W. Parham Casey, both of Columbia, and Wallace K. Lightsey and Wade S. Kolb, III, both of Greenville, for Defendants.

JUSTICE KITTREDGE: This Court accepted the following certified question from the United States District Court for the District of South Carolina:

> Is a federally licensed genetic testing laboratory acting as a "licensed health care provider" as defined by S.C. Code Ann. § 38-79-410 when, at the request of a patient's treating physician, the laboratory performs genetic testing to detect an existing disease or disorder?

Answer: Yes.

I.

This wrongful death action arises from the death of a minor. The deceased was a young child experiencing seizures; the treating physician sent the child's DNA[1] to Defendants' genetic testing laboratory for the purpose of diagnosing the child's disease or disorder. It is alleged the genetic testing laboratory failed to properly determine the child's condition. The child died, and this action followed. Defendants assert that the genetic testing laboratory is a "licensed health care provider" pursuant to S.C. Code Ann. § 38-79-410 (2015). Defendants further contend that Plaintiffs' claims concern medical malpractice, thereby rendering the medical malpractice statute of repose applicable.[2] *See* S.C. Code Ann. § 15-3-545

[1] The common abbreviation for deoxyribonucleic acid.

[2] Plaintiffs expressed concern that the question before us may be premature and answering this certified question in the affirmative, as we do, may preclude other arguments in support of the case moving forward. We recognize this concern, but we believe it has been satisfactorily addressed by Defendants' concession at oral argument that Plaintiffs' other arguments remain viable, unaffected by answering the certified question in the affirmative. *See Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 177–78, 758 S.E.2d 501, 504 (2014) (internal citations omitted) ("[N]ot every injury sustained by a patient in a hospital [or by a licensed health care provider] results from medical malpractice" and "if the patient instead receives 'nonmedical, administrative, ministerial, or routine care,' . . . the action instead sounds in ordinary negligence. . . . Thus, medical providers are still subject to claims sounding in ordinary negligence."). Therefore, we are merely answering the narrow question certified by the federal court. We leave the determination of

(2005). A determination of the nature of Plaintiffs' claims (and the applicability of the medical malpractice statute of repose) is not before us, only the narrow question certified by the federal district court.

II.

As defined in section 38-79-410, "'[l]icensed health care providers' means physicians and surgeons; directors, officers, and trustees of hospitals; nurses; oral surgeons; dentists; pharmacists; chiropractors; optometrists; podiatrists; *hospitals*; nursing homes; *or any similar category of licensed health care providers*." (emphasis added). "Our primary function in interpreting a statute is to ascertain and give effect to the intention of the Legislature." *Swanigan v. Am. Nat. Red Cross*, 313 S.C. 416, 419, 438 S.E.2d 251, 252 (1993) (citing *Wright v. Colleton Cty. Sch. Dist.*, 301 S.C. 282, 391 S.E.2d 564 (1990)). "When the Legislature uses words of particular and specific meaning followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated." *Id.* (citing *State v. Patterson*, 261 S.C. 362, 200 S.E.2d 68 (1973)).

Under this canon of statutory construction, a genetic testing laboratory that performs testing at the request of a patient's treating physician for the purpose of assisting the treating physician in detecting an existing disease or disorder falls within the definition of "licensed health care providers." Under these circumstances, the genetic testing laboratory is performing diagnostic testing at the request of a treating physician for the purpose of diagnosis and treatment, which is a core function of hospitals in diagnosing and treating patients. *See, e.g.*, S.C. Code Ann. § 15-79-110(4) (Supp. 2017) ("'Hospital' means a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons . . . ."); *see also* S.C. Code Ann. § 38-71-1920(7), (11), (12) (2015) (providing the definition of a health care provider as "an institution providing health care services"—"for the diagnosis, prevention, treatment, cure, or relief of a health condition, illness, injury, or disease"—"including, but not limited to, hospitals *and . . . diagnostic, laboratory*, and imaging *centers*" (emphasis added)). Under the circumstances presented, the genetic testing laboratory fits within the category provided by one of the specified designations in section 38-79-410, a hospital. Thus, we conclude that a genetic testing laboratory in these

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whether the statute of repose applies to this case in the capable hands of the United States District Judge.

circumstances clearly falls within section 38-79-410's catchall of "any similar category of licensed health care providers."

III.

We answer the certified question in the affirmative—a genetic testing laboratory that performs genetic testing to detect an existing disease or disorder at the request of a patient's treating physician is acting as a "licensed health care provider" under S.C. Code Ann. § 38-79-410.

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., FEW and JAMES, JJ., concur. HEARN, J., dissenting in a separate opinion.

JUSTICE HEARN: Because I view the role played by Quest Diagnostics to be distinguishable from the health care providers enumerated in section 38-79-410, I respectfully dissent. The key commonality[3] among the health care providers listed in the statute is that all function to provide direct, face-to-face treatment to patients, who in their own right conscientiously select these providers and rely on their skill, expertise, and professional judgment. These are individuals and institutions who make conclusive decisions about a patient's course of treatment. Although hospitals may contain in-house diagnostic laboratories, I do not believe that fact standing alone is dispositive of whether Quest falls within a similar category of health care provider. It is the hospital at the institutional level, taken as the sum of its working parts, which is covered by the statute—not its individual components. While Quest may provide a medical service sometimes available at hospitals, the similarities end there. I do not believe the limited, specialized services offered by Quest are sufficient to render it similar to hospitals, which are holistic enterprises offering a multitude of medical services and treatment options. Therefore, I would answer the certified question, "No."

[3] Of course, the exception to this commonality are "directors, officers, and trustees of hospitals," but their role is sufficiently different from that of a third party diagnostic lab such that their inclusion does not render Quest a "similar category" of licensed health care provider. When one considers agency principles, it becomes clear why the General Assembly would include these individuals in the definition of a licensed health care provider in order to offer increased protections in light of the myriad litigation facing hospitals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Simmons Jr., Petitioner.

Appellate Case No. 2016-001934

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27819
Heard April 17, 2018 – Filed June 27, 2018

REVERSED AND REMANDED

Appellate Defender Susan B. Hackett, of Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

JUSTICE KITTREDGE: Petitioner James Simmons Jr. was convicted of criminal sexual conduct (CSC) involving two minors (Minor 1 and Minor 2, collectively the "minors"). The minors are Petitioner's twin sons. A key feature of the State's case was the challenged testimony of a pediatrician admitted pursuant to Rule 803(4), SCRE, which provides a hearsay exception for statements made in

connection with medical diagnosis or treatment. The court of appeals affirmed, first questioning whether Petitioner's challenge was preserved, and then concluding the pediatrician's testimony was properly admitted. We reverse the court of appeals and remand for a new trial. For the reasons we will explain, Petitioner preserved his objection to the pediatrician's purported Rule 803(4), SCRE, testimony, and the admission of the hearsay statements in this case was blatantly improper. This improper testimony was nothing more than hearsay shrouded in a doctor's white coat, in violation of the South Carolina Rules of Evidence.

Petitioner's twin sons accused him of sexually assaulting them while they were approximately eight years old. Petitioner was convicted by a jury of two counts of criminal sexual conduct (CSC) with a minor. This appeal centers on whether the admission of a pediatrician's testimony, conveying Minor 1's statements, was appropriate under the hearsay exception for statements made for and reasonably pertinent to medical diagnosis or treatment. These statements were made to the minors' regular treating pediatrician two years after the alleged abuse occurred. The statements alleged more than the claim of sexual abuse but also named Petitioner as the perpetrator, alleged that pornography had been viewed and that a secret pact had been made. We further find this error was not harmless beyond a reasonable doubt. Therefore, we reverse the court of appeals and remand to the trial court for a new trial.

I.

The minors were born in 2000. From the time that they were eight months old, the twin minors were cared for by relatives. The minors grew up on the family's land—a property with several houses on it located in Saint Helena Island, South Carolina. Throughout their childhood, the minors were treated by their regular pediatrician, Dr. James Simmons.[1] In 2008, while the minors were staying with their cousin Rose, Petitioner returned to the family property to live in the family house[2] located next door to Rose's home. The minors spent time at both houses and visited with Petitioner. Petitioner left the family house in the summer of 2009.

[1] Dr. James Simmons is not related to Petitioner.

[2] This residence was described during the trial as the house on the property where family members were welcome to stay when they fell on hard times.

Near the end of 2009, Rose requested additional assistance with the minors from their granduncle Johnnie and grandaunt Cynthia.[3]

Cynthia testified that she and Johnnie began watching the minors in 2009. During one of their visits, Cynthia testified that she suspected something was wrong, especially as to Minor 1. Cynthia, however, did not confront Minor 1, bring him to a doctor, or report her concern to law enforcement. Instead, Cynthia returned Minor 1 and his brother to Rose because she was uncertain of what was wrong and did not want to jump to conclusions or wrongly blame someone.

In May 2010, the minors moved to Johnnie and Cynthia's home, which is located in Early Branch, South Carolina. Johnnie and Cynthia eventually adopted the minors in the spring of 2011. Prior to adopting the minors, Cynthia was suspicious that the minors had been sexually abused. Cynthia took the minors to a counselor, who concluded nothing was wrong with them.

Following the adoption, Cynthia confronted the minors in September of 2011, and they allegedly disclosed that Petitioner had sexually abused them at Saint Helena Island approximately two years earlier. The next day, Cynthia made an appointment to take the minors to Dr. Simmons. Cynthia informed Dr. Simmons that the minors had disclosed they were sexually abused.

Dr. Simmons interviewed Minor 1 and, after Minor 1 made several statements regarding the sexual abuse, Dr. Simmons terminated the interview to contact law enforcement and report the disclosure.

II.

Petitioner was charged with two counts of CSC with a minor in the first degree. At trial, the State called several witnesses: Dr. James Simmons, Investigator Jeremiah Fraser, cousin and previous caretaker Rose Simmons, Minor 1, Minor 2, forensic interviewer Ashley Bratcher, adoptive mother Cynthia Simmons, adoptive father Johnnie Simmons, and Nurse Kristin Dalton.

The first witness that the State called was Dr. Simmons, who was qualified as an expert in pediatric medicine. It is a portion of his testimony that is at issue in this appeal. After qualifying him, the State questioned Dr. Simmons about his

[3] Johnnie and Cynthia had been taking care of the minors intermittently on weekends and at other times to help Rose.

examination of the minors:[4]

> **Q:** And Doctor, can you tell me what -- in talking to Minor 1 what he told you happened?
>
> **[Defense Counsel]:** Your Honor, I object. It's hearsay. It's objectionable under *803*. And certainly, he could limit it to the child's disclosure of date and time, and that's it.
>
> **[The State:]** Judge, we'd say that this is under the hearsay exception, *803*. Excuse me, let me pull it up. *803*.
>
> **The Court:** For medical diagnosis?[5]
>
> **[The State]:** For medical -- purpose of medical diagnosis, exactly.
>
> **The Court:** You can go ahead.
>
> **[The State:]** Thank you.
>
> **[Defense Counsel:]** I did -- well --
>
> **Q [by the State]**: Dr. Simmons, can you tell me what Minor 1 told you happened?
>
> . . . .
>
> **A:** Yeah. He said, basically -- basically, he said his -- his father, that

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[4] Dr. Simmons appears to refer to both minors by using the terms "they" or "them."

[5] Under Rule 803(4), SCRE, the following are not excluded by the hearsay rule:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

> he'd been watching porn, and that they [sic] had told him not to tell anybody because of their secret pact. And that I believe that his daddy had -- his father had touched his private area.
>
> **Q:** Touched his private area. Do you recall more specifically what Minor 1 said?
>
> **A:** I believe -- I believe he said his penis.
>
> . . . .
>
> **A:** . . . I asked him what happened, and he said that -- I talked with them separately, and that Dad made them, and I have in quotations, quote/unquote, *Dad made them suck his penis*; and that the episode ended when he was -- when the custody of Mr. Johnnie Simmons. And that, also, they had been watching porno, and he said not to tell them because of the secret pact with Dad.

Dr. Simmons further testified that he performed physical examinations on both minors and found no physical signs of trauma or abuse.

On cross-examination, Dr. Simmons admitted that he did not suspect abuse until Cynthia brought the minors to him with the sexual abuse allegation, even though he had treated them for most of their lives—from approximately eight months old until eleven years old, which was a year and a half before the trial. Furthermore, Dr. Simmons acknowledged that the minors had exhibited physical and behavioral issues prior to Petitioner re-entering their lives, while Petitioner resided next door to them, and after his departure.[6] Moreover, at least months prior to the disclosure, Dr. Simmons had made a referral to a psychiatrist or therapist—Dr. Payne—for the minors; however, the State did not call Dr. Payne to testify.

After the State finished presenting its case, Petitioner called several witnesses to the stand. A few of these witnesses had lived in the family house during a portion of the time that the minors alleged they were abused. For example, Petitioner's

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[6] For example, the minors had experienced constipation, an irritated penis, trouble sleeping, behavioral issues at school, and bed wetting. In addition, Dr. Simmons diagnosed the minors with attention deficit disorder (A.D.D.) as well as possible opposition defiance disorder, which "tends to go along with A.D.D. on many occasions."

sister, Paulette Crockett, lived in the family house with Petitioner, her husband, and her three kids for approximately one year and Petitioner's ex-girlfriend, Mahogany Washington, resided at the family house with Petitioner and her minor son for a period of time. These witnesses testified that they did not see Petitioner sexually abuse the minors. In addition, they did not believe anything inappropriate had occurred during the time they resided in the family house.

After deliberating for several hours, the jury informed the trial court that it was deadlocked. The trial court gave an *Allen*[7] charge and sent the jury back to continue deliberating. Ultimately, the jury returned guilty verdicts on both counts. Petitioner was sentenced to two concurrent life sentences.

On appeal, Petitioner argued his convictions and sentences should be reversed because Dr. Simmons' testimony was improperly admitted and the error was not harmless beyond a reasonable doubt. The court of appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. *State v. Simmons*, Op. No. 2016–UP–182 (S.C. Ct. App. filed Apr. 20, 2016). The court of appeals questioned whether Petitioner's objection to Dr. Simmons' testimony was preserved but held, "[e]ven on the merits," that the trial court did not err in admitting the testimony and cited cases regarding harmless error. This Court granted Petitioner's petition for a writ of certiorari regarding Dr. Simmons' testimony.

III.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494–95 (2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 349, 737 S.E.2d at 495 (quoting *Douglas*, 369 S.C. at 429–30, 632 S.E.2d at 848).

There are three main issues before this Court. First, is Petitioner's objection regarding Dr. Simmons' testimony preserved for appellate review? Second, was Dr. Simmons' testimony concerning Minor 1's statements improperly admitted? Third, if improperly admitted, was Dr. Simmons' testimony harmless beyond a reasonable doubt in light of the other testimony provided at trial? We address each

[7] *See Allen v. United States*, 164 U.S. 492, 501–02 (1896).

of these issues in turn.

A.

The State contends Petitioner's objection at trial was insufficient to preserve his argument that Dr. Simmons' testimony was hearsay because he failed to object again after the trial judge allowed the testimony under an exception to hearsay—statements made for purposes of medical diagnosis or treatment. Rule 803(4), SCRE. The State attempts to push issue preservation too far.

"There are four basic requirements to preserving issues at trial for appellate review." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.* All four requirements were met in this case.

Here, immediately after the question posed by the State—"can you tell me what . . . [Minor 1] told you happened?"—Petitioner objected on the specific basis of hearsay. Petitioner acknowledged that the response was allowed to reveal Minor 1's disclosure of the date and time of the alleged abuse as provided by Rule 801(d)(1)(D), SCRE; however, Petitioner emphasized that other information would be considered hearsay. The State countered that the testimony would be admissible under a hearsay exception in Rule 803, SCRE. The trial court suggested the hearsay exception for medical diagnosis to the State, which the State then asserted. Subsequently, the trial court—aware of the open-ended nature of the question and the strong likelihood that improper hearsay testimony would be produced—overruled Petitioner's objection on the ground that the response would fall within the hearsay exception for statements made for medical diagnosis or treatment. Thus, Petitioner's timely objection was sufficient to apprise the trial court of the issue being raised. *See, e.g.*, *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." (citations omitted)). A second objection was not necessary in this case. Petitioner was not required to be a jack-in-the-box to Dr. Simmons' response to this question to preserve his objection. *See State v. Burroughs*, 328 S.C. 489, 504 n.4, 492 S.E.2d 408, 415 n.4 (Ct. App. 1997) ("While the court's ruling was clearly in error, given that it allowed a much broader range of information to be given than

permitted under Rule 801(d)(1)(D), Burroughs was not required to re-urge his objection after the trial court ruled.").

The State's preservation argument is manifestly without merit. Petitioner's challenge to the evidence is preserved.

B.

Petitioner asserts that the trial court erred in admitting the challenged testimony because Minor 1's statements were not made to Dr. Simmons for the purpose of medical diagnosis or treatment. The State contends that Dr. Simmons' testimony was proper under the hearsay exception as statements made for the purpose of medical diagnosis or treatment because Dr. Simmons was the minors' regular pediatrician and had previously diagnosed them with A.D.D., so "[t]he statements in question were made by [Minor 1] to Dr. Simmons . . . for the purpose of obtaining treatment for physical and emotional trauma, as well as on-going behavioral symptoms." Under these facts, there is no arguable basis to uphold this hearsay testimony under Rule 803(4), SCRE.

The primary method of providing corroborating testimony regarding an alleged sexual assault is through the specific rule created for CSC cases—Rule 801(d)(1)(D), SCRE. *See id.*, Note ("Subsection (D), which is not contained in the federal rule, was added to make admissible in criminal sexual conduct cases evidence that the victim complained of the sexual assault, limited to the time and place of the assault."). This rule "limits corroborating testimony . . . to the time and place of the assault(s)" and considers it to be nonhearsay whereas "any other details or particulars, including the perpetrator's identity," are generally considered hearsay and must be excluded unless they fall within an exception. *Thompson v. State*, Op. No. 27785 (S.C. Sup. Ct. filed Mar. 21, 2018) (citation omitted).

Thus, should the proponent desire more information beyond the permissible "time and place" evidence, a rule or statute must allow for the admission of the additional evidence. Typically, as in this case, the additional evidence constitutes hearsay. Rule 801, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (citing Rule 802, SCRE).

After an objection is raised, the proponent of hearsay testimony has the burden of showing it fits appropriately within a hearsay exception. At issue here is whether Dr. Simmons' testimony, which relayed statements far beyond the time and place of the alleged sexual assaults, falls within the hearsay exception regarding "[s]tatements made for purposes of medical diagnosis or treatment." Rule 803(4), SCRE.

This hearsay exception requires that the statements be provided for the purpose of and be reasonably pertinent to medical diagnosis or treatment. Rule 803(4), SCRE. Rule 803(4), SCRE, may well apply in a CSC case, but there must be a nexus between the information provided by the patient and the diagnosis or treatment of the patient. For example, after recent trauma, these type of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment. In this regard, "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997). However, "[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985); *see also* Rule 803(4), SCRE, Note (stating a "physician's testimony should include only those statements related to him by the patient upon which the physician relied in reaching medical conclusions" (citing *State v. Camele*, 293 S.C. 302, 360 S.E.2d 307 (1987)).

The challenged testimony conveyed several statements by Minor 1 that went well beyond the Rule 803(4), SCRE, hearsay exception. It is manifest that certain statements made to Dr. Simmons were not made for the purposes of medical diagnosis or treatment.

Petitioner left the family house in the summer of 2009. In October 2009 or thereafter, Cynthia began to suspect that the minors may have been sexually abused. The minors were subsequently brought to a counselor who found nothing wrong. In September of 2011, after the minors disclosed the alleged abuse, they were brought to Dr. Simmons—which was more than two years after the alleged abuse occurred. During trial, the length of time that the minors had been treated by Dr. Simmons was highlighted—from the time they were eight months old, through the time of the alleged abuse, and up until a year and a half before the trial. Dr. Simmons admitted that he did not suspect abuse until Cynthia brought the minors

to him with the allegation. In addition, Dr. Simmons acknowledged that the minors had exhibited physical and behavioral concerns prior to Petitioner re-entering their lives.

In addition, Dr. Simmons' physical examinations of the minors resulted in no signs of physical or sexual abuse. Other items may have been available for proper discussion during Dr. Simmons' testimony; however, "any other details or particulars, including the perpetrator's identity"[8] should have been excluded because they did not fall within the exception raised as statements made for purposes of medical diagnosis or treatment. *Thompson v. State*, Op. No. 27785 (S.C. Sup. Ct. filed Mar. 21, 2018) (citation omitted). The same holds true for the testimony related to the viewing of pornography and making of the secret pact, which under these circumstances have no connection to diagnosis or treatment.

This Court will not sanction the State's use of Dr. Simmons as a conduit for this glaringly inadmissible hearsay to be brought before the jury. If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE, would be thwarted. As aptly noted by Petitioner's appellate counsel during oral argument, Dr. Simmons' recounting of Minor 1's statements amounted to nothing more than "hearsay shrouded in a doctor's white coat."

We now turn to whether the error was harmless.

C.

The State argues that Dr. Simmons' testimony is subject to a harmless error analysis, and we agree. However, having carefully reviewed the record, we cannot conclude this error was harmless beyond a reasonable doubt.

"Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (quoting *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010)). "A harmless error analysis is contextual and specific to the

[8] Concerning the statement regarding identity of the alleged abuser, South Carolina generally does not allow a doctor to disclose the identity of the perpetrator through this hearsay exception. *Brown*, 286 S.C. at 447, 334 S.E.2d at 817 ("The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim.").

circumstances of the case." *State v. Byers*, 392 S.C. 438, 447, 447–48, 710 S.E.2d 55, 60 (2011). "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 447–48, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). If a review of the entire record does not establish that the error was harmless beyond a reasonable doubt, then the conviction shall be reversed. *See State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (citing *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996)).

Given that other witnesses—Investigator Fraser and Nurse Dalton—testified and provided similar information as provided by Dr. Simmons, a harmless error argument may appear plausible. Yet we are not able to find the error harmless beyond a reasonable doubt, especially given the critical importance the State assigned to Dr. Simmons' testimony.

The State highlighted the testimony of Dr. Simmons, calling him as the first witness and emphasizing the importance of his testimony in determining credibility for a case that lacked any physical evidence. In particular, the State's closing argument included the following:

> And the Defense has talked about the boys being inconsistent. And that's something I want you to think about. I want you to think about, and I'm going to point out to you their consistent stories, their consistent accounts of what their father did to them. And the first one we heard on the stand was this account that Minor 1 gave to Dr. Simmons, when Cynthia and Johnnie brought them into his office after their disclosure to her, the first account we heard is that Minor 1 told Dr. Simmons that his dad had touched his penis, and his dad had made him suck his penis, and that they had a secret pact, and that his dad was making them watch porn, pornography. And I submit to you that that is consistent with the other statements that Minor 1 made to both the interviewer at Hope Haven and to you here in this courtroom.

When boiled down to its essence, "[t]here was no physical evidence presented in this case" and "[t]he only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts." *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94–95. It is simply a bridge too far to conclude that Dr. Simmons' improper testimony was harmless beyond a reasonable

doubt. *See State v. Gracely*, 399 S.C. 363, 377, 731 S.E.2d 880, 887 (2012) ("Based on the Record before this Court, it is impossible to conclude that the trial court's error did not contribute to the verdict beyond a reasonable doubt."); *see also Jennings*, 394 S.C. at 482, 716 S.E.2d at 96 (Kittredge, J., concurring) ("In my judgment, it may be a rare occurrence for the State to prove harmless error beyond a reasonable doubt in these circumstances. But these determinations are necessarily context dependent, and a categorical rule is at odds with longstanding harmless error jurisprudence." (citations omitted)).

IV.

In sum, the objection to Dr. Simmons' testimony was preserved for appellate review. The hearsay testimony ventured far beyond the parameters of Rule 803(4), SCRE, for much of the testimony was unrelated to medical diagnosis or treatment. And finally, the error was not harmless beyond a reasonable doubt. We reverse the court of appeals and remand the matter to the trial court for a new trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John B. Kern, Respondent.

Appellate Case No. 2017-002083

Opinion No. 27820
Heard April 19, 2018 – Filed June 27, 2018

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Joseph P. Turner, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John B. Kern, of Charleston, *pro se*.

PER CURIAM: In this attorney disciplinary matter, a hearing panel of the Commission on Lawyer Conduct (the Panel) issued a report recommending Respondent John B. Kern be definitely suspended from the practice of law for three years, that he be ordered to pay the costs of disciplinary proceedings, and that he be required to complete the Legal Ethics and Practice Program Ethics School (LEAPPS) as a condition of reinstatement to the practice of law. Neither the Office of Disciplinary Counsel (ODC) nor Kern took exception to the Panel's report. For the reasons stated below, we find the appropriate sanction is an eighteen-month definite suspension and the payment of costs of the disciplinary proceedings.[1]

FACTS AND PROCEDURAL HISTORY

[1] This Court placed Kern on Interim Suspension in an unrelated matter on May 24, 2018. *See In re John B. Kern*, S.C. Sup. Ct. Order dated May 24, 2018 (Shearouse Adv. Sh. No. 22 at 66).

The charges against Kern arise from Securities and Exchange Commission (SEC) proceedings initiated against Kern and others following an SEC investigation of a fraudulent investment scheme perpetrated by Craig Berkman. Berkman fraudulently raised around $13.2 million from approximately 120 investors by selling membership interests in limited liability companies (LLCs) that he controlled. Unfortunately for these investors, Berkman was subject to a $28 million judgment in Oregon—in connection with another fraudulent investment scheme—and was also facing bankruptcy in Florida. Berkman began to use some of the funds from his new ventures to pay his bankruptcy obligations in Florida. Kern helped form and served as general counsel for Ventures Trust II LLC (Ventures II) and Face-Off Acquisitions, LLC, two of the LLCs Berkman used to carry out his crimes. Berkman pled guilty to criminal conduct in a criminal action parallel to the SEC's administrative proceeding.

On February 4, 2014, Kern signed an offer of settlement in connection with SEC administrative proceedings pursuant to Rule 240(a) of the Rules of Practice of the SEC.[2] On March 7, 2014, Kern consented to the entry by the SEC of an order imposing sanctions against him pursuant to section 4C of the Securities and Exchange Act of 1934,[3] and Rule 102(e) of the Rules of Practice of the SEC.[4] The pertinent findings and conclusions in the order were: (1) Kern willfully aided and abetted the fraudulent conduct of Berkman in violation of federal securities law; (2) with Kern's consent, the SEC ordered Kern to disgorge his fees totaling $234,577 and imposed a fine of $100,000; (3) Kern is barred from associating with brokers, investment advisors, and others and from being employed in connection with investment companies or underwriters or others; and (4) Kern consented to being denied the privilege of practicing law before the SEC.

ODC filed formal charges against Kern on February 16, 2016. Kern was largely dilatory during the pre-hearing stage of these proceedings. The Panel allowed Kern until May 1, 2016, to answer the charges. He answered the formal

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[2] 17 C.F.R. § 201.240(a) (2018).

[3] 15 U.S.C. § 78d-3 (2012).

[4] 17 C.F.R. § 201.102(e) (2018).

charges on May 9, 2016, but failed to timely comply with the initial disclosure requirements imposed by Rule 25(a) (Discovery—Initial Disclosure), RLDE, Rule 413, SCACR. On September 23, 2016, the Panel ordered Kern to comply with Rule 25(a) within 10 days of the order. On December 9, 2016, the Panel issued a second order directing Kern to comply with Rule 25(a). Kern finally provided ODC with the Rule 25(a) materials in December 2016, after the Panel's second order to comply with Rule 25(a) and approximately six months after the materials were due.

A hearing was held before the Panel on July 6 and 7, 2017, and the Panel filed its Panel Report on October 4, 2017. The Panel concluded the SEC is "another jurisdiction" under Rule 29(e) (Conclusiveness of Adjudication in Other Jurisdictions), RLDE, Rule 413, SCACR. As a result, the Panel adopted the findings of fact and the findings of misconduct set forth in the above-referenced order issued by the SEC. ODC and Kern were served with a copy of the Panel Report and were advised to refer to Rule 27(a) (Briefs of Disciplinary Counsel and Respondent), RLDE, Rule 413, SCACR, for procedures concerning briefing and taking exception to the Panel Report. Neither ODC nor Kern filed briefs with this Court.

DISCUSSION

We "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission [on Lawyer Conduct]." Rule 27(e)(2), RLDE, Rule 413, SCACR. "This Court is not bound by [the Panel's] recommendation; rather, after a thorough review of the record, this Court may impose the sanction it deems appropriate." *In re McFarland*, 360 S.C. 101, 105, 600 S.E.2d 537, 539 (2004). Additionally, "[T]his Court may make its own findings of fact and conclusions of law." *In re Marshall*, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998).

As mentioned above, pursuant to Rule 29(e), RLDE, Rule 413, SCACR, the Panel adopted the findings of fact and findings of misconduct set forth in the SEC's order. Rule 29(e) provides in pertinent part, "[A] final adjudication in another jurisdiction that a lawyer has been guilty of misconduct . . . shall establish conclusively the misconduct . . . for purposes of a disciplinary . . . proceeding in this state." Rule 29(e), RLDE, Rule 413, SCACR. We have never addressed whether the SEC is "another jurisdiction" under Rule 29(e) for purposes of imposing reciprocal discipline. However, at least two of our sister states have addressed the

issue and concluded that the SEC is not a "jurisdiction" for purposes of reciprocal discipline. *See Florida Bar v. Tepps*, 601 So.2d 1174, 1175 (Fla. 1992); *see also Disciplinary Counsel v. Lapine*, 942 N.E.2d 328, 332 (Ohio 2010). At oral argument, ODC conceded it no longer believed the SEC to be "another jurisdiction" under Rule 29(e), but ODC argued the record contained evidence of Kern's culpable conduct warranting discipline.

We find the SEC is not a jurisdiction for purposes of reciprocal discipline. We also find that because Kern failed to take exception to the Panel Report, the Panel's findings that Kern committed misconduct are deemed admitted pursuant to Rule 27(a), RLDE, Rule 413, SCACR. Rule 27(a) provides in pertinent part, "The failure of a party to file a brief taking exceptions to the [Panel Report] constitutes acceptance of the findings of fact, conclusions of law, and recommendations." Rule 27(a), RLDE, Rule 413, SCACR. As noted above, Kern did not file a brief taking exceptions to the Panel Report. Kern's failure to adhere to Rule 27 is consistent with his conduct throughout these disciplinary proceedings.

Even absent Kern's admission of misconduct pursuant to Rule 27(a), the record contains ample evidence that Kern committed professional misconduct by providing false information in statements to others. First, Kern made misrepresentations to the attorney representing Berkman in Berkman's Florida bankruptcy proceedings. In May 2011, Kern was contacted by Berkman's bankruptcy attorney. Berkman's bankruptcy attorney voiced concerns to Kern about the origin of the funds Berkman was planning to use to settle his bankruptcy proceedings. Kern assured Berkman's bankruptcy attorney that none of the funds used to settle any of the fees resulting from Berkman's bankruptcy litigation were derived from investors in Ventures II. This information was false. By May 2011, approximately $525,000 had been transferred from a bank account held by Ventures II to pay claims owed by Berkman in his bankruptcy litigation.

Second, on August 1, 2012, Kern issued a memorandum to the investors in Ventures II. In this memorandum, Kern assured the investors that their funds were secure and that their investments were not part of a Ponzi scheme orchestrated by Berkman. This information was false. Of the approximate $13.2 million in investor funds, only $600,000 was invested in the ventures in which the investors intended to invest. Berkman personally transferred approximately $5.1 million from the Ventures II account to his personal account to pay his judgment creditors in the

Florida bankruptcy proceedings. Berkman also used approximately $1 million, drawn directly from the Ventures II accounts, in the form of large cash withdrawals, to pay legal fees and other personal expenses.

Kern's primary defense before the Panel and at oral argument was that he was totally unaware of Berkman's malfeasance and that as soon as he became aware, he resigned as general counsel for the investment entities and encouraged a principal in the companies to act as a whistleblower to the SEC. Kern's professed ignorance of Berkman's malfeasance does not save him. At the Panel hearing, Professor John Freeman was qualified as an expert in the field of securities regulation and testified as to a lawyer's duties and obligations when acting as general counsel for a private securities company. Professor Freeman explained that when a company makes representations to investors as to how their money is to be invested, general counsel is obligated to exercise due diligence to ensure the money is invested for the represented purposes. We conclude Kern acted recklessly in making the foregoing assurances to Berkman's bankruptcy attorney and to the Ventures II investors and that Kern failed to exercise the required diligence to ensure investors' money was invested for the purposes represented to them. *See In re Dobson*, 310 S.C. 422, 427, 427 S.E.2d 166, 168 (1993) ("This Court will not countenance the conscious avoidance of one's ethical duties as an attorney."); *In re Solomon*, 307 S.C. 1, 5, 413 S.E.2d 808, 810 (1992) ("This Court will not tolerate an attorney's deliberate avoidance of his ethical responsibilities.").

Because we find Kern has committed misconduct, we must determine the appropriate sanction to impose upon Kern. Kern has a history of misconduct in South Carolina. This Court suspended Kern for ninety days on February 1, 2012, for the commingling of trust account funds with personal funds and for failing to cooperate with ODC. *In re Kern*, 396 S.C. 496, 499-500, 722 S.E.2d 520, 521 (2012).

Also, Kern has made no effort to repay any of the funds he was ordered to repay by the SEC. Kern was ordered by the SEC to disgorge $234,577 in fees, plus prejudgment interest, and to pay a civil penalty of $100,000. Kern consented to this sanction, and while Kern represented at oral argument that he could not afford to pay these obligations, he has paid nothing since the SEC order was issued more than three years ago.

Kern did not cooperate in discovery as mandated by Rule 25, RLDE, Rule 413, SCACR. Rule 25 provides the parties are required to exchange certain information within twenty days of filing an answer to the Formal Charges. As noted above, Kern filed his answer on May 9, 2016; however, Kern did not provide discovery to ODC until December 2016, approximately seven months after filing his answer, and only after the Panel Chair issued two orders directing him to comply with the rule. Also, after the Panel hearing, the Commission thrice requested Kern to redact personal information from his exhibits pursuant to this Court's order dated April 15, 2014. *See Re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, S.C. Sup. Ct. Order dated Apr. 15, 2014 (Shearouse Adv. Sh. No. 15 at 34) (providing "parties shall not include, or will partially redact where inclusion is necessary, personal identifying information from documents filed with the appellate court"). After Kern did not respond to letters dated May 12, 2017, July 27, 2017, and August 31, 2017, a Commission staff member spent 3.25 hours redacting Kern's 46 exhibits.

Kern argued to this Court that he had no dishonest or selfish motive, did not profit from his misconduct, and showed remorse for the harm caused to the investors. *See In re Atwater*, 397 S.C. 518, 530, 725 S.E.2d 686, 693 (2012) (stating a respondent's lack of personal gain and dishonest motive is a relevant mitigation factor); *In re Glover*, 333 S.C. 423, 426, 510 S.E.2d 419, 421 (1998) (stating a respondent's remorse is a relevant mitigating factor to be considered in determining the appropriate sanction). We take these representations into account in determining the appropriate sanction to impose.

We find Kern has committed misconduct in violation of the following Rules of Professional Conduct, Rule 407, SCACR: 4.1 (truthfulness in statements to others); 8.4(d) (conduct involving dishonesty, fraud, deceit or misrepresentation); and 8.4(e) (conduct prejudicial to the administration of justice). We therefore conclude Kern is subject to discipline pursuant to Rule 7(a)(1) (violating the Rules of Professional Conduct), RLDE, Rule 413, SCACR.

CONCLUSION

We find the SEC is not "another jurisdiction" for the purposes of imposing reciprocal discipline pursuant Rule 29 (Reciprocal Discipline), RLDE, Rule 413, SCACR. We find Kern committed professional misconduct by recklessly providing

false information to the investors and to Berkman's bankruptcy attorney. We find the appropriate sanction for Kern's misconduct is an eighteen-month definite suspension, and we order Kern to pay the costs of the disciplinary proceedings within thirty days of the date of this opinion.[5] Within fifteen days of the date of this opinion, Kern shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

[5] The Panel also recommends that Kern be required to complete the Legal Ethics and Practice Program Ethics School as a condition of reinstatement. Since the completion of this program is required for reinstatement by Rule 33(f), RLDE, Rule 413, SCACR, it is unnecessary for any action to be taken on this recommendation.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Orangeburg County. Effective July 17, 2018, all filings in all common pleas cases commenced or pending in Orangeburg County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Chester
Clarendon	Colleton	Edgefield	Fairfield
Georgetown	Greenville	Greenwood	Hampton
Horry	Jasper	Kershaw	Laurens
Lee	Lexington	McCormick	Newberry
Oconee	Pickens	Richland	Saluda
Spartanburg	Sumter	Union	Williamsburg
York	Lancaster	Dorchester	

Orangeburg—Effective July 17, 2018

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
June 20, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Crenshaw, Appellant,

v.

Erskine College and David A. Norman, Respondents.

Appellate Case No. 2015-002090

Appeal From Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. Op. 5571
Heard February 14, 2018 – Filed June 27, 2018

REVERSED

E. Charles Grose, Jr., of Grose Law Firm; and Robert J. Tinsley, Sr. and Robert Jamison Tinsley, Jr., both of Tinsley & Tinsley, P.C., all of Greenwood, for Appellant.

Thomas H. Keim, Jr. and Leland Grant Close, III, both of Ford & Harrison, LLP, of Spartanburg, for Respondents.

LOCKEMY, C.J.: William Crenshaw appeals the trial court's order granting Erskine College's (Erskine) motion for judgment notwithstanding the verdict (JNOV). We reverse.

FACTS/PROCEDURAL BACKGROUND

Crenshaw was a tenured professor at Erskine. On September 24, 2010, a student in Crenshaw's English class who had fallen in an athletic team practice earlier that

morning became disoriented and lethargic. Crenshaw—a former paramedic—called Robyn Agnew, Erskine's Vice President for Student Services, to inform her of the situation and requested she call an ambulance. After the ambulance arrived, Crenshaw and members of Erskine's athletic training staff disagreed over whether the student should be transported to the hospital.

Following the incident, Crenshaw and Erskine's Head Athletic Trainer, Adam Weyer, engaged in an email exchange. Crenshaw suggested Erskine scrutinize the athletic department's protocol for handling emergency medical situations. Crenshaw asserted the athletic department's protocol of having student athletes report to athletic trainers before they see doctors endangers students. Crenshaw further alleged the trainers erred in delaying emergency medical transport for the injured student in his class. Weyer accused Crenshaw of "taking the matter into his own hands" and not following athletic department concussion protocol of contacting athletic training personnel before calling for an ambulance.

As a result of the ambulance incident and its aftermath, Weyer filed a grievance against Crenshaw. Weyer accused Crenshaw of violating athletic department protocol and making slanderous remarks both online and in class regarding the athletic training staff. Weyer's grievance was cosigned by Mark Peeler, Erskine's Athletic Director. Gid Alston, the Chair of Erskine's Department of Health and Human Performance, also filed a grievance against Crenshaw. Alston accused Crenshaw of potentially harming the image of the athletic training program by slandering Erskine's athletic trainers.

The grievances were forwarded to Erskine's faculty grievance committee to mediate the dispute. Following a meeting, the committee determined it could not formulate a mediation plan and sent the grievances to Erskine Dean Brad Christie. Weyer, Peeler, and Alston declined Christie's offer to mediate, and the matter was forwarded to Erskine President David Norman for adjudication.

In November 2010, Norman appointed a special faculty grievance committee to help adjudicate the matter. Norman requested the committee assess Crenshaw's behavior in handling the emergency situation and his professionalism and collegiality during and following the situation. Crenshaw gave a statement to the committee, denied the allegations against him, and agreed to answer any questions. Following two meetings, the committee determined it was unable to help resolve the situation and returned the matter to Norman. Thereafter, Norman began the process of terminating Crenshaw's employment based on (1) Crenshaw's conduct

during and after the ambulance incident[1]; (2) Crenshaw's "obstructionist actions" before the grievance committee[2]; and (3) Crenshaw's disparaging remarks about Erskine on his blog[3].

Pursuant to Erskine's Faculty Manual (the Manual), the procedure for terminating a tenured faculty member's employment for cause begins with "Preliminary Proceedings." Preliminary proceedings require the President to seek to resolve the matter with the faculty member in private and states if the matter is not resolved by mutual consent then the President will formulate a statement describing the grounds for dismissal.

The second step in the procedure is titled "Formal Proceedings." The formal proceedings step states:

> The President will inform the tenured faculty member in writing of the dismissal and the grounds for it. The President will also advise the tenured faculty member of the right to a hearing before a faculty committee and will indicate the time and place of the hearing. In fixing the time and place of the hearing, the President will allow sufficient time for the tenured faculty member to prepare a defense. The President will inform the tenured faculty member of the procedural standards set forth here.

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[1] Norman found Crenshaw attempted to assert control over a situation in which his authority was subordinate to the EMS personnel and Christie.

[2] Norman found Crenshaw exhibited "bullying behavior" and "contempt" for the committee. Norman noted Crenshaw's actions before the committee evidenced a pattern of refusing to respect the legitimate authority of the committee, and a volatility that created a hostile working environment.

[3] Norman found Crenshaw demonstrated his disloyalty to Erskine by posting the following statement on his blog:

> I think this site does accomplish three things. First . . . This is a means to an end. The end are [sic] the other two accomplishments: second, people are encouraged to quit donating to Erskine and to quit sending their kids until all this is straightened up.

> The tenured faculty member will reply in writing to the President stating whether a hearing is desired, and the reply shall be not less than two weeks before the date set for the hearing.

Crenshaw acknowledged these procedures were part of the Manual, which constitutes the contract at issue.

Crenshaw proceeded to teach during the spring 2011 semester. In August 2011, Norman initiated the for cause termination process in the Manual. Norman wrote a letter to Crenshaw on August 5, 2011, introducing the preliminary proceedings. Norman then met with Crenshaw on August 6, 2011, in an attempt to resolve the matter. Norman began the meeting by reading the August 5 letter to Crenshaw, which stated Norman's hope they could resolve the issues by mutual consent, but if they could not, then Norman would provide a statement describing the grounds for Crenshaw's dismissal. Norman offered Crenshaw conditions, consisting of three sets of apologies, which if met would allow him to remain employed. Crenshaw and Norman also discussed severance pay in exchange for Crenshaw's early retirement. Crenshaw and Norman agreed Crenshaw would discuss the early retirement option with his wife and make a decision by 5:00 p.m. on August 8, 2011. The meeting ended with Norman outlining Crenshaw's three options: (1) agree to apologize; (2) go to step two, i.e., formal proceedings for termination at which Norman would outline the grounds for termination; or (3) accept the early retirement offer.

Just before the agreed-upon deadline to decide between the three options, Crenshaw informed Norman that he and his attorney were willing to discuss the issue of his early retirement. Norman was unsure whether this response was a yes or no but treated it as acceptance of the offer. He responded he would draft an agreement for the early retirement and a proposed announcement for Crenshaw's approval to prompt a commitment from Crenshaw if he was in fact serious about retiring.

The next day, Norman sent Crenshaw a draft agreement for an early retirement payment and a proposed announcement of Crenshaw's retirement. Crenshaw responded that announcing his retirement was premature because he was still considering the severance agreement, which provided up to twenty-one days to consider. Norman responded that Crenshaw could indeed take the entire twenty-one day period to consider the early retirement agreement. However, because

Norman had already informed Crenshaw in the August 6 meeting Crenshaw would not be teaching that semester, he provided Crenshaw with an alternative announcement to Erskine's faculty and staff that Crenshaw would not be teaching in the fall and that he and Norman were discussing his future with Erskine. Crenshaw responded that he disagreed with his removal from the classroom for the semester. Crenshaw's response also confirmed he had not yet made a decision on the options he agreed to in the August 6, 2011 meeting.

Because Crenshaw failed to choose one of the agreed-upon options by the fourth day after the deadline, Norman moved to formal proceedings and sent Crenshaw a statement of the grounds for his dismissal on August 12, 2011. Norman's letter informed Crenshaw of his right to a hearing, stating:

> You have a right under College policy to a full hearing before a faculty committee. Unless you waive your right to a hearing, it shall be held on August 29th at 9 [a.m.] in the Chestnut Room. This schedule is subject to adjustment upon reasonable request. As also stated in the handbook, you will reply to this letter in writing, stating whether this hearing is desired. This reply shall not be less than two weeks before the date set for the hearing.

Crenshaw did not request a hearing. Norman never appointed a faculty committee for the termination hearing but waited for Crenshaw at the appointed time and place for the scheduled hearing. Crenshaw did not appear.

While the formal proceedings were ongoing, the timeline for the offer of early retirement was also running. The original twenty-one day consideration period expired on August 30, 2011, without an acceptance or rejection of the offer by Crenshaw. Norman extended Crenshaw's time to respond to the early retirement offer by six days with a new deadline of September 5, 2011, and communicated this to Crenshaw's attorney. Crenshaw did not respond to the early retirement offer by September 5, 2011. After the extended deadline to accept the early retirement offer expired, and because Crenshaw had not made a timely demand for the hearing, Norman terminated Crenshaw's employment on September 7, 2011.

On June 6, 2012, Crenshaw filed a complaint against Erskine and Norman alleging (1) wrongful discharge, (2) breach of contract, and (3) intentional infliction of emotional distress. Erskine and Norman subsequently filed an answer denying Crenshaw's allegations.

On March 28, 2014, Erskine and Norman filed a motion for summary judgment on all of Crenshaw's claims. The trial court denied the motion. Prior to trial, Erskine and Norman filed a second motion for summary judgment on Crenshaw's wrongful discharge claim. During arguments on the motion, Crenshaw conceded his wrongful discharge claim was the same as the breach of contract claim and the two claims were merged.

A jury trial was held June 8 through 11, 2015. At the close of Crenshaw's case, Erskine and Norman moved for directed verdicts on all of Crenshaw's claims. The trial court granted the directed verdict motions on all claims as to Norman but denied the motions as to Erskine. At the close of Erskine's case, Erskine renewed its directed verdict motions, and the court granted Erskine a directed verdict as to the intentional infliction of emotional distress claim. Thereafter, the breach of contract claim was submitted to the jury. The jury, by special verdict form, found (1) Crenshaw did not breach his obligation under the contract and (2) Erskine did breach its obligation under the contract. The jury awarded Crenshaw $600,000 in damages.

Following the verdict, Erskine filed a motion for JNOV and in the alternative for a new trial. Following a hearing, the trial court granted Erskine a new trial. Erskine subsequently filed a Rule 59(e), SCRCP, motion seeking clarification as to whether the court had denied the JNOV motion in order to preserve the issue for appeal. Crenshaw also filed a Rule 59(e) motion seeking to have the jury's verdict reinstated.

On August 24, 2015, the trial court issued an order (1) vacating its prior order granting a new trial and (2) granting Erskine's JNOV motion. The court found Crenshaw failed to comply with the terms of the contract and request a hearing; therefore, he could not recover on a breach of contract claim in which he failed to fulfill the obligations of the contract and consequently breached the contract. The court denied Crenshaw's Rule 59(e), SCRCP, motion. Crenshaw appeals.

STANDARD OF REVIEW

When reviewing the trial court's ruling on a directed verdict or JNOV motion, this court must apply the same standard as the trial court "by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields

more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding such motions, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). This court will reverse the trial court's ruling only if no evidence supports the ruling below. *RFT Mgmt. Co. v. Tinsley & Adams LLP*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012).

LAW/ANALYSIS

I. Verdict Form

Crenshaw argues the trial court erred in granting Erskine's JNOV motion. Crenshaw asserts a jury verdict based on a special verdict form precludes a grant of JNOV. We find this issue unpreserved.

Although Crenshaw maintains he asked the trial court to give deference to the jury's verdict, he did not specifically assert the use of a special verdict form precluded the grant of JNOV. Accordingly, this argument is not preserved for our review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *id.* ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.").

Even assuming this issue was preserved, we note our court rules and case law do not provide that the use of a special verdict form precludes the grant of JNOV. *See* Rule 50(b), SCRCP ("Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . .");

Smith v. Ridgeway Chemicals, Inc., 302 S.C. 303, 305, 395 S.E.2d 742, 743 (Ct. App. 1990) ("[A JNOV] motion is available to one suffering an adverse ruling of

the jury only when the same issues were submitted to the judge at the directed verdict stage.").

II. Implied Covenant of Good Faith and Fair Dealing

Crenshaw argues Erskine breached the implied covenant of good faith and fair dealing by (1) suspending Crenshaw; (2) failing to identify any grounds for terminating Crenshaw during the August 6th meeting; (3) failing to comply with the preliminary proceedings provision in the Manual; (4) terminating the preliminary proceedings prior to the expiration of the 21-day consideration period for the offer of early retirement; (5) failing to comply with the formal proceedings; (6) failing to give Crenshaw a meaningful opportunity for a fair hearing; and (7) failing to give Crenshaw sufficient time to prepare a defense. We agree.

"There exists in every contract an implied covenant of good faith and fair dealing." *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

The Manual provides "[t]he President will . . . advise the tenured faculty member of the right to a hearing before a faculty committee and will indicate the time and place of the hearing . . . . The tenured faculty member will reply in writing to the President stating whether a hearing is desired . . . ." This requirement was also specified in the statement of grounds for dismissal and its cover email sent by Norman to Crenshaw. The letter outlining the grounds for dismissal stated:

> You have a right under College policy to a full hearing before a faculty committee. Unless you waive your right to a hearing, it shall be held on August 29th at 9 a.m. in the Chestnut Room. This schedule is subject to adjustment upon reasonable request. As also stated in the handbook, you will reply to this letter in writing, stating whether this hearing is desired. This reply shall not be less than two weeks before the date set for the hearing.

The jury, by special verdict form, was asked (1) whether Crenshaw breached his obligation under the contract and (2) whether Erskine breached its obligation under the contract. The jury found Crenshaw did not breach his obligation and Erskine did breach its obligation. Thereafter, the trial court granted Erskine's JNOV motion, finding Crenshaw failed to comply with the terms of the contract and request a hearing; therefore, he could not recover on a breach of contract claim

where he failed to fulfill the obligations of the contract and consequently breached the contract.

We find the trial court erred in granting Erskine's JNOV motion. By submitting the special verdict form to the jury, without objection, the parties agreed it was a question of fact as to whether the contract was breached. The jury, as fact finders, could have found the language in the Manual and letter were confusing as to whether Crenshaw was required to specifically request or waive a hearing that had already been set. The jury could have also determined Crenshaw did not breach his obligations to Erskine because the offer for early retirement was still pending when Crenshaw received Norman's letter and remained pending until the day after the scheduled hearing. Finally, even assuming the contract required a reply from Crenshaw, the jury could have determined Crenshaw's breach was immaterial. Accordingly, we reverse the grant of JNOV.[4] *See Strange*, 314 S.C. at 429-30, 445 S.E.2d at 440 (holding the trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt); *Gastineau*, 331 S.C. at 568, 503 S.E.2d at 713 ("A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.").

CONCLUSION

The trial court's order granting Erskine's motion for JNOV is

REVERSED.

WILLIAMS and KONDUROS, JJ., concur.

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[4] Erskine argues Crenshaw's argument regarding a breach of the implied duty of good faith and fair dealing is not preserved because he failed to raise it in either (1) his response to Erskine's motion, (2) his arguments at the hearing on Erskine's motion, or (3) his motion to alter or amend the order granting Erskine a new trial. Crenshaw asserts he argued throughout the trial and during the post-trial proceedings that Erskine violated its duty of good faith to Crenshaw. We find Crenshaw's argument is preserved. While he did not explicitly cite case law regarding the implied covenant of good faith and fair dealing, Crenshaw did assert at trial Erskine violated the duty of good faith by jumping between the stages of termination: "[I]t shows a lack of good faith, the fact that they are jumbling these stages and give him two days to respond or three, I guess, less than three days, weekend days."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Steven Otts, Appellant.

Appellate Case No. 2014-000274

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

Opinion No. 5572
Heard April 20, 2016 – Filed June 27, 2018

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

MCDONALD, J.: Steven Otts appeals his conviction for the murder of Hydrick Burno, arguing the circuit court erred in (1) denying his motion for a directed verdict; (2) failing to tailor a self-defense instruction to the evidence presented; (3) instructing the jury on the law of defense of others with no accompanying

explanation of the necessary elements or the burden of proof; and (4) declining to provide the jury with specific and clarifying language regarding involuntary manslaughter. We reverse and remand for a new trial.

Facts and Procedural History

On January 27, 2011, Steven Otts, Saca Jawea Coleman, Lakeisha Stallworth, and Antonio Valentine were out for the evening in the town of Ridge Springs in Saluda County. The group took Valentine's Ford Explorer to Orchard Park Apartments (Orchard Park), where Otts lived with Hydrick Burno's (Victim's) aunt and uncle. Valentine drove, Stallworth sat in the front passenger seat, and Coleman and Otts sat in the back.

When the group arrived at Orchard Park, Otts and Coleman (Otts's girlfriend), were arguing because Otts wanted Coleman to go home with him, but she wanted to continue partying with Stallworth and Valentine. Stallworth testified Otts was "kind of aggressive" with Coleman and was "pulling" on Coleman to get her out of the Explorer. According to Stallworth, Otts pulled Coleman's coat over her head, leaving her in only a bra because she was not wearing a shirt under her coat.[1]

Coleman testified that when the group arrived at Orchard Park, Otts wanted her to get out of the Explorer, but she was not ready to go because she had not "finished partying yet." She admitted the two argued but denied that Otts assaulted her in any way. Otts denied hitting Coleman but admitted the two argued. When Otts grabbed Coleman's arm to escort her from the vehicle, she refused to exit.

As Otts and Coleman continued to argue, several Orchard Park residents heard the commotion. Angela Creech, who walked outside to her apartment balcony to see what was happening, testified she could see Otts and Coleman "arguing and tussling inside the vehicle." Creech said she could hear "licks" inside the Explorer; Otts was pulling on Coleman in an effort to get her out of the vehicle, and the two

[1] Coleman contradicted Stallworth's testimony by explaining that she was wearing a shirt, not a jacket, and that Otts did not pull off her clothing.

were "tussling and fighting." Victim, the couple's mutual friend,[2] then intervened in an attempt to break up the scuffle.

Stallworth did not remember Victim striking Otts and explained he "wasn't that type of guy." However, Creech testified Victim put his hand around Otts once and held him in a "bear hug." Creech further testified Otts said to Victim, "Motherf****r, when you let me go, I'm going to knock your punk ass out." Coleman testified Victim "kept grabbing" Otts. She heard Otts tell Victim that if he did not let him go, he was going to hit Victim. However, Coleman did not see Otts strike Victim.

Otts testified that Victim grabbed him in a "bear hug" and carried him away from the Explorer. Otts admitted telling Victim he was going to hit him if he did not let him go but denied threatening to "knock [his] punk ass out." When Otts escaped Victim's bear hug and attempted to walk back to the vehicle, Victim grabbed Otts again, ripping his coat. Otts then turned and struck Victim once on the left side of his head. Otts explained that he was "basically trying to get out of the situation" and "never meant to hurt [Victim]." When Otts threw the punch, Victim was knocked unconscious and fell to the ground, striking the back of his head on the pavement. Creech stated Victim had a seizure after falling to the ground. Stallworth testified she put her hands under Victim's head to try to stop him from seizing. Otts instructed Victim to "get up" and "stop playing." When Creech announced she was going to call the police, Otts, Coleman, Stallworth, and Valentine left Orchard Park.[3]

Victim was awake and sitting on a curb when law enforcement and emergency medical services (EMS) arrived. He smelled of alcohol, was swaying, and was "a little confused." Initially, emergency medical technicians (EMTs) were unsure if the swaying and confusion were the result of Victim's head injury or intoxication.[4] However, during the transport to Lexington Regional Medical Center (LRMC),

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[2]Victim's mother and Coleman's uncle are married.

[3] Coleman, Stallworth, and Valentine returned to the scene later that night.

[4] When Victim was admitted to the hospital, his blood alcohol level was 0.274. At the time of autopsy, his blood alcohol level was 0.15.

Victim's behavior changed—he became combative and uncooperative. He also showed more persistent signs of confusion, leading the EMTs to believe Victim had suffered a more serious head injury than they first recognized.

By the time Victim arrived at LRMC—about fifty minutes after EMS arrived at Orchard Park—he was unresponsive. Victim died shortly after his admission to the hospital.

According to the pathologist, Victim died from brain herniation due to cerebral edema, which was caused by blunt-force trauma to the left side of his head. The pathologist testified Victim's death was the result of the blow to the left side of his head and not the injury he suffered when he fell and hit the ground.[5] The pathologist further testified Victim suffered only two blows to the head—one on the left side of his head from the punch and the other on the back of his head from hitting the ground.

Otts remained in hiding until January 31, 2011, when he turned himself in to police. On May 4, 2011, he was indicted for murder. After a four-day trial, the jury considered the murder charge, along with the lesser-included offenses of voluntary and involuntary manslaughter. The jury convicted Otts of murder.

Standard of Review

"A jury charge which is substantially correct and covers the law does not require reversal." *State v. Adkins*, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003). "To warrant reversal, a trial judge's charge must be both erroneous and prejudicial." *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). "It is error to give instructions which may confuse or mislead the jury." *State v. Rothell*, 301 S.C. 168, 169–70, 391 S.E.2d 228, 229 (1990).

Law and Analysis

I. The "Defense of Others" Instruction

[5] Otts stipulated to Victim's cause of death.

Otts argues the circuit court erred in instructing the jury with the "defense of others" language requested by the State because, when used appropriately, this jury instruction presents a possible *defense* to a criminal charge; it is not an instruction for the State to use *offensively*, nor was it an accurate instruction under the facts of this case. Otts further contends the instruction was incomplete and confusing to the jury in that it failed to set forth either the necessary elements of the "defense" or any framework for its application to the facts here. We agree.

During its opening statement, the State told the jury it would present evidence establishing that "Hydrick Burno went and tried to intercede on his cousin's behalf." The State further informed the jury it would hear about "the law of defense of others; about how, if there's a family member or a friend of yours[,] and they're being attacked, that you can stand in their shoes[,] and you can try to help them[,] and you can try to save them[,] and intercede." The State concluded its opening by stating, "Burno was trying to help his cousin, Saca Jawea Coleman, and was murdered for his troubles."

On this point, the only evidence presented during the State's case-in-chief was one affirmative response from Stallworth:

> Q: Was [Victim] trying to help [Coleman] as she was being assaulted by Mr. Otts?
>
> A: Yes, sir.

During Otts's case-in-chief, Officer Russell Padgett of the Saluda County Sheriff's Office testified that Stallworth informed him "Burno came out to assist [Coleman] and try to calm [Otts] down." On cross-examination, Officer Padgett characterized Victim's actions as "coming in defense of another person, a family member." Coleman, who also testified for the defense, admitted on cross-examination that although Victim was not her "cousin by blood," he was someone she was "very close to." Coleman admitted that Victim came out to try to help her during her argument with Otts. Likewise, when the State asked Otts if Victim "came out to help [Coleman]," Otts responded, "I'm assuming." The State followed up by asking Otts if Victim was acting in defense of Coleman. Otts answered, "[Victim] came out to calm us down."

In its closing argument, the State asserted "Burno was the only person man enough there to responsibly come out and defend [Coleman]." Thereafter, the State discussed the "defense of others" doctrine, which the State characterized as a person's "right to defend a friend or family member." The State explained that "a person coming to the defense of a friend or family member stands in their shoes and can exercise any rights that they have." The State further argued that "[t]he law in this case is if one comes to the assistance of his friend or relative and takes part in a difficulty in which a friend or relative is engaged, he enters the combat on the same footing as the person to whose assistance he comes and under the same legal status."

During the charge conference, the State requested a "defense of others" charge and noted its plan to use it in a reverse, offensive posture. Specifically, the State asked the court to instruct the jury that "[i]f one comes to the assistance of a friend or relative and takes part in a difficulty in which a friend or relative is engaged, he enters the combat on the same footing as the person whose [sic] assistance he comes and under the same legal status." Otts objected, arguing that "defense of other[s] is a defense to a [criminal] charge," and noted that the State's effort to use the charge in an offensive posture would confuse the jury. Initially, the circuit court admitted the charge would be confusing to the jury because it was not being used as a defense, but offensively, by the State.

The State asserted the charge was necessary for two reasons: (1) informing the jury that Victim acted in defense of Coleman and "stood in her shoes" would negate the element of sufficient legal provocation required for voluntary manslaughter; and (2) the charge would "counter any self-defense issues." According to the State, this was a "Good Samaritan" case with an "unusual fact circumstance." The State argued that if Victim had killed Otts, Victim would "be entitled to complete and total immunity under the new stand-your-ground statute." The State further stated the defense of others component—that Victim stood in Coleman's shoes—was "vitally important when [Otts is] trying to raise self-defense."

Ultimately, the circuit court gave the following instruction:

> Now under South Carolina law, if one comes to the assistance of a friend or relative and takes part in a

> difficulty in which a friend or relative is engaged, he enters the combat on the same footing as the person whose [sic] assistance he come [sic] and under the same legal status.

We are unable to find any South Carolina case law supporting the circuit court's charging the jury on the offensive "defense of others," at the request of the State, to address a victim's behavior. Indeed, our only case law addressing the defense of others is found in cases in which the instruction was presented as a possible defense to a charged offense. *See e.g.*, *State v. Starnes*, 340 S.C. 312, 323, 531 S.E.2d 907, 913 (2000) (holding the appellant was not entitled to a charge on defense of others because he specifically maintained that he shot the victims because he thought they were going to shoot him, not to protect a third party); *Bozeman v. State*, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (finding evidence in the record supported a self-defense charge rather than a defense of others charge); *State v. Alford,* 264 S.C. 26, 35, 212 S.E.2d 252, 255 (1975) (holding that where defendant did not testify he was shooting for a purpose other than to protect himself, he was not entitled to charge on defense of others), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)); *State v. Norris*, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) ("The right of the father to defend his daughter is coextensive with the right of the daughter to defend herself.").

"The law to be charged is determined from the evidence presented at trial." *State v. Gourdine,* 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." *Starnes*, 340 S.C. at 323, 531 S.E.2d at 913 (quoting *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998)). "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *Id.* at 322–23, 531 S.E.2d at 913.

In *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998), our supreme court explained that a person is justified in using deadly force in self-defense if:

(1) The person was without fault in bringing on the difficulty;

(2) The person actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;

(3) A reasonable, prudent person would have entertained the same belief;

(4) The circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm; and

(5) The person had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Some of the State's own arguments alert us to the confusion created by the defense of others charge given here. For example, the State argued "there is no way a jury could decide this case without knowing what Mr. Burno's legal status was" and "the jury could not determine this case without knowing" this principle of law. But the State's instruction as submitted and then charged to the jury failed to address the legal status of either Victim or the person Victim was alleged to be defending—Coleman. The instruction provided no framework for the application of the self-defense elements necessary for proper evaluation of this "vitally important" legal principle, nor any guidance to the jury with respect to the applicable burden of proof.

Even if we were to accept that a defense of others instruction could be proper in an offensive posture—which, particularly under the facts of this case, we do not—the State would still be required to prove not only that Victim acted in defense of Coleman, thus satisfying the required elements of a self-defense claim, but also that Coleman's own actions satisfied them. And, necessarily, the State would bear

the burden of proving such beyond a reasonable doubt.[6] Here, the jury had no guidance as to the application of this "offensive defense" because the charge failed to set forth either the necessary elements or the applicable burden of proof. Essentially, the jury was left with no standard by which to evaluate the actions and status of the defender or the person being defended.

Specifically, the instruction failed to extrapolate the elements of "self-defense" and instruct the jury to examine such factors as whether the defender and the defended were without fault in bringing on the difficulty, whether both actually believed Coleman was in imminent danger of death or great bodily injury, whether such belief was reasonable, and whether the defender and the defended had no other probable means of avoiding the danger than to act as they did in this particular instance. *See Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493 (explaining the elements of self-defense); *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide."); *State v. Harvey*, 110 S.C. 274, 277, 96 S.E. 399, 400 (1918) ("While a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill."). Thus, we find the offensive defense of others instruction requested here was incomplete, risked improper burden shifting, and was confusing for the jury. *See State v. Day*, 341 S.C. 410, 418, 535 S.E.2d 435 (2000) (reversing murder conviction on multiple grounds, including the trial court's erroneous "after-the-fact" self-defense instruction; trial court's failure to charge on specific elements applicable to the defendant's theory constituted reversible error); *Rothell*, 301 S.C. at 169–70, 391 S.E.2d at 229 ("It is error to give instructions which may confuse or mislead the jury."). Therefore, we find the circuit court erred in instructing the jury on the defense of others.

II. Harmless Error

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[6] Curiously, the State has repeatedly argued that neither State nor the defendant bore the burden of proof, asserting "I don't think anyone has the burden of proof on that issue. It's just a correct principle of law."

Having found the defense of others instruction erroneous, we must next consider whether the giving of the incomplete instruction was, nevertheless, harmless beyond a reasonable doubt. *See Belcher*, 385 S.C. at 611, 685 S.E.2d at 809 ("Errors, including erroneous jury instructions, are subject to harmless error analysis.").

"An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr,* 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* (quoting *Kerr,* 330 S.C. at 144–45, 498 S.E.2d at 218). "Thus, whether or not the error was harmless is a fact-intensive inquiry." *Id.*; *see also State v. Jefferies,* 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.").

At trial, the State maintained the defense of others instruction, along with its component that Victim stood in Coleman's shoes, was "vitally important when they're trying to raise self-defense." Additionally, the State has repeatedly argued that the jury could not decide this case without the defense of others instruction. The State asserted "there's no way the jury could understand the elements of voluntary manslaughter if they couldn't understand what the Victim could legally do and not do." By its own argument, the State has established that the defense of others charge was critical to its case; thus, this court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict." *See Middleton*, 407 S.C. at 317, 755 S.E.2d at 435 (explaining that appellate courts must "determine beyond a reasonable doubt" that the error did not contribute to the jury's verdict).[7]

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[7] Because our reversal on the defense of others instruction is dispositive, we decline to consider Otts's additional assignments of error. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)

Conclusion

Based on the foregoing analysis, we reverse and remand for a new trial.

REVERSED AND REMANDED.

LOCKEMY, C.J., concurs.

WILLIAMS, J., concurs in result only.

(stating an appellate court need not address remaining issues when resolution of a prior issue is dispositive).