The Supreme Court of South Carolina

ORDER

In all appellate proceedings in which the Office of Appellate Defense provides legal counsel or is associated for costs, the following shall apply:

(1) Appeals.

(a) The thirty (30) day period for serving and filing appellant's initial brief and designation of matter under Rule 208(a)(1), SCACR, shall be increased to sixty (60) days.

(b) The thirty (30) day period of serving and filing respondent's initial brief and designation of matter under Rule 208(a)(2), SCACR, shall be increased to forty-five (45) days.

(2) Post-Conviction Relief Cases.

(a) The ten (10) day period to order the transcript as provided by Rule 227(b) and 207(a), SCACR, shall be increased to thirty (30) days.

(b) The thirty (30) day period for serving and filing the petition for certiorari and appendix under Rule 227(c), SCACR, shall be increased to sixty (60) days.

(c) The thirty (30) day period for serving and filing the return under Rule 227(f), SCACR, shall be increased to forty-five (45) days.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

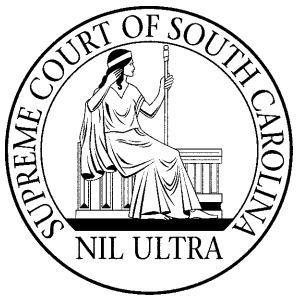
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

July 15, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 21, 2003

ADVANCE SHEET NO. 27

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3645-Hancock v. Wal-Mart	Pending
3646-O'Neal v. Intermedical	Pending
3647-The State v. Andre Tufts	Pending
3648-Walsh v. Woods	Pending
3649-The State v. Chisolm	Pending
3650-Cole et al. v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-The State v. Uuno Mattias Baum	Pending
3654-John Miles v. Rachel Miles	Pending
3655-Kibby Daves v. Jim R. Cleary	Pending
3656-The State v. Carlos Gill	Pending
3660-Venture Engineering v. Tishman	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-317-State v. Jimmy Jones	Pending
2003-UP-324-McIntire v. Columbia	Pending
2003-UP-328-The State v.Tuck	Pending
2003-UP-335-State v. Rogers	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-The State v. Holman	Pending
2003-UP-358–McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending

2003-UP-366-King v. Poston	Pending
2003-UP-368-State v. Walker	Pending
2003-UP-376-Heavener v. Walker	Pending
2003-UP-381-Dickey v. Holloway	Pending
2003-UP-394-Windham v. McLeod	Pending
2003-UP-396-Coaxum v. William Washington	Pending
2003-UP-397-BB&T v. Chewning	Pending
2003-UP-404-Thurmond Guess v. Benedict College	Pending
2003-UP-409-The State v. Legette	Pending
2003-UP-412-McCormick v. McCormick	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Carol Bates v. William Fender	Pending
2003-UP-433-State v. Eugene Kearns	Pending
2003-UP-437-Shirley Jones v. Denmark Police Dept.	Pending
2003-UP-439-Belton v. Jordan	Pending
2003-UP-444-The State v. Donald Roberts	Pending
2003-UP-447-Samantha Crooks v. Richard Crooks	Pending
2003-UP-451-The State v. Shantone D. Curry	Pending
2003-UP-453-Elizabeth Way v. Three Rivers Apartments	Pending
2003-UP-459-The State v. Anthony Nellis, Jr.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3518-Chambers v. Pingree	Pending
3533-Food Lion v. United Food	Pending
3551-Stokes v. Metropolitan	Pending
3558-Binkley v. Burry	Pending
3563-The State v. Missouri	Pending
3565-Ronald Clark v. SCDPS	Pending
3580-FOC Lawshe v. International Paper	Pending
3585-The State v. Murray Roger Adkins, III	Pending
3588-In the Interest of Jeremiah W.	Pending
3592-Gattis v. Murrells	Pending
3597-Anderson v. Augusta Chronicle	Pending
3598-Belton v. Cincinnati	Pending
3599-The State v. Grubbs	Pending
3600-State v. Lewis	Pending
3604-State v. White	Pending
3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending
3608-The State v. Oscar Roy Padgett	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending

3623-Vergie Fields v. Regional Medical Center	Pending
3626-Nelson v. QHG of S.C. Inc.	Pending
3631-The State v. Michael Dunbar	Pending
3639-Redwend Ltd. v. William Edwards et al.	Pending
2002-UP-220-The State v. Hallums	Pending
2002-UP-329-Ligon v. Norris	Pending
2002-UP-368-Roy Moran v. Werber Co.	Pending
2002-UP-489-Fickling v. Taylor	Pending
2002-UP-514-McCleer v. City of Greer	Pending
2002-UP-537-Walters v. Austen	Pending
2002 -UP-538-The State v. Richard Ezell	Pending
2002-UP-598-Sloan v. Greenville	Pending
2002-UP-615-The State v. Floyd	Pending
2002-UP-656-SCDOT v. DDD (2)	Pending
2002-UP-662-State v. Morgan	Pending
2002-UP-715-Brown v. Zamias	Pending
2002-UP-734-SCDOT v. Jordan	Pending
2002-UP-742-The State v. Johnson	Pending
2002-UP-749-The State v. Keenon	Pending
2002-UP-753-Hubbard v. Pearson	Pending
2002-UP-760-State v. Hill	Pending

2002-UP-769-Babb v. Estate of Charles Watson	Pending
2002-UP-785-The State v. Lucas	Pending
2002-UP-787-Fisher v. Fisher	Pending
2002-UP-788-City of Columbia v. Jeremy Neil Floyd	Pending
2002-UP-794-Jones v. Rentz	Pending
2002-UP-795-Brown v. Calhoun	Pending
2002-UP-800-Crowley v. NationsCredit	Pending
2003-UP-014-The State v. Lucas	Pending
2003-UP-019-The State v. Wigfall	Pending
2003-UP-023-The State v. Killian	Pending
2003-UP-029-SCDOR v. Springs	Pending
2003-UP-032-Pharr v. Pharr	Pending
2003-UP-033-Kenner v. USAA	Pending
2003-UP-036-The State v. Traylor	Pending
2003-UP-062-Lucas v. Rawl	Pending
2003-UP-087-The State v. Major	Pending
2003-UP-088-The State v. Murphy	Pending
2003-UP-098-The State v. Dean	Pending
2003-UP-101-Nardone v. Davis	Pending
2003-UP-111-The State v. Long	Pending
2003-UP-113-Piedmont Cedar v. Southern Original	Pending
2003-UP-116-Rouse v. Town of Bishopville	Pending

2003-UP-125-Carolina Travel v. Milliken	Pending
2003-UP-126-Brown v. Spartanburg County	Pending
2003-UP-127-City of Florence v. Tanner	Pending
2003-UP-143-The State v. Patterson	Pending
2003-UP-144-The State v. Morris	Pending
2003-UP-148-The State v. Billy Ray Smith	Pending
2003-UP-150-Wilkinson v. Wilkinson	Pending
2003-UP-161-White v. J. M Brown Amusement	Pending
2003-UP-163-Manal Project v. Good	Pending
2003-UP-165-The State v. Sparkman	Pending
2003-UP-171-H2O Leasing v. H2O Parasail	Pending
2003-UP-175-BB&T v. Koutsogiannis	Pending
2003-UP-179-State v. Brown	Pending
2003-UP-180-State v. Sims	Pending
2003-UP-184-Tucker v. Kenyon	Pending
2003-UP-188-State v. Johnson	Pending
2003-UP-190-Henfield v. Taylor	Pending
2003-UP-228-Pearman v. Sutton Builders	Pending
2003-UP-244-The State v. Tyronne Edward Fowler	Pending
2003-UP-245-Bonte v. Greenbrier Restoration	Pending
2003-UP-271-Bombardier Capital v. Green	Pending

2003-UP-274-The State v. Robert Brown Pending

0000-00-000-Dreher v. Dreher Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clyde Easter, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Lexington County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 25677
Submitted June 25, 2003 - Filed July 21, 2003

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General B. Allen Bullard, all of Columbia, for Petitioner.

Assistant Appellate Defender Aileen P. Clare, of the South Carolina Office of Appellate Defense of Columbia, for Respondent.

JUSTICE BURNETT: We granted certiorari to review the lower court's decision granting Clyde Easter ("Easter") post-conviction relief ("PCR"). We reverse.

FACTS

Easter was indicted for armed robbery, kidnapping, and assault and battery with intent to kill. The State served notice of its intent to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-15-45(A) (Supp. 2001), based on Easter's two previous convictions in New York.

Prior to trial, Easter challenged the application of § 17-15-45 asserting the statute violated his constitutional rights and, alternatively, was inapplicable because his prior convictions could not support the sentence enhancement. The trial court denied Easter's motions.

Easter pled guilty to all charges. While Easter did not dispute his guilt he did object to the life without parole sentence imposed. His appeal was dismissed. State v. Easter, Op. No. 99-UP-013 (S.C. Ct. App. filed January 13, 1999).

Easter filed a PCR application alleging various instances of ineffective assistance of trial and appellate counsel. The PCR court granted relief on trial counsel's ineffectiveness in advising Easter to enter a conditional guilty plea.

ISSUE

Did the PCR court err in finding trial counsel provided ineffective assistance in advising Easter to plead guilty?

DISCUSSION

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application by showing counsel's performance was deficient, and the deficient performance prejudiced the applicant's case.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The PCR court found trial counsel deficient because he advised Easter to plead guilty while preserving for appeal his objection to the imposition of the sentence of life without parole. The PCR court found by objecting to the sentence Easter involuntarily entered an invalid conditional plea. We disagree.

To be valid, a guilty plea must be unconditional. State v. Peppers, 346 S.C. 502, 552 S.E.2d 288 (2001); see, e.g., State v. O'Leary, 302 S.C. 17, 18, 393 S.E.2d 186, 187 (1990); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982). Sentencing, although often combined with the admission of guilt in a hearing, is a separate issue from guilt and a distinct phase of the criminal process. See Gilbert v. State, 538 S.E.2d 104 (Ga. Ct. App. 2000). Therefore, when Easter entered his guilty plea but objected to his sentence he did not enter an invalid, conditional guilty plea. Trial counsel did not provide ineffective assistance of counsel.

We **REVERSE**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Jackson, Jr., Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Gary E. Clary, Trial Judge
Wyatt T. Saunders, Jr., Post-Conviction Judge

Opinion No. 25678
Submitted May 29, 2003 - Filed July 21, 2003

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Donald Zelenka, and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for petitioner.

J. Falkner Wilkes, of Meglic & Wilkes, LLC, of Greenville, for respondent.

JUSTICE BURNETT: Respondent David Jackson, Jr., (Jackson) was convicted of murder and sentenced to life imprisonment. Concluding trial counsel rendered ineffective assistance of counsel by failing to request a self-defense charge, the post-conviction relief (PCR) judge granted Jackson's PCR application. We reverse.

ISSUE

Did the PCR judge err by concluding trial counsel rendered ineffective assistance of counsel by failing to request a self-defense charge?

ANALYSIS

To establish a claim of ineffective assistance of counsel, the PCR applicant must establish that trial counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of trial. Id. 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. The PCR judge's findings will be upheld by this Court when they are supported by any competent evidence in the record. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, the Court will not uphold the findings of the PCR court if no probative evidence supports those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

A.

The State contends the PCR judge erred by concluding trial counsel was ineffective because he did not request a charge on self-defense. It claims Jackson was not entitled to a self-defense charge because 1) Jackson was at fault in bringing on the difficulty and a reasonably prudent person would not have believed he was in danger of losing his life and 2) Jackson and the victim were engaged in mutual combat. We disagree.

A defendant is entitled to a self-defense charge if there is evidence establishing: (1) he was without fault in bringing on the difficulty; (2) he believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) he had no means of avoiding the danger; and (4) that a reasonably prudent person of ordinary firmness and courage would have entertained the same belief about the danger. State v. Bruno, 322 S.C. 534, 473 S.E.2d 450 (1996).

Mutual combat exists when there is "mutual intent and willingness to fight." State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." Id. Mutual combat bars a claim of self-defense because it negates the element of "not being at fault." Id.

At trial, Jackson's father (Father) testified Jackson drove Thomasina Smith (Smith) to the home the two men shared. Jackson and Smith went into Jackson's bedroom with their four month old baby. Father testified he heard Jackson and Smith "scrapping back there, fighting or whatever." Jackson ran out of the bedroom. While carrying a gun, Smith chased Jackson, shouting profanities. Jackson and Smith ran outside. Between one and two hours later, Jackson returned inside. Father did not know where Smith had gone.

Jackson testified, on the night of the shooting, he told Smith he intended to change jobs and wanted his family to see the baby more often. Smith "got hot-tempered about it." Smith strangled and beat Jackson; Jackson was able to get away. He ran outside and attempted to get into the garage, but found it locked. He stated when he headed back down the garage steps, Smith fired a shot at him. He and Smith ran into each other, fell down the garage steps, wrestled, and he managed to get the gun from her. Jackson stated he "guess I fell back and was - - was firing." He testified the "gun just went off." He explained the semiautomatic 25-caliber weapon, owned by Smith, had an "easy" or "hairy" [sic] trigger. Jackson agreed the line of fire would have been slightly upward.

Jackson testified Smith was still alive and he was able to get her into the car. He intended to take her to the hospital. Jackson stated he panicked when he realized Smith was no longer moving. On cross-examination, Jackson admitted dumping Smith's body in a ditch on the side of the road approximately one-quarter of a mile from his home.

Jackson testified, in general, Smith was "more quick-tempered than anything and she would jump on me basically." When she "jumped on" Jackson, he believed she was "aiming to hurt [him]" and he would run. Jackson testified Smith was heavier and stronger than himself.

Jackson was entitled to a self-defense charge. Contrary to the State's claim, Jackson presented evidence he was not at fault in bringing on the difficulty. According to Jackson's testimony, Smith physically attacked him after he told her he intended to change jobs and wanted his family to have the opportunity to see the baby more often. Furthermore, a reasonably prudent person would have believed he was in danger of losing his life or sustaining seriously bodily injury when being chased by an individual who had just attempted to strangle and beat him and had shot at him with a gun.

Moreover, Jackson and Smith were not engaged in mutual combat. According to Jackson, he and Smith did not have a mutual willingness to fight but, rather, Smith was angry with Jackson's decision to change jobs and his request that his family have a greater opportunity to see the baby and she physically attacked him. State v. Taylor, Op. No.25637 (S.C. Sup. Ct. filed April 28, 2003) (Shearouse Adv. Sh. No. 16 at 62) (mutual combat is triggered when both parties contribute to the resulting fight). Jackson and Smith were not engaged in mutual combat.

The evidence supports the PCR judge's conclusion trial counsel provided deficient representation by failing to request a charge on self-defense. Cherry v. State, supra.

B.

The State contends Jackson was not prejudiced by trial counsel's failure to request a self-defense charge. We agree.

In Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), the Court found that, while trial counsel provided deficient representation by failing to request an alibi charge, the PCR applicant was not prejudiced because, in light of the overwhelming evidence, there was not a reasonable probability that, had the charge been given, the outcome of trial would have been different. Similarly, in Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991), the Court suggested that prejudice does not automatically result from the conclusion that trial counsel provided deficient performance by failing to request a particular charge. See also Stone v. State, 294 S.C. 286, 288, 363 S.E.2d 903, 904 (1988) ("because the State's case rested primarily on the testimony of the victim and police officers, [PCR applicant] was prejudiced by counsel's failure to request [self-defense] instruction.").

Our confidence in the outcome of Jackson's trial is not undermined by his failure to receive a self-defense charge. Jackson's testimony was unsupported by the physical evidence and highly incredible.

First, Smith had been shot six times, once in the back. At least four of the gunshot wounds were made from a downward angle, contrary to Jackson's statement he fired the gun in an upward angle. Furthermore, contrary to Jackson's testimony, forensic tests revealed Smith had no gunshot residue on her hands, indicating she had not fired a gun before her death.

Second, while the twenty-five caliber handgun was not recovered, ammunition and a magazine for a twenty-five caliber handgun were recovered from Jackson's bedroom. Jackson testified he did not know what happened to the weapon he used to shoot Smith.

Third, Jackson gave inconsistent statements and testified he did not remember noteworthy events. For instance, Jackson initially told the police he and Smith had a verbal argument and she walked away. He also testified he did not recall Smith's mother and sister coming to his home and inquiring as to Smith's whereabouts shortly after the shooting. He stated he

did not remember the encounter even though Smith's sister physically knocked him to the ground.

Accordingly, while Jackson would have been entitled to a self-defense charge, we conclude the instruction would not have affected the outcome of trial due to the overwhelming evidence of Jackson's guilt.[1] Since the PCR judge's order is not supported by competent evidence, we reverse. Holland v. State, supra.

REVERSED.

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

[1] The jury rejected the involuntary manslaughter charge.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Emory Alvin Michau, Jr., Appellant.

Appeal From Charleston County
Paula H. Thomas, Circuit Court Judge

AFFIRMED

Opinion No. 25679
Heard May 28, 2003 - Filed July 21, 2003

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Ralph E. Hoisington, of North Charleston, for respondent.

JUSTICE BURNETT: Appellant Emory Alvin Michau, Jr., was convicted of contributing to the delinquency of a minor and participating in prostitution of a minor. He was sentenced to three years, consecutive, on each charge. We affirm.

ISSUES

I. Did the trial judge err by failing to quash the contributing to the delinquency of a minor indictment on the grounds the underlying statute was void for vagueness?

II. Did the trial judge err by admitting propensity evidence?

DISCUSSION

I.

Appellant contends the trial judge erred by denying his motion to quash the indictment for contributing to the delinquency of a minor on the basis the indictment was void for vagueness. In particular, he claims the phrase "endanger the morals or health" is unconstitutionally overbroad and vague. We disagree.

Appellant was indicted for violating South Carolina Code Ann. § 16-17-490(10) (2003) which provides, in relevant part:

> It shall be unlawful for any person over eighteen years of age to knowingly and willfully (sic) encourage, aid or cause or to do any act which shall cause or influence a minor:
> . . . .
>
> (10) To so deport himself or herself as to willfully (sic) injure or endanger his or her morals or health or the morals or health of others.

(Underline added).

An indictment is sufficient if it "charges the crime substantially in the language of the common law or of the statute prohibiting the crime. . . ." S.C. Code Ann. § 17-19-20 (2003). An indictment is adequate if the offense is stated with sufficient certainty and particularity to enable the court

to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

The phrase "endanger the morals or health" in the indictment against appellant derives directly from the language of the underlying statute appellant was accused of violating. The indictment was sufficient. S.C. Code Ann. § 17-19-20 (2003).

Appellant's chief complaint is that § 16-17-490(10) is unconstitutionally overbroad and vague. We disagree.

Statutes are to be construed in favor of constitutionality; the Court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made. State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." Curtis v. State, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001), cert. denied 535 U.S. 926 (2002), quoting City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993). The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. Toussaint v. State Bd. of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991). One to whose conduct the law clearly applies does not have standing to challenge it for vagueness. Id.

At trial, the victim testified appellant offered him marijuana and beer in exchange for sex. The victim stated he told appellant he was seventeen years old. Appellant's act of encouraging a minor to drink beer and smoke marijuana, conduct which is illegal, clearly endangers the morals, if not the health, of the minor. Accordingly, appellant lacks standing to challenge the constitutionality of § 16-17-490(10). Toussaint v. State Bd. of Med. Exam'rs, supra.

In any event, the phrase "endangering the morals or health" is not unconstitutionally vague. A person of ordinary intelligence and judgment need not guess at conduct which would "endanger the morals or health" of a minor.

Appellant relies on State v. Flinn, 208 S.E.2d 538 (W.Va. 1974), in which the West Virginia Supreme Court held the statutory language "[d]eports himself so as to willfully injure or endanger the morals or health of himself or others" was unconstitutionally vague because the language was facially subjective. The court concluded that portion of the statute violated the Due Process Clause of the United States Constitution. U.S. Const. amend. XIV.

At least two other courts have upheld challenges to "health and morals" language in their states' contributing to the delinquency of a minor statutes. Brockmueller v. State, 340 P.2d 992 (Ariz.), cert. denied 361 U.S. 913 (1959) (statute which prohibits encouraging acts which have effect of injuring morals or health of a child has long history of common law interpretation which renders sufficiently clear and meaningful language which might otherwise be vague and uncertain); James v. State, 635 S.W.2d 653 (Tex. Ct. App. 1982) (statute providing "any act which tends to debase or injure the morals, health or welfare of [a] child. . . ." is not unconstitutionally vague). Moreover, numerous other jurisdictions have denied vagueness challenges to contributing to the delinquency of a minor statutes even though the statutes do not define with specificity the conduct which is prohibited. State v. Barone, 124 So.2d 490 (Fla. 1960); McDonald v. Commonwealth, 331 S.W.2d 716 (Ky. 1960); State v. Simants, 155 N.W.2d 788 (Neb. 1968); State v. McKinley, 202 P.2d 964 (N.M. 1949); State v. Sparrow, 173 S.E.2d 897 (N.C. 1970); State v. Coterel, 123 N.E.2d 438 (Ohio Ct. App. 1953), appeal dismissed 120 N.E.2d 590 (Ohio 1954); Birdsell v. State, 330 S.W.2d 1 (Tenn. 1959); State v. Tritt, 463 P.2d 806 (Utah 1970); State v. Friedlander, 250 P. 453 (Wash. 1926), error dismissed 275 U.S. 573 (1927).

Section 16-17-490(10) is constitutional.

II.

Appellant argues the trial judge erred by denying his motion to redact a portion of his written statement on the basis the objectionable portion was inadmissible propensity evidence. We disagree.

Prior to trial, appellant requested the trial judge redact nine sentences from his written statement to the police on the basis that the noted portion constituted inadmissible propensity evidence under Rule 404(b), SCRE. The trial judge agreed to redact the last six sentences from the statement, but declined to redact three other sentences.

Over appellant's objection, the State entered appellant's redacted statement during the testimony of a police detective. The three sentences at issue are as follows:

> I don't understand why I was attracted to him. I think I was attracted to him because he looked like he was fifteen. When I found out he was older it seemed perfect.

The trial judge properly overruled appellant's objection to the admission of the three sentences. The three sentences do not constitute propensity evidence under Rule 404(b), SCRE. The sentences at issue do not refer to any "crimes, wrongs, or acts" which are generally inadmissible under Rule 404(b). Rule 404 (b) (evidence of defendant's other crimes, wrongs, or acts to prove defendant's guilt for crime charged inadmissible); see Anderson v. State, Op. No. 25656 (S.C. Sup. Ct. filed May 27, 2003) (Shearouse Adv. Sh. No. 30 at 13) (threatening statement is not a bad act); State v. Beck, 342 S.C. 19, 536 S.E.2d 679 (2000) (statement of intent to commit a crime is not a bad act). Accordingly, the trial judge properly overruled appellant's Rule 404(b) objection to the three sentences.

Appellant's convictions and sentences are **AFFIRMED.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary Johnson,	Petitioner,
v.	
Mohammad B. Arbabi and Akram Arbabi,	Defendants and Third Party Plaintiffs,
of Whom Mohammad B. Arbabi is,	Respondent,
v.	
Beaufort County Treasurer's Office and Joy Logan, Treasurer,	Third Party Defendants.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Thomas Kemmerlin, Circuit Court Judge

Opinion No. 25680
Heard June 11, 2003 - Filed July 21, 2003

REVERSED

Robert L. Widener, of McNair Law Firm, P.A., of Columbia, for Petitioner.

Michael S. Seekings, of Mullen, Wylie & Seekings, LLC, of Charleston, for Respondent.

Assistant County Attorney Jeffrey D. Wile, of Greenville, Stephen P. Hughes and Mary Bass Lohr, both of Howell, Gibson & Hughes, P.A., of Beaufort, for Amicus Curiae Beaufort County Treasurer's Office and the Greenville County Tax Collector's Office.

JUSTICE WALLER: In this action to quiet title on a tax deed, we granted the petition for a writ of certiorari to review the Court of Appeals' opinion in Johnson v. Arbabi, 347 S.C. 132, 553 S.E.2d 453 (Ct. App. 2001). We reverse.

FACTS

In January 1981, respondent Mohammad B. Arbabi ("Dr. Arbabi") and his wife, Akram Arbabi ("Mrs. Arbabi"), entered into a "Land Contract and Agreement for Deed" with the Island Club Investment Company ("ICIC") to purchase a condominium on Hilton Head Island. The Arbabis live in Michigan and were buying the property as an investment. The sale price was $90,000, and ICIC financed the transaction. Title to the property was to remain in ICIC's name until the Arbabis paid their debt. The parties agreed not to record the contract in Beaufort County's public records; therefore, ICIC remained the owner of record.

In 1989 or 1990, the Arbabis decided to pay off the balance on the condominium. On April 22, 1991, Dr. Arbabi's Michigan attorney wrote the Beaufort County Assessor's office to request copies of the property tax bills for 1988, 1989, and 1990. The attorney additionally asked the Assessor's office to send all future tax bills directly to Dr. Arbabi at 3739 White Trillium Drive East in Saginaw, Michigan ("White Trillium address").

On September 3, 1991, the Arbabis recorded their deed in the names of "Mohammad B. Arbabi and Akram Arbabi" with the White Trillium address listed for the Arbabis. ICIC, however, had not paid the property taxes for 1990, and the County had seized the property on July 2, 1991. During September 1991, the County Treasurer advertised the tax sale with ICIC as the owner of record.[1] The tax sale took place in October 1991, and petitioner Gary Johnson bought the condominium for $7,000.

In a letter dated September 1, 1992, which was addressed **jointly** to "Mohammad B. & Akram Arabi" [sic], the County Treasurer informed the Arbabis that the property had been sold at a tax sale and could be redeemed by paying $2,329.40 by October 7, 1992. This redemption notice was sent to the White Trillium address.

Mrs. Arbabi apparently signed for and received this notice. However, Dr. and Mrs. Arbabi were experiencing marital problems, and **in April 1991**, Dr. Arbabi had moved out of the White Trillium home. Their divorce proceedings occurred between August and November 1992, and at some point during these proceedings (but **after** the redemption period had expired), Mrs. Arbabi disclosed the redemption notice to Dr. Arbabi.

In November 1992, the County Treasurer issued Petitioner a tax deed. The deed stated that the tax collector had, via "certified mail, return receipt requested, deliver to addressee only," mailed "a Notice addressed to Mohammad B. and Akrem Arabi," [sic] as the owner of record, informing them of the right to redeem.

In January 1993, petitioner commenced the instant action to quiet title. Dr. Arbabi filed an answer and brought a third-party complaint against the

[1] It appears that although the Arbabis had become the official owners when the deed was recorded on September 3, 1991, the County did not have this information at the time it advertised the tax sale.

Beaufort County Treasurer's Office and the County Treasurer, individually.[2] Mrs. Arbabi never answered the complaint.

The trial court granted summary judgment to Dr. Arbabi and the tax deed was declared invalid. Upon petitioner's motion to alter or amend the judgment, the court modified its order, declared Mrs. Arbabi to be in default, and granted petitioner relief – but only as to Mrs. Arbabi's undivided half-interest. Dr. Arbabi appealed, and in an unpublished opinion, Johnson v. Arbabi, Op. No. 96-UP-008 (S.C. Ct. App. filed January 8, 1996), the Court of Appeals reversed and remanded.

On remand, the case was assigned to a Master-in-Equity and a full hearing was held. Dr. Arbabi testified that after he left the marital home, he did not return to get his mail. He stated Mrs. Arbabi "would bring it to me or she would give it to my attorney."

The Master found the County Treasurer complied with the statutory requirements in S.C. Code Ann. § 12-51-120 when it sent only one redemption notice to the White Trillium address. The Master decided Mrs. Arbabi acted as Dr. Arbabi's agent in receiving the notice because Dr. Arbabi did not stop Mrs. Arbabi from receiving his mail and never notified the County of a change of address. Thus, the Master concluded that petitioner held a valid title to the condominium.

In a 2-1 decision, the Court of Appeals reversed. The majority held: (1) Mrs. Arbabi was not Dr. Arbabi's authorized agent when she received the redemption notice; (2) section 12-51-120 requires that **each co-tenant** be sent a separate notice of the right to redeem, and therefore the single, joint notice sent in this case did not comply with the statute; and (3) the entire tax sale should be invalidated. Judge Stilwell dissented, finding that where multiple owners provide only one address for notice purposes, separate notices need not be sent.

[2] The third-party action eventually was dismissed.

ISSUES

1. Does section 12-51-120 require separate redemption notices for joint owners at the same address?

2. Did the Court of Appeals err in finding Mrs. Arbabi was not Dr. Arbabi's agent for purposes of accepting the redemption notice?

DISCUSSION

Initially, we note this is an action in equity. See Bryan v. Freeman, 253 S.C. 50, 52, 168 S.E.2d 793, 793 (1969) ("An action to remove a cloud on and quiet title to land is one in equity"). Therefore, we are free to find the facts according to our own view of the preponderance of the evidence. Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

1. Notice under section 12-51-120

Petitioner argues the Court of Appeals erred in finding that section 12-51-120 requires separate redemption notices be sent to joint owners of a property even when they reside at the same address. We agree.

S.C. Code Ann. § 12-51-120 (Supp. 1991) provides that a notice be sent to the property owner informing the owner that the end of the redemption period is approaching. Specifically, the section requires that notice should be sent by "certified mail, return receipt requested--deliver to addressee only,"[3] and that the notice be mailed to "the best address of the owner available." Section 12-51-120 also states "the return of the certified mail 'undelivered' is not grounds for a tax title to be withheld or be found defective and ordered set aside or canceled of record."

[3] This statute has been amended twice since the tax sale at issue in this case. The statute now requires the notice be mailed by "certified mail, return receipt requested-**restricted delivery**." (Emphasis added). "Restricted delivery" is the equivalent of "deliver to addressee only." See In re Ryan Inv. Co., 335 S.C. 392, 394 n.1, 517 S.E.2d 692, 693 n.1 (1999).

Because notice under the tax sales is constructive rather than actual, this Court has consistently held that tax sales must be conducted in strict compliance with statutory requirements. See In re Ryan Inv. Co., 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999); Dibble v. Bryant, 274 S.C. 481, 483, 265 S.E.2d 673, 675 (1980); Aldridge v. Rutledge, 269 S.C. 475, 478, 238 S.E.2d 165, 166 (1977). For example, the failure to mail a redemption notice by restricted delivery mail is grounds to invalidate a tax sale. See Manji v. Blackwell, 323 S.C. 91, 473 S.E.2d 837 (Ct. App. 1996). Even **actual** notice is insufficient to uphold a tax sale where strict compliance with statutory requirements is absent. See Aldridge v. Rutledge, supra.

In the instant case, the Court of Appeals found the County Treasurer failed to provide Dr. Arbabi notice under the statute because each co-tenant is equally entitled to **separate** notice. Johnson v. Arbabi, supra. Judge Stilwell dissented on this issue stating the following: "It makes little sense to me that where multiple owners provide only one address for notice purposes each one must be sent a separate notice but all to the same address." Johnson v. Arbabi, 347 S.C. at 147, 553 S.E.2d at 461 (Stilwell, J., dissenting).

Given the particular circumstances of this case, we agree with Judge Stillwell. Here, the co-tenants were spouses **with the same address** (the White Trillium address in Michigan), and this address certainly was "the best address" available. Indeed, this was the **only** address ever given to County officials. It was the address the Arbabis put on the deed and which also was specified by the letter sent from Dr. Arbabi's Michigan attorney in April 1991. Moreover, we note there is no question that the Treasurer utilized the correct method of mailing: certified mail, return receipt requested--deliver to addressee only. Thus, we find there was strict compliance with the constructive notice provisions in section 12-51-120.

Accordingly, we hold that under the facts of this case, separate redemption notices were not required in order to satisfy section 12-51-120.

2. Mrs. Arbabi as Agent for Dr. Arbabi

Petitioner also argues the Court of Appeals erred in reversing the Master's ruling that Mrs. Arbabi acted as Dr. Arbabi's implied agent in receiving the redemption notice. We agree.

Whether an agency relationship exists is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal. American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Hinson v. Roof, 128 S.C. 470, 122 S.E. 488 (1924). In Barber v. Carolina Auto Sales, 236 S.C. 594, 115 S.E.2d 291 (1960), this Court stated the following:

> It is well settled that the wife is not the agent of her husband by virtue of the marital relationship between them.… He may, however, make her his agent and be bound by her acts as such. '**The agency relationship in such case ordinarily rests upon the same considerations as any other agency**; she is his agent, and he is bound by her acts as his agent, only when her agency is **express**, **implied, or ostensible**.'

236 S.C. at 597, 115 S.E.2d at 293 (emphasis added, citations omitted); see also Hinson, supra (the marriage relation of the parties is not necessarily enough to establish the fact that the one is the agent of the other; there must be other proof of agency); 41 C.J.S. Husband & Wife § 56 (1991) ("A spouse may constitute the other spouse as an agent either expressly or impliedly; **but, if agency is implied, it must be by conduct, and not merely from a party's position as a spouse.**") (emphasis added, footnotes omitted).

The Court of Appeals[4] found an implied agency cannot satisfy the requirements relating to the receipt of a redemption notice. Furthermore, looking at the postal regulations, the Court of Appeals held Mrs. Arbabi was

[4] We note that Judge Stilwell agreed with the majority opinion's analysis and result on the agency issue, and therefore there was no dissent on this issue.

not Dr. Arbabi's agent when she received the notice because Dr. Arbabi had not **expressly** authorized her as his agent. Johnson v. Arbabi, 347 S.C. at 139-40, 553 S.E.2d at 457.[5]

We find the Court of Appeals erred in ruling there cannot be implied agency in this situation. The rule regarding agency between spouses is that while a spouse is not automatically an agent for the other spouse, an implied agency can arise by conduct of the parties. See Barber, supra; Hinson, supra.[6] Accordingly, the issue is whether Mrs. Arbabi was Dr. Arbabi's implied agent.

We agree with the Master's view of the evidence in this case that the factual circumstances establish the agency relationship. By Dr. Arbabi's own testimony, and his actions, Mrs. Arbabi was his implied agent. Dr. Arbabi left the marital home in April 1991. Yet, on April 22, 1991, his attorney wrote the County a letter requesting the Assessor's office to send all future tax bills directly to Dr. Arbabi at the White Trillium address. Moreover, Dr. Arbabi stated he never returned to the marital home and Mrs. Arbabi delivered the mail either to him or his attorney. This arrangement apparently went on from April 1991 through, at least, November 1992 – over a year and a half. Certainly, Dr. Arbabi knew he was going to receive mail related to the Hilton Head property during that time period. Yet, there is **no evidence** in

---

[5] Citing United States Postal Services Domestic Mail Manual § S916.3.1 ("Mail marked 'Restricted Delivery' is delivered only to the addressee or to the person authorized in writing as the addressee's agent to receive the mail....").

[6] The Court of Appeals' focus on the postal regulations requiring express, written authorization from the addressee to the agent is misplaced. Cf. In re Ryan Inv. Co., 335 S.C. at 395, 517 S.E.2d at 693 (where the Court held that "postal regulations in and of themselves cannot excuse the failure to comply with statutory mailing requirements"). Just as postal regulations cannot excuse the failure to comply with the statute, see id., these regulations should not be the basis for changing the well-settled rules on agency between spouses. See, e.g., Barber, supra (question of agency between spouses rests upon the same considerations as any other agency).

the record that Dr. Arbabi at any time filed a change of address form with the post office or wrote the County with another, more appropriate, address for him. Under this evidence, we find that Dr. Arbabi, by his actions, appointed Mrs. Arbabi his agent for receiving any and all mail that was directed to the White Trillium address.

While it is unfortunate that Mrs. Arbabi's failure to act on the redemption notice and failure to disclose it to Dr. Arbabi in a timely fashion resulted in their loss of the property, equity nonetheless favors petitioner in this action since any "fault" is on the part of the Arbabis. See Ingram v. Kasey's Assocs., 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) ("He who seeks equity must do equity.") (quoting Norton v. Matthews, 249 S.C. 71, 152 S.E.2d 680 (1967)).

Accordingly, we reverse the Court of Appeals' holding that implied agency cannot satisfy the requirements for the receipt of a redemption notice, and instead find that by his conduct, Dr. Arbabi made Mrs. Arbabi his implied agent.

CONCLUSION

We hold that section 12-51-120 does not require separate redemption notices to joint owners **residing at the same address**. We further hold that Mrs. Arbabi was Dr. Arbabi's implied agent for purposes of receiving the joint redemption notice. Therefore, we agree with the Master's conclusion that petitioner's tax deed is valid. The Court of Appeals' opinion is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In The Matter Of The Care And
Treatment Of Peter E.J. Harvey, Appellant.

Appeal From Greenville County
John C. Few, Circuit Court Judge
Joseph J. Watson, Circuit Court Judge

Opinion No. 25681
Heard May 28, 2003 - Filed July 21, 2003

REVERSED AND REMANDED

Tara Dawn Shurling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Treva Ashworth, Assistant Attorney General Deborah R.J. Shupe, and Assistant Attorney General Steven R. Heckler, of Columbia, for Respondent.

JUSTICE WALLER: Appellant Peter E.J. Harvey appeals his 1999 commitment pursuant to the South Carolina Sexually Violent Predator Act ("the SVP Act"). See S.C. Code Ann. § 44-48-10 *et seq*. (2002). He also appeals from his 2000 annual review trial. See § 44-48-110. We reverse the 1999 order of commitment and remand.

PROCEDURAL BACKGROUND

As a juvenile, Harvey was adjudicated delinquent in 1994 for committing first degree CSC with a minor. In 1998, at age 19, he was paroled. Within weeks of being paroled, the State petitioned for Harvey's commitment under the SVP Act. In February 1999, a bench trial was conducted, and the trial court found Harvey to be a sexually violent predator. Harvey appealed. While the appeal was pending, Harvey received an annual status review, and a jury trial was held in October 2000 to determine whether his status had changed. See § 44-48-110. The jury found Harvey should remain committed under the SVP Act.

FACTS[1]

Harvey was born in 1978. Prior to turning 14, Harvey was both the victim of sexual abuse as well as a perpetrator. At the age of approximately eight, he was molested by a married couple that had a daughter Harvey's age. The abuse involved the four engaging in various sexual activities and went on for a prolonged period of time. Harvey also reported being sexually assaulted by an older boy where the boy forced Harvey to perform oral sex.

At the age of ten while visiting relatives in Michigan, Harvey was involved in an incident with twin boys who were at least six years old. While at the twins' pool, Harvey suggested they all take off their clothes, and the three boys walked around naked for about 20 minutes. When the twins' parents found out, they pressed charges against Harvey. As a result, he attended a sex offender therapy program in Georgia.[2]

---

[1] Because we are reversing from the 1999 proceeding, we confine the factual presentation to that trial, except where otherwise noted.

[2] We note that at the 1999 trial, the twin boys were repeatedly referred to as Harvey's victims. It was not until the review trial in 2000 that the precise details of this Michigan incident were revealed.

When Harvey was approximately 13 years old, he had his younger brother, who was about five years old, perform oral sex on him. This conduct was the basis for his delinquency adjudication in 1994.

The State presented expert testimony from psychiatrist Dr. Donna Schwartz-Watts. Dr. Schwartz-Watts diagnosed Harvey with pedophilia.[3] In her written report, she explained that her diagnosis was based on Harvey's "acts over the past that demonstrate he has arousal to children." At the bench trial, however, Dr. Schwartz-Watts stated that during her evaluation of Harvey, he had admitted having "some recurrent urges" even since turning 16.[4] Furthermore, Dr. Schwartz-Watts opined Harvey met the criteria for a sexually violent predator and that outpatient treatment was not yet appropriate for Harvey.

---

[3] At the State's request, the trial court took judicial notice of the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) ("DSM-IV") as the document regularly relied upon for the diagnosis of mental disorders. According to the DSM-IV manual, the diagnostic criteria for pedophilia include:

> A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 or younger);
>
> B. The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning; and
>
> C. **The person is at least age 16 years and at least 5 years older than the child or children in Criterion A**.

(Emphasis added).

[4] Dr. Schwartz-Watts evaluated Harvey in January 1999 when Harvey was age 20.

On cross-examination, Dr. Schwartz-Watts stated that Harvey was not a sociopath or an antisocial personality. She explained she used the DSM-IV criteria to make her diagnosis and that although Harvey's past acts did not occur after he was 16, he admitted to her that he had urges about having sex with children. She acknowledged her written report did not state that Harvey had recurrent urges over a six-month period.

Over Harvey's objection, the trial court allowed into evidence a "Log of Critical Incidents and Clinically Significant Events" ("the Log"). The Log is an unsigned document kept by the Generations Group Home ("GGH"), a treatment center for juveniles with sexually aggressive behaviors.[5] The Log details various incidents involving Harvey and explanations of these incidents.[6] Dr. Schwartz-Watts reviewed the Log as part of her evaluation, and she testified "there were some things there [she] was concerned about." She also stated, however, that she did not base her diagnosis on the document.

Harvey objected to the admission of the Log based on hearsay. He argued it did not comply with the business record hearsay exception since it contained personal judgments and opinions. See Rule 803(6), SCRE. The trial court, however, found it only contained "facts and data" and admitted the document.

As part of Harvey's case, he called Dr. Karl Bodtorf as an expert in forensic psychology. Dr. Bodtorf also evaluated Harvey, but he did not diagnose Harvey with pedophilia. Because of Harvey's age at the time of his offense, and the age difference between the children in the Michigan incident, Dr. Bodtorf did not feel that pedophilia, as defined by the DSM-IV, was an

[5] For a portion of time while Harvey was serving his DJJ sentence, he was a resident at GGH. According to Dr. Schwartz-Watts' written report, Harvey stated that the "dogma" of the GGH program was sexual abstinence and he was chastised for having sexual fantasies which involved females.

[6] For example, there are entries in the Log focusing on Harvey's "efforts to sexualize" female employees of GGH, as well as entries regarding his progress (and lack of progress) in treatment.

appropriate diagnosis. In addition, Dr. Bodtorf reported that Harvey denied interest in children, and he stated that the psychological testing did not show Harvey had proclivities toward children. Dr. Bodtorf opined that outpatient treatment, which he could provide, would be an appropriate option for Harvey.

The trial court found beyond a reasonable doubt that Harvey suffered from pedophilia and therefore ordered his commitment pursuant to the SVP Act.

ISSUES

Harvey raises two issues from the February 1999 bench trial:

1. Did the State fail to offer sufficient evidence Harvey was a sexually violent predator?

2. Did the trial court err in admitting the Log?

DISCUSSION

1. Sufficiency of the Evidence

Harvey argues the evidence at the bench trial was insufficient to meet two components of the SVP definition: mental abnormality and likelihood of sexual violence.

In an appeal regarding sufficiency of the evidence in a SVP case, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling. In re Matthews, 345 S.C. 638, 646, 550 S.E.2d 311, 315 (2001), cert. denied, 535 U.S. 1062 (2002). In other words, the court is concerned with the existence of evidence, not its weight. Id.

Under the SVP Act, the State bears the burden of proving beyond a reasonable doubt that a person is a sexually violent predator. See S.C. Code Ann. § 44-48-100 (2002). A sexually violent predator is defined as a person who: (a) has been convicted of a sexually violent offense; and (b) suffers

from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. § 44-48-30(1)(a) & (b). The Act defines "[l]ikely to engage in acts of sexual violence" to mean the person's "propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." § 44-48- 30(9).

Harvey contends the State failed to prove he is a pedophile because Dr. Schwartz-Watts' diagnosis of pedophilia was inconsistent with the DSM-IV criteria. Specifically, Harvey maintains that his acts of sexual misconduct which occurred before he was 16 should not be the basis of a pedophilia diagnosis. Since the DSM-IV criteria clearly indicate that a pedophilia diagnosis is only appropriate if the person is over 16, we share Harvey's concern with the focus placed on his acts. See footnote 3, supra. Moreover, we note the Michigan incident does not satisfy the DSM-IV criteria since Harvey was not five years older than the twin boys. Nonetheless, there remain portions of Dr. Schwartz-Watts' testimony which justify her diagnosis. She testified that Harvey reported having urges after turning sixteen and her diagnosis was based on his present mental state. Technically, this meets the definition of pedophilia. Thus, there was sufficient evidence of a mental abnormality or disorder. See In re Matthews, supra (the court is concerned with the existence of evidence, not its weight).

Harvey also argues the State failed to prove that the pedophilia made him "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." Harvey's argument is based primarily on the United States Supreme Court's holding in Kansas v. Crane, 534 U.S. 407 (2002), that there must be proof of a lack of ability to control behavior.

In In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002), this Court noted that the Crane decision "does not mandate a court must separately and specially make a lack of control determination, only that a court must determine the individual lacks control while looking at the totality of the evidence." Id. at 143, 568 S.E.2d at 348. The Luckabaugh Court went on to state the following:

> Inherent within the mental abnormality prong of the Act is a lack of control determination, i.e. the individual can only be committed if he suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act.

Id. at 144, 568 S.E.2d at 349. Thus, the Court concluded the requirements of the SVP Act "are the functional equivalent of the requirement in Crane." Id.

Accordingly, given Dr. Schwartz-Watts' diagnosis of pedophilia and her testimony that Harvey met the statutory SVP definition, we do not agree the State failed to present evidence of present dangerousness. See In re Matthews, supra.[7]

2. Admission of the Log

Harvey next argues the trial court erred in admitting the Log from GGH over his hearsay objection. We agree.

Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is not admissible unless there is an applicable exception. See Rule 802, SCRE. The business record exception reads as follows, in pertinent part:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with

[7] Although we find the State provided sufficient evidence in this case, we do reiterate that the purpose of the requirements in the SVP Act is to ensure that these involuntary commitment procedures are "**only** used to control a 'limited subclass of dangerous persons' and **not to broadly subject any dangerous person to what may be indefinite terms**." Luckabaugh, 351 S.C. at 144, 568 S.E.2d at 349 (citation omitted, emphasis added).

> knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; **provided, however, that subjective opinions and judgments found in business records are not admissible.**

Rule 803(6), SCRE (emphasis added).

At trial, the State called Terri Copilevitz, the clinical director at GGH. She stated the Log was a summary "written by our clinical director at the time and [Harvey's] treatment coordinator providing a summary of the critical incidents that [Harvey] had been a part of." She explained that "**critical incidents**" are "the way that we have staff report to us any behaviors that are **significant** that need to be followed up by the clinical staff." (Emphasis added).

Harvey argues the Log is replete with subjective opinions and judgments and therefore is inadmissible hearsay. We agree. Even the description of what this document is indicates its highly subjective nature. Moreover, it is an unsigned document which repeatedly offers judgments about the progress of Harvey's treatment and his behaviors. Because the document did not meet the business record exception, we hold the trial court erred in admitting this document. See Rule 803(6), SCRE.

Nonetheless, the State argues that any error is not prejudicial. We disagree.

Unless the appellant was prejudiced by the erroneous admission of hearsay, reversal is not required. E.g., State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). The Mitchell court explained as follows:

> Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; 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 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

The State argues there could be no prejudice from the Log's admission because the trial court orally indicated it would not consider this document. The State contends the trial court's comments from the bench show it relied primarily on Dr. Schwartz-Watts' evaluation and testimony in reaching its decision. However, we note that (1) the trial court admitted the Log over objection, (2) Dr. Schwartz-Watts specifically commented on it during her testimony, and (3) the State used it to impeach Dr. Bodtorf's opinion and lend support to Dr. Schwartz-Watts' diagnosis of pedophilia. Therefore, the Log entered into the trial in a significant way. Moreover, despite the trial court's oral comments about the Log, the court's written order does not state that it, in fact, disregarded the Log. See Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court.").

Accordingly, we find the erroneous admission of the Log was not harmless. See Mitchell, supra.

CONCLUSION

In sum, due to the erroneous and prejudicial admission of the Log, we reverse the trial court's 1999 order finding Harvey to be a sexually violent predator.

Because we find error with the initial determination of SVP status, we need not review the issues raised from the 2000 annual review trial. Clearly, if Harvey had not been adjudicated a sexually violent predator in 1999, he would not be confined and subject to annual review. The sole issue at an

annual review trial is whether a person **remains** a sexually violent predator. See § 44-48-110 ("The burden of proof at the trial is upon the State to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder **remains** such that the person is not safe to be at large and, if released, is likely to engage in acts of sexual violence.") (emphasis added). Moreover, we note that whatever the jury found in the 2000 trial certainly could not in any way "cure" an error that occurred at the initial trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Leon Crosby, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Kershaw County
Costa M. Pleicones, Circuit Court Judge

Opinion No. 25682
Heard June 12, 2003 - Filed July 21, 2003

REVERSED

Assistant Appellate Defender Robert M. Dudek, of S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, and Solicitor Warren B. Giese, all of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (Ct. App. 2002). We reverse.

FACTS

Crosby was convicted of voluntary manslaughter in connection with the December 28, 1998 shooting death of Lavaris Dunham (Victim). He asserts the trial court erred in refusing to charge the jury on the law of involuntary manslaughter. We agree.

On the day of the shooting, a number of people were gathered at the apartment of Monica Tucker and Shawanda Knox. Several of the people had spent the previous night at the apartment, including Crosby. Shawanda and her brother, Ryan, left their jobs at Western Sizzlin and went to the apartment where they found several people inside drinking and playing cards. Shawanda asked Monica to make the people leave and, when Monica refused to do so, Shawanda went across the street and called police. A policeman came and requested Shawanda spend the night elsewhere. During this timeframe, Crosby and his girlfriend Ketura Young were inside the apartment. Crosby became upset when the Victim, who had been drinking, told Crosby that he would "take his girlfriend." Crosby went outside to clear his head.

Believing he had diffused the situation the police officer left. Shawanda and Monica began fighting again, along with Monica's cousin Jenelle Outten, and Shawanda's brother Ryan. As Shawanda was leaving, Monica and Jenelle followed her down the stairs and another fight broke out on the landing. According to the statement Crosby gave to police shortly after the incident, Monica and Jenelle started "double teaming" Shawanda, so he and Ryan tried to break up the fight, and he attempted to pull one of them off of Shawanda. At that point, Victim told him "Don't put your hand on her. . . Matter of fact, don't touch her at all." Crosby turned around and then saw Victim "charging at me with his hand behind his back. I went in my pocket and pulled that gun out**. I closed my eyes and pulled the trigger. I didn't even know I pulled the trigger**. I was scared. I seen my life in danger. I

didn't know how to react."[1] Victim died of a gunshot wound which severed the carotid artery and transected the spinal cord.

At trial, Shawanda Knox testified that as the group got into a car and fled the scene, Crosby told them it was an accident and he didn't mean to do it. Ryan Knox also testified Crosby had told him he didn't mean to do it. Another witness, Calvin Hill, testified Crosby told him "he didn't mean to do it" and that the gun had slipped.

Crosby testified that as he attempted to break the girls apart, the Victim told him not to put his hand on Jenelle. Crosby told him he didn't want to fight, and Victim pushed him. Crosby attempted to push his girlfriend Ketura back into the apartment, and he glanced back and saw someone charging at him. He saw him "coming at me with his hand behind his back. So I couldn't tell if he had a weapon or not. . . . When I glanced back, I seen his hands behind his back. So I ain't know what kind it was. That's when I reached in my pocket and turned around. By the time I turned around, he was already up on me, and I just pow. . . . As I turned around, before I could turn around, I've done hit that pocket. He came up, I turned around and boom."

During the charge conference, defense counsel waived his request to charge the defense of accident, agreeing "there was no testimony it was an accidental shooting."[2] However, counsel maintained that the testimony that the shooting was not intentional, and that Crosby didn't even know he had pulled the trigger were sufficient to demonstrate that he handled the gun with a reckless disregard for the safety of others, such that he was entitled to a charge on involuntary manslaughter. The trial court disagreed. The Court of Appeals affirmed, finding no evidence which would support a charge of involuntary manslaughter. It found Crosby's actions were intentional and

---

[1] This was the statement Crosby gave to police shortly after the shooting.

[2] The state asserts that, because Crosby waived an instruction on accident, he likewise waived any entitlement to a charge on involuntary manslaughter. We disagree. To satisfy the legal defense of accident, it must be shown that the defendant used due care in the handling of the weapon. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). A defendant is, however, entitled to a charge on involuntary manslaughter where the evidence shows a reckless disregard of the safety of others. Id.

unlawful, such that he was not entitled to the charge. 348 S.C. at 397, 559 S.E.2d at 352.

ISSUE

Did the Court of Appeals err in ruling there was no evidence to support a charge of involuntary manslaughter?

DISCUSSION

The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense. Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999). To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C.Code Ann. § 16-3-60 (1985).

In State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), this Court held that a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. In Burriss, the defendant was threatened and then attacked by the victim and another male. After being pushed to the ground, the defendant drew a gun and fired two rounds into the ground. One attacker backed away, but urged his accomplice--the victim--to attack the defendant again. At this point, the defendant was on the ground, separated from his gun. When the victim began moving threateningly toward Burris, he snatched his gun up and it fired. Burriss stated he was scared and his hand was shaking when the gun went off: "It was an accident. I didn't try to shoot nobody." Burriss, 334

S.C. at 263, 513 S.E.2d at 108. At one point, however, Burris also testified that "my hand was on the trigger. The trigger was pulled or whatever."

The Court of Appeals found the present case distinguishable from Burris. It found that "Crosby consistently stated he deliberately retrieved the gun from his pocket and pulled the trigger. . . . Crosby admitted he intentionally shot the gun. Furthermore no evidence was presented that the gun accidentally discharged." 348 S.C. at 395, 559 S.E.2d at 357.

The evidence does not support the Court of Appeals' conclusions. We find there is ample evidence from which the jury could have inferred Crosby did not intentionally discharge the weapon. As noted, three witnesses testified that Crosby told them immediately after the shooting that it had been an accident, and that he hadn't meant to do it. Witness Hill testified Crosby told him the gun had slipped. In his trial testimony, Crosby testified that "when I glanced back, I seen his hands behind his back. So I ain't know what kind it was. That's when I reached in my pocket and turned around. By the time I turned around, he was already up on me, and I just pow. . . . As I turned around, before I could turn around, I've done hit that pocket. He came up, I turned around and boom." (emphasis supplied). In his statement to police immediately after the shooting, Crosby stated, "I closed my eyes and pulled the trigger. I didn't even know I pulled the trigger. I was scared. I seen my life in danger. I didn't know how to react."

In our view, the only evidence which appears to directly support the Court of Appeals' ruling is Crosby's statement to police in which he stated he closed his eyes and pulled the trigger. However, this ignores the fact that Crosby immediately added that **he didn't even know he had pulled the trigger**. The effect of the Court of Appeals' holding is that if there is any evidence a shooting was intentional, all evidence from which any other inference is may be drawn is negated. This is not the law of this state. State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993)(charge must be given if there is any evidence to support it; trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence). We hold Crosby was entitled to a jury charge on the law of involuntary manslaughter. The Court of Appeals' opinion is

REVERSED.

MOORE, A.C.J., BURNETT, J., and Acting Justices C. Victor Pyle, Jr., and L. Casey Manning, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Collins Entertainment Corp., Respondent,

v.

Coats and Coats Rental Amusement, d/b/a Ponderosa Bingo and Shipwatch Bingo, Wayne Coats, individually, and American Bingo & Gaming Corp., Defendants,

Of whom American Bingo & Gaming Corp. is Appellant.

Appeal From Charleston County
Roger M. Young, Master in Equity

Opinion No. 3596
Heard December 10, 2002 – Filed February 3, 2003
Withdrawn, Substituted and Refiled July 21, 2003

AFFIRMED

Timothy G. Quinn, of Columbia, for Appellant.

Stephen L. Brown, Edward D. Buckley, Jr., Donald J. Davis, Jr. and Stephen P. Groves, Sr., all of Charleston, for Respondent.

GOOLSBY, J.: Collins Entertainment Corp. (Collins) brought this action against (1) Coats and Coats Rental Amusement, d/b/a Ponderosa Bingo and Shipwatch Bingo, (2) Wayne Coats, individually, and (3) American Bingo & Gaming Corp. (ABG), alleging various causes of action arising out of ABG's removal of Collins' coin machines from Ponderosa Bingo and Shipwatch Bingo. The case was referred to the Charleston County master-in-equity for trial with authority to enter a final judgment. ABG appeals (1) the master's finding that it intentionally interfered in a lease for the placement of Collins' video poker machines in the two business establishments and (2) the punitive damages award. We affirm.

FACTS

T.A. Coats and his wife Darlene owned or operated a business known as Coats and Coats Rental Amusement. Wayne Coats, their son, also appears to have been involved in the business.

Coats and Coats Rental Amusement operated two bingo halls, Ponderosa Bingo and Shipwatch Bingo, at two different locations. The locations had been procured by T.A. Coats subject to written real estate leases between him and the individual property owners.

On March 28, 1996, Collins entered into a six-year lease agreement with "Coats and Coats Rental Amusements d/b/a Ponderosa Bingo and Shipwatch Bingo and Wayne Coats, individually" for the exclusive right to lease video poker machines at both locations. The parties were to split the revenues from operating the machines. The agreement further provided that, if the premises were sold, the buyer was to assume the lease. Wayne Coats signed the agreement individually and on behalf of Coats and Coats Rental Amusement.

In 1997, ABG entered into negotiations with T.A. Coats to purchase the assets of the Ponderosa and Shipwatch businesses and to assume the ground leases to the properties on which they operated. The purchase and sale agreement required Coats and Coats to indemnify ABG in the event ABG was sued for interfering with the video poker machine contract. Although T.A. Coats made ABG aware of the agreement with Collins, ABG did not assume the lease and instead removed Collins' machines from the premises.

Collins then brought this action against Coats and Coats, Wayne Coats, and ABG. In its complaint, Collins asserted a claim for breach of contract against Coats and Coats and Wayne Coats. Collins further asserted causes of action for intentional interference with a contract, civil conspiracy, and unfair trade practices against ABG.

At trial, the master dismissed the civil conspiracy cause of action and found in favor of ABG on the unfair trade practices claim. The master, however, determined ABG was liable for intentional interference with Collins' contract and awarded actual damages of $157,449.66 and punitive damages of $1,569,013.00.[1] The master denied ABG's post-trial motions.

LAW/ANALYSIS

I. Motion to Amend Answer

ABG first contends the master erred in denying its motion to amend its answer to conform to the evidence presented at trial. We find no error.

In its answer, ABG stated: "This Defendant admits purchasing the businesses known as Ponderosa Bingo and Shipwatch Bingo from Coats & Coats Rental Agreement and Wayne Coats individually." Before calling any witnesses, Collins' attorney read this statement into the record verbatim

[1] The master awarded Collins damages for breach of contract against Wayne Coats and Coats and Coats Rental Amusement.

without objection from ABG. At trial, however, Wayne Coats testified that he had no ownership interest in either business when ABG acquired them.

After the close of ABG's case, Collins' attorney again read the answer into the record. This time, however, ABG moved to amend the answer to conform to the proof. In support of the motion, counsel for ABG claimed: "At the time the [a]nswer was drafted, that was the information provided us. We would ask that the [p]leadings be conformed to the proof presented."[2] Collins objected to the motion, alleging the entire litigation was based on the admission in ABG's answer. The master denied the motion to amend.

Citing Rule 15(b) of the South Carolina Rules of Civil Procedure, ABG argues the master should have permitted it to amend its answer to conform to the proof offered.[3] We agree, however, with Collins that Rule 15(b) is

---

[2] At the hearing, ABG never specified exactly how it sought to have the answer amended. On appeal, ABG asserts it purchased the ground leases to the property from T.A. Coats and that Wayne Coats had no interest in the property.

[3] Rule 15(b), SCRCP, states in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

inapplicable to this situation. As this court stated in Sunvillas Homeowners Ass'n v. Square D Co.:

> The rule covers two situations. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary.[4]

Here, the issue prompting ABG's motion to amend was raised in the complaint and admitted by ABG; therefore, the first situation did not apply. Moreover, because no objection was made as to any evidence being outside the pleadings, the master could not have permitted an amendment pursuant to the second part of the rule.

II. Interference with Contractual Relations

A.

ABG asserts Collins failed to prove the elements of intentional interference with contractual relations. In our view, however, the record has sufficient evidence to support a finding that Collins proved each of the necessary elements.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's

---

[4] 30l S.C. 330, 334, 391 S.E.2d 868, 870-71 (Ct. App. 1990) (emphasis added).

knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages."[5]

At trial, ABG contended (1) the parties to the contracts for placement of the video poker machines at Ponderosa Bingo and Shipwatch Bingo were Collins, Wayne Coats, and an entity called Coats and Coats Rental Amusement owned by Wayne Coats; (2) the entity known as Coats and Coats Rental Amusement that was owned by Wayne Coats was a North Carolina entity and separate and distinct from the Coats and Coats owned by T.A. and Darlene Coats; and (3) T.A. Coats held the ground lease on the properties where the businesses were located. ABG maintained that, because it negotiated with only T.A. Coats for the ground leases, it could not have interfered with the video poker machine agreement giving Collins the exclusive right to place its machines at Ponderosa Bingo and Shipwatch Bingo, as that agreement did not involve T.A. Coats.

The master, however, found that Coats and Coats was a business "consisting of Wayne Coats' mother and father, T.A. Coats, Wayne Coats, and Darlene Coats" and that "T.A. Coats, Darlene Coats, and Wayne Coats operated various aspects of the Ponderosa and Shipwatch businesses under various trade names including Coats and Coats, Coats and Coats Rental Amusements, and Darlene's Rental and Amusements, all of which were run and controlled by T.A. Coats." The master then determined that the "contract between Collins and Coats and Coats was negotiated by T.A. Coats and signed by Wayne Coats at his direction and under the authority of T.A. Coats." Finally, the master concluded that "T.A. Coats ratified this contract by his actions subsequent to the placement of Collins Machines at the Shipwatch and Ponderosa locations."

In his deposition, T.A. Coats testified he negotiated the contracts for the video poker machines to be placed in the Ponderosa and Shipwatch

[5] Camp v. Springs Mortg. Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

locations.[6] He further explained that, because he was out of town when Collins' representative brought the machines, he instructed Wayne Coats to sign the contracts so the machines could be left on the premises. Finally, T.A. Coats testified that the Coats and Coats entity that was a party to the Collins agreement was his business and, furthermore, that the Coats and Coats entity that Wayne Coats established was not in existence at that time.[7]

Based on the foregoing, we hold the record contains evidence to support the master's determination that Collins' contract was with T.A. Coats and not with Wayne Coats. Although Wayne Coats may have signed the agreement, the record supports the finding that he did this only with express authorization from T.A. Coats to act on behalf of T.A. Coats and Coats and Coats Rental Amusement.[8]

B.

ABG next contends it had no knowledge of any contract between Collins and T.A. Coats and was told that Wayne had the video poker lease.

---

[6] T.A. Coats died before the final hearing, and his deposition was made part of the record.

[7] Indeed, ABG acknowledged in its brief that "[i]n January, 1997 Wayne Coats (the son of T.A. Coats) applied for a business license for a new business known as Coats and Coats Rental Amusements, a North Carolina entity," and a copy of the application appears in the record. Obviously, ABG knew or should have been able to determine that the Coats and Coats business purportedly run by Wayne Coats may not have been in existence in March 1996, when Collins procured the right to place video poker machines at the two bingo halls.

[8] See Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (stating that, in an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support).

The record, however, supports the finding that ABG knew that T.A. Coats was a party to the contract at issue.

T.A. Coats testified that he told Greg Wilson, Roy Stevens, Richard Henry, and Barry Goldstein, all of ABG, that he had a contract with Collins for the video poker machines. In addition, ten of Collins' video poker machines were present in each location and, as required by state law, were clearly marked as belonging to Collins. T.A. Coats further stated he told individuals at ABG that he was not going to breach the agreement and that ABG had to remove Collins' machines and contact Collins. Roy Stevens, ABG's state manager, testified he knew of the video poker lease with Collins and ABG had a copy of the contract to review. Barry Goldstein testified that a copy of the Collins lease was passed around ABG "like the Sunday comic strip."

C.

ABG further asserts there was no evidence presented at trial that it either induced or coerced T.A. Coats or Wayne Coats into breaching the video poker lease. We disagree.

According to Roy Stevens, the purchase and sale agreement was structured in such a way as to circumvent the Collins agreement. Stevens further testified that, if T.A. Coats refused to sell, ABG intended to run him out of business. In addition, Wayne Coats testified that (1) his family never contemplated cancelling the Collins agreement until ABG was involved; (2) an attempt was made to have ABG assume the Collins contract; and (3) a representative from ABG advised his parents that "if they didn't sell out, that American Bingo would eventually run them out."

D.

Finally, ABG argues it was justified in its actions because it believed that the Collins agreement was with Wayne Coats and that T.A. Coats held only the ground leases on the properties. As discussed above, however, there

was ample evidence to show that T.A. Coats was a party to the Collins agreement and that ABG was aware of his involvement.

III. Expert Testimony

ABG asserts the testimony from Collins' economic expert, Dr. Woodside, regarding Collins' excess capacity of video poker machines was hearsay and, therefore, the master improperly relied on this testimony in calculating damages. We hold the admission of Dr. Woodside's testimony was proper.

Dr. Woodside testified that Collins maintained warehouses with additional machines. He testified that, although he did not know exactly how many machines Collins had in its warehouses, individuals with Collins had informed him that Collins had sufficient excess capacity to fulfill both the contract with T.A. Coats and any subsequent contracts. In addition, Dr. Woodside testified Collins routinely rotated machines from one location to another.

ABG argues that what Collins' employees had told Dr. Woodside was hearsay. We agree the information was hearsay, but hold, however, that it was nevertheless admissible under Rule 703 of the South Carolina Rules of Evidence.[9]

[9] Dr. Woodside's testimony was also cumulative to other evidence previously admitted into the record without objection. Before Dr. Woodside was called to the stand, Jamie Livingston, an assistant comptroller with Collins, testified that Collins had excess machines numbering "in the thousands" stored in warehouses and that Collins was constantly seeking out new locations to generate money and increase business. See Jackson v. Speed, 326 S.C. 289, 305, 486 S.E.2d 750, 758 (1997) ("Where the hearsay is merely cumulative to other evidence, its admission is harmless.").

The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court.[10] With regard to information on which an expert opinion is based, the South Carolina Rules of Evidence provide as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[11]

Here, Dr. Woodside relied on the information provided by Collins' employees to determine how to calculate Collins' damages. In order to do this, he needed to assess Collins' excess inventory of machines vis-à-vis the number of locations it had available in which to place these machines. We therefore hold the hearsay testimony was the "type reasonably relied upon by experts in the particular field" when determining how to calculate damages and the master did not abuse his discretion in admitting the testimony.[12]

IV. Lost Volume Seller Doctrine

ABG maintains the master erred in applying the "lost volume seller" doctrine and in holding Collins did not have to mitigate its damages. We disagree.

---

[10] Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

[11] Rule 703, SCRE.

[12] ABG also argues the testimony violated Rules 403 and 704, SCRE. Because, however, neither objection was raised at trial, the issues have not been preserved for review on appeal. See McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) ("Failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.").

The theory behind the "lost volume seller" doctrine is as follows:

> If the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have "lost volume" and the subsequent transaction is not a substitute for the broken contract. The injured party's damages are then based on the net profit that he has lost as a result of the broken contract.[13]

South Carolina does not require a party to make an unreasonable effort to mitigate.[14] Moreover, once Collins showed it had sufficient inventory "to place as many [machines] as it could have found customers for,"[15] it likewise established that any other deals it would have made would have been in addition to, rather than instead of, the prior agreement. We therefore affirm the master's use of the "lost volume seller" doctrine in calculating damages in this case.

---

[13] Restatement (Second) of Contracts § 347 cmt. f (1981); see also Gianetti v. Norwalk Hosp., 779 A.2d 847, 852 (Conn. App. Ct. 2001) ("Many state courts, as well as judicial commentators, have determined that in appropriate circumstances, the Restatement's lost volume seller theory should be used in awarding damages."); C.I.C. Corp. v. Ragtime, Inc., 726 A.2d 316 (N.J. Super. Ct. App. Div. 1999) (approving the lost volume doctrine to determine damages relating to coin-operated machine contracts and holding that an instruction on mitigation of damages was reversible error).

[14] See Genovese v. Bergeron, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997) ("A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages; however, the law does not require unreasonable exertion or substantial expense for this to be accomplished.").

[15] C.I.C. Corp. v. Ragtime, Inc., 726 A.2d at 320.

V. Punitive Damages

ABG contends the master erred in awarding punitive damages because there was no evidence its actions were willful, intentional, or with reckless disregard of Collins' rights. ABG further contends the amount of punitive damages violated the Due Process Clause of the Fourteenth Amendment. We find no error.

A.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future."[16] "Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party."[17]

South Carolina Code section 15-33-135 provides that "[i]n any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."[18] Nevertheless, the trial court has considerable discretion regarding the amount of damages, both actual or punitive.[19]

In Gamble v. Stevenson, the supreme court mandated the following procedure for appellate review of an punitive damages award:

---

[16] Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).

[17] Id. at 378-79, 529 S.E.2d at 533.

[18] S.C. Code Ann. § 15-33-135 (Supp. 2002).

[19] See Miller v. City of W. Columbia, 322 S.C. 224, 230, 471 S.E.2d 683, 687 (1996) ("The award of actual and punitive damages remains within the discretion of the jury, as reviewed by the trial judge.").

> [T]o ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.[20]

The master based his conclusions on his findings that the actions taken by ABG demonstrated ABG's culpability, awareness of the contract and ultimate concealment of its desire to have Collins' contract breached, the harm that was caused, the deterrent effect of a punitive damages award, and ABG's ability to pay.

We hold there was evidence that ABG's conduct was willful, intentional, and in disregard of Collins' rights. Evidence was presented at trial of ABG's intention to run T.A. Coats out of business if he did not agree to its request to purchase his business. ABG was made aware of the agreement between Collins and T.A. Coats, but nevertheless set up the purchase of the Ponderosa and Shipwatch locations in an attempt to avoid having to comply with the provisions of the lease.

As the master noted, ABG was "aware of the fact that Collins would suffer a serious economic loss if its contract was cancelled and Collins' machines were removed." Also, ABG gained from procuring the breach of the contract because it would not have to share the revenues with Collins, but could instead install machines from another source and retain 100 per cent of the profits.

---

[20] 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991). The "other factors" are discussed in Pacific Mutual Life Insurance v. Haslip, 499 U.S. 1, 20 (1991).

On appeal, ABG focuses on the fact the video poker industry no longer exists and, therefore, there is no opportunity for recidivism. Although the video poker gaming industry is no longer legal in South Carolina, the conduct could nevertheless be continued in other industries. Furthermore, the possibility of future conduct is only one of several factors to consider. Given the egregious conduct by ABG and its total disregard for Collins' rights, we uphold the master's decision to award punitive damages.

B.

ABG also maintains the amount awarded was excessive and violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Although the punitive damages award greatly exceeded Collins' actual damages, we hold the award did not violate due process.

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[21] "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[22]

As noted by the Supreme Court, "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[23] Nevertheless, as one commentator has recently noted, "[g]enerally, attorneys should be cautioned against relying on the ratio of punitive to compensatory damages to argue the constitutionality of awards.

---

[21] BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996).

[22] Id.

[23] Haslip, 499 U.S. at 18.

Although the ratio is a factor universally argued, there is no consistent pattern in its application."[24]

In BMW of North America v. Gore, the Supreme Court provided the following "guideposts" for determining the reasonableness of a punitive damages award: (1) the degree of reprehensibility, (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and (3) the comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.[25] We examine each of these three factors as it applies to the present case.

1.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[26] In the present case, ABG's conduct was clearly wrongful, calculated, and improper. ABG intentionally interfered with a contract, and this interference inured to the detriment of one of the parties to the contract. Although ABG argues Collins suffered only economic harm, the degree of reprehensibility was still significant. ABG went to great lengths to ensure that it would get out from under the Collins agreement, be able to place its own machines at the Ponderosa and Shipwatch locations, and then be entitled to indemnification if anything went awry. Moreover, in addition to the unusual indemnification provision in the purchase and sale agreement, there

---

[24] G. Ross Anderson, Jr., Punitive Damages: A Funny Thing Happened on the Way to the Courthouse, S.C. Trial Lawyer Bulletin, Fall 2002, at 12, 13.

[25] Gore, 517 U.S. at 575-76; see also Welch v. Epstein, 342 S.C. 279, 307, 536 S.E.2d 408, 422 (Ct. App. 2000) (applying the Gore "guideposts" to an analysis of a punitive damages award).

[26] Gore, 517 U.S. at 575.

was also evidence that ABG further attempted to insulate itself from liability by creating a shell corporation with no assets in case "the deal went sour."[27]

2.

The second factor is the ratio of punitive damages to actual damages. ABG contends a ratio of 10 to 1 is excessive. We disagree. In his order, the master stated the award was "in part based upon [his] firm conviction that American Bingo and others must not be allowed to profit from misconduct of the type established in this case."[28] Moreover, we note that, in recent reported decisions, the appellate courts of this State have upheld punitive damages awards with relationships to the actual damages awarded that have been comparably proportionate to the ratio in the present case, even when the tortious conduct resulted in economic rather physical harm.[29]

---

[27] Although it did not formally designate this as a separate issue, ABG also vigorously argues in its brief that the award was unfair because all the employees involved in the events related to the lawsuit were no longer associated with the company. We agree with Collins, however, that this fact, even if true, is immaterial in view of the fact that ABG, as a corporation, "is a distinct legal entity." Todd v. Zaldo, 304 S.C. 275, 278, 407 S.E.2d 666, 668 (Ct. App. 1991).

[28] See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) ("It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."), quoted in Hundley v. Rite Aid of S.C., 339 S.C. 285, 315, 529 S.E.2d 45, 61 (Ct. App. 2000).

[29] See, e.g., Weir v. Citicorp Nat'l Servs., 312 S.C. 511, 435 S.E.2d 864 (1993) (upholding a punitive damages award of $275,000.00 assessed against a finance company for allegedly making a false report of a debt in an action in which the plaintiff received $25,000.00 in actual damages); Dunsil v. E.M. Jones Chevrolet Co., 268 S.C. 291, 233 S.E.2d 101 (1977) (affirming a

3.

Finally, in Gore, the Supreme Court held that state courts, when reviewing punitive damages awards for excessiveness, must "compar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct."[30] Justice Stevens, writing for the Court in Gore, stated that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'"[31] In the present case, however, we were not able to locate any "legislative judgments" imposing civil or criminal penalties for tortious interference with a contract, and counsel has not directed our attention to any such statute. In our view, the absence of statutory sanctions for the specific misconduct complained of here poses a dilemma not unlike that in cases in which the reviewing court recognized that the statutory penalty was set at

---

judgment of $800.00 in actual damages and $5,800.00 in punitive damages in an action for fraud and deceit against a used car dealer); Lister v. NationsBank of Delaware, 329 S.C. 133,152-53, 494 S.E.2d 449, 460 (Ct. App. 1998) (applying the Gamble test and the guideposts in Gore to hold that a punitive damages award of $200,000.00 in an action alleging unauthorized charges on a credit card by a rental car company licensee in which the actual damages award was $8,605.08 "was not unreasonable or grossly excessive so as to violate Avis' due process interests"); Austin v. Indep. Life & Accident Ins. Co., 296 S.C. 156, 370 S.E.2d 918 (Ct. App. 1988) (upholding a remitted punitive damages award of $50,000.00 in a fraud action against an insurer, notwithstanding that the plaintiff received only nominal actual damages).

[30] Gore, 517 U.S. at 583.

[31] Id. (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

"such a low level, there is little basis for comparing it with any meaningful punitive damages award."[32]

Moreover, we reject ABG's argument that the sanctions provided in the South Carolina Antitrust Act and the South Carolina Unfair Trade Practices Act are for "comparable misconduct." Historically, the availability of these sanctions has not precluded punitive damages awards for related causes of action even when the plaintiff has also recovered under one of these acts in the same lawsuit.[33] In our view, then, these statutory penalties are not necessarily for "similar misconduct" to the extent that they would restrict the right of a finder of fact to determine an aggrieved litigant's entitlement to a well-established form of redress.[34]

Finally, with regard to ABG's allegation that, to date, the largest ratio of punitive damages to actual damages for tortious interference with contractual relations in any reported decision issued in this State is 6 to 1,[35]

---

[32] BMW of N. Am. v. Gore, 701 So. 2d 507, 514 (Ala. 1997).

[33] See, e.g. ,Smith v. Strickland, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994) (requiring the plaintiffs to elect between recovering punitive damages for fraud and treble damages under the Unfair Trade Practices Act); Freeman v. A. & M. Mobile Home Sales, Inc., 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987) (upholding a punitive damages award of $40,000.00 in an action for fraud, unfair trade practices, and violations of the consumer protection code, in which the plaintiff recovered $1,751.00 in actual damages on each of her three causes of action).

[34] See Life Ins. Co. of Ga. v. Johnson, 701 So. 2d 524, 531 (Ala. 1997) (recognizing that insurance fraud victims have "little recourse other than through litigation" and that "[p]unitive damages have historically been part of the remedy for such victims").

[35] In support of its argument, ABG cited Kinard v. Crosby, 315 S.C. 237, 433 S.E.2d 835 (1993) and Collins v. Terry, 303 S.C. 358, 400 S.E.2d 783 (Ct. App. 1991).

we find it significant that, notwithstanding the heightened scrutiny by the United States Supreme Court of punitive damages awards in recent cases, the Court has been reluctant to impose a bright-line ratio in a due process analysis.[36] Moreover, the majority in Gore observed that "[i]n most cases, the ratio will be well within a constitutionally acceptable range, and remittitur will not be justified on this basis."[37] In our view, we hold the ratio of punitive to actual damages in this case, which was less than 10 to 1, was not excessive in view of the evidence of ABG's carefully orchestrated scheme to interfere with Collins' contract and of ABG's attempt to shield itself from liability.[38]

---

[36] See State Farm Mut. Auto Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) ("Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'") (quoting Gore, 517 U.S. at 582).

[37] Gore, 517 U.S. at 583.

[38] See Gore, 517 U.S. at 583 (noting that "[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a judicial eyebrow'") (quoting TXO, 509 U.S. at 481 (O'Connor, J., dissenting)); Continental Trend Res., Inc. v. OXY, USA, Inc., 101 F.3d 634, 639 (10th Cir. 1996) ("[W]e surmise that in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio.").

V. Motion to Supplement

ABG contends the master erred in failing to allow it to supplement the record with additional information regarding its financial condition and more recent financial statements. We find no abuse of discretion.[39]

The information ABG purportedly sought to introduce consisted of a letter from an accounting firm concerning the current financial status of Littlefield Corporation, the successor-in-interest to ABG. The certified public accountant who prepared the letter opined that, based on his analysis, the amount of punitive damages awarded represented approximately 27 per cent of the available net equity of Littlefield. ABG maintained this information was not available when the case was tried in September 2000 and did not become available until December 2000.

The master heard the case on September 18, 2000, and his final order was dated February 6, 2001. ABG, however, did not file its motion to supplement the record until March 19, 2001, more than one month after judgment was rendered. Even assuming the information that ABG sought to include in the record was, as ABG contended, unavailable until December 2000, ABG has offered no reason as to why it never moved to supplement the record during the weeks that passed between the time it received the documents and the filing of the master's order and instead waited until after

[39] See Wright v. Strickland, 306 S.C. 187, 410 S.E.2d 596 (Ct. App. 1991) (stating the decision whether or not to grant a motion to supplement the record is within the sound discretion of the trial court).

judgment to proffer the information. We hold this reason alone is sufficient to justify the master's denial of ABG's motion to supplement the record.[40]

AFFIRMED.

HUFF, J., and BEATTY, A.J., concur.

[40] See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding an appellate court can affirm a trial court ruling for any reason appearing in the record).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter Of The Estate Of Gordon S. Boynton

Ervin Mathias, as Co-Personal Representative of the Estate of Gordon S. Boynton; Gordon Benjamin Kearse; Loraine K. Clark; James G. Kearse; Esther S. Kearse, as Personal Representative of the Estate of Henry A. Kearse; and June Kearse, as Personal Representative of the Estate of Richard M. Kearse, Respondents,

v.

Janice Taylor Clark, Individually and as Co-Personal Representative of the Estate of Gordon S. Boynton, Appellant.

Appeal From Barnwell County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3662
Heard March 12, 2003 – Filed July 21, 2003

AFFIRMED

James D. Mosteller, of Columbia, for Appellant.

B. Michael Brackett, of Columbia, for Respondents.

STILWELL, J.: Janice Taylor Clark, the illegitimate daughter of Henry Taylor, appeals the circuit court's decision that the remainder devise to the "child or children" of Taylor in Item I of Gordon Boynton's will did not include illegitimate children. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Boynton died testate in 1954, devising a life estate in an 860 acre farm to Taylor with the remainder to Taylor's child or children and a contingent remainder to Boynton's heirs at law should Taylor die without children. Taylor died in 1995 with Clark as his only issue. On December 6, 2000, Ervin Mathias, as co-personal representative of Boynton's estate, and Boynton's heirs filed a complaint in probate court seeking a declaratory judgment that Boynton's use of the words "child or children," by definition, excluded Clark because she was illegitimate.[1] By agreement of the parties, the matter was submitted on stipulated facts and briefs to the probate court. The probate court found Clark was the "sole remainderman of the life estate interest" under Boynton's will. Mathias appealed to the circuit court. Clark cross-appealed, alleging the probate court erred in refusing to consider evidence outside the written stipulations. The circuit court dismissed the cross-appeal and reversed the probate court.

STANDARD OF REVIEW

[1] This case overlaps with a closely related paternity action filed by Clark. This court affirmed the family court's finding that Taylor was Clark's father. Clark v. Clark, Op. No. 2002-UP-145 (S.C. Ct. App. filed Feb. 26, 2002).

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). "In such cases, the appellate court owes no particular deference to the trial court's legal conclusions." J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (2001); see also Duke Power Co. v. Laurens Elec. Coop., Inc., 344 S.C. 101, 104, 543 S.E.2d 560, 561-62 (Ct. App. 2001). On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Supreme Court or Court of Appeals would apply on appeal. In re Howard, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993).

LAW/ANALYSIS

Clark argues the circuit court erred when it applied 1954 law to construe the language of Boynton's will. We disagree.

Generally, the provisions of a will and restrictions on the power of testamentary disposition are determined according to the law in effect at the time of the testator's death or the time when the will is executed. 79 Am. Jur. 2d Wills § 55 (2002); see 4 Bowe-Parker, Page on Wills § 30.27 (1961 & Supp. 2003); 96 C.J.S. Wills § 880 (2001). A will speaks at the time of the testator's death. See, e.g., Shelley v. Shelley, 244 S.C. 598, 605, 137 S.E.2d 851, 854 (1964); Landrum v. Branyon, 161 S.C. 235, 246-48, 159 S.E. 546, 550 (1931). The modern probate code, which took effect in 1987, states "a substantive right in the decedent's estate accrues in accordance with the law in effect on the date of the decedent's death." S.C. Code Ann. § 62-1-100(b)(4) (Supp. 2002). Boynton executed his will in August 1954 and died three weeks later. Thus, the law as it existed in 1954 applies.

Clark insists to construe the will the court should apply the law as it existed at the time of the death of the life tenant Taylor. Clark relies on the holding in Freeman v. Freeman, 323 S.C. 95, 100-105, 473 S.E.2d 467, 471-73 (Ct. App. 1996) and Haskell v. Wilmington Trust Co., 304 A.2d 53 (Del. 1973) superseded by statute as stated in Annan v. Wilmington Trust Co., 559 A.2d 1289, 1292 n.2 (Del. 1989). Freeman concerned an illegitimate heir

who was not permitted to inherit from her putative father because she could not satisfy the condition set out in Mitchell v. Hardwick, 297 S.C. 48, 51, 374 S.E.2d 681, 683 (1988) that she conclusively establish paternity within the statutory timeframe. Freeman did not involve a testate estate, will construction, or a determination of whether the date of death law or subsequent law controlled the construction of a will. Further, even though Haskell may be persuasive, holdings of the Delaware Supreme Court are not binding on this court. We know no rule or precedent under South Carolina law requiring a testator who makes a devise to a class whose membership could close at a point after the testator's death to contemplate all the changes that could occur in the controlling law subsequent to his death. Thus, the law as it existed in 1954 controls.

Clark argues that the application of more current law would require an equal protection analysis under Trimble v. Gordon, 430 U.S. 762 (1977), which held it unconstitutional to create legal distinctions between legitimate and illegitimate children's inheritance rights under statutes of descent and distribution, and its progeny. See Mitchell v. Hardwick, 297 S.C. 48, 374 S.E.2d 681 (1988); Wilson v. Jones, 281 S.C. 230, 314 S.E.2d 341 (1984). In the alternative, Clark urges retroactive application of Trimble's equal protection doctrine if the court determines 1954 law controls.

The equal protection analysis in Trimble is inapplicable. The question before this court is whether Boynton intended to include illegitimate children when he used the term "child or children of Henry Taylor" in his 1954 will. Trimble addresses the question of an illegitimate child's right or ability to inherit from the intestate estate of his parent pursuant to a state intestacy statute. No state action or intestacy in this case requires the application of equal protection principles. Equal protection is only implicated where there is state action. See Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). Private conduct does not raise an equal protection violation. See id. South Carolina law is well settled that a testator may devise his property any way he sees fit, as long as it is not contrary to law or public policy. See Hellams v. Ross, 268 S.C. 284, 290, 233 S.E.2d 98, 101 (1977); Brown v. Drake, 275 S.C. 299, 270 S.E.2d 130 (1980).

Clark also relies on the public policy advanced by the probate court that applying 1954 common law would be unconstitutional, contrary to In re Estate of Mercer, 288 S.C. 313, 317, 342 S.E.2d 591, 593 (1986) (citing Trimble, 430 U.S. at 762) ("The state's interest in the sanctity of marriage is not substantially related to limiting the inheritance rights of a certain class of illegitimate children."). Clark's reliance on Mercer is misplaced. Mercer found South Carolina Code Annotated § 21-7-480 (1976) unconstitutional on equal protection grounds because it limited what a married man could devise to his mistress or illegitimate child. The facts and result are inapposite to the issue in this case, since no statute prohibits Boynton devising to illegitimate children. Rather, our concern is determining the testator's intent under the intestacy law, which he is presumed to know.

Clark argues the court erred in determining the remainder to Taylor's "child or children" in Boynton's will excluded illegitimate children. We disagree.

Generally, the law provides that the word "children" does not include illegitimate children, except when the testator's intent to include them is clear. 96 C.J.S. Wills § 934 (2001). The law of South Carolina in 1954 embraced this view. See Shearman v. Angel, 8 S.C. Eq. (Bail. Eq.) 351 (1831) (illegitimate children cannot take with legitimate children where testator devises to "children"); Wish v. Kershaw, 8 S.C. Eq. (Bail. Eq.) 353 (1827) (parol or extrinsic evidence cannot be admitted to show testator's intent to include illegitimate takers); see also Coleman Karesh, Wills 7 (1977) (general rule of construction that gift by will to testator's children or the children of another includes only legitimate children).

Clark argues that Wish and Shearman are limited to a narrow set of facts where legitimate and illegitimate children are competing to take from the same devise. She cites the court's language in Wish that: "If there had been any legitimate children, they would have been understood to be the persons designated [to take as "children"]; but there being none, we are driven to the inquiry, whether there are any persons in existence, who had acquired the reputation of children." Clark interprets the court's opinion to mean that where the only surviving child is illegitimate, then extrinsic

evidence may be introduced to prove reputation as a child. Clark then presents the family court's determination and evidence presented in that case as proof of her reputation as Henry Taylor's illegitimate child.

We decline to accept Clark's interpretation of the holding in Wish. In Wish, the testatrix died leaving an illegitimate grandchild and several legitimate grandchildren. The issue was whether extrinsic or parol evidence could be admitted to prove there was an illegitimate grandchild and that the testatrix intended to include her. Parol evidence was excluded. The court in Wish cited case law that "an illegitimate child was held not to be under the description of a child contained in the Will; although the testator knew the state of the family, and that there were several illegitimate, and no legitimate children."

Both Clark and Taylor were alive in 1954 when Boynton executed his will. Boynton did not choose to designate Clark as a devisee by name or description. He chose instead to leave a remainder interest to the "child or children" of Henry Taylor. "[P]rovisions in a will are presumed to be made with an understanding of, and intent to act pursuant to, law and public policy as it exists when the will is executed . . . ." 80 Am. Jur. 2d Wills § 1219 (2002). The common law governing testamentary dispositions in 1954 recognized a narrow definition for the terms "child" and "children" to mean only legitimate children. Accordingly, the remainder interest to the "child or children of Henry Taylor" in Boynton's will does not include illegitimate children.

Clark argues the circuit court erred in dismissing her cross-appeal that the probate court erred by refusing to consider evidence outside the parties' agreed stipulation of facts. We disagree.

Clark agreed to submit the matter to the probate court on stipulated facts. She made no objection to limiting the record to the stipulations nor did she reserve the right to present evidence outside of the stipulations. 4 C.J.S. Appeal & Error § 185 (1993) (A party who voluntarily acquiesces in or takes a position inconsistent with the right to appeal impliedly waives or is

estopped to assert his right to appellate review.). Thus, Clark's cross-appeal was properly dismissed.

AFFIRMED.

CURETON and HOWARD, JJ., concur.

STATE OF SOUTH CAROLINA
In The Court of Appeals

Lighthouse Tennis Club Village Horizontal Property Regime LXVI, Respondent,

v.

South Island Public Service District f/k/a Sea Pines Public Service District, Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Circuit Court Judge

Opinion No. 3664
Heard April 8, 2003 – Filed July 21, 2003

AFFIRMED

Stephen E. Carter, of Hilton Head Island, for Respondent.

Edward E. Bullard and Stephen Bull, both of Hilton Head Island, for Appellant.

HOWARD, J.: Lighthouse Tennis Club Horizontal Property Regime LXVI ("Lighthouse") brought this declaratory judgment action to enjoin South Island Public Service District ("South Island") from leasing an access easement granted in connection with the operation of a water and sewer system to telecommunications companies for the unrelated activity of installing and maintaining telecommunications equipment. Lighthouse asserted South Island improperly leased the use of its access easement across Lighthouse's property to five telecommunications companies ("Telecom"), allowing them to travel over Lighthouse's property to install and maintain telecommunications antennas and equipment on the adjoining property owned by South Island. The circuit court ruled the easement does not permit South Island or its assignees to use the easement across Lighthouse's property for any purpose except "to operate and maintain [Lighthouse's] water and sewer systems." South Island appeals. We affirm.

FACTS/PROCEDURAL HISTORY

During the construction of a condominium complex in the Sea Pines Plantation of Hilton Head Island, the developer installed water and sanitary sewer systems, including the necessary pipes, valves, hydrants, fittings, manholes, and other appurtenances. Following completion of the project, the developer conveyed the condominiums and recreational areas to Lighthouse, and the water and sewer systems to South Island's predecessor. As part of this transaction, the developer granted South Island's predecessor an easement across its property to the water and sewer company's adjoining property on which a water tower and related equipment were located. The adjoining property is landlocked by Lighthouse's property and is only accessible via the easement. This easement later ran to South Island as the original water company's successor in interest.

The easement provides South Island with an "easement . . . over all open area[s], driveways, and parking lots . . . to service the said water and sewer lines and ingress and egress to all adjacent pump stations, wells, tank sites, etc." The easement grants South Island "the right to do whatever acts are necessary . . . to operate and maintain the . . . water and sewer systems . . . [and] the right of reasonable access across the properties of [Lighthouse] as

may be necessary from time to time to maintain the water and sewer systems."

Almost two decades after the easement was granted, South Island began leasing space on top of its water tower to Telecom for the installation of antennae, support equipment, and emergency power generation equipment. To install and maintain the telecommunications equipment, South Island leased to Telecom the use of the easement, permitting Telecom to travel over Lighthouse's property. Following the execution of the lease agreements, Telecom began moving equipment onto and through the easement. None of the equipment was necessary for maintaining the water or sewer systems.

Lighthouse brought this declaratory judgment action to enjoin South Island from using its property in violation of the easement. The parties stipulated the question presented was whether the easement's use, as provided in the lease agreements, constituted a non-permitted use of the easement property. The circuit court found the easement did not permit South Island to use the easement property for any purpose except "to operate and maintain [Lighthouse's] water and sewer systems." Thus, the circuit court ruled the easement's use, as contemplated in the lease agreements, was a non-permitted use of the easement property. South Island appeals. We affirm.

LAW/ANALYSIS

I. Extent of Easement

South Island argues the circuit court erred in finding the easement does not permit South Island or its assignees to use the easement across Lighthouse's property for any purpose except "to operate and maintain [Lighthouse's] water and sewer systems." We disagree.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "[T]he determination of the extent of a grant of an easement is an action in equity. Thus, this Court may

take its own view of the evidence . . . ." Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997) (internal citation omitted).

South Island argues the granting clause of the easement created a complete and absolute estate, which could not be limited by the subsequent description of the easement. As authority for its position, South Island cites and strongly relies on Abbeville County v. Knox, 267 S.C. 38, 225 S.E.2d 863 (1976) and Stylecraft, Inc. v. Thomas, 250 S.C. 495, 159 S.E.2d 46 (1968) for the proposition that once an estate has been granted in a deed, subsequent words attempting to limit the grant of that estate are ineffective. However, South Island's reliance on these two cases is misplaced.

> In [Groce v. S. Ry. Co., 164 S.C. 427, 162 S.E. 425 (1932) and Stylecraft], the granting clause created a *fee simple estate* in the grantee.
>
> . . .
>
> [Thus, the] court held in both cases that [any subsequent] limitations upon the use of the property conveyed were ineffectual under the established rule that where the granting clause in a deed conveys a fee simple title that estate may not be cut down by subsequent words in the same instrument.

Douglas v. Med. Investors, Inc., 256 S.C 440, 446, 182 S.E.2d 720, 722-23 (1971) (emphasis added).[1] In the present case, the deed in question never granted South Island a fee estate. Thus, we find these cases and the general premise of law for which they are cited are not applicable with respect to the grant of an easement.

[1] Although Douglas does not directly address Abbeville County, we find its discussion of Groce and Stylecraft consistent with our reading of Abbeville County.

The grant of an easement does not create a complete and absolute estate. See id. at 445, 182 S.E.2d at 772 (holding "[a]n easement is . . . not an estate in lands in the usual sense"). Rather, "[a]n easement is a right which one person has to use the land of another for a *specific purpose*," Steele v. Williams, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944) (emphasis added), and "gives no title to the land on which the servitude is imposed." Morris v. Townsend, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970).

"The general rule is that the character of an express easement is determined by the nature of the right and intention of the parties creating it." Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994). To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the "[c]lear and unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken, and understood in their plain, ordinary, and popular sense." S.C. Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). Moreover, we must effectuate the parties' intention "unless that intention contravenes some well-settled rule of law or public policy." Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987).

In reviewing the law of this state, we find "no settled rule of law which would prohibit [us from] giving effect to the intent of the parties" when construing the grant of an easement with its subsequent description where both are contained within the same instrument. See Douglas, 256 S.C at 446, 182 S.E.2d at 722.

Contained within the deed conveying the adjoining property to South Island's predecessor is the grant of the easement at issue in this case, which provides South Island an

> easement . . . over all open area[s], driveways, and parking lots . . . to service the said water and sewer lines and ingress and egress to all adjacent pump stations, wells, tank sites, etc.

. . .

> to do whatever acts are necessary . . . to operate and maintain the . . . water and sewer systems . . . [and] the right of reasonable access across the properties of [Lighthouse] as may be necessary from time to time to maintain the water and sewer systems.

Clearly the easement grants South Island the right to use Lighthouse's property. However, reading the grant in light of the clear and unambiguous terms contained within the easement's description, we agree with the circuit court's ruling that the easement does not permit South Island to use the easement property for any purpose except "to operate and maintain [Lighthouse's] water and sewer systems." Thus, because the easement is limited to those acts necessary to operate and maintain the water and sewer systems, we conclude neither South Island nor Telecom is permitted to use the easement as access over Lighthouse's property to install and maintain telecommunications equipment.

II. Motion to Alter or Amend

After the circuit court issued its initial order, South Island moved pursuant to Rules 52(b), 59(e), and 60(a), SCRCP, to have the circuit court amend its judgment. Specifically, South Island asked the circuit court to review its order and clarify a contradictory factual finding. Subsequently, the circuit court issued an amended order in which it changed the contradictory factual finding to conform with its original legal conclusion. South Island argues the circuit court erred in amending its order.

In its motion to alter or amend the judgment, South Island asked the circuit court to review its order and clarify a contradictory finding. The rules cited by South Island in its motion specifically provide the circuit court with the authority to amend its findings or correct clerical mistakes. See Rules 52(b), 59(e), & 60(a), SCRCP. Thus, in light of South Island's request, we find the circuit court did not err in amending its order to remove any confusion.

CONCLUSION

For the foregoing reasons, the circuit court's order, finding the grant of the easement does not permit South Island or its assignees to use the easement across Lighthouse's property for any purpose except "to operate and maintain [Lighthouse's] water and sewer systems," and the easement's use, as contemplated in the lease agreements, constituted a non-permitted use of the easement property is

AFFIRMED.

STILWELL, J., and STROM, Acting Judge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Fisher, as Personal Representative of the Estate of Daniel Adam Fisher, Sr., Respondent,

v.

Randy Stevens; Robert E. Poindexter, Individually and d/b/a Low Country Tops Wrecker Service; Speedway of South Carolina, Inc. d/b/a Myrtle Beach Motor Speedway; and National Association for Stock Car Auto Racing, Inc., Defendants,

Of whom Randy Stevens; Robert E. Poindexter, Individually and d/b/a Low Country Tops Wrecker Service; and Speedway of South Carolina, Inc. d/b/a Myrtle Beach Motor Speedway, are Appellants.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 3665
Submitted May 12, 2003 – Filed July 21, 2003

AFFIRMED

Willard D. Hanna, Jr. and Nancy K. Tracy, both of Surfside Beach, for Appellants Randy Stephens and Robert E. Poindexter, Individually and d/b/a Low Country Tops Wrecker Service.

Perry D. Boulier, and Ginger D. Goforth, both of Spartanburg, for Secondary Appellant Speedway of South Carolina, Inc. d/b/a Myrtle Beach Motor Speedway.

Richard L. Hinson, of Florence, and Ronald G. Kronthal, of Gaithersburg, Maryland, for Respondent.

CONNOR, J.: Daniel Adams Fisher, Sr., by and through his Conservator and Legal Guardian, Cole Smith, brought this action asserting negligence, gross negligence, and recklessness claims against Randy Stevens, Robert E. Poindexter, individually and d/b/a/ Low Country Tops Wrecker Service, and Speedway of South Carolina, Incorporated ("Speedway"), for injuries suffered after falling from a wrecker truck at the Myrtle Beach Motor Speedway.[1] All parties filed cross-motions for summary judgment seeking a determination of whether the Release and Waiver of Liability and Indemnity Agreement signed by Fisher bars Fisher's recovery. The trial court partially granted Fisher's motion for summary judgment as to Stevens and Poindexter. The trial court also denied summary judgment to Speedway, finding a

[1] David Fisher, as Personal Representative of the Estate of Daniel Adam Fisher, Sr., has been substituted as Respondent because of the death of Daniel Fisher during the pendency of this appeal.

genuine issue of material fact existed concerning whether a master/servant relationship existed between Speedway and Fisher.[2] We affirm.

FACTS

On June 10, 2000, Fisher served on a wrecker crew at Speedway. Fisher signed a release to gain access to the pit area where the wrecker was located and did not pay admission. Fisher had signed the release and served on a wrecker crew on numerous prior occasions. The release states in applicable part:

> RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT
>
> THIS SECTION MUST BE CAREFULLY READ AND SIGNED BY THE APPLICANT IN CONSIDERATION OF BEING PERMITTED TO ENTER FOR ANY PURPOSE ANY RESTRICTED AREA (herein defined as including but not limited to the racing surface, pit areas, infield, paddock area, grandstand area, and all walkways, concessions, and other areas appurtenant to any area where any activity related to the EVENT(S) shall take place) or being permitted to compete, officiate, observe, work for, or for any purpose participate in any way in the EVENT(S) . . . .
>
> 1. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE THE PROMOTERS, PARTICIPANTS, RACING ASSOCIATION, SANCTIONING ORGANIZA-

[2] The trial court also granted National Association for Stock Car Auto Racing's (NASCAR) motion for summary judgment. Fisher does not appeal this ruling.

TION OR ANY SUBDIVISION THEREOF, TRACK OPERATOR, TRACK OWNER, OFFICIALS, VEHICLE OWNERS, DRIVERS, PIT CREWS, ANY PERSONS IN ANY RESTRICTED AREA . . . ALL FOR THE PURPOSES HEREIN REFERRED TO AS THE "RELEASEES", FROM ALL LIABILITY to the undersigned, his/her personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claim or demands therefore on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence or gross negligence of the "RELEASEES" or otherwise while the undersigned is in or upon the restricted area, and/or competing, officiating in, observing, working for, or for any purposes participating in the EVENT(S).

. . .

3. HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGES DUE TO THE NEGLIGENCE OR GROSS NEGLIGENCE OF "RELEASEES" OR OTHERWISE while in or upon the restricted areas . . . .

EACH OF THE UNDERSIGNED expressly acknowledges and agrees that the activities of the EVENT(S) are very dangerous and involve risk of serious injury and/or death . . . . EACH OF THE UNDERSIGNED further expressly agrees that the foregoing release, waiver, and indemnity agreement is intended to be as broad and inclusive as is permitted by the law of the Province or State in which the EVENT(S) is conducted . . . .

During a race on the day of the accident, two racecars crashed on the racing surface and Fisher's wrecker responded to retrieve one of the vehicles. Fisher was riding on the back of a wrecker driven by Stevens and owned by Poindexter. After briefly slowing down to ask if the driver of the first car needed assistance, the wrecker moved off towards the second car. Fisher fell off the wrecker, suffering severe head injuries.

Fisher brought suit alleging negligence, gross negligence, and recklessness. Stevens, Poindexter, and Speedway asserted the release as an affirmative defense. All parties filed cross-motions for summary judgment, asking for a determination of whether the release acted as complete bar to Fisher's claims. The trial court granted partial summary judgment to Fisher against Stevens and Poindexter, finding the release, as a matter of law, does not bar Fisher's claims. The court denied summary judgment to Speedway, finding an issue of fact existed concerning whether Fisher was an employee of the Speedway, thus invalidating the release as being contrary to public policy.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

LAW/ANALYSIS

I. Partial Grant of Summary Judgment

Stevens and Poindexter argue the trial court erred in granting summary judgment to Fisher and finding the Release inapplicable to them as a matter of law. Stevens and Poindexter contend the Release applies to them pursuant to the language releasing "VEHICLE OWNERS, DRIVERS, [and] . . . ANY PERSONS IN ANY RESTRICTED AREA" from any liability.

Our Supreme Court, in recognition of the freedom of private parties to contract as they choose, previously has upheld exculpatory contracts such as the one in this case. Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281 S.E.2d 223 (1981); Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964). In Huckaby, the Court addressed a waiver and release form in the context of a racetrack and held a waiver agreement voluntarily entered into by a racecar driver barred his cause of action for negligence against the defendant speedway. Huckaby, 276 S.C. at 630, 281 S.E.2d at 224. The Court noted several jurisdictions have upheld the validity of releases from liability for injuries arising in connection with automobile racing against public policy challenges to their enforcement. Id.

However, notwithstanding the general acceptance of exculpatory contracts, "[s]ince such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon." Pride, 244 S.C. at 619, 138 S.E.2d at 157.

> Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair and just, the latter construction will prevail.

Georgetown Mfg. & Warehouse Co. v. South Carolina Dep't of Agric., 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct. App. 1990).

Stevens and Poindexter first claim they are clearly encompassed within the language of the release since they were the driver and owner, respectively, of the wrecker. However, as the trial court found, the terms "vehicle owner" and "driver" are used in this setting to denote the owner and driver of a competing racecar. The NASCAR rulebook governing events at the Myrtle Beach Motor Speedway includes the terms "drivers" and "car owners" within the definition of a "competitor."[3] These two terms of art are not used to identify any owner or driver of any vehicle. This provision cannot be construed to exempt Stevens and Poindexter from liability for their negligence "'in the absence of explicit language clearly indicating that such was the intent of the parties.'" South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984) (quoting Hill v. Carolina Freight Carriers Corp., 71 S.E.2d 133, 137 (N.C. 1952)); see also Dobratz v. Thomson, 468 N.W.2d 654 (Wis. 1991) (finding an exculpatory contract unenforceable as a matter of law due to its ambiguity and uncertainty and stating the facts and circumstances of the agreement must express the intent of the parties with particularity). Neither the wrecker, nor its owner or driver, was explicitly mentioned in the release. Thus, the trial court did not err in strictly construing the language of the release to apply to only the owner and driver of a competing racecar.

Stevens and Poindexter additionally rely on the phrase in the agreement purporting to release "ANY PERSONS IN ANY RESTRICTED AREA" from liability. As the trial court found, this phrase is overly broad and its enforcement would offend notions of public policy.

South Carolina courts have not specifically addressed whether an overbroad exculpatory contract contravenes public policy. In an analogous

---

[3] The Myrtle Beach Motor Speedway operates under a NASCAR sanctioning agreement. The sanctioning agreement provides racing events held at the Speedway shall be conducted in accordance with the NASCAR rulebook.

case, Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231 (1934), our Supreme Court addressed whether an indemnity provision relieved a defendant from liability for its own negligence. The Court found the following provision to be broad and comprehensive, yet provocative of some doubt: "The agent shall . . . exonerate the Company and hold it harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station." Id. at 401-02, 174 S.E. at 231-32. Resolving all doubt in favor of the plaintiff, the Court found the parties did not intend for the contract to relieve the defendant from all liability for its own negligence since it could have plainly stated such if that was the intention of the parties. Id. at 402-03, 174 S.E. at 232. Thus, in Murray, the Court resolved the issue on a contractual basis, rather than on public policy grounds. See also Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989) (finding a broad, comprehensive indemnity provision to be nonetheless provocative of some doubt concerning its application, thus resolving doubt in favor of party against whom enforcement is sought).

In Richards v. Richards, 513 N.W.2d 118 (Wis. 1994), the court found an overly broad exculpatory contract void because it was against public policy. In Richards, a truck driver's employer required the driver's wife to sign a "Passenger Authorization" form before she could accompany her husband. The language of the form purported to relieve the employer and "all affiliated, associated, or subsidiary companies, partnerships, individuals, or corporations, and all other persons, firms, or corporations" from any and all liability for harm to the person signing the form. Id. at 119-122. In holding this provision overly broad and in contravention of public policy, the court noted the "very breadth of the release raises questions about its meaning . . . ." Id. at 122.

If we agreed with Stevens and Poindexter, the language of the release in the present case would release from liability any person in the restricted area of the track, whether authorized to be there or not. Any person who somehow gained unauthorized access to the restricted area would then be released from liability under this provision. "An exculpatory agreement will be held to contravene public policy if it is so broad 'that it would absolve [the

defendant] from any injury to the [plaintiff] for any reason.'" Id. at 121 (quoting College Mobile Home Park & Sales, Inc. v. Hoffmann, 241 N.W.2d 174, 178 (Wis. 1976)). In Richards, like the present case,

> the release does not refer to an injury the plaintiff may sustain while riding as a passenger in the specified . . . vehicle . . . [and] purports to release the [defendant] from liability for any and all injury to the plaintiff while the plaintiff is a passenger in **any** vehicle (not necessarily one owned by the [defendant]) at **any** time . . . .

Richards, 513 N.W.2d at 122 (emphasis added).

Accordingly, this provision is too broad to be enforceable against Fisher and is void as against public policy.

Moreover, strictly construing this broad provision and resolving any doubt in favor of Fisher, it was not the intent of the parties to give the contract the effect claimed by Stevens and Poindexter, given the release could have plainly stated that Fisher agreed to relieve the wrecker's owner and driver from all liability. See Murray, 172 S.C. at 402-03, 174 S.E. at 232. The contract did not clearly inform Fisher he would be waiving all claims due to Stevens's and Poindexter's negligence. See Yauger v. Skiing Enters., Inc., 557 N.W.2d 60 (Wis. 1996) (finding an exculpatory contract void as against public policy because it did not clearly inform the plaintiff he was waiving all claims due to defendant's negligence).

The cases cited by Stevens and Poindexter are distinguishable from the present case. In each case, the plaintiff sued the track owners, operators, promoters, or sanctioning body, all of whom are parties clearly intended to be covered under waiver and release forms similar to the one in this case.[4]

[4] See, e.g., Dunn v. Paducah Int'l Raceway, 599 F. Supp. 612 (W.D. Ky. 1984); Rhea v. Horn-Keen Corp., 582 F. Supp. 687 (W.D. Va. 1984); LaFrenz v. Lake County Fair Bd., 360 N.E.2d 605 (Ind. Ct. App. 1977);

Moreover, none of the cases cited exempted a defendant from liability based on the broad "catch-all" phrase relied on by Stevens and Poindexter.

The trial judge correctly determined the Release did not bar Fisher from recovering against Poindexter and Stevens. Accordingly, we affirm the trial court's partial grant of summary judgment.

II. Denial of Speedway's Motion for Summary Judgment

Speedway argues the trial court erred in finding the release did not bar Fisher's claims as a matter of law. The trial court denied Speedway's motion for summary judgment, finding a genuine issue of material fact concerning whether a master/servant relationship existed between Fisher and Speedway.

We decline to address the merits of this issue. The denial of a motion for summary judgment is not directly appealable, even after final judgment. Olson v. Faculty House of Carolina, Inc., Op. No. 25632 (S.C. Sup. Ct. filed Apr. 28, 2003) (Shearouse Ad. Sh. No. 16 at 24); Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994).

CONCLUSION

Based on the foregoing analysis, the trial court's partial grant of summary judgment to Fisher is

AFFIRMED.

HEARN, C.J. and STILWELL, J., concur.

Holzer v. Dakota Speedway, Inc., 610 N.W.2d 787 (S.D. 2000); Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993); Plant v. Wilbur, 47 S.W.3d 889 (Ark. 2001); Seymour v. New Bremen Speedway, Inc., 287 N.E.2d 111 (Ohio Ct. App. 1971); Dean v. MacDonald, 786 A.2d 834 (N.H. 2001).