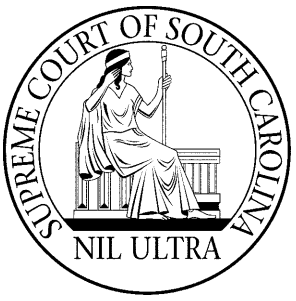

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 28, 2003

ADVANCE SHEET NO. 28

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Laurens Emergency Medical Specialists, PA, Respondent,

v.

M.S. Bailey & Sons Bankers, and Laurens County Health Care System, Defendants,

Of which Laurens County Health Care System is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25683
Heard April 22, 2003 - Filed July 28, 2003

REVERSED AND REMANDED

J. Michael Turner and Rhett D. Burney, both of Turner, Able & Burney, LLP, of Laurens, for Petitioner.

A. Camden Lewis and Thomas Pendarvis, both of Lewis, Babcock & Hawkins, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This Court granted certiorari to review the Court of Appeals' decision affirming summary judgment in favor of Respondent, Laurens Emergency Medical Specialists, P.A. ("EMS").

FACTUAL / PROCEDURAL BACKGROUND

On November 1, 1992, EMS and Laurens County Health Care System ("Hospital") entered into a contract in which EMS agreed to provide emergency services for the Hospital. Under the contract, EMS was responsible for employing emergency room physicians and a medical director for the Hospital's emergency department. The contract required the Hospital to employ and assign non-physician personnel to the emergency department to perform the department's administrative work.

Dr. Gail Bundow, managing partner and principal shareholder of EMS, was appointed as the medical director for the Hospital's emergency department. The Hospital hired Anita Raines ("Raines") to be the secretary to Dr. Bundow in her capacity as the medical director.[1] From 1995 to 1997, Raines stole thousands of dollars from EMS before the theft was finally detected. As a result, EMS sued the Hospital, alleging several causes of action, including negligent hiring, retention, and supervision of Raines; breach of contract for failure to provide qualified and competent employees and for permitting improper and illegal activities; and indemnification. EMS sought indemnification for its losses pursuant to a clause in its contract with the Hospital. The indemnification clause provided,

> The Hospital will indemnify and hold [EMS] and the Emergency Physicians harmless from and against any and all claims[,]

[1] There is no question that Raines was the Hospital's employee, but Dr. Bundow did get to interview Raines before the Hospital hired her and also participated in Raines' evaluations during the time she was employed by the Hospital.

> actions, liability, or expenses (including judgments, court costs, and reasonable attorney's fees) caused by or resulting from allegations of wrongful acts or omissions of Hospital employees, servants, agents. Upon notice by [EMS], the Hospital shall resist and defend, and at its own expense, and by counsel reasonably satisfactory to [EMS], such claim or action.

Hospital admitted Raines was its employee, but asserted several defenses, including that EMS was contributorily negligent in failing to procedurally safeguard against theft or detect it once it occurred. EMS moved for summary judgment on the indemnification cause of action. Hospital moved for summary judgment on all causes of action. Hospital argued any losses suffered by EMS were the result of EMS' failure to properly monitor its own affairs and Raines, and, therefore, that it was not obligated to indemnify EMS.

The trial court granted EMS' motion for summary judgment, finding that EMS was entitled to indemnification by the Hospital for the wrongful acts of Raines, as the Hospital's employee. The trial court went on to award EMS $76,709.32 in damages. Upon the Hospital's motion for reconsideration, however, the trial court reversed summary judgment on the damages issue, finding that the *amount* of damages was a question of fact for the jury to decide.

The Hospital appealed, arguing that the absence of a third party claim against EMS relieves the Hospital from indemnifying EMS. The Court of Appeals disagreed, and found that the parties to a contract may agree to indemnify each other even when no third party claim has been filed. *Laurens Emergency Med. Specialist, P.A. v. M.S. Bailey & Sons Bankers,* 348 S.C. 191, 558 S.E.2d 531 (Ct. App. 2002).[2] Applying the general principles of contract interpretation, the Court of Appeals held that the parties intended for the Hospital to indemnify EMS for losses suffered at the hands of the Hospital's employees, and that embezzlement counted as an expense, a term

[2] EMS also sued its bank, M.S Bailey & Sons Bankers, for conversion and negligence for failure to use due care in examining checks to determine whether they had been altered or forged.

used in the indemnification clause of the contract. *Id.* The Court of Appeals found the absence of language restricting the obligation to indemnify EMS for losses resulting form third party claims to be significant. *Id.* Similarly, the Court of Appeals found that any negligence on the part of EMS was irrelevant because the contract did not condition indemnification on a lack of negligence. *Id.* (citing *United States v. Hollis*, 424 F.2d 188, 190 (4th Cir. 1970)).

The Court granted certiorari to review the following issues:

I. Did the Court of Appeals err in holding that Hospital was obligated to indemnify EMS for losses caused by the Hospital's employee in the absence of a third party claim?

II. Did the Court of Appeals err in refusing to consider whether EMS' negligence impacted the Hospital's obligation to indemnify EMS?

LAW /ANALYSIS

I. Indemnification

Hospital argues that EMS is not entitled to indemnification for the money Raines embezzled in the absence of a third party claim. We agree.

In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. *City of Columbia v. Town of Irmo,* 316 S.C. 193, 447 S.E.2d 855 (1994). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Café Assocs., Ltd. v. Gerngross,* 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom. *MacFarlane v. Manly,* 274 S.C. 392, 264 S.E.2d 838 (1980). Upon review, an appellate court reviews the grant of summary judgment

under the same standard as the trial court. *George v. Fabri,* 345 S.C. 440, 548 S.E.2d 868 (2001).

South Carolina courts have consistently defined indemnity as "that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." *Campbell v. Beacon Mfg. Co., Inc.,* 313 S.C. 451, 454, 438 S.E.2d 271, 272 (Ct. App. 1993); *see also Winnsboro v. Wiedeman-Singleton, Inc.,* 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990), *aff'd,* 307 S.C. 128, 414 S.E.2d 118 (1992); 41 Am. Jur. 2d. *Indemnity* §§ 41-44 (1995). In a second party action to recover attorney's fees for breach of contract, this Court denied attorney's fees, stating that the standard indemnification clause at issue limited recovery "to the reimbursement for damages, costs, expenses, etc. incurred in third party actions, not actions between the contracting parties themselves." *Smoak v. Carpenter Enterprises, Inc.,* 319 S.C. 222, 224, 460 S.E.2d 381, 383 (1995). In *Smoak,* the purchase and sale agreement executed by the parties contained a provision requiring the defendant/buyer to "'indemnify and hold [Sellers] harmless' for certain damages, costs, and expenses." *Smoak,* 319 S.C. at 224, 460 S.E.2d at 383. [3]

In the present case, the Court of Appeals acknowledged this general rule, but reasoned that parties may craft an indemnity clause to provide for other forms of compensation, including one in which a first party is liable to a second party for a loss or damage the second party might incur. *Laurens Emergency Med. Specialists,* 348 S.C. 191, 194, 558 S.E.2d 531. In support of this proposition, the Court of Appeals cites to a decision by the Texas Supreme Court: *Dresser Industries, Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1983). In *Dresser*, however, the indemnity clause expressly provided for second party indemnity,

[3] Judging from this excerpt of the indemnification clause in *Smoak*, the clause in *Smoak* is very similar to the indemnification clause in the present case in which the Hospital agreed to "indemnify and hold [EMS] . . . harmless from and against any and all claims[,] actions, liability, or expenses."

> [Page] shall indemnify [Dresser] and hold [Dresser] free and harmless from all claims for . . . subsurface damage or injury to the well . . . including claims alleging that injuries or damages were caused by [Dresser's] negligence, ***whether such claims are made by [Page], by [Page's] employees, or by third parties.***

853 S.W.2d at 506-07 (emphasis added).

There is no such provision for second party indemnification in the indemnity agreement between EMS and Hospital presently before the Court. *Infra,* page 2. This Court's decision in *Smoak* indicates that the default rule of interpretation for indemnity clauses is that third party claims are a prerequisite to indemnification. 319 S.C. at 224, 460 S.E.2d at 383. In *Smoak,* the Court concluded that the indemnification provision was limited to reimbursement for expenses incurred in third party actions based on the clause itself and on a reading of the entire agreement between the parties. *Id.*

In our opinion, the clause at issue in this case is a typical indemnity agreement, much like the clause presented in *Smoak*. The contract between EMS and the Hospital contains reciprocal indemnification provisions; both parties agreed to indemnify each other under the same circumstances. In our view, the circumstance EMS and the Hospital contemplated in including an indemnity provision in their contract was a third party claim brought against one of them for the wrongful acts of the other. As such, we find that it cannot be invoked absent a third party claim against the second party, EMS.

We base this conclusion on the language of the clause itself:

> The Hospital will indemnify and hold [EMS] and the Emergency Physicians harmless from and against any and all claims[,] actions, liability, or expenses (including judgments, court costs, and reasonable attorney's fees) caused by or resulting from allegations of wrongful acts or omissions of Hospital employees, servants, agents. Upon notice by [EMS], the Hospital shall resist and defend, and at its own expense, and by counsel reasonably satisfactory to [EMS], ***such*** claim or action.

(emphasis added). The above quoted language, so similar to the indemnity agreement in the *Smoak* contract, supports the interpretation that the intended purpose of this indemnification clause was protection against third party claims, not reimbursement for claims between the parties themselves. *Smoak.*

We believe the business arrangement between EMS and Hospital make the purpose for the mutual indemnity clauses within their contract clear. EMS contracted to perform emergency services that would otherwise be provided by the Hospital. EMS would be liable to third parties for its physicians and other employees' negligence, but it did not want to assume liability to third parties for the actions of the Hospital's employees. Similarly, the Hospital did not want to assume liability to third parties for the actions of EMS' employees. Based on these circumstances and this Court's indemnity clause jurisprudence, we decline to broaden the scope of a standard indemnity clause to include recovery for second party claims when the agreement does not explicitly contemplate those claims.

II. EMS' Negligence

Hospital argues that the Court of Appeals erred in holding that EMS' own negligence was irrelevant in determining Hospital's obligation to indemnify. We agree.

In determining that EMS' negligence (if there was any) had no impact on the Hospital's obligation to indemnify, the Court of Appeals attached considerable importance to the contract's failure to condition the Hospital's liability on anything related to negligence by EMS. In doing so, the Court of Appeals overlooked the rule requiring strict construction of a contract containing an indemnity provision purporting to relieve an indemnitee from the consequences of its own negligence. *Federal Pacific Elec. v. Carolina Production Enterprises,* 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989). "Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and

unequivocal terms." *Id.* at 26, 378 S.E.2d at 57; 41 Am. Jur. 2d. *Indemnity* § 20. Specifically, the *Federal Pacific* court found that the indemnification clause did not meet this standard. The court held "that the use of the general terms 'indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the Leased Premises during the term of [the] lease' does not disclose an intention to indemnify for consequences arising from [the indemnitee's] own negligence." *Federal Pacific,* 298 S.C. at 28, 378 S.E.2d at 58-59.

In this case, the indemnity provision is even narrower than the provision in *Federal Pacific*; it does not have the loss or damage "of any kind" language that the court found to be insufficient in *Federal Pacific.* The standard language in the indemnification clause here does not disclose an intention by the parties to relieve EMS of the consequences of its own negligence.

CONCLUSION

For the foregoing reasons, we **REVERSE** the decision of the Court of Appeals affirming summary judgment in favor of EMS and **REMAND** for entry of summary judgment in favor of the Hospital on EMS' indemnification cause of action.

MOORE, WALLER and BURNETT., JJ., concur. Acting Justice James C. Williams, Jr., dissenting in a separate opinion.

WILLIAMS, A.J.: Because I believe that the case was correctly reasoned and decided by the Court of Appeals, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert L. Mathis, Jr., Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Howard P. King, Circuit Court Judge

Opinion No. 25684
Heard June 25, 2003 - Filed July 28, 2003

VACATED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief Capital and Collateral Litigation Attorney Donald J. Zelenka, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Petitioner, Robert L. Mathis ("Petitioner"), challenges his first degree burglary conviction alleging that the circuit court lacked subject matter jurisdiction to convict him. In the alternative, Petitioner argues that the Court of Appeals erred in affirming the circuit court's dismissal of his petition for writ of habeas corpus.

FACTUAL / PROCEDURAL BACKGROUND

Petitioner was convicted *in absentia* of first-degree burglary in 1990. After the jury returned with the verdict, the trial judge issued a sealed sentence. In 1995, Petitioner appeared with his attorney to have the sentence - life imprisonment - read to him. Petitioner appealed and was informed by his attorney on January 3, 1997, that his conviction had been affirmed on direct appeal.[1]

On October 5, 1999, Petitioner filed a petition for writ of habeas corpus in the circuit court. The State filed a return and motion to dismiss, arguing that Petitioner must file a petition for writ of habeas corpus in the original jurisdiction of this Court because he had not exhausted his remedies in PCR.

The circuit court dismissed the petition accordingly, agreeing that petitioning this Court in its original jurisdiction was Petitioner's only remedy because he had not exhausted his PCR remedies nor shown that PCR was not available to him. Petitioner appealed, and the Court of Appeals affirmed the circuit court's dismissal. *Mathis v. State,* Op. No. 2001-UP-300 (S.C. Ct. App. filed May 31, 2001).

After the Court of Appeals denied Petitioner's motion for rehearing, Petitioner filed a petition for writ of certiorari. All five members of this Court granted certiorari. Subsequently, Petitioner filed a motion to vacate his conviction for first degree burglary on grounds that the circuit court lacked

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[1] The letter from Petitioner's attorney stated, "You will need to try other avenues for your appeal," but did not mention post-conviction relief ("PCR") specifically or that Petitioner had one year from the filing of the final decision of the appeal in which to file a PCR application. S.C. Code Ann. § 17-27-45(A) (Supp. 1995 & 2002).

subject matter jurisdiction to convict him of that offense because the indictment failed to name all the elements of first degree burglary enumerated in S.C. Code Ann. § 16-11-311. The Court granted Petitioner leave to address the subject matter jurisdiction issue in this proceeding.

The following issues are presently before the Court:

I. Did the circuit court have subject matter jurisdiction to convict Petitioner of first degree burglary when the indictment did not name a circumstance of aggravation?

II. Did the Court of Appeals err in affirming the dismissal of Petitioner's petition for writ of habeas corpus rather than treating the petition as an application for PCR?

LAW /ANALYSIS

I. Indictment

Petitioner argues that the circuit court lacked subject matter jurisdiction to convict him of first degree burglary because the indictment failed to state an element of the crime: a circumstance of aggravation. We agree.

Issues related to subject matter jurisdiction may be raised at any time. *Browning v. State,* 320 S.C. 366, 465 S.E.2d 358 (1995); *State v. Funderburk,* 259 S.C. 256, 191 S.E.2d 520 (1972). A circuit court has subject matter jurisdiction if: (1) there has been an indictment that sufficiently states the offense; (2) there has been a waiver of the indictment; or (3) the charge is a lesser included offense of the crime charged in the indictment. *Cutner v. State,* Op. No. 25644 (S.C. Sup. Ct. filed April 28, 2003). "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." *Browning,* 320 S.C. at 368, 465 S.E.2d at 359 (citing *State v. Munn,* 292 S.C. 497, 357 S.E.2d 461 (1987)).

In *Browning,* defendant was convicted of seven counts of second degree burglary after pleading guilty. 320 S.C. at 367-68, 465 S.E.2d at 359. At the time of the indictments in question, second-degree burglary of a building required that the burglary be accompanied by a circumstance of aggravation as defined by S.C. Code Ann. § 16-11-312(B).[2] *Id.* (citing S.C. Code Ann. § 16-11-312(B) (Supp. 1993)). None of the seven indictments in *Browning* stated any circumstances of aggravation. Consequently, the Court found that the indictment failed to "contain the necessary elements of *second* degree burglary." *Browning,* 320 S.C. at 369, 465 S.E.2d at 359. The Court held, "[b]ecause no circumstances of aggravation were stated, the indictments were insufficient, and the circuit court lacked jurisdiction to accept [defendant's] guilty plea to second degree burglary." *Id.* The Court then vacated the defendant's plea and sentence for second degree burglary. *Id.*[3]

In the present case, Petitioner was indicted for first and second degree burglary in 1990, and convicted *in absentia* of first degree burglary in 1995. In 1990, first degree burglary was defined as follows:

> A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime therein, and either:

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[2] Section 16-11-312(B) lists three types of aggravating circumstances. The first category occurs when the burglar enters the building with some type of weapon, threatens to use a dangerous instrument, or physically harms any person who is not a participant in the crime. The second category makes any burglary second degree if the person committing it has two or more prior burglary convictions. The third category applies to all burglaries that occur at nighttime.

[3] *See also State v. Lynch,* 344 S.C. 635, 545 S.E.2d 511 (2001) (finding that although it is only one element of the crime, the aggravating circumstance is "'the essence' of first degree burglary" and must be included on the indictment presented to the grand jury to confer subject matter jurisdiction on the circuit court).

> (1) When effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with a deadly weapon or explosive; or
>
> (b) Causes physical injury to any person who is not a participant in the crime:
>
> (c) Uses or threatens the use of a dangerous instrument; or
>
> (d) Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
>
> (2) The burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
>
> (3) The entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311(A) (Supp. 1990).

Petitioner's indictment fails to list any of the circumstances of aggravation provided for in section 16-11-311(A) (1), (2), or (3). It does not indicate that Petitioner had a weapon, harmed anyone, or threatened to use force, nor does it indicate that Petitioner had prior burglary convictions or that the burglary occurred at night. Accordingly, we find that the indictment failed to state the necessary elements of the offense under *Lynch* and *Browning*. Therefore, the circuit court lacked subject matter jurisdiction to convict Petitioner of first degree burglary, and Petitioner's conviction for that offense must be vacated.[4]

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[4] In reaching this conclusion, we considered the impact of S.C. Code Ann. § 17-19-90 (Supp. 2002). First enacted in 1887, section 17-19-90, requires objections to defects apparent on the face of an indictment be made before the jury is sworn. This section has not been amended since its original enactment and has not been cited in recent years by this Court in its discussion of the sufficiency of indictments. In our opinion, this statutory provision applies to defects in an indictment that do not affect the subject matter jurisdiction of the circuit court. Our modern jurisprudence makes it

II. Habeas Petition

Petitioner argues that his petition to the circuit court for writ of habeas corpus should have been evaluated as a PCR application because he was deprived of his "one bite of the apple" in PCR. Based on our conclusion that the circuit court lacked subject matter jurisdiction to convict Petitioner due to an insufficient indictment, it is unnecessary for us to address this issue.

CONCLUSION

For the foregoing reasons, we **VACATE** Petitioner's first-degree burglary conviction.[5]

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

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clear that failure to list an aggravating circumstance does affect subject matter jurisdiction, and that subject matter jurisdiction cannot be waived and may be raised at any time. Thus, we believe section 17-19-90 does not limit a court's consideration of indictment defects that affect subject matter jurisdiction, no matter when such issues are raised. *Lynch; Browning*

[5] The State argues that this Court should direct the entry of judgment against Petitioner on the lesser included offense of second degree burglary for which Petitioner was also indicted. This Court exercised its option to do so in *State v. Muldrow,* 348 S.C. 264, 559 S.E.2d 847 (2002) (sentencing defendant to lesser included offense of strong arm robbery after finding that insufficient evidence was submitted to support conviction for greater offense). In this case, although Petitioner was indicted for second degree burglary, the record on appeal reflects that second degree burglary was never presented to the jury as an option and was not charged to the jury at the close of the case. Under the circumstances presented in this case, we decline to direct the entry of judgment on the lesser offense.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of R. Dean Welch, Respondent.

Opinion No. 25685
Heard June 12, 2003 - Filed July 28, 2003

DISBARRED

Henry B. Richardson, Jr., and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

R. Dean Welch, of Surfside Beach, pro se.

PER CURIAM: In this attorney disciplinary matter, a full panel of the Commission on Lawyer Conduct recommended respondent be disbarred. We agree and disbar respondent, retroactive to the date he was placed on interim suspension for the misconduct which led to his indefinite suspension and to the conviction which forms the basis for disbarment.[1]

FACTS

On July 26, 1999, respondent was placed on indefinite suspension for failing to supervise an employee who engaged in a check

[1] In re Welch, 330 S.C. 7, 496 S.E.2d 855 (1998).

kiting scheme which involved trust and title accounts.[2] In the Matter of Welch, 335 S.C. 613, 518 S.E.2d 821 (1999). On August 29, 2000, respondent pled guilty to one count of bank fraud stemming from his involvement in the scheme.

Thereafter, Disciplinary Counsel filed formal charges against respondent based on respondent's conviction and on misrepresentations he allegedly made during an examination under oath pursuant to Rule 19, RLDE, Rule 413, SCACR, and in an affidavit in mitigation submitted with the previous Agreement for Discipline by Consent. The sub-panel and full panel recommended respondent be disbarred and required to pay $365.14 in costs. The recommendation was based on respondent's conviction and a finding that admissions made during his guilty plea rendered false respondent's allegations and representations made under oath during the Rule 19 examination leading up to, and in the affidavit submitted with, the previous Agreement for Discipline by Consent.

DISCUSSION

The authority to discipline attorneys and the manner in which discipline is given rests entirely with this Court. In re Barker, 352 S.C. 71, 572 S.E.2d 460 (2002). The Court may make its own findings of fact and conclusions of law and is not bound by the Panel's recommendation. Id. The Court must administer the sanction it deems appropriate after a thorough review of the record. Id.

Respondent has argued throughout these proceedings that his admissions made during his guilty plea in federal court did not conflict with prior statements made to Disciplinary Counsel and this Court. We find respondent's statements made to Disciplinary Counsel and this Court in conjunction with the prior disciplinary matter were neither false nor misleading.

[2] Respondent has not been reinstated.

Respondent does not, however, dispute the fact that, subsequent to his indefinite suspension, he pled guilty to bank fraud, nor does he argue that he should not be disciplined as a result. In In re Chastain, 340 S.C. 356, 532 S.E.2d 264 (2000), this Court held that an attorney's criminal conviction, which involves a matter for which the attorney was sanctioned in a prior disciplinary proceeding, provides a separate basis for an additional sanction. The following factors are to be considered in determining whether to impose an additional sanction: (1) whether an additional sanction is necessary to protect the public; (2) whether an additional sanction is necessary to protect the integrity of the legal system or the administration of justice; (3) whether the criminal proceeding resulted in any information the Court did not consider in imposing the prior sanction; (4) whether the convicted lawyer would be unable to practice law due to incarceration, probation or parole; (5) whether the disciplinary or criminal processes have been improperly manipulated to harass or intimidate the lawyer; (6) whether imposing an additional sanction would be unfair to the lawyer; and (7) any other factor the Court deems relevant.

We find that this is a case in which the imposition of an additional sanction would not be unfair to the lawyer. Bank fraud is a serious crime as defined by Rule 2(z), RLDE, and is a ground for discipline pursuant to Rule 7(a)(4), RLDE. A bank fraud conviction also constitutes a violation of Rule 8.4(d) of the Rules of Professional Conduct, Rule 407, SCACR, which prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Moreover, we find there is precedent for imposition of the sanction of disbarment for such misconduct. See In re Holt, 328 S.C. 169, 492 S.E.2d 793 (1997)(attorney's federal conviction of one count of bank fraud warranted disbarment); see also In re Thompson, 343 S.C. 1, 539 S.E.2d 396 (2000) (disbarment for mishandling of trust account, commingling of funds, and use of trust accounts in check kiting scheme); In re Yarborough, 343 S.C. 316, 540 S.E.2d 462 (2000)(use of escrow funds to pay margin call on stock purchased for personal use, engaging in check kiting scheme, and bank fraud conviction warranted disbarment); In re Gibbes, 323 S.C. 80, 450 S.E.2d 588 (1994)(engaging in check kiting scheme and misappropriating and converting client funds warrant disbarment); In re Gates, 311 S.C. 246, 428 S.E.2d 716 (1993) (writing checks on trust accounts

without sufficient funds in accounts to cover checks, writing checks on trust and escrow accounts for personal matters, and engaging in check kiting schemes in violation of federal law warrants disbarment).

Accordingly, we disbar respondent retroactive to February 19, 1998, the date he was placed on interim suspension for the misconduct which led to his indefinite suspension and to the conviction which forms the basis for the current sanction. Respondent is also ordered to pay $365.14, the costs of these proceedings.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

MOORE, A.C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice C. Victor Pyle, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Bamberg
County Magistrate Danny J.
Singleton, Respondent.

Opinion No. 25686
Submitted July 8, 2003 - Filed July 28, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Deborah Stroud McKeown, both of Columbia, for the Office of Disciplinary Counsel.

C. Bradley Hutto, of Orangeburg, for Respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. Therein, respondent admits he violated the Code of Judicial Conduct, Rule 501, SCACR, and agrees to the imposition of a confidential admonition, a public reprimand or a definite suspension not to exceed six months. We accept the agreement and suspend respondent for six months.

Facts

The facts, as stated in the agreement, are as follows. On occasions prior to 1997, respondent conducted sales of abandoned or stored motor vehicles pursuant to S.C. Code Ann. § 29-15-10 without turning the proceeds from the sale of the vehicles over to the county treasurer or the clerk of court. Instead, respondent kept the proceeds from the sale of the vehicles for his personal use. Since 1997, when respondent was confronted about this matter by another magistrate, respondent has turned the proceeds from the sale of the vehicles over to the county. Respondent maintains he was not aware that the proceeds from the sale of the vehicles had to be turned over to the county until the other magistrate advised him of the requirement. The South Carolina Law Enforcement Division investigated the matter and found that respondent failed to turn over $870 in proceeds to the county. Respondent has since paid that amount to the clerk of court. In addition, respondent represents that he has corrected his procedures for the sale of vehicles pursuant to section 29-15-10 and now complies with the statutory requirements.

Law

Respondent admits that these allegations constitute grounds for discipline under Rules 7(a)(1) and (4), RJDE, Rule 502, SCACR. Respondent also admits that he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A)(a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3(a judge shall perform the duties of judicial office impartially and diligently); Canon 3(B)(2)(a judge shall be faithful to the law and maintain professional competence in it); Canon 3(B)(8)(a judge shall dispose of all judicial matters promptly, efficiently and fairly); and Canon 3(C)(1)(a judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain

professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business).

Conclusion

We find that respondent's misconduct warrants a six month suspension. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent for six months. Bamberg County is under no obligation to pay respondent his salary during the period of suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991).

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Roger Dale Cobb, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Pickens County
Henry F. Floyd, Circuit Court Judge

Opinion No. 25687
Heard June 11, 2003 - Filed July 28, 2003

REVERSED AND REMANDED

Assistant Appellate Defender Eleanor Duffy Cleary and 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, and Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Solicitor Robert M. Ariail, of Greenville for Respondent.

JUSTICE PLEICONES: We granted certiorari to review a decision of the Court of Appeals holding that the circuit court properly refused to sentence Roger Dale Cobb ("petitioner") under the accommodation statute[1]. State v. Cobb, 349 S.C. 126, 561 S.E.2d 631(Ct. App. 2002). We reverse and remand.

Petitioner was indicted for: distribution of marijuana to a person under 18 years of age, distribution of marijuana, second degree sexual exploitation of a minor, and possession of marijuana with intent to distribute. The jury found petitioner not guilty of distribution of marijuana to a person under 18 years of age; guilty of distribution of marijuana; and guilty of sexual exploitation of a minor. Petitioner was found not guilty of possession with intent to distribute, but guilty of the lesser-included offense of possession of marijuana. Petitioner received a 20 year sentence for distribution[2], a consecutive five year sentence for exploitation of a minor, and a concurrent one year sentence for possession.

Petitioner appealed the trial judge's refusal to sentence petitioner on the distribution charge under the accommodation statute, and the Court of Appeals affirmed his sentence. State v. Cobb, supra. We granted petitioner's petition for writ of certiorari to review this decision, and now reverse and remand to the circuit court.

ISSUE

Did the Court of Appeals err in finding that the trial court properly refused to consider the distribution charge as an accommodation and therefore mitigate petitioner's sentence?

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[1] S.C. Code Ann. § 44-53-460 (2002).

[2] Petitioner's maximum sentence exposure was enhanced by two prior drug offenses.

DISCUSSION

South Carolina Code Ann. § 44-53-460 (2002) allows a person who is found guilty of distributing certain controlled substances, such as marijuana, to have a hearing and

> if the convicted person establishes by clear and convincing evidence that he delivered or possessed with intent to deliver a controlled substance…only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient…of the controlled…substance to use or become addicted upon the substance, the court shall sentence the person as if he had been convicted of [simple possession].

Petitioner, an adult, drove victim, a sixteen year old minor, and her girlfriend ("girlfriend"), a seventeen year old minor, to his home at victim's request, because she wanted to "get drunk." When they got to petitioner's home, petitioner did not offer victim marijuana, but victim asked if she could smoke some of the petitioner's marijuana. Victim testified that petitioner did not force victim to smoke the marijuana. Later that evening, victim and girlfriend began "making out" and petitioner took a picture of the girls having sex with each other.

The next day, police took victim into custody because she was a runaway, and the victim recounted the events of the previous night to the police. The police obtained a search warrant for petitioner's home and found a tin can with four ounces of marijuana in it, as well as the photo of the nude girls.

During the accommodation hearing[3], the trial judge held that this event was not an accommodation distribution because petitioner profited by

[3] Petitioner moved for an accommodation hearing pursuant to S.C. Code Ann. § 44-53-460 (2002), after the jury verdict. No additional evidence was

satisfying his prurient interests. The Court of Appeals affirmed the trial court's decision holding this was not an accommodation distribution because "[petitioner] benefited from his furnishing of the marijuana to the victim because he watched the girls undress and engage in a sexual act. [Petitioner] also used the opportunity to take [a] naked picture[] of the girls." State v. Cobb, supra at 128, 561 S.E.2d at 633. We disagree with the Court of Appeals that the phrase "intent to profit" as used in the accommodation statute is tantamount to "benefit".

The General Assembly's use of the phrase "intent to profit" clearly demonstrates it was distinguishing transactions that are commercial in nature wherein the defendant intends to profit in a material sense, from those of a more 'personal' nature[4]. See e.g., State v. McNabb, 241 N.W.2d 32, 35 (Iowa 1976)(defining "profit" in Iowa's accommodation statute as "the excess of returns over expenditures in a given transaction or series of transactions"); Barlow v. Commonwealth, 494 S.E.2d 901, 905 (Ct. App. Va. 1998)(defining "profit" as "any commercial transaction in which there is consideration involved"). We hold that "intent to profit" in the statute does not mean the distributor merely received a "benefit." Instead the statute requires profit in a commercial sense or a *quid pro quo*, as where the marijuana is used as a medium of exchange. If "intent to profit" as used in the statute means "benefit" as the Court of Appeals implies, the statute would be eviscerated as "benefit" has a broader meaning than "intent to profit" and would arguably apply in any situation.

In the case at hand, the victim testified that petitioner did not offer the marijuana to her, but rather that she asked if she could smoke it. The victim also testified that she did not pay petitioner for the marijuana nor did she do

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presented at the accommodation hearing, but the parties relied on the evidence presented at trial.

[4] In interpreting statutes, "our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute." State v. Ramsey, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993).

anything in return for its provision. The victim testified that her girlfriend, initiated the kissing, and that both victim and girlfriend initiated sex, not petitioner. The situation presented in this case is a classic accommodation sale. We note that there could be situations when sex is involved in a commercial sense, and thus a "profit" would be realized. That does not apply here because there was no agreement that the drugs were in exchange for the girls having sex or for petitioner taking pictures of them. Moreover, there is no evidence that the pictures were intended for commercial use by petitioner.

The petitioner's actions, while reprehensible, fit clearly within the General Assembly's definition of accommodation.

CONCLUSION

We reverse the decision of the Court of Appeals. There is no evidence to support the trial court's decision not to sentence petitioner under the accommodation statute. We remand the case to the circuit court to sentence petitioner under the accommodation statute.

REVERSED AND REMANDED.

MOORE and WALLER, JJ., concur. BURNETT, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE BURNETT: I dissent. The majority narrowly defines "intent to profit" as provided in S.C. Code Ann. § 44-53-460 (2002) as a net commercial gain. The majority overlooks the factual differences which may make a distribution an accommodation in one instance but not in another.

First, in my opinion, the majority's limitation of "intent to profit" to the commercial setting defeats legislative intent. The majority's citation to McNabb defining "profit" as "the excess of returns over expenditures" dismisses other ways drug dealers may "profit". See Walker v. Commonwealth, Case No. 2974-01-4 (Va. Ct. App. Filed March 4, 2003) available at 2003 WL 722239 (no accommodation where man provided undercover detectives with cocaine in hopes of sharing the drugs); Barlow v. Commonwealth, 26 Va. App. 421, 494 S.E.2d 901 (Va. Ct. App. 1998) (denying accommodation charge where heroin dealer sold drugs at "costs").

The majority limits the definition of "intent to profit" to either a benefit of a personal nature or a profit in a commercial, material sense. Our task as a Court is not to divine the metaphysical distinction between those two choices, but merely to give effect to the intent of the legislature. State v. Ramsey, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993).

The intent of the Legislature in enacting § 44-53-460 was to differentiate between suppliers of drugs who, while committing an illegal act, are different from dealers who supply a drug in exchange for a tangible benefit. While I agree with the majority that "intent to profit" necessarily means something more than the distributor gained some intangible benefit from the exchange, this case illustrates the difficulty of narrowly defining the term. The *quid pro quo* of a transaction may often be deduced, as in this case, from the historical relationship between the parties.

Second, an attempt to strictly define "profit" in this statute subverts the Legislature's intent to differentiate between the two types of distributors of illegal drugs.

A specific definition of "intent to profit" may provide a superficial benefit, but only at the sacrifice of comprehensiveness explicit in the statutory language. It is difficult to determine, and thus define, whether a person who supplies marijuana to another is acting in mere benevolence or with a design to obtain some tangible benefit from the transaction.

This Court would better discern legislative intent by refusing to strictly define the term "intent to profit." Instead, we should acknowledge that whether a particular act amounts to an accommodation is a case-specific fact inquiry. As stated above, the *quid pro quo* or the distributor's intent to profit from a transaction may be deduced by the relationship among the parties.

The victim's testimony reveals her relationship with Cobb. She regularly visited his house to smoke marijuana provided by him and would allow Cobb to take nude pictures of her. The behavior of Cobb and the victim on the night in question is a continuation of their historical relationship in which the victim received illegal drugs and Cobb satisfied his prurient interests, in exchange.

This evidence establishes Cobb did not deliver the marijuana as a mere accommodation but intended to profit tangibly from the exchange by satisfying his prurient interests. See, e.g., State v. McDaniel, 265 N.W.2d 917, 927 (Iowa 1978) (Uhlenhopp, dissenting).

Accordingly, I would affirm.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Pamela C. Curcio, as Personal Representative of the Estate of Dennis M. Turner, Petitioner,

v.

Caterpillar, Inc., a/k/a Caterpillar Tractor Company, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
John W. Kittredge, Circuit Court Judge

Opinion No. 25688
Heard February 20, 2003 - Filed July 28, 2003

REVERSED

B. Randall Dong, of Suggs & Kelly, P.A., David G. Owen, John D. Kassel, and John S. Nichols, of Bluestein & Nichols, all of Columbia, for Petitioner.

W. Frances Marion, Jr., of Haynsworth Sinkler Boyd, P.A., of Greenville, for Respondent.

JUSTICE PLEICONES: The circuit court set aside a jury verdict for petitioner in this products liability wrongful death action, and the Court of Appeals affirmed. Curcio v. Caterpillar, Inc., 344 S.C. 266, 543 S.E.2d 264 (Ct. App. 2001). We granted certiorari, and now reverse.[1]

FACTS[2]

The deceased was killed while working on a track loader manufactured by respondent ("CAT"). Petitioner alleged two bases for her strict liability claim: (1) a design defect theory and (2) an inadequate warning theory. The jury returned a general verdict in the amount of $500,000 for petitioner on her strict liability claim.

Following the verdict, CAT moved for a judgment notwithstanding the verdict ("JNOV"). As to the design defect theory, CAT argued that the alternate design proposed by petitioner's expert would not have prevented the accident. CAT argued that it was entitled to a JNOV on the inadequate warning theory as well, contending the warning given was adequate as a matter of law. The trial judge issued an order ("JNOV order") holding that the warning was adequate as a matter of law, but finding that there was evidence to support the design defect theory. Accordingly, CAT's JNOV motion was denied.

CAT then filed a motion to reconsider the JNOV order. CAT argued that the finding in the JNOV order that the warning was adequate precluded petitioner's recovery on the design defect theory as a matter of law. See S.C.

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[1] We reinstate the jury award, subject to an unappealed order requiring a new trial on the issue whether petitioner was the common law wife of the deceased.

[2] A full exposition of the facts and procedural history of this case can be found in the decision of the Court of Appeals.

Code Ann. §§ 15-73-10 and –30 (1976) (adopting Restatement (Second) of Torts § 402A and incorporating comments to § 402A as the legislative intent of the Chapter); see, e.g. Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998) ("If a warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous."); Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996) ("A product bearing a warning that the product is safe for use if the user follows the warning is neither defective nor unreasonably dangerous; therefore the seller is not liable for any injuries caused by the use of the product if the user ignores the warning"). The trial court agreed, and set aside the verdict.

Petitioner appealed, and the Court of Appeals held that the verdict was properly set aside on both theories. Curcio v. Caterpillar, Inc., *supra*.

ISSUE

Was the verdict properly set aside?

ANALYSIS

As explained below, we agree with Chief Judge Hearn's dissent and find that there was evidence to support the inadequate warning verdict. Since the jury returned a general verdict, we need find only that there was evidence to support either the inadequate warning theory or the design defect theory in order to reinstate that verdict. Andersen v. South Carolina Dep't of Highway and Public Transportation, 322 S.C. 417, 472 S.E.2d 253 (1996)(two issue rule applied to general verdict). Accordingly, we address only the warning evidence.

The majority of the Court of Appeals held that the JNOV on the warning theory should be upheld on a procedural ground. Specifically, it reviewed the trial court's JNOV order and extracted one sentence from that order: "Had the batteries been disconnected the accident would not have happened." The Court of Appeals' majority characterized this sentence as

constituting an "independent ground"[3] to support the JNOV on the warning theory. Since the majority found that petitioner had failed to challenge this "independent ground" on appeal, the Court of Appeals upheld the JNOV on the warning theory.

There is no question that CAT warned against working on the loader's engine without disconnecting the batteries first, and that had the batteries been disconnected, the accident would not have occurred. As Chief Judge Hearn correctly pointed out in her dissent, however, this explicit warning was contradicted by other instructions and warnings given by CAT. The trial court's observation, seized upon by the Court of Appeals' majority, is no doubt a true statement. It is not, however, dispositive of the issue before the trial judge when deciding the JNOV: Whether there was any evidence that the warnings, as a whole, were inadequate. The majority of the Court of Appeals erred in relying on this mere observation by the trial judge as an "independent ground" to uphold the JNOV on the warning theory.

Since the case comes before us on CAT's claim of entitlement to a directed verdict/JNOV, we review the facts in the light most favorable to Curcio. Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, "neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." Reiland v. Southland Equip. Serv., Inc. 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998). The adequacy of a warning is generally a jury question. See, Allen v. Long Mfg. NC, Inc., supra. The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993).

Curcio's expert testified that, although the service manual stated that the batteries should be disconnected before any work is done on the loader, the manual also stated in various places that the engine "could be started"

[3] I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

when the loader's cab is tilted in the 24° position. The expert also testified that the words crank, start, and run had different meanings, and were used with different meanings in the manual. We recognize that there was conflicting evidence, but note that the trial judge is concerned with the existence of evidence, not the weight of the evidence, or credibility of the witness.[4]

We have reviewed the record and agree with Chief Judge Hearn that the trial judge improperly weighed the evidence rather than merely considering its existence in granting CAT's JNOV motion on the inadequate warning theory. We therefore

REVERSE.

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

[4] E.g., in the JNOV Order, the trial judge stated that "[a]lthough not essential for purposes of this ruling, I note that Mr. Warren has absolutely no experience with heavy equipment. Conversely, all witnesses with such experience understood the term 'start' to include any notion that the engine was to be 'turned-over' by the electrical starter motor."

The Supreme Court of South Carolina

In re: Amendments to Rule 601, SCACR, Conflicts in Hearing Dates.

O R D E R

Pursuant to art. V, § 4, of the South Carolina Constitution, Rule 601, SCACR, is amended as follows:

1. Rules 601(a)(5) through (a)(11) are renumbered Rules 601(a)(6) through (a)(12).

2. Rule 601(a)(5) shall read: The Family Court - merits hearings in cases involving child abuse, child neglect and termination of parental rights upon approval of the Chief Judge for Administrative Purposes for the Family Court and notice to the Chief Judge for Administrative Purposes for the Circuit Court five days prior to the term of the Circuit Court.

3. Rule 601(a)(7) shall read: The Family Court -- all cases not referenced in (5) above.

4. Rule 601(a)(9) is amended to read: Alternative Dispute Resolution Conferences conducted pursuant to the Circuit Court Alternative Dispute Resolution Rules or the Family Court Mediation Rules.

This Order shall be effective September 1, 2003.

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 23, 2003

The Supreme Court of South Carolina

In the Matter of Barry W. Bellino, Respondent.

ORDER

On May 7, 2003, an arrest warrant was signed charging respondent with simple assault and battery for allegedly committing inappropriate acts against a client who had come to his office seeking assistance with a divorce. Respondent has been suspended from the practice of law in the past based on similar behavior. In the Matter of Bellino, 308 S.C. 130, 417 S.E.2d 535 (1992).

Based on the incident which led to the arrest warrant and another similar incident set forth in an affidavit provided by another client who sought respondent's assistance with a legal matter, the Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, because he poses a substantial threat of serious harm to the public or the administration

of justice. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17(b), RLDE, Rule 413, SCACR, from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that Patrick M. Higgins, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Higgins shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Higgins may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals

from the account(s) and shall further serve as notice to the bank or other financial institution that Patrick M. Higgins, Esquire, has been duly appointed by this Court.

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina
July 22, 2003

The Supreme Court of South Carolina

In the Matter of Barry W. Bellino, Respondent.

ORDER

By order dated July 22, 2003, respondent was placed on interim suspension and Patrick M. Higgins, Esquire, was appointed, pursuant to Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Philip L. Fairbanks, Esquire, is hereby appointed, pursuant to the same rule, to assist Mr. Higgins in this matter. Mr. Fairbanks shall have the same authority as that given Mr. Higgins in the July 22, 2003 order.

IT IS SO ORDERED.

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

Columbia, South Carolina
July 24, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dedric Thomason, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 3666
Heard April 9, 2003 – Filed July 21, 2003

AFFIRMED

Chief Appellate Defender Daniel T. Stacey, of SC 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 Deborah R. J. Shupe, all of Columbia; and Solicitor Duane Dykes White, of Anderson, for Respondent.

HOWARD, J.: Dedric Thomason pled guilty to two counts of resisting arrest in violation of South Carolina Code Annotated section 16-9-320 (Supp. 2001). During sentencing, Thomason moved to withdraw his guilty pleas, and the circuit court denied his motion. On appeal, Thomason contends the circuit court erred by refusing his request to withdraw his pleas because the state failed to abide by a plea agreement. Additionally, Thomason argues we should reverse his sentences because they resulted from the court's bias and prejudice. We affirm.

FACTS

A Greenville County grand jury returned a two-count indictment against Thomason. Each count charged him with resisting arrest involving an assault on a law enforcement officer in violation of section 16-9-320(B). Thomason pled guilty to one count, and on the remaining count, he pled to the lesser-included offense of resisting arrest under section 16-9-320(A). Neither Thomason nor the state advised the circuit court of any plea negotiations or agreement. The state recommended probation.

The circuit court questioned Thomason to determine if he understood the nature of the offenses, the possible punishments, and the rights he would be waiving. Thomason confirmed no promises had been made to induce his guilty pleas. During this questioning, neither the state nor Thomason's attorney alerted the circuit court to any plea agreement.

Having determined Thomason's pleas were knowingly, intelligently, and voluntarily entered, the circuit court accepted them, stating: "All right. I'll accept his plea if the State gives me a substantial factual basis for it." The state then presented a limited summary of the facts and recommended probation. Thomason did not argue the summary was legally insufficient to support the charges.

Hearing the recommendation of probation, the circuit court immediately advised Thomason, his attorney, and the state, the circuit

court was not bound by any recommendation and would be the sole judge of the sentences to be imposed. Thomason's attorney acknowledged this fact and did not mention a plea agreement to the circuit court.

Thomason's attorney then gave a factual presentation in mitigation of the offenses, shifting blame for the incident to the arresting law enforcement officers. Hearing this, the circuit court asked if the solicitor notified the officers regarding the pleas and the recommendation of probation. When the solicitor could not confirm the officers had been notified, the circuit court recessed the hearing and summoned the officers to appear.[1]

Thomason then moved to withdraw his guilty pleas, arguing, for the first time, he had a plea agreement with the state limiting the state's factual presentation. Thomason claimed allowing the officers to present controverted facts would violate the plea agreement to his prejudice because he could not contest their version of events in a guilty plea as he could through cross-examination in a trial.

The circuit court refused to allow Thomason to withdraw his pleas and resumed the sentencing when one of the two officers appeared. As Thomason feared, the officer presented facts adverse to Thomason and confirmed he had not been notified of the guilty pleas or the solicitor's proposed recommendation of probation.

Following the officer's presentation, Thomason again moved to withdraw his pleas. The circuit court denied the motion, opining Thomason's attorney and the state had misled the circuit court in the factual presentation. The circuit court rejected the recommendation of probation and sentenced Thomason to one-year imprisonment for resisting arrest under subsection (A) and six years imprisonment for resisting arrest with assault under subsection (B). Thomason appeals.

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[1] The solicitor who presented the case was substituting for the solicitor assigned to handle the case.

ISSUES PRESENTED

I. Was Thomason entitled to withdraw his guilty pleas as a matter of right before the circuit court imposed sentence?

II. Did the circuit court abuse its discretion in refusing to allow Thomason to withdraw his guilty pleas based on the state's breach of a plea agreement?

III. Was Thomason's sentence a result of the circuit court's bias and prejudice resulting from anger at Thomason's counsel?

LAW/ANALYSIS

I. Was Thomason entitled to withdraw his guilty pleas as a matter of right before the circuit court imposed sentence?

Thomason argues he was entitled to withdraw his guilty pleas as a matter of right. We disagree.

"All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001).

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 242 (1969); State v. Lambert, 266 S.C. 574, 577-78, 225 S.E.2d 340, 341-42 (1976). However, once a defendant enters a guilty plea, whether to allow withdrawal of the plea is left to the sound discretion of the circuit court. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982).

Thomason acknowledged he was guilty of the charges and was voluntarily pleading guilty. The circuit court questioned him to determine whether the pleas were knowingly, voluntarily, and

intelligently entered. At that stage, the circuit court stated it accepted the pleas pending presentation of the facts by the state. Thomason did not then move to withdraw his pleas. Next, the state presented facts legally sufficient to support the charges and recommended probation. Again, Thomason did not move to withdraw the pleas and raised no objection to the sufficiency of the factual presentation given by the state. Thomason then began to discuss sentencing issues with the court. Under the authority of State v. Cantrell, 250 S.C. 376, 158 S.E.2d 189 (1967), and State v. Barton, 325 S.C. 522, 481 S.E.2d 439 (Ct. App. 1997), we conclude the circuit court accepted Thomason's guilty pleas and whether to allow withdrawal rested within the sound discretion of the circuit court.

In Cantrell, a case factually similar to this case, the defendant entered guilty pleas, which the circuit court accepted. During the preliminary stages of sentencing, the circuit court began to review the defendant's prior statement to police. In the statement, the defendant admitted multiple prior offenses. Based on this information, the circuit court indicated it was not inclined to give a probationary sentence, whereupon the defendant moved to withdraw his plea. 250 S.C. at 378, 158 S.E.2d at 190-91.

Upholding the trial court's decision to deny the motion to withdraw the pleas, the supreme court noted a guilty plea "is a confession of guilt made in a formal manner and is equivalent to and as binding as a conviction after a trial on the merits. It has the same effect in law as a verdict of guilt and authorizes the imposition of the punishment prescribed by law." Cantrell, 250 S.C. at 379, 158 S.E.2d at 191. Furthermore, "[a]n accused is not permitted to speculate on the supposed clemency of the judge and enter a plea of guilty with the right to retract it if he finds that his expectation was not realized." Id. at 380, 158 S.E.2d at 192-93. Thus, under those circumstances, our supreme court ruled the decision to deny withdrawal of the plea rested within the sound discretion of the circuit court.

In Barton, the defendant entered his guilty pleas, and the circuit court began to impose sentence. Before the circuit court could

complete the publication of its sentence, Barton interrupted. In a later motion for reconsideration, Barton claimed he interrupted to withdraw his guilty pleas. Under those circumstances, this Court ruled the guilty pleas were entered, and the proceeding entered the sentencing phase at the time of Barton's interruption. Therefore, refusal to allow withdrawal of the accepted pleas was limited to review for abuse of discretion. Id. at 525-28, 481 S.E.2d at 441-42.

Based on this record, we conclude the guilty pleas in this case were clearly accepted by the circuit court. Thus, once the state completed its recitation of the facts, the hearing entered the sentencing phase, and no further ruling was required to accept the guilty pleas. See Boykin, 395 U.S. at 242; Rollison, 346 S.C. at 511, 552 S.E.2d at 292; Cantrell, 250 S.C. at 380, 158 S.E.2d at 191; Barton, 325 S.C. at 531, 481 S.E.2d at 443-44. Therefore, whether to allow Thomason to withdraw his guilty pleas was a matter resting within the sound discretion of the circuit court, and Thomason could not withdraw his pleas as a matter of right. See Riddle, 278 S.C. at 150, 292 S.E.2d at 796.

II. Did the circuit court abuse its discretion in refusing to allow Thomason to withdraw his guilty pleas based on the state's breach of a plea agreement?

Thomason argues he was entitled to withdraw his guilty pleas because the state breached the terms of a plea agreement. Thomason contends the plea agreement required the state to notify the officers and ensure their accord with the state's factual presentation and proposed disposition. We disagree.

Generally, the circuit court may conduct an inquiry broad in scope, largely unlimited either as to the kind of information it may consider or the source from which the information may come, to assist it in determining the sentence to be imposed. State v. Gulledge, 326 S.C. 220, 228, 487 S.E.2d 590, 594 (1997); Cantrell, 250 S.C. at 380, 158 S.E.2d at 191 (holding when sentencing a convicted defendant, a circuit court exercises a wide discretion regarding the sources and types

of evidence it may use to assist it in determining the kind and extent of punishment to be imposed). As noted in Gulledge, "[i]n a sentencing proceeding, evidentiary rules are inapplicable[,]" and the court may consider inadmissible evidence, so long as the information is relevant, reliable and trustworthy. 326 S.C. at 228, 487 S.E.2d at 594.

Furthermore, the circuit court's inquiry into notification of the victims is appropriate, as is providing an opportunity for the victims to be heard during sentencing. See S.C. Const. art. I, § 24.

Thomason argues the state agreed to limit the factual presentation to those statements contained in the solicitor's factual presentation. Thus, Thomason contends allowing the officer to present his version of the events violated the plea agreement and prejudiced him by limiting his ability to cross-examine the witnesses. However, no such plea agreement was divulged to the court prior to the acceptance of the guilty pleas.

Our supreme court has recognized a plea agreement rests on contractual principles. State v. Gates, 299 S.C. 92, 94-95, 382 S.E.2d 886-87 (1989); see also Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled."); Alston v. State, 379 A.2d 754, 757 (Md. 1978) ("When the State's Attorney has given his word in the form of a plea bargain and that bargain is accepted by the trial court, it behooves the State's Attorney to make every reasonable effort to correct any deviation from the bargain when the deviation is called to his attention.").

However, plea agreements will only be reviewed when they are clearly delineated on the record. In Thrift, our supreme court ruled:

> Today, the complexity of cases dictates that a reliable record exist containing the specific terms of any plea agreement. We hold, therefore, that effective with this decision, all plea agreements must be on the record and

> must recite the scope, offenses, and individuals involved in the agreement. We also hold that prospectively for all plea agreements entered after the filing of this opinion, we will limit our review of a plea agreement only to those terms which are fully set forth in the record . . . . [Furthermore,] neither the State nor the defendant will be able to enforce plea agreement terms which do not appear on the record before the trial judge who accepts the plea.

312 S.C. at 295-96, 440 S.E.2d at 348-49.

In this case, there was no written plea agreement in the record, and neither party identified an oral plea agreement meeting the requirements of Thrift prior to the circuit court's acceptance of Thomason's pleas. Only after the circuit court accepted the pleas and undertook its duty to examine all of the pertinent facts necessary to fashion an appropriate sentence did Thomason assert, for the first time, there was a plea agreement limiting the factual presentation.

Under these circumstances, we conclude Thomason's assertion was untimely and did not comply with Thrift. Consequently, we cannot review the alleged plea agreement.

In so holding, we acknowledge our supreme court has placed an affirmative, shared duty on circuit court judges and counsel to ensure the scope of plea agreements is sufficiently entered on the record. Thrift, 312 S.C. at 296, 440 S.E.2d at 349. However, in this case, neither the state nor Thomason alerted the circuit court to any plea agreement specifically limiting the factual presentation given by the state. Under these circumstances, the circuit court fulfilled its duty under Thrift by inquiring, prior to the acceptance of the pleas, whether any promises had been made to Thomason in exchange for his guilty pleas.

Furthermore, Thomason's argument that he was prejudiced by his inability to cross-examine the witnesses is unavailing because he waived his right to cross-examination of the witnesses when he knowingly, voluntarily, and intelligently entered his guilty pleas. See Gulledge, 326 S.C. at 228, 487 S.E.2d at 594. As noted in Gulledge, the only constraint on the information which may be considered by the circuit court at sentencing is that it be relevant and have sufficient indicia of reliability. Id.

Having failed to present an enforceable plea agreement, Thomason argues no other basis for his claim the circuit court abused its discretion. Consequently, we hold there was no abuse.

III. Was Thomason's sentence a result of the court's bias and prejudice resulting from anger at Thomason's counsel?

Thomason argues the circuit court was biased and prejudiced against him because the circuit court was angry with his attorney.

During sentencing, Thomason's attorney twice assured the circuit court the solicitor had communicated with the arresting officers about the guilty pleas. Thomason's attorney then clarified he believed the solicitor had contacted the officers as a part of plea negotiations. However, when the arresting officer later appeared and denied any knowledge of the guilty pleas or the sentence recommendation, the circuit court opined Thomason's attorney and the solicitor misled it.

On appeal, Thomason argues this exchange, coupled with the lengthy sentence of incarceration, proves the severity of the sentences resulted from the circuit court's bias and prejudice. We conclude this argument is not preserved for appeal.

"Generally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision." Butler v. Sea Pines Plantation Co., 282 S.C. 113, 122-123, 317 S.E.2d 464, 470 (Ct. App. 1984). For an appellate court to review an issue, a contemporaneous

objection at the trial level is required. State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994). "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). Moreover, a party cannot argue one theory at trial and a different theory on appeal. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Thomason made no motion for recusal. Further, he neither objected to the sentence nor moved the circuit court to alter or amend the judgment. Thus, this argument is not preserved for appellate review. See Hoffman, 312 S.C. at 393, 440 S.E.2d at 873; Prioleau, 345 S.C. at 411, 548 S.E.2d at 216; Bailey, 298 S.C. at 5, 377 S.E.2d at 584; see also State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999) (holding an objection to sentence exceeding the maximum allowable by law does not raise a question of subject matter jurisdiction and cannot be raised for the first time on appeal).

We recognize there is authority relaxing this rule where the tone and tenor of the trial judge's remarks are such that any objection would have been futile. State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994). However, the record in this case does not support such a conclusion.

The circuit court explained its policy to listen to the facts before sentencing and emphasized sentencing was exclusively within the purview of the circuit court. The circuit court gave Thomason an opportunity to respond to the officer's statements and made sure the additional facts had been given to Thomason during discovery.

Contrary to Thomason's assertion that there is no other explanation for the harsher sentences imposed, the facts revealed by the law enforcement officer were more egregious than the limited version

of events conveyed by the solicitor.[2] Further, the sentences imposed by the circuit court were within the range allowed by law.

Throughout the sentencing proceeding, the circuit court remained focused on the facts pertinent to sentencing, responding with an appropriate and well-reasoned ruling to each argument raised by counsel. The record simply does not reasonably lend itself to the conclusion a timely objection would have been futile. Thus, notwithstanding the circuit court's disappointment in the handling of the matter by counsel, we conclude this issue was not raised to the circuit court and is not preserved for review.

CONCLUSION

Based on the foregoing, Thomason's sentences are

AFFIRMED.

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

[2] The officer's version revealed he and his partner were called to the scene because Thomason was shooting a firearm outside a residence. The officer testified Thomason repeatedly ordered his pit bull dog to attack the officers as they tried to arrest him. The dog did attack one of the two officers, diverting his attention from the arrest. The remaining officer fell to the ground with Thomason on top of him.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Karl Albert Overcash, III, Appellant,

v.

South Carolina Electric & Gas Company, Respondent.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3667
Heard June 11, 2003 – Filed July 21, 2003

REVERSED and REMANDED

F. Patrick Hubbard and Fred Walters, both of Columbia, for Appellant.

John M. Mahon, Jr., Robert A. McKenzie, and Gary H. Johnson, all of Columbia, for Respondent.

HOWARD, J.: Karl Albert Overcash, III, brought this private action for public nuisance against South Carolina Electric & Gas Company

("SCE&G"), seeking damages for personal injuries he sustained when the boat he was operating collided with a wooden dock constructed across a portion of Lake Murray. Overcash alleges the dock constituted a public nuisance and his "special" personal injuries give rise to a private cause of action. The circuit court disagreed and granted SCE&G's motion to dismiss Overcash's claim for failure to allege facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), SCRCP. We reverse and remand.

FACTS/PROCEDURAL HISTORY

The pertinent facts alleged in Overcash's Complaint may be fairly summarized as follows. SCE&G was the owner and project manager of the hydroelectric facility commonly know as Lake Murray. Lake Murray is a navigable body of water within the applicable statutory definition.[1]

In 1964, Sarah and Crawford Clarkson purchased property on Lake Murray. They constructed a 250 foot long wooden dock from their property to a small island located over 100 yards away. SCE&G allowed the dock to be built, deeded the island to the Clarksons reserving the sole right to enforce covenants to prevent a nuisance or dangerous condition, and granted a post-construction permit for the dock.

As part of its obligations to the Federal Energy Regulatory Commission ("FERC"), SCE&G conducted periodic, routine inspections of the Lake Murray shoreline for the purpose of identifying structures built in violation of FERC requirements. SCE&G had actual or constructive knowledge the

[1] See S.C. Code Ann. § 49-1-10 (1987) ("All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly . . . .")

Clarksons' dock existed and constituted an unlawful obstruction of the navigable waterway.

On the night of July 17, 1999, Overcash was traveling home by boat from his job at Lake Murray Marina. His boat collided with the dock and he was thrown forward and sustained severe personal injuries.

Overcash brought this action seeking damages against SCE&G for the injuries he sustained, alleging, among other things, statutory and common law public nuisance. SCE&G moved to dismiss Overcash's public nuisance cause of action pursuant to Rule 12(b)(6), SCRCP, arguing personal injuries are not different in kind from the type of injury suffered or anticipated by the public at large from a dock obstructing a navigable stream, and thus, a private cause of action for damages based on public nuisance is not permitted. The circuit court agreed, concluding Overcash failed to allege facts indicating he suffered a "special injury" such as would allow him to maintain a private action for public nuisance. Overcash appeals.

STANDARD OF REVIEW

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Washington v. Lexington County Jail, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct. App. 1999); McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be construed liberally and the trial court and this Court must presume all well pled facts to be true so that substantial justice is done between the parties. See Justice v. Pantry, 330 S.C. 37, 42, 496 S.E.2d 871, 874 (Ct. App. 1998).

DISCUSSION

On appeal, Overcash argues personal injury constitutes direct and special injury, and the trial court erred in holding that a plaintiff who suffers personal injury from colliding with a public nuisance blocking a public right of way does not have a right to recover damages for that injury, either at common law or pursuant to statute. We agree.

The argument is deceptively simplistic in its phrasing. However, neither this Court nor our supreme court have had occasion to rule on the precise question of whether personal injury, standing alone, constitutes the type of "special" or "particular" injury necessary to maintain a private action for public nuisance in South Carolina. Likewise, no reported decision expressly determines whether, as found by the circuit court, some property right must be injured in conjunction with a personal injury so that a personal injury may serve as a harm sufficient to allow a private action for public nuisance. Finally, no reported decision specifically determines whether the danger of colliding with an obstruction erected in a public waterway is a different type of harm from that presented to the general public.

To properly address these inquiries we find it necessary to explore the historic development and application of nuisance law in this state, both generally and particularly as it concerns a private right of action for public nuisance. In doing so, we venture, with some amount of consternation, into what Dean William Prosser fittingly referred to as the "impenetrable jungle . . . which surrounds the word 'nuisance.'" W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser & Keeton on Torts § 86 at 616 (5th ed., West 1984).

A. Historical Overview

In part, the mystery surrounding the common law of nuisance arises because, although the word "nuisance" literally means nothing more than harm, injury, inconvenience, or annoyance, the term has at times meant "all

things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach in a pie." Id. (footnote omitted).

Modern American public nuisance law is traceable to the medieval English criminal writ of "purpresture." See 4 William Blackstone, Commentaries on the Laws of England 167 ("Where there is a house erected, or an enclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a purpresture."). At the time of its emergence, purpresture was not a tort but rather a criminal remedy for infringement on the rights of the Crown (or general public), and was enforceable solely by indictment brought pursuant to the police powers of the sovereign. Keeton, Prosser & Keeton on Torts, § 86 at 617.[2]

The concept of a mutual sovereign and public right to seek redress beyond criminal sanctions for interference with the rights of the general public emerged in Sixteenth Century England with a line of cases "recogniz[ing] that a private individual who had suffered special damage might have a civil action in tort for the invasion of the public right." Id. at 618 n.14. Seminal among the cases credited with contributing to the development of both the "special injury rule" and the less stringent "different in degree rule" is an "anonymous" 1536 King's Bench decision. Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536). The 1536 case involved an unnamed plaintiff who alleged the defendant obstructed the King's highway in an attempt to prevent the plaintiff from traveling from his house to his fields. In a one-sentence opinion, Chief Justice Bladwin, writing for the majority, concluded the plaintiff could not maintain the action:

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[2] Although the common law of private nuisance found its parentage at the same time, it springs from entirely different legal roots. The assize of nuisance, introduced in thirteenth century England, was a criminal writ affording incidental civil relief as redress for conduct on one person's land resulting in the invasion of the land of another. The assize of nuisance eventually gave way to the action on the case for nuisance, which remedy addressed only interference with the use or enjoyment of land. Keeton, Prosser & Keeton on Torts, § 86 at 617.

> It seems to me that this action does not lie to the plaintiff for the stopping of the highway; for the King has the punishment of that, and he has his plaint in the [criminal court] and there he has his redress, because it is a common nuisance to all the King's [subjects], and so there is no reason for a particular person to have an [action on his case]; for if one person shall have an action by this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case.

Id., quoted as translated in Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755 (2001). In a brief but ultimately significant dissent, Justice Fitzherbert opined:

> I agree well that each nuisance done in the King's highway is punishable in the [criminal court] and not by an action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of his special hurt.

Id. (Fitzherbert, J., dissenting). Thereafter, Justice Fitzherbert set forth the following hypothetical which has become legendary in the labyrinthine path leading to the modern special injury rule:

> If one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the highway, because I have suffered more damage than any other person. So here the plaintiff had more convenience by this highway than any other person had, and so when he is stopped he suffers more damage because he has to go to his close.

> Wherefore it seems to me that he shall have this action *pour ce special matiere* [for the special matter], but if he had not suffered greater damage than all other suffered, then he would not have the action.

Id. As Prosser noted centuries later: "It was Fitzherbert who was followed; and with this decision the crime of public nuisance became also a tort in any instance in which the plaintiff could show damage which was particular to him and not shared in common with the rest of the public." William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1005 (1966) (footnote omitted).

B. Modern Development

Similar to English courts, American courts, including South Carolina, continue to employ a broad definition of the term nuisance.

> 'Nuisance' has . . . variously been defined as –
>
> - conduct that is either unreasonable or unlawful and causes annoyance, inconvenience, discomfort, or damage to others.
> - that which unlawfully annoys or does damage to others.
> - anything that works injury, harm or prejudice to an individual or the public.
> - anything which works hurt, inconvenience, or damage on another.
> - anything which works or causes injury, damage, hurt inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his or her reasonable rights of person or property.
> - anything which causes a well-founded apprehension of danger.
> - anything that essentially interferes with the enjoyment of life or property.

- something that is offensive, physically, to the senses, and which, by such offensiveness, makes life uncomfortable.

58 Am. Jur. 2d Nuisances § 1 (2002).

While numerous distinguishing considerations exist regarding what generally constitutes a nuisance, American courts distinguish between private and public nuisances in the same manner as was historically employed under English common law. "The difference between public and private nuisance does not consist in any difference in the nature or character of the nuisance itself, but only in the degree, that is, in the extent or scope of its injurious effect." Id. at § 31 (footnotes omitted). "[A] public nuisance affects the public at large, while a private nuisance affects one or a limited number of individuals only. In other words, to be considered public, the nuisance must affect an interest common to the general public." Id. at § 32 (footnote omitted).

In South Carolina, "[a] public nuisance exists whenever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights." State v. Turner, 198 S.C. 487, 495, 18 S.E.2d 372, 275 (1942). Further, to be deemed public, the nuisance must affect a number of people. See Morton v. Rawlison, 193 S.C. 25, 32, 7 S.E.2d 635, 638 (1940) (holding "[a] public nuisance must be in a public place or where the public frequently congregate"); State v. Rankin, 3 S.C. 438, 447 (1872) ("Whether it be one or the other [public or private] depends upon the extent of its existence."); but cf. Bowlin v. George, 239 S.C. 429, 434-35, 123 S.E.2d 528, 531 (1962) ("[A] nuisance may effect a considerable number of persons in the same manner and yet not be a public nuisance." (quoting Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 450-51, 86 S.E. 817, 820 (1915))).

Besides the common law governing what constitutes a nuisance, certain conduct is statutorily prohibited in South Carolina such that a violation of the statute constitutes a nuisance. See, e.g., S.C. Code Ann. § 49-1-10 (1987) (providing, in part, "[i]f any person shall obstruct any such stream, otherwise than as in Chapters 1 to 9 of this Title provided, such person shall be guilty of

a nuisance and such obstruction may be abated as other public nuisances are by law").

Conforming to the development of English common law, American courts have universally held a public nuisance affecting a purely public right gives no right of action to an individual unless the individual has suffered some particular or special damage. Keeton, Prosser & Keeton on Torts, Nuisance § 90 at 646. Thus, where such a special damage exists, the right of the injured individual to bring a tort action for nuisance subsists separately from the right of public officials to bring civil actions for nuisance, and of states to bring criminal actions against nuisance perpetrators. 58 Am. Jur. 2d Nuisances § 35 (2002).

C. The Special Injury Rule

Having universally adopted the general concept that special injuries will support private rights of action for special damages, American courts have found it an entirely more difficult task to determine what constitutes "special" or "particular" damage sufficient to support the private tort action for public nuisance. Courts have held a private individual may establish standing to bring an action for public nuisance merely by having sustained an injury in fact, and the concerns regarding a multiplicity of suits are satisfied by any means, such as by way of a class action. See Akau v. Olohana Corp., 652 P.2d 1130 (1982). A separate and antiquated view holds it is sufficient to show one's injury is different in degree only. See Carver v. San Pedro, L.A. & S.L.R. Co., 151 F. 344 (C.C.S.D. Cal. 1906). However, most jurisdictions, including South Carolina, adhere to the view that the plaintiff in such an action must establish damages different in kind, not degree, from the damage shared by the general public stemming from the exercise of the same rights. See generally Huggin v. Gaffney Dev. Co., 229 S.C. 340, 92 S.E.2d 883 (1956); Brown v. Hendricks, 211 S.C. 395, 45 S.E.2d 603 (1947); 66 C.J.S. Nuisances §§ 2, 76, 78-79 (1998); Restatement (Second) of Torts, § 821C (1979).

Although it is clear an individual plaintiff seeking to bring a tort suit for public nuisance in South Carolina must establish a special injury which is

different in kind, not merely in degree from that of the general public, we are yet faced with the additional challenge of determining the more particular matter of what constitutes an injury different in kind from the injury suffered by the general public in the case of an obstruction of a public waterway.

Only a limited body of South Carolina case law exists which even tangentially discusses the issue now before us. Unlike other jurisdictions, South Carolina has no bright-line rule indicating "[p]ersonal injuries are sufficient to show an individual's peculiar injury as required to maintain an action for public nuisance," or stated differently, "[i]njuries to a person's health are by their nature special and peculiar for the purposes of maintaining such an action." 58 Am. Jur. 2d Nuisances § 252 (2002); see also Restatement (Second) of Torts § 821C ("When the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained."); Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. at 1012 ("[T]here can now be no doubt that the nuisance action can be maintained where a public nuisance causes physical injury."); see, e.g., Breeding v. Hensley, 519 S.E.2d 369 (Va. 1999) (allowing award for personal injuries resulting from bicyclist's collision with trash dumpster left by city workers to obstruct public roadway); Gilmore v. Stanmar, Inc., 633 N.E.2d 985 (Ill. App. Ct. 1994) (holding injuries sustained by motorist, who was injured in collision caused by pedestrian canopy extending into street, were different in kind from those of the general public); City of Evansville v. Rinehart, 233 N.E.2d 495 (Ind. App. Ct. 1994) (upholding award of damages in public nuisance action against city for injuries minor received by falling in a ditch, cutting his knee, which then became infected because of germs in contaminated waters of ditch); Erickson v. Sorenson, 877 P.2d 144 (Utah Ct. App. 1994) (upholding award of damages for personal injuries in public nuisance action sustained due to sign left for protection of worker at road construction site held recoverable in public nuisance suit); Nash v. Schultz, 417 N.W.2d 241 (Iowa Ct. App. 1987) (upholding award of damages in public nuisance action where woman sustained personal injuries when she tripped and fell over sump pump hose left lying across sidewalk); Guy v. State, 438 A.2d 1250 (Del. Super. Ct. 1981) (holding when tall growths of corn and other vegetation obstructing

view of intersection were a public nuisance, injuries arising from automobile accident were different in kind from injury to general public); Flaherty v. Great N. Ry. Co., 16 N.W.2d 553 (Minn. 1944) (holding injuries sustained due to obstruction of roadway by railroad train or automobile held distinct from interference with the public right of travel); Downes v. Silvia, 190 A. 42 (R.I. 1937) (reversing grant of demurrer where plaintiff sustained injuries after encountering unguarded excavation site on private property very near highway); Hammond v. Monmouth County, 186 A. 452 (N.J. 1936) (allowing recovery for personal injuries when truck encountered unlighted and unguarded excavation site); Baker v. City of Wheeling, 185 S.E. 842 (W. Va. 1936) (holding pedestrian injured by falling into an unguarded declivity below the end of a blind alley could maintain an action for public nuisance).

D. Overcash's Special Injury

In this case, the circuit court found Overcash's accident did not constitute an injury different in kind from that suffered by the general public. In support of this view, the circuit court reasoned, and SCE&G argues on appeal "all who forcefully collide with an obstruction face the prospect of personal injury whether the obstruction is on a public highway or navigable stream." We find this rationale untenable.

In Drews v. E.P. Burton & Co., 76 S.C. 362, 366-67, 57 S.E. 176, 178 (1907), our supreme court expressly determined, when the obstruction of a public waterway was a nuisance, damage to the plaintiff's boat arising from a collision with the obstruction constituted a "special injury" sufficient to maintain a tort action for nuisance. In so holding, the court reasoned damages sustained in the collision were a special injury to Drews and not a general injury to the public. The court determined the injury common to both Drews and the public was the inconvenience resulting from the obstruction of the right of way. The sheer possibility a boater might collide with the obstruction did not render it a nuisance. Rather, its mere presence in the public waterway constituted the public nuisance because it interfered with the public right to travel unobstructed along the waterway. Id.

Applying this interpretation to the instant case, we hold the circuit court erred in finding Overcash's injuries were not different in kind from those of the general public. We can discern no meaningful distinction between the essential reasoning in Drews and the reasoning applicable to the facts and circumstances as alleged in this case. Applying the Drews analysis, the public is "injured" by the creation of the illegal obstruction in the public waterway, and Overcash sustained injuries of a wholly different kind when he collided with the dock.[3]

Moreover, we find the discussion in Carey v. Brooks, 19 S.C.L. (1 Hill) 146, 147-48 (Ct. App. 1833), both instructive and compelling.

> But if by such nuisance, the party suffer a particular damage, as if by stopping up a highway with logs, &c. [sic] his horse throws *him*, by which *he is wounded or hurt*, an action lies. [B]ut if a highway is stopped that a man is delayed in his journey a little while, and by reason thereof, he is damnified or some important affair neglected, this is not such special damage for which an action on the case will lie; but a particular damage to maintain this action, ought to be direct and not consequential; as for instance, the loss of his horse [a damage to a property interest], *or*

[3] We do not suggest that a personal injury will always be sufficient to meet the requirements of the special injury rule. For example, if the public nuisance complained of were the sort of nuisance that by its very nature endangers the public health, then a plaintiff injured by the nuisance would likely suffer injury of the same kind as the public in general. See, e.g., Ventro v. Owens-Corning Fiberglass Corp, 99 Cal. Rptr. 350 (Cal App. 1971) (holding, in an air pollution case, where the pollution is the public nuisance itself, a personal injury of the same type caused by the mere existence of the nuisance is insufficient to sustain a cause of action); Page v. Niagra Chem. Div. of Food Machinery & Chem. Corp., 68 So.2d 382 (Fla. 1953) (same).

> *some corporal hurt in falling into a trench on the highway* [a personal injury], &c. [sic].

(Emphasis added) (internal quotations omitted). Clearly, in Carey, the court contemplated the precise situation we face in this case. We see no reason to ignore the clear example provided by the court. Furthermore, the court's reasoning is sound. In the Carey court's hypothetical, the public nuisance would be the blocking of the highway with logs, causing each and every member of the public to be delayed. The special injury would be caused if the traveler's horse threw him into the roadside ditch. Likewise, in the present case, the public nuisance was created by building a dock across a navigable waterway, causing each and every member of the public to be delayed while traveling in Lake Murray. The special injury arose when Overcash struck the dock and was injured.

We further conclude the circuit court erred in ruling an injury not incidental to a property interest will not support a private action for a public nuisance. The circuit court correctly noted South Carolina public nuisance cases addressing the issue of special injury have largely been predicated on injury either directly to property or incidental to a property interest. However, the circuit court misinterpreted these cases when it concluded they limit recovery in nuisance solely to injury to property.

In its order, the circuit court cited Crosby v. S. Ry. Co., 221 S.C. 135, 69 S.E.2d 209 (1952) for the proposition that "In order for a private individual to maintain a private action for damages caused by a public nuisance, the special injury must involve the property rights of the individual, and the public nuisance would then constitute a private nuisance." However, the plaintiff's cause of action in that case was founded on the allegation that the public nuisance caused a diminution in the value of his land. Id. at 138-39, 69 S.E.2d at 210-11. Naturally, it follows that the asserted injury different in kind from that of the general public would necessarily involve the plaintiff's property rights. Id. However, nothing in Crosby or any other authority cited by either the circuit court or SCE&G indicates an injury different in kind can exist *only* in the case of an injury to a property interest.

In this regard, SCE&G posits Teague v. Cherokee County Mem. Hosp., 272 S.C. 403, 405, 252 S.E.2d 296, 297 (1979), overruled on sovereign immunity grounds by McCall ex rel Andrews v. Batson, 285 S.C. 243, 247, 329 S.E.2d 741, 743 (1985) for the proposition that South Carolina does not recognize a private action founded upon public nuisance when only a personal injury results.

In Teague, the plaintiff brought an action based in negligence for injuries she sustained when the heel of her shoe caught in a hole in a stairway of a public hospital. When the trial court granted a demurrer to the complaint based on sovereign immunity, she re-pled her action as one in nuisance. The trial court again granted a demurrer on the grounds of sovereign immunity because no allegation of interference with the use of or any damage to private property, a necessary element of private nuisance, existed in the complaint. On appeal, the plaintiff argued her action was sustainable as a private action for personal injuries arising out of a public nuisance.

Our supreme court noted previous decisions had stripped governmental immunity from the sovereign if the danger causing the harm was in fact a nuisance, but noted this rule had never been extended to a claim for personal injuries or death. Speaking of an action for private nuisance, the court noted "[t]his position, while admittedly the minority view, is consistent with the basic rationale upon which the nuisance exception originated, namely as an action to recover for interference with the use or enjoyment of rights in land." Id. at 405, 252 S.E.2d at 297. The court then stated: "The advantage of this position is indicated by the confusion and inconsistency resulting in jurisdictions which have allowed tort actions for personal injuries caused by a public nuisance." Based upon these observations, SCE&G argues the Teague Court refused to recognize a cause of action for personal injuries arising out of a public nuisance. We disagree with this analysis.

The Teague Court noted that on appeal the plaintiff portrayed her private cause of action as one for special injuries suffered as a result of a public nuisance. However, the court concluded "[e]ven if the condition of the hospital stairs rose to the dignity of a nuisance, either public or private, which is tenuous at best, the basis of the appellant's claim would still have to

rest upon the negligence of the hospital and would require suing the hospital in a tort action, which would find no authorization under our statutes." Id. at 406, 252 S.E.2d 298. Thus, the court ruled the action was barred by the doctrine of sovereign immunity.

Significantly, in reaching this conclusion, the court referred to Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. at 1003-05, in which Prosser noted the basis for liability for public nuisance recognized by the courts has been either the violation of a statute, as is alleged by Overcash in this case, *or* on any one of the three traditional tort bases: intent, negligence or strict liability. Unlike in this case, the facts as alleged by the plaintiff in Teague were susceptible to only negligence as a basis for underlying liability. Otherwise stated, no basis existed for claiming the stairway was a public nuisance. Rather, in a light most favorable to the plaintiff, only the *condition* of the staircase was claimed as a public nuisance. Thus, as the court recognized, ultimately the plaintiff's cause of action sounded in negligence, and was barred by sovereign immunity. We do not consider this dictum to be controlling, but in any event, we do not interpret the ruling to rest on a conclusion that special injury will sustain an action for public nuisance only if it involves damage to property interests.

In the absence of any applicable authority limiting special injuries solely to injuries to property interests, we decline to interpret the South Carolina caselaw to restrict a private cause of action for public nuisance to special property damage claims.

CONCLUSION

For the foregoing reasons, the circuit court's order dismissing Overcash's cause of action for public nuisance is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

STILWELL and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Jimmy Wilds,

Appellant.

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge

Opinion No. 3668
Submitted April 18, 2003 – Filed July 21. 2003

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

ANDERSON, J.: Jimmy Wilds was indicted for assault and battery with intent to kill (ABIK) and petit larceny. The jury found him guilty as charged. The judge sentenced him to twenty years, suspended to eight years with five years probation for ABIK and thirty days concurrent for petit larceny. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

On October 5, 2000, Wilds and Allen Ladd drove a vehicle to Miller's Country Store to steal gasoline. After the men exited the car, the storeowner, Clarence Miller, and the cashier, Stanley Tuffill, became suspicious and approached the men at the gas pump. Tuffill stood at the front, right corner of the car. Miller was standing at the rear of the car. Wilds entered the driver's side of the car as Ladd "dove in the passenger side of the car." Miller, approaching the driver's side window from the rear, hollered at Wilds, "Are you going to pay for this gas?" When Wilds looked at Miller, Miller showed him the butt of a gun in his pocket. Wilds immediately sped off, running over Tuffill. Tuffill's belt caught in the brake line, and he was dragged under the car about 300 feet before being jarred loose. While Tuffill was under the car, Wilds swerved the car as he accelerated.

In Wilds' voluntary statement that was introduced as evidence at trial, Wilds admitted seeing Tuffill in front of the car, saying, "[Tuffill] never said anything but he walked and stood in front of the car." Wilds acknowledged knowing Tuffill was under the car, "Alan was screaming the dude was under the car, and the next time I saw him was in my rear view mirror when he came out from under the car. I didn't stop . . . ." Lora Radford, a witness who saw the car speeding away from the store, said the men "looked like they were laughing."

At the end of the State's case, Wilds moved for a directed verdict on the ABIK charge. The trial court denied the motion. At the close of

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

evidence, Wilds renewed his motion for a directed verdict. The judge again denied the motion.

STANDARD OF REVIEW

The trial court is concerned with the existence or nonexistence of evidence, not its weight, when ruling on a motion for a directed verdict. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Rosemond, 348 S.C. 621, 626, 560 S.E.2d 636, 639 (Ct. App. 2002). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003); State v. Rothschild, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002). The judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984); State v. Horne, 324 S.C. 372, 379, 478 S.E.2d 289, 293 (Ct. App. 1996). However, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002).

When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999); State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272-73 (1990); State v. Patterson, 337 S.C. 215, 232, 522 S.E.2d 845, 853 (Ct. App. 1999).

LAW/ANALYSIS

Wilds contends the court erred in failing to grant a directed verdict on ABIK based upon the insufficiency of the evidence. Specifically, Wilds argues the State did not offer any evidence that he acted with malice.

ASSAULT AND BATTERY WITH INTENT TO KILL

ABIK is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied. Tate v. State, 351 S.C. 418, 427, 570 S.E.2d 522, 527 (2002); Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002); State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 284-85 (Ct. App. 1999). ABIK comprises all the elements of murder except the death of the victim. State v. Foust, 325 S.C. 12, 14, 479 S.E.2d 50, 51 (1996); State v. Glenn, 328 S.C. 300, 310, 492 S.E.2d 393, 398 (Ct. App. 1997); see S.C. Code Ann. § 16-3-10 (2003) ("'Murder' is the killing of any person with malice aforethought, either express or implied."). To be convicted of ABIK, the jury must be satisfied beyond a reasonable doubt that if the victim had died, the defendant would have been guilty of murder. State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000); Glenn, 328 S.C. at 310, 492 S.E.2d at 398.

I. GENERAL INTENT

Furthermore, ABIK requires the intent to kill. State v. Foust, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1996); State v. Coleman, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000); State v. Glenn, 328 S.C. 300, 310, 492 S.E.2d 393, 398 (Ct. App. 1997). It is adequate if general intent is established; specific intent is not necessary. Sutton, 340 S.C. at 396, 532 S.E.2d at 285; Foust, 325 S.C. at 15, 479 S.E.2d at 51; Coleman, 342 S.C. at 176, 536 S.E.2d at 389. Foust inculcates:

> Such intent may be shown by acts and conduct from which a jury may naturally and reasonably infer intent. See State v. Lyons, 102 N.C. App. 174, 401 S.E.2d 776 (1991);

> Colbert v. State, 84 Ga. App. 632, 66 S.E.2d 836 (1951). See also 41 C.J.S. Homicide § 195 (intent may be shown by acts and conduct of accused and other circumstances from which the jury may naturally and reasonably infer intent; evidence of the character of the means or instrument used, manner in which it was used, purpose to be accomplished, resulting wounds or injuries, etc., are admissible to show the intent with which the assault was committed); 41 C.J.S. Homicide § 179 (intent to kill may be inferred from the character of the assault, the use of a deadly weapon with an opportunity to deliberate, or the use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm; intent may be inferred when it is demonstrated that the accused voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life).

325 S.C. at 16 n.4, 479 S.E.2d at 52 n.4.

II. MALICE

Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002); State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); State v. Johnson, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987). It is the doing of a wrongful act intentionally and without just cause or excuse. Tate, 351 S.C. at 426, 570 S.E.2d at 527; State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991). Malice is defined as a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002); State v. Fennell, 340 S.C. 266, 275 n.2, 531 S.E.2d 512, 517 n.2 (2000). In its legal sense, it does not necessarily "import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief." Id.; accord State v. Mouzon, 231 S.C. 655, 622, 99 S.E.2d 672, 675-76

(1957). To prove recklessness or negligence, the State is prohibited from relying on the terms' civil concepts; instead the State must look to the meaning of the words as defined in criminal law. State v. Rowell, 326 S.C. 313, 317, 487 S.E.2d 185, 187 (1997).

Malice may be either express or implied. "The words 'express or implied' add nothing to the meaning of the word 'malice.' They do not imply different kinds of malice, but merely the manner in which the only kind known to the law may be shown to exist--that is, either by positive evidence or by inference." State v. Milam, 88 S.C. 127, 130, 70 S.E. 447, 449 (1911). Express malice is when there is a deliberate intention to unlawfully take the life of another. 40 C.J.S. Homicide § 34 (1991). Implied malice is when circumstances demonstrate a "wanton or reckless disregard for human life" or "a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act." Id. at § 35.

Although malice must be aforethought, there is no requirement that it must exist for any appreciable length of time before the commission of the act. State v. Cooper, 212 S.C. 61, 66, 46 S.E.2d 545, 547 (1948); State v. Ballington, 346 S.C. 262, 272, 551 S.E.2d 280, 285 (Ct. App. 2001) (quoting State v. Fuller, 229 S.C. 439, 446, 93 S.E.2d 463, 467 (1956)). It may be conceived at the very moment the assault occurs. Cooper, 212 S.C. at 66, 46 S.E.2d at 547 (quoting Milam, 88 S.C. at 131, 70 S.E. at 449).

Permissive Inference of Malice

The use of a deadly weapon gives rise to a permissive inference of malice. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); State v. Von Dohlen, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996); State v. Mattison, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981). In South Carolina, an automobile is regarded as a dangerous instrumentality. Yaun v. Baldridge, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964); State v. Caldwell, 231 S.C. 184, 188, 98 S.E.2d 259, 261 (1957); State v. Sussewell, 149 S.C. 128, 145, 146 S.E. 697, 703

(1929); In re McFadden, 112 S.C. 258, 261, 99 S.E. 838, 839 (1919). The jury may draw an inference of malice from proof of the use of a deadly weapon if it concludes such is proper after considering all of the facts and circumstances in evidence. Mattison, 276 S.C. at 239, 277 S.E.2d at 600. In a charge to the jury, the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence. State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 405 S.E.2d 315 (2001); see State v. Pilgrim, 320 S.C. 409, 415 n.3, 465 S.E.2d 108, 112 n.3 (Ct. App. 1995) ("While the evidence in this case may give rise to an inference the attack was committed with malice and intent to kill, the inference is a permissive one which the jury is free to accept or reject."), overruled on other grounds by State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). The supreme court has enunciated a proper jury charge:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 405 S.E.2d 315 (2001). The court cautioned the Bench that only slight deviations from the given charge would be acceptable. Id.

Viewing the evidence and all reasonable inferences in the light most favorable to the State, we find that the jury could infer that Wilds acted with malice aforethought. Because an automobile has been deemed a dangerous instrumentality, the jury was allowed to draw a permissive inference of malice. Furthermore, Wilds, in his statement, declared seeing Tuffill standing in front of his car before he drove away. Evidence was presented that Wilds was swerving while

accelerating and laughing as Tuffill was dragged underneath the automobile.

CONCLUSION

We find the judge did not err in failing to grant a directed verdict. Accordingly, the judgment of the circuit court is

AFFIRMED.

CURETON and HUFF, JJ., concur.