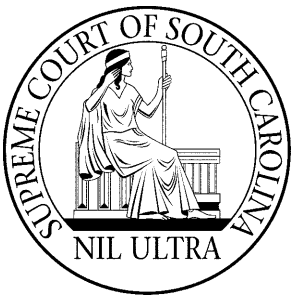

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28

July 6, 2004

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2004-UP-423-Brenda C. Gilmore et al. v. Holiday Network, Int., Inc. et al.
(Horry, Judge J. Stanton Cross, Jr., Master-in-Equity)

2004-UP-424-Val Jacobsen v. American Agviation, Inc., and Transland, Inc.;
Loretta W. Jacobsen v. American Agviation, Inc., and Transland, Inc.
(Hampton, Judge Rodney A. Peeples)

2004-UP-425-The State v. Alan Dalrymple
(Florence, Judge James E. Brogdon, Jr.)

2004-UP-426-The State v. Melvin McNeil
(Richland, Judge James C. Williams, Jr.)

PETITIONS FOR REHEARING

3724-State v. Pagan	Denied 6/25/04
3730-State v. Anderson	Denied 4/01/04
3780-Pope v. Gordon	Denied 6/25/04
3784-State v. Miller	Denied 6/28/04
3786-Hardin v. SCDOT	Denied 6/28/04
3787-State v. Horton	Denied 6/28/04
3789-Upchurch v. Upchurch	Denied 6/25/04
3794-State v. Pipkin	Denied 6/28/04
3795-State v. Hill	Denied 6/28/04
3802-Roberson v. Roberson	Denied 6/25/04
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending

3813-Bursey v. SCDHEC & SCE&G	Pending
3814-Beckman Concrete v. United Fire	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3822-Rowell v. Whisnant	Pending
3830-State v. Robinson	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-261-Zahn v. Allen	Denied 6/25/04
2004-UP-271-Hilton Head v. Bergman	Denied 6/28/04
2004-UP-276-Washington v. Miller	Denied 6/25/04
2004-UP-289-E. Hathaway Const. v. Eli	Denied 6/28/04
2004-UP-330-In the matter of Williams, A.	Denied 6/25/04
2004-UP-333-Nationwide Insurance v. Smith et al.	Denied 6/25/04
2004-UP-336-Clayton v. Lands Inn, Inc.	Denied 6/28/04
2004-UP-338-Lynn Whitsett Corp. v. Norbord	Denied 6/28/04
2004-UP-339-Shaffer v. Bacot	Denied 6/28/04
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-345-Huggins v. Ericson et al.	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-348-Centura Bank v. Cox	Pending

2004-UP-354-Weldon v. Tiger Town RV	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending
2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-365-Agnew v. Spartanburg Co. School District	Pending
2004-UP-368-Brown v. Harper	Pending
2004-UP-369-City of Myrtle Beach v. Miss Kitty's	Pending
2004-UP-370-Thigpen v. Baker Homes	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3602-State v. Al-Amin	Pending
3610-Wooten v. Wooten	Pending
3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Granted 6/24/04
3645-Hancock v. Wal-Mart Stores	Denied 6/24/04
3647-State v. Tufts	Denied 6/24/04
3653-State v. Baum	Pending
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending

3667-Overcash v. SCE&G	Pending	
3669-Pittman v. Lowther	Pending	
3674-Auto-Owners v. Horne et al.	Pending	
3676-Avant v. Willowglen Academy	Pending	
3677-The Housing Authority v. Cornerstone	Pending	
3678-Coon v. Coon	Pending	
3679-The Vestry v. Orkin Exterminating	Pending	
3680-Townsend v. Townsend	Pending	
3681-Yates v. Yates	Pending	
3683-Cox v. BellSouth	Pending	
3684-State v. Sanders	Pending	
3685-Wooten v. Wooten	Granted	6/24/04
3686-Slack v. James	Pending	
3690-State v. Bryant	Pending	
3691-Perry v. Heirs of Charles Gadsden	Pending	
3693-Evening Post v. City of N. Charleston	Pending	
3703-Sims v. Hall	Pending	
3706-Thornton v. Trident Medical	Pending	
3707-Williamsburg Rural v. Williamsburg Cty.	Pending	
3708-State v. Blalock	Pending	
3709-Kirkman v. First Union	Pending	

3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3714-State v. Burgess	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3717-Palmetto Homes v. Bradley et al.	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3728-State v. Rayfield	Pending
3729-Vogt v. Murraywood Swim	Pending
3730-State v. Anderson	Pending
3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3743-Kennedy v. Griffin	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending

3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3753-Deloitte & Touche, LLP v. Unisys Corp.	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3766-Craig v. Craig	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending

2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-444-State v. Roberts	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Denied 6/24/04
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Denied 6/24/04
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-488-Mellon Mortgage v. Kershner	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending

2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending

2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending

2004-UP-038-State v. Toney	Pending
2004-UP-050-Lindsey v. Spartan Roofing	Pending
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-100-Westbury v. Dorchester Co. et al.	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-215-State v. Jones	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-237-In the interest of B., Justin	Pending
2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David A. Horton, Appellant,

v.

Darby Electric Company, Inc., Respondent.

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

Opinion No. 25839
Heard April 8, 2004 - Filed July 6, 2004

AFFIRMED

W. Andrew Arnold, of Arnold & Arnold, of Greenville, for appellant.

D. Randle Moody, II, of Roe Cassidy Coates & Price, and Ellison F. McCoy, of Haynsworth Baldwin Johnson & Greaves LLC, both of Greenville, for respondent.

Eric Schweitzer, of Ogletree, Deakins, Nash, Smoak, & Stewart, PC, of Columbia, for *Amicus Curiae* South Carolina Chamber of Commerce.

CHIEF JUSTICE TOAL: David Horton (appellant) appeals the trial court's decision granting Darby Electric Company's (respondent's) motion for summary judgment.

FACTUAL/PROCEDURAL BACKGROUND

Appellant was employed by respondent, which is in the business of the sale and repair of industrial electric motors, from March 1981 to April 2001. Within a month of his hiring, appellant was promoted to shop manager and, at the time of his termination, he held the position of Vice President of Operations. Appellant's job responsibilities included bringing in work and getting work out, maintaining good morale in the shop, hiring and firing employees, and keeping costs under control.

As a result of losing several employees to competitors, respondent drafted a restrictive covenant and non-disclosure agreement (the agreement) in 1990. This agreement provided that the employees who signed the agreement would not compete with respondent, solicit respondent's customers, or utilize or disclose certain proprietary information of respondent for a period of two years following the termination, for any reason, of the employee's employment. Appellant signed this agreement and received a raise in return for signing the agreement.

In April 1992, respondent published a policy and procedure manual. Appellant stated in his deposition that he had read and understood the manual. Steve Darby, president of the company, stated that the manual applied to all of the employees, including appellant, and management was to follow the manual as a guide. Darby stated he used the manual as a guide to terminate appellant. The disciplinary policy in the manual provides:

> It is the Company's wish that a uniform policy be followed by its supervisors which will mean:
>
> First -- that an employee will have had sufficient notice that a continuance

of his improper actions will bring about his discharge, and

Second – that a report in writing is made of all warnings given and disciplinary measures taken.

The following is to be viewed as the guiding policy insofar as taking disciplinary action for infractions of company rules and misconduct is concerned.

1. At first offense, if not in itself serious enough to warrant suspension or discharge, give warning and advise that another offense will result in suspension for 3 days without pay as a disciplinary measure.

2. At second offense, if not in itself serious enough to warrant discharge, give 3 days' suspension without pay and warn that another offense may result in discharge.

3. At third offense, discharge, and point out to employee that he brought the action on himself and left the supervisor without any alternative.

. . .

It should be emphasized again that supervisors are not required to go through the entire three steps involved in this disciplinary procedure. Discipline may begin at any step in the procedure depending on the seriousness of the offense committed. Any discipline administered by a supervisor should be commensurate with the offense committed. In addition, the supervisor may repeat any of the first

> two steps of this procedure when he feels it is necessary, so long as the discipline is commensurate with the offense committed. If there is any doubt on your part as to what step to begin with, you should consult with the Plant Manager.[1]

Steve Darby testified that, for a non-serious infraction, the employee would be entitled to some form of progressive discipline and that he did not think an employee could be terminated for a non-serious first time offense. However, he said if a supervisor terminated an employee for a non-serious first offense, it would not be a violation of the disciplinary policy because the supervisors had discretion in deciding how to handle their employees. Appellant testified he tried to always use the manual when disciplining employees. However, he confirmed Darby's testimony by stating he had discretion as to what level of discipline to impose on the employees.

Darby stated appellant's offenses were serious enough to terminate him immediately. Darby testified that, in 2000, appellant was suspended with pay for three days for using profanity in the workplace. However, he testified appellant treated the suspension as if it was extra vacation.

In January 2001, appellant and Darby had a meeting in which they discussed the company's progress and how appellant could improve his performance. After the meeting, Darby wrote appellant a letter recapping points from the meeting. Darby testified he did not consider this letter a warning, but an understanding regarding appellant's performance. The letter stated, in pertinent part:

> You must eliminate mistakes. This is a constant and recurring problem. Your employees must understand procedures and procedures must be enforced. Thorough planning prevents mistakes. Procedures need to be constantly improved. Clear concise instructions prevent mistakes, which saves

[1]The "Plant Manager" was appellant.

> time and reduces costs. Doing a job without thinking frequently causes us to have to do it over to get it right. Cleaning parts half way, performing a drop voltage test incorrectly, jumping to conclusions without gathering all of the facts, these are some of the ways we are wasting time. We can change this.

Darby testified appellant was terminated for the following reasons: (1) allowing a motor to be shipped out when the mechanics did not approve the motor;[2] (2) making a frivolous written statement to a client about the cause of the client's motor's failure ("burnt to a crisp");[3] (3) failing to give certain work priority as he should have; (4) previous 3-day suspension; (5) previous letter indicating mistakes should not be made; and (6) the way he treated his employees. Darby stated these factors were serious enough to proceed directly to termination.

Following appellant's termination from his position, he filed a complaint against respondent alleging breach of contract and breach of implied covenant of good faith and fair dealing. The trial court granted respondent's summary judgment motion.

---

[2]The Blue Ridge motor was a five-ton motor that respondent expected to make a profit of about $9,000 on for its repair. An employee, Ron Hunt, set up the machine incorrectly and refused help. Appellant admitted the shop was his responsibility but stated he did not "micromanage his employees." Appellant approved the motor to leave the shop although it did not have a good cosmetic appearance and had not been approved by the mechanics because it was not reaching full voltage. Before approval for shipment, appellant knew the motor was not reaching full voltage and that its appearance was not satisfactory. However, he stated he did not know the mechanics had not approved the motor until after his termination. From the evidence, it appears appellant wished to hasten the repair because he was about to leave for a vacation.

[3]Appellant testified the comment was a description of the failure but was probably a "slight of tongue comment" concerning the motor.

Appellant appeals the trial court's decision granting summary judgment and raises the following issues on appeal:

I. Did the trial court err by ruling the restrictive covenant and nondisclosure agreement provides for employment at-will?

II. Did the trial court err by ruling there was not a genuine issue of fact regarding the existence and breach of an implied contract of employment based upon respondent's policy manual?

LAW/ANALYSIS

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

I. Restrictive covenant and nondisclosure agreement

Appellant argues the trial court erred by ruling the restrictive covenant and nondisclosure agreement (the agreement) allowed for the termination of appellant's employment for any reason.

The trial court found this case is not a traditional handbook case given there was an independent agreement governing appellant's employment. The court held respondent was entitled to summary judgment because the agreement specifically provided appellant could be terminated for any reason and thus, retained his at-will status.

This ruling is in error given the agreement does not provide that appellant can be terminated for any reason. Reading the phrase, "termination, for any reason, of his employment" within the context of the

agreement, it is clear the agreement is not stating that appellant's employment can be terminated for any reason.[4] In context, the phrase is simply conveying to the employee that the agreement will be in force regardless of how the employment is terminated.

The trial court also incorrectly interpreted the agreement to be an employment contract that maintained appellant's employment at-will status.

---

[4]The text of the agreement states:

> Employee therefore agrees that, for a period of two years following the termination, for any reason, of his employment with Employer, Employee will not, either on his own behalf or on behalf of a competing business: (1) solicit business from any ongoing customer of Employer's with whom Employee had contact while employed by Employer, or 2) perform any services similar to the services provided by Employer for any ongoing customer of Employer's with whom Employee had contact while employed by Employer.
>
> . . .
>
> Employee therefore agrees not to cause information from Employer's customer list to become available to a competing business at any time, whether during the continuation of Employee's employment relationship with Employer or following the termination, for any reason, of that employment relationship. . . . All documents relating to Employer's customers in Employee's possession are to be surrendered to Employer at the termination, for any reason, of Employee's employment or at any other time upon Employer's demand.

The trial court interpreted the agreement too broadly. Nothing in the agreement indicates the agreement is for the purpose of maintaining the status of employment at-will. The agreement is solely concerned with attempting to prevent employees from competing with respondent for two years following their departure from their employment with respondent. This agreement does not answer the question of what type of employment relationship is held between appellant and respondent. Accordingly, the trial court erred by granting summary judgment on this point.[5]

II. Employee handbook

The trial court found summary judgment was proper on the basis there was no contract altering appellant's at-will status. The court stated the fact there were two disclaimers in the manual that state nothing in the manual is intended to be construed as a contract of employment required the grant of summary judgment.[6] The trial court found appellant was on actual notice that

---

[5]Appellant further argues the employment at-will doctrine does not apply where the employee has given good consideration in addition to the services rendered. (Citing *Orsini v. Trojan Steel Corp.*, 219 S.C. 272, 64 S.E.2d 878 (1951) (employment at-will does not apply where employee has given good consideration in addition to services rendered; held the giving up of a job terminable at-will to take job with employer was not sufficient independent consideration to render contract enforceable)). Appellant states the "good consideration" he gave was his agreement to relinquish his right to compete with respondent after termination.

Appellant's relinquishment of the right to compete with respondent after termination is not "good consideration," such that the agreement changed his employment at-will status. The relinquishment does not have any effect on the duration of appellant's employment and there is nothing in the agreement that can be construed to alter the employment relationship between appellant and respondent.

[6]The disclaimer in the Purpose section of the manual states:

his employment was at-will because he admitted he read and understood the manual, including the disclaimers. Further, the trial court found the disciplinary procedure was not a mandatory procedure because the discipline meted out was at the discretion of management. The trial court further ruled that even assuming the manual somehow could restrict decisions related to appellant's continued employment, it is clear the contract was not breached. Finally, the trial court granted summary judgment on appellant's breach of the implied covenant of fair dealing claim given appellant's employment was at-will.

Appellant argues the trial court erred by granting summary judgment when there were issues of material fact regarding the existence of an employment contract and regarding whether that contract was breached.

Generally, an employer may terminate an at-will employee for any reason or no reason and will not be subjected to a breach of employment contract claim. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606

> We must emphasize that **YOUR EMPLOYMENT IS AT THE WILL OF YOU AND THE COMPANY. EITHER MAY TERMINATE THE EMPLOYMENT AT ANY TIME, FOR ANY REASON. NOTHING HEREIN SHALL BE CONSTRUED AS A CONTRACT OF EMPLOYMENT.**

The disclaimer in the Statement on Policies section states:

> We emphasize again that **YOUR EMPLOYMENT IS AT WILL. EITHER YOU OR THE COMPANY MAY TERMINATE THE EMPLOYMENT AT ANY TIME, FOR ANY REASON. NOTHING HEREIN IS INTENDED TO BE CONSTRUED AS A CONTRACT OF EMPLOYMENT.**

(2002). This Court has held that the determination of whether an employee manual alters an employee's at-will status is a question for the jury. *Fleming v. Borden*, 316 S.C. 452, 460, 450 S.E.2d 589, 594 (1994); *Small v. Springs Industries*, 292 S.C. 481, 357 S.E.2d 452 (1987). *See also Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002) (because employee handbook may create contract, issue of existence of employment contract is proper for jury when its existence is questioned and evidence is either conflicting or admits of more than one inference). An employee manual that contains promissory language and a disclaimer is "inherently ambiguous," and a jury should interpret whether the manual creates or alters an existing contractual relationship. *Fleming*, 316 S.C. at 463-464, 450 S.E.2d at 596.

Respondent's manual exemplifies the appropriate manner in which to give employees a guide regarding their employment without altering the at-will employment relationship. The manual contained conspicuous disclaimers and appellant understood those disclaimers. Further, the disciplinary procedure contained permissive language[7] and did not provide for mandatory progressive discipline. Appellant, who himself had the responsibility of interpreting the manual, stated he interpreted the manual as not limiting his ability to terminate employees. Accordingly, the policy manual did not alter the employment at-will relationship between appellant and respondent.[8]

---

[7]The permissive language is as follows: (1) the disciplinary procedure "is to be viewed as the guiding policy insofar as taking disciplinary action . . .;" (2) "supervisors are not required to go through the entire three steps involved in the disciplinary procedure;" (3) "[d]iscipline may begin at any step in the procedure depending on the seriousness of the offense committed;" and (4) "supervisor may repeat any of the first two steps of this procedure when he feels it is necessary, so long as the discipline is commensurate with the offense committed." (Emphasis added).

[8]Although the question has been raised that the manual does not apply to appellant, as respondent's Vice-President of Operations, the manual in fact applies to appellant. The manual does not limit itself to employees who are

Further, even if the manual could be interpreted as setting limitations on respondent's ability to terminate appellant, the evidence is uncontradicted that respondent had a reasonable good faith belief that sufficient cause existed for appellant's termination. *See Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002) (fact finder must not focus on whether employee actually committed misconduct; instead, focus must be on whether employer had reasonable good faith belief that sufficient cause existed for termination). While it appears the first two steps of the disciplinary policy had been used prior to terminating appellant, appellant's conduct was serious enough to proceed directly to termination.

We note this case is distinguishable from *Conner*. In *Conner*, we found the question remained whether the employer (the City) had a reasonable good faith belief that sufficient cause existed for terminating Conner. In that case, the City terminated Conner, the grievance committee reinstated her, and then the City Council overturned the grievance committee's reinstatement. The Court found that, because reasonable minds could differ as to whether just cause existed to support Conner's termination, the trial court should not have granted summary judgment in favor of the City. The instant case is unlike *Conner* because reasonable minds cannot differ as to whether just cause existed to support appellant's termination and, also, because respondent's employees were not entitled to progressive discipline.

Accordingly, the trial court did not err by granting summary judgment on appellant's contract claims.[9] Therefore, the trial court's decision is

---

not supervisors and specifically states in the Purpose section that the manual "is designed to be a working guide for <u>all</u> personnel." (Emphasis added).

[9]Appellant further argues the trial court *sua sponte* ruled on the affirmative defenses of unclean hands and equitable estoppel although respondent had not raised those defenses. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 (2000) (doctrine of unclean hands precludes plaintiff from recovering in equity if he acted unfairly in subject matter of litigation to prejudice of defendant; and elements of equitable estoppel as to

AFFIRMED.

WALLER, BURNETT, JJ., and Acting Justice Paula H. Thomas, concur. PLEICONES, J., concurring only in the result.

---

party estopped are: (1) conduct by party estopped which amounts to false representation or concealment of material facts; (2) intention that such conduct shall be acted upon by other party; and (3) knowledge, actual or constructive, of true facts).

Appellant correctly argues the doctrines of equitable estoppel and unclean hands do not apply in this case. However, appellant incorrectly argues the trial court raised those doctrines *sua sponte*. The trial court's ruling was not based on either of those doctrines.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sun Light Prepaid Phonecard Co., Inc., and DTL Companies, Inc., Plaintiffs,

v.

State of South Carolina and South Carolina Law Enforcement Division, Defendants.

Phonecards R Us, Inc., R.L. Jordan Oil Company of North Carolina, Inc. and DTL Companies, Inc., Plaintiffs,

v.

State of South Carolina and South Carolina Law Enforcement Division, Defendants,

Of Whom Phonecards R Us, Inc., and R.L. Jordan Oil Company of North Carolina, Inc. are Appellants,

And State of South Carolina and South Carolina Law Enforcement Division are Respondents.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 25840
Heard February 4, 2004 - Filed July 6, 2004

AFFIRMED

Matthew A. Henderson and Joshua M. Henderson, of Henderson, Brandt & Vieth, of Spartanburg, for appellants.

Assistant Attorney General Elizabeth R. McMahon, of Columbia; William H. Davidson, II, and Andrew Lindemann, of Davidson, Morrison, and Lindemann, P.A., of Columbia, for respondents.

W. Hogan Brown, Carl W. Stent, and David M. Barden, all of Columbia, for Amicus Curiae.

JUSTICE MOORE: We are asked to determine whether the trial court erred by finding certain long distance telephone cards and electronic phone card dispensers to be illegal gambling devices. We affirm.

PROCEDURAL FACTS

Appellants commenced this action following respondents' (the State's) seizure of appellants' pre-paid, long distance telephone cards (phone cards) and electronic phone card dispensers. Appellants sought the return of the phone cards and dispensers and damages resulting from the seizure. Before hearing the claim for damages, a trial was first held on the declaratory

judgment claim to determine the legality of the phone cards and dispensers.[1] The trial court held the phone cards and dispensers were illegal gambling devices.

FACTS

The phone card dispensers, which are entitled "Lucky Shamrock," were manufactured by Diamond Games Enterprises and distributed and leased by DTL Companies, Inc. to appellants. The promotional materials furnished by the manufacturer and distributor contain a header in large print stating, "Pay Winners in Cash Legally." On this same page, the promotion contains the sentence, "Audio and Visual Effects Make It Look Like a Slot Machine Although It's Not!" The promotional information mentions the sale of the phone cards in the following way: "Sell Hundreds of Phone Cards Every Day Reaping Big Profits!"

The phone cards, including the game pieces, are pre-printed by the manufacturer before they are placed in a dispenser. The cards are printed on rolls containing 7,500 cards. Attached to each phone card is a game piece that gives the customer a chance to win a cash prize. The entire card contains a paper cover, which, when pulled back, reveals a toll-free number and pin number for activating the phone service as well as an array of nine symbols in a 8-liner format.[2] If the game piece contains symbols arranged in a certain order, the customer wins a prize. The computer that prints the card randomly generates winners on the cards. Seventy percent of the revenue from the cards is paid out in prizes and the rest is a hold percentage.[3] A hold

---

[1]By order of this Court, all magistrate court cases and appeals therefrom arising out of the seizures of the phone card machines and phone cards were stayed pending the conclusion of this action.

[2]Appellants' expert agreed that if the card included only the game portion of the card and did not include the phone card, the card would be a pull-tab, which is a gambling device.

percentage is the net profit received by the sellers of the cards. The dispensers do not adjust to ensure the hold percentage is received; however, the amount of the hold percentage is predetermined based on the printing of the phone card rolls.

After printing, the roll of pre-printed phone cards are placed inside the dispenser and the dispenser cannot work without a roll of phone cards inside.[4] Each card sells for $1 and gives the customer two minutes of long distance telephone service. The customer can use the two minutes of time by dialing a toll-free number and entering a PIN number. The customer can also recharge the card and put additional long distance time on the card at the rate of 14.9 cents per minute.

Appellants contend the purpose of the game piece is to promote the sale of the phone cards. The prizes are paid to the winning customer either by the cashier in the store or by mail, but not by the dispenser itself. A customer does not need to purchase a phone card to obtain a free game piece. A free game piece could be obtained from the operator of the dispenser by mail. Instructions on how to obtain a free game piece were posted on the side of the machine and on the video screen of the machine.

The phone card dispensers are housed within a standard slot machine cabinet. The dispensers contained several features present in a gambling machine as opposed to a vending machine that simply dispenses a product: (1) the dispensers contain a video screen that has a gambling theme in that, if the user so chooses, the user can see reels turn as if the winner is chosen by

---

[3]Sun Light Prepaid Phonecard Company's (Sun Light) promotion was predicted to result in $9,744,000 in prizes and $4,178,000 in net revenue.

[4]Donald Louden, who was involved in the design and building of the machines, testified the phone cards could be purchased from a clerk and did not have to be dispensed by the machines.

the machine;[5] (2) if the machine dispenses a winning game piece, celebration music is played, whereas no music plays if the game piece is a loser; (3) the machine has a lock-out feature which freezes the operation of the machine when a pre-determined level of prize money is reached; (4) the machine contains two hard meters, one is an in-meter that records the amount of money going into the machine, and the other is labelled "WON" and records the value of the prizes issued by the machines; (5) the machine, although it accepts $1, $5, $10, $20, $50, and $100 bills, does not have a mechanism for returning change; and (6) the machines could be linked, a feature of a gambling device.

Further, although the sweepstakes promotion was set to run for 22 months, the long distance service on the phone cards was valid only for six months from the time the *first* phone card pin number was used. There was testimony that appellants, the manufacturer, and the distributor did not keep any records of the phone time used or what pin numbers had been sold via the cards. Also, some stores contained more than one phone card dispenser. According to the lease and purchase agreements, Phonecards R Us, Sun Light, and another company not involved in this case, were under contract to sell 117 million and 360 thousand (117,360,000) cards a year in the state of South Carolina. The South Carolina population in early 2000, the time of the seizures, was only about three million people. A marketing study had not been conducted to determine whether there would be such a high demand for the phone cards. Finally, the phone company from which the long distance service was purchased could not legally provide intrastate service in South Carolina because it had not been licensed to do so.

[5]The machine does not play a role in determining the winner because the winning cards have already been pre-selected on the phone card rolls. The machine simply reads the bar code on the back of the phone card and displays that image on the video screen. The customer can either look at the game piece or the monitor to determine if they have a winning game piece.

ISSUE

Did the trial court err by finding the phone cards and phone card dispensers are illegal gambling devices?

DISCUSSION

The trial court found the phone cards and phone card dispensers are illegal under S.C. Code Ann. § 12-21-2710 (2000), which provides:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State . . . *any* . . . *pull board, or other device pertaining to games of chance of whatever name or kind*, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, *but the provisions of this section do not extend to . . . vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance*.

(Emphasis added).

Appellants argue the phone card dispensers are legal under § 12-21-2710 because they are the same as traditional vending machines and provide a uniform return for every dollar inserted, *i.e.* a phone card. They argue that only when a machine and its components determine who will be a winner does the machine violate § 12-21-2710.

While it is true the dispenser always gives the customer the same return, *i.e.* a phone card with a game piece attached, and that the dispenser

does not itself determine whether a customer has won, the dispenser still contains an element of chance.

When printing the phone card rolls, a computer randomly determines which game piece attached to which phone card will be a winner. The phone card roll is then placed inside the dispenser. As testified to by the designer of the dispensers and by appellants' expert, the phone card rolls are an integral part of the machine, and, without them, the dispensers will not work. Therefore, the phone card rolls present the element of chance in the dispensers and cause the cards and the dispensers to violate § 12-21-2710.

Although the phone cards are an integral component of the dispensers, the phone cards would be illegal if they were issued over the counter as opposed to being placed in the dispensers. As the trial court found, § 12-21-2710 declares illegal any pull board or other device pertaining to games of chance. The phone card itself contains an element of chance and is a type of gambling device known as a pull-tab. Appellants' expert stated that if the card did not include the long distance phone service but only included the sweepstakes portion, the card would be a gambling device. Given the characteristics of the phone cards , the phone portion of the cards is mere surplusage to the game piece. Accordingly, the trial court properly determined the phone cards themselves were illegal gambling devices.

Furthermore, the trial court correctly determined the phone card dispensers are like slot machines and not traditional vending machines. The dispensers have a gambling-themed video screen, play celebration music when a customer is a winner, have a lock-out feature which freezes the operation of the machine when a pre-determined level of prize money is reached, contain a meter that records the value of the prizes paid out, and do not give change. None of these features is present in a traditional vending machine that is exempted from § 12-21-2710.

Accordingly, the trial court properly found the phone cards and dispensers to be illegal gambling devices pursuant to § 12-21-2710.[6]

Appellants further argue the trial court should have found the dispensers and phone cards legal pursuant to S.C. Code Ann. § 61-4-580 (Supp. 2003).[7] However, the phone cards and dispensers do not meet the

---

[6] Appellants argue that if the dispensers are found illegal under § 12-21-2710, then all vending machines in South Carolina that dispense candy or snacks with promotional sweepstakes game pieces likewise violate the statute, otherwise their equal protection rights would be violated. However, this argument is without merit given the phone card dispensers are illegal gambling devices and vending machines are not. The two machines are *not* similarly situated such that an equal protection claim may arise. *See* Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999) (equal protection is satisfied if: (1) classification bears reasonable relation to legislative purpose sought to be effected; (2) members of class are treated alike under similar circumstances and conditions; and (3) classification rests on some reasonable basis).

The main difference between the dispensers and vending machines is that the vending machines dispense promotional game products that are legitimate because their companies are attempting to promote the sale of those products. The phone card dispensers, on the other hand, do not issue game pieces that are part of a legitimate promotion or sweepstakes. The product being sold to consumers is not the long distance phone service but a game of chance.

[7]Section 61-4-580 provides:

> No holder of a permit authorizing the sale of beer or wine . . . may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:
> . . .

requirements of § 61-4-580 because the game pieces are not a legitimate promotion or sweepstakes. Accordingly, the trial court did not err by failing to find the dispensers and phone cards legal pursuant to § 61-4-580.[8]

CONCLUSION

We find the trial court did not err by finding the two-minute emergency long-distance phone cards and the electronic phone card dispensers to be illegal gambling devices under § 12-21-2710.

> (3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:
>
> (a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
>
> (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and
>
> (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

[8]Given the phone cards and dispensers are illegal under § 12-21-2710, it is unnecessary to address appellants' argument that the trial court erred by finding the dispensers illegal under S.C. Code Ann. § 12-22-1040 (2000).

AFFIRMED.

TOAL, C.J., and Acting Justice Alexander S. Macaulay, concur. PLEICONES, J., and Acting Justice Daniel F. Pieper dissenting in separate opinions.

JUSTICE PLEICONES: I agree with the majority that the machines in question are gambling devices that violate S. C. Code Ann. § 12-21-2710 (2000), but would hold they meet the exception found in S. C. Code Ann. § 61-4-580(3) (Supp. 2003). Accordingly, I would reverse the circuit court's order.

In 1929, this Court held a machine that dispensed a package of mints for each nickel deposited, and in addition dispensed, at random intervals, between 2 and 20 brass tokens, was an unlawful gambling device under the predecessor to § 12-21-2710.[9] Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929). In my opinion, that decision controls the gambling device issue raised here.

Having determined that the dispenser/phone card/game piece scheme here is a gambling device, the next issue is whether it is permitted under §

---

[9] This gambling device statute has been amended over the years as the technology evolved, but the essential structure has remained intact. The version in effect in 1929 read:

> It shall be unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State, any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance. Any person whomsoever who shall violate this section shall be subject to a fine of not more than one hundred dollars, or imprisonment upon the public works of the County wherein the offense is committed for a period of not more than thirty days.
>
> 2 S.C. Code § 196 (1922).

61-4-580. The General Assembly has legalized games of chances "in connection with the sale, promotion or advertisement of a consumer good or service . . ." if conducted on premises licensed for the sale of beer or wine. § 61-4-580(3). The majority concludes that the phone cards and dispensing machines are without this statute because "the game pieces are not a legitimate promotion or sweepstakes." While I agree that the phone cards are a foolish investment, I do not believe the statute limits promotions or sweepstakes to those where the consumer good or product that is the subject of the promotion is deemed by a court to be "legitimate" or a "good deal." As neither the wisdom nor the legitimacy of the promotion is an issue, I can find no basis to deny these machines and cards the exemption provided by the statute.

I would reverse the decision of the circuit court, and hold that these devices are within the ambit of § 61-4-580(3), and thus are legal when placed in licensed premises.[10]

[10] It is unclear from the record whether any of appellants are licensed premises within the meaning of § 61-4-580.

ACTING JUSTICE PIEPER: I concur with Justice Pleicones' opinion as to the interpretation of S.C. Code § 12-21-2710 and strict construction of § 61-4-580. However, since the record is not clear and since the trial court declined to address § 61-4-580, I would first remand for a hearing to determine whether the appellants held a permit and allowed the placement of these machines upon licensed premises in accordance with § 61-4-580. If the trial court finds upon remand that the permit and licensed premises requirements have been met, I would reverse and hold that the devises are legal pursuant to § 61-4-580(3).

The Supreme Court of South Carolina

In the Matter of Rosalyn K. Grigsby, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Lana H. Sims, Jr., 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. Sims shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Sims 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 Lana H. Sims, Jr., 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 Lana H. Sims, Jr., 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. Sims' office.

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

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

Columbia, South Carolina
June 29, 2004

The Supreme Court of South Carolina

In the Matter of Rodney
L. Foushee, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that John M. Leiter, 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. Leiter shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Leiter 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 John M. Leiter, 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 John M. Leiter, 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. Leiter's office.

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

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

Columbia, South Carolina
June 29, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Earl Miller, Appellant.

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

Opinion No. 3784
Heard March 10, 2004 – Filed April 26, 2004
Withdrawn, Substituted, and Refiled June 28, 2004

REMANDED

William G. Rhoden, of Gaffney, for Appellant.

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

HUFF, J.: A Cherokee County grand jury indicted Robert Earl Miller for unlawful possession of a handgun, failure to stop for a police vehicle, and armed robbery. Following a jury trial, Appellant was convicted of all three charges. During trial, Appellant asked for and was denied a suppression hearing concerning the show-up identification of his alleged co-participant. We remand for an in camera hearing.

FACTUAL/PROCEDURAL BACKGROUND

On or about 4:00 p.m. on the afternoon of October 5, 2001, a black male robbed the Alltel Communications store located on Floyd Baker Boulevard in Gaffney, South Carolina. The perpetrator entered the store with his back to the store's two female employees. As the man turned to face the employees, he pulled a black mask over his face, brandished a black handgun, and ordered the employees to fill a bag with money.

The two employees began filling the bag with money from one of the store's cash registers, when the man ordered one of the women to open the second cash register. However, the employees could not find the keys to the second register. While in the back looking for the keys, the man forced one of the women to open the store's safe. After finding the safe empty, the man told one of the women to keep looking for the keys to the register. Realizing they would not be able to open the second register, the man took both women into the back of the store and made them lie down on the floor. The employees lay on the floor as instructed until they heard the front door buzzer. Assuming the robber had left the store, the employees went to the front of the store, locked the door, and called 911.

The robbery lasted approximately ten minutes and resulted in a little over four hundred dollars being stolen. When police arrived on the scene, the employees described the robber as a black male who wore a blue shirt and dark pants. Sometime later, an individual was brought back to the store, and both women positively identified this person as the robber. One of the women testified, although the man

never removed the mask during the robbery, they were able to see the side of his face as he pulled the mask down. Both women testified they never saw a car in the parking lot, but they heard a car door and assumed it was a customer coming in when the robber entered the store.

On October 5, 2001, shortly after starting his 4:00 shift, Trooper Johnnie Godfrey with the South Carolina Highway Patrol was traveling on Floyd Baker Boulevard near the Alltel store when a vehicle came from his right and cut him off. At this point, Trooper Godfrey testified that he turned on his blue lights and attempted to pull over the car for the purpose of issuing a warning for improper lane change and failing to yield the right-of-way. The car pulled into a parking lot, but failed to stop, instead exiting on another street and heading up the interstate toward Blacksburg. A pursuit ensued involving several officers, including the Highway Patrol and the Blacksburg City Police Department.

The pursued car left Gaffney and headed up I-85 toward North Carolina, sideswiping a car and turning off the interstate. A bystander testified that she observed the chase and as the car approached her, she saw someone toss a gun from the passenger side window. Officer Christy Poole of the Gaffney City Police Department searched the area where the gun was allegedly thrown and retrieved a black handgun.

The chase ended after the pursued car attempted to make a right hand turn and ran off the road and into a field. The two occupants then jumped from the car as it was still rolling, and fled. The driver of the vehicle was quickly apprehended and identified as appellant, Robert Miller.

Miller was placed in the back seat of Sergeant Mark Gooch's patrol car. Miller remained in the car for a period of fifteen to twenty minutes, while detectives and the crime scene unit responded to the scene. Sergeant Gooch testified that while en route to the detention center, Miller commented "I heard someone say something about a robbery. I don't know anything about a robbery. I wasn't even near an Alltel store." Miller also questioned what the crime scene officers were

doing at the vehicle, and when the sergeant told him they were recovering evidence and asked Miller if he was worried about them finding his fingerprints on the guns, he stated, "my man had a gun." After hesitating, Miller then said, "if you will get a detective to talk to me, I'll tell them what they need to know." Officer Gooch stated that, while Miller was seated in his car, he did not mention a robbery or any charges against him to Miller. He admitted, however, that his police radio was on while Miller was seated in the car, and he did discuss these matters with other officers outside of the car, about fifteen feet behind the patrol vehicle.

Once he was transported to the local detention center, a datamaster test was administered. Trooper Godfrey testified he smelled an odor of alcohol on appellant and suspected appellant had been using marijuana. Based on the datamaster test, the trooper asked Miller to submit to a urine test and Miller refused. Trooper Godfrey charged Appellant with driving under the influence and Miller subsequently pled guilty to the charge.

The passenger from the vehicle was apprehended after he was found hiding in an outbuilding approximately two hundred yards from where the car was abandoned. This individual, identified as Tavo Glenn, was wearing a blue shirt and dark pants when apprehended. Mr. Glenn had several items in his possession when he was arrested including a little over four hundred dollars, a pair of latex gloves, and eight to ten rounds of .380 caliber pistol ammunition. A search of the automobile produced a .380 caliber silver handgun, found under the passenger seat.

Shortly after Glenn's apprehension, Captain Skinner of the Gaffney Police Department arrived on the scene and instructed one of his officers to take Glenn back to the Alltel store to be identified. When Glenn arrived at the Alltel store, the officers took him out of the patrol car and placed him in front of the vehicle, twenty to twenty-five feet from the front door of the store. Glenn was handcuffed and was the only civilian in the area, standing among police officers. The two

employees positively identified Glenn as the perpetrator of the robbery. Thereafter, both Glenn and Miller were charged with armed robbery.

Appellant took the stand and admitted that he was the driver of the vehicle and that he intentionally failed to stop when he saw the police cars' blue lights. He claimed he did not see the lights while on Floyd Baker Boulevard, but noticed them after he cut through a parking lot, and thought he was being pulled for cutting through the lot to avoid a red light. Miller claimed that he rode with Glenn to Gaffney so that Glenn could get some marijuana. The two were riding around smoking and drinking and made some stops along the way for Glenn to sell some of the drugs. They also stopped for Miller to go to the bathroom, at which point he took over driving since Glenn's license had been suspended. Miller stated that he failed to stop for the blue lights because he was on parole and he knew there was a gun in the car, as well as significant amounts of illegal drugs. At some point during the chase, Miller saw Glenn throw something out the window. He knew that Glenn was getting rid of the drugs, but he did not know if Glenn threw a gun out the window. Miller denied that he robbed anyone. He stated he did not know anything about the Alltel robbery until after he was put in the police car. While sitting in the car, he was listening to the police radio, and "heard them keep bringing up something about armed robbery." He stated he must have heard them specifically mention Alltel.

Prior to trial, defense counsel moved for a suppression hearing pursuant to State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), based on the unduly suggestive show-up identification of Tavo Glenn. Recognizing Glenn was not on trial in this case and had already been convicted in the matter, defense counsel nonetheless argued Miller was entitled to such a hearing as this was a "hand of one, hand of all case" and the identification of Glenn was a critical part of the State's case against Miller. The defense asserted the court needed to make a determination of the reliability of the evidence prior to the matter going before the jury.

The trial court pointed out that it had held such a hearing in Glenn's trial and, although it acknowledged that courts generally disfavor one person show-ups, the court had found the necessary requirements of the law met and admitted the identification in Glenn's trial. Because Glenn had already been tried and convicted, the court held that his identification was not an issue in Miller's case. Defense counsel countered the State elected to try Glenn and Miller separately, and as a result, Miller was not present during the proceedings in Glenn's trial dealing with the identification issue. He therefore never had the opportunity to cross-examine the witnesses. Finding no case law to give guidance on the matter, the court determined Miller was not entitled to an in camera hearing regarding the identification of Glenn as the perpetrator.

LAW/ANALYSIS

Appellant argues the trial court erred by failing to conduct a suppression hearing related to the show-up identification of his alleged co-participant, Tavo Glenn. We agree.

South Carolina courts have consistently held that when identification of a defendant is at issue, "the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971)). In State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992), our Supreme Court noted the court had adopted a per se rule requiring the trial court to hold an in camera hearing in such situations. Simmons, 308 S.C. at 82-83, 417 S.E.2d at 93.

This court has also recently addressed the issue of a defendant's right to an in camera hearing concerning the admissibility of identification of the accused. In State v. Cheatham, 349 S.C. 101,

561 S.E.2d 618 (Ct. App. 2002), this court recognized the per se rule adopted by our courts. Cheatham, 349 S.C. at 117-118, 561 S.E.2d at 627. There, the defendant moved for a hearing outside the presence of the jury regarding his identification pursuant to Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375 (1972), State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996), and Rule 104(c), SCRE. The trial judge denied this request. Cheatham, 349 S.C. at 112-13, 561 S.E.2d at 624-25. This court found Rule 104(c), SCRE, "unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury." Rule 104(c) provides as follows:

> **Hearing of Jury. Hearings on** the admissibility of confessions or statements by an accused, and **pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury.** Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

Rule 104(c), SCRE (emphasis added).

In Cheatham, we pointed out that the in camera hearing required by Rule 104(c) allowed for a more vigorous cross-examination that might otherwise be curtailed if such an examination were conducted in the presence of the jury, thereby requiring the defendant to risk alienating himself from the jurors. Cheatham, 349 S.C. at 117, 561 S.E.2d at 627. Based on Rule 104(c) and prior case law, this court reaffirmed the rule requiring an in camera hearing when a defendant challenges the in-court identification of defendant as being tainted by a previous illegal identification. Cheatham, 349 S.C. at 117-18, 561 S.E.2d at 626-27.

Although the procedures to be followed when a defendant challenges an in-court identification of himself on the basis that it has been tainted by a prior illegal or suggestive identification are clearly established, South Carolina courts have yet to address whether the same

procedures are to be followed when, as here, the defendant seeks to challenge the identification of an alleged co-participant. The State contends Miller has no standing to challenge the line-up identification of another because constitutional rights are personal rights. Miller asserts, under the facts of this case, due process requires that he be allowed to challenge the identification process. He contends he was never identified as a participant in the robbery and his only connection to the robbery is that he was apprehended with Glenn. He further argues the issue is the reliability of the evidence.

While there are no South Carolina cases directly on point, other jurisdictions have examined the issue of whether a defendant has standing to challenge the identification of an alleged co-participant. In People v. Bisogni, 483 P.2d 780 (Cal. 1971), the defendant sought to challenge the show-up identification of one of his alleged co-participants in a robbery. The defendant introduced alibi evidence that he and his alleged co-participant were somewhere else on the night of the crime. Id. at 782. Therefore, if this co-participant were proven to be one of the perpetrators, it would effectively destroy the defendant's alibi.

The California Supreme Court noted the reason for excluding unfairly conducted show-up identification evidence is that such evidence is unreliable as a matter of law and may result in the conviction of innocent persons. As pointed out by that court, such evidence is equally unreliable whether it involves the identity of the defendant, or the identity of a co-participant. Based on the circumstances of that case, the court held that "whenever the identity of a confederate is essential to prove the defendant's participation in a crime and when, as here, such evidence effectively destroys the defense offered by the defendant, he has standing to challenge the fairness of the identification procedures of the alleged co-participant." Id. at 783.

Similarly, in the more recent case of State v. Clausell, 580 A.2d 221 (N.J. 1990), the Supreme Court of New Jersey considered the issue of a challenge to the identification of a co-defendant. In Clausell, as in Bisogni, defendant presented the alibi defense that neither he nor

his co-defendant were at the scene of the crime. Id. at 234. Finding that the defendant did have standing to challenge the identification of his co-defendant, the court held that "[a]lthough a litigant generally may assert only his or her constitutional rights, when the party raising the claim is not simply an interloper and the proceeding serves the public interest, standing will be found." Id. (citations omitted). Noting that any evidence that placed the co-defendant at the scene of the crime bolstered the State's case against the defendant, the court held "[b]ecause defendant has a substantial personal stake in the admissibility of the identification evidence, . . . [defendant] has standing to challenge the trial court's ruling on that question." Id.

A similar situation presents itself under the facts of the current case. As Miller points out, he was never identified by the victims of the robbery and the only thing linking him to the robbery of the Alltel store is the fact that he was apprehended in the company of Tavo Glenn, who in turn, was identified as the person who perpetrated the robbery. Neither of the eyewitnesses saw the car the robber may have used, much less whether there was another person involved who may have been the driver of that car. As in Clausell and Bisogni, the success or failure of Miller's defense – that he knew nothing about the robbery – turns largely on the identification of Tavo Glenn as the perpetrator of the crime.

The State argues that Miller does not have standing to challenge the identification procedure used in regard to Glenn because such rights are constitutional rights, personal to Glenn. We disagree. While a defendant challenging the admissibility of evidence obtained in violation of constitutional rights must often show he is challenging the evidence based on a personal violation of his rights by the manner in which the evidence was obtained, a person requesting a hearing as to identification evidence is challenging the evidence based on the reliability of that evidence. For example, it is generally recognized that one does not have standing to challenge the admission of evidence obtained based on the violation of another's constitutional rights. Thus, where one does not have an expectation of privacy, he may not challenge the admission of evidence based on the violation of another's

right to privacy. See State v. McKnight, 291 S.C. 110, 115, 352 S.E.2d 471, 473 (1987) (defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate he has a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search). The concern under the current set of facts is not whether one's personal constitutional rights were violated in obtaining the evidence, but whether the evidence obtained is unreliable, such that failure to suppress the evidence violates one's due process rights. Accordingly, we find Miller has standing to challenge the reliability of the identification of Glenn.

The State contends, however, that even if there was error in the identification procedure, such error was harmless as the evidence of Miller's guilt was overwhelming, and was sufficient to conclusively establish his guilt beyond a reasonable doubt. Again, we disagree.

Whether an error is harmless depends on the circumstances of the particular case. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here, assuming the identification evidence was improperly admitted, we cannot conclude it could not have reasonably affected the result of Miller's trial. Miller was never identified as a participant in the robbery of the Alltel store. Indeed, no direct evidence was presented that the robbery was accomplished by anyone other than a lone gunman. While we acknowledge that there is circumstantial evidence of Miller's participation in the crime by way of Miller's apprehension with Glenn and the circumstances surrounding that apprehension, it cannot be said that, without the identification of Glenn, Miller's guilt was conclusively proven by competent evidence such that no other rational conclusion could be reached. Accordingly, we find

any error in the admission of the identification evidence was not harmless.

In light of the critical nature of the identification of Glenn to the State's case against Miller, we find, under the facts of this particular case, the interests of justice required a preliminary hearing be conducted outside the hearing of the jury on the pretrial identification of Glenn,[1] and the trial court erred in refusing to hold such a hearing. It does not follow, however, that Miller is entitled to a new trial. Rather, we remand this case to the trial court for the purpose of conducting an in camera hearing to determine whether the identification of Glenn was so tainted as to require its suppression at trial. Should such a finding be made, Miller will then be entitled to a new trial. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 93-94 (1992) (proper remedy where court erroneously refuses to hold suppression hearing on identification is remand for such a hearing).

REMANDED.

STILWELL, J. and CURETON, A.J., concur.

[1]As previously noted, Rule 104(c), SCRE provides that hearings on pretrial identifications of an accused shall be conducted out of the hearing of the jury, and "[h]earings on other preliminary matters shall be so conducted when the interests of justice require . . . ."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Craig Moore, **Respondent,**

v.

Robert Moore, **Appellant.**

Appeal From Colleton County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3840
Submitted June 8, 2004 – Filed June 28, 2004

AFFIRMED

Bert Glenn Utsey, III, of Walterboro, for Appellant.

Peter Brandt Shelbourne, of Summerville, for Respondent.

ANDERSON, J.: In this appeal from a breach of fiduciary duty cause of action, Appellant Robert Moore argues the trial court erred in admitting evidence and in submitting the claim to the jury. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Appellant, the sole proprietor of Moore's Heating and Air, received the majority of his business through subcontracting work for Greene's Heating and Air Conditioning, a business run by John Greene. Two to three months after beginning work as Moore's Heating and Air, Appellant entered into an arrangement with his brother, Respondent Craig Moore, whereby Appellant subcontracted a portion of his work to Respondent. Under this informal arrangement, Appellant paid Respondent based on a percentage of business revenue, though Respondent contributed no capital or assets to the business. As explained by Respondent, "I was self employed from Bobby, and Bobby was self employed from [Greene]."

The brothers conducted business in this manner for some time until Greene, having decided to retire, approached Appellant about selling Greene's Heating and Air Conditioning to Appellant for $100,000.00. After discussing the possibility of a purchase with Greene, Appellant suggested to Respondent that they become equal partners in the business, each contributing fifty percent toward the business's purchase price. Respondent agreed to the proposal, and the two planned to later draft a partnership agreement or form a limited liability company.

The brothers executed a contract with Greene whereby they agreed to purchase Greene's Heating and Air Conditioning for $100,000.00. The brothers then spoke with a bank officer about obtaining a joint loan for the purchase amount. The loan application was not completed at this first meeting with the bank officer. To obtain the loan, the brothers had Paul Walker, an accountant, draft a pro forma balance sheet projecting future profits of the planned business. According to Respondent, the brothers

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

agreed they would each be paid a salary of $800.00 per week. From their projected salaries, Appellant and Respondent would each be responsible for paying back their half of the $100,000.00 loan.

Three days after the bank visit, the plans of Appellant and Respondent went awry when Appellant became frustrated with Respondent's decision to leave for a weekend trip to Myrtle Beach while a job deadline loomed nigh. Upon Respondent's return, Appellant openly expressed his misgivings, advising Respondent he no longer desired to be equal partners with him. With Respondent present, Appellant telephoned the bank and instructed the loan officer to remove Respondent's name from the loan. Respondent would accept no other arrangement and advised Appellant he would become Appellant's competition. As a result of the disagreement, Respondent discontinued working for Moore's Heating and Air and began operating his own heating and air conditioning business.

Appellant continued with the planned purchase of Greene's Heating and Air Conditioning, individually securing a loan for $100,000.00 and executing a purchase agreement with Greene. Respondent filed suit against Appellant and Greene, alleging breach of contract and breach of fiduciary duty.

During direct examination of Walker, Respondent sought to introduce the income projection Walker prepared for the brothers' loan acquisition. Appellant objected to the document's admission on the grounds of relevance. The trial court overruled the objection, admitting the income projection as Plaintiff's Exhibit 2. Similarly over Appellant's objection, the trial court permitted Respondent's counsel to question Appellant on cross-examination about Appellant's personal purchases and spending since the acquisition of Greene's Heating and Air Conditioning.

At the close of all evidence, Appellant moved for directed verdict on both the breach of contract and breach of fiduciary duty causes of action. The trial court dismissed Respondent's breach of contract theory but denied Appellant's motion as to the breach of fiduciary duty action. Before the court submitted the breach of fiduciary duty claim to the jury, Appellant requested

a jury charge that Respondent had a duty minimize his damages. The court refused to charge the jury as requested.

The jury returned a verdict in favor of Respondent in the amount of $30,000.00 actual damages.

LAW/ANALYSIS

I. FIDUCIARY DUTY

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Ellis v. Davidson, ___ S.C. ___, ___, 595 S.E.2d 817, 822 (Ct. App. 2004); Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct. App. 2003). A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). A relationship must be more than casual to equal a fiduciary relationship. Ellis, ___ S.C. at ___, 595 S.E.2d at 822; Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93.

As a general rule, a fiduciary relationship cannot be created by the unilateral action of one party. Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997). To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986); Ellis, ___ S.C. at ___, 595 S.E.2d at 822.

The evidence must show the entrusted party actually accepted or induced the confidence placed in him. Regions Bank, 354 S.C. at 671, 582 S.E.2d at 444; State v. Parris, 353 S.C. 582, 593, 578 S.E.2d 736, 742 (Ct. App. 2003); Brown, 326 S.C. at 423, 483 S.E.2d at 484.

"Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." Ellie v. Miccichi, 358 S.C. 78,___, 594 S.E.2d 485, 497 (quoting Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct. App. 1995)). Partners are fiduciaries to each other and their relationship is one of mutual trust and confidence, imposing upon them requirements of loyalty, good faith and fair dealing. Redwend, 354 S.C. at 475, 581 S.E.2d at 505; Few v. Few, 239 S.C. 321, 336, 122 S.E.2d 829, 836 (1961).

The fiduciary relationship of partners is discussed in 59A Am. Jur. 2d Partnership § 420 (1987):

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. It is a fundamental characteristic of partnership that the partners' relationship is one of trust and confidence when dealing with each other in partnership matters.
>
> Partners are held to a standard stricter than the morals of the marketplace, and their fiduciary duties should be broadly construed, connoting not mere honesty but the punctilio of honor most sensitive. In all matters connected with the partnership every partner is bound to act in a manner not to obtain any advantage over his copartner in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. A partner

> cannot act too quickly to protect his own financial position at the expense of his partners, even in the absence of malice.

59A Am. Jur. 2d Partnership § 420 (1987) (footnotes omitted).

South Carolina case law recognizes the fiduciary duty owed between partners:

> The law holds each member of a partnership to the highest degree of good faith in his dealings with reference to any matter which concerns the business of the common engagement, and each partner, being the agent of the firm, must be held to the same accountability as other trustees, in all matters which affect the common interest. The relationship of a partnership is fiduciary in character and imposes on the members the obligation of refraining from taking any advantage of one another by the slightest misrepresentation or concealment.

Lawson, 312 S.C. at 498-99, 435 S.E.2d at 857 (emphasis added) (citations omitted); see also Edwards v. Johnson, 90 S.C. 90, 72 S.E. 638 (1911) (stating that each member of a partnership is held to the highest degree of good faith in his dealings with reference to any matter concerning the business of the common engagement, and each partner, being an agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees in all matters affecting the common interest).

Redwend, 354 S.C. at 476-77, 581 S.E.2d at 505; accord Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 597-98, 538 S.E.2d 15, 24-25 (Ct. App. 2000).

Whether a fiduciary relationship exists between two people is an equitable issue for the judge to decide. Hendricks v. Clemson Univ., 353

S.C. 449, 458-59, 578 S.E.2d 711, 715 (2003) (citing Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987)). However, the determination of a breach of a fiduciary relationship can be a question for the jury. Id.

II. DAMAGES/LOST PROFIT

Appellant contends the trial court erred in submitting the breach of fiduciary duty claim to the jury because Respondent failed to prove damages with reasonable certainty. We disagree.

One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. In a breach of fiduciary case, the plaintiff is entitled to damages for harm caused by the breach of a fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty are those proximately resulting from the wrongful conduct of the defendant.

> "Profits" have been defined as "the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them." Restatement of Contracts § 331, Comment B (1932); see Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988) (defining "profits" as the net of income over expenditures during a given period).

Drews Co. v. Ledwith-Wolfe Assocs., 296 S.C. 207, 210, 371 S.E.2d 532, 534 (1988).

The case of Drews Co. v. Ledwith-Wolfe Assocs. articulates the standard of proof for proving lost profits:

> The same standards that have for years governed lost profits awards in South Carolina will apply with equal force to cases where damages are sought for a new business or enterprise. First, profits must have been prevented or lost "as a natural consequence of" the breach of contract.

> The second requirement is foreseeability; a breaching party is liable for those damages, including lost profits, "which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of the breach of it."
>
> The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative. The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.

Drews, 296 S.C. at 213, 371 S.E.2d at 535-36 (internal citations and quotations omitted); see Beck v. Clarkson, 300 S.C. 293, 298, 287 S.E.2d 681, 684 (Ct. App. 1989) (citing the factors in Drews).

The requirement to establish lost profits with "reasonable certainty" permits "an inherent flexibility facilitating the just assessment of profits lost to a new business due to contractual breach." Drews, 296 S.C. at 214, 371 S.E.2d at 536.

> Numerous proof techniques have been discussed and accepted in different factual scenarios. See e.g, Upjohn v. Rachelle Laboratories, Inc., 661 F.2d 1105, 1114 (6th Cir. 1981) (proof of future lost profits based on marketing forecasts by employees specializing in economic forecasting); Petty v. Weyerhaeuser Co., supra (skating rink's projected revenues compared to those of another arena in a nearby town); see also Restatement (Second) of Contracts, § 352, at 146 (1981) (proof of lost profits "may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like."); Note, supra, 48 Ohio St. L.J. at 872-3 (means of

> proving prospective profits include (1) "yardstick" method of comparison with profit performance of business similar in size, nature, and location; (2) comparison with profit history of plaintiff's successor, where applicable; (3) comparison of similar businesses owned by plaintiff himself, and (4) use of economic and financial data and expert testimony).

Drews, 296 S.C. at 213-14, 371 S.E.2d at 536.

> Proof may be established through expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, comparison with profit performance of businesses similar in size, nature and location, comparison with profit history of plaintiff's successor, comparison of similar businesses owned by plaintiff himself, and use of economic and financial data and expert testimony.

Global Prot. Corp. v. Halbersberg, 332 S.C. 149, 158, 503 S.E.2d 483, 487 (citing Drews, 296 S.C. at 213-14, 371 S.E.2d at 536). The standard for proving lost profits complies with the general rule for recovery of damages, which mandates that the fact finder determine the amount of damages with reasonable certainty from the evidence. Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). The amount of damages cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. Id.; see Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000) ("The amount of damages need not be proved with mathematical certainty. The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount."); Minter, 322 S.C. at 528, 473 S.E.2d at 70 ("While proof of mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation."). Case law in South Carolina has defined "reasonable certainty:"

> To warrant such recovery, loss of profits must be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative. But it must be borne in mind that

> since profits are prospective they must, to some extent, be uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaining of breach of contract cannot be deprived of all remedy, and uncertainty merely as to the amount of profits that would have been made does not prevent a recovery. The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy.

Beck, 300 S.C. at 298-99, 387 S.E.2d at 684 (quoting South Carolina Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 122-23, 133 S.E.2d 329, 336 (1960)).

The fact that the business is new does not prohibit lost profits from being recovered. Beck, 300 S.C. at 297-98, 287 S.E.2d at 683. It only is to be considered as a matter of "evidentiary sufficiency rather than an automatic bar to recovery." Id.; see Drews, 296 S.C. at 211, 371 S.E.2d at 534 ("Courts are now taking the position that the distinction between established businesses and new ones is a distinction that goes to the weight of the evidence and not a rule that automatically precludes recovery of profits by a new business.") (quoting D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES, § 3.3, at 155 (1973)). Reviewing the factors in Drews, the supreme court affirmed the master's findings in South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 310 S.C. 232, 423 S.E.2d 114 (1992), where the master awarded the developer of a proposed condominium complex lost profits. The master found that had the builder timely performed, the developer would have realized a profit. Id. at 236, 423 S.E.2d at 116. The master correctly determined lost profits were established with reasonable certainty from the pre-sold sales, anticipated sales, and expenses. Id. In Sterling Development Co. v. Collins, 309 S.C. 237, 421 S.E.2d 402 (1992), the supreme court affirmed the award of lost profits to a real estate purchaser because of the seller's breach of the real estate sale contract. The

purchaser planned to develop a shopping center and already had a lease agreement with BiLo. Id. at 242, 421 S.E.2d at 405. The court found that but for the seller's breach, the lease agreement between the purchaser and BiLo would still be in effect; and, therefore, the purchaser proved lost profits with reasonable certainty. Id.

In Drews, our supreme court addressed the standard of proof required in a cause of action for breach of contract where the exclusive measure of damages was lost profit. Id. Unlike Drews, however, the claim submitted to the jury in the instant case was for breach of fiduciary duty rather than breach of contract. Because a cause of action for breach of fiduciary duty sounds in tort rather than in contract, the two claims are not marked by fungible damage measures. As a consequence, although compensation for the tort may include lost profit, other measures of damages are also available that are not likewise available in contract. Indeed, the evidence introduced at trial demonstrated Respondent's loss could also be measured by the assets he would have had an interest in but for Appellant's breach and opportunity cost in terms of the projected value of the planned business.

The jury in this case returned a general verdict for Respondent in the amount of $30,000.00. Appellant did not request the trial court to submit a special verdict form to determine whether the actual damages were for lost profit or some other measure. Without a special verdict form, we cannot speculate as to what portion of the award the jury attributed to lost profit as opposed to other tort damages. Accordingly, the trial court committed no error in submitting the claim to the jury.

III. PROJECTED INCOME STATEMENT

Appellant argues the trial court erred in admitting Plaintiff's Exhibit 2 on the basis the projected income statement was irrelevant to any issue in dispute. Although Appellant's argument to this Court includes assertions the exhibit was "speculative [and] lacked proper foundation," the only basis for the objection offered at trial was to the exhibit's relevance. Accordingly, the exhibit's relevance is the only issue Appellant has preserved for appeal. We disagree.

As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court. Gamble v. Int'l Paper Corp. of South Carolina, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996); Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989); R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2001). On appeal, therefore, this court will not disturb a trial court's evidentiary rulings absent a clear abuse of discretion. Hofer; R&G Constr., Inc., 343 S.C. at 439, 540 S.E.2d at 121. "For this court to reverse a case based on the admission of evidence, both error and prejudice must be shown." Stevens v. Allen, 336 S.C. 439, 448, 520 S.E.2d 625, 629 (Ct. App. 1999) (citing Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970)). The trial judge has wide discretion in determining the relevancy of evidence, and his decision to admit or reject evidence will not be reversed on appeal absent an abuse of that discretion. Hoeffner v. The Citadel, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993); Davis v. Taylor, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct. App. 2000); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 108, 498 S.E.2d 395, 404 (Ct. App. 1998).

All that is required for evidence to be relevant is that it have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; see Davis, 340 S.C. at 155, 530 S.E.2d at 387 (quoting Rule 401, SCRE). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE; see Pike v. South Carolina Dep't of Transp., 332 S.C. 605, 613, 506 S.E.2d 516, 520 (Ct. App. 1998). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. This threshold requirement is satisfied here. First, the projected income statement tended to prove the business's earning potential, a matter

relevant to the calculation of damages. Moreover, the exhibit was independently probative in that it tangibly demonstrated the brothers had done more than merely discuss the possibility of a partnership, but had actually begun working together in furtherance of the planned business. Thus, even if speculative, the projected income statement is still admissible as relevant evidence that there was, in fact, a working partnership between the brothers. Accordingly, the trial court did not err in admitting the exhibit into evidence.

IV. PERSONAL PURCHASES TESTIMONY

Appellant contends the trial court erred in admitting testimony about personal purchases Appellant made after purchasing Greene's Heating and Air Conditioning. We disagree.

Because Appellant's business was a sole proprietorship, he and his business were not distinct entities. Appellant's own testimony illustrates his cognizance of the mutual identity:

> Q: Now, did Moore Heating and Air file a separate tax return at the end of the year?
>
> A: No.
>
> Q: How did Moore report earnings for taxes—Moore's Heating and Air?
>
> A: I was the business.

As a sole proprietor, just as his personal income and the business's income are the same, Appellant's personal expenditures are probative as to his business's financial viability. When Appellant twice testified his business lost money during the first year of operation, Respondent's inquiry into Appellant's personal purchases over the same period was a legitimate method of rebutting Appellant's assertion. As such, nothing indicates the trial court abused its discretion in allowing the questions.

V. PARTNERSHIP

Appellant avers the trial court erred in submitting the case to the jury on the breach of fiduciary duty claim because evidence of a partnership was lacking and because Respondent abandoned the proposed partnership.

In ruling on motions for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591, 597 (1999); Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999) (citation omitted). "If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 92, 508 S.E.2d 848, 849 (1998) (citation omitted); Strange, 314 S.C. at 429-30, 445 S.E.2d at 440. "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001) (citations omitted). This Court can only reverse the trial court when there is no evidence to support the ruling below. Swinton Creek Nursery, 334 S.C. at 477, 514 S.E.2d at 130. On appeal, we will uphold a trial court's denial of a directed verdict motion if supported by any evidence. Strange 314 S.C. at 430, 445 S.E.2d at 440.

A partnership is an association of two or more persons to carry on as co-owners a business for profit. S.C. Code Ann. § 33-41-210 (Supp. 2003); see Wyman v. Davis, 223 S.C. 172, 174, 74 S.E.2d 694, 698 (1953); Halbersberg v. Berry, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (Ct. App. 1990); Beck v. Clarkson, 300 S.C. 293, 301, 387 S.E.2d 681, 685 (Ct. App. 1989); Buffkin v. Strickland, 280 S.C. 343, 345, 312 S.E.2d 579, 580 (Ct. App. 1984). "[W]here the parties to a contract, by their acts, conduct, or agreement show that they intended to combine their property, labor, skill and

experience, or some of these elements on one side, and some on the other, to carry on, as principals or co-owners, a common business, trade, or venture as a commercial enterprise, and to share, either expressly or by implication, the profits and losses or expenses that may be incurred, such parties are partners." Stephens v. Stephens, 213 S.C. 525, 532, 50 S.E.2d 577, 580 (1948). "A partnership agreement may rest in parol. It may be implied and without express intention." Wyman, 223 S.C. at 174, 74 S.E.2d at 698; Halbersberg, 302 S.C. at 101, 394 S.E.2d at 10; accord Beck, 300 S.C. at 301, 387 S.E.2d at 685; Buffkin, 280 S.C. at 345, 312 S.E.2d at 580. A partnership may be found to exist by implication from the parties' conduct. Corley v. Ott, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997); Stephens, 213 S.C. at 532, 50 S.E.2d at 580. "One of the most important tests as to the existence of a partnership is the intention of the parties." Stephens, 213 S.C. at 530-31, 50 S.E.2d at 579. To determine whether a partnership exists, the following tests are used: (1) the sharing of profits and losses; (2) community of interest in capital or property; and (3) community of interest in control and management. Wyman, 223 S.C. at 181, 74 S.E.2d 699; Stephens, 213 S.C. at 531, 50 S.E.2d at 579; Halbersberg, 302 S.C. at 101, 394 S.E.2d at 10. "[W]hen all of the conditions exist which by law create a legal relationship, the effects flowing legally from such relation follow whether the parties foresaw and intended them or not." Stephens, 213 S.C. at 531, 50 S.E.2d at 579.

In the case at bar, Respondent introduced evidence showing the intention of the brothers was to conduct business as partners. On cross-examination, Appellant admitted he and Respondent agreed to enter into a partnership:

> Q: Do you agree you all verbally agreed to a partnership?
>
> A: Yes.
>
> Q: Mr. Moore, looking at page 32 [of deposition], what you read from before, the question on line 25 is, so prior to him—that's Craig—returning from Myrtle Beach, and prior

to the time you signed this, you all were thinking fifty-fifty, and the answer on page 33 is what?

A: Yes. I was thinking fifty-fifty.

Moreover, the brothers also conducted themselves as partners: together they signed the original purchase agreement with Greene, together they inquired with a bank about funding the enterprise, and together they enlisted the services of an accountant to draw up financial documentation for the partnership. Thus, because there was not an absence of evidence demonstrating the existence of a partnership, the trial court correctly denied Appellant's motion for directed verdict and submitted the claim to the jury.

VI. JURY CHARGE

Appellant next contends the trial court erred in refusing to charge the jury that Respondent had the burden of showing he had mitigated damages. We disagree.

"When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000); accord Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002). "A trial court must charge the current and correct law." Burroughs, 352 S.C. at 392, 574 S.E.2d at 220. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. In re McCracken, 346 S.C. 87, 94, 551 S.E.2d 235, 239 (2001); Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 495-96, 514 S.E.2d 570-74 (1999); Burroughs, 352 S.C. at 392, 574 S.E.2d at 220. Appellant argues Respondent should have shown how much money Respondent was making in his present business to establish Respondent's loss. His failure to do so, Appellant argues, was fatal to his claim because he had not demonstrated he attempted to minimize damages. "Although the law requires an injured party to do those things a prudent person would do to avoid damages that are reasonably avoidable, it does not require him to exert himself unreasonably or to incur substantial expense to

avoid damages." Chastain v. Owns Carolina, Inc., 310 S.C. 417, 420, 426 S.E.2d 834, 835 (Ct. App. 1993); accord Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985). "Moreover, the party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced." Chastain, 310 S.C. at 420, 426 S.E.2d at 835; accord Adam v. Orr, 260 S.C. 92, 98, 194 S.E.2d 232, 235 (1973); Darby v. Waterboggan of Myrtle Beach, Inc., 288 S.C. 579, 586, 344 S.E.2d 153, 156 (1986); Hyde v. S. Grocery Stores, 197 S.C. 263, 278, 15 S.E.2d 353, 360 (1941); Tri-Continental Leasing Corp., 287 S.C. at 342, 338 S.E.2d at 346. Such a contention, however, stands at odds with the rule that defendants have the burden of proving a plaintiff's damages could have been avoided, reduced, or minimized. Thus, because the proposed instruction would have inappropriately shifted the burden from Appellant to Respondent, the trial court correctly refused to charge the jury as requested.

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Teresa Stone,
Claimant/Employee, Respondent,

v.

Traylor Brothers, Inc.,
Employer, and St. Paul's Fire &
Marine Insurance Co., Carrier, Appellants.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 3841
Heard April 6, 2004 – Filed July 6, 2004

REVERSED

James R. Courie and R. Mark Davis, of Columbia, for Appellants.

Ian D. Maguire, of Myrtle Beach and John S. Nichols, of Columbia, for Respondent.

BEATTY, J.: In this workers' compensation action, Traylor Brothers, Inc. and St. Paul Insurance Company appeal a circuit court's finding that Teresa Stone was entitled to benefits for injuries she sustained when her estranged boyfriend assaulted her at work. We reverse.

FACTS

Teresa Stone ("Claimant") and Kevin Stone ("Stone") began a relationship in July of 1998.[1] The two apparently started living together in October of that year.[2] The relationship became difficult and was "all over and done with" by the Christmas holidays. Claimant however continued living with Stone. While still living together, Claimant and Stone started working for Traylor Brothers ("Employer") in January of 1999.[3] Two or three weeks later, Claimant spent five nights away from the home she shared with Stone. The morning after the fifth day, Claimant rode to work with a co-worker named Butch. When they arrived, Stone approached Claimant as she was going to retrieve her work tools. The two had a physical confrontation. The other workers separated them but they resumed their fight and had to be separated a second time. Stone allegedly "snatched" Claimant by the hair, "pulled [her] across the parking lot," and told her "we cannot work for the same company. You leave or I leave." Stone also told a male co-worker "Leave my lady alone."

Claimant sustained some injuries as a result of the altercation and sought a hearing with the South Carolina Workers' Compensation Commission ("the Commission"). The commissioner concluded that Claimant's injuries were not compensable. The full Commission affirmed the findings. Claimant appealed to the circuit court. That court reversed the

---

[1] Despite identical surnames, Teresa Stone and Kevin Stone are not related by blood or marriage.

[2] At the time, they were both working for a company other than Employer.

[3] Stone worked as a supervisor and Claimant, a welder; however, Stone was not Claimant's supervisor.

decision, reasoning that it had been reached without substantial evidence. This appeal followed.

STANDARD OF REVIEW

In an appeal from the Commission, neither this court nor the circuit court may substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). "Any review of the commission's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). "Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." Lockridge, 344 S.C. at 515, 544 S.E.2d at 844. We review the Commission's ruling only to determine whether it is supported by substantial evidence or is controlled by some error of law. See Corbin, 351 S.C. at 617, 571 S.E.2d at 95.

LAW/ANALYSIS

Appellant argues that the circuit court erred in reversing the Commission's decision. We agree.

To receive a worker's compensation award in South Carolina, an employee must show that her injury arose "out of" and "in the course of employment." Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). While the term "in the course of" refers to the time, place, and circumstances of the accident, the term "arising out of" refers to the origin or the cause of the accident. Id. An injury arises out of one's employment "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." Broughton v. S. of the Border, 336 S.C. 488, 497, 520 S.E.2d 634, 638 (Ct. App. 1999). The injury need not be expected or even foreseeable, but "it must appear to have had its origin in a risk connected with the employment, and to

have flowed from that source as a rational consequence." Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 345, 200 S.E.2d 64, 65 (1973).

Here, the dispute between Claimant and Stone originated from their personal relationship. That relationship started deteriorating even before Stone and Claimant started working for Employer. They had previously fought at home and on other job sites. By all accounts, Stone was acting out of jealously the morning he approached Claimant at work. There is clearly ample support for the Commission's decision.[4]

Admittedly, the Commission could have reached a different conclusion. However, that fact does not alter the scope of our inquiry. See Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984) ("[The] possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). We must consider only whether the Commission's decision is supported by substantial evidence. We find that it is. Therefore, it must be affirmed.

Based on the foregoing, the circuit court's decision is

REVERSED.[5]

HEARN, C.J., and ANDERSON, J., concur.

---

[4] See Bright v. Orr-Lyons Mills, 285 S.C. 58, 61, 328 S.E.2d 68, 71 (1985) (holding that "when the dispute that culminates in an assault arises out of the claimant's private life, the injury is not ordinarily compensable"); Allsep v. Daniel Constr. Co., 216 S.C. 268, 270, 57 S.E.2d 427, 428 (1950) (excluding from coverage an injury "which comes from a hazard to which the workmen would have been equally exposed apart from the employment").

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Gonzales, Appellant.

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

Opinion No. 3842
Heard May 13, 2004 – Filed July 6, 2004

AFFIRMED

Tara Shurling, 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 David A. Spencer, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

PER CURIAM: Michael Gonzales was convicted of trafficking in methamphetamine pursuant to section 44-53-375 of the South Carolina Code and sentenced to thirty years imprisonment and a $200,000 fine. He appeals, arguing the trial court (1) lacked subject matter jurisdiction to impose judgment due to a faulty indictment, and (2) erred in admitting improper character evidence at trial. We affirm.

FACTS

Gonzales was arrested after selling one pound of methamphetamine to undercover agents of the Spartanburg County Sheriff's Department. This transaction was the culmination of an investigation that began earlier the same day when Johnny Solomon offered to work as an informant for the sheriff's office.

On June 3, 2002, Solomon contacted Officer Rhett Fox and informed him that he had the ability to purchase marijuana from Gonzales. At the behest of Fox, Solomon placed a recorded phone call to Gonzales from Fox's office. Gonzales informed Solomon that he could not sell any marijuana, but could sell him one pound of the "other stuff" for "thirteen five." Solomon testified he understood "other stuff" to mean methamphetamine and "thirteen five" to mean a sale price of $13,500. Gonzales and Solomon arranged to meet later that afternoon in the bathroom of a local convenience store to complete the transaction. After three additional recorded conversations between Gonzales and Solomon concerning the sale, a meeting time of approximately 5:50 p.m. was agreed upon.

An undercover officer posing as the interested buyer accompanied Solomon, who was fitted with a body wire to record the transaction. Fox and other officers monitored the wire transmissions from a truck parked on the edge of the convenience store parking lot. The officers were waiting for the audio "take-down signal" before moving in to make an arrest.

Gonzales arrived at the convenience store with co-defendant Steven Shelhamer. Gonzales and Solomon entered the store and had a brief conversation, during which Solomon, as instructed, informed Gonzales that

the transaction was to occur outside. Gonzales left the store and moved his vehicle next to that of the undercover officer. After he was introduced to Gonzales, the officer asked where the drugs were located. Gonzales answered that they were in Shelhamer's possession. Shelhamer handed a package wrapped in black plastic and tape to the officer. While weighing the package, the officer gave the takedown signal, and the other officers moved in to make the arrest. Gonzales fled the scene on foot, but was later arrested.

The package handed to the undercover officer contained 448.8 grams of methamphetamine surrounded by a layer of mustard and a layer of barbeque sauce,[1] all separated by plastic and wrapped in electrical tape. Gonzales was indicted for trafficking in methamphetamine pursuant to section 44-53-375 of the South Carolina Code and tried jointly with codefendant Shelhamer. See S.C. Code Ann. § 44-53-375 (2002). Appellant was convicted and sentenced to thirty years imprisonment and fined $200,000. This appeal follows.

LAW / ANALYSIS

I. Subject Matter Jurisdiction

Gonzales contends that his indictment for "trafficking in methamphetamine . . . in violation of §44-53-375," was insufficient to convey subject matter jurisdiction to the trial court because section 44-53-375 does not contain the specific word "methamphetamine." We disagree.

For a circuit court to have subject matter jurisdiction to convict a defendant of an offense, one of three things must occur: (1) the grand jury true bills an indictment which sufficiently states the offense; (2) the defendant waives presentment in writing; or (3) the offense is a lesser included offense of a crime adequately charged in a true billed indictment. State v. Primus, 349 S.C. 576, 579, 564 S.E.2d 103, 105 (2002); see also Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998); Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995). An indictment

[1] At trial, Officer Fox explained that drugs are often wrapped "with any type of scented object" to conceal the odor of drugs from a trained drug dog.

adequately conveys subject matter jurisdiction to a trial court only if it states the charged offense "with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer." Carter, 329 S.C. at 362, 495 S.E.2d at 777. In determining whether an indictment meets this standard, however, a court should look at the indictment with a practical eye in view of all the surrounding evidence. State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993).

Gonzales was indicted for "Trafficking in Methamphetamine . . . in violation of §44-53-375, The Code of Laws of South Carolina, (1976), as amended." Section 44-53-375(C) reads as follows:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of ice, crank, or crack cocaine, **as defined and otherwise limited in Sections 44-53-110** . . . is guilty of a felony **which is known as "trafficking in ice, crank, or crack cocaine"**. . . .

(Emphasis added.) Section 44-53-110 (2002), the definitional section of chapter 53 specifically referenced in the "trafficking in ice, crank, or crack cocaine" statute, defines "ice" and "crank" as "amphetamine or methamphetamine."

While the statute referenced in Gonzales's indictment does not include the specific term "methamphetamine" in its text, it does list the term's commonly accepted synonyms of "crank" and "ice." Furthermore, it clearly guides the defendant to the definitional statute where "crank" and "ice" are defined as "methamphetamine." Previously, this court has stated that "[a]n

indictment phrased substantially in the language of the statute which creates and defines the offense is ordinarily sufficient." State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 312 (Ct. App. 2002); see also S.C. Code Ann. § 17-19-20 (Supp. 2003); State v. Shoemaker, 276 S.C. 86, 88, 275 S.E.2d 878, 879 (1981). Here, with the exception of this transposition of synonyms, the indictment is phrased in almost the exact language of the statute.

In State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), the supreme court held an indictment, even one that fails to allege a key element of an offense, sufficiently vests the circuit court with subject matter jurisdiction when a statute outlining the elements of the offense is referenced in the body of the indictment. Owens, 346 S.C. at 649, 552 S.E.2d at 751-52. In the case at bar, the indictment referenced such a statute, which in turn, clarified the elements of the offense by its own reference to a separate definitional statute. The fact that the statute referenced by Gonzales's indictment referenced another statute for definitional clarification does not constitute a substantial factual departure from the holding of Owens.

When viewing the sufficiency of an indictment from a practical standpoint, our fundamental determination "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." Guthrie, 352 S.C. at 108, 572 S.E.2d at 312. In the case before us, a specific listing of the alternative terms for methamphetamine (i.e. "ice," "crank") in the body of the indictment would certainly make the indictment more definite and certain. However, the indictment in question, when practically viewed, contained the necessary elements of the offense and was clearly sufficient to apprise Gonzales of the charges he was to answer in court. Thus, the circuit court had subject matter jurisdiction to convict Gonzales of the charged offense.

II. Admissibility of Evidence Concerning the Investigation of Appellant

Gonzales next argues the testimony of Fox and Solomon singled him out as a particular subject of a police investigation and therefore improperly

called into question his character. Gonzales contends this admission of testimony was reversible error on the part of the trial court. We disagree.

Rule 404, SCRE, limits the circumstances when a defendant's character may be properly brought into evidence. Subsection (a) of the rule reads in relevant part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Pursuant to this rule, South Carolina courts have held that while "[e]vidence that police began an investigation because of reports of criminal activity [is] admissible . . . , identification of an individual as the suspect of a criminal investigation, based upon speculation and effectively calling into question that individual's character, is not." State v. Jones, 343 S.C. 562, 575, 541 S.E.2d 813, 820 (2001) (citations omitted).

At trial, Officer Fox testified concerning his initial questioning of Solomon as follows:

> Q: And what are you trying – are you trying to determine at [the initial questioning of an informant], if this person can be of use to you?
> A: Yes, sir, basically . . . we want to know if they are aware of actors in the drug trade that may be of interest or that can produce drugs to this person.
> Q: And during this debriefing did the name [of Gonzales] come up?

Before Fox could respond to this line of questioning, Gonzales objected and the jury was sent from the courtroom. After hearing arguments by both counsel, the trial judge reiterated his pretrial ruling on this issue, namely that the prosecution could continue to elicit testimony regarding the meeting between Fox and Solomon but was to carefully avoid any reference to Gonzales's prior criminal convictions or any specific behavior regarding drug sales. The State was to limit all questioning to the alleged transaction at issue at trial.

After the jury was allowed back into the courtroom, Fox's testimony returned only briefly to Gonzales's status as a criminal suspect:

> Q: In your discussions with Mr. Solomon, were you able to make a determination as to whether or not he could contact [Gonzales] for you?
> A: Yes
> Q: Were you able to make a – and what was that determination?
> A: He knew him personally and knew how to reach him.
>
> . . . .
>
> A: This was an attempt to conduct an investigation that would result in an arrest and confiscation of illegal drugs.
> Q: From [Gonzales]?
> A: Correct.

We conclude the above testimony was not admitted in error because Gonzales's identification as a suspect of this investigation was not "based on speculation," nor did this identification "effectively [call] into question [Gonzales's] character." Jones, 343 S.C. at 575, 541 S.E.2d at 820. Before Gonzales was identified to the jury as a criminal suspect due to his known reputation as an "actor in the drug trade," an objection was made, and the jury was sent from the courtroom. At no time did testimony reveal to the jury that the police began their investigation of Gonzales because of speculative reports that Gonzales was a known drug dealer or a person of criminal character. Later testimony instead reflected that Gonzales became a suspect because of the specific personal knowledge of Fox that the informant could, on this particular occasion only, purchase illegal drugs from Gonzales.

The purpose of Rule 404 is to exclude evidence that tends to prove a defendant's guilt based merely on his reputation or character, i.e. evidence which implies "because this person is a bad guy or acted in a manner similar

to this before, he is guilty." Therefore, evidence that shows a defendant was singled out as a particular suspect in a criminal investigation merely because of his character or reputation is inadmissible. See Jones, 343 S.C. at 574-76, 541 S.E.2d at 819-20 (finding testimony which singled out defendant as a murder suspect merely because of reports he held a "grudge" inadmissible); German, 325 S.C. at 26-28, 478 S.E.2d at 688-89 (finding testimony that defendant was a criminal suspect due to generalized reports that he was a drug dealer inadmissible). Had Fox answered counsel's question and identified Gonzales as a known "actor in the drug trade," Rule 404 would clearly have been triggered in this case. However, because an objection was made and the question was not answered, Gonzales's character was never effectively questioned. What Jones and its ilk prohibit is not evidence that a defendant was once considered a suspect in the particular criminal investigation which led to the defendant's arrest, but evidence a defendant was made a suspect due to generalized reports of his character or past conduct.

In the case at bar, all testimony concerning Gonzales's status as the suspect of this criminal investigation was based on the personal knowledge of informant Solomon that he could purchase drugs from Gonzales on a specific occasion. Testimony regarding personal knowledge of a particular criminal transaction is not character evidence and therefore not inadmissible under Rule 404, SCRE. Accordingly, we conclude that the admission of the testimony at issue was proper.

CONCLUSION

Because we find that the trial court had subject matter jurisdiction to convict Gonzales and that the disputed testimony was not inadmissible under Rule 404, SCRE, the decision of the trial court is

AFFIRMED.

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