The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF BARRY T. WIMBERLY, PETITIONER

Barry T. Wimberly, who was definitely suspended from the practice of law for a period of twelve months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, August 19, 2005, beginning at 10:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 8, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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N O T I C E

IN THE MATTER OF T. ALADDIN MOZINGO, PETITIONER

On February 23, 1998, Petitioner was disbarred from the practice of law. In the Matter of Mozingo, 330 S.C. 67, 497 S.E.2d 729 (1998). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than September 6, 2005.

Columbia, South Carolina

June 8, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF THOMAS M. RICHARDSON, JR., PETITIONER

Thomas M. Richardson, Jr., who was indefinitely suspended from the practice of law, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, August 19, 2005, beginning at 11:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 8, 2005

The Supreme Court of South Carolina

RE: Lawyers Suspended for Failing to Meet the Requirements Regarding the Amended Lawyer's Oath

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law for failing to take the Amended Lawyer's Oath and, if applicable, complete the required Continuing Legal Education Seminar on the Amended Oath. This list is being published as required by the order of the Supreme Court dated February 22, 2005. If these lawyers are not reinstated by the South Carolina Bar by August 1, 2005, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina.

Columbia, South Carolina
July 6, 2005

Adger L. Blackstone III
1613 Forest Trace Dr.
Columbia, SC 29204

George M. Crawford
1697 Amelia NE
Orangeburg, SC 29115

Donald Lionel Fowler Jr.
1698 Woodlake Dr.
Columbia, SC 29206

Lauren M Gersch
5850 Southcenter Blvd., D-103
Seattle, WA 98188

Lizabeth W. Littlejohn
430 Glenolden Dr.
Landrum, SC 29356-9391

Robert D. Purcell Jr.
1260 Palmetto Peninsula Dr.
Mt. Pleasant, SC 29464

Robert Wilson III
32 Broughton Rd.
Charleston, SC 29407

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28

July 11, 2005

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Drew John Monahan, Petitioner,

v.

State of South Carolina, Respondent.

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

ON WRIT OF CERTIORARI

Opinion No. 26007
Heard April 6, 2005 - Filed July 5, 2005

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, of Columbia, for respondent.

JUSTICE MOORE: Petitioner was indicted for murder and second degree arson after he stabbed his mother to death and burned her house. At trial, petitioner raised an insanity defense and presented medical testimony that he was paranoid schizophrenic. The jury returned a verdict of guilty but mentally ill (GBMI). We granted a belated review of petitioner's direct appeal issue pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and now affirm.

FACTS

Before trial, defense counsel requested that petitioner be evaluated for competency to stand trial as provided in S.C. Code Ann. § 44-23-410 (2002). In ordering the competency exam, the trial judge used a form order indicating petitioner should also be examined for criminal responsibility although this was not requested.

Drs. Berg and Lewis examined petitioner and concluded he was competent to stand trial but not criminally responsible for his actions at the time of the offense. The State then requested that petitioner be examined for criminal responsibility by its own expert, Dr. Price. Petitioner objected on the ground § 44-23-410 does not allow an additional evaluation. Over petitioner's objection, the trial judge allowed petitioner to be examined by Dr. Price in the presence of defense counsel. The trial judge specified that the evidence resulting from the State's examination would be admissible only in reply at trial.

At trial, petitioner conceded he killed his mother but contended he was insane, or not criminally responsible, at the time of the offense. Dr. Berg, who conducted petitioner's original evaluation, testified for the defense that in her opinion, petitioner was not criminally responsible because at the time of the offense he was suffering from the delusion that his mother was going to kill him. In reply, Dr. Price testified that petitioner's contrition and attempts to cover up his crime were signs of sanity. Dr. Price concluded petitioner was criminally responsible because he was able to distinguish right from wrong and was able to conform his conduct to the requirements of the law. The

trial judge charged both insanity and GBMI. The jury returned a verdict of GBMI.

ISSUE

> Did the trial judge err in allowing the State's expert to examine petitioner on the issue of criminal responsibility?

DISCUSSION

Petitioner contends it was error for the trial judge to allow the State's expert to examine him for criminal responsibility because § 44-23-410 does not provide for an additional examination and there is no statutory authority allowing it.

Section 44-23-410 does not apply to evaluations for criminal responsibility; it governs only evaluations to determine competency to stand trial.[1] These are separate mental health issues. The test for criminal responsibility relates to the time of the alleged offense, while competency to stand trial relates to the time the defendant is before the court for trial. State v. Lee, 274 S.C. 372, 375, 264 S.E.2d 418, 419 (1980). Accordingly, even if § 44-23-410 allows only one examination, it is not dispositive here.

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[1] Section 44-23-410 provides:

> Whenever a judge of the Circuit Court or Family Court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall: [order examination as provided].

(emphasis added).

The trial judge has the discretion to order a mental health evaluation where the defendant indicates an intent to introduce evidence at trial that he lacked criminal responsibility. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000); *see also* State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951) (where insanity is interposed as a defense, compulsory examination to determine defendant's mental condition does not violate self-incrimination or due process provisions). We find no abuse of discretion here. Although petitioner was examined twice, only one examination was at the State's request after it became apparent petitioner intended to proceed with an insanity defense. There is no evidence the State was engaging in "opinion shopping" by requesting another expert evaluation. Evidence from the State's examination was introduced at trial in fair response to evidence of the initial evaluation in petitioner's favor.

We find the trial judge did not err in ordering an evaluation by the State's expert.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Virgil Treece, Petitioner,

v.

State of South Carolina, Respondent.

Appeal from Spartanburg County
Donald W. Beatty, Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 26008
Submitted June 2, 2005 - Filed July 5, 2005

AFFIRMED

Assistant Appellant Defender Eleanor Duffy Cleary, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Molly R. Crum, all of Columbia, for respondent.

JUSTICE MOORE: Petitioner pled guilty but mentally ill on February 7, 1994, to two counts of second degree criminal sexual conduct (CSC) and one count of first degree sexual exploitation of a minor. The charges stemmed from petitioner's sexual activity with his fourteen-year-old stepdaughter which he videotaped. We granted a writ of certiorari to review the denial of post-conviction relief (PCR) and now affirm.

FACTS

At petitioner's plea hearing, counsel informed the judge that the sexual exploitation statute, S.C. Code Ann. § 16-15-395 (Supp. 2004), mandates a consecutive sentence to other charges. Petitioner was sentenced to twenty years on one count of CSC, suspended upon service of fifteen years with five years probation; fifteen years on the second count of CSC; and fifteen years on the sexual exploitation charge. The plea judge did not specify whether the sentences were to run consecutively or concurrently.

After sentencing, petitioner was advised by his caseworker at the Department of Corrections (DOC) that his sentences were concurrent and he was serving a fifteen-year term. His projected max-out date was September 11, 2001. In December 1999, however, petitioner's caseworker informed petitioner that his sentence for sexual exploitation was to run consecutively and not concurrently, adding five years to his max-out date which was now projected to be August 16, 2006. Although petitioner filed a grievance, DOC refused to change his classification. Petitioner then filed this action.

ISSUE

> Is petitioner's sentence for sexual exploitation to run concurrently or consecutively?

DISCUSSION

The PCR court found that DOC properly calculated petitioner's sentence for sexual exploitation as consecutive under § 16-15-395.[1] This section provides for a sentence of three to twenty years for sexual exploitation of a minor with the additional provision that: "[s]entences imposed pursuant to this section must run consecutively with and commence at the expiration of another sentence being served by the person sentenced."

It is well-settled that sentences are deemed to run concurrently "unless the intention that one should begin at the end of the other is expressed." Finley v. State, 219 S.C. 278, 282, 64 S.E.2d 881, 882 (1954). This rule of construction has never been applied, however, where the legislature has mandated a consecutive sentence for a particular offense. In fact, we have recognized that "[j]udicial discretion in . . . determining that sentences run concurrent or consecutive is subject to statutory restriction." State v. De La Cruz, 302 S.C. 13, 15, 393 S.E.2d 184, 186 (1990). Under § 16-15-395, the plea judge had no authority to order anything but a consecutive sentence for the sexual exploitation charge.

AFFIRMED.

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

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[1]Although this issue should have been appealed to the Administrative Law Court as provided in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), we dispose of it for purposes of judicial economy. *See* Furtick v. S.C. Dep't of Probation, Parole & Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003) (addressing merits of claim for judicial economy).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Smith-Hunter Construction Company, Inc., Respondent/Appellant,

v.

Clark N. Hopson and Nancy Hopson, Appellants/Respondents.

and

Clark Hopson and Nancy Hopson, Appellants/Respondents,

v.

Smith-Hunter Construction Company, Inc., Respondent/Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Circuit Court Judge

Opinion No. 26009
Heard April 19, 2005 - Filed July 5, 2005

AFFIRMED

H. Fred Kuhn, Jr., of Moss, Kuhn & Fleming, P.A., of Beaufort, and Mark H. Lund, of Bluffton, for appellants/respondents.

Joseph R. Barker, of Bethea, Jordan & Griffin, P.A., of Hilton Head Island, for respondent/appellant.

JUSTICE MOORE: Both parties have appealed the trial court's order in this action concerning the construction of a house. This matter was certified from the Court of Appeals pursuant to Rule 204(b), SCACR.

FACTS

In 1998, respondent/appellant, Smith-Hunter Construction Company (Builder), filed an affidavit of mechanic's lien and a complaint. The complaint arose from Builder's construction of a residence for appellants/respondents (Homeowners) for the amount of $828,363. The complaint set forth three causes of action: (1) foreclosure of a mechanic's lien; (2) breach of contract; and (3) *quantum meruit*. Homeowners also filed a complaint asserting various breaches of the contract and defective construction by Builder. The two lawsuits were consolidated for trial without a jury.

In its first order, the trial court entered judgment on behalf of Builder in a total amount of $209,337.90. After a hearing on Homeowners' Rule 59(e), SCRCP, motion to alter or amend the judgment, the court issued a revised order that reduced the judgment against Homeowners from $209,337.90 to $199,028.48. The court reversed its previous ruling that Builder was entitled to recover for the amount representing 13% of the cost of the roof that was placed on the residence and the amount representing 13% of the cost of Arrow Roofing labor in placing the roof on the residence. Builder then made a Rule 59(e) motion that was denied. Both parties appeal the court's order.

Homeowners' Appeal

Did the trial court err by awarding prejudgment interest to Builder?

DISCUSSION

The trial court found Builder was entitled to recover $73,117 in actual damages and also found Builder was entitled to $26,397.24 in prejudgment interest. Homeowners argue the award of prejudgment interest was in error because the trial court had to review the facts and determine if the amount claimed by Builder was reasonable given that all of the underlying amounts for work completed were not represented by written and signed change orders. Homeowners argue prejudgment interest could not be awarded because the amount owed to Builder was neither a sum certain nor capable of being reduced to a sum certain.

The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty. Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993). The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. *Id.* The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. *Id.*

We find the trial court properly awarded prejudgment interest because the amount owed to Builder is "capable of being reduced to a sum certain." The measure of recovery was fixed by conditions existing at the time the claim arose. The costs of the work completed by Builder at the time of

Homeowners' breach of contract were established via Builder's invoices.[1] Builder was also entitled to 13% in profits and overhead on the jobs completed.[2] The mere fact that Homeowners disagreed with Builder regarding the amounts, which were stated in the invoices, representing completed work did not preclude an award of prejudgment interest. The trial court did not err by awarding prejudgment interest because the measure of recovery was fixed by conditions existing at the time the claim arose.

CONCLUSION

We find the trial court did not err by awarding prejudgment interest to Builder. Regarding Homeowners' remaining issues, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issue II: Food Mart v. South Carolina Dep't of Health and Envt'l Control, 322 S.C. 232, 471 S.E.2d 688 (1996) (matters not argued to or ruled on by trial court are not

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[1]Homeowners argue the invoices and memos representing work completed by Builder at the time of wrongful termination were not "change orders" as contemplated by the contract. However, as the trial court correctly noted, while these documents did not comply with the contract by not being signed by both parties and setting forth the resulting adjustments in contract price and completion date, Homeowners had waived those provisions of the contract. *See* T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994) (homeowners waived right to insist written change order forms be completed for changes in home improvement project where homeowners requested changes in construction work without insisting on written change order forms). The trial court appropriately found Homeowners had authorized the work done pursuant to those invoices, knew the work was being done, and accepted the benefits of the work.

[2]Homeowners have not disputed that 13% of the work completed and materials used prior to wrongful termination is an appropriate method to calculate the profits and overhead to which Builder is entitled. The trial court appropriately found that using the 13% figure is a fixed method by which the profits Builder seeks to recover may be determined with a fair degree of accuracy.

preserved for review); S.C. Code Ann. § 29-5-10(a) (Supp. 2004) (costs which may arise in enforcing mechanic's lien, including reasonable attorney's fee, may be recovered by prevailing party; fee and court costs may not exceed the lien amount); Issue III: Food Mart, *supra* (matters not argued to or ruled on by trial court are not preserved for review); Issue IV: Food Mart, *supra* (matters not argued to or ruled on by trial court are not preserved for review); Trico Surveying, Inc. v. Godley Auction Co., Inc., 314 S.C. 542, 431 S.E.2d 565 (1993) (attorney's fee award affirmed where attorney provided detailed affidavit itemizing time and expenses and where court considered factors requisite to award of attorney's fees); Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989) (amount of attorney's fees to be awarded in particular case is within trial court's discretion).

Regarding Builder's appeal, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 440 S.E.2d 129 (1994) (elements of *quantum meruit* are: (1) benefit conferred upon defendant by plaintiff; (2) realization of that benefit by defendant; and (3) retention by defendant of benefit under conditions that make it unjust for him to retain it without paying its value); Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (1989) (while Court may review evidence to determine facts in accordance with its own view of the preponderance of the evidence, Court does not disregard Master's findings, who saw and heard witnesses and was in better position to evaluate their credibility). Therefore, the decision of the trial court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

George Koutsogiannis, Respondent,

v.

BB&T f/k/a United Carolina Bank, Appellant.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26010
Heard June 1, 2005 - Filed July 11, 2005

AFFIRMED

Charles M. Groves, of Chapman, Harter & Groves, P.A., of Greenville, for appellant.

Robert C. Wilson, Jr., of Greenville, for respondent.

JUSTICE MOORE: Following a jury's finding that appellant (BB&T) was grossly negligent in its conduct regarding an automobile loan, BB&T appealed on the basis the trial court erred by failing to give a requested instruction to the jury. We certified this matter from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

ISSUE

Did the trial court err by refusing to charge the jury the law of independent contractor?

FACTS

In July 1996, respondent financed the purchase of a car with a loan from United Carolina Bank, which subsequently merged into BB&T. In May 1999, respondent made a full cash payment for the month; however, the payment was improperly entered as a partial payment. BB&T claimed respondent owed the bank $23.76. Based on BB&T's own error, BB&T began collection efforts against respondent. Respondent continued to make regular payments, but then ceased payments in October 1999, due to BB&T's collection efforts and its inability to give him a correct pay-off figure.

BB&T referred the collection matter to an outside attorney. In negotiations with BB&T's attorney (Attorney), respondent's attorney attempted to establish a correct pay-off figure and sought to have BB&T correct the error on his credit report. When the attorneys could not reach a final agreement, BB&T commenced an action against respondent.

Meanwhile, respondent entered into a real estate contract to purchase a parcel of land with commercial potential. The purchase price for the parcel was $122,000; however, it appraised at $210,000. Respondent lost the real estate deal due to BB&T's credit reporting error. After the real estate deal was lost, negotiations essentially ceased between the two attorneys and respondent filed counterclaims of libel, conversion, breach of contract accompanied by fraudulent intent, and gross negligence against BB&T. On behalf of BB&T, Attorney moved for summary judgment. The trial court granted summary judgment on both BB&T's claims and respondent's counterclaims in an order prepared by Attorney. The Court of Appeals reversed the court's order and stated respondent was never afforded an opportunity to argue the merits of his counterclaims. BB&T f/k/a United Carolina Bank v. Koutsogiannis, Op. No. 2003-UP-175 (S.C. Ct. App. filed

March 4, 2003). Thereafter, respondent paid off the car loan and a jury trial was conducted on the counterclaims.

At trial, respondent sought to recover damages from BB&T based on BB&T's misconduct in handling the loan matter and vicarious liability for Attorney's misconduct in attempting to collect the debt and preparing the draft order for summary judgment. As to Attorney, respondent asserted Attorney engaged in dilatory tactics which intentionally prolonged the unsuccessful settlement negotiations. With respect to the preparation of the summary judgment order, respondent asserted Attorney intentionally sought to deceive the trial court and injure respondent.

BB&T requested a charge on the law of independent contractor.[1] BB&T's theory was that even if Attorney's conduct could be considered wrongful, he was, nonetheless, an independent contractor for whose misconduct BB&T was not vicariously liable. The request for the charge was denied; however, the trial court gave a detailed and extensive charge on the law of agency to the jury. The court further charged that the "acts of an attorney are directly attributable and binding upon the client."

At trial, Attorney testified he was paid by BB&T on a case-by-case basis and that BB&T did not supervise him or instruct him as to how he

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[1]The requested charge is as follows:

> The principal's or master's liability is derived from his or her relationship to the agent, or servant. A master is one who has the right to control the manner and method of work performed. A servant is one whose work is subject to the supervision or control of the master. By contrast, an independent contractor is a person hired for a particular purpose or project, who is compensated on a project-by-project basis, and who exercises his own discretion over the manner and method of carrying out the work.

should handle the case. Sonja Allen, a BB&T employee who Attorney was required to report to regarding respondent's case, testified Attorney was a private lawyer who was sent cases by BB&T on a case-by-case basis. Allen stated she did not supervise Attorney in the sense that he was instructed on what methods to use to collect the debt. Allen stated Attorney kept her informed of significant events in the case. She stated she was aware there had been a summary judgment hearing and that Attorney had submitted documents for her approval before and after the hearing. She stated she would have reviewed the proposed summary judgment order prepared by Attorney.

The jury returned a verdict in favor of respondent on the counterclaim of gross negligence and awarded respondent $98,000.[2] The jury found in favor of BB&T on the other counterclaims.

DISCUSSION

BB&T argues that because a client may not be vicariously liable for the conduct of its attorney, the trial court erred by failing to charge the jury on the law of independent contractor. We disagree.

The trial judge is required to charge the current and correct law. McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995). Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error. Eaddy v. Jackson Beauty Supply Co., 244 S.C. 256, 136 S.E.2d 297 (1964). To warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial. Jones v. Ridgely Communications, Inc., 304 S.C. 452, 405 S.E.2d 402 (1991). In determining prejudice, a charge to the jury should be considered in its entirety. *Id.*

[2]It cannot be determined from the jury verdict whether the jury found in favor of respondent on the counterclaim of gross negligence due to BB&T's own negligence or due to Attorney's negligence.

The proper focus here is whether Attorney was acting within the scope of his representation when he committed the alleged acts of gross negligence. In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority. *See*, *e.g.*, Shelton v. Bressant, 312 S.C. 183, 439 S.E.2d 833 (1993) (client bound by attorney's actions in settlement of a case; acts of attorney are directly attributable to and binding upon client); Shuler v. Crook, 290 S.C. 538, 351 S.E.2d 862 (1986) (clients penalized because frequent change of counsel added to other parties' cost in defending the case; acts of attorney are directly attributable to and binding upon client). Attorney was an agent for BB&T because the work and acts he engaged in, such as the settlement negotiations and the submission of a proposed summary judgment order to the trial court, were within the scope of his representation. *Cf.* BB&T of South Carolina v. Fleming, 360 S.C. 341, 345, 601 S.E.2d 540, 542 (2004) (in another case, we held that because this specific attorney was BB&T's attorney of record, he was BB&T's agent). As a result, BB&T can be held liable for its agent's, Attorney's, actions taken within his scope of representation, including possible torts committed by him.[3] *See* Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996) (doctrine of apparent authority provides principal bound by agent's acts when principal has placed agent in such position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe agent has certain authority and they in turn deal with agent based on that assumption). Therefore, the trial court did not err by failing to

[3]We have previously held that an action may not be maintained against an attorney for actions taken in the attorney's professional capacity; however, an attorney is not immune for acts taken *outside* the scope of the professional relationship. *See* Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995) (attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to third person or acts in own personal interest, outside scope of representation of client); Douglass ex rel. Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001) (attorney immune from liability to third persons arising from attorney's professional activities on behalf and with knowledge of client, absent independent duty to third party).

charge the law of independent contractor and charging only the law of agency.[4] *See* Jones v. Ridgely Communications, Inc., *supra* (refusal to give requested charge must have been erroneous and prejudicial).

CONCLUSION

We find Attorney's engagement in settlement negotiations and in the preparation of the proposed summary judgment order is clearly within the scope of authority set out to him by BB&T. Any misconduct engaged in by Attorney during those actions is directly attributable to BB&T. *See* Shuler v. Crook, *supra* (acts of attorney are directly attributable to and binding upon client). Accordingly, the trial court did not err by refusing to charge the jury the law of independent contractor. *See* McCourt v. Abernathy, *supra* (trial court is required to charge correct law); Jones v. Ridgely Communications, Inc., *supra* (refusal to give requested charge must have been erroneous and prejudicial to warrant reversal).

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[4]This result is supported by other jurisdictions which have found clients to be vicariously liable for their attorney agents' wrongful acts committed within the scope of the attorneys' representation. *See* Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755 (Tex. App. 1988) (creditor vicariously liable for alleged tortious collection efforts of its attorneys for its benefit; relationship between client and attorney was agency relationship); Peterson v. Worthen Bank & Trust Co., N.A., 753 S.W.2d 278 (Ark. 1988) (client could be held accountable for acts of attorney, who used successive garnishments to collect client's judgment, so long as attorney was acting within scope of employment, even though client may not have directed attorney or affirmatively acquiesced in attorney's conduct); Hewes v. Wolfe, 330 S.E.2d 16 (N.C. App. 1985) (where attorney is guilty of oppressive or wrongful conduct during course of proceeding to enforce claim of principal, principal is liable for attorney's wrongful acts); Nyer v. Carter, 367 A.2d 1375 (Me. 1977) (if tort committed by agent/attorney, then principal/client is liable if act was done within scope of attorney's employment, even though client did not specifically authorize the tortious conduct).

AFFIRMED.

TOAL, C.J., WALLER, BURNETT, J.J. and Acting Justice Kenneth G. Goode, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Carr, Appellant,

v.

Marion T. Guerard, Edward P. Guerard, Jr., and Thomas Guerard, Respondents.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26011
Heard June 2, 2005 - Filed July 11, 2005

AFFIRMED

Chalmers Carey Johnson, of Charleston, for Appellant.

Mark Wester McKnight, of Charleston, for Respondents.

JUSTICE PLEICONES: This is a fraudulent-transfer case based on the Statute of Elizabeth.[1] Appellant Carr (Carr) commenced the action on January 11, 2002, alleging that Respondent Edward P. Guerard, Jr. (Guerard) fraudulently concealed transfers of money to the other respondents,

[1] S.C. Code Ann. §§ 27-23-10 through 27-23-90 (1991 and Supp. 2004).

Guerard's wife and son. According to Carr's complaint, Guerard concealed the transfers to avoid satisfaction of a judgment entered by confession on June 14, 1991.[2] The circuit court granted Guerard's motion for summary judgment, holding that Carr's fraudulent-transfer action was, in reality, an action on the judgment that was more than ten years old. We certified the case pursuant to Rule 204(b), SCACR, and we affirm.

FACTS

The judgment was entered on June 14, 1991. Throughout the next ten years, Carr actively sought but was unable to locate assets of Guerard to satisfy the judgment. On January 11, 2002 – ten years and seven months after entry of the judgment – Carr brought this action based on the Statute of Elizabeth. Carr alleges that beginning in 1997, Guerard wrote checks to his wife and son on funds that should have been used to satisfy the judgment. Carr further alleges that Guerard fraudulently concealed the transfers to avoid fulfilling his obligation to Carr.

Guerard and the other respondents moved for summary judgment, arguing that Carr's action was an action to recover on the 1991 judgment and that the judgment was stale because it was over ten years old. The circuit court agreed and granted summary judgment to the respondents.

On appeal, Carr argues that his fraudulent-transfer action is not an action to recover on the judgment but rather an independent action. Further, Carr claims, the statute of limitations in South Carolina Code section 15-3-530[3] applies, and Carr asserts he brought this action within the limitations period.

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[2] The judgment was originally obtained by Development Business Corporation, of which Carr was an officer. The judgment was assigned to Carr in 2000. For simplicity, we hereinafter refer to Carr and the corporation collectively as "Carr."

[3] S.C. Code Ann. § 15-3-530 (Supp. 2003).

ISSUE

Whether the circuit court erred in holding that Carr is prevented from pursuing his fraudulent-transfer action because his judgment is more than ten years old.

ANALYSIS

The Statute of Elizabeth renders void any transfer of property made with "intent or purpose to delay, hinder, or defraud creditors and others." S.C. Code Ann. § 27-23-10 (Supp. 2004). The statute may be employed by any creditor, including a judgment creditor. Future Group, II v. NationsBank, 324 S.C. 89, 98, 478 S.E.2d 45, 50 (1996); Lebovitz v. Mudd, 293 S.C. 49, 52-53, 358 S.E.2d 698, 700-01 (1987). When a judgment creditor is the plaintiff, the statute limiting the time for executing on judgments to ten years might also apply. S.C. Code Ann. § 15-39-30 (1976).[4] It does here.[5]

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[4] Section 15-39-30 states:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

[5] Carr argues that the respondents are not entitled to summary judgment because there is a question of fact whether he brought this action within the time provided by the statute of limitations. Carr is correct that a three-year limitations period and the discovery rule apply to Statute of Elizabeth claims. See S.C. Code Ann. § 15-3-530 (Supp. 2003); Walter J. Klein Co. v. Kneece, 239 S.C. 478, 483-87, 123 S.E.2d 870, 873-74 (1962) (involving the 1952 Code); Home Port Rentals, Inc. v. Moore, 359 S.C. 230, 237, 597 S.E.2d 810, 813 (Ct. App. 2004); Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 183-84, 512 S.E.2d 123, 127 (Ct. App. 1999). Carr overlooks that Code

There are alternate reasons that section 15-39-30 prevents Carr from succeeding in this action. First, as soon as his judgment became more than ten years old, Carr lost his judgment-creditor status. Because he is no longer a creditor, he lacks standing to bring an action under the Statute of Elizabeth.

Second, and notwithstanding the absence of standing, it is apparent that Carr's fraudulent-transfer action is part of an attempt to execute on the expired judgment. Carr seeks to have the money transfers set aside so that he can attach the funds, which he says should have been used to satisfy his judgment. South Carolina courts will not permit a litigant to bypass the ten-year limitation on executions by styling an action as something other than an action to execute. See Garrison v. Owens, 258 S.C. 442, 445, 189 S.E.2d 31, 33 (1972) (after reviewing the complaint, which stated that the action was in equity, finding that "irrespective of this characterization which appellant seeks to apply to the nature of her cause of action, its very essence partakes of an action upon her judgment," and holding that because the plaintiff's judgment was more than ten years old, the plaintiff could not recover on it); Hardee v. Lynch, 212 S.C. 6,13, 46 S.E.2d 179, 182 (1948) (containing essentially the same quote and holding).

Although at this point Carr is seeking only to set aside the money transfers, he admits that his next step would be to seek to attach the subject funds. The only way for him to do that would be to try to execute on his judgment, which is stale. It would be a meaningless exercise to permit the setting aside of the transfers despite Carr's inability to effectively take any subsequent action. Thus, under the rationale of Garrison and Hardee, Carr's Statute of Elizabeth action must fail.

CONCLUSION

Carr is no longer a judgment creditor and lacks standing to bring this action under the Statute of Elizabeth. In addition, Carr's fraudulent-transfer action is actually an impermissible attempt to circumvent the bar to his

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section 15-39-30 also applies, rendering the statute of limitations inapposite in this particular case.

executing on the expired judgment. For these alternate reasons, the circuit court's decision to grant summary judgment to the respondents is

AFFIRMED.

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

The Supreme Court of South Carolina

In re: Amendment to Rule 1.15(f) of the Rules of Professional Conduct, Rule 407, SCACR.

O R D E R

By order dated June 20, 2005, we substantially amended the Rules of Professional Conduct, Rule 407, SCACR, to incorporate many of the changes made by the ABA to the Model Rules of Professional Conduct as part of its Ethics 2000 initiative, as well as other changes. These amendments become effective October 1, 2005.

Pursuant to Article V, § 4, of the South Carolina Constitution, we further amend Rule 1.15(f) of the Rules of Professional Conduct, Rule 407, SCACR, as follows:

> (f) A lawyer shall not disburse funds from an account containing the funds of more than one client or third person unless the funds to be disbursed have been deposited in the account and are collected funds; provided, however, a lawyer may treat as equivalent to collected funds cash, verified and documented electronic fund transfers, or other deposits treated by the depository bank as equivalent to cash, properly endorsed government checks, certified checks, cashiers checks or other checks drawn by a bank, and any other instrument payable at

> or through a bank, if the amount of such other instrument does not exceed $5,000 and the lawyer has reasonable and prudent belief that the deposit of such other instrument will be collected promptly. If the actual collection of deposits treated as the equivalent of collected funds does not occur, the lawyer shall, as soon as practical but in no event more than five working days after notice of noncollection, deposit replacement funds in the account.

This amendment shall also become effective October 1, 2005.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

July 6, 2005

The Supreme Court of South Carolina

In the Matter of Garry D. Conway, Respondent.

ORDER

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

IT 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 Julius Holman Hines, 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. Hines shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Hines 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 Julius Holman Hines, 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 Julius Holman Hines, 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. Hines' office.

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

IT IS SO ORDERED.

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

Columbia, South Carolina
July 1, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Lawrence A. Coleman, Arthur Caesar, and Scott A. Adamson, Respondents.

Appeal From Lancaster County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 4008
Heard May 11, 2005 – Filed July 5, 2005

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, State Grand Jury Sherri A. Lydon, and Assistant Deputy Attorney General Robert E. Bogan, all of Columbia, for Appellant.

Francis L. Bell, Jr., of Lancaster, Robert T. Williams, Sr., of Lexington and Robert William Mills, of Columbia, for Respondents.

STILWELL, J.: The State appeals the trial court's order finding double jeopardy barred the State from prosecuting Lawrence A. Coleman, Arthur Caesar, and Scott A. Adamson. We reverse.

FACTS

On January 28, 2001, John Allen was working as a guard at the Kershaw Correctional Institution. Another guard called for assistance with two inmates, Erving and Jones, who were causing a disturbance. Allen, Caesar, and other guards responded and escorted Erving and Jones to the "special management unit" located in an adjacent building. As they were crossing the prison yard, Erving became aggressive toward Allen. Allen sprayed Erving with mace and forced him to the ground. While Allen had Erving on the ground, Jones jumped on Allen from behind and punched him on the back of his head and the side of his face.

After the altercation ended, Coleman, the highest-ranking guard on duty, spoke to the guards who were involved about the incident. Coleman ordered Jones handcuffed and escorted to the "A" building's holding cell. Caesar and Adamson escorted Jones to the holding cell, and Coleman joined them en route. Caesar left briefly and returned with Allen. Coleman ordered Jones's handcuffs removed, and Allen pushed Jones from behind. Allen and Jones then exchanged blows with Allen hitting, kicking, and biting Jones while the other guards, including Respondents, watched without intervening. After one of the guards made the comment to Jones that he had "better not win," Jones curled into a ball on the floor and Allen continued to kick him.

After Jones reported the incident, the State Law Enforcement Division (SLED) investigated. Although Allen originally denied the altercation occurred, he later confessed and assisted SLED in its investigation. The grand jury indicted Respondents on the common law charge of misconduct in office.

At the initial trial, Respondents made several objections to portions of the solicitor's opening statement. The following colloquy took place:

Solicitor Bogan's Opening Statement: As I mentioned to you, there are two incidents that occurred here. The first one, the transfer from the Oak building holding cell to the Special Management Unit concerned a little scuffle that was handled fairly professionally by the officers, and then the second attitude adjustment if you will of inmate. . .

Defense counsel Mr. Mills: Your Honor, I object. He's getting into argument at this time.

The Court: I'll allow it. Go ahead.

Mr. Bogan: The second incident that occurred in the A building holding cell with inmate Jones and the six corrections officers. How do you know that that took place dishonestly, corruptly? The evidence will show in this case that the officers took the position that it never happened.

Defense counsel Mr. Bell: Your Honor, I'm going to object to that comment unless he's going to point to one particular officer. My officer never took that position. I'm going to object. That's unfair comment that he's not going to be able to prove as to my client. I can't speak for anybody else.

The Court: Well, of course, you'll be able to address that in your opening, Mr. Bell, but Mr. Bogan, if it's comments that apply to only one of the defendants, you should identify or exclude the ones that it doesn't apply to.

. . .

Mr. Bogan: Ladies and Gentlemen, we'll present some testimony concerning what each of the defendants did, if anything, concerning the dishonesty and corruption that occurred in this case. Consider this, no report, you'll hear testimony, was ever filed concerning - -

Mr. Bell: Objection, Your Honor, I - - - the indictment charges me with what occurred on the 28th and nothing thereafter. I'm going to object to the State trying to expand what he says I did wrong. It's not in the indictment, Your Honor.

Mr. Mills: I join in - - -

Mr. Bell: He cannot - - - He cannot convict me of something I'm not indicted in.

Defense counsel Mr. Williams: I also join in that.

Mr. Bell: I'm not indicted on that.

The Court: Mr. Bogan?

Mr. Bogan: Thank you, Your Honor. I contend that the fact that no report was ever filed and that the fact that the report that was filed only contained half the story is evidence of the dishonesty and the cover-up.

Mr. Bell: I move for a mistrial, Your Honor.

Mr. Mills: I would join the motion, Your Honor.

Mr. Williams: I would join.

Thereafter, the trial judge excused the jury and heard arguments regarding the motion for a mistrial. Respondents' attorneys argued the solicitor's comments, characterizing the guards' failure to file a report as a cover-up, went beyond the scope of the indictment. The solicitor opposed the motion for a mistrial, arguing the guards' failure to file a report was evidence of dishonesty, an element of the crime charged. Although the trial judge stated he knew the solicitor's comments were "not an intentional thing," he granted a mistrial.

Respondents' attorneys opposed beginning the trial anew the following day, so the case was rescheduled. Before the case was called to trial for the second time, the solicitor obtained a superseding indictment containing language referencing the "cover-up" to avoid another mistrial. Subsequently, Respondents' attorneys moved to dismiss the case based on double jeopardy. After a hearing, the trial judge dismissed the case based on his finding that the solicitor "forced these Defendants into seeking a mistrial after jeopardy had attached." The State appeals.

LAW/ANALYSIS

The State argues the trial judge erred in dismissing the case based on the Double Jeopardy Clauses of the United States and South Carolina Constitutions. We agree.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being twice placed in jeopardy of life or liberty. See U.S. Const. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb. . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial. State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 718 (Ct. App. 2000).

In Oregon v. Kennedy, the Supreme Court adopted a rule providing that a defendant who has moved for and been granted a mistrial may successfully

invoke the Double Jeopardy Clause to prevent a second prosecution only when the prosecutor's conduct giving rise to the mistrial was intended to "goad" or provoke him into moving for the mistrial. 456 U.S. 667, 676-77 (1982). See also State v. Mathis, 359 S.C. 450, 460, 597 S.E.2d 872, 877 (Ct. App. 2004) (applying same standard in South Carolina).

Under this standard, the determination of whether double jeopardy attaches depends upon whether the prosecutorial misconduct was undertaken with the specific intent "to subvert the protections afforded by the Double Jeopardy Clause." Mathis, 359 S.C. at 460, 597 S.E.2d at 877 (quoting Kennedy, 456 U.S. at 676). The trial court's finding concerning the prosecutor's intent is a factual one and will not be disturbed on appeal unless clearly erroneous. Id. at 460-61, 597 S.E.2d at 877-78.

Here, there is clear error. At the initial trial, the trial court specifically found the solicitor's comments did not intentionally provoke the Respondents into moving for a mistrial. At the time of Respondents' objection, after the jury was excused, the solicitor apologized to the court and stated he was, in good faith, trying to establish dishonesty, an element of the crime charged. The trial judge concluded:

> I know that it was not an intentional thing. I don't mean to imply that at all, but I - - - you know, my job is to make certain that these gentlemen get a fair trial. . . . And I'm just not certain - - - well, one, I am certain that you didn't intentionally do anything to cause that not to happen, but I'm certain that there's no way to give them a curative instruction that would erase - - - erase it from their mind, and for that reason, I'm going to grant a mistrial in this case.

In the order of dismissal based on double jeopardy, the trial court considered this statement by the solicitor: "I contend that the fact that no report was ever filed and the fact that the report that was filed only contained half the story as evidence of the dishonesty and cover-up." The trial court concluded the solicitor forced Respondents to move for a mistrial "because it

was the third time the Prosecutor had made this statement before the jury after twice being instructed not to. . . ."

However, the record conclusively shows the objections to the solicitor's first two comments were on other grounds. The ground for the first objection was for exceeding the scope of the opening statement and "getting into argument." The second objection dealt with the solicitor's failure to differentiate between the three defendants. We fail to see, based on the record, any intent by the solicitor to force a mistrial. The trial court overruled the first objection. The trial court essentially ruled again for the solicitor on the second objection, although the court also cautioned the solicitor to differentiate between the defendants. The last objection, and the only one on the grounds giving rise to the double jeopardy issue, resulted in the motion for mistrial even before there was a ruling on the objection by the trial court.

Based on the record, there is only one reasonable inference. Under the facts of this case, the solicitor's conduct was unintentional as a matter of law. Accordingly, we find that the Double Jeopardy Clause is no bar to Respondents' retrial. The order of the trial court is

REVERSED.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of John Phillip Corley, Appellant.

Appeal From Aiken County
James R. Barber, Circuit Court Judge

Opinion No. 4009
Submitted June 1, 2005 - Filed July 5, 2005

AFFIRMED

Sonja R. Tate, and Michael N. Loebl, of Augusta, Georgia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General R. Westmoreland Clarkson, Assistant Attorney General Deborah R. J. Shupe, Office of the Attorney General, of Columbia, for Respondent.

KITTREDGE, J.: Following a determination, pursuant to the Sexually Violent Predator Act (the Act), that John Phillip Corley is a sexually violent predator, a probable cause hearing was held on the issue of whether the results of the statutory annual review warranted a trial to determine if Corley should be released from confinement. Corley appeals from the circuit

court's finding that there was no probable cause to believe his mental abnormality or personality disorder had so changed that he was safe to be at large and that he was not likely to commit acts of sexual violence. We affirm.

FACTS

In March 1993, a jury convicted Corley of assault and battery of a high and aggravated nature and he was sentenced to ten years. In August 1993, Corley pled guilty to criminal sexual conduct in the second degree and was sentenced to a concurrent term of fourteen years.

A jury subsequently found Corley to be a sexually violent predator and he was committed pursuant to the Act. The judgment was affirmed on appeal. In the Matter of the Care & Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003). In May 2003, Corley petitioned the court for release from commitment pursuant to S.C. Code Ann. § 44-48-110 (Supp. 2002).[1]

The circuit court held a probable cause hearing in September 2003 to determine whether the results of Corley's annual review warranted a trial on the issue of his fitness for release. Following the submission of written reports and arguments by counsel, the court found probable cause did not exist to believe Corley's mental abnormality or personality disorder had so changed that he was safe to be at large and unlikely to commit acts of sexual violence. Corley challenges the circuit court's finding of no probable cause.

LAW/ANALYSIS

I. Sufficiency of the Order

Section 44-48-110 of the South Carolina Code (Supp. 2002)—which was applicable at the time of Corley's September 2003 hearing—set forth the

[1] The Act was amended in 2004. "The 2004 amendment substituted 'must' for 'shall' throughout and added [a] sentence relating to notification of the victim." See Effect of Amendment, S.C. Code Ann. § 48-44-110 (Supp. 2004). This appeal is unaffected by the 2004 amendment.

procedure for reviewing commitments under the Act. A person committed under the Act must have an annual examination of his mental conditions. Id. The court must conduct an annual hearing to review the committed person's status, and the committed person may petition the court for release at this hearing. Id. At the hearing, the circuit court uses a probable cause standard to determine whether sufficient evidence exists to go to trial:

> If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence, the court shall schedule a trial on the issue.

Id.

In this case, the circuit court conducted an annual review hearing and determined that probable cause did not exist to warrant a trial on Corely's request for release from confinement. The court considered the evidence and determined that the lack of the requisite probable cause precluded a further hearing or trial. The circuit court's conclusory order appears to be a form order submitted by the State. Corley maintains that the circuit court's order failed to make adequate findings of fact and conclusions of law to permit judicial review.

The first question before us, which we answer in the affirmative, is whether the circuit court must make detailed findings in connection with a probable cause determination in an annual review under the Act. We find especially persuasive our supreme court's sound analysis in In the Matter of the Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). The court held in Luckabaugh that the circuit court erred in failing to set forth its findings—and violating Rule 52(a), SCRCP—in an initial merits hearing under the Act.[2] Luckabaugh recognizes the obvious—meaningful

[2] Rule 52(a) provides as follows: "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately

appellate review is more readily obtained when we are presented with a clear presentation of the basis for the circuit court's findings:

> Trial courts, sitting without juries in an action at law, write their findings specially and separately:
>
> > to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

Id. at 132, 568 S.E.2d at 343 (internal citations omitted) (quoting Coble v. Coble, 268 S.E.2d 185, 189 (N.C. 1980)).

There are, to be sure, innumerable instances where the strictures of Rule 52(a) do not apply. Trial courts routinely make rulings in a variety of settings (preliminary to, and in the context of a, trial) without the need to issue a formal order containing specific findings of fact. "We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case." Luckabaugh, 351 S.C. at 133, 568 S.E.2d at 343. We are not presented here with a mere evidentiary ruling or some peripheral determination. An annual review hearing under the Act is in the nature of a trial. A finding of "no probable cause" is indeed dispositive of the proceeding and provides the finding from which an appeal is taken.[3]

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its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 (providing for entry of judgment) . . . ." Rule 52(a), SCRCP.

[3] In the family court context, Rule 26(a), SCFCR, provides a counterpart to Rule 52(a), SCRCP. When considering family court orders deemed conclusory, and thus incapable of proper judicial review, this court noted in Atkinson v. Atkinson, 279 S.C. 454, 456, 309 S.E.2d 14, 15 (Ct. App. 1983):

We hold that, in making a probable cause determination in an annual review under the Act, the circuit court should substantially comply with Rule 52(a) and "find the facts specially and state separately its conclusions of law."

We do not find, however, that the deficient order requires reversal. Unlike the uncertainty that surrounded the circuit court's determination in Luckabaugh, a review of this record clearly documents a factual basis for concluding that probable cause was lacking. From the comments of and questions posed by the able circuit judge, we need not speculate as to the basis of his decision, for we clearly discern—as discussed below—the basis of his finding of no probable cause.

II. Probable Cause Finding

Concerning Corley's challenge to the circuit court's probable cause finding, such ruling will not be disturbed "unless found to be without evidence that reasonably supports the hearing court's finding." In the Matter of the Care & Treatment of Tucker, 353 S.C. 466, 470, 578 S.E.2d 719, 721 (2003).

> Proper appellate review is extremely difficult, if not impossible, where a lower court order omits specific findings of fact to support its legal conclusions. We appreciate the problems which Family Court Judges may have from time to time in meeting the requirements of [Rule 26(a)]. Unremitting workloads and arduous responsibilities hamstring even the most dedicated. Nonetheless, we believe that strict compliance with the rule promotes the administration of justice at every judicial level.

We echo the sentiments of the court in Atkinson, and recognize that a trial court's specific findings of fact and conclusions of law are critical to meaningful appellate review. We do not intend to unnecessarily increase our trial courts' substantial existing burdens, but instead our goal is to seek greater efficiency in the "administration of justice" by facilitating proper appellate review.

Evidence reasonably supports the circuit court's probable cause finding. Although Corley made progress, his behavior remained "a big problem." He received at least five major disciplinary citations in the year prior to the review, some of which involved his "manipulating to use the telephone" to make sexually inappropriate calls. Corley had been involved in a sexual relationship with a staff member, and had threatened staff. Additionally, he had numerous unexcused absences from group sessions. Corley had not completed treatment. At the time of the hearing, he was on the lowest level in the Treatment Incentive Program due to his inappropriate behavior on the unit.

Dr. Lanette Atkins testified Corley needs further treatment. Dr. Atkins further testified that based on Corley's history of assaultive behavior and continuing manipulative behavior, he continues to be a risk to the community.

In response, Corley offered the testimony of Carl Harry Douglas, a counselor who treats sex offenders in an outpatient setting. Douglas testified Corley would need to continue in outpatient treatment if he were released. However, the Act contains no provision for court-ordered outpatient treatment.

We find ample support to sustain the circuit court's finding of no probable cause.

III. Constitutional Challenge to the Act

Corley further requests a ruling that the Act is invalid on due process grounds. This argument has not been preserved for appeal.

Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal. See State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000). The record contains no indication that Corley ever raised a due process argument in the circuit court. This argument is not preserved for review.

CONCLUSION

We find that the circuit court's probable cause determination is supported by the evidence.

AFFIRMED.

GOOLSBY, and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ruby E. Matthews, Bobby J. Matthews and David McCoy, Respondents,

v.

Gloria Dennis and Alton Dennis, Appellants.

Appeal From Florence County
Kevin M. Barth, Special Referee

Opinion No. 4010
Submitted May 1, 2005 – Filed July 5, 2005

AFFIRMED

Gordon B. Jenkinson, of Kingstree, for Appellants.

S. Porter Stewart, II, of Florence, for Respondents.

PER CURIAM: Gloria and Alton Dennis ("Defendants") appeal the special referee's determination that their property was subject to an easement in favor of adjoining property owned by Ruby E. Matthews, Bobby J. Matthews, and David McCoy (collectively referred to as "Plaintiffs").

Specifically, the special referee found Plaintiffs established their right to an easement under the theories of prescription and necessity. We affirm.[1]

FACTS

Gloria Dennis and Ruby Matthews are first cousins. In 1946, Otis McKnight, who was Gloria's father and Ruby's uncle, built a home place on a tract of land that he owned in Florence County, South Carolina. This property, consisting of about twenty-one and one-half acres of farmland, was adjacent to a tract of land owned by Otis's brother.

In 1951, Otis received from his brother a thirty-foot-wide strip of land, running approximately one-quarter of a mile between their respective properties. According to the deed of conveyance, the property, commonly known as "Hawk Lane," was "to be used as a roadbed leading from Anderson Bridge road to [the] home of Otis McKnight." The deed also noted that G.M. Evans, Ruby's father, helped to stake out the property and that Bobby Matthews, Sr., Ruby's now deceased husband, was present when this took place. Other than Hawk Lane, there is no documented legal access to Otis's property, and the location of the roadway has not changed since the time that Otis acquired it.

In 1963, Otis conveyed a one-acre portion of his land to Defendants, who have lived on this property since 1964. In 1969, Otis transferred his remaining property to Bobby Matthews, Sr., while reserving a life estate for himself and his wife in the one acre of land where their home was located. Upon Otis's death in 1976, his remaining property transferred to his widow and children. By deed dated April 23, 1986, Otis's heirs transferred their interest in Hawk Lane to Defendants.

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

In 1970, Bobby Matthews, Sr., transferred a portion of the property that he received from McKnight to other individuals. Two roads, Vansel and Farmer Roads, border the property. The testimony differed in regards to whether the roads were in existence at the time of the 1970 transfer. In 1984, Bobby Matthews, Sr., transferred the remainder of his property to Ruby. In 1998, Ruby transferred a one-acre parcel to her nephew, David McCoy. In 2002, she transferred her remaining property to her son, Bobby J. Matthews, while reserving a life estate for herself.

Plaintiffs' property is presently bounded by land owned by the McAllister family. A roadbed known as McAllister Lane traverses the McAllister property and is within a quarter-mile from Ruby's home.

The Matthews have rented the McAllister property for farming. With permission from the McAllisters, they have periodically used McAllister Lane for access to and from their property; however, Hawk Lane has always been the main access route.

A dispute over the use of Hawk Lane resulted in an attempt by Defendants to block Plaintiffs' access to the road in July 2000. This prompted Plaintiffs to bring the instant action to have an easement declared over Hawk Lane for access to their property. In their complaint, they alleged they had an easement by prescription, necessity, or dedication. Defendants denied Plaintiffs' right to an easement and sought an injunction prohibiting their use of Hawk Lane.

The case was transferred to a special referee, who found (1) Plaintiffs had both a prescriptive easement and an easement by necessity to use Hawk Lane to access their property, but (2) Plaintiffs failed to prove Hawk Lane had been dedicated to public use. Following the denial of their motion for

reconsideration, Defendants appealed.[2]

LAW/ANALYSIS

1. Citing the Maine case of Rollins v. Blackden,[3] Defendants first assert the 1986 conveyance of Hawk Lane to them by the heirs of Otis McKnight "interrupted" the use of the property and, therefore, the time for calculating the twenty years necessary for a prescriptive easement should have started in 1986. They also contend the twenty-year prescriptive period could not begin to run against them until they acquired title to the property in 1986 because they could not have sued to enjoin the use of a road that they did not own. To the extent these arguments have been preserved for appeal, we find they are without merit.[4]

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[2] We address only those arguments challenging the special referee's findings of fact and conclusions of law regarding an easement by prescription. Because we affirm the determination that Plaintiffs had established their right to an easement under this theory, we make no ruling on their entitlement to an easement by necessity. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); Dwyer v. Tom Jenkins Realty, 289 S.C. 118, 120, 344 S.E.2d 886, 888 (Ct. App. 1986) ("[w]here a decision is based on two grounds, either of which, independent of the other, is sufficient to support it, it will not be reversed on appeal because one of those grounds is erroneous") (quoting 5 Am. Jur. 2d Appeal and Error § 727, at 171 (1962)).

[3] 92 A. 521 (Me. 1914).

[4] Although the special referee ruled the use was uninterrupted since at least 1969, he never specifically addressed either the issue of whether the 1986 conveyance to Defendants disrupted Plaintiffs' use of the road or whether the prescriptive period should have been calculated from the time Defendants acquired Hawk Lane.

Creation of a prescriptive easement requires the following: "(1) There must be [a] continued and uninterrupted use or enjoyment of the right for a period of 20 years. (2) The identity of the thing enjoyed must be proven. (3) The use must have been adverse or under a claim of right."[5] "Periods of prescriptive use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefited by the inchoate servitude."[6]

In the present case, Plaintiffs have used Hawk Lane continuously, openly, and without interruption since at least 1969 for ingress and egress to their property. As late as 1998, the Florence Municipal/County Planning Department approved a plat that was prepared for David McCoy for the installation of a well and septic system on the Matthews property and depicted Hawk Lane as the only access to the property. Hawk Lane has been identified by Florence County with a standard blue road sign, and, as testified by Alton Dennis, is part of the emergency 9-1-1 system. It also appears the twenty-year prescriptive period ran long before Defendants' initial attempt to barricade Hawk Lane, which, according to Ruby, was about eight years before the final hearing in this case.[7] Under these circumstances, we hold the evidence in the record supports the special referee's finding that Plaintiffs successfully established uninterrupted use of Hawk Lane for at least twenty

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[5] Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993).

[6] Restatement (Third) of Property: Servitudes § 2.17 (2000).

[7] The final hearing in this case was held in August 2003.

years.[8] The fact that Hawk Lane was conveyed to Defendants during the prescriptive period did not interrupt Plaintiffs' use of the roadway.[9]

2. We disagree with Defendants' argument that Plaintiffs' claim of right was insufficient because it was based on a mistaken belief of ownership.

A party claiming a prescriptive easement under a claim of right must "demonstrate a substantial belief that he had the right to use the parcel or road based upon the totality of circumstances surrounding his use."[10]

We hold the record supports the special referee's finding that "Plaintiffs have established that theirs has always been a belief that they have had a right to use of the subject roadway for ingress and egress, and had openly done so for well in excess of twenty years." Ruby testified that members of her family had always used Hawk Lane for access while acknowledging they may not have had legal documents granting them the right to do this. Moreover, this case is distinguishable from Babb v.

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[8] See Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998) (stating the determination of the existence of an easement is a question of fact in a law action); Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987) ("The decision of the trier of fact as to whether or not an easement exists will be reviewed by the Court as an action at law.").

[9] See James W. Ely, Jr. & Jon W. Bruce, The Law of Easements and Licenses in Land § 5:21 (Thomson/West 2005) ("Transferees of land take subject to ripening prescriptive claims.").

[10] Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003) (emphasis in original); see also 25 Am. Jur. 2d Easements and Licenses, § 57, at 552 (2004) (stating "an intent to claim adversely may be inferred from the acts and conduct of the dominant users" and defining "claim of right" as "without recognition of the rights of the owner of the servient estate").

Harrison,[11] which Defendants cite in support of their position. Whereas the party asserting the easement in Babb based her initial claim on one of ownership of the property over which she asserted a right of use, the testimony in the present case reflects that Plaintiffs believed that they had only the right to use Hawk Lane; there is no suggestion that they ever believed they owned Hawk Lane itself.[12]

3. Finally, Defendants argue Plaintiffs' use of the road should be deemed permissive because of the family relationship between the parties. We disagree.

Lynch v. Lynch,[13] which Defendants cite in support of their position, is distinguishable from the present case. Lynch concerned a claim of adverse possession and not a claim for a prescriptive easement. Moreover, that decision addresses only immediate family relationships, such as between siblings or parent and child, rather than extended kinship, such as in the present case. In any event, based on case law from both South Carolina and other jurisdictions, we see no reason to hold that the degree of affinity between the parties in this case is by itself sufficient reason to reverse the special referee's finding that Plaintiffs met their burden of proof in establishing their right to a prescriptive easement.[14]

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[11] 220 S.C. 20, 66 S.E.2d 457 (1951).

[12] In their brief, Defendants cite Ruby's testimony in which she admitted, "I might not have no legal document, but when the farm was sold to us, we thought we had legal documents." This statement, however, was in response to the following question: "But you have no legal documents that say you have the right to use Hawk Lane?"

[13] 236 S.C. 612, 115 S.E.2d 301 (1960).

[14] See id. at 620, 115 S.E.2d at 305 (stating that "where one seeks to acquire title by adverse possession against his brothers and sisters, such a claim should not be sustained 'except upon a clear preponderance of the evidence'") (quoting Whitaker v. Jeffcoat, 128 S.C. 404, 405, 122 S.E. 495,

AFFIRMED.

GOOLSBY, HUFF, and STILWELL, JJ., concur.

495-96 (1924)); Nordin v. Kuno, 287 N.W.2d 923, 927 (Minn. 1980) (holding the fact that landowners and claimants of prescriptive easement were first cousins once removed was insufficient to rebut the presumption of hostile use); Cope v. Cope, 493 P.2d 336, 338-39 (1972) (reversing the finding of a prescriptive easement and noting, in addition to the familial relationship between the owners of the estates involved, the "continuous and cordial relationship" they maintained for "a considerable period of time" and the presence of gates on the servient estate); Martin v. Proctor, 313 S.E.2d 659, 662 (Va. 1984) (noting that "use by a child of land owned by its parent is regarded as permissive" absent clear notice of the child's intention to assert an adverse claim).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Max Nicholson, Appellant.

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

Opinion No. 4011
Heard June 7, 2005 – Filed July 5, 2005

AFFIRMED

Larry C. Brandt, of Walhalla, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

GOOLSBY, J.: William Max Nicholson appeals his convictions for three counts of second-degree criminal sexual conduct. We affirm.

FACTS

The trial in this case revolved around the accusations of a young adult male who was born March 25, 1980. In late 2001, he told his mother that Nicholson sexually assaulted him several years earlier.

On December 21, 2001, the accuser gave a written statement about the alleged assaults to the Oconee County Sheriff's Department. According to the statement, the accuser first met Nicholson, a high school science teacher, when he was a ninth-grade student in Nicholson's physical science class at West Oak High School. The accuser participated in tasks such as setting up labs and cleaning up chemical spills. Eventually, he began to receive small sums of money from Nicholson for this work. At that time, the accuser was not approached in a sexual manner.

After the school year ended, the accuser, at Nicholson's request, began doing odd jobs around Nicholson's house and receiving payment from Nicholson for his services. Although the accuser could not remember exactly how Nicholson approached him, he related that the "incidents" began only after "a few times of doing the work" and that they were "in the nature of oral sex" performed by Nicholson on him.

The following school year, the accuser was initially enrolled at Walhalla High School, but later transferred back to West Oak High School. After he transferred back to West Oak, he visited Nicholson's classroom frequently even though he did not have Nicholson for class. During the summer, the accuser helped Nicholson move to another residence. Although the move was completed before the end of the summer, Nicholson offered the accuser additional work, promising the pay would be fair and a bonus was possible. Throughout the completion of those tasks, the oral sex continued, probably at least every other day, for the duration of the summer. When the accuser reached eleventh grade, he continued his relationship with Nicholson and claimed that he received at least a thousand dollars per month for his companionship. The incidents became less frequent when the accuser reached twelfth grade, and he surmised this was because he was approaching adulthood and Nicholson's "fascination was strictly adolescent males." Even

so, the accuser claimed that he visited Nicholson at various times in the month preceding the investigation and that Nicholson paid him a total of about one thousand dollars during that time.

As part of the investigation, law enforcement officers outfitted the accuser with a recording device and sent him to Nicholson's home on two occasions for the express purpose of eliciting incriminating statements from Nicholson. They also videotaped Nicholson's home while Nicholson and his accuser were inside talking and filmed the accuser on the porch talking with Nicholson as the accuser was preparing to leave the premises. Although Nicholson made no direct admissions on the tape, he did not refute statements by the accuser.

Authorities arrested Nicholson on January 2, 2002. After a preliminary hearing on February 22, 2002, and February 26, 2002, the Oconee County Grand Jury issued three indictments against Nicholson for second-degree criminal sexual conduct, charging him with committing acts of fellatio on his accuser during the periods of June 1 through June 30, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995.

After a jury trial commencing October 21, 2002, Nicholson was convicted on all three indictments and sentenced to twelve years. After the trial judge denied his post-trial motions, Nicholson filed this appeal.

LAW/ANALYSIS

1. Nicholson argues the trial judge should have dismissed the indictments because the time periods alleged were not sufficiently specific. In particular, he complains that without more specific dates in the indictments, he could not avail himself of the defense of alibi and other testimony that could have refuted his accuser's claims or impeached his accuser's credibility. We reject these arguments.

"Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred."[1] "[T]he sufficiency of an indictment must be judged from a practical standpoint, with all of the circumstances of the particular case in mind."[2]

In this case, time was not an essential element of the charged offenses.[3] Moreover, although Nicholson argued in his brief that the trial judge should have, in the alternative, required the State to make the dates of the offenses more definite and certain, we do not see any indication in the record that this issue was clearly raised at trial.[4]

2. We disagree with Nicholson's argument that the trial judge erred in denying his directed verdict motion.

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[1] State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991).

[2] State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991) (citing State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 588 (1981)).

[3] Cf. State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."); 65 Am. Jur. 2d Rape § 34, at 582 (2001) ("Because time is not an essential ingredient of either forcible or statutory rape, the exact date of the commission of the offense need not be alleged unless a statute provides otherwise."); 75 C.J.S. Rape § 45, at 515-16 (1952) (stating it is proper and sufficient to prove the commission of a sexual assault on any day before the indictment and within the period of limitations and, in cases involving a victim under the age of consent, on a day when the victim was still under the statutory age).

[4] See State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (2004) (stating that an issue must be "raised to the trial court with sufficient specificity" to be preserved for appellate review) (citing Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002)).

Under Rule 19(a) of the South Carolina Rules of Criminal Procedure, "the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment."[5] In considering a directed verdict motion, the court "shall consider only the existence or non-existence of the evidence and not its weight."[6] "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."[7]

At the close of the testimony, Nicholson moved for a directed verdict on the ground that there was "no credible evidence as to all the elements upon which the burden of proof lies upon the State." On appeal, he alleges there were inconsistencies and time gaps in the accuser's testimony and suggests, among other things, that the evidence supported a finding that the alleged abuse occurred after the accuser's sixteenth birthday and was therefore outside the statutory age limit for the offense with which he was charged.[8] We agree with the trial judge, however, that, viewing the evidence in the light most favorable to the State, Nicholson was not entitled to a directed verdict.

The accuser testified Nicholson performed oral sex on him "throughout the summer" of 1995. Specifically, he averred the oral sex happened in June, July, and August of 1995, and at a frequency of two to three times per week. There was no dispute that the accuser's date of birth was March 25, 1980,

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[5] Rule 19(a), SCRCrimP (emphasis added).

[6] Id.

[7] State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004).

[8] Nicholson was charged under South Carolina Code section 16-3-655(3), which requires that the victim be at least fourteen years of age but less than sixteen years of age. S.C. Code Ann. § 16-3-655 (2003).

which would have made him under the age of sixteen during the summer of 1995. It further appears uncontested that he was younger than Nicholson and had been a student in Nicholson's class, which would have placed Nicholson in a "position of familial, custodial, or official authority to coerce the victim to submit."[9] Any concerns about contradictory statements by the accuser, whether on the stand or outside the courtroom setting, were ultimately about his credibility and therefore in the domain of the jury.[10]

3. Nicholson also contends he was deprived of a fair trial because the presiding trial judge instructed the solicitor on how to introduce a piece of evidence against him. We disagree.

During the trial, the solicitor sought to introduce into evidence a composite audiotape recording of conversations between Nicholson and his accuser that took place on December 20 and 27, 2001. While the solicitor was attempting to lay a foundation for admission of the recording, the trial judge, apparently dissatisfied with the solicitor's line of questioning, undertook to advise her outside the presence of the jury about the particulars that he viewed as necessary steps in this procedure. Nicholson objected to the "depth and detail" of the assistance to the State. After a recess, the solicitor, following the trial judge's advice, made a successful proffer of the tape.

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[9] Id.

[10] See State v. Buckman, 347 S.C. 316, 324 n.6, 55 S.E.2d 402, 406 n.6 (2001) (mentioning whether a witness was credible goes to the weight of the evidence and is therefore not considered by the trial court when it considers a directed verdict motion); State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) (allowing testimony of prior inconsistent statements to be used as "substantive evidence when the declarant testifies at trial and is subject to cross examination"); State v. Crawford, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct. App. 2005) (noting that a contradiction between a witness's "sworn statement to police and his later testimony in court is a matter of weight for the jury to decide").

We find no error in the trial judge's intervention in this case. In State v. Gaskins, the supreme court, quoting State v. Anderson, reiterated the following "duties and limitations" that a trial judge must observe while conducting a trial:

> A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and, if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence.[11]

In our view, the trial judge did not exceed the limits recognized in Gaskins. The jury was absent from the courtroom when the exchange at issue took place and thus could not have been affected by the trial judge's remarks. Moreover, the trial judge, when explaining to counsel what he required to lay a foundation, did not show any favoritism or otherwise indicate he had an opinion about the case. We therefore hold that, contrary to Nicholson's argument, the instructions did not result in the trial judge's assumption of an adversarial role in the case.[12]

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[11] State v. Gaskins, 284 S.C. 105, 119, 326 S.E.2d 132, 140-41 (1985) (quoting State v. Anderson, 85 S.C. 229, 233, 67 S.E. 237, 238 (1910)), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (emphases added).

[12] See People v. Robinson, 603 N.E.2d 25, 29 (Ill. App. Ct. 1992) ("A trial judge may remind the prosecutor of the necessity to prove additional elements, examine witnesses to clarify material issues or eliminate confusion,

4. Nicholson next argues the trial judge erred in refusing to strike a juror for cause. We disagree.

In the voir dire, the trial judge asked if any members of the jury panel or their close personal friends or family members had been victims or claimed to be victims of any type of sexual offense or child abuse. Among those answering the question in the affirmative was Juror Number 98, who advised the trial judge that his sister-in-law had been raped and the perpetrators "got away with it" and "[i]t was pretty ugly." Notwithstanding this information, Juror Number 98 was not dismissed for cause. Nicholson argues on appeal that, during jury selection, he was forced to use one of his peremptory challenges to excuse this particular juror, which ultimately resulted in the seating of another juror whom he maintains he would have excused but for the exhaustion of all his peremptory strikes.

Nicholson's argument before the trial judge and on appeal focuses on the juror's apparently "deeply troubled" demeanor and answer to a follow-up question from the trial judge that suggested that he could not be fair and impartial. In the colloquy, it is evident that, when initially examining the juror, the trial judge asked two questions in immediate succession. Whereas the first question called for a negative response from a qualified juror, the second question called for an affirmative answer. To clear up the confusion, the trial judge impressed upon the juror the importance of a fair trial for both sides, inquiring of him, "Could you do that?" The juror responded affirmatively. The trial judge also rephrased the other question, asking the

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and advise counsel on the proper phrasing of questions."); Village of Lodi v. McMasters, 511 N.E.2d 123, 124 (Ohio Ct. App. 1986) ("During the trial, a judge may, in the interest of justice, act impartially in developing facts germane to an issue of fact to be determined by the jury."); 23A C.J.S. Criminal Law § 1180, at 51 (1989) (noting the trial judge "is the governor of the trial" and it is therefore "his duty[ ] to participate directly in the trial and to facilitate its orderly progress[ ] and insure that the issues are clearly presented to the jury").

juror, "And it would not interfere with your ability to be fair to the State and the defendant?" To this question the juror replied, "I don't think so." Based on these exchanges, we hold the trial judge conducted an adequate examination into the juror's impartiality and acted within his discretion in qualifying Juror Number 98.[13]

5. During closing argument, the solicitor referred to Nicholson's counsel as an "experienced defense attorney," which, Nicholson contends, may have suggested to the jury he was guilty because he hired experienced counsel. The solicitor also made references about "justice for all" and advised the jurors that, in reaching a verdict, they could consider the trauma of the trial on Nicholson's accuser. Nicholson asserts the trial judge erred in denying his motion for a mistrial based on these allegedly improper comments. We find no abuse of discretion.[14] Nicholson failed to make a contemporaneous objection to either remark,[15] and, although the trial judge declined to declare a mistrial, he issued a curative instruction.[16]

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[13] See State v. George, 323 S.C. 496, 503, 476 S.E.2d 903, 907 (1995) ("A venireperson must be excused only if her opinions would prevent or substantially impair the performance of her duties as a juror in accordance with her oath and instructions."); State v. Tucker, 320 S.C. 206, 211, 464 S.E.2d 105, 108 (1995) ("The determination whether a juror is disqualified is within the discretion of the trial judge and will not be reversed on appeal unless wholly unsupported by the evidence."); id. ("[I]n reviewing the trial judge's disqualification of prospective jurors, the responses of a challenged juror must be examined in light of the entire voir dire.").

[14] See State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion.").

[15] See In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235, 238-39 (2001) (stating a contemporaneous objection is required to preserve issues regarding a closing argument for review); State v. Moultrie, 316 S.C. 547, 555-56, 451

6. We reject Nicholson's argument that the trial judge erred in refusing to grant his motion to suppress the testimony of an expert witness offered by the State or, in the alternative, to grant a continuance so he could obtain his own expert on the subject. The witness was called to testify about the general characteristics of a sex abuse victim. Nicholson contends the notice he received from the State about this witness was too close in time to the trial for him to prepare his defense. The State, however, is not required to provide its witness list to a criminal defendant,[17] and the disclosure in the present case of this witness to the defense before trial was nothing more than a professional courtesy. We therefore hold that the trial judge properly declined to suppress the expert testimony and acted within his discretion in refusing to continue the case.[18]

7. Next, Nicholson asserts the trial judge should have required the State to release records concerning two psychological evaluations that had been performed on his accuser during a family court proceeding between the accuser's parents. Nicholson further alleges the trial judge erred in limiting

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S.E.2d 34, 39 (Ct. App. 1994) (holding the lack of a contemporaneous objection could not be salvaged by a motion for a mistrial).

[16] See State v. Cooper, 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999) (deeming the solicitor's impermissible closing remarks about the defendant's failure to present a case cured by the trial court's instructions).

[17] See Brady v. Maryland, 373 U.S. 83 (1963) (requiring the State to divulge to a criminal defendant exculpatory or mitigating information); Rule 5, SCRCrimP (requiring the State to disclose certain statements of the defendant, the defendant's prior record, certain documents and tangible objects, and certain reports of examinations or tests).

[18] See State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) ("A trial judge's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion.").

cross-examination of the accuser about his mental health history and in denying the defense "sufficient time and opportunity to effectively process certain information." We find no error.

The records that Nicholson sought were not in the State's possession; and the trial judge did not allow full access of the documents to either the State or to the defense. After receiving the records under seal and reviewing them for admissibility, the trial judge "declined to admit it based on the confidential nature of the report" and further noted that any probative value in the records would be outweighed by the fact that they were "remote" and "somewhat cumulative." We hold the trial judge followed the correct procedure in determining whether Nicholson could have access to his accuser's psychological evaluations and whether the evaluations were admissible.[19] Moreover, we have reviewed the records, which were submitted to this court under seal, and concur with the trial judge that the evaluations were so remote in time they would render questionable any probative information they might yield in the present case.

8. Nicholson asserts recordings by law enforcement of the conversations between him and his accuser should have been suppressed

[19] See S.C. Code Ann. § 16-3-659.1(1) (2003) (providing that evidence of specific incidents of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct are not admissible in prosecutions for criminal sexual conduct; id. § 19-11-95(D)(1) (Supp. 2004) (stating a mental health provider shall reveal confidences "when required . . . by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding); id. § 44-115-40 (2002) (prohibiting a physician from releasing medical records without the written consent of the patient); State v. Bryant, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992) (noting the State is required to disclose evidence in its possession favorable to the accused and material to guilt or punishment and stating that the trial court must inspect contested material to determine if it should be available to a defendant under a Brady request).

because they amounted to a denial of his right to counsel, an invasion of his privacy, and an unreasonable search and seizure. We disagree. When the tapes were made, Nicholson was not in police custody and had not been indicted.[20] In addition, there was no dispute that the accuser in this case consented to have his conversations with Nicholson recorded.[21]

9. Finally, Nicholson contends the cumulative effect of the errors he has alleged warrants a new trial.[22] Because, however, we have determined that the trial judge did not err in any of the particulars alleged in this appeal, we likewise hold the cumulative error doctrine is inapplicable.

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

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[20] See State v. Owens, 346 S.C. 637, 661, 552 S.E.2d 745, 758 (2001) ("The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages."), overruled on other grounds by State v. Gentry, 346 S.C. 637, 552 S.E.2d 745 (2005); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (stating the focus of an investigation on a suspect who is not in custody does not trigger Miranda warnings).

[21] State v. Andrews, 324 S.C. 516, 519-21, 479 S.E.2d 808, 810-11 (Ct. App. 1996) (holding a tape of a telephone call was admissible because one party to the call consented to the recording).

[22] See State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (noting the cumulative error doctrine provides relief when a combination of errors, each of which may be considered insignificant by itself, has the collective effect of preventing a party from receiving a fair trial).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Seabrook Island Property Owners' Association, **Respondent,**

v.

Joseph A. Berger, **Appellant.**

Opinion No. 4012
Heard June 17, 2005 – Filed July 5, 2005

AFFIRMED

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Paul A. James, of Mt. Pleasant, for Appellant.

David B. Wheeler and Edward T. Fenno, of Charleston, for Respondent.

ANDERSON, J.: Joseph A. Berger appeals the trial court's order assessing attorney's fees in the amount of $39,194.08 in favor of Seabrook Island Property Owners' Association (Seabrook). Berger argues the award is excessive and the trial court abused its discretion by refusing to allow him to testify in person at trial. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of a dispute between Berger, who is a resident of Seabrook Island, and Seabrook. The dispute began in 1997 when Seabrook notified Berger that his floating dock and unkempt yard violated Seabrook's covenants. Seabrook alerted Berger to the violations on numerous occasions and informed him of assessments he was incurring for failing to remedy the problems. After Berger neglected to correct the violations, Seabrook referred the matter to its attorney, David Wheeler, for enforcement and collection.

Over the course of the next couple of years, Wheeler and his associates sent many letters to Berger and his attorneys. Wheeler followed up with numerous attempts to resolve the matter. After these attempts failed, Seabrook filed suit against Berger seeking injunctive relief and recovery of assessments levied for violations of the covenants. The case was tried before Judge Roger M. Young who granted Seabrook injunctive relief, $43,945, and attorney's fees and costs in an amount to be determined.

Berger appealed Judge Young's order. The attorney's fees determination was stayed pending the outcome of the appeal. We affirmed Judge Young's order in an unpublished opinion. Seabrook Prop. Owners Ass'n v. Berger, Op. No. 2003-UP-417 (Ct. App. filed June 19, 2003).

On December 10, 2003, Seabrook petitioned the trial court to render an award of attorney's fees and costs, and included itemized invoices detailing the costs it incurred. Thereafter, Berger requested a hearing, and the matter was set for February 23, 2004 before Judge Mikell R. Scarborough. At the hearing, Berger's attorney requested that Berger be permitted to testify to contest specific items in the bills. The judge declined the request due to time considerations, but allowed Berger to submit a post-hearing affidavit setting forth his testimony. The trial judge further requested that Berger provide information about his own attorney's fees and asked him to outline why he thought Seabrook's attorney's fees were excessive.

After reviewing Berger's affidavit, the trial judge ruled that Seabrook had established the reasonableness of its attorney's fees and awarded

Seabrook attorney's fees in the amount of $39,194.08. Berger filed a motion to vacate, alter, or amend the judgment and requested an opportunity to testify in person. The trial judge denied the motion.

LAW/ANALYSIS

I. Reasonableness of Attorney's Fees

Berger argues the trial court's award of attorney's fees should be vacated or reduced because it was excessive and punitive in nature. We disagree.

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citing Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989); Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978); Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961)). "In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001) (citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993); Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989); Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001); Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998); Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990)).

"Restrictive covenants are contractual in nature." Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974); see also Seabrook Island Property Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987) ("Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.") (citation omitted).

The trial judge's order analyzes Seabrook's contractual basis for recovery of attorney's fees as follows:

> Section 2 of The Protective Covenants for the Seabrook Island Development, as amended (the "Covenants"), binds all property owners in the Development to the obligations set forth in the Covenants and derivative regulations; Paragraph 2(e) addresses the adoption, distribution, and enforcement of the regulations for the common good, including regulations for the design and construction of improvements on and for the maintenance of property, as well as sanctions for violations. Section 3 of the Covenants provides that the Board of Directors of the SIPOA has the right to bill for fees, charges, costs and assessments contemplated by the Covenants and/or imposed pursuant to the SIPOA's Bylaws, as amended from time to time, and to institute legal proceedings to collect such sums, "including the right to charge and collect all necessary attorneys' fees, court costs and other collection expenses." Section 7.3 of the Bylaws of the SIPOA, as amended, provides for Plaintiff to recover its attorneys' fees and costs incurred in actions to collect amounts due and owing. Section 8.5 of the Bylaws provides that in any action to enforce the covenants, the Bylaws or rules and regulations of the SIPOA, "the Property Owner, tenant, guest, invitee or other person responsible for the violation of which abatement is sought shall pay all costs, including reasonable attorneys' fees actually incurred."

We are, accordingly, dealing with a contract-based attorney's fee award.

"Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989) (citing Smith v. Smith, 264 S.C. 624, 216 S.E.2d 541 (1975); Nelson v. Merritt, 281 S.C. 126, 314 S.E.2d 840 (Ct. App. 1984)); accord Blumberg, 310 S.C. at 493, 427 S.E.2d at 660. "Where an attorney's

services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence." Baron Data Sys., 297 S.C. at 384, 377 S.E.2d at 297 (citing Singleton v. Collins, 251 S.C. 208, 161 S.E.2d 246 (1968)).

There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Blumberg, 310 S.C. at 494, 427 S.E.2d at 660 (citing Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961)); Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997); Burton v. York County Sheriff's Dept., 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004); Weatherford v. Price, 340 S.C. 572, 580, 532 S.E.2d 310, 314 (Ct. App. 2000). On appeal an award of attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. Blumberg, 310 S.C. at 494, 427 S.E.2d at 660.

In the case sub judice, the trial judge made detailed findings of fact and considered the six factors enumerated in Blumberg in concluding the attorney's fees were reasonable and customary. The judge noted the case took more than six years to resolve, included an appeal, and constituted 250 hours of attorney time. The rates outlined in the itemized billing records reflected Wheeler's normal rates for similar litigation, were customary for the community, and showed Wheeler made numerous attempts to resolve the matter short of trial. Additionally, Wheeler is a respected practitioner in the area of homeowners' association law and achieved a beneficial result in this case.

Berger's arguments that he spent less money than Seabrook on attorney's fees and that the case was "not complicated" enough to warrant the award do not persuade us that the trial judge abused his discretion. Berger represented himself at various stages in the dispute. The judge found the issues presented were "complex" and cited Judge Young's order noting the "lengthy litigation process." Based upon the trial court's written findings and

our review of the record, we find the trial court did not abuse its discretion in determining the amount of attorney's fees.

Additionally, Berger's argument the award of attorney's fees was punitive in nature is without merit. The only issue before the trial court was the assessment of attorney's fees and costs to Seabrook. There is no evidence the award was excessive or punitive in nature. Seabrook presented ample evidence indicating it actually incurred the fees awarded.

II. No Right to Testify

Berger argues the trial court erred by requiring that he submit an affidavit contesting the reasonableness of Seabrook's attorney's fees, rather than allowing him to testify live at the hearing. Berger further contends his live testimony would have better enabled him to address his objections to the attorney's fees because Seabrook's attorney, Wheeler, was present and would have been able to clarify or respond to any matters in dispute.

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 Realty 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. 2000). On appeal, therefore, this Court will not disturb a trial court's evidentiary rulings absent a clear abuse of discretion. Id. at 439, 540 S.E.2d at 121; Elledge v. Richland/Lexington School Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002); see also Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (observing admission of evidence will not be reversed absent an abuse of discretion). The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001); Sullivan v. Davis, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995). "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)).

As a preliminary matter, we note that this case does not involve the exclusion of any of Berger's proffered evidence; rather it concerns the manner in which he was allowed to present the evidence. Considering that the trial judge is vested with discretion to admit or exclude evidence, a fortiori the trial judge may regulate the manner in which evidence is offered to the court, subject to review for abuse of discretion or error of law. Accordingly, we reason that in contesting a trial judge's regulation of the way in which testimony is presented, an appellant must show both error and prejudice. Cf. Fields v. Reg'l Med. Center Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citations omitted) (finding that to warrant a reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof); Ellis v. Davidson, 358 S.C. 509, 525, 595 S.E.2d 817, 825 (Ct. App. 2004) (same); Rule 103, SCRE (providing that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]").

Unlike in criminal cases, litigants in civil matters do not have a constitutionally guaranteed right to testify before the court. In Faretta v. California, the United States Supreme Court observed that the Court has "often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process." 422 U.S. 806, 819, n.15 (1975). Among these rights is the right of "an accused . . . to testify on his own behalf[.]" Id. (citations omitted). This guarantee pertains only to criminal cases, however. "[I]n the absence of due process concerns, there is no fundamental right to testify in a civil action." Williams v. Chrysler Ins. Co., 928 P.2d 1375, 1381 (Colo. Ct. App. 1996).

The South Carolina Supreme Court has addressed the award of attorney's fees where a trial judge did not receive any evidence on the reasonableness of attorney's fees. In Farmers & Merchants Bank v. Fargnoli,

274 S.C. 23, 260 S.E.2d 185 (1979), the court affirmed an award of attorney's fees, even though the trial judge did not "receiv[e] evidence as to the value of the services rendered." Id. at 25-26, 260 S.E.2d at 187. The Farmers court propounded:

> As a general rule, the amount of attorney fees to be awarded in a particular case is within the discretion of the trial judge. The law requires, however, that the award must be reasonable. While there may be instances where the taking of evidence should be required in determining fees, we cannot say under the facts of this case that the amount awarded is unreasonable, or that it was error for the judge to award such an amount without evidentiary support.

Id. at 26, 260 S.E.2d at 187. Subsequent decisions have emphasized the requirement that the record contain evidence supporting each of the six factors enumerated in Blumberg. In Rowell v. Whisnant, 360 S.C. 181, 600 S.E.2d 96 (Ct. App. 2004), this Court explicated:

> Trial courts make specific findings of fact on the record for each of the factors set out above [the Blumberg factors]. In fact, "[o]n appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact."

Rowell, 360 S.C. at 186, 600 S.E.2d at 99 (quoting Blumberg, 310 S.C. at 494, 427 S.E.2d at 661).

Thus, so long as the record supports each of the six factors for awarding attorney's fees, a trial judge's refusal to take any evidence—written or oral—on the reasonableness of the fees is not necessarily erroneous. In the instant case, the trial judge specifically addressed each of the Blumberg factors and concluded Seabrook's fees were reasonable. Berger is unable to demonstrate to this Court that the trial judge erred, and we find no abuse of discretion in the trial judge's decision to consider Berger's testimony through an affidavit rather than live testimony.

Even were we to find error, Berger's claim would still fail because he has not demonstrated prejudice resulting from the trial judge's decision. The judge did not exclude any evidence, and Berger cannot show he was prejudiced because his testimony was written rather than oral. Although the trial judge did not permit Berger to testify in person, he allowed Berger to submit an affidavit up to twenty days after the hearing. The affidavit provided Berger with a fair opportunity to offer complete, detailed testimony regarding his objections to the attorney's fees.

CONCLUSION

We rule that a trial judge in the exercise of discretion in an award of attorney's fees under a contract between the parties is **NOT** required to take live testimony, **provided** the adverse party is allowed to present a full and complete presentation against the award of attorney's fees by affidavits. The record contains ample evidence to support the trial judge's findings and his award of $39,194.08 in attorney's fees in favor of Seabrook. Therefore, the order of the trial judge is

AFFIRMED.

STILWELL and WILLIAMS, JJ., concur.