The Supreme Court of South Carolina

In re: Amendments to the Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar

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O R D E R

The South Carolina Bar has proposed amending the Regulations for Mandatory Continuing Legal Education in Appendix C to Part IV, South Carolina Appellate Court Rules, to provide that lawyers and judges be required to complete continuing legal education courses dealing with substance abuse or mental health issues. The Bar notes members of the legal profession tend to suffer from higher rates of depression, substance abuse, and suicide than other professions, and the Bar believes such instruction may help lower those rates.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Regulation II of Appendix C to Part IV, South Carolina Appellate Court Rules, to require that, at least once every three annual reporting periods, attorneys and judges complete one hour of instruction devoted exclusively to substance abuse or mental health issues and the legal profession.

The amendments, which are attached, are effective March 1, 2011, the start of the next annual reporting period.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

August 5, 2010

APPENDIX C

REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION FOR JUDGES AND ACTIVE MEMBERS OF THE SOUTH CAROLINA BAR

. . .

II. Requirements

A. Active Members of the South Carolina Bar.

1. Except as otherwise provided in Regulation III, each active member of the South Carolina Bar, as defined in the By-Laws of the South Carolina Bar, shall complete a minimum of 14 hours of accredited continuing legal education (CLE) each annual reporting period.

2. At least 2 of the 14 hours shall be devoted to legal ethics/professional responsibility (LEPR). LEPR shall include, but not be limited to, instruction focusing on the Rules of Professional Conduct as they relate to law firm management, malpractice avoidance, lawyer fees, legal ethics, and the duties of lawyers to the judicial system, the public, clients and other lawyers.

3. As part of the legal ethics/professional responsibility (LEPR) requirement set forth in paragraph 2, at least once every three annual reporting periods, each lawyer must complete one hour of LEPR devoted exclusively to instruction in substance abuse or mental health issues and the legal profession.

4. An active member who accumulates in excess of 14 hours credit in an annual reporting period may carry a maximum of 14 hours forward to the next annual reporting period, of which a maximum of 2 hours may be LEPR credit (earned LEPR credit in excess of the required 2 hours may be applied to CLE requirements and/or carried forward not to exceed the maximum of 14 hours).

B. Judicial Members.

1. Minimum Requirements.

Judicial members specified in Rule 504(a), SCACR, shall complete a minimum of 15 hours of accredited judicial continuing legal education (JCLE) each annual reporting period. JCLE credit accumulated in any annual reporting period in excess of 15 hours may be carried forward to the next annual reporting period; provided, however, that not more than 30 hours credit may be carried forward to the next annual reporting period. At least once every three annual reporting periods, each judicial member must complete one hour of JCLE devoted exclusively to instruction in substance abuse or mental health issues and the legal profession.

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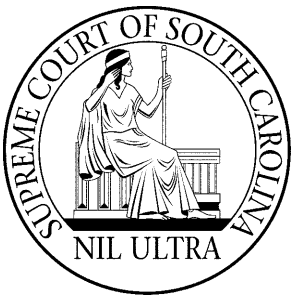

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 9, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Ashley Boyd, Respondent.

Opinion No. 26847
Submitted June 8, 2010 – Filed August 9, 2010

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William Ashley Boyd, of Andrews, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or a definite suspension not to exceed six (6) months. We accept the agreement and definitely suspend respondent from the practice of law in this state for six (6) months. The facts, as set forth in the agreement, are as follows.

FACTS

For a period of four years, respondent was employed as an associate attorney in a law firm. Sometime during the months of September and November 2009, a client retained the law firm to quiet title to a tract of

land that was purchased from an estate. Respondent informed the client that the fee for the action would be $1,500.00. Prior to the final hearing, respondent requested the client pay the fee in full. The client wrote a check made payable to respondent individually and not to the firm. Respondent deposited the funds into his personal bank account. Respondent represents that he completed the quiet title action for the client.

Sometime during late 2007 or early 2008, another client retained the law firm to perform a partition on a tract of land in which the client had an interest. Respondent informed the client that the attorney fee for the action would be $3,000.00. The client agreed to pay the fee in installments. Prior to the fall of 2009, the client had paid $2,500.00 to the firm. In the fall of 2009, at respondent's instructions, the client sent a check and money order made directly payable to respondent. The check and money order totaled $500.00. Respondent deposited the $500.00 directly into his personal account.

When confronted by the partners of the law firm, respondent admitted that he took the $2,000.00 from the two clients and deposited the funds into his own personal bank account. Respondent made full restitution to the law firm; he resigned from the law firm on November 25, 2009. The law firm reports that no client funds were at risk and that the funds deposited into respondent's personal accounts were the firm's earned fees.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall hold funds belonging to clients or third persons separately from lawyer's personal account and shall promptly deliver funds that others are entitled to receive); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); and Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not

engage in conduct tending to pollute the administration of justice or bring the courts or the legal profession into disrepute or engage in conduct demonstrating an unfitness to practice law).

CONCLUSION

While recognizing the seriousness of this misconduct, the Court is aware that respondent did not place any client funds at risk, that he has fully repaid his former law firm for the misappropriation, that he has resigned from the law firm, and that he has no prior disciplinary history. Accordingly, we accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for six (6) months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joseph W. Ginn, III, Respondent.

Opinion No. 26848
Submitted June 8, 2010 – Filed August 9, 2010

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John R. Ungaro, III, of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension from the practice of law not to exceed two (2) years with conditions. He requests that the period of suspension be made retroactive to the date of his interim suspension, October 1, 2009. See In the Matter of Ginn, 385 S.C. 240, 684 S.E.2d 176 (2009). We accept the agreement and impose a nine (9) month suspension with conditions as stated hereafter in this opinion. The suspension shall be made retroactive to the date of respondent's interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In August 2007, respondent was appointed to represent Client A in a post-conviction relief (PCR) matter. Respondent worked on the matter until March 2008. From March 2008 until his interim suspension from the practice of law on October 1, 2009, respondent did not work on the case or communicate with Client A or his family. At the time Client A filed his grievance, he did not know the status of his PCR action, in spite of his several letters to respondent requesting information about the progress of his case.

Matter II

On January 9, 2009, the Commission on Lawyer Conduct (the Commission) received notice from respondent's bank that a check in the amount of $8,134.91 was presented on insufficient funds in respondent's client trust account. Respondent was unable to produce the documentation necessary to explain this discrepancy because he was not in compliance with the recordkeeping requirements of Rule 417, SCACR. Respondent did not maintain adequate client ledgers and did not conduct appropriate monthly reconciliations of his trust account.

On October 1, 2009, respondent was placed on interim suspension because he did not respond to inquiries from the Commission or ODC concerning the insufficient fund notice from the bank. Upon notice of his interim suspension, respondent contacted ODC and, since that time, he has cooperated with ODC's investigation.

Following his interim suspension, respondent hired an independent auditor to reconstruct his account records. The accountant determined respondent should have had a balance of $21,559.36 in client funds in his trust account, although the balance was only $3,499.66. The discrepancy was the result of respondent's improper commingling of personal funds with client funds in the trust account and a concurrent failure by respondent to keep adequate records.

Further, on several occasions and for various reasons, respondent deposited personal funds into his trust account. He issued checks from those funds to himself and to third parties without maintaining a ledger or monitoring the balance of personal funds in the account. Respondent used $18,059.70 in client money for his own benefit. Respondent has restored those funds by delivering them to the attorney appointed to protect his clients' interests.

The bank's January 9, 2009, notice of insufficient funds to the Commission occurred after a check in the amount of $8,134.91 was issued by respondent to a third party on behalf of a client in March 2007, but not negotiated until January 2009. Because respondent was taking more money out of the trust account than he was putting into the account, the funds to cover the check were not available when it was presented. Respondent was not aware the check had not been negotiated for nearly two years because he was not reconciling his trust account or reviewing the bank statements. Respondent has now delivered a cashier's check to the third party to cover the insufficient funds.

In mitigation, respondent admits that he has suffered from severe depression which affected his judgment and decision making processes; however, in the last year he has been able to successfully treat his illness with medication, counseling, and other forms of therapy, and he voluntarily entered into a monitoring agreement with Lawyers Helping Lawyers. Respondent's psychiatrist now asserts respondent is mentally fit and capable of returning to the practice of law.

LAW

Respondent admits that by his misconduct he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 1.15(a) (lawyer shall safekeep client funds); Rule 1.15(b) (lawyer shall not deposit personal funds in trust account except for amount to cover service charges); and Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority). In addition, respondent acknowledges his misconduct violated the financial recordkeeping provisions of Rule 417, SCACR. Respondent admits that

his actions constitute grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months, retroactive to the date of his interim suspension, subject to the following conditions:

1. within one year of the date of this order, respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Trust Account School and Ethics School;

2. respondent shall renew his monitoring contract with Lawyers Helping Lawyers for two years from the date of his reinstatement to the practice of law and shall deliver a copy of the renewed contract to the Commission as soon as practical after it is signed and, on a quarterly basis, respondent shall file an affidavit confirming his compliance with the contract and a statement from his monitor confirming his compliance with the contract with the Commission;

3. each quarter during the two year period following his reinstatement to the practice of law respondent shall file a statement from his primary treating physician setting forth his diagnosis, treatment plan, compliance, and prognosis with the Commission; and

4. each quarter during the two year period following his reinstatement to the practice of law respondent shall file copies of his law office bank statements, checks, records of deposits, monthly reconciliations, and a statement from his accountant that he is in compliance with Rule 417, SCACR, with the Commission.

Within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating he has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Beaulah Platt, as guardian for Asia Platt, a minor under the age of fourteen years, as Personal Representative of the Estate of Valerie Marie Platt, deceased, and as Personal Representative of the Estate of William Leroy Platt, deceased, Petitioner,

v.

CSX Transportation, Inc., and South Carolina Department of Transportation, Defendants,

of whom South Carolina Department of Transportation is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Roger M. Young, Circuit Court Judge

Opinion No. 26849
Heard April 6, 2010 – Filed August 9, 2010

AFFIRMED IN PART, VACATED IN PART

David L. Savage, of Savage & Savage, of Charleston; John E. Parker, Ronnie L. Crosby and Matthew V. Creech, all of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Petitioner.

Jonathan J. Anderson, Lisa A. Reynolds and Eric M. Johnsen, all of Anderson and Reynolds, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: Petitioner brought wrongful death and survival actions against CSX Transportation, Inc. (CSX) and the South Carolina Department of Transportation (SCDOT) stemming from a collision between an automobile and a freight train. Petitioner settled the claims against CSX, and the trial court granted summary judgment in favor of SCDOT. The court of appeals affirmed, and we granted Petitioner's request for a writ of certiorari to review the court of appeals' decision.

FACTS/PROCEDURAL BACKGROUND

On June 19, 1999, an automobile (the Vehicle) carrying four passengers (one adult male, one adult female, one boy child, and one girl child) was struck by a freight train at the intersection of US 52 and Red Bank Road in Berkeley County. The girl child, the only survivor, was thrown from the Vehicle upon impact and suffered severe physical injuries.

US 52 intersects Red Bank Road at approximately a 45 degree angle, with the railroad track running parallel to US 52. Red Bank Road runs generally east-to-west, and US 52 runs generally north-to-south. An automobile travelling west on Red Bank Road approaching US 52 would first encounter the railroad tracks, cross the tracks, and then, within several car

lengths, come to the intersection with US 52, which is equipped with a traffic light. The Vehicle was travelling west on Red Bank Road; thus, it came upon the railroad tracks before reaching the traffic light at the US 52/Red Bank Road intersection.

Safety devices and warning signals at the intersection of the railroad track with Red Bank Road include cantilevered gate arms, flashing lights, warning bells, and "Do Not Stop on Tracks" signage. The traffic lights are designed to work in concert with the warning signals to prevent collisions. Specifically, as a train approaches the intersection, a signal is sent to SCDOT's traffic light system and the preemption cycle is initiated, overriding the normal system operation. The preemption cycle is pre-programmed to run through the light phases (green, yellow, and red) to clear any traffic off the tracks before the train arrives at the intersection. There are several different preemption cycles that may run, depending upon what phase the traffic lights are in when the preemption signal is received. The ultimate goal, regardless of which preemption cycle is run, is for a red light to be showing at Red Bank Road when the train arrives.

At trial, Petitioner alleged SCDOT was negligent in: (1) failing to coordinate the active warning devices with the traffic signals; (2) failing to properly sequence the lights during the preemption cycle; (3) sequencing the lights so as to create a trap for motorists; and (4) failing to warn motorists of the dangers of being trapped between the gate arms.

The trial court granted SCDOT's motion for summary judgment, finding: (1) SCDOT only had a duty to warn CSX of defects in the warning system, and it fulfilled that duty, and (2) the gate arms were the proximate cause of the accident and there was no evidence establishing otherwise. The trial court mentions but did not rule on the issue of SCDOT's potential immunity under the South Carolina Tort Claims Act (SCTCA) and federal preemption under the Railroad Safety Act of 1970 because it found SCDOT's traffic signals were not a proximate cause of the accident.

The court of appeals affirmed the trial court's grant of summary judgment, holding: (1) the public duty rule bars Petitioner's claim; (2) Petitioner's state law claims are preempted by federal regulations; and (3) the gate arms were the proximate cause of the accident, not the traffic lights. *Platt v. CSX Transp., Inc.*, 379 S.C. 249, 665 S.E.2d 631 (2008).

ISSUES

Petitioner presents the following issues for review:

I. Did the court of appeals err in holding the public duty rule barred Petitioner's claim on SCDOT's negligence regarding the traffic lights?

II. Did the court of appeals err in holding Petitioner's claims were preempted by federal law?

III. Did the court of appeals err in holding the record lacked evidence to establish the traffic signals as a proximate cause of the accident?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

ANALYSIS

SCDOT alleges and the court of appeals held that the public duty rule bars Petitioner's negligence claims based on statutory obligations. We agree.

An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007). Without a duty, there is no actionable negligence. *Id.* A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law. *Arthurs ex rel. Estate of Munn v. Aiken County*, 346 S.C. 97, 104, 551 S.E.2d 579, 582 (2001). When the duty is created by statute, we refer to this as a "special duty," whereas when the duty is founded on the common law, we refer to this as a legal duty arising from "special circumstances." *See id.* at 109-10, 551 S.E.2d at 585 (explaining that this Court restricts the term special duty to those arising from statutes, whereas a legal duty arising from a "special circumstance" is created under the common law).

Under the public duty rule, public officials are not liable to individuals of the public for negligence in discharging their statutory obligations. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 561, 521 S.E.2d 152, 158 (1999). A public official may be liable if he owed a special duty of care to the individual, as determined by a six-factor test, assessing whether: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within that class; (5) the public officers know or should know of the likelihood of harm to the class if he fails in his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office. *Jensen v. Anderson County Dep't of Soc. Servs.*, 304 S.C.195, 200, 403 S.E.2d 615, 617 (1991).

Petitioner does not contend that the six-factor test is met in this case. Rather, she argues the public duty rule is not dispositive because SCDOT has a common law duty to properly repair and maintain the state highway system, which she contends the court of appeals erroneously failed to consider when it affirmed the trial court's grant of summary judgment. We find Petitioner's common law argument is not preserved for appellate review.

While Petitioner pleaded common law negligence in her complaint, the trial court did not rule on that issue, and Petitioner did not file a motion to alter or amend the judgment. *See I'on L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating if the trial court fails to rule upon an issue raised to it, the losing party must file a motion to alter or amend the judgment to preserve that issue for appellate review). In fact, Petitioner did not fully assert a common law basis for SCDOT's duty until her reply brief to the court of appeals. For these reasons, we hold Petitioner did not properly preserve the issue of a common law duty for appellate review. *See Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 511, 598 S.E2d 712, 715 (2004) (stating issue may not be raised for the first time on appeal).

Because Petitioner's common law argument is unpreserved and the court of appeals correctly affirmed the grant of summary judgment regarding SCDOT's statutory obligations, Petitioner is unable to establish SCDOT owed a legal duty to Petitioner. *See Doe*, 375 S.C. at 72, 651 S.E.2d at 309. Without this essential element, Petitioner cannot prevail on her negligence claim. *See id.*

Having found Petitioner is unable to establish a legal duty, we need not address Petitioner's remaining issues. *See Futch v. McAllister Towing of Greenville, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that appellate court need not address remaining issues when determination of one issue is dispositive). Accordingly, we affirm the court of appeals as to the public duty rule, and vacate the remainder of that opinion.

CONCLUSION

The trial court properly granted summary judgment on SCDOT's statutory duty, and the court of appeals correctly affirmed on that ground. Petitioner failed to preserve her common law duty argument; thus, she cannot establish SCDOT owed her a legal duty. Therefore, the court of appeals is affirmed in part and vacated in part.

PLEICONES, BEATTY, JJ., and Acting Justices James E. Moore and John H. Waller, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of
Motor Vehicles, Respondent,

v.

Osier Palmer Blackwell, III, Appellant.

Appeal from Richland County
Carolyn C. Matthews, Administrative Law Court Judge

Opinion No. 26850
Heard May 13, 2010 – Filed August 9, 2010

AFFIRMED

Ricky Keith Harris, of Spartanburg, for Appellant.

Philip S. Porter, Frank L. Valenta, Jr., Linda A. Grice, of Blythewood, for Respondent.

CHIEF JUSTICE TOAL: Osier P. Blackwell, III (Appellant) appealed the administrative law court's (ALC) decision that a conviction for

driving with an unlawful alcohol concentration constitutes a major violation under the habitual traffic offender statute found at S.C. Code Ann. § 56-1-1020. We certified the case pursuant to Rule 204(b), SCACR, and affirm.

FACTS/PROCEDURAL BACKGROUND

In 2003, Appellant twice was cited for and convicted of driving while under suspension. Appellant was cited for driving with an unlawful alcohol concentration (DUAC) in 2006, but not convicted until 2008. In July 2008, Appellant received an official Notice of Declaration of Habitual Offender Status from the Department of Motor Vehicles (DMV), which included a five year suspension of his driver's license.

Appellant requested a hearing, and the Division of Motor Vehicles Hearings (DMVH) rescinded Appellant's suspension. The DMVH found that DUAC is not a major offense under the habitual traffic offender statute because it does not include the material element of establishing the offender was under the influence of alcohol. Thus, DUAC does not equate to the enumerated offense in section 56-1-1020 of operating or attempting to operate a motor vehicle while under the influence of alcohol.

The DMV appealed to the ALC, which reversed the DMVH. South Carolina Code section 56-5-2950(b)(3) says that if a person has an alcohol concentration of .08% or greater, then it may be inferred that person is under the influence of alcohol. The ALC reasoned that because the DUAC statute requires a person's alcohol concentration to be at .08% or above, you can infer "under the influence" from a DUAC conviction. Thus, if a person is convicted of DUAC, it is a major violation of the habitual traffic offender statute because it equates to operating a motor vehicle while under the influence of alcohol. The ALC reversed the DMVH and reinstated Appellant's suspension. Appellant appealed, and we certified the case.

STANDARD OF REVIEW

In an appeal from the ALC's decision, the Administrative Procedures Act provides the appropriate standard of review. S.C. Code Ann. § 1-23-610(B) (Supp. 2008). This Court will only reverse the ALC's decision if it is:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

ANALYSIS

Appellant argues the ALC erred in reversing the DMVH and reinstating his suspension. We disagree.

South Carolina's habitual offender law states that a person who has been convicted of committing at least three described offenses within a three year period is an habitual traffic offender. S.C. Code Ann. § 56-1-1020 (2006). Included in the list is "operating or attempting to operate a motor vehicle while under the influence of intoxicating liquors, narcotics or drugs." *Id.* § 56-1-1020(a)(2).

Appellant was convicted of driving with an unlawful alcohol concentration under section 56-5-2933, which states that it is "unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more." This offense is distinct from "operating a motor vehicle while under influence of alcohol

or drugs," which requires the driver to be under the influence of alcohol to the extent that the driver's faculties are "materially and appreciably impaired." *Id.* § 56-5-2930.

Appellant argues that because the habitual offender statute uses the language "under the influence," an offense that does not require a showing of being "under the influence" may not be counted against him under the statute. The ALC, on the other hand, found that DUAC is comparable to operating a motor vehicle while intoxicated and thus is sufficient for the habitual offender statute. We agree.

Specifically, the ALC found that while "under the influence" is not defined within the statutes, section 56-5-2950(b)(3) states that if a driver's alcohol concentration is .08% or higher, it may be inferred that the driver is under the influence of alcohol. Thus, because a driver must have an alcohol concentration of at least .08% to be convicted of DUAC, an inference of "under the influence" may be inferred from a DUAC conviction. That permissible inference, along with the broad and inclusive nature of the habitual offender statute,[1] supports the ALC's ruling that a conviction of DUAC is contemplated by and qualifies under the habitual offender statute.

The offense of DUAC carries a permissible inference of being under the influence. A conviction under section 56-5-2930 requires a driver to be under the influence to a certain extent. A driver may have an alcohol concentration sufficient to support a conviction of DUAC and trigger the inference, but his faculties may not be impaired to the degree required for a conviction under section 56-5-2930. Both offenses are predicated upon a driver operating a vehicle while under the influence of alcohol, albeit to potentially different extents. The plain language of the habitual offender statute only requires a driver to be under the influence – it does not have the

[1] The legislative declaration of policy also supports the ALC's reading of the habitual offender statute. *See id.*§ 56-1-1010 (stating the policy behind the legislation is to provide for the safety of people on public roads, to deny driving privileges to those drivers who demonstrate indifference to traffic laws, and to discourage drivers from repeatedly violating traffic laws).

higher standard of section 56-5-2930. Therefore, a conviction for DUAC qualifies as a major violation under the habitual offender statute.

CONCLUSION

For the above reasons, the ALC's decision that a conviction for driving with an unlawful alcohol concentration constitutes a major violation under the habitual traffic offender statute is affirmed.

HEARN, J. and Acting Justice James E. Moore, concur.
KITTREDGE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE KITTREDGE: I respectfully dissent. The habitual traffic offender statute defines a "habitual offender" as a person who has:

> (a) Three or more convictions, singularly or in combination of any of the following ***separate and distinct offenses*** arising out of separate acts:
>
> (1) Voluntary manslaughter, involuntary manslaughter or reckless homicide resulting from the operation of a motor vehicle;
>
> (2) Operating or attempting to operate a motor vehicle while under the influence of intoxicating liquor, narcotics or drugs;
>
> (3) Driving or operating a motor vehicle in a reckless manner;
>
> (4) Driving a motor vehicle while his license, permit, or privilege to drive a motor vehicle has been suspended or revoked, except a conviction for driving under suspension for failure to file proof of financial responsibility;
>
> (5) Any offense punishable as a felony under the motor vehicle laws of this State or any felony in the commission of which a motor vehicle is used;
>
> (6) Failure of the driver of a motor vehicle involved in any accident resulting in the death or injury of any person to stop close to the scene of such accident and report his identity;

S.C. Code Ann. § 56-1-1020(a) (2006) (emphasis added).

The habitual offender statute lists six specific offenses that "count" towards habitual offender status. Indeed, the legislature elected to limit qualifying offenses to the enumerated "separate and distinct offenses." The enumerated offenses set forth in sections (1), (2), (3), (4) and (6), refer to

specific statutory offenses,[2] and section (5) incorporates the provisions of the motor vehicle laws punishable as a felony.

Given the clear statutory language, I take the view that if an offense is not one of the six listed in the habitual offender statute, the conviction may not "count" towards habitual offender status. The offense of driving with an unlawful alcohol concentration (DUAC) is not included as one of the section 56-1-1020(a) offenses. I thus conclude the offense of DUAC is not a qualifying offense under section 56-1-1020(a) for habitual offender status.

Moreover, I disagree with the Court's attempt to satisfy the statute by equating the offense of DUI with the offense of DUAC. Under South Carolina law, DUI and DUAC are different offenses. *See* § 56-5-2930 and § 56-5-2933. The element of "driving under the influence" is not present in an offense for DUAC. I respectfully disagree with the majority's analysis which bootstraps § 56-5-2950(b)(3), a permissible inference provision located in an entirely different statute, to the DUAC statute in order to reach the conclusion that a conviction for DUAC qualifies as a conviction of "operating or attempting to operate a motor vehicle while under the influence."

I certainly understand the policy rationale for including the offense of DUAC as a qualifying offense for habitual traffic offender status, but that determination lies with the legislature and not this Court.

I vote to reverse the decision of the ALC.

PLEICONES, J., concurs.

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[2] *See* S.C. Code Ann. §§ 56-1-440, 56-5-1210, 56-5-2910, 56-5-2920, and 56-5-2930 (2008).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Blair Mathis, Respondent,

v.

Brown & Brown of South Carolina, Inc., Appellant.

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 26851
Heard March 16, 2010 – Filed August 9, 2010

AFFIRMED IN PART; REVERSED IN PART

Jeffrey A. Lehrer and S. Clay Keim, both of Ford & Harrison, of Spartanburg, for Appellant.

Robert M. Barrett, of Spartanburg, for Respondent.

John Green Creech, of Ogletree Deakins Nash Smoak & Stewart, of Greenville, for Amicus Curiae SC Chamber of Commerce.

Nikole Setzler Mergo, of Nexsen Pruet, of Columbia, for Amicus Curiae SC Hospital Association.

JUSTICE PLEICONES: This is an appeal from a trial court's order awarding damages under claims for breach of contract and violation of the Payment of Wages Act. Appellant Brown & Brown of South Carolina (Appellant) contends the trial court erred (1) in finding it breached its contract with Respondent Blair Mathis (Mathis); (2) in finding it violated the Payment of Wages Act; (3) in applying the Payment of Wages Act to prospective wages; (4) in failing to comply with Rule 52, SCRCP; and (5) in denying Appellant's motion for change of venue. We affirm on all issues with the exception of the trial court's holding that the Payment of Wages Act applies to prospective wages.

FACTS

A. Employment History

Mathis was employed as an account executive and producer for Reidman Insurance in Spartanburg, which was acquired by Appellant during Mathis's employment. In 2003, Mathis left employment with Appellant and went to work with a company that would later become Carolina First.

In 2004, Mathis received a call from an acquaintance, Herb McBride, the Profit Center Manager for Appellant's Greenville office. The two had lunch a number of times and began to discuss Mathis returning to work for Appellant. In August 2004, McBride verbally offered Mathis a salary of $90,000 per year for the first year of employment with Appellant, as well as a 20% commission on new business generated by Mathis. Additionally, Mathis would be assigned the $300,000 book of business of a departing producer and, in six months, would be named the Sales Manager. Mathis declined the offer.

McBride later laid out a new offer, which he then communicated in an e-mail (the McBride e-mail) which provided in part:

> This offer is from Hyatt Brown. The guaranteed salary for the first year is $110,000. You will be assigned the duties, responsibilities, and title of sales manager. Going forward I will assign, at least, $500,000 in coded existing business to comply with the 40/20 [commission structure] or apply the appropriate salary as a sales manager to insure that the second year will be $120,000 earnings. As we discussed, if you are meeting your goals and achievements, doing your part, we will make sure we do our part and you are taken care [of] going forward. You will have an open expense account for customary expenses less than $100. Anything larger will require my approval.

Hyatt Brown was the CEO of Appellant's corporate office. Mathis testified that McBride explained that Hyatt Brown was involved through "corporate assistance," which meant that corporate headquarters was willing to pay part of Mathis's salary. After further negotiations, on September 17, 2004, Mathis accepted the offer and sent his resignation letter to Carolina First. Mathis began work on September 27, 2004. Two days later, he signed an Employment Agreement.

B. Employment with Appellant

Mathis testified that he arrived for work one morning and found a blank copy of a corporate assistance form on his chair with a note from McBride saying that they needed to discuss the document. Mathis reviewed the document and noticed that it contained language providing for certain production goals and consequences for failing to meet the goals. According to Mathis, he objected to McBride that such contingencies were not part of his contract deal to which McBride responded that Mathis's salary would be unaffected by any failure to meet the goals.

In February 2005, McBride was replaced as Profit Center Manager by Clay Collins. Mathis testified that he met with Collins and brought his correspondence and employee records. Collins explained that he would not

need a sales manager as he would be handling those duties himself. Mathis testified that he told Collins that he expected to have his job offer honored, to which Collins responded that he needed time to get acclimated to the new job and they would discuss the matter later.

In an e-mail in May 2005, Collins placed limits on expense accounts which were inconsistent with Mathis's agreement with McBride. In July 2005, Collins asked to meet with Mathis and informed him that, due to his failure to meet corporate assistance goals, he would reduce Mathis's salary to $90,000. According to Mathis, he told Collins that "it was wrong" and that the two of them needed to speak with McBride, but Collins declined to do so. Mathis testified that he then turned to McBride who explained that he could not help Mathis. Beginning August 8, Appellant paid Mathis at the reduced salary.

In January 2006, Collins set new goals for Mathis for the coming year and warned that "[a]ny future short falls in new business and growth to your book will certainly have an impact on your compensation." Mathis responded with a letter in which he detailed his negotiations with McBride and the terms set forth in the e-mails from McBride. In a memo dated March 10, 2006, Collins again outlined payment reductions and extended a termination offer to Mathis. The memo provided, in part:

> In an email sent by Herb McBride (Profit Center Manager at the time) in September 2004, it was agreed that you would earn $110,000 in the first year and $120,000 in the second year of employment. In return for full cooperation with reasonable requests made by me, I am prepared to continue paying your current bi-weekly draw of $3,461.54 through March 31, 2006. During this time, you will be expected to meet with all current clients and future prospects currently in inventory in order to make full introductions to the new agent handling the account or myself as the Profit Center Manager. In return, I will provide you with a severance package totaling $16,124.86 which is equivalent to the pro-rata difference of $110,000 Year 1 and

> $120,000 Year 2 salaries that were originally agreed upon versus amounts paid through March 31, 2006.

Mathis did not respond to the offer and was terminated. Mathis then instituted this action.

C. Procedural History

The trial court found a two-year contract of employment existed between the parties and that Appellant breached the terms of the contract by reducing Mathis's pay. The court further found that there was no bona fide dispute regarding the wages due Mathis and that Appellant violated the Payment of Wages Act by failing to pay Mathis the contract amount. Pursuant to the Payment of Wages Act, the trial court awarded Mathis three times the unpaid wages of his two-year contract, plus attorney's fees. See S.C. Code Ann. § 41-10-80(C) (Supp. 2005). The award was based on the difference between the reduced wages and the contractual compensation during the period Mathis remained employed, plus the wages he would have earned for the remaining term of the contract, less post-termination wages earned from other employment during that term. Appellant appealed, contesting a number of issues from the trial court.

STANDARD OF REVIEW

Actions seeking damages for breach of contract and actions for violation of the Payment of Wages Act are actions at law. See McCall v. ICON, 380 S.C. 649, 657, 670 S.E.2d 695, 700 (2008); Ross v. Ligand Pharmaceuticals, Inc., 371 S.C. 464, 468, 639 S.E.2d 460, 462 (Ct. App. 2006). In an action at law tried without a jury, the trial judge's findings have the force and effect of a jury verdict upon the issues and are conclusive on appeal when supported by competent evidence. See Beheler v. Nat'l Grange Mut. Ins. Co., 252 S.C. 530, 535, 167 S.E.2d 436, 438 (1975). Accordingly, this Court's scope of review is limited to determining whether the findings are supported by competent evidence and correcting errors of law. See Temple v. Tec-Fab, Inc., 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009).

ISSUES

I. Did the trial court err in finding that Appellant breached its contract with Mathis?

II. Did the trial court err in finding that Appellant violated the Payment of Wages Act?

III. Did the trial court err in applying the Payment of Wages Act to prospective wages?

IV. Did the trial court order comply with Rule 52, SCRCP?

V. Did the trial court err in denying a change of venue?

DISCUSSION

I. Did the trial court err in finding that Appellant breached its contract with Mathis?

Appellant does not dispute that a contract was created by the McBride e-mail, but instead contends that it did not breach the contract for the following reasons: (1) the McBride e-mail did not establish a term contract but rather one of indefinite duration; (2) Mathis was employed "at will"; (3) even if the McBride e-mail established a term contract, Mathis was estopped from raising any claims for breach by continuing to work following the compensation change; and (4) the contract was voidable because it was induced by Mathis's misrepresentations as to the size of his business at Carolina First. We address each argument in turn.

A. Did the trial court err in finding that the McBride e-mail established a term contract rather than one of indefinite duration?

Appellant contends that the McBride e-mail did not create a contract of definite term. Appellant therefore argues that it was free to reduce Mathis's pay without violating the contract. We find there is competent evidence to support the trial court's finding that the e-mail created a contract of definite term.

Appellant correctly notes that "'[i]n order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement.'" Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). Appellant argues that, "[a]t a minimum, there was no meeting of the minds regarding [Appellant's] right to terminate the employment relationship at-will":

> The McBride e-mail makes it clear that Mathis['s] employment was of indefinite duration. It specifically stated, "As we discussed, if you are meeting your goals and achievements, doing your part, we will make sure we do our part and make sure you are taken care of going forward." Therefore, no definite term was established, but rather the employment period was intended by both parties to be indefinite.

The McBride e-mail provides, in relevant part, as follows:

> As we discussed, we at Brown & Brown are convinced that you are a big part of our future. This offer is from Hyatt Brown. The guaranteed salary for the first year is $110,000. You will be assigned the duties, responsibilities and title of sales manager. Going forward, I will assign at least $500,000 in coded existing business to comply with the 40/20 or apply the appropriate salary as a sales manager to insure that the second year will be $120,000 earnings. As we discussed, if you are meeting your goals and achievements, doing your part, we will make sure we do our part and you are taken care of going forward.

We find that the plain language of the e-mail refutes Appellant's contention that "the employment period was intended by both parties to be indefinite" and that Appellant could terminate the relationship at-will. The e-mail specifically refers to two years of employment. The document guarantees Mathis one-year of employment at a salary of $110,000. It then provides that McBride will "insure that the second year will be $120,000 in earnings." These statements provide competent evidence to support the trial court's finding that the contract was a two-year contract. That the parties may or may not have chosen to continue their relationship beyond the two-year term does not render the contract one of indefinite duration. The vague language cited by Appellant that "if you are meeting your goals and achievements, doing your part, we will make sure we do our part and you are taken care of going forward" does not refute the language providing for, at minimum, two years of guaranteed employment. See Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449, 451 (Ct. App. 1988) (courts must interpret contracts based on their plain language). Moreover, even if the language creates an ambiguity, a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement. See Duncan v. Little, 384 S.C. 420, 425, 682 S.E.2d 788, 790 (2009).

B. Did the trial court err in finding that Mathis was not employed "at-will"?

Appellant contends that overwhelming evidence demonstrates that Mathis was employed "at-will" and, consequently, the trial court erred in finding that the contract between Mathis and Appellant was a term contract. We disagree.

In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment. See Prescott v. Farmers Tel. Coop., 335 S.C. 330, 334-36, 516 S.E.2d 923, 925-26 (1999). An at-will employee may be terminated at any time for any reason or for no reason, with or without cause. See Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 107, 616 S.E.2d 694, 697 (2005).

Appellant argues that while Mathis may have initially been party to a term contract, by signing the Employment Agreement, he became an at-will employee. Appellant cites to the case of Cape v. Greenville County Sch. Dist., 365 S.C. 316, 618 S.E.2d 881 (2005), for the proposition that a term contract may be altered to at-will. 365 S.C. at 319, 618 S.E.2d at 883. We find that Cape is not applicable here.

In Cape, a teacher signed a contract for a specific school year which contained a provision specifying that the contract was for at-will employment. Id. at 317, 618 S.E.2d at 882. This Court noted that a contract for a definite term "is presumptively terminable only upon just cause" but found that the parties had "by express contract provision, altered *the presumption* that employment for a definite term is terminable only upon just cause, and replaced that presumption with an at-will termination clause." Id. (emphasis added). The instant case is markedly different than Cape as the e-mail which formed the basis for the contract did not contain an at-will clause, and instead only referenced the definite term.

Moreover, the document which Appellant contends converted the contract from a term contract to an at-will contract was signed *after* the contract was created. Any subsequent agreement must be supported by consideration and Appellant has shown no separate consideration to support the Employment Agreement. See Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 548 S.E.2d 207 (2001) (holding that when a covenant is entered into after the inception of employment, separate consideration, in addition to continued employment, is necessary in order for the covenant to be enforceable).

Appellant further contends that "Mathis was aware from the outset of his discussions about the possibility of working for [Appellant] . . . that his employment would be at-will and governed by [Appellant's] Employment Agreement." However, the portions of the record cited by Appellant do not support this contention. Mathis admits that, based on his past employment with Appellant, he expected that he would have to sign an Employment Agreement, which he referred to as a "non-piracy" agreement. However,

while Mathis testified that he expected certain non-compete clauses to be part of the Employment Agreement, Appellant did not demonstrate that Mathis knew that the Employment Agreement specified at-will employment.

Given the above, we find competent evidence supports the trial court's finding that the contract between Appellant and Mathis was a term contract rather than an at-will contract.

C. Did the trial court err in finding that Appellant breached its contract with Mathis where Appellant had a reasonable good faith belief that it had "cause" to terminate Mathis?

Appellant argues that even if its contract with Mathis was a term contract and, consequently, could only be terminated "for cause," Appellant had a reasonable good faith belief that it had "cause" to terminate Mathis. Consequently, in Appellant's view, it did not breach the contract by reducing Mathis's salary or discharging him and the trial court erred in finding to the contrary. We find that this issue is not properly preserved for our review.

In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The trial court's order did not address Appellant's argument that it had "cause" to terminate Mathis's contract. Appellant's Motion to Alter or Amend did not bring the absence of this issue to the trial court's attention. Accordingly, this issue is not preserved.

D. Did the trial court err in finding that Mathis was not estopped from raising his claims by continuing to work following the compensation change?

Appellant argues that even if the McBride e-mail established a term contract, the trial court erred in finding that it breached the contract as Mathis

was estopped from raising claims regarding the change in compensation by continuing to work for Appellant. We disagree.[1]

As noted above, Collins informed Mathis of the compensation change in writing in a letter dated August 1, 2005. According to Mathis, Collins verbally notified him of the change during a meeting on July 18, 2005. Mathis testified that he objected to the change and asked that they discuss the matter with McBride, which Collins declined to do. Mathis then claimed that he raised the issue with McBride and presented Collins with McBride's initial offer, explaining that he had declined the offer and instead accepted a two-year guarantee. Months later, in response to a letter from Collins referencing Mathis's agreement with McBride, Mathis sent a letter to Collins detailing his negotiations with McBride and the e-mail offers.

Appellant claims that because Mathis continued to work for Appellant in the months following the change in compensation, he is estopped from raising contract and wage claims. In support of its argument, Appellant cites Facelli v. Southeast Mktg. Co., 284 S.C. 449, 327 S.E.2d 338 (1985). In Facelli, this Court found that an employee who continued to work for his employer for six months without complaint following a change to his commission rate impliedly consented to the change. Id. at 452, 327 S.E.2d at 339. Consequently, the employee was estopped from seeking damages for the change. Id.

Mathis argues that Facelli is distinguishable from the instant case because, unlike the employee in Facelli, Mathis objected to the compensation change. Two cases from the Court of Appeals are instructive on this point and reach different conclusions on the issue. In Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991), the Court of Appeals relied on Facelli in upholding a circuit court's ruling granting

[1] Though Appellant uses the term "waiver," Appellant actually argued to the trial court and argues in its brief to this Court that Mathis is barred from recovering for the compensation change under the doctrine of estoppel. Case law cited by Appellant at the trial court and on appeal holds that an employee may be barred recovery for a reduction in salary based on estoppel.

summary judgment on an employee's claim based on a unilateral change in his original employment contract. Id. at 270-71, 407 S.E.2d at 669-670. The City initially agreed to provide the employee with a car for personal and business use, but then gave the employee notice of a new policy which prohibited personal use of city vehicles. Id. at 270, 407 S.E.2d at 669. Despite the fact that Matthews protested the change, the Court of Appeals found that by continuing to work for approximately seven years after the change, he was estopped from seeking damages. Id. at 271, 407 S.E.2d at 670.

The Court of Appeals reached a different conclusion in Estes v. Roper Temp. Serv., 304 S.C. 120, 403 S.E.2d 157 (Ct. App. 1991). Estes involved an employee whose written employment contract was unilaterally altered by her employer. Id. at 121, 403 S.E.2d at 158. The Court of Appeals noted that the employee "did not agree to these changes and, indeed, objected to them while continuing to work" and it found that the trial court erred in finding the employee estopped from asserting the breach of contract action. Id. at 122, 403 S.E.2d at 158.

The Estes court noted that the employer, as the party seeking estoppel, was required to prove the elements of estoppel, including that the employee "engaged in conduct that amounted to a false misrepresentation or concealment." Id., citing Frady v. Smith, 247 S.C. 353, 359, 147 S.E.2d 412, 415 (1966) (the party estopped must have made a false misrepresentation or concealment or made some representation calculated to convey an incorrect impression of the facts), *overruled on other grounds by* Tolemac, Inc. v. United Trading, Inc., 326 S.C. 103, 484 S.E.2d 593 (1997). The court continued:

> The trial court, relying upon [Facelli] found Estes made a false representation by continuing to work and receive compensation. In Facelli, the Supreme Court held that an employee's continuing to work and accept compensation, without either objecting to or complaining about a change in compensation, constitutes a representation that the employee impliedly consents to the

> employer's unilateral change in compensation. The trial court, however, ignored the fact that in this instance the employee objected to the change in compensation. This circumstance alone distinguishes the case here from Facelli. More importantly, it creates a genuine issue of material fact as to whether Estes consented to the change in compensation and thus renders summary judgment inappropriate.

Estes, 304 S.C. at 122, 403 S.E.2d at 158.

We are most persuaded by Estes, as we find it to be more relevant factually and that it best comports with the doctrine of estoppel. See Black's Law Dictionary 589 (8th ed. 2004) (defining estoppel, in part, as: "A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."). We therefore hold that, on these facts, there was a genuine issue of material fact whether Mathis consented to the compensation reduction by continuing employment with Appellant. We find competent evidence to support the trial court's finding that Mathis did not impliedly consent by continuing to work following the reduction in pay.

E. Did the trial court err in finding that the contract was not voidable because it was induced by Mathis's misrepresentation?

Appellant contends the trial court erred in finding it breached its contract with Mathis because the contract was induced by Mathis's misrepresentations regarding his book of business at Carolina First and is therefore voidable. We disagree.

A contract may be rescinded for mistake, if justice so requires, where the mistake is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the recission, without negligence on the part of the party claiming recission. See King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (Ct. App. 1984), citing Jumper v. Queen Mab Lumber Co., 115 S.C. 452, 106 S.E. 473 (1921).

We find there is conflicting evidence whether Mathis made misrepresentations to Appellant. Clearly, the trial judge made a credibility determination in favor of Mathis. We find that the trial court's determination is supported by competent evidence and he did not err in failing to find the contract voidable based on misrepresentation. See Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) (scope of review does not require appellate court to disregard findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses).

II. Did the trial court err in finding that Appellant violated the Payment of Wages Act?

As noted, the trial court found that Appellant withheld wages from Mathis though there was no bona fide dispute as to wages due. The court therefore found that Appellant violated the Payment of Wages Act and awarded Mathis an amount equal to three times the unpaid wages, plus costs and attorney's fees. Appellant contends that the trial court erred in finding that it violated the Payment of Wages Act because (1) there was a bona fide dispute as to wages due Mathis, and (2) Appellant provided seven days notice prior to the compensation change as required under the Payment of Wages Act.

A. Bona fide dispute

Appellant argues that the trial court erred in ruling that Appellant did not have any bona fide dispute to Respondent's contract and Payment of Wages Act claims. We disagree.

S.C. Code Ann. § 41-10-40 generally requires an employer to timely pay all wages due and § 41-10-50 provides that when an employer discharges an employee, it must timely pay him all wages due. S.C. Code Ann. §§ 41-10-40, 50 (Supp. 2005). S.C. Code Ann. § 41-10-80(C) provides that when an employer violates the provisions of §§ 41-10-40 or 41-10-50 "the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as

allow." S.C. Code Ann. § 41-10-80(C) (Supp. 2005). However, this Court held in Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), that the penalty set forth in § 41-10-80(C) is discretionary with the trial judge. 318 S.C. at 98, 456 S.E.2d at 383. The Court reasoned that "[t]he imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh." Id.

Appellant contends that "[t]o warrant reversal, [Brown & Brown] need only establish that one of the following defenses constitutes a bona fide defense or good faith dispute" and then lists each of the arguments set forth in its brief. However, the relevant date for determining whether the employer reasonably withheld wages is the time at which the wages were withheld, i.e., when the employer allegedly violated the Act. See Rice, 318 S.C. at 99, 456 S.E.2d at 383 (in enacting the Payment of Wages Act, "the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute."). The question before this Court, therefore, is whether, at the time that Appellant reduced Mathis's compensation, it had a reasonable good faith reason for doing so. Consequently, Appellant's arguments that it reasonably believed that the agreed-upon compensation was not owed Mathis due to (1) his waiver by continuing to work after the change; and (2) alleged violations of the non-piracy provisions cannot justify the decision to reduce Mathis's guaranteed salary.[2]

We have addressed Appellant's remaining arguments above and we find competent evidence supports the trial court's finding that no bona fide dispute existed to support Appellant's decision.

[2] These points could be relevant to show that a bona fide dispute existed regarding Appellant's failure to pay Mathis's future wages, but we need not address this contention as we find below that the Payment of Wages Act does not apply to future wages.

B. Required Notice

Appellant also contends that the trial court erred in finding that it violated the Payment of Wages Act because it complied with the Act by providing Mathis with seven days notice prior to the compensation change, in accordance with S.C. Code Ann. § 41-10-30. We disagree.

S.C. Code Ann. § 41-10-30 requires, in part:

> Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases.

S.C. Code Ann. § 41-10-30(A) (Supp. 2005). Appellant notes that, in a letter dated August 1, Clay Collins informed Mathis of the reduction in salary effective August 8. Consequently, in Appellant's view, "[b]y giving Mathis seven-days written notice of the change in his compensation structure, [Brown & Brown] fully complied with the Payment of Wages Act regardless of the Trial Court's ruling regarding Mathis's contract claim."

Even assuming that Appellant has complied with the requirements of § 41-10-30(A), this alone does not show full compliance with the Payment of Wages Act. S.C. Code Ann. § 41-10-40(C) provides: "An employer shall not withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions as required by subsection (A) of § 41-10-30." Appellant cannot comply with § 41-10-40(C) merely by giving notice, as the latter half of the

statute applies only to “deductions.” In altering Mathis’s salary, Appellant’s action constituted a *reduction* rather than a *deduction*. A "deduction" within the terms of the statute, is the act of taking away from a salary in order to fund some benefit. This is how the term is used in the context of § 41-10-30(A): "Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, *and the deductions which will be made from the wages, including payments to insurance programs*." S.C. Code Ann. § 41-10-30(A) (Supp. 2005) (emphasis added). This reading better comports with the purpose of the Payment of Wages Act, which is "to protect employees from the unjustified and willful retention of wages by the employer." Rice, 318 S.C. at 98, 456 S.E.2d at 383.

Under this interpretation, Appellant cannot comply with the Payment of Wages Act, while breaching the contract, simply by providing seven days notice of the breach. Consequently, even assuming that Appellant gave notice, we find competent evidence to support the trial court's finding that Appellant violated the Act.

III. Did the trial court err in finding the Payment of Wages Act applies to prospective wages?

Appellant contends that the trial court erred in awarding Mathis damages for prospective wages under the Payment of Wages Act.[3] We agree.

As noted above, this Court has held that the purpose of the Payment of Wages Act is "to protect employees from the unjustified and willful retention of wages by the employer." Rice, 318 S.C. at 98, 456 S.E.2d at 383. The Act itself defines the term "wages" as follows:

> "Wages" means all amounts at which *labor rendered* is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of

[3] The South Carolina Hospital Association and the South Carolina Chamber of Commerce submitted amicus briefs on this issue.

> calculating the amount and includes vacation, holiday, and sick leave payments which are *due* to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

S.C. Code Ann. § 41-10-10(2) (Supp. 2009) (emphasis added). The past tense of the word "rendered" suggests services provided in the past. The word "recompensed" too suggests that payment is for labor already completed. See Webster's Third New Int'l Dictionary 1897 (2002) (defining "recompensed" in part, as "an equivalent or a return for something done, suffered, or given"). Other sections of the Payment of Wages Act speak of acts done in the past. See, e.g., S.C. Code Ann. §§ 41-10-40(D) ("Every employer in the State shall pay *all wages due* at the time and place designated . . . ."); 41-10-50 ("When an employer separates an employee from the payroll . . . the employer shall pay *all wages due* . . . ."); 41-10-80(C) ("In case of any failure to pay *wages due* to an employee . . . ."). The word "due" means "owed or owing as a debt" and, as wages are defined by the Act as amounts paid for labor rendered, no wages can be due for future services. See Webster's Third New Int'l Dictionary 699 (2002). Based on the plain language of the statutes in the Payment of Wages Act, the Act does not apply to prospective wages. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

A majority of other jurisdictions addressing this issue have interpreted similar statutes as applying only to services rendered in the past.[4] North Carolina courts have found that future unearned wages are not "wages" for purposes of its Wage and Hour Act, which contains a definition of "wage"

[4] See, e.g., Martin v. Pomeroy Computer Res., Inc., 87 F.Supp.2d 496 (W.D.N.C. 1999); Lee v. Great Empire Broad, Inc., 794 P.2d 1032 (Colo. Ct. App. 1989); City of Clinton v. Goldner, 885 N.E.2d 67 (In. Ct. App. 2008); Battaglia v. Clinical Perfusionists, Inc., 658 A.2d 680 (Md. Ct. Spec. App. 1995).

similar to the definition of "wages" found in the South Carolina Act. See, e.g., Narron v. Hardee's Food Sys., 75 N.C. App. 579, 583, 331 S.E.2d 205, 208 (N.C. Ct. App. 1985), *overruled on other grounds* ("the Wage and Hour Act requires an employer . . . to pay those wages and benefits due when the employee has actually performed the work required to earn them.").

In support of his argument that the Payment of Wages Act applies to future wages, Mathis cites to a case from the Louisiana Court of Appeals, Saacks v. Mohawk Carpet Corp., 855 So.2d 359 (La. Ct. App. 2003). In Saacks, the Louisiana court found that amounts owed under a fixed-term contract constituted "wages" under a Louisiana statutory scheme similar to the Payment of Wages Act. We do not find Saacks persuasive as the case contains little discussion of the past wages versus future wages issue and espouses a view which it appears has not been adopted by any other jurisdiction. We find persuasive the argument advanced by the amici, that while "prospective" or "post-termination" earnings may be awarded as damages for breach of contract, they do not constitute "wages."

We find the trial court erred in finding the Payment of Wages Act applied to future wages. Accordingly, the treble damages award should be reduced from $127,199.94 to $46,073.25.[5]

IV. Did the trial court's order comply with Rule 52, SCRCP?

Appellant argues that the trial court's order lacks findings of fact and does not address Appellant's defenses specifically and is therefore not in compliance with Rule 52, SCRCP. We disagree.

Rule 52, SCRCP provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find facts specially and state separately its conclusions of law thereon . . . ." Rule 52, SCRCP. This Court has held that

[5] Mathis agreed that the difference between what he was paid by Appellant and what he should have been paid under his guaranteed salary is $15,357.75. This amount trebled is $46,073.25. Mathis is also entitled to receive an additional $27,042.23 as post-termination breach of contract wages.

this rule "is directorial in nature so 'where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002), citing Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991). The requirement for appropriately detailed findings "is designed . . . 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, citing Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (N.C. 1980). A lower court is not required to set out findings on all the myriad factual questions arising in a particular case, but the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below. Id.

We find the trial court's four-page order complies with Rule 52(a). The order expressly addressed the existence of a valid employment contract, the terms of the contract, breach of the contract, mitigation, Mathis's damages, and the applicability of the Payment of Wages Act. The trial court also specifically found no bona fide dispute as to the wages owed and that Mathis did not waive his claims. The order is sufficient to allow this Court to perform its role of appellate review.

V. Did the trial court err in denying the motion to change venue?

Appellant argues that the trial court erred in denying its motion to change venue from Spartanburg to Greenville County. We disagree.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent a manifest abuse of discretion. See McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 335, 479 S.E.2d 67, 71 (Ct. App. 1996). South Carolina's venue statute provides that "[a] civil action tried pursuant to this section against a domestic corporation . . . must be brought and tried in the county in which the: (1) corporation . . . has its principal place of business at the time the cause of action arose; or (2)

most substantial part of the alleged act or omission giving rise to the cause of action occurred." Appellant is a domestic corporation with offices in Charleston, Greenville, and Spartanburg counties. Appellant does not have a principal place of business in South Carolina[6], but its largest office is in Greenville.

Appellant contends that the most substantial part of the alleged act or omission giving rise to the cause of action occurred in Greenville County, where Mathis maintained his office, and therefore Greenville is the appropriate venue. Mathis counters that venue in Spartanburg is appropriate because Appellant maintains an office in Spartanburg and actively recruited Mathis, a Spartanburg resident, for employment.

In denying Appellant's motion to transfer venue, the trial court noted that "the central issue to the case is going to be the contract or the existence of the contract. . . . Furthermore, from the attachments to the Complaint, it appears that Spartanburg is the primary county for purposes of the contract and, thus, venue can be considered proper . . . ." We do not believe Appellant has shown the trial judge committed a manifest abuse of discretion in denying its motion to transfer venue.[7]

CONCLUSION

For the reasons stated above, we affirm that portion of the trial court's order finding that Appellant breached its contract with Mathis but reverse that

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[6] Appellant argues in its Reply Brief that its principal place of business is in Greenville County. Appellant did not make this argument in its Motion to Change Venue and Clay Collins's affidavit, which it submitted to the trial court, provides that Appellant does not have a principal place of business in the State. Consequently, Appellant may not argue that its principal place of business is in Greenville. See I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724.

[7] Additionally, we note Appellant does not allege that it was harmed by the trial court's refusal to change venue, especially given the fact that the case was tried without a jury, at its specific insistence.

portion awarding damages for prospective wages under the Payment of Wages Act. We therefore remand the matter to the circuit court for calculation of damages consistent with this opinion, which should not include damages for prospective wages under the Payment of Wages Act.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Angle Joe Perrie Vasquez,
a/k/a/ Angle Joe Perrie
Vazquez, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Horry County
John M. Milling, Circuit Court Judge

Opinion No. 26852
Heard March 17, 2010 – August 9, 2010

REVERSED AND REMANDED

Senior Appellate Defender Joseph L. Savitz, III, and Appellate Defender Elizabeth A. Franklin-Best, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, for Respondent.

JUSTICE BEATTY: In this post-conviction relief (PCR) case, Angle Joe Perrie Vazquez (Petitioner) petitioned this Court for a writ of certiorari to review the PCR judge's denial of his request for relief from his convictions and capital sentence. We granted the writ of certiorari to review whether trial counsel was ineffective in failing to object to comments made by the solicitor in which he: (1) referred to Petitioner, a Muslim, as a "domestic terrorist" and drew a correlation between Petitioner's indicted conduct and the events of September 11, 2001; and (2) urged jurors to imagine the fear and terror of one of the murder victims. We reverse and remand for a new sentencing hearing.

I. FACTUAL/PROCEDURAL HISTORY

A.

The charges for which Petitioner was indicted arose out of the following facts established during the guilt phase of his trial. On March 26, 2002, Joey Williams, the manager of a Burger King in Myrtle Beach, fired Petitioner for using profanity in front of a patron toward fellow employee Reginald Atkins. Petitioner left the restaurant after being fired. Employee Robbie Robertson was called in to complete Petitioner's shift. In addition, Kuma Walker was on duty at the restaurant.

Atkins and Robertson testified that Petitioner and his cousin, Michael Keith Howard, returned to the restaurant as they were preparing to close for the evening. Petitioner then pulled out a gun and ordered them to get into the restaurant's freezer. Petitioner locked the two in the freezer. After about five minutes, Atkins and Robertson forced their way out of the freezer and fled through the back door.

Concerned about Williams and Walker, Atkins returned to the Burger King and discovered that they had been shot and killed. When investigating the scene, the police discovered that $737 had been stolen from the restaurant. The police also found nine-millimeter shell

casings and live nine-millimeter ammunition. Ballistic analysis revealed that the bullets that killed Williams and Walker were fired from a nine-millimeter pistol that was linked to Petitioner.

At the conclusion of the trial, the jury convicted Petitioner of two counts of murder, four counts of kidnapping, one count of armed robbery, and one count of criminal conspiracy.

B.

In the penalty phase, the State sought to establish the following statutory aggravating factors before the jury: (1) the murder was committed while in the commission of a kidnapping; (2) the murder was committed while in the commission of a robbery while armed with a deadly weapon; and (3) two or more persons were murdered by the Petitioner by one act or pursuant to one scheme or course of conduct.[1]

After outlining Petitioner's prior record, the State presented the testimony of SLED Agent Stephen Derrick, an expert witness who reviewed the crime scene reconstruction material, crime scene photographs, and autopsy photographs. Based on this information, Agent Derrick opined that Kuma Walker was shot first and then Joey Williams. He further testified that the shots were not random given both victims were shot in the head.

In response, Petitioner's trial counsel offered evidence as to the following mitigating circumstances: (1) Petitioner had no significant history of prior criminal convictions involving the use of violence against another person; and (2) Petitioner was an accomplice in the murder committed by another person and his participation was relatively minor.[2]

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[1] S.C. Code Ann. § 16-3-20(C)(a)(1)(b), (a)(1)(d), (a)(9) (2003 & Supp. 2009).

[2] S.C. Code Ann. § 16-3-20(C)(b)(1), (4) (2003 & Supp. 2009).

In addition to presenting evidence of Petitioner's background, trial counsel called Rasheed Kaleem Solom Mohammed to provide testimony regarding Petitioner's Muslim faith. Rasheed, an imam[3] for all Muslims incarcerated in South Carolina, testified he met Petitioner, a Sunni Muslim, and ultimately "appointed him as imam" at the J. Reuben Long Correctional Facility where he teaches other Muslim inmates. In discussing his and Petitioner's faith, Rasheed stated, "Ever since September the 11th we as Muslims have had it very, very, extremely hard."

During their closing arguments, the solicitor and trial counsel elaborated on this witness's testimony. The solicitor, who characterized Petitioner as a "domestic terrorist" during his opening guilt phase statements, drew a correlation between the events of September 11th and those for which Petitioner was charged. In response, trial counsel referenced the solicitor's use of the term "domestic terrorism" and attempted to counter the implications of this term.

Following the solicitor's and his trial counsel's closing arguments, Petitioner made a statement to the jury in which he reiterated the evidence of his troubled background. He then specifically denied his guilt and explained to the jury his Muslim faith and attempted to discount the State's references to him as a terrorist and events of September 11th.

Ultimately, the jury found three aggravating factors and recommended the death penalty. The trial judge denied all of Petitioner's post-trial motions and ordered that Petitioner be put to death as a result of the conviction. Petitioner appealed his convictions and sentences to this Court.

This Court vacated the two life sentences for kidnapping with regard to the murder victims, but affirmed Petitioner's convictions and remaining sentences. State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359

[3] Rasheed explained that an imam is "a teacher of Islam" who instructs other Muslims to read, speak, and write Arabic.

(2005), abrogated in part by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006) (recognizing error preservation requirements after State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) for challenging mitigation jury charges during a capital sentencing proceeding).

C.

Subsequently, Petitioner filed a PCR application in which he raised thirty-six allegations of counsel's ineffectiveness. In an amended application, Petitioner's PCR counsel requested Petitioner be granted a new sentencing hearing on the grounds trial counsel was ineffective in two respects: (1) failing to object to the solicitor's improper "Golden Rule" argument wherein he appealed to the jury's bias by asking them to imagine themselves in the place of the victims; and (2) failing to object when the solicitor referred to the tragic events of September 11th during his closing in the penalty phase at trial, implying that Petitioner deserved the death penalty because he was a fanatic terrorist and a practicing Muslim who inspired fear across the country.

At the hearing, one of Petitioner's trial attorneys admitted he should have objected to the solicitor's "domestic terrorist" comment during his opening statement of the guilt phase. He believed his failure to object was "double prejudice" because Petitioner's September trial occurred during the second anniversary of September 11th and Petitioner was a Muslim. He further explained, "[A]t [this] time . . . the whole country was sort of upset with Muslims;" "they didn't have good Muslims and bad Muslims," most people thought "all Muslims were bad" based on the events of September 11th. He testified the jurors knew Petitioner was a Muslim because he wore a traditional Muslim prayer cap throughout the trial. Although he could not definitively testify that the solicitor's comments affected the jurors, he felt "the atmosphere at the time was charged with . . . Muslim hatred."

Petitioner's other trial attorney conceded that he should have objected to the solicitor's reference to the events of September 11th during closing argument in the sentencing phase. He believed in retrospect that the argument could be perceived as inappropriate given

the solicitor initially called Petitioner a "domestic terrorist" and the jury clearly knew Petitioner was a Muslim based on his attire and his choice of mitigation witnesses.

PCR counsel also called Dr. Nick DePhillips, an expert in clinical and neuropsychology, who testified regarding his research on psychological issues after September 11th. According to Dr. DePhillips, a study revealed that when the term "terrorist" is used in a conversation about Muslims, the people interviewed "have more negative views of Muslims." Dr. DePhillips opined the solicitor's use of the word "domestic terrorist" would have inferred to the jury that "this is a person who . . . had a plan to . . . hurt society in the same way as the people who . . . planned and took out the 9/11 attacks." He believed that once the solicitor used the term "terrorist," the negative connotations associated with that term could not be removed.

To explain the comments in the context of the trial, PCR counsel called the solicitor who prosecuted Petitioner. He testified he intentionally used the term "domestic terrorist," referenced the events of September 11th, and asked the jury to imagine the final moments of Williams' life. In terms of the "domestic terrorist" comment and the September 11th reference, he admitted that he knew Petitioner was Muslim, but nevertheless, believed these comments were a "fair characterization" of Petitioner's actions during the crimes. He believed the jury could have interpreted the term "terrorist" in the general sense that Petitioner "struck fear in the hearts of innocent people." He further explained that the September 11th reference "made a very valid point" and was "sort of the introductory story for the victim impact testimony." He acknowledged that his request for the jury to imagine the final moments of Williams' life could be construed as "objectionable." He, however, testified his purpose in making this argument was to give the jury "some sense of the fear and the terror that . . . Joey Williams inevitably experienced."

Following the hearing, the PCR judge issued an order in which he dismissed Petitioner's application in its entirety. Although the PCR judge rejected each of Petitioner's allegations of ineffective assistance

of counsel, he specifically found trial counsel was deficient in failing to object to: (1) the solicitor's improper "Golden Rule" argument where he appealed to the jury's bias by asking them to imagine themselves in the place of the victim; and (2) the solicitor's closing argument reference to the events of September 11th. However, the judge concluded Petitioner was not prejudiced by his counsel's deficient performance.

In terms of trial counsel's failure to object to the "Golden Rule" argument, the PCR judge concluded that "the brief reference to 'imagine the terror' and horror in the prosecution['s] closing statement did not undermine the confidence in the outcome" of the trial. Essentially applying a harmless error analysis, the judge reasoned that Petitioner had killed two known friends and co-workers "in execution style." The judge also stated that Petitioner had a history of refusing to obey correctional officers and a history of criminal domestic violence.

With respect to trial counsel's failure to object to the solicitor's use of the term "domestic terrorist" and reference to the events of September 11th, the judge determined that the deficient performance was not prejudicial given it "did not undermine confidence in the outcome" of the penalty phase. The judge reasoned that "the comments were not a call to arouse the passion and prejudice of the jury nor equate [Petitioner] as a member of the 9-11 terrorist[s]." The judge further found the solicitor's comments were not "anti-Muslim." Instead, he concluded the comments were an "acceptable argument" which was "figurative speech concerning victim impact evidence generally."

This Court granted Petitioner's request for a writ of certiorari to review the decision of the PCR judge.

II. DISCUSSION

A.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

B.

Petitioner contends trial counsel's failure to object to the solicitor's opening statement during the guilt phase, in which he described Petitioner as a "domestic terrorist," and his closing argument at sentencing, in which he drew a correlation between the events of September 11, 2001, and the acts for which Petitioner was standing trial constituted deficient performance. Given the solicitor's "egregiously prejudicial" comments during the capital trial, Petitioner asserts the PCR judge erred in not finding Petitioner was denied effective

assistance of counsel. Based on this assertion, Petitioner requests this Court reverse his convictions and sentence of death.

In the first sentence of his opening statement to the jury during the guilt phase of the trial, the solicitor stated, "Ladies and gentlemen, this is a case about a domestic terrorist." Prior to informing the jury about Petitioner's charges, the solicitor again stated, "This case is about a domestic terrorist."

In his closing argument to the jury during the penalty phase, the solicitor made the following reference to the events of September 11th:

> I was - - I guess this was several weeks ago . . . . It was in September. It was right before the 11th. I was watching a news show and former New York mayor, Rudy Giuliani, was being interviewed and they were talking to him about - - 9/11 was coming up, the second anniversary of 9/11 was coming up - - and they're talking to him about his experiences and . . . he was talking to this reporter about the things that happened that day and that he was actually very close to ground zero after the first plane hit and then he got out of there. . . . [H]e talked about so many of his friends, personal friends and acquaintances and co-workers with the City of New York that were killed in the attack, and he talked about his secretary who was - - had been with him for 20 years. . . . [T]hey were, you know, very, very, very close friends, and he talked about on 9/11 how his secretary came in and he had to tell her that her husband had been killed in one of the towers, and during and just hours after the attack, and he concluded his discussion and his interview about this, he said, you know, "Now I have - - before 9/11 I had one life, but now I have two lives," . . . "I have my life before September 11th of 2001, and I have my life after September 11th, 2001.
>
> In this case, folks, the friends and family of Joey Williams and Kuma Walker have two lives. They have

> their life before March 26th, 2002. They have their life after March 26th, 2002. It's appropriate, it's proper for you to consider the impact of this crime on the family and friends of Kuma Walker and Joey Williams.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, "[s]olicitors are bound to rules of fairness in their closing arguments," as we have explained:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons, 331 S.C. at 338, 503 S.E.2d at 166. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction

a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

Although we agree with the PCR judge's conclusion that trial counsel was deficient in failing to object to the above-referenced comments, we find the PCR judge erred in finding Petitioner was not prejudiced by this deficient performance. As will be more thoroughly discussed, we hold the solicitor's comments so infected the trial with unfairness as to make the resulting death sentence a denial of due process.

As a threshold matter, Petitioner's case was clearly not one that constituted "terrorism" by the legal sense of the word. Significantly, our General Assembly has promulgated a specific statutory scheme related to terrorist acts within this state. S.C. Code Ann. §§ 16-23-710 to -770 (2003 & Supp. 2009). As defined by this Act, Petitioner's indicted conduct did not come within the purview of this statute.[4]

Given the solicitor's depiction of Petitioner as a domestic terrorist was without legal support, trial counsel was deficient in failing to object on this ground. Furthermore, it is indisputable that the term

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[4] Section 16-23-710(18) of the South Carolina Code states that "terrorism" includes activities that:

> (a) involve acts dangerous to human life that are a violation of the criminal laws of this State;
> (b) appear to be intended to:
> (i) intimidate or coerce a civilian population;
> (ii) influence the policy of a government by intimidation or coercion; or
> (iii) affect the conduct of a government by mass destruction, assassination, or kidnapping; and
> (c) occur primarily within the territorial jurisdiction of this State.

S.C. Code Ann. § 16-23-710(18) (Supp. 2009).

"terrorist," even in the general sense, can only conjure negative connotations. Thus, the solicitor's use of the term was clearly improper because there was no evidentiary basis to support this characterization. See Thomas M. Fleming, Annotation, Negative Characterization or Description of Defendant, by Prosecutor During Summation of Criminal Trial, as Ground for Reversal, New Trial, or Mistrial -- Modern Cases, 88 A.L.R.4th 8, § 28 (1991 & Supp. 2009) (discussing differing results of cases where prosecutor characterized the defendant in closing argument as a "terror" or "terrorist"); cf. Hernandez v. State, 114 S.W.3d 58, 64 (Tex. Ct. App. 2003) (finding solicitor's penalty phase argument that equated defendant to a terrorist did not violate defendant rights because the term "terrorism" is generally defined as "the act of terrorizing; use of force or threats to demoralize, intimidate, and subjugate" and the evidence established defendant committed the crime to advance in the hierarchy of a gang; therefore, the prosecutor's statements were merely a summation of the evidence in the case).

Although this Court on several occasions has found no reversible error in a solicitor's singular inflammatory characterization of a defendant,[5] we find the solicitor's comments in the instant case clearly exceeded the bounds this Court has established with respect to this type of comment. Here, the inflammatory term characterizing Petitioner, a Sunni Muslim, as a "domestic terrorist" was intentionally used in conjunction with the solicitor's extensive reference to the events of September 11, 2001. We find the solicitor's statements improperly

[5] See, e.g., State v. Bennett, 369 S.C. 219, 231-32, 632 S.E.2d 281, 288-89 (2006) (recognizing, in capital case, that the terms "blond lady" and "King Kong," could have racial connotations, but finding solicitor's use of these terms "descriptive of Appellant's size and strength as they related to his past crimes" and were not made to inflame the passions or prejudices of the jury; concluding term "Caveman" was not inflammatory given it was "merely descriptive of two of Appellant's past violent incidents"); Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (holding that prosecutor's likening of defendant as "cockroach" during closing argument did not so infect trial as to deny defendant due process); State v. Lee, 269 S.C. 421, 237 S.E.2d 768 (1977) (concluding prosecutor's reference to defendant as a "menace to society" could not be considered prejudicial since that concept forms the very basis for crimes involving moral turpitude).

evoked religious prejudice and, thus, served only to inflame the passions and prejudice of the jury. Cf. Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) (holding "vicious, inflammatory" closing argument that evoked racial prejudice was a flagrant case warranting a new trial).

Having determined the solicitor's comments were improper, the question becomes whether trial counsel's failure to object to these comments prejudiced Petitioner and, in turn, denied him effective assistance of counsel.

As recognized by the PCR judge, this is a novel issue in this state and has only been addressed to a limited extent in other jurisdictions. A number of appellate decisions, which were cited by the PCR judge, have held references to the events of September 11th did not constitute reversible error; however, these cases do not establish a definitive rule on this issue. Instead, these decisions merely provide guidance given the significant factual distinctions from Petitioner's capital case.

Unlike Petitioner, none of the defendants in the cited cases was Muslim. Here, Petitioner's Muslim faith was a key theme throughout the trial proceedings which coincided with the second anniversary of September 11th.

Even before the inception of the trial, the jurors were apprised that Petitioner was a Muslim. Apparently concerned with the jurors' perception of Petitioner, trial counsel questioned potential jurors during *voir dire* as to whether Petitioner's Muslim faith would affect their decision. At the beginning of the penalty phase, counsel explained to the jury about Petitioner's Muslim beliefs and the fact that Petitioner wore a "traditional Muslim headdress" during the trial. During his penalty phase closing argument, trial counsel also referenced the solicitor's use of the term "domestic terrorism" and attempted to counter the implications of such a term.

Petitioner also affirmatively reinforced his Muslim faith to the jury: by wearing a traditional Muslim prayer cap during trial; calling

his "brother" Rasheed as a mitigation witness; and giving a statement to the jury in which he explained his Muslim faith and attempted to counter what he perceived to be the State's attempt to disparage his Muslim faith. Notably, even one of the State's witnesses during the penalty phase made reference to Petitioner as a Muslim.

Thus, in the context of the entire record, the solicitor's characterization of Petitioner, a Muslim, as a "domestic terrorist" and the direct correlation between Petitioner's indicted conduct and the events of September 11th can only be deemed prejudicial as confirmed by the expert witness called by Petitioner during the PCR hearing. See State v. Millsaps, 610 S.E.2d 437 (N.C. Ct. App. 2005) (holding defendant was entitled to a new trial where the prosecutor in closing compared defendant's acts to those of the September 11th terrorists); cf. United States v. Hakim, 344 F.3d 324, 333 (3rd Cir. 2003) (finding government's mention of defendant's Muslim religion "disturbing," but concluding no plain error given government offered a permissible explanation for why it made these references to defendant's faith and "never directly drew the link between [defendant's] faith and the events of 9/11").

Additional support for this conclusion may be found in the analogous case of State v. Jones, 558 S.E.2d 97 (N.C. 2002). In Jones, the defendant was convicted of first-degree murder and sentenced to death. On direct appeal, the North Carolina Supreme Court affirmed the defendant's conviction, but reversed his sentence of death and remanded for a new sentencing proceeding based on the prosecutor's improper closing argument. Over the defendant's objection, the prosecutor referenced the Columbine school shootings and the bombing of the Oklahoma City federal building. Specifically, he stated:

> The United States of America, a great country, indeed [known] around the world for its freedoms: freedom of speech, freedom of privacy in your own home. But with those freedoms comes individual responsibility that every citizen of this country must realize; that to have these

> freedoms, one is responsible for their [sic] own conduct; one is responsible for their [sic] own behavior.
>
> A year ago the Columbine shootings; five years ago Oklahoma City bombings. When this nation faces such tragedy - [the defendant's objection overruled] - the laws of this country come in to bring order to that tragedy, to speak to that tragedy. Here we are addressing a tragedy of a man's life. The tragedy not of this defendant, the tragedy of the [the victim] . . .

Id. at 107. In interpreting these remarks, the North Carolina Supreme Court stated that such remarks could not be "construed as anything but a thinly veiled attempt to appeal to the jury's emotions by comparing defendant's crime with two of the most heinous violent criminal acts of the recent past." Id. The court found the argument was improper for at least three reasons: "(1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." Id. Finally, the court determined that the defendant was prejudiced by these remarks given "[t]he impact of the statements in question, which conjure up images of disaster and tragedy of epic proportion, is too grave to be easily removed from the jury's consciousness, even if the trial court had attempted to do so with instructions." Id.

Similar to the comments in Jones, the solicitor's remarks in the instant case were clearly improper and indisputably prejudicial to Petitioner's case. Because there was no legal or evidentiary support for the solicitor's use of the term "domestic terrorist," the comments invoked circumstances outside of the record. Furthermore, by verbally drawing a direct correlation between Petitioner's acts and the events of September 11th, the solicitor appealed to the jurors' sense of passion and prejudice involving anti-Muslim sentiment. Additionally, given that trial counsel did not object, there was no opportunity for the trial judge to even attempt to cure the error.

Based on the foregoing, we find there is a reasonable probability that trial counsel's failure to object to the solicitor's comments affected the jury's deliberation of Petitioner's sentence of death. See Von Dohlen v. State, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004) ("It is difficult to determine the precise impact of the solicitor's argument on the jury's deliberation of the sentence, but the potential impact must be carefully and thoroughly evaluated in a capital case."); State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all."); State v. White, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) (noting that "[i]n view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict").

Because the solicitor's comments were primarily confined to the penalty phase and not the guilt phase of Petitioner's trial, we hold they do not warrant a reversal of his convictions. Instead, a finding of ineffective assistance of counsel only entitles Petitioner to a new sentencing hearing.

Admittedly, the facts of this case are horrific and there is overwhelming evidence of Petitioner's guilt. Moreover, we are cognizant of this Court's decisions finding that counsel's deficient performance in a death penalty case did not warrant reversal where the error did not contribute to the verdict.[6] However, the sheer weight of the evidence in the instant case does not negate the prejudicial impact of the solicitor's improper comments.

[6] Cf. Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice).

As previously described, the solicitor intentionally and unnecessarily injected religious prejudice into Petitioner's trial. Because we are bound to uphold the integrity of this state's court proceedings, we cannot condone the deliberate use of religious prejudice during a trial. Accordingly, we must necessarily conclude that trial counsel's failure to object to the solicitor's remarks was prejudicial to Petitioner. See Simmons, 331 S.C. at 340, 503 S.E.2d at 167 (stating that "because the issue is whether the solicitor's improper argument prevented the jury from fairly considering the guilty with a recommendation of mercy verdict, the overwhelming evidence of petitioner's guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument").[7]

III.

In conclusion, we hold Petitioner's trial counsel was deficient in failing to object to the solicitor's challenged remarks. Because the solicitor's characterization of Petitioner, a Muslim, as a "domestic terrorist" and correlation between Petitioner's acts and the events of September 11th was so egregious, Petitioner has proven he was prejudiced by counsel's deficient performance. Thus, the PCR judge erred in failing to find Petitioner was denied effective assistance of counsel. Given the solicitor's improper remarks occurred primarily during the penalty phase of Petitioner's trial, we find Petitioner is only entitled to a new sentencing hearing and not a reversal of his convictions.

REVERSED AND REMANDED.

KITTREDGE, J., concurs. PLEICONES, J., concurring in result only. TOAL, C.J., dissenting in a separate opinion in which HEARN, J., concurs.

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[7] In view of our holding as to Petitioner's first issue, we need not address Petitioner's remaining issue regarding the PCR judge's determination that Petitioner was not prejudiced by trial counsel's failure to object to the solicitor's "Golden Rule" argument.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the PCR judge properly concluded Petitioner was not denied effective assistance of counsel, and I would affirm the PCR judge's denial of relief.

I. Guilt Phase

In my opinion, the majority arrived at the correct result regarding the guilt phase of the trial. While I agree Petitioner is not entitled to a new trial, I do not agree with the majority that trial counsel was deficient or Petitioner was prejudiced by trial counsel's failure to object to the solicitor's "domestic terrorist" comment. However, even assuming those prongs are satisfied, I would find the overwhelming evidence of guilt established at trial precludes relief. *See Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding PCR applicant not prejudiced by trial counsel's performance because evidence of guilt was overwhelming).

II. Sentencing Phase

As to the sentencing phase, I disagree with the majority that trial counsel was deficient or Petitioner was prejudiced by the solicitor's comments regarding September 11, 2001.

In my view, the solicitor's statement regarding September 11, 2001 simply was reference to an historical event, not an attempt to inflame the passions and prejudices of the jury. The PCR judge found the statement an acceptable introduction to the victim impact evidence. I agree with the PCR judge. During his speech, the solicitor mentioned September 11, 2001 as a tragic, life-changing historical event. The solicitor's remark, despite the majority's characterization, was not religious in nature or directed at Petitioner's Muslim faith.[8] He did not

[8] The majority indicates the solicitor's comments are so egregiously prejudicial because they "intentionally and unnecessarily injected religious prejudice into Petitioner's trial." However, as the majority details, Petitioner repeatedly raised the issue of his religious faith at various stages of the trial, making his religion a theme throughout the trial. The solicitor did not invoke Petitioner's religion at any point

call attention to any racial or religious aspect of that event, and he did not liken Petitioner to the attackers. The solicitor focused on the before-and-after effects on an individual who suffers a sudden, tragic loss of a loved one. Therefore, in my opinion, the solicitor's comments were not improper, and I would hold counsel was not deficient for failing to object.

Even assuming trial counsel were deficient for failing to object to the solicitor's closing argument, I do not believe the solicitor's comments so infected the proceedings with unfairness that Petitioner was denied due process. A solicitor's statements must be viewed in the context of the entire record. *State v. Smith*, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007). Appellant has the burden of proving he did not receive a fair trial because of the alleged inappropriate comments. *State v. Simmons*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The relevant question is whether those comments so infected the proceedings with unfairness so as to make the result a denial of due process. *Id.* Improper comments do not require reversal if they are not prejudicial. *Id.*

The majority first finds that counsel was deficient, and then discusses the egregiousness of the solicitor's comments. From there, the majority presumes prejudice from the comments regarding September 11, 2001, stating they are "so egregious" there is no possibility they did not affect the jury's sentence of death.[9] This approach creates a *per se* rule of prejudice and ignores the well-established analytical framework for PCR cases. Our PCR jurisprudence is clear that the PCR applicant must prove the allegations in his petition. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814

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during either phase of the trial. Thus, in my view, the majority's assertion that the solicitor introduced any supposed religious prejudice with his comments is unfounded.

[9] The majority appears to find that the solicitor's reference to September 11, 2001 is not *per se* prejudicial by itself, but rather the prejudice results when the comments are coupled with the fact Petitioner is Muslim.

(1985). To establish prejudice, Petitioner must show a reasonable probability the result of the proceeding would have been different but for trial counsel's deficiency. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Therefore, to demonstrate prejudice in this case, Petitioner must prove a reasonable probability exists that a jury would not have sentenced him to death if trial counsel had objected to the solicitor's comments. In my view, Petitioner has not met his burden of proving prejudice.

In *Arnold v. State/Plath v. State*, 309 S.C 157, 420 S.E.2d 834 (1992), a combined death penalty PCR appeal, this Court said that to find harmless error, a court must find that error "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." That case concerned a constitutionally improper burden-shifting jury charge. This Court evaluated all the evidence and found beyond a reasonable doubt that the improper jury charge could not have affected the verdict; thus the improper charge was harmless error.

Similarly, in the instant case, I would find any alleged error is unimportant in relation to everything else the jury considered. First, overwhelming evidence of Petitioner's guilt was established during the guilt phase of the trial. Second, three statutory aggravating factors were established during the sentencing phase: (1) the murder was committed while in the commission of a kidnapping; (2) the murder was committed while in the commission of a robbery while armed with a deadly weapon; and (3) two or more persons were murdered by Petitioner by one act or pursuant to one scheme or course of conduct. Third, there are no relevant statutory mitigating factors.[10] Thus,

[10] Petitioner did present evidence of two mitigating factors: (1) no significant prior criminal history involving violence; and (2) Petitioner was an accomplice whose participation was relatively minor. However, the facts of the crime do not support these mitigating factors. After having been fired for using obscenities at a customer, Petitioner recruited his cousin, armed himself, and returned that evening to the restaurant. At gun-point, Petitioner kidnapped and imprisoned two

following this Court's earlier decision in *Arnold v. State/Plath v. State*, I would find the weight of evidence against Petitioner and the utter lack of mitigating circumstances demonstrate there is no reasonable probability the solicitor's comments influenced the jury's sentence of death.

Therefore, in my opinion, in light of the overwhelming evidence of guilt established at trial and the statutory aggravating factors, there is no reasonable probability that the jury would not have recommended the death penalty but for the solicitor's comments, and I would affirm the PCR judge's denial of relief.

III. Golden Rule Argument

The majority does not address Petitioner's Golden Rule argument because it reverses the PCR court's denial of relief on other grounds. Because I would affirm the PCR court on those grounds, I address Petitioner's remaining argument.

Petitioner argues the solicitor made an improper Golden Rule argument in his closing of the sentencing phase by asking the jurors if they could imagine the terror and horror the victims experienced in their final moments of life. I disagree, and would find the solicitor's statements were appropriate references to victim impact statements. The references did not encourage the jury to depart from neutrality and decide the case on personal interest or bias rather than the evidence presented. *See State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006) (finding improper Golden Rule argument when solicitor asked the jury to speak for the victim through its verdict); *Von Dohlen v. State*, 360

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employees in the restaurant's cooler. Those employees escaped. Petitioner then brought the store manager and another employee into the cooler, where he repeatedly shot each victim "execution style" in the back of the head. He then left with over one thousand dollars from the cash register and went directly to a nearby strip club. I would find the sheer cold brutality of this crime outweighs Petitioner's lack of prior criminal violence. Further, the second mitigating factor simply cannot be proven in light of the guilty verdict.

S.C. 598, 602 S.E.2d 738 (2004) (finding solicitor's comments asking jurors to put themselves in victim's shoes was an improper Golden Rule argument). Furthermore, even if the solicitor did make an improper Golden Rule argument, I would find the error harmless in light of the enormity of the evidence against Petitioner, the presence of three statutory aggravating factors, and the absence of any factors in mitigation.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Amos Lamont Mattison, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 26853
Heard June 8, 2010 – Filed August 9, 2010

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, Robert Mills Ariail, of Greenville, for Respondent.

JUSTICE BEATTY: The Court granted Amos Lamont Mattison's petition for a writ of certiorari to review the decision of the

Court of Appeals in State v. Mattison, 380 S.C. 326, 669 S.E.2d 635 (Ct. App. 2008), affirming Mattison's convictions for murder, assault and battery with intent to kill (ABWIK), and possession of a weapon during the commission of a violent crime. In so ruling, the Court of Appeals found the trial judge did not err in refusing Mattison's request to charge that "prior knowledge of the commission of a crime is insufficient to establish guilt" and that "mere association with a person who commits a crime is insufficient to establish guilt." We affirm as modified.

I. Factual/Procedural History

On the morning of August 21, 2003, Jose Garcia was injured in a shooting that left his brother, Roberto Garcia, and their cousin, Jorge Lemus-Patricio, dead. In its opening statement, the State advanced the theory that Mattison and Britney Ervin schemed to lure all three men to a remote location to murder them and steal Jose's 1964 black Chevy Impala.[1]

Jose, the State's primary witness, testified that his cousin Jorge woke him up on the morning of August 21, 2003, and told him that someone wanted to buy Jose's Chevy Impala. Shortly thereafter, a "black skinny man," whom Jose later identified as Ervin, came to his home to discuss the purchase price of the car. After this discussion, Ervin left and returned approximately five to ten minutes later requesting to test drive the car. Jose and Ervin then left the house in the car. As they approached a street corner, Jose saw Mattison wave at them, but they did not pick him up. Jose and Ervin continued driving and then returned to Jose's home at which time Ervin left. Approximately five minutes later, Ervin returned to Jose's house and

[1] As a result of this incident, a Greenville County grand jury indicted Mattison for: (1) ABWIK with respect to Jose Garcia; (2) murder and possession of a weapon during the commission of a violent crime as to Jorge Lemus-Patricio; (3) murder and possession of a weapon during the commission of a violent crime with regard to Roberto Garcia; and (4) grand larceny as to Roberto and Jorge's vehicle. Mattison was charged based on his "aiding, abetting, and/or assisting" of Ervin. Ervin pleaded guilty to the charges prior to Mattison's trial.

told him that he wanted to purchase the car but had to go to his grandfather's house to get the money.

Jose then drove Ervin to the home of Ervin's grandfather. Roberto and Jorge followed in their Honda Passport vehicle in order to bring Jose home after he sold the car. As Jose and Ervin were driving, they saw Mattison at the same street corner as before. This time, they stopped the car and picked up Mattison as a passenger. Although Jose could not completely understand their conversation due to a language barrier, he testified that Ervin and Mattison talked during the ride and appeared to know each other.

Upon arrival at the destination, Mattison and Ervin exited the car and walked around the house. After about ten minutes, Mattison returned to the car and began talking with Jose. Mattison told Jose that he did not want to go back around the house because Ervin's grandfather did not like him.

After waiting for approximately fifteen minutes, Jose was about to leave, but Ervin returned to the front of the house and told Jose that he was getting the money from his grandfather. Ervin also said that he needed help with a tire. Roberto complied with this request and went around the house with Ervin to assist him. Jorge exited the Honda Passport and asked Jose what was happening when they heard a gunshot. Mattison told Jose that Ervin's grandfather "was crazy and he was shooting."

Jose, Jorge, and Mattison then went around the house where Jose observed Ervin with a gun in his hand, coming toward the three men. When Jorge saw Ervin with the gun, he tried to run. As Ervin chased Jorge, Mattison told Jose not to worry because he also had a gun and that he would help them. Mattison then pulled out a handgun, which Jose described as "not like" the one that Ervin brandished. Ervin caught Jorge and the four men then continued walking toward the back of the house with Jose and Jorge in front followed by Ervin and then Mattison.

As they reached the corner of the house, Jose heard Roberto moaning and then saw him face down on the ground. Jose then pled with Mattison and Ervin to just take the cars and let him get his brother to a hospital. As Ervin raised the gun to shoot Jose, Jorge jumped on top of Ervin and Jose joined in the struggle. Jose looked up and saw Mattison standing in the same corner as before with the gun in his hands.

During the struggle over the gun with Ervin, the gun fired but did not hit Jose. As Ervin was trying to shoot Jose, he told Mattison more than once to shoot Jose. Jose then heard a gunshot from Mattison's direction, felt his shirt fly up, and then turned to see Mattison running away. Jose noticed Jorge "getting weaker in fighting" and saw him fall to the ground. Jose eventually obtained control of the gun. Ervin then fled the scene.

As Jose went to seek help, he discovered both the Chevy Impala and Honda Passport were gone. Ultimately, Jose found a neighbor who called 911 to report the incident.

Jose suffered a bullet graze injury to his shoulder during the struggle. Roberto and Jorge were transported to the hospital where both were eventually pronounced dead. According to the autopsies, Roberto died from a gunshot wound to the abdomen and another to the pelvis. Jorge died from a gunshot wound to the head. Ballistic evidence revealed that the two bullets recovered from Roberto were fired from the nine millimeter Luger gun that Jose had taken from Ervin during the struggle. The bullet recovered from Jorge was a thirty-two caliber, fired from a gun that authorities never recovered.

Later in the day, Jose gave a statement to investigating officers wherein he described his assailants as "the skinny guy and the fat guy." He identified Ervin as "the skinny guy" from a photographic lineup after Ervin was arrested while driving Jose's Chevy Impala. Jose made an in-court identification of Mattison as the other man who rode in the back of his car that day and ultimately shot in his direction.

Following his arrest, Ervin gave two statements to the investigating officers. In his first statement, Ervin claimed Mattison asked him to set up "some Mexicans" so that Mattison could rob them of their drugs. In describing the incident at his grandfather's shop, Ervin claimed that Mattison used a nine millimeter gun to shoot "the Mexicans."

Ervin asserted he gave a second statement in order to correct his first statement "regarding how the shooting went down." In contrast to his first statement, Ervin admitted to shooting one of the victims in the chest and the neck. However, he claimed his gun discharged when the other men struggled with him over the weapon. Ervin further stated that when his gun discharged, Mattison fired his weapon.

At trial, Ervin denied telling the investigating officers much of what was in his two prior statements. He also gave a different version of the events in that he claimed Mattison brought "some Mexicans" to his home that day to see if Ervin wanted to buy a Chevy Impala. Ervin testified that when they arrived at his grandfather's property, Mattison shot one of the Mexicans. After hearing these gunshots, Ervin claimed to have driven away in the Chevy Impala.

Although Mattison did not testify at trial, a statement made by Mattison was read into the record. In his statement, Mattison claimed Ervin brought a Mexican to his house who tried to buy Mattison's car in exchange for drugs. According to Mattison, he rode with Ervin and the Mexican in a black car while a "short black guy named Chuck or Bud" followed in a gray car with two other Mexicans. Mattison stated that Ervin and the Mexican then exited the car and went around the house while the Mexicans from the gray car remained with Mattison. Mattison claimed that "Chuck" remained in the gray car. Mattison then heard a "pop, pop," and said "let's go," but one of the Mexicans refused because of his brother. They then ran to the back of the house. When Mattison heard "pop, pop" again, he took off running in the other direction. As he ran up the driveway, Mattison claimed to have seen Ervin drive off in the "black car."

Prior to closing arguments, Mattison's counsel submitted eight requests to charge involving "mere knowledge," "mere association," and "mere presence." In response, the trial judge stated he would cover the requests, but "not exactly" as counsel requested. Counsel then asked whether the trial judge would instruct the jury that "prior knowledge is not sufficient, mere association." Mattison's counsel took exception to the trial judge's refusal to charge this request.

During his jury instructions, the trial judge charged in part:

> Ladies and Gentlemen, a principal in a crime is one who either in person perpetrates the crime or who being present aides and abets and assists the commission of that crime. I charge you, Ladies and Gentlemen, that mere presence at the scene of a crime is not sufficient to convict.
>
> However, when one does an act in the presence of or with the assistance of another, the act is done by both. Where two or more acted with a common design or intent is present at the commission of a crime, it does not matter by one who the crime is committed, for all are guilty.
>
> Intent, however, Ladies and Gentlemen, is a necessary element of the offense. There must have been a common design or attempt to commit the crime. The crime must have been committed pursuant to the person aiding and abetting by some overt act. Now, presence at the commission of a crime means to be sufficiently near so as to be able to aid and abet in its commission.
>
> Stated somewhat differently, Ladies and Gentlemen, is several, two or more persons [pursuant] to a common [design] to commit an unlawful act, set out together and each takes a part agreed upon or assigned to him to commit the act or which to watch at a proper distance at stations to prevent an appearance or surprise or to encourage the commission of [an] unlawful act or to assist, if necessary,

> escape of those immediately engaged in the commission of the unlawful act, under any or all of these circumstances, if the unlawful act is committed, the act is one, the act of one is the act of all and all would be guilty.
>
> In other words, if several persons agree or conspire to commit a crime, each of those persons are criminally responsible for the acts of his confederates of which are done in the presence of the common purpose for which they combined. The common purpose may have not included or involved killing anyone.
>
> But, if in executing the common design and purpose, a common homicide is committed by one of the confederates and you, the jury, determine from all the evidence beyond a reasonable doubt that the homicide was a probable and natural consequence of the acts which was done in pursuit to the common design, then Ladies and Gentlemen, all who are present either actually or constructively and participated in the unlawful common design would be guilty.

At the conclusion of the charge, Mattison's counsel took exception to the trial judge not charging his requests, "particularly mere association and prior knowledge."

The jury found Mattison guilty of: (1) the murder of Jorge; (2) possession of a weapon during the commission of a violent crime as to Jorge's murder; and (3) ABWIK with respect to Jose.[2] Because the jury was unable to reach a verdict regarding Roberto's murder, the trial judge declared a mistrial as to this charge.

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[2] Before the case was submitted to the jury, the trial judge granted Mattison's directed verdict motions as to the charge of possession of a weapon during the commission of a violent crime with respect to the murder of Roberto, as well as the charge of grand larceny of the Honda Passport.

Mattison appealed his convictions to the Court of Appeals based on the trial judge's failure to charge the jury that "prior knowledge that a crime is going to be committed is not sufficient to convict" and that "mere association with a person who commits a crime was insufficient to establish guilt as an accomplice or an aider or abetter."

The Court of Appeals affirmed Mattison's convictions. State v. Mattison, 380 S.C. 326, 669 S.E.2d 635 (Ct. App. 2008).

Relying in part on this Court's decision in State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998), the court found the trial judge's charge on the whole was proper. Id. at 336, 669 S.E.2d at 640. Specifically, the court noted the charge to the jury included a "detailed instruction on aiding, abetting, and assisting in the commission of a crime through some overt act." Id. at 335, 669 S.E.2d at 640. Based on this language, the court concluded the charge "clearly indicated that mere presence alone was insufficient to sustain a conviction." Id. at 335-36, 669 S.E.2d at 640. Additionally, the court stated:

> Implicit in the charge given to the jury was that mere knowledge a crime was going to occur, or mere association with one who commits a crime is insufficient to constitute guilt, but that Mattison must have, while present at the commission of the crime, aided, abetted, or assisted in the commission of the crime pursuant to a common design or purpose before a conviction could be had.

Id. at 336, 669 S.E.2d at 640.

This Court granted Mattison's petition for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A.

Mattison contends the Court of Appeals erred in affirming the trial judge's refusal to instruct the jury that "prior knowledge of the commission of a crime was insufficient to establish guilt" and that "mere association with a person who commits a crime was insufficient to establish guilt." Because the evidence in this case "made the jury's understanding of those legal principles critical," Mattison claims the judge had "a duty to craft his instructions to the facts of the case."

B.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464; State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). A jury charge that is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The substance of the law is what must be charged to the jury, not any particular verbiage." Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464.

"A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "However, if the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." Id.

To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." Id. at 263, 565 S.E.2d at 304. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

"It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002).

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999) (quoting Austin, 299 S.C. at 459, 385 S.E.2d at 832).

"In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987); see Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995)

("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime.").

"Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." Leonard, 292 S.C. at 137, 355 S.E.2d at 272; State v. Barroso, 328 S.C. 268, 272, 493 S.E.2d 854, 856 (1997) (stating that mere association with admitted members of a conspiracy is insufficient to tie other persons to the conspiracy). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977).

"Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005).

C.

Initially, we note the judge's charge is confusing and at times contradictory with respect to the explanation of "mere presence." However, the charge when read as a whole was proper in that it adequately covered the law and was consistent with at least two of this Court's decisions. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989).

In Kelsey, a case involving the murder of a teenage female by three teenage males, Kelsey argued the trial judge erred in failing to give proper conspiracy and mere presence instructions. Kelsey further asserted the judge improperly failed to instruct the jury that one's mere association with a person who commits a crime does not make a defendant an accomplice or a co-conspirator to the guilty perpetrator. Kelsey challenged the following portion of the trial judge's instruction:

> Now of course, mere presence at the scene is insufficient to prove someone guilty of a crime. The burden is upon the state to prove every element of the crime charged. If you

> find after reviewing all of the evidence that the state has proven that the defendant was only present at the scene of the crime and they have not proven beyond a reasonable doubt any other participation in the crime, then you must find a defendant not guilty.
>
> The law says that proof of mere presence at the scene of the crime is not sufficient to find someone guilty. But, of course the law also says that the hand of one is the hand of all.
>
> The law says-that if a person-if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both.

Kelsey, 331 S.C. at 76-77, 502 S.E.2d at 76.

Although the charge did not include Kelsey's requested charge of "mere association," this Court found the trial judge's instructions on mere presence and accomplice liability were not misleading and were proper as a whole. Id. at 77, 502 S.E.2d at 76-77. In support of this finding, we noted the charge clearly explained that the State had the burden of proving every element of the crime and that mere presence was not enough to sustain a conviction. Additionally, we found the trial judge extensively instructed the jury on the requisite criminal intent of each of the charged crimes. Id.

Here, similar to the instruction in Kelsey, the judge specifically instructed that "mere presence" was insufficient to sustain a conviction. The judge also charged the jury regarding the State's burden of proving each and every element of the offenses for which Mattison was indicted.

In Austin, this Court found sufficient a nearly identical "mere presence" charge as the one in the instant case. In Austin, the trial judge charged the jury in relevant part:

> [A] principal in a crime is one who either in person perpetrates the crime or who being present aids, abeits [sic] and assists in the commission of that crime. When one does an act in the presence of and with the assistance of another, the act is done by both. And where two or more, acting with a common design or a common intent, are present at the commission of a crime, it matters not by whose immediate agency that crime is committed because all would be guilty. Intent, however, ladies and gentlemen, is a necessary element, for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abeiting [sic] by some overt act.

Austin, 299 S.C. at 458-59, 385 S.E.2d at 831-32. Given "the language of the instruction made it sufficiently clear that to find guilt for a crime, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act," this Court found the trial judge did not err by refusing to give Austin's requested "mere presence" charge. Id. at 459, 385 S.E.2d at 832.

As evidenced by these decisions, we find the trial judge correctly and sufficiently charged the law on "mere presence" and "mere association." Furthermore, the judge's instructions regarding "mere presence" encompassed Mattison's request to charge "mere association." A review of Mattison's requests to charge reveals that he included "mere presence" in the same charge as "mere association" and specifically recognized that these principles were similar or essentially synonymous. Accordingly, the trial judge did not err in refusing to charge Mattison's requests with respect to "mere presence" and "mere association."

We are, however, concerned with the trial judge's failure to charge "mere knowledge" or "prior knowledge" and the Court of

Appeals' conclusion that this charge was "implicit" in the judge's instruction.

As a threshold matter, we believe this case is factually distinguishable from Kelsey and Austin on the ground Mattison submitted this charge and challenged its omission on appeal. In contrast, this was not an issue in either Kelsey or Austin. Thus, unlike the Court of Appeals, we find Kelsey is not dispositive of Mattison's entire appeal.

In view of this factual distinction, it is necessary to analyze the trial judge's refusal to charge Mattison's requested instruction regarding "mere knowledge."

Significantly, the element of "knowledge" is not mentioned in the trial judge's instruction even though Mattison's request to charge represented a correct statement of the law. See, e.g., State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) (analyzing accomplice liability charge as to the offense of reckless homicide arising out of an automobile collision and recognizing a "charge must clearly explain" that "[i]n order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct"); State v. Collins, 266 S.C. 566, 570-71, 225 S.E.2d 189-92 (1976) (concluding trial judge erred in refusing to charge that "[p]rior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime" given the evidence was susceptible to the inference that "the defendant knew the robbery was to take place but did not aid in it"); State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005) (holding "mere presence" charge was sufficient where charge included an instruction on "mere knowledge" in addition to an explanation of aiding and abetting and the requisite intent element); State v. Staten, 364 S.C. 7, 41, 610 S.E.2d 823, 840 (Ct. App. 2005) (concluding the following charge sufficiently covered the law on mere presence and knowledge: "To be liable as an accomplice, the defendants must have knowledge of the principal's criminal conduct. Now, mere presence at the scene of the crime is not sufficient to establish . . . guilt as an accomplice."), vacated in part by, 374 S.C. 9,

647 S.E.2d 207 (2007) (vacating Court of Appeals' analysis regarding Crawford v. Washington, 541 U.S. 36 (2004)).

Despite this omission, the Court of Appeals found it to be "implicit" in the judge's instruction. Although we agree with the Court of Appeals' ultimate decision that the trial judge's failure to charge this requested instruction was not fatal to the entire charge, we are disturbed by the use of the term "implicit." We believe that to require jurors to delve into and interpret a judge's "implicit" instruction is contrary to the purpose of a trial judge being an instructor of the law. If this were the case, the burden would effectively shift from the trial judge, as the instructor of the law, to the jury to discover the "hidden" meaning in a judge's charge.

Instead, we find the trial judge's explicit instruction regarding the necessary element of "intent," sufficiently covered the substance of Mattison's "mere knowledge" request and, thus, there was no error. This principle has been explained as follows:

> For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged, or advised the killing. Also, the courts have required that the **alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide**, or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions.

40 Am. Jur. 2d Homicide § 26 (2010) (emphasis added); see 40 C.J.S. Homicide § 30 (2010) ("To be guilty as an accomplice to homicide, a defendant must have acted with the state of mind required for guilt.").

Applying the above-referenced principle, we conclude the judge's "intent" instruction in conjunction with his instruction regarding each

element of the offenses[3] and his instruction that the jury find "beyond a reasonable doubt that the homicide was the probable and natural consequence of the acts which was done in pursuit to the common design" was substantially correct and adequately covered the applicable law.

Finally, in view of the jury's verdict, we believe the jurors understood this portion of the charge. More specifically, the jury convicted Mattison only of Jorge's murder and ABWIK as to Jose. According to Jose's testimony, Mattison was present during these crimes and actually aided Ervin when he asked for Mattison's assistance. Jose further testified that a shot was fired from Mattison's direction during his and Jorge's struggle with Ervin over the weapon.

The jury, however, was unable to reach a verdict as to Roberto's murder. According to Jose, Mattison was with him at the time Roberto was shot. Thus, the jury's decision would appear to discount Mattison's concern that he was convicted based on "mere knowledge" or simply "prior knowledge." Instead, the jury arguably applied the judge's instruction regarding the requisite "intent" and, as a result, convicted Mattison of the applicable charges.

III. Conclusion

In conclusion, we find the trial judge's instruction: (1) was confusing and contradictory with respect to an explanation of "mere presence;" (2) omitted an express instruction regarding "mere association;" and (3) omitted an express instruction regarding "mere knowledge." However, when the trial judge's instruction is read as a

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[3] See S.C. Code Ann. § 16-3-10 (2003) (Murder is statutorily defined as "the killing of any person with malice aforethought, either express or implied."); Kelsey, 331 S.C. at 62, 502 S.E.2d at 69 ("'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong."); Foust, 325 S.C. at 15, 479 S.E.2d at 51 (analyzing requisite intent for ABWIK and concluding that in order to establish the charge of ABWIK "it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State").

whole we find it adequately covered the law and sufficiently covered the substance of Mattison's requests to charge.

We modify the portion of the Court of Appeals' decision regarding the use of the term "implicit." In view of this modification, our decision should dispel any inference that a trial judge's general instruction is necessarily sufficient to cover a defendant's specific request to charge a correct statement of the law. Rather, we would urge trial judges to carefully consider charging a request to charge that is factually accurate and a correct statement of the law.

Based on the foregoing, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

TOAL, C.J., KITTREDGE, J., and Acting Justices James E. Moore and R. Knox McMahon, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jeffrey Scott Holcombe, Respondent.

Opinion No. 26854
Submitted July 12, 2010 – Filed August 9, 2010

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Jeffrey Scott Holcombe, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension of no more than two years from the practice of law. We accept the Agreement and suspend respondent from the practice of law in this state for two years. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter A

Respondent was working as a contract attorney with Law Firm A when the firm was hired to represent a client who had been injured on a cruise ship. The client's injury occurred less than a month before she hired the firm and her case was respondent's direct responsibility. Respondent gathered information from the client, spoke with the client, and wrote a letter of representation to the cruise line. However, respondent performed no other work on the case. Approximately five months after the representation began and one month after his single letter to the cruise line, respondent ended his relationship with Law Firm A. Respondent did not notify the client or the cruise line of his departure from the firm and did not reach a clear understanding with the firm as to whether he or the firm would retain the client's case and associated responsibilities. After leaving the firm, respondent performed no additional work in the matter and the client's claim against the cruise line became time barred.

Matter B

Respondent represented a client in a post-conviction relief matter. The circuit court issued a final order in favor of the State; however, respondent failed to notify the client of the outcome of the case as well as his right to appeal the court's decision. Respondent also failed to file a notice of appeal to protect the client's right to appeal the court's decision. Respondent failed to timely respond to Disciplinary Counsel's initial inquiry in this matter and did not provide a substantive response, despite multiple reminders and requests from Disciplinary Counsel, until after receiving a Notice of Full Investigation.

Matter C

Respondent worked at Law Firm B from May of 2006 until late February of 2009. When he began work at the firm, he was still working on files from his time with Law Firm A. Law Firm B was generally aware of these holdover cases and expected to be compensated for the time and effort respondent devoted to completing the cases. However, respondent failed to diligently work on several of the cases and failed to keep some of the clients informed of the status of their matters. He also failed to hold separately any unearned fees associated with those cases.

In addition to his continued representation of clients associated with Law Firm A, respondent also continued his representation of other clients without the knowledge or permission of Law Firm B. Respondent did not hold any unearned fees or other funds associated with those cases in a trust account, nor did he perform a conflicts check with Law Firm B with regard to any of the clients. Finally, respondent failed to diligently pursue at least two of the matters and failed to communicate adequately with at least one of the clients.

Respondent also accepted new clients while working at Law Firm B without the firm's knowledge or permission. As with his other clients who were not clients of Law Firm B, respondent failed to maintain a trust account for any unearned fees or other funds associated with the clients. Respondent also failed to diligently pursue the matters that several of the clients hired him to pursue.

Respondent also failed to diligently represent at least two of Law Firm B's clients. In one matter, respondent represented two clients in a civil lawsuit. During the representation, the clients asked respondent to help them incorporate their business. Although respondent prepared the articles of organization, he never filed the appropriate documents or forwarded the clients' checks to the South Carolina Secretary of State. In another matter, respondent represented a client in a domestic action. He failed to comply or

respond to numerous requests from the client, failed to comply with the client's request for a copy of a letter respondent wrote to opposing counsel, failed to file a motion at the client's request, and failed to keep the client informed of the status of settlement negotiations and his efforts on the client's behalf.

Respondent accepted another client on behalf of Law Firm B on a matter outside of the firm's normal area of practice. Respondent accepted a $1,000 check from the client and submitted the funds to the firm for deposit. One month later, respondent accepted another $1,000 check from the client. Unlike the first check, respondent negotiated the second check and retained the funds for his own personal use. The client sought a refund after respondent's departure from the firm. Law Firm B refunded $1,312.60 to the client, representing the unearned balance of his initial payment and the full amount of his second payment even though the firm never received his second payment.

When respondent's employment with Law Firm B ended, he left the files of several clients who were not associated with Law Firm B in his office. He did not notify his active clients of his whereabouts and other than leaving the files in a firm with other attorneys, he took no steps to protect his clients' interests.

The complaint in this matter was filed by a partner of Law Firm B. Disciplinary Counsel served respondent with a Supplemental Notice of Full Investigation. Although respondent appeared and testified during an interview pursuant to Rule 19(c)(5), RLDE, Rule 413, SCACR, and provided limited documentation in response to Disciplinary Counsel's subpoena, he never provided a written response to the Supplemental Notice. Respondent also failed to provide a written response to the Amended Supplemental Notice of Full Investigation that Disciplinary Counsel served after the interview.

LAW

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which the objectives are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter, promptly comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, in a separate account maintained in the state where the lawyer's office is situated, and the property shall be identified as such and appropriately safeguarded; complete records of such account funds and other property shall be kept by the lawyer; a lawyer shall comply with Rule 417, SCACR; a lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred); Rule 1.16 (a lawyer may withdraw from representation of a client in certain situations, but must take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred); Rule 8.1(b) (a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional

misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for two years from the date of this opinion. Respondent's reinstatement shall be conditioned upon his compliance with the conditions of reinstatement set forth in the Agreement for Discipline by Consent,[1] as well as those set forth in Rule 33, RLDE, Rule 413, SCACR. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. In addition, respondent shall, within thirty days of the date of this opinion, pay the costs incurred in the investigation of this matter by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[1] The Agreement provides that respondent will complete the South Carolina Bar Legal Ethics and Practice Program Trust Account School and Ethics School within one year of reinstatement.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Ricky Brannon, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Cherokee County
Roger L. Couch, Circuit Court Judge

Opinion No. 26855
Heard March 17, 2010 – Filed August 9, 2010

AFFIRMED IN RESULT

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Michelle Parsons Kelley, all of Columbia, and Harold W. Gowdy, III, of Spartanburg, for Petitioner.

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE HEARN: We granted certiorari to consider whether the court of appeals erred in finding Ricky Brannon, who fled on foot from uniformed police officers after they ordered him to stop, was entitled to a directed verdict on the charge of resisting arrest. Although we disagree with the court of appeals' rationale, we affirm in result.

FACTUAL/PROCEDURAL BACKGROUND

Maria Raney, a resident of Westwood Apartments in Gaffney, looked out the window of her apartment in the early morning hours of April 21, 2003 and noticed an individual inside her vehicle. She immediately called 911, and was instructed by the 911 operator to remain on the line until police arrived. While waiting, Raney saw the individual exit her vehicle and enter a nearby Ford Explorer. Minutes later, Officers Michael Scruggs and Randy Quinn of the Gaffney Police Department arrived on the scene.

Scruggs and Quinn approached the apartment complex in their patrol car, with the headlights and siren turned off. The officers parked their car around the corner of the building and then proceeded on foot. Once they rounded the corner of the building, they saw an individual standing next to a Ford Explorer. As they approached the suspect, he looked up, and Quinn shouted "stop, police!" The suspect fled. After chasing him for 300 to 350 yards, the officers apprehended the suspect and placed him under arrest. The suspect was later identified as the respondent, Ricky Brannon.

The State charged Brannon with breaking into a motor vehicle and resisting arrest under section 16-9-320(A) of the South Carolina Code (2003), which makes it "unlawful for a person knowingly and willfully . . . to resist an arrest being made . . . ." (emphasis added). At the conclusion of the evidence, Brannon moved for a directed verdict on the charge of resisting arrest, arguing the State failed to demonstrate that an arrest was being made when he fled from police. The circuit court denied Brannon's motion. Subsequently, Brannon was convicted of both charges. The court of appeals

reversed, finding Brannon was not "seized" under the Fourth Amendment, and therefore, not under arrest when he ran from police. *State v. Brannon*, 379 S.C. 487, 508, 666 S.E.2d 272, 282 (Ct. App. 2008). This Court granted the State's petition for writ of certiorari to review the court of appeals' decision.

STANDARD OF REVIEW

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007). When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Gaines*, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008).

LAW/ANALYSIS

I. PROCEDURAL ARGUMENTS

Initially, the State asserts the court of appeals violated error preservation rules by using a seizure analysis to determine whether an arrest was being made. The State contends this argument was not preserved for appellate review because Brannon never used the terms "seizure" or "Fourth Amendment" in his motion for a directed verdict. We disagree.

Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue. *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). In this case, Brannon met this requirement by arguing an arrest was not being made when he ran from police. *See State v. Mitchell*,

378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008), *cert. dismissed as improvidently granted*, Feb. 2010 (finding defense counsel preserved his objection under the Confrontation Clause where he objected to the introduction of a written statement at trial on the grounds he could not cross-examine the statement). Accordingly, we find this issue was properly preserved for appellate review.

The State also argues the court of appeals disregarded the law of the case doctrine in finding Brannon's flight from police did not constitute resisting arrest. *Brannon*, 379 S.C. at 517, 666 S.E.2d at 287. In charging the jury, the circuit court defined the term "resist" to include "peaceful nonviolent indirect obstruction of an arrest." Brannon failed to object to this charge. As a result, the State contends the circuit court's definition of the term "resist" is the law of the case, and under that definition, Brannon's act of running from police qualifies as resisting arrest under section 16-9-320(A). *See Mickle v. Blackmon*, 255 S.C. 136, 141-42, 177 S.E.2d 548, 549-50 (1970) (stating the failure to object to a jury instruction makes the charge the law of the case). We find it unnecessary to address this issue.

The State has the burden of proof as to all the essential elements of the crime. *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975). The accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004).

There are multiple elements to the crime of resisting arrest as codified in section 16-9-320(A). Under section 16-9-320(A), the State must demonstrate that the accused knowingly and willfully resisted an arrest being made. As explained below, we find the State has failed to put forth any evidence demonstrating that an arrest was being made when Brannon fled from police. In light of this finding, we need not decide whether Brannon's flight from police amounted to resistance. *See Whiteside v. Cherokee Cty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (stating an appellate court need not address remaining issues when resolution of prior issue is dispositive).

II. SEIZURE ANALYSIS

Next, the State contends the court of appeals erred in using a seizure analysis to determine whether an arrest was being made because the concepts of arrest and seizure are different. We agree.

At the outset, we note the concepts of arrest and seizure are related in the sense that an arrest represents the highest form of seizure of the person under Fourth Amendment jurisprudence. *California v. Hodari D.*, 499 U.S. 621, 624 n.3, 111 S.Ct. 1547, 1551 n.3 (1991). However, the concepts are distinguishable because under *Terry v. Ohio* and its progeny, an individual can be seized under the Fourth Amendment without being arrested under state law. 392 U.S. 1, 16, 88 S.Ct. 1868, 1877 (1968). As the United States Supreme Court stated in *Terry*, "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology." *Id.* Furthermore, the concepts of arrest and seizure are also distinguishable because each concept requires a distinct analysis. In determining whether an arrest has occurred, the focus is on the intent of the police officer and the suspect. *State v. Williams*, 237 S.C. 252, 257, 116 S.E.2d 858, 860-61 (1960). By contrast an individual is seized under the Fourth Amendment when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988).

Based on the foregoing, we find the analysis employed by the court of appeals constitutes error because the concepts of arrest and seizure are unique creatures of criminal law, calling for distinct inquiries. Accordingly, we turn our attention to the common law of arrest to determine whether an arrest was being made at the time of Brannon's flight.

III. WHETHER AN ARREST WAS BEING MADE

In *Williams*, this Court set forth specific elements to determine when an arrest has been consummated. 237 S.C. at 257, 116 S.E.2d at 860-61. Where the police officer does not manually touch the suspect, an arrest requires intent on the part of the officer to arrest the suspect, and intent on the part of the suspect to submit to the arrest, under the belief that submission was necessary. *Id.* Although Williams sets forth two elements to determine when an arrest has occurred, an arrest, itself, is an "ongoing process" in South Carolina. *State v. Dowd*, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991). In this case, consistent with the plain language of section 16-9-320(A), we must determine whether an arrest was being made when Brannon fled from police. *See Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009) (stating whether the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning). Thus, our inquiry is directed at determining whether the arresting process was underway at the time of Brannon's flight. Because the State has failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to the arrest, we find an arrest was not being made when Brannon ran from police.

Initially, the State urges this Court to evaluate the officers' intent based on an objective inquiry of whether the officers had probable cause to arrest Brannon at the time of flight. *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 593 (2004). We decline to do so because it is immaterial to our analysis to determine if the officers had probable cause to arrest Brannon. Under the plain language of section 16-9-320(A), we are only focused on determining whether an arrest was being made at the time of Brannon's flight. In *Williams*, this Court noted where the officer does not manually touch the suspect, "the intentions of the parties to the transaction are very important . . ." 237 S.C. at 257, 116 S.E.2d at 860. We find the phrase "the intentions of the parties to the transaction," refers to the subjective intentions of the law enforcement officer and the suspect. Thus, the intent of the officers to arrest

Brannon must be evaluated under a subjective standard rather than the objective standard governing probable cause.

Both Officer Scruggs and Officer Quinn testified that when they arrived on the scene, they believed Brannon was breaking into automobiles. However, neither officer testified they intended to arrest him after seeing him. In fact, Quinn testified "our intention was to approach the subject and find out exactly what he was doing there at the time." Thus, according to Quinn, the police officers intended to question Brannon at the time he ran away. In support of its argument that an arrest was being made, the State points to the facts and circumstances as they existed when the police officers encountered Brannon. However, in our view, these facts reveal only that the police officers could have arrested Brannon, *i.e.* they had probable cause to believe he was committing a crime. These facts do not demonstrate that the police officers intended to actually do so.[1]

Likewise, there was also no evidence presented demonstrating Brannon submitted to the officers. To the contrary, as soon as Brannon saw the police officers, he ran. Therefore, we find an arrest was not being made at the time Brannon fled from police.

CONCLUSION

Accordingly, we affirm the result reached by the court of appeals and find the circuit court erred in denying Brannon's motion for a directed verdict on the charge of resisting arrest.

PLEICONES and BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which Acting Justice James E. Moore, concurs.

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[1] The State contends the question of the officers' intent was a factual issue for the jury to determine. We disagree. This argument fails to take into account that an arrest is a material element of the crime of resisting arrest under section 16-9-320(A). *See Brown*, 360 S.C. at 586, 602 S.E.2d at 395 (stating the accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged).

CHIEF JUSTICE TOAL: I respectfully dissent from the majority's opinion, and would reverse the court of appeals' decision finding the trial court erred in denying Brannon's motion for a directed verdict on the resisting arrest charge. I would affirm the trial court's denial of the directed verdict motion.

Section III

The majority holds, "Because the State has failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to arrest, we find an arrest was not being made when Brannon ran from police."[2] I disagree, and would hold that when the evidence and all reasonable inferences are viewed in the light most favorable to the State, the State put forth evidence that the officers intended to arrest Brannon. *See State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) (recognizing that when reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the non-moving party).

I agree with the majority that, in addressing the issues in this matter, we are focused on whether an arrest was being made at the time of Brannon's flight. However, I disagree with their analysis and conclusion. The statute at issue states, "It is unlawful for a person knowingly and willfully . . . to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not." S.C. Code Ann. § 16-9-320(A) (2003).

An arrest is an ongoing process. *State v. Dowd*, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991). This Court has held that in order to "'constitute an arrest, there must be an actual or constructive seizure or detention of the

[2] Brannon did not submit to the arrest because he was running away from the officers. Holding a suspect must submit to an arrest for an arrest to be initiated leads to an absurd result in a resisting arrest charge. The whole point of a resisting arrest charge is that a person is not submitting.

person, performed with the intention to effect an arrest and so understood by the person detained.'" *State v. Williams*, 237 S.C. 252, 257, 116 S.E.2d 858, 860 (1960) (quoting *Jenkins v. United States*, 161 F.2d 99, 101 (10th Cir. 1947)). *Williams* provided further guidance:

> It is not necessary "that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. However, in all cases in which there is no manual touching or seizure or any resistance, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty."

Id. at 257, 116 S.E.2d at 860-61 (quoting 4 Am. Jur. *Arrest* § 2 (1936)); *see also* 5 Am. Jur. 2D *Arrest* § 4 (2007) ("Police detention constitutes an 'arrest' if a reasonable person in the suspect's position would understand the situation to be a restraint on freedom of the kind that the law typically associates with a formal arrest."); 6A C.J.S. *Arrest* § 1 (2004) ("An arrest is the taking, seizing, or detaining the person of another by any act which indicates an intention to take him or her into custody and subject the person arrested to the actual control and will of the person making the arrest.").

Because Brannon was not physically touched or seized, pursuant to *Williams* the intentions of the parties are important. The question of intent from Brannon's perspective is obvious. Brannon was breaking into vehicles in the middle of the night. When he was surprised by two uniformed police officers, he ran and tried to avoid arrest. Any reasonable person in Brannon's position would not have the slightest doubt that the pursuing officers intended to place him in custody. Clearly, Brannon was "conscious of [the] restraint of his liberty." *Williams*, 237 S.C. at 257, 116 S.E.2d at 860.

Regarding the officers' intent, the majority holds that the intent of the officers must be evaluated under a subjective standard rather than the objective standard governing probable cause. I disagree and would apply an objective standard. The evidence reveals that a resident called 911 to report a car break-in which the caller was seeing in progress. The 911 operator kept the caller-witness on the line and notified the officers as to the location of the break-in and its progress. As the officers apprehended the suspect, they were receiving a live transmission of the caller-witness's ongoing observations as relayed by the 911 operator. Based on the information received from the 911 operator, coupled with the officers observations of Brannon next to the Ford Explorer with its door open and inside light on, a reasonably prudent police officer would have cause to believe that Brannon was committing the crime of breaking into a motor vehicle. The majority merely quoted one sentence of Officer Quinn's testimony when he stated that "[o]ur intention was to approach the subject and find out exactly what he was doing there at the time." The next sentence out of Officer Quinn's mouth was, "We believe [sic] he was breaking into a motor vehicle and we placed him under arrest for that charge." Taking the officers' testimony as a whole, and construing it in a light most favorable to the State, I would find there was sufficient evidence of intent to arrest Brannon.[3]

The presence of probable cause to arrest for breaking into a motor vehicle at the time of the initial encounter lies at the core of my view that the process of arrest was underway when the officers caught Brannon in the act. Probable cause is guided by Fourth Amendment jurisprudence and an officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," *Whren v. U.S.*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). The proper inquiry is an objective one, based on what a reasonable police officer would believe under the same circumstances. *Id.* at 810-13. In this case, a reasonable police officer would

[3] Even using the majority's subjective standard, I believe that taking Officer Quinn's testimony as a whole and construing it in a light most favorable to the State would provide sufficient evidence of his subjective intent to arrest Brannon.

have probable cause to arrest Brannon at the initial encounter. Brannon's location and conduct exactly matched the witness's description, as Brannon was standing next to the Ford Explorer with an open door in the deserted parking lot late at night.

In conclusion, I would hold that a person violates section 16-9-320(A) irrespective of the lack of physical contact when: (1) a law enforcement officer, from an objective standpoint, has probable cause to believe a person has committed a crime; (2) the law enforcement officer through words or actions makes known his intent to arrest or otherwise detain the person; (3) the person, from an objective standpoint, recognizes the presence of a law enforcement officer and understands the intent of the officer to arrest him; and (4) the person attempts to avoid the arrest by impeding, hindering, or obstructing the law enforcement officer, by means of fleeing from the officer or some other method of resisting or opposing the arrest. In this case, viewing the evidence and reasonable inferences in a light most favorable to the State, I would find a jury question was presented as to the charge of resisting arrest and would affirm the trial court's denial of a directed verdict motion.

Sections I & II

I agree with the majority's holding in Section II of the majority opinion. I also agree with the portion of Section I of the majority opinion that holds Brannon did not need to use the terms "seizure" or "Fourth Amendment" in his motion for a directed verdict. However, because I would analyze Section III of the opinion differently than the majority, it is necessary for me to address the resistance issue in Section I of the majority opinion. In Section I, the majority held that it need not decide whether Brannon's flight from police amounted to resistance because it found there was no evidence an arrest was being made when Brannon fled from police. Because I would find there is evidence that an arrest was being made, I must also address whether Brannon's flight from police amounted to resistance.

The State argues the court of appeals disregarded the law of the case doctrine in finding Brannon's flight from police did not constitute resisting arrest. I agree. In charging the jury, the trial court defined the term "resist" to include "peaceful nonviolent indirect obstruction of an arrest." Brannon failed to object to this charge. As a result, the trial court's definition of "resist" is the law of the case, and under that definition, Brannon's act of running from the police qualifies as resisting arrest under section 16-9-320(A). *See Mickle v. Blackmon*, 255 S.C. 136, 141-42, 177 S.E.2d 548, 549-50 (1970) (recognizing the failure to object to a jury instruction makes the charge the law of the case).

For the aforementioned reasons, I would affirm the trial court's denial of the directed verdict motion.

Acting Justice James E. Moore, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Energy Users Committee, Appellant,

v.

The South Carolina Public Service Commission, South Carolina Electric & Gas, and Office of Regulatory Staff,of whom South Carolina Electric & Gas, and Office of Regulatory Staff are Respondents.

In Re Combined Application of South Carolina Electric & Gas Company for a Certificate of Environmental Compatibility and Public Convenience and Necessity and for a Base Load Review Order for the Construction and Operation of a Nuclear Facility in Jenkinsville, South Carolina.

Appeal From The Public Service Commission of South Carolina

Opinion No. 26856
Heard April 6, 2010 – Filed August 9, 2010

REVERSED

Scott Elliott, of Elliott & Elliott, of Columbia, for Appellant.

Belton T. Zeigler and Lee E. Dixon, of Pope Zeigler, of Columbia, Florence P. Belser, Nanette S. Edwards, Shannon Bowyer Hudson, of Office of Regulatory Staff, of Columbia, James B. Richardson, Jr., of Columbia, Mitchell Willoughby and Tracey Green, both of Willoughby & Hoefer, of Columbia, and K. Chad Burgess and Catherine D. Taylor, both of SC Electric & Gas, of Cayce, for Respondents.

JUSTICE HEARN: In this appeal, the South Carolina Public Service Commission ("Commission") determined South Carolina Electric & Gas Company ("SCE&G") was entitled to recover contingency costs under the Base Load Review Act.[1] We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In 2005, SCE&G identified the need for additional base load power plants[2] to support increased energy demands in South Carolina. After extensive study, SCE&G elected to address these needs by constructing a two-unit nuclear generating facility in Jenkinsville. Following two years of contract negotiation, SCE&G entered into an agreement—the Engineering Procurement and Construction contract ("EPC contract")—with Westinghouse Electric Company, LLC ("Westinghouse") and Stone & Webster, Inc. (collectively "Westinghouse/Stone & Webster") for the acquisition and installation of the nuclear units. Under the terms of the EPC contract, more than half of the cost of the project was subject to fixed pricing (*i.e.* prices that are fixed in 2007 dollars subject to no inflation) or firm prices with adjustment provisions (*i.e.* prices that are fixed in 2007 dollars subject to

[1] This is a companion case to *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, No. 26811, 2010 WL 1656997 (S.C. Apr. 26, 2010).

[2] Base load plants are typically either coal or nuclear fired plants. Base load plants are fuel efficient generating units that are designed and intended to run for extended periods of time at high capacity.

fixed or indexed inflation going forward).[3] For the remainder of the contract, the price terms were neither fixed nor firm. Therefore, SCE&G assumes an increased risk that the actual costs of the project could exceed expectations with respect to this portion of the EPC contract.

In May 2008, SCE&G filed a combined application with the Commission, seeking certification under the Utility Facility Siting and Environmental Protection Act[4] to construct and operate the nuclear facility. Additionally, in the combined application, SCE&G asked for a rate adjustment to recover its anticipated capital costs of the project under the Base Load Review Act.[5] SCE&G estimated the capital costs of the project less inflation to be in excess of 4.5 billion. This figure included contingency costs in the amount of $438,293,000. SCE&G included contingency costs in the estimate of capital costs to account for the risks associated with the EPC contract and other variables.

The South Carolina Energy Users Committee ("Energy Users"), an association of large industrial consumers of energy who receive electrical service from SCE&G, timely filed a petition to intervene in the proceedings before the Commission.[6] During the three-week hearing before the Commission, Energy Users argued the Base Load Review Act did not allow the Commission to include contingency costs as a component of capital costs. The Commission rejected this argument. In its final order, the Commission granted the capital costs and contingency costs requested by SCE&G. This appeal followed.

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[3] The majority of the equipment and service costs that are primarily nuclear in nature are subject to fixed or firm prices. The price terms that are neither fixed nor firm are primarily standard construction cost items (labor and general construction materials).

[4] S.C. Code Ann. § 58-33-10 et seq. (1977 & Supp. 2009).

[5] S.C. Code Ann. § 58-33-210 et seq. (Supp. 2009).

[6] In addition to Energy Users, the Commission also received timely petitions to intervene from CMC Steel South Carolina, Pamela Greenlaw, Friends of the Earth, Mildred A. McKinley, Lawrence P. Newton, Ruth Thomas, Maxine Warshauer, Samuel Baker, and Joseph Wojcicki. None of the above listed intervenors are a party to this action.

STANDARD OF REVIEW

This Court employs a deferential standard of review when reviewing a decision from the Commission and will affirm the Commission's decision if it is supported by substantial evidence. *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001). The Commission is considered the expert designated by the legislature to make policy determinations regarding utility rates. *Kiawah Prop. Owners Group v. Public Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs. In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole. *Duke Power Co.*, 343 S.C. at 558, 541 S.E.2d at 252; *see* S.C. Code Ann. § 1-23-380(5)(f) (Supp. 2009) (stating this Court may reverse or modify the Commission's decision if it is arbitrary, capricious, or characterized by an abuse of discretion).

LAW/ANALYSIS

The Commission found SCE&G was entitled to recover contingency costs as a component of capital costs pursuant to section 58-33-270(B)(2) of the South Carolina Code (Supp. 2009). We disagree. In our view, the Commission abused its discretion in granting contingency costs to SCE&G.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hardee v. McDowell*, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009) (internal quotation omitted). Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are

not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

If the statute is ambiguous, however, courts must construe the terms of the statute. *Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). Words in a statute must be construed in context, and their meaning may be ascertained by reference to words associated with them in the statute. *Eagle Container Co., LLC v. City of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-96 (2008). When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000). Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Id.*, at 410, 532 S.E.2d at 292.

Initially, the General Assembly explicitly defined what type of costs a utility can recover under the Base Load Review Act. In section 58-33-275(C) of the South Carolina Code (Supp. 2009), the General Assembly stated, "[s]o long as the plant is constructed or being constructed in accordance with the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2) . . . the utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings." Thus, under the Base Load Review Act, a utility, such as SCE&G, can recover its capital costs related to the nuclear facility. The General Assembly did not leave any room for doubt as to what type of costs qualify as capital costs. The General Assembly broadly defined capital costs as:

> [C]osts associated with the design, siting, selection, acquisition, licensing, construction, testing, and placing into service of a base load plant, and capital costs incurred to expand or upgrade the transmission grid in order to connect the plant to the transmission

> grid and includes costs that may be properly considered capital costs associated with a plant under generally accepted principles of regulatory or financial accounting, and specifically includes AFUDC[7] associated with a plant and capital costs associated with facilities or investments for the transportation, delivery, storage, and handling of fuel.

S.C. Code Ann. § 58-33-220(5) (Supp. 2009).

Contingency costs are not included in the statutory definition of recoverable capital costs. In fact, the phrase "contingency costs" does not appear anywhere in the Base Load Review Act. However, the term "contingencies" appears multiple times in the Base Load Review Act. Because it is not defined in the statute, we must interpret the word "contingencies" in accordance with its usual and customary meaning. *Branch*, 340 S.C. at 409-10, 532 S.E.2d 292. In doing so, we cannot merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Id.*, at 410, 532 S.E.2d at 292.

The term "contingencies" appears for the first time in section 58-33-270(B)(1) of the South Carolina Code (Supp. 2009). Section 58-33-270(B)(1) provides, "[t]he base load review order shall establish: (1) the anticipated construction schedule for the plant including contingences . . . ." Under section 58-33-270(B)(1), the Commission interpreted the term "contingencies" to refer to unexpected events potentially affecting the construction schedule of the nuclear facility. The Commission identified the possibility for "major components being damaged in transit or their manufacturing being delayed" as factors possibly contributing to the delay of the project. In light of the possible delays associated with a project of this magnitude, the Commission granted SCE&G a construction schedule contingency of eighteen months. Thus, it is clear the Commission interpreted

[7] "'AFUDC' means the allowance for funds used during construction of a plant calculated according to regulatory accounting principles." S.C. Code Ann. § 58-33-220(1) (Supp. 2009).

the term "contingencies" as used by General Assembly in section 58-33-270(B)(1) to refer to unexpected events.

The term "contingencies" appears for a second time in section 58-33-270(B)(2) of the South Carolina Code (Supp. 2009).[8] Section 58-33-270(B)(2) states, "[t]he base load review order shall establish . . . (2) the anticipated components of capital costs and the anticipated schedule for incurring them, including specified contingencies." The Commission found, "the plain meaning and grammatical structure of this statutory provision intends that contingencies be provided both for capital costs and for the schedule for incurring capital costs." The Commission's finding indicates that it gave two meanings to the term "contingencies" in this section. On the one hand, consistent with the manner that it defined "contingencies" in section 58-33-270(B)(1), the Commission interpreted the term to refer to unexpected events accelerating or delaying SCE&G's schedule for incurring capital costs. In accordance with this understanding of the term, the Commission granted SCE&G a twenty-four-month cost acceleration contingency period to be used if the project was ahead of schedule, and an eighteen-month capital cost rescheduling contingency period to be used if the project should incur delays. On the other hand, the Commission interpreted the term "contingencies" to refer to unexpected costs and awarded SCE&G contingency costs in the amount of $438,293,000.

Based on the grammatical structure of section 58-33-270(B)(2), it is possible that the General Assembly intended for the term "contingencies" to apply to both "the anticipated components of capital costs and the anticipated schedule for incurring them." (emphasis added). However, even if we were to agree with such an interpretation of this statute, the term "contingencies" as it appears in section 58-33-270(B)(2) cannot have two meanings. In other words, it cannot refer to both unexpected events and unexpected costs. As a consequence, we find the Commission abused its discretion in finding the plain meaning of section 58-33-270(B)(2) allowed SCE&G to recover

[8] Normally, identical words within the same statute should be given the same meaning, unless the context suggests another meaning. *Eagle Container Co.*, 379 S.C. at 570, 666 S.E.2d at 895-96; *Smalls v. Weed*, 293 S.C. 364, 370, 360 S.E.2d 531, 534 (Ct. App. 1987).

contingency costs. In our view, the statute is ambiguous. Moreover, we find it unclear as to whether the Base Load Review Act allows utilities to recover contingency costs. As explained above, the General Assembly unequivocally stated that capital costs were recoverable under the Base Load Review Act. 58-33-275(C). The General Assembly went on to expressly define capital costs. S.C. Code Ann. § 58-33-220(5). In doing so, the General Assembly did not include contingency costs in the definition of recoverable capital costs. For these reasons, we find it unclear as to whether contingency costs are recoverable under the Base Load Review Act. Thus, we turn to the policy objectives behind the Base Load Review Act to discern whether the General Assembly intended for utilities to recover contingency costs as a component of capital costs.

In enacting the Base Load Review Act, the General Assembly announced the purpose of the Act "is to provide for the recovery of the prudently incurred costs associated with new base load plants . . . when constructed by investor-owned electrical utilities, while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs." S.C. Code Ann. § 58-33-210 (Supp. 2009) (Editor's Note). Thus, the goal of the Base Load Review Act is two-fold: (1) to allow SCE&G to recover its "prudently incurred costs" associated with the nuclear facility; and (2) to protect customers "from responsibility for imprudent financial obligations or costs." *Id.*

Initially, the first objective of the Base Load Review Act is not achieved by allowing SCE&G to recover contingency costs. The contingency costs requested by SCE&G do not represent costs SCE&G anticipates incurring in constructing the nuclear facility. Jimmy Addison, Senior Vice President and Chief Financial Officer of SCE&G, testified "[t]he Company does not currently anticipate needing to use these contingencies . . . ." Stephen Byrne, Senior Vice President of SCE&G, stated the contingency costs:

> [A]re based on SCE&G's assessment of the potential for actual costs to be greater than the forecasted costs based on such things as the necessity for change orders, delays due to weather, delays in receiving

> licenses and permits, actual inflation exceeding applicable indices, and estimates of the units of time and materials used to price the project that understate actual requirements. In my opinion, these risk factors are not subject to mathematical quantification, but must be assessed as a matter of sound engineering judgment.

Accordingly, because contingency costs are not costs SCE&G anticipates incurring in constructing the nuclear facility, the first objective of the Base Load Review Act would not be achieved by allowing SCE&G to recover contingency costs.

The Commission's award of contingency costs to SCE&G also does not meet the second objective of the Base Load Review Act—to protect customers "from responsibility for imprudent financial obligations or costs." *Id.* SCE&G has not designated how contingency funds will be spent. Additionally, if this Court approves the contingency costs granted to SCE&G by the Commission, ratepayers will have no means to challenge how SCE&G spends contingency funds in the future. S.C. Code Ann. § 58-33-275(B) (Supp. 2009). Thus, in effect, the Commission has allowed SCE&G to increase rates so that it can recover in excess of 438 million dollars in speculative, un-itemized expenses with no mechanism in place to challenge the prudence of SCE&G's financial decisions. Accordingly, the Commission's award of contingency costs to SCE&G directly conflicts with the two stated purposes of the Base Load Review Act. For this reason, we find the General Assembly did not intend for SCE&G to recover contingency costs under the Base Load Review Act.

Furthermore, the enactment of section 58-33-270(E) of the South Carolina Code (Supp. 2009) reveals that the General Assembly anticipated that construction costs could increase during the life of the project. Under section 58-33-270(E), SCE&G may petition the Commission for an order modifying rate designs. Consistent with the above mentioned objectives of the Base Load Review Act, section 58-33-270(E)(2) further states that the Commission should approve such a request, after a hearing, if the Commission finds the "rate designs are just and reasonable."

Accordingly, we find the Commission abused its discretion in granting SCE&G contingency costs under the Base Load Review Act. In light of our decision, we also find the Commission erred in adding inflation to the contingency costs. Therefore, the decision of the Commission is

REVERSED.

BEATTY, J. and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion. KITTREDGE, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I join Justice Kittredge's dissent as I agree that we should defer to the Commission's interpretation of the statute it is required to administer. See Dunton v. South Carolina Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

I further dissent as I believe the Commission's order does not indicate that it gave two meanings to the word "contingencies," as used in S.C. Code Ann. § 58-33-270(B). Instead, I believe the Commission defined "contingencies" as "unexpected events" and simply considered the impact of such "unexpected events" in the context of each of the subsections of § 58-33-270(B), specifically in the context of the construction schedule and capital costs. This interpretation best comports with our rules of statutory construction. See Adams v. Clarendon County School Dist. No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978) ("It is the duty of this Court to give all parts and provisions of a legislative enactment effect and reconcile conflicts if reasonably and logically possible."). Consequently, I would affirm the order of the Commission.

JUSTICE KITTREDGE: I respectfully dissent. I vote to affirm the order of the South Carolina Public Service Commission.

Pursuant to the Base Load Review Act, South Carolina favors the development and construction of new coal and nuclear fueled electrical generating facilities to meet our state's increasing energy demands. S.C. Code Ann. §58-33-210 *et seq.* (Supp. 2009). I agree with the majority that the applicable "statute is ambiguous" and that it is "unclear as to whether the Base Load Review Act allows utilities to recover contingency costs." Given this ambiguity juxtaposed to the clear purpose of the Act, I see no compelling reason to depart from the general rule that we should accord deference to the Commission's construction of a statute it must administer. I would not reverse the Commission's interpretation of the statute. The estimated capital cost of the proposed project is in excess of $4.5 billion, including contingency costs in the amount of $438,293,000. The Commission fully vetted all issues at the multi-week hearing, including the basis for determining the contingency costs. In my judgment, the inclusion of contingency costs for the construction of the proposed nuclear facility is amply supported by the record and survives the deferential "substantial evidence" standard of review.

The Supreme Court of South Carolina

In the Matter of Horry County
Magistrate James Oren Hughes,
Jr., Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Horry County is under no obligation to pay respondent his salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to immediately deliver all books, records, bank account records, funds, property, and documents relating to his judicial office to the Chief Magistrate of Horry County. He is enjoined from access to any monies, bank accounts, and records related to his judicial office.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the magistrate court unless escorted by a law

enforcement officer after authorization from the Chief Magistrate of Horry County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records and he is prohibited from access to any judicial databases or case management systems. This order authorizes the appropriate government or law enforcement official to implement any of the prohibitions as stated in this order.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from having access to or making withdrawals from the accounts.

IT IS SO ORDERED.

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

Columbia, South Carolina

August 2, 2010

The Supreme Court of South Carolina

In the Matter of Williamsburg
County Magistrate Carolyn
Gardner Lemmon, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Williamsburg County is under no obligation to pay respondent her salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to immediately deliver all books, records, bank account records, funds, property, and documents relating to her judicial office to the Chief Magistrate of Williamsburg County. She is enjoined from access to any monies, bank accounts, and records related to his judicial office.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the magistrate court unless escorted by a law

enforcement officer after authorization from the Chief Magistrate of Williamsburg County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records and she is prohibited from access to any judicial databases or case management systems. This order authorizes the appropriate government or law enforcement official to implement any of the prohibitions as stated in this order.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from having access to or making withdrawals from the accounts.

IT IS SO ORDERED.

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

Columbia, South Carolina

August 3, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sherrie Mann McBride, Appellant,

v.

School District of
Greenville County, Respondent.

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

Opinion No. 4718
Heard April 15, 2010 – Filed August 4, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Katherine Carruth Goode, of Winnsboro and David Lloyd Thomas of Greenville, for Appellant.

N. Heyward Clarkson, III, Sean A. Scoopmire and John D. Harjehausen, of Greenville, for Respondent.

GEATHERS, J.: Appellant Sherrie Mann McBride (McBride) brought this action against Respondent School District of Greenville County (the District), asserting causes of action for breach of contract, wrongful discharge, defamation of character, abuse of process, false imprisonment, malicious prosecution, intentional infliction of emotional distress, negligence, negligence per se, and gross negligence. McBride challenges the circuit court's order granting a directed verdict for the District on her causes of action for defamation of character, abuse of process, false imprisonment, and malicious prosecution. We affirm in part, reverse in part, and remand for a new trial.

FACTS/PROCEDURAL HISTORY

The facts in the light most favorable to McBride are as follows. McBride began her teaching career in August 2000 as a special education teacher at Berea High School in Greenville County. Near the end of the 2001-2002 school year, she also served as a teacher for a home-bound student, John Doe (Doe),[1] for approximately six weeks. Doe, whom McBride and others understood to be homosexual, was home-bound because he had been having anxiety attacks whenever he attended classes on campus. His anxiety attacks stemmed from the emotional trauma he experienced from being sexually abused by a teacher while attending Greenville Technical Charter High School. Between the time he attended this school and the time he began attending Berea High School, he attempted suicide and was committed to the state mental hospital. During the time McBride served as Doe's home-bound teacher, they developed an emotional bond.

Doe resumed class attendance for the 2002-2003 school year, but he was not in any of McBride's classes. Nevertheless, he visited McBride on an increasingly frequent basis. At this time, he was still experiencing anxiety and began cutting himself. On one occasion he showed McBride cuts extending the length of his arms, and she consulted another teacher for guidance on how to handle the situation.

[1] The former student's named has been changed to protect his identity.

After this incident, according to McBride, the school guidance counselor and Doe's teachers worked out an arrangement allowing Doe to stay in McBride's classroom during one of his morning classes and one of his afternoon classes, provided he obtain his assignments at the beginning of class time and return his work to his teachers at the end of class time. During his time in McBride's classroom, when he was not working on his assignments, he helped McBride with lesson planning, grading papers, setting up computer equipment, and performing other tasks related to McBride's classes.

At the beginning of the 2003-2004 school year, Doe continued to stay in McBride's classroom during some of his classes. He frequently complained of being abused by his parents and expressed a desire to run away from home. He began storing clothing in a file drawer in McBride's classroom and requested advice about becoming emancipated from his parents. McBride did not give him any advice about becoming emancipated, but Doe consulted the school resource officer, Deputy Daniel Oslager, on the topic. Deputy Oslager was an employee of the Greenville County Sheriff's Department.

In mid-September, McBride took Doe with her on an errand after school to buy educational supplies and allowed him to drive her car. Doe's mother had given him permission to accompany McBride, but she became angry when McBride brought him home after his 7 p.m. curfew. Several days later, McBride allowed Doe to drive her car after school hours on what she thought would be a very short trip to a grocery store near the school. Although Doe only had a learner's permit to drive, McBride thought he had a license with full driving privileges. Doe drove McBride's car to pick up his friend, Chris Boehmke (Chris), at his house and to take him back to the school.

Later that afternoon, McBride gave Doe and Chris a ride to Chris' house. She was under the impression that Chris was merely having a sleepover at his house because she knew that Doe had been going home with

Chris on Fridays on a regular basis. However, Doe had decided to run away from home that weekend. He planned on staying at Chris' house on Friday night, then traveling to Marietta, Georgia to live with his aunt.

When McBride arrived at Chris' house, she went inside and spoke with his mother, Linda Boehmke. Mrs. Boehmke became upset when Doe mentioned that he wanted to run away from home. McBride told Mrs. Boehmke that Doe "says stuff like that all the time" and that she did not think that Doe's aunt was going to come to Greenville to take him home with her. McBride also told Mrs. Boehmke to telephone her if she had any concerns later that night and that McBride could then contact Deputy Oslager.

Later that night, Doe's mother went to the Boehmkes' house looking for Doe. Mrs. Boehmke was concerned about Doe's allegations of being abused by his parents, so she told his mother that he was not there. Doe's mother also telephoned McBride and left a voice mail message asking if she knew where Doe was. McBride did not check her voice mail messages until the next day, and she failed to return the call.

The next day, McBride found Doe sitting on her door step. He told her that he was trying to run away from home but that Mrs. Boehmke had made him leave her house. McBride allowed Doe to enter her home, but she telephoned Deputy Oslager to report that Doe was trying to run away from home. Deputy Oslager advised McBride to call the sheriff's office. McBride did so, and an officer later arrived at her house to pick up Doe. The officer later returned Doe to his parents.

A few days later, McBride noticed that her car was missing from the school parking lot. As she was standing there, Deputy Oslager arrived and asked McBride what was going on. When she told him that her car had been stolen, he began taking notes. She then realized that Doe might have been the one who took her car. She advised Oslager of this possibility but said that she did not want to press charges. Oslager insisted that either Doe would be charged with an offense for taking the car or McBride would be charged for allowing him to drive it. McBride then reluctantly allowed Oslager to charge

Doe with taking the car. A few minutes later, Doe drove McBride's vehicle into the parking lot. Oslager removed Doe from the car and arrested him. When Doe's mother arrived at the scene, she demanded that McBride stay away from her son.

The school principal, William Roach (Roach) questioned Doe, after which Oslager took him to the law enforcement center for further questioning. During questioning, Doe told Oslager that McBride had allowed him to drive her car on previous occasions, that she had written passes for him to get out of classes, and that she had given him passwords to access various school computer systems. Oslager telephoned Roach several times to consult with him about these statements. Doe also told Oslager that McBride knew he was running away from home when she took him to Chris Boehmke's house. Oslager communicated this information to his supervisor, Sergeant Shea Smith, who began an investigation into McBride's conduct.

Sergeant Smith assigned Deputy Leslie Lambert to be the lead investigator. Oslager assisted Lambert in taking statements from teachers, including McBride herself, and other school staff members. Deputy Lambert presented the information gathered from the investigation to the solicitor's office. Deputy Solicitor Betty Strom and assistant solicitor Howard Steinberg agreed that the charges of contributing to the delinquency of a minor and enticing an enrolled child from school attendance should be taken to a magistrate for a determination of probable cause to arrest McBride. A magistrate issued corresponding arrest warrants, and assistant solicitor John Rowell signed an indictment charging McBride with contributing to the delinquency of a minor.[2] The grand jury true billed this indictment, and

[2] There is nothing in the record indicating that the solicitor's office presented an indictment to the grand jury for the charge of enticing an enrolled child from attendance in school. The likely reason is that the charge was for a first offense, and S.C. Code Ann. § 16-17-510 (2003) requires a first or second offense to be tried exclusively in magistrate's court. Further, S.C. Const. art. I, § 11 and S.C. Code Ann. § 17-19-10 (2003) exempt charges prosecuted in magistrate's court from the requirement that an indictment be presented to a

Deputy Oslager later arrested McBride.

Oslager took McBride to the law enforcement center, where she was booked and fingerprinted. She was later released on bond, and the criminal charges were ultimately dropped. However, the District's superintendent recommended to the Board of Trustees that McBride be terminated. The Board voted to accept the recommendation.

Several local television stations reported McBride's arrest and quoted sheriff's office investigators regarding allegations that she allowed Doe to drive her car, helped him run away from home, and signed him out of class. The newscasts described McBride's relationship with Doe as "bizarre" and implied that students could not be safe with McBride. One of the stories quoted the superintendent as saying that he was going to recommend McBride for termination. Another story quoted unidentified teachers as saying "There is a lot of gray area" in drawing the line in a relationship with a student.

After McBride was dismissed from Berea High School, the District's equipment that had been allotted to her classroom was transferred to her colleagues' classrooms. One of her colleagues heard Roach accuse McBride of stealing this equipment when he stated "She cleaned us out."

McBride filed this action against the District and Roach, asserting causes of action for breach of contract, wrongful discharge, defamation of character, abuse of process, false imprisonment, malicious prosecution, intentional infliction of emotional distress, negligence, negligence per se, and gross negligence. Both Roach and the District filed motions for summary judgment. The circuit court granted summary judgment to Roach on all of the causes of action and granted summary judgment to the District on McBride's causes of action for breach of contract, wrongful discharge,

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grand jury before a criminal charge is prosecuted.

negligence, negligence per se, and gross negligence. The District later filed a second summary judgment motion, and the circuit granted the motion as to McBride's cause of action for intentional infliction of emotional distress.

At trial, the circuit court granted a directed verdict for the District on the remaining causes of action (defamation of character, abuse of process, false imprisonment, and malicious prosecution). In explaining his ruling, the presiding judge cited the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2009) (the Tort Claims Act or the Act) as a bar to McBride's claims for abuse of process and malicious prosecution.[3] The judge also ruled that there was no evidence of any defamatory statement made by the District and that the prosecution was solely instituted by the sheriff's office. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in directing a verdict for the District on McBride's causes of action for defamation of character, abuse of process, false imprisonment, and malicious prosecution?

STANDARD OF REVIEW

In ruling on a directed verdict motion, the trial court must view the evidence and the inferences reasonably drawn from the evidence in the light most favorable to the party opposing the motion. Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). "The trial court must deny the motion[] when the evidence yields more than one inference or an inference is in doubt." Id. "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Id. "However, if the

[3] See S.C. Code Ann. § 15-78-60(17) (2005) ("The governmental entity is not liable for a loss resulting from . . . employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude[.]").

evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied." Id.

> When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury.

Id. at 319-20, 656 S.E.2d at 388 (citations omitted) (emphasis added).

LAW/ANALYSIS

McBride contends that the circuit court erred in directing a verdict for the District on her claims for defamation of character, abuse of process, false imprisonment, and malicious prosecution. We agree that the circuit court improperly directed a verdict for the District on the defamation and abuse of process causes of action. However, the circuit court correctly directed a verdict for the remaining causes of action.

I. Defamation

McBride argues that a jury issue existed as to the publication of "false and defamatory statements by the . . . District's employees." McBride points to the following instances of statements or conduct she claims are defamatory and are attributable to employees of the District: (1) Roach's allegation that McBride stole school property after she was dismissed ("She cleaned us out"); (2) the District superintendent, William Harner, "made public comments about Ms. McBride, her arrest, and her [alleged] misconduct[;]" (3) "one of the accounts attributed comments to unnamed teachers from the School District[;]" and (4) Roach and Oslager coerced false statements from

Doe in their efforts to fabricate charges against McBride. As to the fourth item, McBride argues that the conduct of Roach and Oslager "in orchestrating Ms. McBride's arrest, for the District's own purposes and in an effort to discredit and dismiss her, fits squarely within the category of actionable defamation accomplished by actions or conduct."[4] We agree as to item 1 but disagree as to the remaining items.

The tort of defamation permits a plaintiff to recover for injury to her reputation as the result of the defendant's communications to others of a false message about the plaintiff. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). To prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Id.

Defamatory communications may be in the form of libel or slander. Holtzscheiter, 332 S.C. at 508, 506 S.E.2d at 501. A statement is classified as defamatory per se when the meaning or message is obvious on its face, and defamatory per quod when the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement. Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Even "[a] mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain." Murray, 344 S.C. at 139, 542 S.E.2d at 748. However, when the statement is defamatory per quod, "the plaintiff must introduce extrinsic facts to prove the defamatory meaning." Erickson, 368 S.C. at 465, 629 S.E.2d at 664.

[4] See Murray v. Holnam, Inc., 344 S.C. 129, 138 542 S.E.2d 743, 748 (Ct. App. 2001) ("Slander is a spoken defamation, while libel is a written defamation or one accomplished by actions or conduct.") (emphasis added).

Additionally, a statement may be actionable per se or not actionable per se. Id. "The determination of whether or not a statement is actionable per se is a matter of law for the court to resolve." Id. When the statement is classified as actionable per se, the defendant is presumed to have acted with common law malice, and the plaintiff is presumed to have suffered general damages. Id. When the statement is not actionable per se, "the plaintiff must plead and prove both common law malice and special damages." Id. "Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, i.e., with conscious indifference of the plaintiff's rights." Id. at 466, 629 S.E.2d at 665. "Slander is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001).

Concerning damages, our supreme court has instructed:

> General damages include injury to reputation, mental suffering, hurt feelings, emotional distress, and similar types of injuries which are not capable of definite money valuation. Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages.

Erickson, 368 S.C. at 465 n.6, 629 S.E.2d at 664 n.6.

As to the first item that McBride claims is defamatory, we believe Roach's allegation that McBride stole school property should go to the jury. McBride presented evidence that the statement was false when a teacher's aide testified that after McBride was dismissed, she took only the items she had purchased with her own funds. Further, the statement was actionable per

se because it accused McBride of committing a crime involving moral turpitude. See Bell v. Bank of Abbeville, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946) (holding that an allegation charging the plaintiff with larceny or breach of trust, crimes involving moral turpitude, was actionable per se and did not require an allegation of special damages). Thus, common law malice and general damages are presumed. See Erickson, 368 S.C. at 465, 629 S.E.2d at 664. Moreover, there is no question that Roach was responsible for making the statement himself.

Additionally, Roach made the statement to a teacher's aide as she was showing Roach some items McBride had used in her classroom.[5] Both Roach and the teacher's aide were District employees. Therefore, one might conclude that Roach's statement was not published to a "third party," as is required to prove defamation. However, in South Carolina, an employee's statement to another employee is a "publication" when the privilege of the employees' common interest is abused. Bell, 208 S.C. at 493-94, 38 S.E.2d at 643. In Bell, our supreme court explained the privilege as follows:

> When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

[5] The circuit court ruled that the testimony of the teacher's aide regarding Roach's statement constituted inadmissible hearsay. However, the court did not strike this testimony. Therefore, it is a legitimate part of the record. See Scott v. Novich, 300 S.C. 334, 337, 387 S.E.2d 704, 706 (Ct. App. 1989) (holding that because counsel made no motion to strike the offending testimony from the record, the trial court did not err in admitting the testimony after sustaining counsel's objection on the ground of irrelevancy).

Id. at 493-94, 38 S.E.2d at 643 (emphasis added). In sum, communications between employees of an organization are qualifiedly privileged only if made in good faith and in the usual course of business. Murray, 344 S.C. at 140-41, 542 S.E.2d at 749.

During oral arguments, the District relied on our Supreme Court's opinion in Watson v. Wannamaker for the proposition that a defendant's statement to his secretary does not constitute sufficient publication for purposes of a defamation claim. 216 S.C. 295, 296-99, 57 S.E.2d 477, 477-78 (1950). However, Watson is distinguishable from the present case. In Watson, the defendant made the statements in question for the purpose of including them in a letter he was dictating to his secretary. 216 S.C. at 296-97, 57 S.E.2d at 477.

In any event, even if the privilege has not been abused, qualified privilege must be raised as an affirmative defense. See Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (classifying qualified privilege as an affirmative defense). Here, the District did not include this defense in its answer; therefore, it may not assert this privilege.

Turning to items 2 and 3, these are vague references to the local newscasts concerning McBride's arrest and are not specific enough to evaluate. In any event, the only statement in the local newscasts that was attributable to a District employee and specifically named McBride was the quotation from the superintendent stating his intention to recommend that McBride be terminated. This statement was a true statement. Therefore, the element of defamation that the statement be "false and defamatory" is missing. See Fleming, 350 S.C. at 494, 567 S.E.2d at 860 (requiring a showing that the statement in question is false and defamatory in order to prove defamation).

Item 4 rests on the assumption that the charges against McBride were, in fact, based on false information. However, assuming, arguendo, that Doe gave false information in his statements, those statements were not the only ones on which investigators relied in seeking warrants for McBride's arrest.

McBride's own statement, combined with the statements from some of Doe's teachers, guidance counselors, Chris Boehmke, and Mrs. Boehmke, provide sufficient probable cause for the charges against McBride.[6] See S.C. Code Ann. § 16-17-490 (2003) (defining the offense of contributing to the delinquency of a minor); S.C. Code Ann. § 16-17-510 (2003) (prohibiting the enticement of a child enrolled in elementary or secondary school away from required school attendance). Therefore, it cannot be said that the conduct of Roach and Oslager in procuring warrants for McBride's arrest constituted actionable defamation.

In sum, although there was insufficient evidence of the elements of defamation as to items 2, 3, and 4, McBride presented sufficient evidence to support her defamation claim as to item 1—Roach's allegation that she stole school property. Therefore, the circuit court erred in directing a verdict for the District on this cause of action.

II. Abuse of Process

A. Immunity

McBride asserts that the circuit court erred in concluding that a cause of action for abuse of process is barred by the Tort Claims Act, specifically S.C. Code Ann. § 15-78-60(17) (2005), which states: "The governmental entity is not liable for a loss resulting from . . . employee conduct outside the

[6] See Law v. S.C. Dep't of Corr., 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2006) (defining probable cause to make an arrest as "a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise.").

scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude[.]" (emphases added).[7] We agree.

The circuit court specifically concluded that it was "almost impossible" to bring abuse of process and malicious prosecution claims against the state and its political subdivisions "because . . . of the elements of the crime [sic] under the South Carolina [T]ort [C]laims [A]ct." However, a cause of action for abuse of process "contains neither an element of intent to harm, nor actual malice." Swicegood v. Lott, 379 S.C. 346, 352, 665 S.E.2d 211, 214 (Ct. App. 2008). "The tort of abuse of process consists of two elements: an ulterior purpose, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding." Id. at 351-52, 665 S.E.2d at 213.

Based on the foregoing, a cause of action for abuse of process is not barred by section 15-78-60(17) because of its elements. The elements of the tort of malicious prosecution will be discussed later in this opinion.

B. Merits of claim

McBride maintains that the circuit court should not have directed a verdict for the District on her abuse of process claim.[8] She argues that there was sufficient evidence of the District's involvement, through Roach, in the decision to arrest her for her claim to go to the jury. We agree.

To successfully maintain an abuse of process claim, the plaintiff must show an ulterior purpose and a willful act in the use of the process that is not

[7] Although the District cited in its answer several additional exceptions to the waiver of immunity under section 15-78-60, counsel raised only subsection 17 in its directed verdict motion and thus the circuit court addressed only that exception.

[8] In addition to concluding that the abuse of process claim was barred by the Tort Claims Act, the circuit court concluded that there was no evidence to find that the District instituted any process.

proper in the regular conduct of the proceeding. Swicegood, 379 S.C. at 351-52, 665 S.E.2d at 213. McBride points to evidence of her bad relationship with Roach and asserts that a jury could infer from this evidence Roach's desire to silence McBride and to ultimately obtain her dismissal from Berea High School. She also points to evidence of the close relationship between Roach and Oslager, who arrested McBride; Oslager's repeated telephone calls to Roach during his interrogation of Doe; and Doe's testimony indicating that Oslager pressured him to implicate McBride in illegal activity. McBride argues that from this evidence, the jury could infer that Oslager was working in concert with Roach to assist him in accomplishing the purpose of silencing McBride and that they were improperly using the legal process to do so.

We believe that more than one reasonable inference can be drawn from the evidence of telephone calls from Oslager to Roach during his interrogation of Doe. Granted, it is reasonable to assume that Oslager was telling the truth when he testified that he called Roach only to verify certain information Doe provided to him. However, it is equally reasonable to infer from this evidence, combined with Doe's testimony, that Roach provided information to Oslager in an attempt to elicit this information from Doe and use it against McBride. In reviewing the propriety of a directed verdict, neither the trial court nor this court has the authority to decide credibility issues or to resolve conflicts in the evidence. Parrish, 376 S.C. at 319, 656 S.E.2d at 388. Therefore, the circuit court should have allowed this cause of action to go to the jury.

III. Malicious Prosecution

A. Immunity

McBride contends that the circuit court erred in concluding that a cause of action for malicious prosecution is barred by section 15-78-60(17). We agree. The elements of malicious prosecution are (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting

injury or damage. Law, 368 S.C. at 435, 629 S.E.2d at 648. In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse." Eaves v. Broad River Elec. Coop., Inc., 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted). It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. Law, 368 S.C. at 437, 629 S.E.2d at 649.

> Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution.

Id. (emphases added).

Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution. Therefore, the circuit court erred in concluding that a cause of action for malicious prosecution is barred by section 15-78-60(17) because of its elements.

B. Merits of claim

McBride contends that there was sufficient evidence of the elements of malicious prosecution to withstand the District's directed verdict motion. We disagree.

As previously stated, the elements of malicious prosecution are (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. Law, 368 S.C. at 435, 629 S.E.2d at 648. Here, McBride has failed to show a lack of probable cause for pursuit of the charges against her.

> Probable cause means "the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered." In determining the existence of probable cause, the facts must be "regarded from the point of view of the party prosecuting; the question is not what the actual facts were, but what he honestly believed them to be." South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution. Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion.

Id. at 436, 629 S.E.2d at 649 (citations omitted) (emphasis added).

In McBride's case, the grand jury's true bill of the indictment against her for contributing to the delinquency of a minor is prima facie evidence of probable cause as to that charge. Further, the information in several witness

statements supports a finding that the sheriff's department had probable cause to pursue both the charge for contributing to the delinquency of a minor and the charge for enticing an enrolled child from attendance in school. Therefore, the circuit court properly directed a verdict for the District on McBride's malicious prosecution claim.

IV. False Imprisonment

McBride asserts that a directed verdict for the District on her claim for false imprisonment was inappropriate. We disagree.

> The essence of the tort of false imprisonment consists of depriving a person of his liberty without lawful justification. To prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful.
>
> The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise. Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion.

Law, 368 S.C. at 440-41, 629 S.E.2d at 651 (citations omitted).

Here, McBride has failed to show a lack of probable cause for her arrest. The information in several witness statements supports a finding that the sheriff's department had probable cause to arrest McBride for the offenses

of contributing to the delinquency of a minor and enticing an enrolled child from attendance in school. Further, an assistant solicitor testified that he believed there was probable cause to take the charges to a magistrate for the issuance of an arrest warrant. Based on the foregoing, the circuit court properly directed a verdict for the District on McBride's false imprisonment claim.

In view of our disposition of the foregoing issues, we need not address McBride's remaining arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that the appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Accordingly, we affirm the circuit court's directed verdict for the District as to the causes of action for malicious prosecution and false imprisonment. We reverse the directed verdict as to defamation and abuse of process and remand for a new trial on these causes of action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

PIEPER, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Karen B. Pruitt, Respondent,

v.

Raymond Scott Pruitt
and Karen Leigh Pruitt, Appellants.

Appeal From Darlington County
James A. Spruill, III, Family Court Judge

Opinion No. 4719
Heard June 22, 2010 – Filed August 4, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Kenneth E. Sowell, of Anderson, for Appellants.

H. Lee Herron, of Florence and John Leon Schurlknight, Greenville, for Respondent.

GEATHERS, J.: In this divorce action, Raymond Pruitt (Husband) and Karen Leigh Pruitt, Husband's sister (Sister) assign several errors to the family court's final decree, including the conclusions that Sister did not loan $40,000 to Husband and that the marital home was transmuted into marital property.[1] Husband also challenges the finding that his adultery was the sole reason for the breakup of his marriage to Karen B. Pruitt (Wife). We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

Wife filed this action in January 2007, seeking a divorce on the ground of adultery. Husband filed an answer admitting the adultery but alleging that Wife forgave him. In March 2007, the family court issued a consent order granting temporary alimony pending further order of the court. Wife then amended her complaint to add Sister as a party to the action because title to the marital home and title to the real estate associated with Husband's business were in Sister's name. Sister answered, alleging that she loaned Husband money over a period of several years and that Husband conveyed the disputed property to Sister at her request following his failure to repay her.

The family court granted Wife and Husband a divorce on the ground of one year of continuous separation. The family court also granted Wife a lump sum award representing 55 percent of the marital estate as well as attorney's fees in the amount of $10,000. The family court ordered Sister to execute a deed conveying to Husband the marital home and the real estate associated with his business. Husband and Sister then filed motions for reconsideration. The family court denied Sister's motion but granted Husband's motion in part, allowing him a credit for the temporary alimony paid to Wife after the month of December 2007.[2] This appeal followed.

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[1] For the sake of brevity only, we will refer to the home in which Husband and Wife lived as the marital home. This reference is not a conclusion that the home is marital property subject to equitable distribution.

[2] The family court had found in its initial order that Wife had sexual relations

ISSUES ON APPEAL

1. Did the family court properly find that Sister did not loan $40,000 to Husband?

2. Did the family court err in concluding that the marital home was transmuted into marital property?

3. Did the family court err in failing to consider the marital debts in determining the value of the marital estate?

4. Did the family court err in valuing the marital assets?

5. Did the family court err in concluding that Husband's adultery was the sole reason for the breakup of the marriage, thus entitling Wife to a greater percentage of the marital estate?

6. Did the family court err in failing to consider gifts from Husband's family when distributing the parties' household furnishings?

7. Did the family court err in refusing to deduct from Wife's equitable distribution award the full amount of temporary alimony she received from Husband because her adultery disqualified her from receiving alimony?

8. Did the family court err in awarding attorney's fees to Wife?

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with a former boyfriend in December 2007 and thus committed adultery.

STANDARD OF REVIEW

Findings

"In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence." Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005). However, this broad scope of review does not require the Court to disregard the family court's findings. Id. at 189-90, 612 S.E.2d at 711. "[W]here evidence is disputed, the appellate court may adhere to the findings of the trial judge, who saw and heard the witnesses. The trial judge was in a superior position to judge the witnesses' demeanor and veracity and, therefore, his findings should be given broad discretion." Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). Moreover, the Court's broad scope of review does not relieve the appellant of the burden of proving to this Court that the family court committed error. Nasser-Moghaddassi, 364 S.C. at 190, 612 S.E.2d at 711.

Division of Marital Property

"The division of marital property is within the sound discretion of the family court, and on appeal, it will not be disturbed absent an abuse of discretion." Simpson v. Simpson, 377 S.C. 527, 533, 660 S.E.2d 278, 282 (Ct. App. 2008). "An appellate court should approach an equitable division award with a presumption that the family court acted within its broad discretion." Dawkins v. Dawkins, 386 S.C. 169, 172, 687 S.E.2d 52, 54 (2010). The appellate court looks to the overall fairness of the apportionment. Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004). If the end result is equitable, the fact that the appellate court would have arrived at a different apportionment is irrelevant. Id.

Attorney's Fees

The decision to award attorney's fees is also within the family court's discretion and will not be disturbed absent an abuse of discretion. Simpson, 377 S.C. at 538, 660 S.E.2d at 284.

LAW/ANALYSIS

I. Loan

Husband and Sister challenge the family court's finding that Sister did not loan $40,000 to Husband. We affirm this finding.

Husband and Sister were questioned extensively on whether there was any written documentation supporting their claim that Sister loaned Husband large sums of money to support his business and to fund improvements to the marital home. Neither Husband nor Sister could point to any documentation of the alleged loans, and Wife testified that Husband never told her about any loans from Sister. The family court noted with suspicion the claim that the alleged loans were made in cash. It also cited Husband's history of conveying title to the marital home to another family member—his mother—during previous marital discord as an indication that his conveyance to Sister was, in fact, a further attempt to keep the home out of the marital estate. Moreover, no provision was put in place for Husband to redeem the property.

Husband has not carried his burden of convincing this Court that the family court erred in regarding the alleged loan as a fiction. Hence, we defer to the family court's assessment of witness credibility on this issue. See Woodall, 322 S.C. at 10, 471 S.E.2d at 157 ("The trial judge was in a superior position to judge the witnesses' demeanor and veracity and, therefore, his findings should be given broad discretion.").

II. Transmutation

Husband argues that the family court erred in characterizing the marital home as marital property. We agree; however, we remand the case to the family court for a determination of Wife's entitlement, if any, to an equitable interest in the home's increase in value.

"Identification of marital property is controlled by the provisions of the Equitable Apportionment of Marital Property Act" (the Act). Johnson v. Johnson, 296 S.C. 289, 294, 372 S.E.2d 107, 110 (Ct. App. 1988). The Act defines marital property as all real and personal property acquired by the parties during the marriage that is owned as of the date of filing or commencement of marital litigation, regardless of how legal title is held. S.C. Code Ann. § 20-3-630(A) (Supp. 2009). Under the Act, property acquired by either party before the marriage is nonmarital property. Id. § 20-3-630(A)(2).

"The spouse claiming an equitable interest in property upon dissolution of the marriage has the burden of proving the property is part of the marital estate." Johnson, 296 S.C. at 294, 372 S.E.2d at 110. If a spouse carries this burden, a prima facie case is established that the property is marital property. Id. If the opposing spouse then wishes to claim that the property is not part of the marital estate, that spouse has the burden of presenting evidence to establish its nonmarital character. Id. (citing Miller v. Miller, 293 S.C. 69, 71 n.2, 358 S.E.2d 710, 711 n.2 (1987)). If the opposing spouse can show that the property was acquired before the marriage or falls within a statutory exception, this rebuts the prima facie case for its inclusion in the marital estate. Johnson, 296 S.C. at 295, 372 S.E.2d at 110.

Even if property is nonmarital, it may be transmuted into marital property during the marriage. Id. Transmutation occurs if the property is utilized in support of the marriage or in such a manner as to evidence an intent to make it marital property. Canady v. Canady, 296 S.C. 521, 523-24, 374 S.E.2d 502, 503 (Ct. App. 1988). Transmutation is a matter of intent to

be gleaned from the facts of each case, and the spouse claiming transmutation "must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Johnson, 296 S.C. at 295, 372 S.E.2d at 110-11.

Evidence of intent to transmute nonmarital property may include using the property exclusively for marital purposes or using marital funds to build equity in the property. Id. at 295, 372 S.E.2d at 111. However, "[t]he mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." Id. at 295-96, 372 S.E.2d at 111.

Here, Husband testified that he started clearing the lot on which he built the marital home in 1979 and began construction of the home in 1983. Husband's mother, Dorothy Pruitt (Mother), testified that Husband started building the marital home on land owned by his grandmother, but that it was not completed when Husband married Wife in 1988. Wife's sister also testified that the home was not completed when Wife moved into it, and that Wife helped Husband complete the construction. However, Mother admitted that the couple were able to live in the home when they first married, as it had a bedroom, a kitchen, a bathroom, and a living room.

Mother also testified that she inherited the land on which Husband built the home when Husband's grandmother died and that she later conveyed the land to Husband after he married Wife.[3] Sister also testified that Husband's grandmother originally owned the land on which the marital home sits and that Mother inherited the property and later conveyed it to Husband. Husband conveyed the property back to Mother when he suspected Wife was

[3] Even though Mother's conveyance of land to Husband occurred after he married Wife, property acquired by either party by gift from a party other than the spouse is nonmarital property. S.C. Code Ann. § 20-3-630(A)(1) (Supp. 2009); see also Smith v. Smith, 294 S.C. 194, 199, 363 S.E.2d 404, 407 (Ct. App. 1987) ("[G]ifts made by a third party to one spouse alone . . . do not ordinarily constitute marital property and therefore should not be included in the marital estate.").

having an affair in 1995, but Mother reconveyed the property to Husband a few months later. In May 2006, Husband conveyed the property to Sister.

As to Wife's contributions to the marital home's improvements, Mother testified that Wife helped with installing fans and adding a carport and another bedroom to the home. Wife testified that she helped to hang siding, replace the kitchen floor, install glass in the sunroom, paint and install flooring in the master bedroom, and build a carport. However, she also testified that she did not know where the money to pay for the materials came from and that Husband "always seemed to have cash on him." Notably, Husband denied that the cash used to pay for the improvements came from marital funds but rather claimed that the cash came from Sister (see Issue I discussed above). In any event, Wife did not carry her burden of showing that the improvements to the home were paid for with marital funds.

Based on the foregoing, Wife failed to carry her burden of producing objective evidence showing that Husband regarded the home as the common property of the marriage, which is essential for a transmutation claim. This case is similar to Murray v. Murray, 312 S.C. 154, 157-58, 439 S.E.2d 312, 315 (Ct. App. 1993). In Murray, the parties had lived in the marital home for the duration of their seventeen-year marriage, and wife had worked on improvements to the marital home during that time. Id. This Court stated the following:

> The parties lived in the marital home for the duration of the marriage. Although this was Mrs. Murray's home for over seventeen years, the mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation.
>
> Mrs. Murray contends her contributions of labor and time to the improvement and maintenance of the marital home and rental properties are

> evidence that the parties considered the properties were marital property [sic]. While improvements made by a spouse to nonmarital property may result in the spouse's receiving an equitable interest in the property, contributions of time and labor do not necessarily prove transmutation. In this case, Mr. Murray paid for all of the properties prior to marriage. Mrs. Murray failed to produce evidence that any appreciable amount of marital funds was expended on improvement of the properties.

Id. (citations omitted). Here, similar to the wife in Murray, Wife lived in and worked on improvements to the marital home during her nineteen-year marriage to Husband. However, the record does not reflect that marital funds paid for the materials used to improve the home.

Further, there is nothing in the record to show the value of Wife's contributions or how those contributions affected the value of the home. Section 20-3-630(A)(5) of the South Carolina Code (Supp. 2009) allows a spouse a special equity in the increase in value of nonmarital property when the spouse contributes directly or indirectly to the increase. On more than one occasion, South Carolina appellate courts have remanded a case to the family court with instructions to determine the value of a spouse's contributions to the increase in value of nonmarital property. See Anderson v. Anderson, 282 S.C. 162, 164, 318 S.E.2d 566, 567 (1984) ("On remand, the court shall make factual findings regarding the parties' relative contributions to the improvements."); Craig v. Craig, 358 S.C. 548, 559-60, 595 S.E.2d 837, 844 (Ct. App. 2004) ("We remand this issue to the trial court to properly consider the full extent of Wife's contributions, the full amount of marital funds employed, and any increase in the value of the property resulting directly from the contributions of Wife."); Webber v. Webber, 285 S.C. 425, 428, 330 S.E.2d 79, 81 (Ct. App. 1985) ("[W]e remand for a determination of the extent of Mrs. Webber's contribution to the renovation."). Therefore, we remand this case to the family court to

determine any appreciation of the marital home's value resulting from Wife's contributions and to reapportion the marital estate.

III. Marital Debts

Husband contends that the family court failed to consider all of the marital debts in determining the net value of the marital estate. We agree as to three particular debts but disagree as to remaining debts listed by Husband. The $35,000 loan balance on Husband's truck, the $1,092 debt to the IRS, and the $356 debt to Husband's accountant should have been deducted from the value assigned to the marital estate because they were supported by the evidence as legitimate business debts.

"Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution." Wooten v. Wooten, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005). Section 20-3-620 of the South Carolina Code (Supp. 2009) creates a rebuttable presumption that a debt of either spouse incurred prior to marital litigation is a marital debt and must be factored in the totality of equitable apportionment. Id. Section 20-3-620 states, in pertinent part, the following:

> (B) In making [a final equitable] apportionment [of the parties' marital property], the court must give weight in such proportion as it finds appropriate to all of the following factors:
>
> . . .
>
> (13) liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage[.]

S.C. Code Ann. § 20-3-620(B)(13) (Supp. 2009) (emphasis added).

"For purposes of equitable distribution, 'marital debt' is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable." Hardy v. Hardy, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993). "In the equitable division of a marital estate, the estate which is to be equitably divided by the family court judge is the net estate, i.e., provision for the payment of marital debts must be apportioned as well as the apportionment of property itself." Id. at 437, 429 S.E.2d at 813. "[B]asically the same rules of fairness and equity [that] apply to the equitable division of marital property also apply to the division of marital debts." Id. at 437, 429 S.E.2d at 814.

When the debt is incurred before marital litigation begins, the burden of proving a spouse's debt is non-marital rests on the party making that assertion. Wooten, 364 S.C. at 547, 615 S.E.2d at 105. When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for the joint benefit of the parties during the marriage. Id. Under these circumstances, the burden of proving the debt is marital rests on the party making that assertion. Id.

If the family court finds that a spouse's debt was not made for marital purposes, it need not be factored in the court's equitable apportionment of the marital estate and the family court may require payment by the spouse who created the debt for non-marital purposes. Hardy, at 437, 429 S.E.2d at 814. "[T]he words 'in such proportion as it finds appropriate,' as used in section [20-3-620] accord much discretion to the trial judge in providing for the payment of marital debts as a consideration in the equitable division of the marital estate." Id.

Here, the only debts that the family court addressed in its initial order were the alleged loan from Sister, which it rejected, the parties' medical bills, and the Dixie Federal Line of Credit. In its order on Husband's motion for

reconsideration, the family court generally addressed the debts listed in Husband's motion. The court indicated that, with the exception of those debts already deducted from the marital assets, the debts listed in Husband's motion did not qualify as debts incurred for the joint benefit of the parties.[4]

Some of the debts Husband contends were overlooked by the family court are debts of his business, Scott's Collision Center. The value the family court assigned to the business was based on the entry of "Total Assets" in the business' 2006 federal corporate income tax return. However, the debts of the business were not reflected in that entry and thus the entry was not an accurate indicator of the net value of the business. A tax worksheet drafted by Husband's accountant while preparing the business' 2006 tax return lists business assets and includes a 2006 Chevrolet truck valued at $39,704. Husband testified that he owed $35,000 on the truck.

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[4] The order on the motion for reconsideration states:

> The debts the Defendant now contends were omitted in paragraph 12 of his motion make no sense at all. The Court does not recall the testimony with respect to them at the trial. However, the substantial ones are for the purchase of assets no part of which are reflected in the division of the property nor do they appear on the schedule attached to the motion as assets of the business. Eq. [sic] Software, trailer, truck. Nor did the tax return show any interest paid by the business. If that money is in fact owed, it would be owed by the business and those assets which were bought would surely have showed [sic] on the schedule of business assets attached to the motion as it seems would [sic] have been accounts receivable and inventory. The motion exhibit is not convincing of any mistake in the order.

Husband also testified about the following debts that were listed in his financial declaration and motion for reconsideration and documented in Defendant's Exhibit 16: Webster Rogers accounting firm ($356) and IRS ($1,092). These are well-documented business debts that should have been deducted from the value of the marital assets.

Turning to Husband's testimony about money he owed his paramour for her purchase of home furnishings for him, he admits that this "debt" was incurred after the filing of marital litigation. However, he contends that the debt should be deducted from the marital assets because Wife took all of the furnishings from the marital home when she vacated it and this alleged wrongdoing required Husband to purchase new furnishings with the financial assistance of his paramour. The family court acted well within its discretion in disregarding the debt to this particular "creditor," as it was not incurred for the joint benefit of both parties. In fact, it was an expenditure naturally associated with the parties going their separate ways.

Regarding the alleged debts listed by Husband that were not adequately explained by his testimony at trial, we defer to the family court's finding that these debts do not qualify as debts incurred for the joint benefit of the parties. See Woodall, 322 S.C. at 10, 471 S.E.2d at 157 (holding that because the family court was in a superior position to judge the witnesses' demeanor and veracity, its findings should be given broad deference).

IV. Valuation of marital assets

Husband challenges the family court's valuation of the parties' assets. We agree as to certain assets that were counted twice in the family court's list of marital assets but disagree with Husband's remaining assertions on asset valuation.

Initially, Wife argues that Husband did not preserve this issue for appeal as to the values for the real estate because Husband agreed to these values at trial. We agree. In fact, Husband indicates in his brief that he

submitted Joint Exhibit 1, which is an appraisal of the parties' marital home and the land and buildings for Husband's business. However, Husband asserts that the costs of converting the marital real estate to cash should have been deducted from the values assigned to these properties so that Husband would have liquid funds to pay to Wife for her share of the marital estate, as ordered by the family court. Specifically, Husband argues that he is entitled to a deduction for the realty commissions and any necessary loan costs.[5] We disagree. Because the family court's order does not contemplate the sale of either the marital home or the real property associated with Husband's business, it would be inappropriate to deduct any estimated costs of converting the real estate to cash. Cf. Bowers v. Bowers, 349 S.C. 85, 97-98, 561 S.E.2d 610, 617 (Ct. App. 2002) (holding that when an order of equitable apportionment does not contemplate the liquidation or sale of an asset, it is an abuse of discretion for the court to consider the tax consequences from a supposed sale or liquidation).

Concerning the personal property, Husband argues that two vehicles—the Chevy Sierra and the 2000 Chevy Van—should not have been included in the marital estate because he did not own them at the time that marital litigation was filed. We disagree. Husband testified that he did not sell the Chevy Sierra until two months prior to trial, after marital litigation was filed. Further, the record does not reflect the date when Husband purchased the Chevy Sierra. Moreover, the testimony does not support Husband's assertion that he did not own the Chevy Van when marital litigation was filed. Husband's testimony does not address the length of his ownership of the vehicle. Husband simply testified that he owned it, that he purchased it for $500, and that it was worth $2,500 after he made repairs to it. Therefore, Husband has not carried his burden of convincing this Court that the family court erred by including these assets in the marital estate. See Duckett by

[5] Husband's request for a deduction for loan costs was raised for the first time in his reply brief. Therefore, the Court may not consider this argument. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

Duckett v. Payne, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this Court that the trial court erred.").

As to the assets that were counted twice, the asset schedule for the 2006 corporate tax return shows that the value of the GMC Sierra had already been included in the value of Husband's business, which was added as item 3 in the family court's list of marital assets. Husband's proposed list of marital assets in his brief omits the value assigned to the business, which the family court took from the "Total Assets" entry on Husband's tax return, and instead lists certain business assets individually. This approach is justified in part because certain business assets accounted for in item 3 of the family court's list also had individual entries in the same list and thus the following assets were counted twice: GMC Sierra (items 3 and 12 in the family court's list) and the business' buildings (items 2 and 3).

Husband also asserts that the family court assigned inaccurate values to the parties' Darlington County bank account, their savings bonds and their boat. However, he does not explain why he believes these values are incorrect. Therefore, he has abandoned this argument as to these assets. See Glasscock, 348 S.C. at 81, 557 S.E.2d at 691 ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Husband also argues that the drag racers housed at his business should not have been included in the marital estate because he did not own them. Husband contested his ownership of these vehicles at trial, and the family court did not find him to be credible on this issue. We defer to the family court's determination of credibility on this issue. See Woodall, 322 S.C. at 10, 471 S.E.2d at 157 (requiring broad deference to be given to the family court's findings because the family court was in a superior position to judge the witnesses' demeanor and veracity).

V. Husband's Adultery

Husband argues that the family court erred in finding that his adultery was the sole reason for the breakup of the marriage and thus Wife was entitled to a greater percentage of the marital assets. We disagree.

The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Morris v. Morris, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999). "Upon dissolution of the marriage, marital property should be divided and distributed in a manner [that] fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." Id. The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership. Johnson, 296 S.C. at 298, 372 S.E.2d at 112. Section 20-3-620(B) of the South Carolina Code (Supp. 2009) provides that the family court must consider fifteen factors in apportioning the marital estate and give each factor its proper weight.[6] These criteria are intended to guide the family

[6] Section 20-3-620 lists the fifteen factors the family court must consider as: (1) the duration of the marriage along with the ages of the parties at the time of the marriage and at the time of the divorce; (2) marital misconduct or fault of either or both parties, if the misconduct affects or has affected the economic circumstances of the parties or contributed to the breakup of the marriage; (3) the value of the marital property and the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) either spouse's need for additional training or education in order to achieve that spouse's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of

court in exercising its discretion over apportionment of marital property. Johnson, 296 S.C. at 297-98, 372 S.E.2d at 112. The family court has the discretion to decide what weight to assign various factors. Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002). The factors were meant to provide merely guidance in reaching a fair distribution of marital property. Johnson, 296 S.C. at 297-98, 372 S.E.2d at 112. On review, this Court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact that this Court might have weighed specific factors differently than the family court is irrelevant. Johnson, 296 S.C. at 300, 372 S.E.2d at 113.

Here, to the extent that the family court considered marital fault in the division of marital assets, the record supports the family court's findings that Husband's adultery caused the breakup of the marriage and that Wife's adultery did not occur until December 2007, after Wife filed the complaint and the parties had separated. Husband admitted that he committed adultery, and Wife testified that Husband refused to give up his relationship with his paramour after she requested him to do so.

Further, the family court indicated in its order that it based the division of assets on several factors, including the following: marital fault; Wife's indirect contributions to the marriage; the fact that Wife did not have any significant nonmarital assets; and Wife's limited income, earning capacity, and opportunity to acquire other property. Therefore, the family court's division of property was not based solely on marital fault. In any event, we believe that the family court's emphasis on the foregoing factors was appropriate.

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awarding the family home as part of equitable distribution or the right to live in it for reasonable periods to the spouse having custody of any children; (11) the tax consequences to either party as a result of equitable apportionment; (12) the existence and extent of any prior support obligations; (13) liens and any other encumbrances on the marital property and any other existing debts; (14) child custody arrangements and obligations at the time of the entry of the order; and (15) any other relevant factors that the family court expressly enumerates in its order. S.C. Code § 20-3-620(B) (Supp. 2009).

Nonetheless, because we are reversing the family court's conclusion that the marital home was transmuted and remanding the case for a determination of any special equity Wife may have in the marital home's improvements, reconsideration of the division of the marital estate is in order.

VI. Gifts from Husband's Family

Husband contends that the family court erred in neglecting to order Wife to return those household items given to Husband as gifts from members of his family. Wife concedes in her brief that she should return any household items given to Husband by members of his family, but argues that he should have to provide "sufficient evidence" that the specific items claimed are in fact gifts to him from his family. We remand this issue to the family court with instructions to unconditionally order Wife to return to Husband all household items given to him by members of his family. Should the parties disagree on which items should be returned, Husband has the option of presenting evidence of ownership in proceedings to enforce the order.

VII. Temporary Alimony

Husband asserts that the family court should have given him credit for all of the temporary alimony paid to Wife because her adultery barred her from receiving alimony pursuant to S.C. Code Ann. § 20-3-130 (Supp. 2009). We disagree.

In his motion for reconsideration, Husband sought a credit for the temporary alimony paid to Wife on the ground that the family court found in its initial order that Wife had committed adultery during the pendency of this action. The family court granted Husband's motion, but only to the extent that Wife was barred from receiving alimony prospectively. Because the family court found that Wife did not commit adultery until December 2007, it granted Husband a credit only for alimony paid after December 2007.

Section 20-3-130(A) states:

> No alimony may be awarded a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties.

S.C. Code Ann. § 20-3-130(A) (Supp. 2009). In other words, section 20-3-130(A) allows alimony to a spouse only if his or her adultery post-dates the "formal signing of a written property or marital settlement agreement;" the entry of a "permanent order of separate maintenance and support;" or the entry of a "permanent order approving a property or marital settlement agreement between the parties."

Here, there exists no written property or marital settlement agreement. Rather, the parties merely placed on the record an oral agreement regarding temporary relief, and the family court incorporated the oral agreement into its consent order granting temporary relief. Further, there exists neither a permanent order of separate maintenance and support nor a permanent order approving a property or marital settlement agreement between the parties. Hence, Wife's adultery cannot be said to have post-dated any of the qualifying events listed in section 20-3-130(A). Therefore, she was barred from receiving alimony. The dispute lies in determining whether the bar is retroactive to the first temporary alimony payment, which was made by Husband before Wife committed adultery, or merely to the first payment to occur after Wife's adultery.

Prior to 1990, the statute's bar for an adulterous spouse from receiving alimony was absolute. In 1990, the legislature amended section 20-3-130 to add the language regarding the commission of adultery before one of two events. Act No. 518, 1990 S.C. Acts 2255. South Carolina jurisprudence

pre-dating the current version of the alimony statute remain instructive in determining an appropriate disposition in the present case. In Morris v. Morris, our Supreme Court terminated alimony retroactively merely to the date of the divorce decree rather than to the very first alimony payment. 295 S.C. 37, 41, 367 S.E.2d 24, 26 (1988). However, unlike the Supreme Court's approach in Morris, in Watson v. Watson, this Court required a credit against the wife's equitable distribution award for all alimony paid because the wife's adultery pre-dated the temporary alimony award. 291 S.C. 13, 22-24, 351 S.E.2d 883, 889-90 (Ct. App. 1986). Morris is distinguishable from Watson in that the wife in Morris did not commit adultery until after a decree of separate maintenance was filed. 295 S.C. at 40-41, 367 S.E.2d at 26. Notably, that decree was a permanent decree in the wife's action for separate maintenance and support and pre-dated Husband's divorce action. Morris, 295 S.C. at 40, 367 S.E.2d at 25.

Based on the foregoing, we believe that the family court acted within its discretion in allowing Husband a credit for temporary alimony payments made after Wife's act of adultery in December 2007.

VIII. Attorney's Fees

Husband argues that the family court abused its discretion in awarding attorney's fees in the amount of $10,000 to Wife. Because we remand the case on the property division issues discussed above, the family court must reconsider attorney's fees in light of this Court's opinion. See Sexton v. Sexton, 310 S.C. 501, 503-04, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney's fees for reconsideration when the substantive results achieved by trial counsel were reversed on appeal).

CONCLUSION

We affirm the family court's findings that Sister did not loan $40,000 to Husband and that Husband's adultery was the sole reason for the breakup of the marriage. We also affirm the family court's ruling that Husband receive a credit for temporary alimony paid after December 2007. We reverse the conclusion that the marital home was transmuted into marital property but remand for a determination of any special equity Wife may have in the marital home's improvements and reconsideration of the division of the marital estate and the attorney's fees award.

We direct the family court to correct the list of marital assets so that the GMC Sierra and the buildings of the Husband's business are no longer counted twice. We further direct the family court to deduct the following debts from the value assigned to the marital estate: (1) the $35,000 loan balance on Husband's truck; (2) the $1,092 debt to the IRS; and (3) the $356 debt to Husband's accountant. Finally, we direct the family court to order Wife to return to Husband all household items that were gifts from members of his family.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

CURETON and GOOLSBY, A.JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bruce L. McGee, Respondent,

v.

South Carolina Department of Motor Vehicles, Appellant.

Appeal From Administrative Law Court
Paige J. Gossett, Administrative Law Court Judge

Opinion No. 4720
Heard April 14, 2010 – Filed August 4, 2010

REVERSED

Frank L. Valenta, Jr., Philip S. Porter, and Linda A. Grice, S.C. Department of Motor Vehicles, of Blythewood, for Appellant.

D. Malloy McEachin, Jr., of Florence, for Respondent.

INTRODUCTION

WILLIAMS, J.: The South Carolina Department of Motor Vehicles (the Department) appeals the decision of the Administrative Law Court (the ALC). The Department contends the ALC erred in reversing Bruce McGee's (McGee) suspension under section 56-10-530 of the South Carolina Code. We reverse.

FACTS

On March 14, 2007, Michael Jackson (Jackson) operated an uninsured 1968 Chevrolet truck (the truck) with a 2007 South Carolina registered license plate. The truck was involved in an accident at the intersection of U.S. Hwy 52 and S-21-488 in or near Lake City, South Carolina. McGee, the owner of the truck, was in Las Vegas, Nevada, at the time of the accident. Jackson's insurance carrier settled all claims of property damage and bodily injury.

On September 24, 2007, the Department sent McGee a Notice of Suspension of his driving and registration privileges pursuant to section 56-10-530 of the South Carolina Code (Supp. 2009).[1] McGee requested a hearing with the Office of Motor Vehicle Hearings to contest his suspension.

At the hearing, McGee testified Jackson was unauthorized to operate the truck, and he was unaware that Jackson was going to drive the truck. McGee also claimed he was going to use the truck for replacement parts because it was inoperable. Jackson substantiated McGee's testimony when he admitted he was not authorized to operate the truck. The hearing officer

[1] Section 56-10-530 authorizes the Department to suspend an owner's driver's license and all of his license plates and registration certificates if the Department's records reflect that the owner's uninsured motor vehicle is involved in a reportable accident resulting in death, injury, or property damage and the uninsured motor vehicle fee is not paid.

found McGee was unable to produce liability insurance coverage on the truck on the date of the accident, and the truck was not registered pursuant to section 56-10-510 of the South Carolina Code (Supp. 2009).[2] Consequently, the hearing officer concluded McGee's suspension should be enforced.

McGee subsequently appealed to the ALC. In reversing the decision of the Office of Motor Vehicle Hearings, the ALC found McGee did not operate or permit Jackson to operate the truck. The ALC concluded the plain language of section 56-10-510 does not apply to owners who do not operate their vehicle nor give permission to others to operate their vehicle. Thus, the ALC held McGee's suspension was not warranted pursuant to section 56-10-530. This appeal followed.

STANDARD OF REVIEW

This court's scope of review for appeals from the ALC is set forth in section 1-23-610(B) of the South Carolina Code (Supp. 2009). That section provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;

[2] Section 56-10-510 provides at the time of registration or reregistration an uninsured motor vehicle, every person must pay an uninsured motor vehicle fee of $550.

(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

LAW/ANALYSIS

The Department contends the ALC erred in failing to uphold McGee's suspension pursuant to section 56-10-530. We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The court will give words their plain and ordinary meaning and will not resort to a subtle or forced construction that would limit or expand the statute's operation. Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, 310-311, 649 S.E.2d 28, 30 (2007) (citation omitted). In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Section 56-10-530 provides in pertinent part:

> When it appears to the director from the records of his office that an uninsured motor vehicle as defined in Section 56-9-20, subject to registration in the

> State, is involved in a reportable accident in the State resulting in death, injury, or property damage with respect to which motor vehicle the owner thereof has not paid the uninsured motor vehicle fee as prescribed in Section 56-10-510, the director shall, in addition to enforcing the applicable provisions of Section 56-10-10, et seq. of this chapter, suspend such owner's driver's license and all of his license plates and registration certificates until such person has complied with those provisions of law and has paid to the director of the Department of Motor Vehicles a reinstatement fee as provided by Section 56-10-510, to be disposed of as provided by Section 56-10-550, with respect to the motor vehicle involved in the accident and furnishes proof of future financial responsibility in the manner prescribed in Section 56-9-350, et seq. However, no order of suspension required by this section must become effective until the director has offered the person an opportunity for a contested case hearing before the Office of Motor Vehicle Hearings to show cause why the order should not be enforced. Notice of the opportunity for a contested case hearing must be included in the order of suspension. Notice of such suspension shall be made in the form provided for in Section 56-1-465.

The Department's records reflect McGee's truck was a registered and plated uninsured motor vehicle that was involved in an accident resulting in property damage. However, McGee argues he did not intend to operate or permit operation of the truck; and, therefore the uninsured motor vehicle fee statute is not applicable.

Section 56-10-510 states, in pertinent part:

> In addition to any other fees prescribed by law, every person registering an uninsured motor vehicle, as defined in Section 56-9-20, at the time of registering or reregistering the uninsured vehicle, shall pay a fee of five hundred and fifty dollars. . . .The application for registering an uninsured vehicle must have the following statements printed on or attached to the first page of the form, boldface, twelve point type: "THIS $550 FEE IS NOT AN INSURANCE PREMIUM AND YOU ARE NOT PURCHASING ANY INSURANCE BY PAYING THIS FEE. THIS $550 UNINSURED MOTORIST FEE IS FOR THE PRIVILEGE TO DRIVE AND OPERATE AN UNINSURED MOTOR VEHICLE ON THE SOUTH CAROLINA ROADS."
>
> (emphasis in original).

Section 56-10-510 suggests the uninsured motor vehicle fee only applies to an owner who operates an uninsured motor vehicle on South Carolina roads. However, we conclude a plain reading of the statute would effectuate an absurd result because this State requires either insurance coverage or payment of the uninsured motor vehicle fee for all registered motor vehicles.

In Shores v. Weaver, 315 S.C. 347, 352, 433 S.E.2d 913, 915 (Ct. App. 1993) this court stated, "[The General Assembly] decided that all vehicles registered and licensed in this State must be insured to the minimal coverage and limits required by the Motor Vehicle Financial Responsibility Act."[3] Thus, under Shores, South Carolina required mandatory liability insurance for registered and licensed motor vehicles.

[3] Shores was superseded by statute as stated in Cowan, 351 S.C. 626, 571 S.E.2d 715 (Ct. App. 2002).

In Cowan v. Allstate Ins. Co., 351 S.C. 626, 632-33, 571 S.E.2d 715, 718 (Ct. App. 2002), this court found section 56-10-510 superseded Shores. As a result, South Carolina is no longer a mandatory insurance state because section 56-10-510 allows a person to pay an uninsured motor vehicle fee when registering with the Department of Motor Vehicles.[4]

McGee's argument would discourage similarly-situated individuals from obtaining liability insurance or paying the uninsured motor vehicle fee while simultaneously owning a registered and plated uninsured motor vehicle. We believe this result contravenes legislative intent because South Carolina requires liability insurance, or in the alternative, payment of the uninsured motor vehicle fee for a registered motor vehicle. See S.C. Code Ann. § 56-10-10 (2006) (stating every owner of a motor vehicle required to be registered in this State shall maintain the security required by Section 56-10-20 throughout the effective registration period); S.C. Code Ann. § 56-10-20 (2006) (generally stating the security under this chapter must be for at least the minimum coverages and the director may approve and accept another form of security in lieu of such a liability insurance policy if he finds that such other form of security is adequate to provide and does in fact provide the benefits required by this chapter); S.C. Code Ann. § 56-10-510 (stating every person registering or reregistering an uninsured motor vehicle shall pay an uninsured motor vehicle fee of five hundred and fifty dollars). Moreover, pursuant to section 56-10-240(A) of the South Carolina Code (Supp. 2006) McGee was obligated to surrender his license plate and registration to the Department after the truck became uninsured. See S.C. Code Ann. § 56-10-240(A) (stating a motor vehicle owner shall immediately obtain insurance or surrender his license plate and registration certificate within five days after the effective date of cancellation or expiration of

[4] Our Supreme Court subsequently reversed the Court of Appeals' decision in Cowan and concluded section 38-77-142(B) did not impact the holding of Shores. See Cowan v. Allstate Ins. Co., 357 S.C. 625, 594 S.E.2d 275 (2004). Despite our Supreme Court's reversal, the Court of Appeals' statement regarding the transformation of South Carolina from a mandatory insurance state to a non-mandatory insurance state is a correct pronouncement of the law.

liability insurance if the motor vehicle is or becomes an uninsured motor vehicle during the period for which it is licensed).

Therefore, we conclude an owner who fails to pay the uninsured motor vehicle fee while maintaining a registered and licensed uninsured motor vehicle is subject to suspension pursuant to section 56-10-530.

CONCLUSION

Accordingly, the Administrative law court's decision is

REVERSED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clarence Rutland, as Personal Representative for the Estate of Tiffanie Rutland, Appellant,

v.

South Carolina Department of Transportation, Respondent.

Appeal From Orangeburg County
George C. James, Circuit Court Judge

Opinion No. 4721
Heard May 18, 2010 – Filed August 4, 2010

AFFIRMED

J. Christopher Wilson, of Bamberg; Lee D. Cope, R. Alexander Murdaugh, Matthew V. Creech, of Hampton, for Appellant.

Richard B. Ness and Norma A. T. Jett, of Bamberg, for Respondent.

WILLIAMS, J.: Clarence Rutland (Rutland), as personal representative of the Estate of Tiffanie Rutland, appeals the trial court's decision granting the South Carolina Department of Transportation's (SCDOT) post-trial motion for set-off, which subsequently reduced the verdict against SCDOT to zero. We affirm.

FACTS

On June 7, 2003, Tiffanie Rutland (the decedent) was a passenger in a 1999 Chevrolet S-10 Blazer (the Blazer) on Highway 301 in Orangeburg County along with her husband, Rutland, her son, and Rutland's aunt. Rutland's uncle, Joseph Bishop (Bishop), was driving the Blazer. While traveling on Highway 301, Bishop encountered a heavy rain storm and reduced his speed to approximately 45-50 miles per hour. However, Bishop subsequently lost control of the Blazer when it hydroplaned. The Blazer overturned in a nearby ditch. The decedent sustained fatal injuries after she was partially ejected from the Blazer's side window.

Rutland received a $30,000 settlement from Bishop's automobile insurance policy. On February 2, 2005, Rutland filed a wrongful death action against SCDOT. On May 8, 2006, Rutland amended his complaint and added REA Construction Company[1] and General Motors (GM) as defendants to the wrongful death action.

Prior to the trial against SCDOT, GM and Rutland reached a settlement agreement. The settlement agreement totaled $275,000, of which GM agreed to allocate $137,500 to the wrongful death claim and $137,500 to the survival claim. The trial court approved the settlement agreement (the settlement trial court) on August 9, 2007, and allocated $167,000 ($29,500 from Bishop's automobile policy and $137,500 from the GM settlement) to the wrongful death claim and $138,000 to a survival claim.[2] The Bishop and GM settlements totaled $305,000.

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[1] REA Construction Company was voluntarily dismissed prior to trial.

[2] The settlement trial court's order states, "Petitioner did not allege a survival action. Nevertheless, the Petitioner's settlement with [GM] includes

In the trial against SCDOT, the jury awarded Rutland a $300,000 verdict in actual damages for the decedent's wrongful death. SCDOT subsequently filed a motion to set-off the proceeds of the Bishop and GM settlements. Rutland filed a motion for a new trial absolute, new trial on damages only, or in the alternative for a new trial nisi additur.

The trial court that heard the case against SCDOT (the SCDOT trial court) issued an order approving SCDOT's motion for set-off, reduced the verdict against SCDOT to zero, and denied Rutland's new trial motions. Rutland subsequently filed a motion for reconsideration of the SCDOT's trial court order. In the SCDOT trial court's final order, the trial court denied Rutland's new trial motions and clarified its set-off ruling. The SCDOT trial court concluded the settlement agreement should be reallocated based on the insufficiency of the evidence to support a survival claim. This appeal followed.

STANDARD OF REVIEW

The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000). A set-off is not necessarily founded upon any statute or fixed rule of court but grows out of the inherent equitable jurisdiction of the court. Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 376, 71 S.E. 992, 995 (1911). Therefore, a motion for set-off is addressed to the discretion of the court, and this discretion should not be arbitrarily or capriciously exercised. Id.

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settlement of all alleged and unalleged claims, including Petitioner's wrongful death claim and any potential survival claim."

LAW/ANALYSIS

A. Survival Action

Rutland contends the SCDOT trial court erred in granting SCDOT's motion for set-off because there is sufficient evidence to support a survival claim.[3] We disagree.

The test of a survival action in South Carolina is whether the decedent suffered conscious pain and suffering. Camp v. Petroleum Carrier Corp., 204 S.C. 133, 139, 28 S.E.2d 683, 685 (1944). South Carolina case law provides illustrative examples of when a survival action has evidentiary support of conscious pain and suffering.

In Ward v. Epting, 290 S.C. 547, 560, 351 S.E.2d 867, 875 (Ct. App. 1986), this court found testimony that the decedent's response to directions in the recovery room following surgery constituted sufficient evidence of conscious pain and suffering to present a factual question to the jury. In contrast, in Welch v. Epstein, this court concluded there was only evidence the decedent lapsed into a coma at the time of his arrest and he did not recover from this condition. 342 S.C. at 313, 536 S.E.2d at 426. This court found the survival action was limited solely to medical bills, and Ward was distinguishable because there was some evidence to support a factual issue of conscious pain and suffering based on Ward's responses to directions. Id.

Rutland asserts there was sufficient evidence to support a survival claim because a passerby indicated the decedent had a pulse after the accident. After reviewing the record, we conclude the trial court did not err

[3] Rutland did not plead a survival claim against SCDOT or any other defendant. However, the settlement trial court concluded the settlement included all alleged and unalleged claims, including Rutland's wrongful death claim and any potential survival claim against GM. Even though Rutland failed to plead a survival action, the elements of a survival action are discussed to analyze whether the trial court properly concluded that there was insufficient evidence to support a survival action in reallocating the proceeds of the survival action to the wrongful death action.

in granting SCDOT's motion for set-off based on the insufficiency of the evidence to support a survival claim. The record does not reveal any evidence tending to show the decedent endured conscious pain and suffering. In fact, Rutland testified the decedent did not respond when he called her name, the decedent did not make any noises, he knew she was dead immediately after the accident, and he knew the decedent died even though he was told that the decedent had a pulse. Therefore, the SCDOT trial court did not err in concluding that there was not sufficient evidence from which a jury could have concluded the decedent experienced conscious pain and suffering.

B. "Pre-Impact Fear"

Rutland argues the decedent experienced "pre-impact fear" and suffered mental trauma because of her knowledge of her impending death. Rutland contends this "pre-impact fear" is recoverable in a survival action when the decedent suffered mental trauma before actual physical injury resulting in the decedent's death. We disagree.

In support of his position, Rutland cites Spaugh v. Atlantic Coast Line Railroad. Co., 158 S.C. 25, 155 S.E. 145 (1930). Spaugh involved a woman who became physically ill after experiencing a nervous breakdown when she was stranded by a train company. Id. at 27-29, 155 S.E. at 146-47. The woman "became highly nervous" and "suffered from troubles peculiar to ladies, which condition was brought on her by the exposure and experience she was subjected to." Id. at 29-30, 155 S.E. at 147. In affirming the trial court's denial of the defendant's directed verdict motion, our supreme court concluded there was sufficient evidence that the plaintiff suffered bodily injury. Id. at 30, 155 S.E. at 147. The court stated,

> In order to receive bodily injury, it was not necessary that the plaintiff should lose a limb or receive a broken limb, or to have wounds inflicted on her body. Having her nervous system injured and being made sick, in the manner she testified, constitutes bodily injury . . . provided the proof establishe[d] negligence on the part of the defendant's agent . . . and such negligence caused the alleged injury complained of.

Id.

Additionally, Rutland cites several cases in which other jurisdictions have recognized a cause of action for "pre-impact fear."

South Carolina does not recognize "pre-impact fear" as a compensable cause of action. See Hoskins v. King, 676 F. Supp. 2d 441, 451 (D.S.C. 2009) (concluding South Carolina law does not permit recovery for pre-impact fright). Also, we decline to extend the holding in Spaugh for the proposition that "pre-impact fear" is recoverable in this State.

C. Sufficiency of the Evidence

Rutland contends SCDOT is bound by the sufficiency of the evidence in the settlement trial court's order. We disagree.

The settlement trial court's order stated,

> The court approves the allocation without making any factual findings about the cause of the crash or the cause of Tiffanie Rutland's death but finds that there exists some evidence, however slight, that Tiffanie Rutland survived the crash and consciously endured pain and suffering prior to her death.

Nonetheless, the order further states,

> Nothing herein shall preclude by waiver or otherwise the right of SCDOT to argue against the allocation or apportionment of wrongful death and survival proceeds or findings herein, to which SCDOT does not stipulate at the appropriate later time in the continuing litigation for purposes of set[-]off to which SCDOT may be entitled.

Because SCDOT was not a party to the Bishop and GM settlements and the settlement trial court's order expressly granted SCDOT the right not to

stipulate to the findings of the order, we conclude SCDOT was not bound by the settlement trial court's sufficiency of the evidence ruling in regard to whether the decedent endured conscious pain and suffering. McCrea v. City of Georgetown, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App. 2009) (stating that a stipulation is an agreement, admission, or concession made in judicial proceedings that are binding upon those who make them). Additionally, the settlement trial court's order as it pertains to the non-binding effect of non-stipulated matters is the law of the case because Rutland never appealed the order. See ML-Lee Acquisition Fund, LP v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

D. Equitable Reallocation

Rutland finally contends the trial court erred in equitably reallocating the Bishop and GM settlement proceeds and in applying the full settlement award towards SCDOT's right of set-off. Rutland argues the trial court's reallocation of the settlement proceeds is improper because the settlement agreement is binding and argues the decedent experienced conscious pain and suffering. We disagree.

A non-settling defendant is entitled to credit for the amount paid by another defendant who settles. Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000). The trial court's jurisdiction to set-off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. Welch, 342 S.C. at 313, 536 S.E.2d at 425.

In Ward, the personal representative settled with a co-defendant for $29,500 for pain and suffering and $500 for wrongful death on behalf of the decedent. 290 S.C. at 559, 351 S.E.2d at 874. The personal representative subsequently went to trial against Dr. Epting, the non-settling defendant, and the jury awarded Ward $400,000 in actual damages for wrongful death. Id. at 552, 351 S.E.2d at 870. Dr. Epting moved in limine to assign the full amount of the settlement agreement to the wrongful death action and argued the personal representative's settlement with the co-defendant was a de facto settlement of the wrongful death action since there was insufficient evidence

to support a survival action. Id. at 559, 351 S.E.2d at 874. This court declined to reallocate the proceeds because there was evidence that Ward was responding to directions following surgery; therefore, there was sufficient evidence to present a jury question on conscious pain and suffering. Id. at 560, 351 S.E.2d at 875.

In Welch, the personal representative settled with a co-defendant for $445,000 for a survival claim and $5,000 for a wrongful death claim. Welch, 342 S.C. at 312, 536 S.E.2d at 425. The personal representative asserted a wrongful death and survival action claim against Dr. Epstein, and the jury awarded the personal representative $28,535.88 on the survival claim, $3,000,000 on the wrongful death claim, and $3,900,000 in punitive damages. Id. at 287, 536 S.E.2d at 412. Dr. Epstein filed a post-trial motion for set-off based on the reallocation of the settlement proceeds. Id. at 312, 536 S.E.2d at 425. The trial court reallocated the proceeds in the amount of $28,535.88 for the survival action and $421,464.12 in the wrongful death action. Id. In upholding the trial court's reallocation, this court concluded that the reallocation must "yield to fairness and justice." Id. at 313, 536 S.E.2d at 426. This court also distinguished Ward on the grounds that the decedent fell into a coma and the pain suffered by the decedent was directly related to the surgery. Id. Additionally, the court noted Dr. Epstein was not a party to the settlement and was not bound by the settlement's terms. Id.

We conclude the instant case is controlled by Welch. The SCDOT trial court concluded, and we agree, the record does not contain any evidence to support a survival action based on conscious pain and suffering suffered by the decedent. Thus, unlike in Ward, where there was evidence that existed to prohibit the reallocation of the pain and suffering and wrongful death claims, there is not sufficient evidence to present a jury question that the decedent suffered conscious pain and suffering in the instant case. Moreover, SCDOT was not a party to the settlement agreement, and the settlement trial court's order expressly granted SCDOT the right not to be bound by the settlement agreement. Therefore, we conclude the SCDOT trial court did not abuse its discretion in reallocating the settlement proceeds to the wrongful death verdict against SCDOT.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jack David Bennett, Respondent,

v.

Lori G. Rector f/k/a Lori G. Bennett, Appellant.

Appeal From Charleston County
Jack Alan Landis, Family Court Judge

Opinion No. 4722
Heard February 2, 2010 – Filed August 4, 2010

AFFIRMED

Mark A. Mason, of Mount Pleasant, for Appellant.

J. Michael DeTreville and Patricia O. DeTreville, both of Charleston, for Respondent.

KONDUROS, J.: Lori G. Rector (Mother) appeals from the family court's order awarding Jack David Bennett (Father) child support. Mother contends the family court erred in (1) determining the amount of child support under the Child Support Guidelines (the Guidelines); (2) making the award retroactive; and (3) awarding Father attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

Father and Mother married in 1989 and had a daughter (Daughter) in 1990. In 1993, the parties entered into a separation agreement under which Mother received sole custody of Daughter and Father paid $500 a month in child support. The parties divorced in 1994. In 1996, Mother married John Rector, an IBM executive. On December 12, 2005, when Daughter was fifteen years old, she had a child (Grandchild). Father filed a petition for ex parte relief against Mother on February 27, 2006, seeking an emergency order awarding him temporary custody of Daughter. He alleged Daughter, Grandchild, and Mother were living with an unrelated male who was not Mother's husband; Mother abused alcohol and drugs; and Mother had been restrained by a magistrate for her behavior towards Father, including harassing phone calls. Father also filed a motion for temporary relief, requesting custody, child support, and attorney's fees. Additionally, Father filed a complaint asking for temporary and permanent custody of Daughter. Father further requested Mother pay temporary and permanent child support and attorney's fees.

On February 28, 2006, the family court entered a temporary order granting Father custody of Daughter, pending a hearing on the motion for temporary relief.[1] On March 6, 2006, the parties entered into an agreement that Father would have temporary custody and Mother would pay child support pursuant to the Guidelines and $1,500 towards Father's temporary attorney's fees. An attached worksheet determined Mother's temporary child support obligation under the Guidelines, based upon gross monthly income of

[1] Custody of Grandchild was an issue before the family court but is not an issue on appeal.

$2,298 and set the amount at $324 per month. On March 29, 2006, the family court approved and adopted the temporary agreement.

On December 6, 2006, Mother filed an answer to Father's complaint, relinquishing custody of Daughter if Daughter wished to reside with Father. She further stated she should pay child support under the Guidelines if she is not the custodial parent.

Beginning on June 5, 2007, the family court conducted a final hearing to determine child support and whether to award attorney's fees. Mother submitted a financial declaration listing her monthly income at $1,967 and monthly expenses amounting to $7,357, including $1,350 for the lease for her car. Mother testified she began working as a real estate agent in 2005. She stated she applied for a car loan on June 23, 2006, and provided her income as $141,000 a year but contended that was projected income.[2] Mother testified she was up-to-date on her lease payments. She also testified that in December of 2005, she purchased a house for $795,000 using $450,000 she had acquired from other property. She stated she had completed an application for a $200,000 line of equity against her home that listed her gross monthly income as $21,000. She explained she had based her income on that application on a real estate commission she was expecting to receive but it was still pending and had not yet closed. Mother also testified she and Rector are separated but they did not have a separation agreement and he does not pay her any spousal support.[3] She stated that during their marriage, she and Rector had invested in real estate and bought several properties as investments and that was her retirement plan.

Mother introduced an expert qualified in domestic financial matters, Cindy MacCully, who assisted her in drafting her financial declaration for the court. MacCully testified she did not impute any income to Mother in

[2] The loan application actually lists her yearly income at $149,000, with $100,000 as her gross annual income and an additional $49,000 in rental income.

[3] Mother and Rector's 2005 joint income tax return lists $193,472 as "wages, salaries, tips, etc."

preparing the financial declaration because Mother's properties were not idle land or vacation homes that were not rented. She further testified Mother was using gifts and loans from her mother and equity lines to pay expenses, which MacCully did not consider income. She also stated she did not include money Mother obtained from refinancing in her income.

Following the hearing, the family court issued a final order finding the majority of Mother's testimony "absolutely lacking in credibility." The court further found Mother

> voluntarily absented herself from the courtroom for approximately three-quarters . . . of the hearing. This [c]ourt has not previously encountered a situation where a party voluntarily absented himself or herself from the courtroom during the proceeding, although such occurrence might be expected or encountered in default proceedings or where a party was unavailable by reason of distance or illness, etc. This case presented the first time that this [c]ourt has ever had a party who was available but who voluntarily absented herself from the courtroom during most of the proceedings. This election on the part of [Mother] denied the [c]ourt the opportunity to observe her demeanor during this trial, other than during the period in which she was testifying. During her period of testimony, however, this [c]ourt finds her demeanor indicated a lack of credibility.

The family court found based upon the lifestyle Mother enjoys, setting child support based only upon $2,000 a month would be inequitable, particularly because it would deprive Daughter from benefitting from the style of life that Mother enjoys. The court stated: "This is a situation where it is proper to impute income to [Mother] based upon her own testimony that she has the ability to earn and that she believes that she will earn between $149,000 and $252,000 per year." The court used the lower of the two

figures and imputed to Mother $12,416.66 per month in gross income for purposes of determining the amount of child support. The family court ordered Mother to pay child support of $1,138 per month, retroactive to March 6, 2006.

Additionally, the family court found Mother's failure to file responsive pleadings in a timely manner and be truthful and honest about her ability to earn income prolonged the matter. It also found the matter was difficult for Father to prosecute because whether custody was being contested was unknown and a great deal of discovery had to be conducted to determine Mother's ability to earn an income. Further, the court found the "litigation was complicated and prolonged by [Mother's] failure to accept reality and by her failure to be credible and forthcoming in her dealings when trying to resolve these issues." The family court determined the time spent was necessary; Father's attorney charged customary fees, was regularly before the family court, and was in good standing; Mother had the ability to pay her own fees as well as part of Father's based on her lavish lifestyle and the $400,000 in equity she has in her home, whereas Father had taken out a loan and reduced his lifestyle to pay for his attorney; and Father had received beneficial results. The family court ordered Mother to pay $25,000 in attorney's fees to Father. This appeal followed.

STANDARD OF REVIEW

"On appeal from a family court order, this [c]ourt has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence." E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). "Because the family court is in a superior position to judge the witnesses' demeanor and veracity, its findings should be given broad discretion." Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003). When the evidence is disputed, the appellate court may adhere to the family court's findings. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

LAW/ANALYSIS

I. Child Support

Mother argues the family court erred in determining the amount of child support Father would receive under the Guidelines by improperly determining her gross monthly income. Specifically, she contends the family court could not use potential income because it made no finding she was unemployed or underemployed. Further, Mother maintains the family court improperly deviated from the Guidelines. We disagree.

"A child support award rests in the discretion of the trial judge, and will not be altered on appeal absent abuse of discretion." Floyd v. Morgan, 383 S.C. 469, 475, 681 S.E.2d 570, 573 (2009). An abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings lacking evidentiary support. Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004). Generally, the family court is required to follow the Guidelines in determining the amount of child support. Sexton v. Sexton, 321 S.C. 487, 490, 469 S.E.2d 608, 610 (Ct. App. 1996). Although the Guidelines govern all actions involving child support, the family court retains discretion when making the final award. Woodall v. Woodall, 322 S.C. 7, 13, 471 S.E.2d 154, 158 (1996).

> In any proceeding for the award of child support, there is a rebuttable presumption that the amount of the award which would result from the application of the [G]uidelines . . . is the correct amount of child support to be awarded. A different amount may be awarded upon a showing that application of the [G]uidelines in a particular case would be unjust or inappropriate. When the court orders a child support award that varies significantly from the amount resulting from the application of the [G]uidelines, the court shall make specific, written findings of those

> facts upon which it bases its conclusion supporting that award.

S.C. Code Ann. § 63-17-470(A) (2010). "Deviation from the [G]uidelines should be the exception rather than the rule. When the court deviates, it must make written findings that clearly state the nature and extent of the variation from the [G]uidelines." S.C. Code Ann. Regs. 114-4710(B) (Supp. 2009).

"The [G]uidelines define income as the actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." S.C. Code Ann. Regs. 114-4720(A)(1) (Supp. 2009). "Gross income includes income from any source including salaries, wages, commissions, royalties, bonuses, rents (less allowable business expenses), dividends, severance pay, pensions, interest, trust income, annuities, capital gains, . . . and alimony, including alimony received as a result of another marriage . . . ." S.C. Code Ann. Regs. 114-4720(A)(2) (Supp. 2009). Child support payments do not have to be made solely from current earnings. Sutton v. Sutton, 291 S.C. 401, 406, 353 S.E.2d 884, 887 (Ct. App. 1987). "The assets of a person having the duty to support a child may be considered in determining the amount of child support." Id. "The court may also take into account assets available to generate income for child support." S.C. Code Ann. Regs. 114-4720(A)(2)(A). "In addition to determining potential earnings, the court should impute income to any non-income producing assets of either parent, if significant, other than a primary residence or personal property. Examples of such assets are vacation homes (if not maintained as rental property) and idle land." S.C. Code Ann. Regs. 114-4720(A)(2)(B). "Ordinarily, the court will determine income from verified financial declarations required by the Family Court rules. However, . . . where the amounts reflected on the financial declaration may be an issue, the court may rely on suitable documentation of current earnings . . . ." S.C. Code Ann. Regs. 114-4720(A)(6) (Supp. 2009).

"If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the

parent." S.C. Code Ann. Regs. 114-4720(A)(5) (Supp. 2009). "In order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." S.C. Code Ann. Regs. 114-4720(A)(5)(B). A bad faith motivation is not required for a finding of voluntary underemployment. Arnal v. Arnal, 371 S.C. 10, 13, 636 S.E.2d 864, 866 (2006). "However, the motivation behind any purported reduction in income or earning capacity should be considered in determining whether a parent is voluntarily underemployed." Spreeuw v. Barker, 385 S.C. 45, 62, 682 S.E.2d 843, 851 (Ct. App. 2009). When actual income versus earning capacity is at issue, courts should closely examine a good-faith and reasonable explanation for the decreased income. Id.

Although the family court did make some reference to deviation from the Guidelines, that is not what it did.[4] Instead, it found Mother's gross income to be greater than she claimed. Mother obviously had access to a large amount of money judging from her monthly expenses, expensive properties, and shopping habits. Mother listed her monthly income at the amount the family court found it to be and higher on documents she filled out during the pendency of this case. She has $30,000 in a savings account that she claims she inherited and also owns several expensive properties. The family court is allowed to take this into account when determining the amount of child support. Allowing Mother to receive the benefit of such an extravagant lifestyle while only paying child support based on income of $23,000 a year would be inequitable.

We leave matters of credibility to the family court, and the record supports the family court's finding Mother uncredible. Although the family

[4] The family court specifically stated: "I'm not deviating from the [G]uidelines. . . . I was making my ruling based upon imputed income, and that is not a deviation from the [G]uidelines. That, instead, is a finding of imputed income. In using that amount, there is no deviation from the [G]uidelines."

court found Mother's expert credible, it recognized she completed the financial declaration based on Mother's uncredible information. The family court did not abuse its discretion in determining the amount of child support. Accordingly, we affirm the family court's award of $1,138 per month in child support.

II. Retroactive Child Support

Mother argues the family court erred in applying the higher amount of child support retroactively because the parties stipulated to the temporary amount and did not stipulate that it would be reviewed. Further, she argues Father did not plead or argue at the final hearing for an increase to be applied retroactively. We find this issue unpreserved for our review.

"When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). Mother contends that Father never requested the award to be retroactive. Accordingly, when the family court made the award retroactive in its order, Mother needed to raise the issue in a Rule 59(e) motion. Because she did not, this issue is not preserved for appellate review.

III. Attorney's Fees

Mother maintains the family court erred in awarding Father attorney's fees because she did not prolong the case and the case was largely uncontested. We disagree.

The family court has discretion in deciding whether to award attorney's fees, and its decision will not be overturned absent an abuse of discretion. Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). An abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings lacking evidentiary support. Degenhart, 360

S.C. at 500, 602 S.E.2d at 97. In deciding whether to award attorney's fees, the family court should consider (1) each party's ability to pay his or her own fees; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the fees on each party's standard of living. Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). In determining reasonable attorney's fees, the six factors the family court should consider are "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

This court has previously held when parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees. Anderson v. Tolbert, 322 S.C. 543, 549-50, 473 S.E.2d 456, 459 (Ct. App. 1996); see also Donahue, 299 S.C. at 365, 384 S.E.2d at 748 (holding husband's "lack of cooperation . . . serves as an additional basis for the award of attorney's fees"); Johnson v. Johnson, 296 S.C. 289, 304, 372 S.E.2d 107, 115 (Ct. App. 1988) (citing husband's lack of cooperation in discovery as basis for increasing wife's attorney fees award on appeal). "An adversary spouse should not be rewarded for such conduct." Anderson, 322 S.C. at 549, 473 S.E.2d at 459.

We find the family court did not abuse its discretion in awarding attorney's fees or in determining the amount of attorney's fees. It considered all of the appropriate factors and stated why those factors supported awarding Father attorney's fees. The record contains evidence to support each of the family court's findings. Father prevailed on all issues, and Mother has the ability to pay the fees. Further, Mother's dishonesty about her income was the main source of contention. Additionally, her failure to respond to pleadings prolonged the matter. Because the evidence in the record supports the family court's findings as to attorney's fees, it did not abuse its discretion in awarding attorney's fees and calculating the amount.[5]

[5] Mother further contends a portion of Father's attorney's fees were due to third parties. However, Mother never argued this to the family court.

CONCLUSION

The family court did not abuse its discretion in determining the amount of child support or awarding Father attorney's fees. Additionally, Mother's argument that the family court erred in applying the child support award retroactively is unpreserved for our review. Accordingly, the family court's order is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

Accordingly, this issue is not preserved for our review. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.").