Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

July 8, 2013; 10 a.m.

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

The term of office currently held by the Honorable Jean Hoefer Toal, Judge of the Supreme Court, Chief Justice, will expire July 31, 2014.

The term of office currently held by the Honorable Daniel F. Pieper, Judge of the Court of Appeals, Seat 7, will expire June 30, 2014.

The term of office currently held by the Honorable Alison Renee Lee, Judge of the Circuit Court, At-Large, Seat 11, will expire June 30, 2014.

The term of office currently held by the Honorable Thomas A. Russo, Judge of the Circuit Court, At-Large, Seat 12, will expire June 30, 2014.

The term of office currently held by the Honorable Larry B. Hyman, Jr., Judge of the Circuit Court, At-Large, Seat 13, will expire June 30, 2014.

The term of office currently held by the Honorable Michael S. Holt, Judge of the Family Court, Fourth Judicial Circuit, Seat 3, will expire June 30, 2014.

A vacancy exists in the office formerly held by the Honorable Brian M. Gibbons, Judge of the Family Court, Sixth Judicial Circuit, Seat 1, upon his election to the Circuit Court, Sixth Judicial Circuit, Seat 1. The successor will fill the unexpired term which will expire on June 30, 2019.

The term of office currently held by the Honorable W. Thomas Sprott, Jr., Judge of the Family Court, Sixth Judicial Circuit, Seat 2, will expire June 30, 2014.

The term of office currently held by the Honorable Jocelyn B. Cate, Judge of the Family Court, Ninth Judicial Circuit, Seat 5, will expire June 30, 2014.

A vacancy will exist in the office currently held by the Honorable Robert N. Jenkins, Sr., Judge of the Family Court, Thirteenth Judicial Circuit, Seat 5, upon Judge Jenkins' retirement on or before June 30, 2014. The successor will fill the unexpired term of that office which will expire June 30, 2014, and the subsequent full term which will expire June 30, 2020.

The term of office currently held by the Honorable Ronald R. Norton, Judge of the Family Court, Fifteenth Judicial Circuit, Seat 3, will expire June 30, 2014.

A vacancy will exist in the office currently held by the Honorable Robert E. Guess, Judge of the Family Court for the Sixteenth Judicial Circuit, Seat 1, upon Judge Guess' retirement on or before January 31, 2014. The successor will fill the unexpired term of that office which will expire June 30, 2016.

The term of office currently held by the Honorable Ralph King "Tripp" Anderson, III, Judge of the Administrative Law Court, Chief Administrative Law Judge, Seat 1, will expire June 30, 2014.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

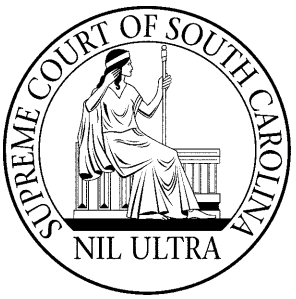
Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (M-Th).

Or

Jaynie Jordan, JMSC Administrative Assistant at (803)-212-6623

The Commission will not accept applications after 12:00 noon on Thursday, August 8, 2013.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
July 10, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5135-MicroClean Technology v. EnviroFix	Pending
5137-Ritter and Assoc., Inc. v. Buchanan Volkswagen	Pending
5138-Chase Home Finance, LLC v. Cassandra S. Risher et al.	Pending
5139-H&H of Johnston v. Old Republic National	Pending
5140-Bank of America v. Todd Draper et al.	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail et al.	Pending
2013-UP-189-Thomas Torrence v. SCDC	Pending
2013-UP-207-Jeremiah DiCapua v. Thomas D. Guest, Jr.	Pending
2013-UP-209-State v. Michael Avery Humphrey	Pending
2013-UP-218-Julian Ford, Jr., v. SCDC	Pending
2013-UP-230-Andrew Marrs v. 1751, LLC d/b/a Saluda's	Pending
2013-UP-232-Brown v. Butcher and Butcher Law Firm	Pending
2013-UP-233-Phillip Brown v. SCDPPP	Pending
2013-UP-236-State v. Timothy Young	Pending
2013-UP-241-Shirley Johnson v. Angela Lampley et al.	Pending
2013-UP-243-State v. Daniel Rogers	Pending
2013-UP-251-Betty Joe Floyd v. Ken Baker Used Cars	Pending
2013-UP-266-Aubrey Alexander v. The State	Pending
2013-UP-272-James Bowers v. The State	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal	Pending
4764-Walterboro Hospital v. Meacher	Pending
4779-AJG Holdings v. Dunn	Pending
4832-Crystal Pines v. Phillips	Pending
4851-Davis v. KB Home of S.C.	Pending
4872-State v. Kenneth Morris	Pending
4880-Gordon v. Busbee	Pending
4888-Pope v. Heritage Communities	Pending
4895-King v. International Knife	Pending
4898-Purser v. Owens	Pending
4909-North American Rescue v. Richardson	Pending
4923-Price v. Peachtree Electrical	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4935-Ranucci v. Crain	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4956-State v. Diamon D. Fripp	Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4970-Carolina Convenience Stores et al. v. City of Spartanburg	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4982-Katie Green Buist v. Michael Scott Buist	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending

5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5033-State v. Derrick McDonald	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5041-Carolina First Bank v. BADD	Pending
5044-State v. Gene Howard Vinson	Pending
5052-State v. Michael Donahue	Pending
5053-State v. Thomas E. Gilliland	Pending
5055-Hazel Rivera v. Warren Newton	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending
5060-State v. Larry Bradley Brayboy	Pending
5061-William Walde v. Association Ins. Co.	Pending
5062-Duke Energy v. SCDHEC	Pending
5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending
5072-Michael Cunningham v. Anderson County	Pending
5074-Kevin Baugh v. Columbia Heart Clinic	Pending
5077-Kirby L. Bishop et al. v. City of Columbia	Pending

5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending
5082-Thomas Brown v. Peoplease Corp.	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5090-Independence National v. Buncombe Professional	Pending
5092-Mark Edward Vail v. State	Pending
5093-Diane Bass v. SCDSS	Pending
5097-State v. Francis Larmand	Pending
5101-James Judy v. Ronnie Judy	Pending
5110-State v. Roger Bruce	Pending
5118-Gregory Smith v. D.R. Horton	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-475-State v. James Austin	Pending

2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-588-State v. Lorenzo R. Nicholson	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending

2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as	Pending

representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.

2012-UP-404-McDonnell and Assoc v. First Citizens Bank Pending

2012-UP-432-State v. Bryant Kinloch Pending

2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al. Pending

2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al. Pending

2012-UP-462-J. Tennant v. Board of Zoning Appeals Pending

2012-UP-479-Elkachbendi v. Elkachbendi Pending

2012-UP-481-State v. John B. Campbell Pending

2012-UP-502-Hurst v. Board of Dentistry Pending

2012-UP-504-Palmetto Bank v. Cardwell Pending

2012-UP-552-Virginia A. Miles v. Waffle House Pending

2012-UP-561-State v. Joseph Lathan Kelly Pending

2012-UP-563-State v. Marion Bonds Pending

2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC Pending

2012-UP-573-State v. Kenneth S. Williams Pending

2012-UP-576-State v. Trevee J. Gethers Pending

2012-UP-577-State v. Marcus Addison Pending

2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway Pending

2012-UP-580-State v. Kendrick Dennis Pending

2012-UP-585-State v. Rushan Counts Pending

2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety	Pending
2012-UP-627-L. Mack v. American Spiral Weld Pipe	Pending
2012-UP-647-State v. Danny Ryant	Pending
2012-UP-654-State v. Marion Stewart	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2012-UP-674-SCDSS v. Devin B.	Pending
2013-UP-007-Hoang Berry v. Stokes Import	Pending
2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending
2013-UP-014-Keller v. ING Financial Partners	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-037-Cary Graham v. Malcolm Babb	Pending
2013-UP-056-Lippincott v. SCDEW	Pending
2013-UP-058-State v. Bobby J. Barton	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-063-State v. Jimmy Lee Sessions	Pending

2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending
2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending
2013-UP-085-Brenda Peterson v. Hughie Peterson	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending
2013-UP-110-State v. Demetrius Goodwin	Pending
2013-UP-115-SCDSS v. Joy J.	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-133-James Dator v. State	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wachovia Bank, N.A., Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., Respondents.

Appellate Case No. 2010-174086

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Marvin H. Dukes, III, Master In-Equity

Opinion No. 27282
Heard October 31, 2012 – Filed July 10, 2013

AFFIRMED AS MODIFIED

Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA of Greenville, Hamilton Osborne, Jr. and James Y. Becker of Haynsworth Sinkler Boyd, PA of Columbia, all for Petitioner.

Gregory Milam Alford and Curtis Lee Coltrane, both of Alford Wilkins and Coltrane, LLC of Hilton Head Island, for Respondents.

CHIEF JUSTICE TOAL: We granted certiorari in this case to review a court of appeals' decision finding that Wachovia Bank, N.A. (Petitioner) committed the unauthorized practice of law in closing a home equity loan in 2001, and that Petitioner's unclean hands barred it from any equitable relief. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

In 2001, Michael Coffey (Husband) obtained a home-equity line of credit from Petitioner. Husband signed a mortgage prepared by Petitioner's employees that purported to encumber Husband's Hilton Head Island home (the property). The mortgage contained the express language that Husband lawfully owned the property, and held the right to mortgage the property. However, Husband did not possess any interest in the property. In fact, Ann Coffey (Wife) held sole title to the property. Wife did not participate in the loan transaction and had no knowledge of Husband's transaction with Petitioner. Petitioner did not perform a title search to determine ownership of the property at time of the transaction. Additionally, Petitioner prepared the loan documents and closed the loan transaction without the participation or supervision an attorney licensed to practice law in South Carolina.

Husband subsequently purchased a sailboat, and financed the purchase through a $125,000 draw on the line of credit. Husband placed title to the sailboat in the name of A&M Partners, a corporation Husband and Wife jointly owned, and of which they served as President and Vice-President, respectively. Husband made regular payments on the line of credit from July 2001 until his death on March 21, 2005. Husband made these payments using funds from a personal checking account he shared with Wife. Following Husband's death, Wife continued making monthly payments using the same checking account. In September 2005, Wife discovered documents showing a loan or mortgage on the sailboat. Wife wrote "boat loan," or "boat" on the memo line of at least three checks she sent to Wachovia in September and November 2005.

That same year, Wife also began efforts to sell the boat with the assistance of her daughter, Maureen Coffey-Edri (Daughter). In December 2005, Daughter provided St. Barts Yachts (St. Barts), a yacht broker, with loan information for the sailboat showing a payoff amount due to Petitioner in the amount of $125,643.30. An employee of St. Barts prepared a draft "Seller's Disbursement Summary," showing a sale price of $112,000, with a $125,600 "payoff" to Petitioner. This payoff amount required a balance due from Wife of $25,525. However, when

Wife asked a St. Barts employee to check on the status of the loan, the employee informed her that there was no lien or mortgage on the sailboat. Wife believed the sailboat was "paid for," and never inquired with Petitioner about the line of credit or any other possible encumbrances on the sailboat. Wife sold the sailboat in January 2006 for $112,000 and received $100,075 from the sale. Wife deposited the proceeds in her personal bank account and did not make any further payments to Petitioner.

In June 2006, Petitioner filed a foreclosure action in the circuit court against Husband's estate, Wife, both individually and as personal representative of Husband's estate, and three of the couple's five children. In September 2006, Wife filed an inventory and appraisal of Husband's estate with the Beaufort County Probate Court. This inventory and appraisal acknowledged Husband and Wife's joint ownership of the boat. Petitioner then filed an amended complaint in 2008 naming Wife and Bank of America, N.A. as the only defendants. Petitioner sought to foreclose on the mortgage signed by Husband and included causes of action for equitable lien, prejudgment interest, restitution, ratification, quantum meruit, and quasi-contract. Petitioner filed a motion for summary judgment, and Wife filed a cross-motion for summary judgment on all of Petitioner's claims.

The master-in-equity denied Petitioner's motion for summary judgment on its claims against Wife, and granted Wife summary judgment on all of the claims asserted by Petitioner. The master-in-equity held, *inter alia*:

> I am troubled by the concept that [Wife] sold the sailboat and retained the proceeds and that there is some perception of unfairness to Petitioner. However, in this court's opinion, Petitioner is the architect of its own problem. Petitioner prepared the loan documents and closed the loan with Husband without an attorney. Had Petitioner retained an attorney to prepare the loan documents and *performed a title search, which should have been done, it would have known Husband did not own the subject [p]roperty to be mortgaged*. This case would not have been filed and Petitioner's mistake would have been caught. It now attempts to seek equitable relief for its own mistake. Its own mistake arose by its own acts.

(emphasis added).

Petitioner appealed, and the court of appeals affirmed. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010). The court of appeals held

that Petitioner's actions constituted the unauthorized practice of law, and therefore, barred its equitable and legal claims. *Id.* at 76–77, 698 S.E.2d at 248 ("We therefore reach the inescapable conclusion that [Petitioner] has come to court with unclean hands and is barred from seeking equitable relief . . . . [Petitioner's] legal causes of action are barred as well.") (citations omitted).

This Court granted Petitioner's request for certiorari pursuant to Rule 242, SCACR.

ISSUES PRESENTED

I. Whether the court of appeals erred in holding that Wachovia was on notice that its conduct constituted the unauthorized practice of law and that Wachovia had unclean hands.

II. Whether the court of appeals erred in stating that Petitioner's legal remedies were barred.

III. Whether the holding of the court of appeals conflicts with that court's prior holding that a trial court does not have jurisdiction to determine the unauthorized practice of law.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). Rule 56, SCRCP provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC*, 387 S.C. at 235, 692 S.E.2d at 505. (citation omitted).

LAW/ANALYSIS

Petitioner's arguments, and to a significant degree the lower court decisions in this case, center on whether Petitioner's alleged unauthorized practice of law

bars equitable and legal relief. However, this is not the dispositive question in this case. Instead, the pertinent inquiry is whether Petitioner may foreclose on an invalid mortgage.

As explained, *supra*, Husband obtained a $125,000 home equity line of credit from Petitioner, and secured the loan with the couple's residence, which was titled in Wife's name only. Petitioner failed to verify Husband's interest in the couple's residence. Therefore, Petitioner never possessed a valid mortgage on the property and cannot pursue an action against Wife related to that mortgage. *See, e.g.*, *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) ("A mortgage foreclosure is an action in equity.").[1]

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[1] We respectfully disagree with the dissent's view that Petitioner may rely on equitable principles to foreclose on an invalid mortgage. One of equity's most important aspects is the principle of "right and fair dealing," between *parties* to particular transaction. *See, e.g., Kelly v. McCray*, 278 S.C. 88, 90, 292 S.E.2d 587, 589 (1982) (agreeing with the lower court that equity prevented the respondent from rendering *her own* agreement unenforceable). However, equitable maxims do not operate to place burdens on individuals made party to a particular transaction through no fault or expressed interest of their own, or, as in this case, through the fault and mistake of others. *Cf.* Henry L. McClintock, McClintock on Equity, at 52 (2d. 1948) (listing the equitable maxims, "(1) equity regards as done what ought to be done; (2) equity looks to intent, rather than to form; . . . [(3)] equity imputes an intention to fulfill an obligation; [(4)] equity will not suffer a wrong without a remedy; and [(5)] equity follows the law." (citation omitted) (alterations added)); *see also Regions Bank v. Wingard Props. Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011) ("Maxims developed, at least in part, to reflect the attempt by the courts of equity to create guiding principles, in the same way that the legal courts developed binding precedent.").

We do not agree with the view that what "ought to be done" is to place responsibility for Petitioner's mistake on to Wife. The dissent offers an incorrect summation of today's decision, stating that we find Petitioner is not entitled to equitable relief because of a mere "mistake." To the contrary, equity should not be used to validate Husband's decision to mortgage a property for which he held no interest, and Petitioner's choice to simply take Husband at his word, and then attempt to charge Wife with responsibility for that blunder. This finding comports with well-settled equitable principles and poses no new "bar" or "universal rule" as the dissent asserts.

Thus, the master-in-equity properly granted summary judgment in favor of Wife. We need not discuss the remaining issues presented by the parties. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

For the foregoing reasons, the court of appeals decision is

AFFIRMED AS MODIFIED.

BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which HEARN, J., concurs.

The dissent focuses too narrowly on the notion that Petitioner committed an "error," to the exclusion of Petitioner's and Husband's *actual* conduct in this case.

We stress that sophisticated financial institutions that prepare mortgages purporting to encumber a customer's property must ensure that the customer in fact holds a legal interest in that property so as to protect all pertinent interests. Concomitantly, South Carolina courts should not stretch equitable principles to unfairly place fault on parties who did not contribute to the underlying transaction. *See, e.g.*, McClintock on Equity, at 320 ("Where *the parties* have manifested an intention that the real property *of one of them* shall be especially set aside as security for the payment of an obligation due to the other, equity will give effect to the intention by treating the property as though it had been validly mortgaged." (emphasis added)). We earnestly appreciate the dissent's concerns. However, we would be more concerned with an equitable doctrine so broad as to allow lenders to ameliorate their complete failure to exercise proper due diligence at the expense of third parties.

JUSTICE PLEICONES: I respectfully dissent and would remand the matter to the Court of Appeals. Petitioner (Wachovia) sought to recover the proceeds from respondent Coffey's sale of the boat under several equitable theories: mortgage foreclosure, unjust enrichment, equitable mortgage, restitution, ratification, quantum merit, or quasi-contract. While the majority may well be correct that Wachovia's foreclosure action fails because the purported mortgage was invalid, it is the unavailability of recovery under that cause of action that is the predicate for Wachovia's other theories. In footnote 1, the majority makes explicit its philosophy that equity acts to punish those who make a mistake. *See also Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 434, 714 S.E.2d 532 (2011). In my view, equity exists to correct mistakes and prevent windfalls. *E.g.*, *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998) (unjust enrichment/constructive trust used to recover money from innocent third party where third party would be unjustly enriched by a windfall actually owed to plaintiff). The majority offers no explanation why the lender should be denied the opportunity to recover the money it lent other than that it made an error.

We granted certiorari to review a Court of Appeals' decision that affirmed the trial court's grant of summary judgment to respondent. The Court of Appeals held that because Wachovia committed the unauthorized practice of law (UPL) in closing a home equity loan in 2001, its unclean hands barred it from any equitable relief. Further, the Court of Appeals held Wachovia's UPL barred it from any legal remedies. I would reverse the equitable ruling under *BAC Home Loan Servicing LP v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012), which clarified that UPL bars equitable remedies[2] only when the transaction occurred after August 8, 2011. Further, I would vacate the dicta stating that UPL also bars Wachovia from any legal relief, as no legal relief was sought by Wachovia in this case. Since the trial court's order granting respondent summary judgment on Wachovia's theories of unjust enrichment/restitution/quasi-contract, mortgage ratification and foreclosure, equitable lien, and prejudgment interest rest on several grounds other than UPL, I

[2] It is with some irony I note that the UPL ruling announced in *Matrix Fin. Serv. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2001) is intended to protect borrowers from lenders. Here, viewing the facts in the light most favorable to Wachovia, it appears the lender was taken advantage of by a long-time client.

would remand the case to the Court of Appeals to consider the issues raised by Wachovia on appeal but left unaddressed by its original decision.

The majority holds Wachovia is not entitled to equitable relief because it made a mistake. I cannot tell whether this new bar is applicable only to commercial lenders, or if it is a universal rule. Further, the majority leaves standing the dicta in the Court of Appeals' opinion to the effect that UPL bars a lender from legal as well as equitable remedies. While I am concerned about the impact of the majority's decision on lenders especially, I am even more apprehensive about its impact on the status of equity generally in South Carolina.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lexie Dial, III, Appellant.

Appellate Case No. 2011-190693

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5157
Heard May 7, 2013 – Filed July 10, 2013

AFFIRMED

H. Wayne Floyd, of Wayne Floyd Law Office, of West Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Christina J. Catoe, both of Columbia, for Respondent.

LOCKEMY, J.: Lexie Dial, III appeals his conviction of homicide by child abuse. Dial argues the trial court committed reversible error by: (1) ruling officer Henry Dukes had arrest authority as a United States Marshal under section 23-1-220 of the South Carolina Code (2007), or in the alternative, as a citizen pursuant to section 17-13-10 of the South Carolina Code (2003); (2) refusing to allow Dial to impeach the State's lead investigator; (3) denying his motion for a mistrial after

Victim's mother brought an urn to the witness stand; (4) admitting autopsy photographs into evidence; (5) refusing to admit the pathologist's conflicting death certificates; and (6) sentencing him to the maximum sentence permitted under South Carolina law without properly considering the aggravating and mitigating circumstances. We affirm.

FACTS

On January 10, 2010, Dial was at his home in Lexington County with his five-month-old son (Victim) when Victim sustained severe head injuries. Victim began suffering breathing problems and Dial tried CPR, which was unsuccessful. Dial then called his father, who came to the home and attempted CPR as well. All CPR attempts failed, and emergency personnel responded after Dial's father made a 911 call. At the scene, Dial claimed he fell while holding Victim, and when he fell, Victim's head hit a coffee table that was in the room.

Victim was initially transported to Lexington Medical Center but was transferred to Richland Memorial Hospital[1] in Richland County. Early the next afternoon, Victim passed away. Lexington County major crimes investigator Eric Russell was placed in charge of investigating Victim's death. Russell spoke with Victim's doctors and based on their diagnoses and explanations, he asked Officer Luis Rivera to obtain a warrant for Dial for great bodily injury to a child. The first warrant was issued prior to Victim's death, but once Victim passed away, it was withdrawn. A new warrant for homicide by child abuse was issued against Dial. Officer Dukes, a Lexington County officer with the U.S. Marshal's fugitive task force, arrested Dial at Richland Memorial.

Russell questioned Dial at the Lexington County Detention Center and obtained a statement from him. Dial first stated he was carrying Victim when he tripped over a steam cleaner in the living room and fell through a coffee table. Dial said that after the fall, Victim was gasping for breath so he shook Victim in a manner that would not have caused injury. Russell explained to Dial that he had spoken with the doctors, and Dial's version of the events did not match their description of Victim's symptoms and injuries. Dial then admitted to Russell in a second statement he had been frustrated at the Victim for failing to walk so he shook

[1] Richland Memorial Hospital is now known as Palmetto Health Richland. Witnesses referred to it by different names throughout the record.

Victim. At trial, Russell stated he never mentioned anything about shaken baby syndrome to Dial. Dial claimed at trial he made the second statement out of fear and after being told cooperation would help him.

At trial, Dr. Shuler, with Lexington Medical Center, testified he was given a history stating Victim was dropped on a coffee table, and Victim's bilateral bleeding and subdural hematoma could have been caused by a drop on a coffee table. Further, Dr. Shuler stated the small 2-3 inch bruise found on the back of Victim's head could have been caused by Victim's head striking an object. Dr. Sarah Webb-Wood, a pediatric resident at Richland Memorial, stated Victim was brain dead when she saw him, and she ordered a skeletal survey to determine whether prior injuries existed. She found a large amount of blood in Victim's eye area and bleeding on both sides of his brain. Dr. Susan Luberoff, a pediatrician, was called in to assist Dr. Webb-Wood with Victim. Dr. Luberoff stated Victim had non-accidental blunt force trauma, with extensive retinal hemorrhaging. She did not believe the injuries could have been accidentally caused, but conceded the pathologist was best suited to determine the cause of death. Dr. Edward Cheeseman, an ophthalmologist, also examined Victim. He found numerous hemorrhages in Victim's eyes and found he suffered from retinaschisis, which could be caused by a back and forth acceleration or a fall, although falls are usually accompanied by crushing type injuries of the skull. Dr. Cheeseman opined it was unlikely Victim hit his head on a table because there were no crushing skull injuries. His diagnosis was shaken-baby syndrome. Dr. Greta Harper, a pediatric critical care specialist, also opined Victim died from shaken-baby syndrome.

Dr. Janice Ross, a forensic pathologist, testified she found subdural and subarachnoid hemorrhaging.[2] She determined Victim's death was a homicide caused by subdural hemorrhaging due to blunt force trauma to the head but initially wrote on Victim's death certificate that Victim died from hitting his head on an object or surface. Thereafter, she edited the death certificate to omit the language regarding Victim hitting his head on an object because there was an ongoing investigation and she did not want to narrow the possibilities for the cause of death. Dr. Ross conceded she could not rule out more than one injury as leading to Victim's death.

[2] The arachnoid is a thin membrane covering the surface of the brain. The bleeding was subarachnoid, underneath the arachnoid but on top of the brain's surface.

The jury found Dial guilty of homicide by child abuse. The trial court sentenced Dial to life imprisonment, and this appeal followed.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous.'" *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)).

LAW/ANALYSIS

Arrest Authority

Dial first argues Dukes was a Lexington County Sheriff's officer with no authority or jurisdiction to arrest in Richland County. Thus, Dial contends his arrest was unlawful. We disagree.

Prior to Dukes's testimony at trial, Dial made a motion to dismiss his charge because Dukes lacked authority to arrest him. As alternate relief, Dial requested exclusion of any evidence obtained subsequent to the arrest as being the fruit of the poisonous tree. In response, the State presented a Memorandum of Understanding (MOU) between the Lexington County Sheriff's Office and the United States Marshals Service. The trial court denied Dial's motion, finding the MOU and the warrant were valid and therefore the arrest was valid. In the alternative, it found under *State v. Swilling*, 249 S.C. 541, 155 S.E.2d 607 (1967), and pursuant to section 17-13-10, Dukes made a valid citizen's arrest, because the arrest was made upon certain information that a felony had been committed. During Dukes's testimony, Dial objected to his statement to Russell being placed into evidence, again arguing his arrest was unlawful. The trial court overruled the objection.

While Dial argues in his Statement of Issues the trial court erred in determining Dukes's authority arose from section 23-1-220, in the body of his argument he asserts the trial court erred in ruling that Dukes's authority arose from section 23-1-212 of the South Carolina Code (2007 & Supp. 2012). Despite this discrepancy in statutes, Dial is inaccurate in his assertions that the trial court determined Dukes had authority pursuant to section 23-1-212 or section 23-1-220. After the State and

Dial presented their arguments on the issue, the trial court ultimately found the agreement between Lexington County and the U.S. Marshals was valid because there was no testimony otherwise, and the warrant was valid. It ruled that as a result, Dukes had authority to arrest Dial in Richland County. It did not specify any statutory authority in its final decision, and neither party requested clarification regarding the statutory authority upon which the trial court based its decision.

The MOU stated the Lexington County Sheriff's Office entered into an agreement with the U.S. Marshals pursuant to the Presidential Threat Protection Act of 2000. 28 U.S.C. § 566 (2006 & Supp. 2012). The MOU's primary purpose was to create a task force that would "investigate and arrest, as part of joint law enforcement operations, persons who have active state and federal warrants for their arrest." Further, the MOU explained "[t]he authority of the United States Marshals and Deputy U.S. Marshals to, 'in executing the laws of the United States within a State . . . exercise the same powers which a sheriff of the State may exercise in executing the laws thereof' is set forth in 28 USC § 564."

We find the MOU was valid pursuant to its cited federal authority. Because the MOU recites that U.S. Marshals and their deputies have "the same powers which a sheriff of the State may exercise in executing the laws thereof," Dukes, as a specially deputized member of the task force, had the same arrest authority as the Richland County Sheriff. A sheriff may arrest someone within his county pursuant to an arrest warrant, and, therefore, Dukes had authority under the MOU and § 564 to arrest Dial in Richland County. Consequently, we find the arrest was lawful, and we affirm the trial court. Because we affirm the trial court on the first independent ground, we need not reach the argument regarding a citizen's arrest. *See Henry v. Lewis*, 327 S.C. 336, 340 n.1, 489 S.E.2d 639, 641 n.1 (Ct. App. 1997) (stating that because the appellate court affirmed the circuit court on one independent ground, it need not reach the alternative ground).

Cross-Examination Regarding Bias

Dial argues the trial court erred in not allowing cross-examination of Russell regarding Russell's romantic relationship with the assistant solicitor initially assigned to the case. Specifically, he contends the State did not show the cross-examination was clearly improper pursuant to Rule 608(c), SCRE, and thus, he should have been permitted to cross-examine Russell pursuant to Rules 401 and

403, SCRE, because Russell's bias and motive to lie were relevant issues in the trial.[3] We disagree.

Dial requested to cross-examine Russell regarding his romantic relationship with the assistant solicitor who was initially assigned to prosecute the case. In October of 2010, Russell and his then-wife separated due to the discovery that Russell was conducting a romantic relationship with the assistant solicitor. The solicitor's office withdrew from the case and the South Carolina Attorney General's Office took it over due to the potential conflict of interest arising from the relationship between the assistant solicitor and Russell. Dial argued the cross-examination was admissible to show Russell's personal bias and to question his credibility. The State argued the connection between Russell's relationship with the assistant solicitor and Russell's conduct during Dial's questioning was too tenuous, regardless of the time period. The trial court ruled that pursuant to Rule 608(c), the cross-examination was not allowed, and it also found the cross-examination was not relevant to the case.

"'As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion.'" *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000) (quoting *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998)). "Rule 608(c), SCRE, provides that 'bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.'" *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (quoting *State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001)). "Rule 608(c) 'preserves South Carolina precedent holding that generally, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" *Id.* (quoting *Jones*, 343 S.C. at 570, 541 S.E.2d at 817).

Here, the timeline of Russell's and the assistant solicitor's romantic relationship was not definitively established. Russell claimed the relationship did not occur until October 2010, ten months after he took Dial's confession, and denied there was any romantic relationship at the time of Dial's investigation. *See State v. Beckham*, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999) (stating "[w]hen a

[3] Dial did not raise any constitutional argument at trial or on appeal regarding his right to confrontation.

witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness"). Further, the solicitor's office removed the assistant solicitor from the case when the improper relationship was discovered, and the Attorney General took over the case. The assistant solicitor had no involvement with the prosecution at the time of trial. We find the connection between the romantic relationship and Russell's bias merely speculative, and the trial court did not abuse its discretion in limiting the cross-examination. Accordingly, we affirm.

Motion for Mistrial

Dial argues the trial court committed reversible error by denying his motion for a mistrial after Misti Richard, Victim's mother, approached the witness stand with an urn in her hands containing Victim's ashes. Dial contends Richard's actions caused severe prejudice to him and only served to sway the emotions of the jury. We disagree.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *Id.* "The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." *Id.* "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." *Id.* "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." *Id.* at 495-96, 692 S.E.2d at 563.

When the State called Richard as a witness, she approached the witness stand carrying a bronze, heart-shaped urn containing Victim's ashes. The trial court immediately prevented her from advancing any further and asked the jury to leave the courtroom. The jury was removed, and Dial requested a mistrial based on the extremely prejudicial nature of the urn in eyesight of the jury. Dial argued the action was a ploy to sway the jurors to convict him out of emotion and sympathy.

The trial court noted Richard approached the witness stand in a "very low-grade manner," and it did not believe any of the jury members saw the urn or knew it was an urn. The trial court measured the urn and found it was slightly less than three inches in width and about two-and-a-half inches in length. The trial court denied Dial's motion given the small size of the item, the manner in which Richards approached the witness stand, and the fact that the trial court had the best view of the item and still did not know it was an urn. Dial again requested a mistrial because the urn was shaped like a heart, and the jurors were likely to figure out it was an urn. The trial court also denied that motion, stating it did not think the jury saw the item, and offered to give a curative instruction. Dial suggested language for the curative instruction, but the trial court declined to use it and issued a general instruction to the jury. Dial noted for the record that he preferred the more specific instruction.

A curative instruction is generally deemed to have cured any alleged error. *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). Here, the trial court issued the following instruction to the jury:

> Again, I would advise you that you may not allow yourself to be governed by sympathy, prejudice, passion, public opinion, emotions, any improper conduct or any other arbitrary factors.
>
> Both the State and the Defendant have a right to expect that each of you will carefully and impartially consider all of the evidence in the case and that you will follow the law as I instruct it to you.
>
> The State has the burden of proving its case beyond a reasonable doubt. The Defendant is presumed to be innocent. He does not have to prove his innocence. He does not have to present evidence or testimony in any manner.
>
> He is entitled under the Constitution of our State and United States Constitution to a fair and impartial trial, based on the law and evidence from the witnesses

> testifying under oath, and any inferences that you may properly draw from that evidence.

We believe any alleged error or prejudice was cured by the curative instruction. Dial could not establish that any juror saw the item in Richard's hands. Moreover, he could not show the item would be recognizable as Victim's urn if in fact a juror did see it. The trial court noted Richard approached the witness stand in a normal manner without attracting attention to the item, and the trial court, which had the best view of the urn, was not aware of the exact nature of the item when it excused the jury. Further, the thorough curative instruction ensured the jurors knew they were to base any decision on the facts presented at trial, not on emotional response or improper conduct. Accordingly, we affirm the trial court's denial of Dial's motion for a mistrial.

Autopsy Photographs

Dial argues the trial court erred in admitting autopsy photographs into evidence. He maintains that pursuant to Rule 403, SCRE, State's Exhibits 7, 8, and 86 were much more prejudicial than probative due to their gory and shocking nature. We disagree.

During Dr. Ross's testimony, the trial court admitted three autopsy photographs of Victim's head injuries over Dial's objection that the photographs were shocking and gross. The trial court ruled the photographs would assist Dr. Ross in showing the force or violence in which Victim's injuries occurred.

Dr. Ross testified *in camera* that she regularly took pictures as part of performing autopsies. She stated it aided her testimony to be able to show the photographs she took of Victim. State's Exhibit 86 depicted Victim's scalp area, with the skin over the scalp folded back to reveal Victim's skull and brain. Dr. Ross stated it was important to examine this inside fold of skin to identify a possible pattern of injury, including blunt force injuries. In Victim's case, there was no contusion or bruising, and she was able to definitively conclude there was no bruising on the back of the head. State's Exhibit 8 depicted the top of the brain with a subarachnoid hemorrhage. The exhibit further showed the surface of the brain was flat which indicated it was swollen. Dr. Ross testified that the depiction helped identify that

there was enough edema to have swelling of the brain, and that the bleeding would have been started by the original trauma. State's Exhibit 7 showed the subdural space in the brain after the brain had been removed. It depicted hemorrhaging on the right and left sides of the brain. She stated the hemorrhaging pictured typically results from the brain being jostled around and from pulling on the veins surrounding the brain's surface. She testified the bleeding was caused by the original trauma that led to Victim's death, and the photographs would be helpful in explaining the injury to the jury. The trial court conducted a Rule 403 analysis and found the three contested exhibits corroborated Dr. Ross's testimony and supported her conclusive findings, and thus, it found they were admissible.

"The State has the right to prove every element of the crime charged . . . ." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008) (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). "'The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.'" *Id.* (quoting *State v. Haselden*, 353 S.C. 190, 199, 577 S.E.2d 445, 450 (2003); *State v. Rosemond*, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999)); *see also State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (stating the trial court has "considerable latitude in ruling on admissibility of evidence and his rulings will not be disturbed absent showing of probable prejudice"). "'The trial judge must balance the prejudicial effect of graphic photographs against their probative value.'" *Martucci*, 380 S.C. at 249, 669 S.E.2d at 607 (quoting *State v. Vang*, 353 S.C. 78, 87, 577 S.E.2d 225, 229 (Ct. App. 2003)). "A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." *Id.* at 250, 669 S.E.2d at 607 (citing *State v. Hamilton*, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001)). "Admitting photographs which serve to corroborate testimony is not an abuse of discretion." *Id.* (citing *Rosemond*, 335 S.C. at 597, 518 S.E.2d at 590). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *Id.* (citing *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). "'To constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Id.* (quoting *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71). "A trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive."

Id. (citing *Davis v. Traylor*, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct. App. 2000)).

Dial claimed he tripped and fell with the Victim in his arms, and thus, Victim's injuries were accidental. These photographs were introduced to corroborate the testimony of Dr. Ross, who testified regarding the Victim's various injuries, including the placement and severity of bruising, which would be inconsistent with an accidental injury. She testified the photographs would aid in her testimony. We find the photographs were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death, which are integral elements to the charge of homicide by child abuse. *See* S.C. Code Ann. § 16-3-85(A)(1) (2003). Thus, we find the danger of unfair prejudice did not outweigh the photographs' probative value, and the trial court did not abuse its discretion by admitting them. Accordingly, we affirm the trial court's decision.

Admission of Death Certificates

Dial argues the trial court erred in excluding copies of Dr. Ross's death certificate reports. He maintains the conflicting death certificates authored by the same doctor were relevant and should have been admitted pursuant to Rules 401 and 403, SCRE.

Dial attempted to place Victim's death certificates authored by Dr. Ross into evidence, because her initial determination supported his theory that Victim's injuries were sustained by a fall onto the coffee table. The trial court refused Dial's request, stating the evidence would unduly highlight the apparent change in Dr. Ross's opinion. Dr. Ross testified she initially described the injury on the death certificate as one where the Victim's head hit an object. She subsequently changed the description because there was an ongoing investigation, and she realized the injuries were such that the head could have been hit by something or could have hit an object. She removed any language from that section of the death certificate and left it blank. She admitted she spoke with the coroner after she removed the language.[4]

[4] Dial asserts Dr. Ross spoke with the coroner after she completed the first death certificate and then decided to remove the description. However, Dr. Ross testified she spoke with the coroner only after she altered the death certificate.

While it may be argued the trial court erred in refusing to admit the death certificates into the record, we find the error, if any, was harmless. *See State v. McLeod*, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." (citations omitted)). The first document merely had a description stating, "head hit object," while the second document did not contain any description and had a blank space. Dr. Ross testified to the exact changes made to the two documents, and she thoroughly explained the reason for the change. Moreover, Dial had the opportunity to fully cross-examine Dr. Ross about the death certificates and any changes made to them. We do not believe the admission of the documents would have affected the outcome of the trial. Accordingly, we affirm the trial court's decision.

Sentencing

Dial contends the trial court committed reversible error in sentencing him to the maximum sentence permitted under section 16-3-85(D) because he maintains the trial court did not properly consider the aggravating and mitigating circumstances. He maintains the record clearly demonstrates there were no aggravating circumstances in his past history with Victim or any other child under the age of eleven, and the trial court did not accord any weight to the mitigating factors he presented at trial.[5] We find this issue was not preserved for our review.

The State argues Dial did not preserve this argument for our review because he did not raise it at the trial. *See State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[T]his [c]ourt has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.") We agree. The record reflects Dial did not raise an objection during or after sentencing. *See State v. Salisbury*, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998) (finding that to preserve any alleged error in sentencing, a party must make a contemporaneous objection). Accordingly, we find this issue was not preserved.

[5] Despite Dial's contention, the trial court did discuss and weigh aggravating and mitigating factors before sentencing Dial.

CONCLUSION

For the foregoing reasons, Dial's conviction is

AFFIRMED.

CURETON, A.J., concurs.

FEW, C.J., concurring: I agree with the majority's decision to affirm. I also agree with most of the majority's analysis. However, as to the denial of the mistrial motion and the exclusion of the death certificates, I would find the trial court committed no error. With no error, further analysis of those issues is not necessary.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gregg Gerald Henkel, Appellant.

Appellate Case No. 2011-184986

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5159
Heard March 6, 2013 – Filed July 10, 2013

REVERSED

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

LOCKEMY, J.: Gregg Henkel argues the trial court erred in denying his motion to dismiss his indictment for driving under the influence (DUI). Henkel contends the South Carolina Highway Patrol (SCHP) failed to comply with section 56-5-2953 of the South Carolina Code (2006), which requires the arresting officer to provide videotaping of the defendant's conduct at the incident site. We reverse.

FACTS/PROCEDURAL BACKGROUND

Around 1:00 a.m. on January 19, 2008, Lillie Chastain called 911 and reported a motorist driving a truck erratically on I-385 in Greenville County. Chastain followed the truck until it hit a bridge and overturned into a ditch. She observed the driver get out of the truck and jump over a fence. Sergeant Wesley Hiott of the SCHP arrived on the scene and organized a search for the driver. Officers were unable to locate the driver, and the scene was cleared.

Around 4:00 or 5:00 a.m., Sergeant Hiott responded to a call indicating the possible driver of the truck had been located on I-385. When he arrived on the scene, Sergeant Hiott pulled his patrol car to the front of the line of emergency vehicles on the side of the interstate. Thereafter, Sergeant Hiott found Henkel being examined by EMS in an ambulance behind his patrol car. Sergeant Hiott got into the ambulance with Henkel and could smell alcohol. Sergeant Hiott read Henkel his *Miranda* rights and performed a horizontal gaze nystagmus (HGN) test inside the ambulance. After performing the HGN test, Sergeant Hiott concluded Henkel was under the influence and moved him from inside the ambulance to the side of his patrol car. There, Sergeant Hiott had Henkel recite his ABCs.[1] Henkel failed the ABC test and admitted to Sergeant Hiott he was the driver of the wrecked truck. Henkel was arrested and placed in Sergeant Hiott's patrol car. Once inside the patrol car, Sergeant Hiott turned the dashboard video camera to face Henkel and read him his *Miranda* rights again.

Henkel was indicted for DUI and a trial was held in February 2011. Prior to trial, Henkel moved to dismiss the indictment on the ground that neither the field sobriety tests nor the initial *Miranda* warning were videotaped as required by section 56-5-2953 of the South Carolina Code. The trial court reserved ruling on the motion until all of the testimony was presented.

Sergeant Hiott testified he activated the patrol car's video camera and his microphone by the remote control on his belt. The record indicates this occurred after Sergeant Hiott read Henkel his *Miranda* rights in the ambulance but before he administered the HGN test. Sergeant Hiott testified he activated the camera as soon as it was practicable. Two versions of the videotape from the incident site were admitted into evidence. In the defense's version (Court's Exhibit 1), the videotape includes audio of the HGN and ABC tests but does not include video

[1] Sergeant Hiott did not have Henkel perform any walking or balancing tests because Henkel indicated his leg was injured.

because these tests were not administered in front of Sergeant Hiott's patrol car where the video camera was aimed. The State's version (State's Exhibit 2) of the videotape is nearly identical to Court's Exhibit 1 but does not begin until after the HGN test. Thus, the videotapes in evidence do not include any video or audio of the initial *Miranda* warning, or any video of the HGN or ABC tests.

At the conclusion of the testimony, Henkel renewed his motion to dismiss. The trial court denied Henkel's motion based on "the totality . . . [of] the evidence." The trial court noted Sergeant Hiott testified he activated the video camera as soon as practicable. The trial court further found the HGN and ABC tests "don't cry out for video representation . . . [t]hey cry out for audio representation on the ABCs." Based on the tests given, the trial court determined the videotape "met the requirements of the law."

The jury found Henkel guilty of DUI, and he was sentenced to three years in prison suspended upon the service of three months and thirty months of probation. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

Henkel argues the trial court erred in denying his motion to dismiss his DUI indictment because the State failed to produce a videotape that complied with section 56-5-2953 of the South Carolina Code. The State contends Sergeant Hiott activated the video camera as soon as practicable, and the videotape, while capturing only audio of the field sobriety tests, was sufficient to show Henkel's conduct at the incident site. We reverse the trial court's decision.

I. Applicable Law

Subsection 56-5-2953(A) provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped.
>
> (1) The videotaping at the incident site must:
>
> (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and
>
> (b) include the person being advised of his *Miranda* rights before any field sobriety tests are administered, if the tests are administered.

S.C. Code Ann. § 56-5-2953(A) (2006).[2] Subsection (B) of section 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Pursuant to subsection 56-5-2953(B),

> [f]ailure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal . . . if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations,

[2] Section 56-5-2953 was amended effective February 10, 2009. *See* Act No. 201, 2008 S.C. Acts 1682-85. The amended statute is not applicable to Henkel's January 19, 2008 arrest.

> and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape.

S.C. Code Ann. § 56-5-2953(B).

"Our appellate courts have strictly construed section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011) (citing *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding that "dismissal of the DUAC charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions"); *Murphy v. State*, 392 S.C. 626, 630, 709 S.E.2d 685, 687 (Ct. App. 2011) (recognizing the State's noncompliance with section 56-5-2953, which is not mitigated by a statutory exception, warrants dismissal)). "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Id.* at 348, 713 S.E.2d at 286.

II. Analysis

Subsection 56-5-2953(A)(1) requires that a person who drives under the influence must have his conduct at the incident site videotaped. Under subsection 56-5-2953(A)(1)(a), the videotaping must "begin not later than the activation of the officer's blue lights." Sergeant Hiott testified his patrol car was equipped with front and rear blue lights, which could be activated independently of each other, but the car's video camera turns on only when the front blue lights are activated. When he arrived at the scene, Sergeant Hiott activated only his rear blue lights. Because the event that subsection 56-5-2953(A)(1)(a) sets as the latest point in

time when videotaping must begin—activation of the front blue lights that turn on the camera—never occurred, the failure to videotape the *Miranda* warnings did not violate subsection 56-5-2953(A)(1).

Subsection 56-5-2953(B) (2006) provides that "in circumstances including, but not limited to . . . traffic accident investigations, . . . where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal." The next sentence of subsection (B) qualifies that provision with two requirements: "However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section."

This is a case in which the videotaping equipment was not activated by blue lights. The trial court made a factual finding that Sergeant Hiott activated his patrol car's video as soon as practicable. There is evidence to support this finding, and under our standard of review, we are bound by it. However, the requirement in subsection 56-5-2953(B) that the videotaping "conform with the provisions of this section" refers back to subsection (A). Subsection 56-5-2953(A)(1)(b) requires that the videotaping at the incident site "include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered." Sergeant Hiott performed field sobriety tests after he started videotaping. Because the videotape did not include him giving Henkel *Miranda* warnings, it did not conform to the provisions of section 56-5-2953. Therefore, the trial court was required to dismiss the charge,[3] and it erred by not doing so.

REVERSED.

FEW, C.J., concurs.

GEATHERS, J., dissenting: For the following reasons, I would affirm Appellant's conviction for DUI.

I agree with the majority's analysis that a key determination in this case is whether the officer activated his patrol car's video recording equipment as soon as was practicable, such that the officer's delay in initiating the recording (non-compliance

[3] Because the omission of the *Miranda* warnings requires dismissal, it is not necessary for us to consider the significance of the alleged failure to videotape Henkel's conduct.

with subsection 56-5-2953(A)) was excused pursuant to an exception within subsection 56-5-2953(B). However, I disagree with the majority's conclusion that when this exception is invoked that an officer must still strictly comply with subsection (A). To so construe the exception would effectively eviscerate it. *See State v. Hercheck*, Op. No. 27258 (S.C. Sup. Ct. filed May 29, 2013) (Shearouse Adv. Sh. No. 24 at 46) ("[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction" (citation omitted)). Further, the majority's interpretation disregards the plain meaning of subsection (B). In my view of the terms of this provision, when the exception is properly invoked an officer must, *from that point forward*, comply with all applicable recording requirements. *See* § 56-5-2953(B) ("[*A*]*s soon as is practicable* in these circumstances, *videotaping must* begin and *conform* with the provisions of this section." (emphases added)). Accordingly, the initiation of the videotaping and conformance must each begin as soon as is practicable. *Id.* In the instant matter, it was not practicable for the officer to capture video evidence of Appellant receiving his initial *Miranda* warning or performing the HGN or ABC tests while Appellant was inside the ambulance.

Additionally, I believe that a complete recording of events "at the incident site," as required by subsection (A), was excused due to the "totality of the circumstances" exception within subsection (B). *See* § 56-5-2953(A) (requiring "videotaping *at* the incident site"); § 56-5-2953(B) (providing that "[n]othing in this section prohibits the court from considering *any other valid reason* for the failure to produce the videotape based upon the *totality of the circumstances*." (emphases added)). Notably, this case did not involve a typical DUI investigation and subsequent arrest at or near the site of a traffic stop. Instead, this case involved a report of an erratic driver, the erratic driver's collision with a bridge and overturning of his vehicle, and his subsequent fleeing on foot and jumping a fence. Thus, when the officer first encountered the suspect *four hours after the accident, inside of an ambulance*, and after the suspect had *wandered down the middle of the highway back toward* the site of the wreck that was cleared hours earlier, the totality of these circumstances did not require video recording, at least not as contemplated by subsection (A) for a typical DUI stop and investigation.

Accordingly, the totality of the circumstances did not require a video recording in strict compliance with subsection (A). Here, the produced video recording still began as soon as was practicable and included audio of the HGN and ABC tests. Thus, in light of subsection (B) and the totality of the circumstances, the produced recording was sufficient.

For these reasons, I respectfully dissent.