# The Supreme Court of South Carolina

In the Matter of Julius B. Aiken, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Aiken and the interests of Mr. Aiken's clients.

IT IS ORDERED that James M. Allison, Esquire, is hereby appointed to assume responsibility for Mr. Aiken's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Aiken may have maintained. Mr. Allison shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Aiken's clients and may make disbursements from Mr. Aiken's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Julius B.

Aiken, Esquire, shall serve as notice to the bank or other financial institution that James M. Allison, Esquire, has been duly appointed by this Court.

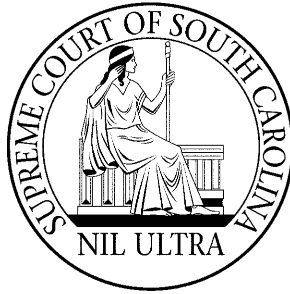
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James M. Allison, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Aiken's mail and the authority to direct that Mr. Aiken's mail be delivered to Mr. Allison's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

Mr. Allison's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
August 1, 2008




# OPINIONS

OF

# THE SUPREME COURT

AND

# COURT OF APPEALS

OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 32**
**August 11, 2008**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Cornelius Washington, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 26526
Heard June 11, 2008 – Filed August 4, 2008

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**AFFIRMED AS MODIFIED**

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Beattie Inglis Butler, of Charleston, and Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

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**CHIEF JUSTICE TOAL:** A jury convicted Petitioner Cornelius Washington of murder, and the court of appeals affirmed. *State v. Washington*, 367 S.C. 76, 623 S.E.2d 836 (Ct. App. 2006). This Court granted certiorari to review whether the court of appeals erred in holding that the trial court properly admitted certain hearsay evidence pursuant to the excited utterance exception. We affirm the court of appeals' decision as modified.

## FACTUAL/PROCEDURAL BACKGROUND

Petitioner and Adria Cropper were involved in a ten-year, on-again-off-again relationship. After the final break-up, Cropper began a relationship with Roy Cotman (Victim). One evening in August 2002, at approximately 9:00 p.m., Victim drove Cropper to her home where Petitioner was waiting. An altercation ensued in which Petitioner fatally stabbed Victim.

At trial, Cropper testified that Petitioner approached the vehicle, leaned in the driver's side yelling at Victim, and as she attempted to pull Petitioner away, Petitioner stabbed Victim. Petitioner, on the other hand, testified that he and Cropper were arguing outside of the vehicle and that he saw Victim exit the driver's side and look in the back of the car under the seats. Petitioner testified that he thought Victim was looking for a weapon, and that as Petitioner approached Victim, Victim "jump[ed] up and turn[ed] around" and Petitioner "started swinging." Petitioner then fled the scene, and Cropper called the police.

Following the incident, Cropper gave a statement to police. At trial, the State sought to introduce this statement through the interviewing officer (Officer). The Officer testified in camera that at approximately 9:30 p.m., he transported Cropper from the crime scene to the police station and began taking her statement at approximately 11:00 p.m. He described Cropper as being extremely upset and distraught over the incident. The Officer further explained that the statement consisted of a written narrative of the incident, which Cropper wrote, and three pages of questions and answers, which the

Officer transcribed. Additionally, the Officer testified that after another officer informed Cropper during the interview that Victim had died, she became hysterical.

Defense counsel argued that the statement was inadmissible hearsay evidence, while the State contended that it fell within the excited utterance exception. The trial court found that Cropper made the statement under the continuing stress of excitement of the events and ruled that the statement was therefore admissible as an excited utterance. The court of appeals affirmed the trial court's ruling.

## 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). A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *Id.*

## LAW/ANALYSIS

Petitioner argues that the trial court erred in admitting Cropper's statements pursuant to the excited utterance exception. Although we agree that the trial court erred in admitting Cropper's statement to police as an excited utterance, we find that any error was harmless.

Three elements must be met in order for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). The rationale underlying the excited utterance exception is that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). A court must consider the totality of the circumstances

when determining whether a statement is admissible under the excited utterance exception, and the determination is generally left to the sound discretion of the trial court. *Id.*; *see also State v. Burdette*, 335 S.C. 34, 43-44, 515 S.E.2d 525, 530 (1999).

Cropper's statement to police does not qualify as excited utterance. Cropper made her statements in a formal interview with law enforcement at police headquarters almost ninety minutes after the events. These statements were made in response to the Officer's questions. None of the statements were independent assertions or exclamations regarding the events. Indeed, it is apparent that the Officer was seeking detailed answers regarding the specific facts of the incident as opposed to emotional, unprompted, or inherent responses. *Compare State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999) (involving an eyewitness's statements to friends made two minutes after a shooting); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991) (finding that panicked and hysterical statements made by an eyewitness who met the responding police officer at the crime scene would have qualified as an excited utterance). While we have no doubt that Cropper was certainly upset as a result of the stabbing, the trial court's finding that statements made in a formal interview or interrogation to be excited utterances greatly expands the scope of the exception.

We note that this Court has found statements made to law enforcement qualify as an excited utterance under other circumstances. *See Burdette; State v. Harrison*, 298 S.C. 333, 380 S.E.2d 818 (1989); *State v. Quillien*, 263 S.C. 87, 207 S.E.2d 814 (1974). However, an important distinction between *Burdette*, *Harrison*, and *Quillien* and the instant case is the fact that that Cropper's statements were responses made in a formal police interview. In this way, Cropper's out-of-court statements are fundamentally different from the off-the-cuff, volunteered responses to law enforcement that the Court has allowed under the excited utterance exception. *See State v. McHoney*, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001) (observing that an excited utterance expresses the real belief of the speaker because the utterance is made under the immediate and uncontrolled domination of the senses, rather than under reason and reflection).

Nonetheless, in our opinion, any error in admitting Cropper's statement to police was harmless. The State presented overwhelming evidence that Petitioner killed Victim in a jealous rage. For example, Cropper, Cropper's mother, and police officers testified as to statements Petitioner made on the night of the incident indicating that he intentionally and maliciously stabbed Victim. Furthermore, the Officer's testimony regarding Cropper's statements was not extensive and was merely cumulative to Cropper's testimony.[1] Finally, there is no evidence in the record to support Petitioner's claim of self defense as there is no evidence indicating that Victim was the first aggressor. *See State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) (providing a list of factors to consider in determining whether error is harmless).

Accordingly, we hold that although the trial court erred in admitting Cropper's statement to police as an excited utterance, this error was harmless beyond a reasonable doubt.

## CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision as modified.

**MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.**

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[1] In *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001), the Court held that the trial court improperly admitted a witness's statements to police because they were prior consistent statements and did not fall under an exception to the hearsay rule. Additionally, the Court held the error was not harmless because although the testimony was cumulative, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Although it is arguable that the Officer's testimony improperly corroborated Cropper's testimony, we do not believe that it impacted the case or affected the jury's decision. Unlike the witness in *Saltz*, Cropper's testimony was not weak, and furthermore, the State presented a much stronger case against Petitioner.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Henry Fletcher, Petitioner.

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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

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Opinion No. 26527
Heard February 20, 2008 – Filed August 4, 2008

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**REVERSED**

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Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Norman Mark Rapoport, and Solicitor Warren Blair Giese, of Columbia, for Respondent.

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**JUSTICE WALLER:** We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (2005). We reverse.

## FACTS

Petitioner, Henry Fletcher, was indicted for homicide by child abuse relating to the death of nine-month-old Jaquan Perry. Jaquan was the son of Fletcher's live-in girlfriend, Ikeisha Perry. On the afternoon of September 21, 2000, Perry and Fletcher transported Jaquan to Palmetto Richland Memorial Hospital at approximately 1:15 p.m. According to Perry and Fletcher, the child had been fine that morning, so they took him on errands and to his brother's dental appointment. As they were leaving the dentist office, Fletcher noticed the soft spot on Jaquan's head was not moving so Perry checked and could not find a heart beat. Neither Fletcher nor Perry had noticed anything wrong with him prior to this time. However, both Fletcher and Perry told police Jaquan had fallen off a mattress onto a hardwood floor that morning. Although he seemed sleepy, they thought he was otherwise okay.

Dr. Robert Hubbird, the Pediatric ICU physician who first saw Jaquan at the hospital, testified that when he first saw him, Jaquan was in full cardiopulmonary arrest, his heart was not beating, and he was not breathing. Jaquan was resuscitated several times but was ultimately pronounced dead at 4:20 p.m. Dr. Hubbird testified Jaquan's abdomen was severely distended and protuberant, and that both his liver and bowel were injured. The bowel was injured so severely that it was leaking out into the abdomen and perineal cavity. According to Dr. Hubbird, both the liver and bowel were dying; the fact that he could not hear any bowel sounds meant they had been like that for days. Dr. Hubbird testified that Jaquan's injuries were not consistent with the reports given by Perry and Fletcher, and that the injuries would have taken an extreme amount of force directly to the abdomen. Dr Hubbird opined that the injuries would not have happened from falling a few feet from a bed onto a hardwood floor. Dr. Hubbird also testified that Jaquan had multiple rib fractures and there were numerous bruises on his body, ranging in date from 1-10 days old. The cause of Jaquan's death was child abuse from massive intra-abdominal injuries, massive injuries to kill the bowel, and widespread infection which killed the liver.

Dr. Timothy P. Close, a radiologist, also testified to the injuries to Jaquan's liver, bowels, kidneys, spleen, and that there were fractured ribs. Close testified there were numerous rib fractures, and that they were not all suffered at the same time, which was evident from the bruising, swelling, and different shading of the bones as they attempted to heal themselves. Close felt the newest fractures were anywhere from several hours to 2-3 days old, whereas some of the older ones were more likely 10-14 days old. Dr. Close likened the injuries suffered by Jaquan to injuries suffered in an auto accident where a person has been ejected at 60-70 miles per hour.

At trial, over the objection of defense counsel, the state called Carlos Jenkins, a friend and co-worker of Fletcher, as a witness to two events he had seen in the month prior to Jaquan's death. The attorneys for both Perry and Fletcher objected, contending there was not clear and convincing evidence as to who committed those acts, nor were those acts causally related to Jaquan's death. The trial court ruled that the "the course and conduct within a reasonable time before [Jaquan] died" was admissible. The Court also ruled it was a *res gestae* type situation. Accordingly, Jenkins was permitted to testify.

Jenkins testified he had known Fletcher for 4-5 years and had known Perry for only a couple of months. Over counsels' renewed objections, Jenkins testified that approximately two weeks prior to Jaquan's death, he had gone to Fletcher's house (where Perry and her two children were also living) and heard the baby crying. Fletcher told him the baby was upstairs, so he walked upstairs and found Jaquan sitting in a walker in the attic, "pouring down sweat like he had just dipped him in a bathtub." Jenkins testified he took Jaquan outside on the porch and cooled him off. Both Fletcher and Perry were home at the time.

Jenkins also testified that sometime in the two or three weeks prior to the attic incident, he came to the house and found Jaquan handcuffed by his feet to the bed on which Fletcher and Perry slept, so he unlocked the cuffs. Both Perry and Fletcher were home at the time. When Jenkins asked them if they were crazy, they just giggled.

Perry did not testify at trial. She did, however, give several statements to police, which were admitted in redacted form at trial. In her statements, Perry also indicated Jaquan had fallen from the bed the morning of September 21st. She comforted him, and then sat him on the sofa beside Fletcher. She and Fletcher brought Jaquan with them to run errands and, as they left the dentist's office, she realized his heart was not beating and drove to the emergency room while Fletcher attempted CPR. Perry denied ever beating Jaquan, but admitted Jaquan had been handcuffed to the bottom of the bed in her room.

Fletcher gave several statements to police and testified at trial. In his statements to police, he indicated similarly to Perry that Jaquan had rolled off a mattress in the morning, but was unharmed so they took him along on errands. He noticed Jaquan's soft spot on his head wasn't moving when they left the dentist's office and discovered he didn't appear to be breathing. They drove to the hospital while Fletcher attempted CPR, striking him in the chest a few times.

Fletcher denied ever beating Jaquan, but testified that Perry had done so a few times. He testified he had not seen Perry handcuff Jaquan to the bed, but saw him that way after he got out of the shower. He also testified that the "attic" where Perry would sometimes bring the children and hang clothes to dry was not actually an attic, but an unfinished room off of a bedroom on the second level of the house. According to Fletcher, there was an air duct right outside the "attic," one step outside from the stairs. He testified he had never put Jaquan in the attic.

Fletcher testified that he was not at the house on Sycamore Avenue from the Sunday until the Wednesday evening before Jaquan's death, arriving at 11:00 p.m. that Wednesday. (Jaquan died on Thursday). According to Fletcher, on the day of Jaquan's death, after he fell out of bed, Jaquan kept trying to go to sleep, so he was tapping/hitting Jaquan on the bottom of his feet to keep him awake.

The jury convicted Fletcher of homicide by child abuse. On appeal, the Court of Appeals affirmed, holding, *inter alia*, the prior bad acts testified to

by Jenkins were properly admitted pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). It held the prior bad acts had been proved by clear and convincing evidence, and that the acts were admissible to demonstrate a) a common scheme or plan of child abuse or neglect, b) intent or the absence of mistake or accident, c) as part of the res gestae of crime of homicide by child abuse and d) that, in any event, any error in admission of Jenkins' testimony was harmless beyond a reasonable doubt given the overwhelming evidence of guilt in this case.

## ISSUES

Did the Court of Appeals err in holding Jenkins' testimony concerning the events he witnessed in the weeks prior to Jaquan's death were admissible under Rule 404(b), SCRE and that admission of this evidence was, in any event, harmless error?

## DISCUSSION

Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the

result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364, cert. denied, 498 U.S. 881 (1990).

The Court of Appeals stated, without discussion, "The evidence demonstrates by clear and convincing proof the occurrence of the prior bad acts." This was error.[1] The present record does not contain clear and convincing evidence that Fletcher was the person who put Jaquan in the attic, nor does it indicate he was the person who handcuffed her to the bed.

Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 478 S.E.2d 282, 283 n. 4 (1996).

Here, there is simply not clear and convincing evidence in the record that Fletcher committed the prior bad acts testified to by Jenkins. Although Jenkins testified he saw Jaquan handcuffed to the bed and in the walker in the attic, there was no evidence whatsoever introduced at trial that Fletcher was either the person who placed Jaquan in the attic, or that he handcuffed him to the bed. On the contrary, Fletcher testified that upon discovering Perry had handcuffed Jaquan to the bed, he cussed her out about it after Jenkins left. Additionally, there was no testimony Fletcher was the person who put Jaquan in the attic room, and he testified Perry sometimes put him there while she dried her clothes as she used it as a laundry room.

We have previously found a lack of clear and convincing evidence the defendant committed the prior bad act in question where, for example, there was no evidence the appellant had committed the prior injuries of a split lip

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[1] We are not persuaded by the state's contention that this issue is not preserved for review. During a lengthy pre-trial hearing on the matter, both counsel for Perry and Fletcher argued against admission of Jenkins' testimony. Later, immediately prior to Jenkins' testimony, counsel for Perry objected, raising numerous grounds, including "the evidence relating to the rib injuries should not come in because there was not clear and convincing evidence as to who inflicted these rib injuries. . . . The same with the handcuffs and with the attic incident . . ." We find the issue is sufficiently preserved for our review.

and a swollen eye because the state offered no proof the appellant inflicted the injuries. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (evidence of prior child abuse inadmissible where there was no evidence defendant inflicted previous injury). See also State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (evidence of prior infant deaths inadmissible where there was lack of evidence defendant was the perpetrator).

On the present evidence, there is simply no evidence, let alone clear and convincing evidence that Fletcher was the perpetrator of the prior bad acts[2] against Jaquan. Accordingly, the trial court erred in admitting Jenkins' testimony.[3]

Finally, the Court of Appeals held that even if admission of Jenkins' testimony was improper, any error was harmless in light of the overwhelming evidence of guilt in this case. This holding was error.

Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). An insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

There was little evidence at trial as to who inflicted Jaquan's injuries. Although Fletcher gave a statement to police in which he admitted to wrestling with Jaquan, and hitting him with his elbows, and ultimately to punching him, he explained this at trial both by claiming he was being sarcastic after hours of questioning, and was utilizing the police officer's definition of "hitting" in describing his wrestling with Jaquan. Accordingly, given that the identity of the perpetrator was the essential issue at trial, and

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[2] We need not decide whether these acts, if proven by clear and convincing evidence, would otherwise be admissible under Rule 404 (b), SCRE.

[3] Further, contrary to the trial court's ruling, the prior acts simply do not come within the *res gestae* under the facts of this case Accord State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990). (prior acts must be so intimately connected to the crimes charged that their introduction is appropriate to complete the story of the crime charged).

given the dearth of evidence in the record, we simply cannot say that error in the admission of Jenkins' testimony was harmless beyond a reasonable doubt.

This case fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial. We find the only function of Jenkins' testimony in this case was to demonstrate Fletcher's bad character. Accordingly, admission of this testimony was both erroneous and prejudicial.[4] The Court of Appeals' opinion is reversed.

**REVERSED.**

**MOORE, PLEICONES, JJ., and Acting Justice J. Michelle Childs, concur. TOAL, C.J., dissenting in a separate opinion.**

[4] The dissent would hold the evidence is admissible to establish a pattern of child abuse and neglect, such that it is relevant to the charge of homicide by child abuse. The majority of this Court, however, has specifically rejected an identical contention under similar facts. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997).

**CHIEF JUSTICE TOAL**: I respectfully dissent. In my view, the trial court properly admitted the prior bad acts at issue. Accordingly, I would affirm Petitioner's conviction and sentence.

Although evidence of other crimes, wrongs, or acts is not admissible for purposes of proving that the defendant possesses a criminal character or has a propensity to commit the charged crime, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. To be admissible, a prior bad act must logically relate to the crime with which the defendant has been charged. *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.* Prior bad acts may also be admissible under the *res gestae* doctrine. Under this doctrine, evidence of prior bad acts may be admissible where such evidence constitutes an integral part of the crime with which the defendant is charged or is needed to aid the fact finder in understanding the context in which the crime occurred. *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999).

Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help. It is also not uncommon for child abuse victims to be so young that they are incapable of offering testimony against the abuser. For these reasons, proving the crime of child abuse is extremely difficult.

In light of the insidious nature of this crime, our Legislature created a separate homicide statute related to child abuse. That statute provides that "[a] person is guilty of homicide by child abuse if the person: causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme

indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2006). The Legislature has defined "child abuse or neglect" as "an act or omission by any person which causes harm to the child's physical health or welfare." S.C. Code Ann. § 16-3-85(B)(1) (2006). Thus, the homicide by child abuse statute criminalizes the specific infliction of abuse as well as the failure to protect a child from abuse which results in the death of that child while exhibiting an extreme indifference to human life. In this way, the statute incorporates more than just the act that causes the death – it criminalizes the course of conduct which results in the death of a child. In my view, this statute is grounded in the public policy that an adult is not only prohibited from physically abusing a child, but also is prohibited from deliberately sitting by and allowing a child's life to be threatened by the abuse of another.

In my opinion, the majority's view of the prior bad acts in the instant case as it relates to the crime of homicide by child abuse is far too narrow. Because the statute specifically prohibits not just acts resulting in death to a child, but also omissions, I believe that it is irrelevant whether Petitioner was the one to actually handcuff the infant victim to the bed and to place him in the attic, or whether he was aware of the abusive incidents that occurred in his home and failed to act to protect the child from the abuse. Pursuant to the statute, the jury was free to return a guilty verdict if it found that Petitioner failed to act in the face of patently dangerous conditions in which the victim was placed.

The evidence at trial showed that Petitioner and the infant victim's mother began a relationship in March 2000. In August 2000, several weeks prior to the victim's death, the victim's mother along with the victim and her other child began living at Petitioner's house with Petitioner. Although Petitioner testified that he did not spend every night at the house, he testified that he observed the victim's mother beat the victim and saw her wrap the victim in a blanket and get on top of him. Petitioner admitted that he would "play fight" with the victim, and in his statement to police, he stated that he

had hit the victim several times with his elbow and twice with his fists, pinched him, and put his weight on him, but that he did not mean to hurt the victim.[5]

The State presented evidence that the infant victim suffered severe internal injuries, multiple rib fractures, ruptured bowels which caused infection and sepsis, internal bleeding, abdominal infections, and dying organs, all of which ultimately culminated in his death. Doctors testified that these injuries occurred at different times and that the newer fractures were between several hours to three days old, while the older fractures were likely two weeks old. Additionally, doctors testified that the victim's injuries resulted from multiple and repeated blows and were not consistent with a single blow. The record contains no evidence that the victim died accidentally, and I believe that the extensive evidence of repeated brutal physical abuse leads only to the conclusion that the victim died an agonizing, prolonged death by torture at the hands of an adult. Petitioner's friend's testimony showed, at a minimum, that Petitioner deliberately failed to come to the victim's aid while the victim was living in Petitioner home and that Petitioner exhibited extreme indifference to human life, resulting in harm to the victim's safety and welfare.[6] Thus, under statute, this evidence was clearly relevant to Petitioner's guilt of the crime of homicide by child abuse.

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[5] At trial, the police officer testified that Petitioner had shown him how he placed his weight on the victim, which the officer demonstrated to the jury. The officer also testified that Petitioner weighed approximately 220 pounds at the time of his arrest, and another witness described Petitioner as "really, really big."

[6] I reach this conclusion viewing the prior bad act in the light most favorable to Petitioner, for there is evidence in the record that Petitioner himself committed the acts of abuse. Specifically, the record includes testimony that the handcuffs were Petitioner's; that Petitioner giggled after the friend removed the handcuffs; and that Petitioner told the friend "to mind his own business."

Considering the evidence presented in this case, I would hold that the friend's testimony was admissible under the *res gestae* doctrine. I believe that the testimony showed a course of conduct and established an integral part of the crime of homicide by child abuse because it is evidence that Petitioner abused and neglected the victim just weeks before his death. In light of the temporal proximity to victim's death and considering the nature of child abuse, I believe that Petitioner's friend's testimony was necessary to a full presentation of the crime. *See State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370 (1996) (quoting *United States v. Masters,* 622 F.2d 83, 86 (4th Cir. 1980) (holding that evidence of prior bad acts is admissible under the *res gestae* doctrine where such evidence "furnishes part of the context of the crime or is necessary to a full presentation of the case.").

I would also hold that the testimony was admissible pursuant to Rule 404(b) to show a common scheme or plan, because I believe that the prior bad acts bore a close degree of similarity and were sufficiently connected to the victim's death. In my view, Petitioner's friend's testimony was evidence of a pattern of abuse towards the victim shortly before his death in Petitioner's own home. These acts were committed against the same victim, close in time to the victim's death, and showed escalating abuse over a narrow and specific time period. In this way, this case is distinguishable from other cases in which we have found prior bad act evidence inadmissible under 404(b) as a common scheme or plan. *See State v. Smith*, 322 S.C. 107, 110, 470 S.E.2d 364, 366 (1996) (holding prior bad acts against girlfriend's son would not have been admissible in defendant's trial for the death of girlfriend's daughter where there was no evidence defendant previously abused the daughter and where the prior acts of abuse were not sufficiently similar); *State v. Pierce*, 326 S.C. 176, 179, 485 S.E.2d 913, 914 (1997) (holding evidence of prior bad act was inadmissible under the common scheme or plan exception where the acts were not sufficiently similar and where the acts occurred more than a year apart).[7]

[7] In my view, the majority in *Pierce* did not hold that prior bad acts are never admissible to establish a pattern of child abuse, but rather, that testimony from medical personnel regarding injuries to the child was inadmissible to

Furthermore, I would hold that this evidence is admissible pursuant to Rule 404(b) to prove intent and absence of mistake or accident. In order to prove its case, the State was required to prove that Petitioner exhibited an extreme indifference to human life. In my view, these prior bad acts showed that Petitioner exhibited extreme and deliberate indifference and conscious disregard towards the victim's life just weeks prior to his death. *See State v. McKnight*, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003) (noting that in reckless homicide cases, reckless disregard for the safety of others signifies an indifference to the consequences of one's acts or a conscious indifference to the safety of others); ***State v. Jarrell,*** 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002) (holding that "in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death."). Moreover, I believe that this testimony is evidence that the victim's death was not the result of the victim accidentally falling off of the bed, as Petitioner claimed. *See State v. Smith*, 337 S.C. 27, 33, 522 S.E.2d 598, 601 (1999) (holding that the trial court properly admitted the defendant's previous domestic violence convictions to show intent and absence of mistake or accident where he claimed the shooting was an accident).

In the homicide by child abuse statute, the Legislature drafted a criminal offense that recognizes and criminalizes both the acts and the omissions that typify the situation in which a helpless child perishes as a result of an adult's actions or criminal ambivalence. In my view, this evidence was not admitted as character or propensity evidence. Rather, I believe that the evidence showed a common scheme or plan, absence of mistake or accident, and intent, and that it was necessary for a full

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show a pattern of child abuse because there was no evidence the defendant committed the abuse causing the injuries. Additionally, the majority held that evidence of the defendant's "rough treatment" of the child a year prior to his death did not bear a close similarity or connection. Contrary to the testimony sought to be admitted in *Pierce*, Petitioner's friend's testimony provides an eyewitness account of the manner in which Petitioner treated Jacquan shortly before his death.

presentation of the State's case. For these reasons, I would affirm Petitioner's conviction and sentence.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of the Care and Treatment of Alfred William Lasure, Appellant.

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Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

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Opinion No. 26528
Heard June 26, 2008 – Filed August 11, 2008

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**AFFIRMED**

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Appellate Defender LaNelle C. Durant and Appellate Defender M. Celia Robinson, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Attorney General Deborah R. J. Shupe and Assistant Attorney General Brandy A. Duncan, all of Columbia, for Respondent.

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**JUSTICE WALLER:** This is a direct appeal from the jury's verdict which found appellant, Alfred William Lasure, to be a sexually violent

predator, and from the subsequent court order of commitment to the Department of Mental Health for appellant's long term control, care, and treatment. We affirm.

## FACTS

In March 2000, appellant pled guilty to one count of lewd act upon a child which had been committed in January 1997 when appellant molested a seven-year-old boy while traveling through South Carolina on a Greyhound bus. Appellant was sentenced to 12 years imprisonment. The sentencing sheet specifically noted that appellant was to participate in any sexual offender treatment offered by the Department of Corrections (DOC).

Prior to his anticipated release from prison, the State filed a petition pursuant to the Sexually Violent Predator (SVP) Act. See S.C. Code § 44-48-10 *et seq*. (Supp. 2007). At his jury trial, appellant moved to dismiss based on the argument that the SVP Act is unconstitutional because the State Constitution mandates rehabilitation of inmates. Appellant contended that the State should not have waited until the end of his criminal sentence to provide treatment. The trial court denied appellant's motion.

The State's sole witness was Dr. Pamela Crawford, an expert in forensic psychiatry. Her testimony demonstrated appellant has a long criminal history of sexually abusing pre-pubescent and adolescent boys. Appellant was convicted of various offenses in Florida in 1967, 1972, 1974, 1978, 1979, 1981 and 1982.[1] While on bond for the January 1997 South Carolina offense, appellant fled to Florida and again re-offended which resulted in another Florida conviction in 1997. Because he failed to get sex offender treatment in Florida, he was taken back to jail. In 1999, the fugitive warrant from South Carolina was discovered which ultimately led to his South Carolina conviction in 2000.

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[1] The majority of these offenses are sexual in nature, generally for lewd acts either against a child or in the presence of a child. His 1979 conviction was for delivering a controlled substance to a minor where he gave two 15-year-old boys marijuana.

Dr. Crawford diagnosed appellant with pedophilia as well as paraphilia NOS. In her opinion, appellant met the statutory definition of a sexually violent predator.

Additionally, Dr. Crawford noted that although appellant completed Phase I of the Sex Offender Treatment Program offered by the DOC – which she described as the educational phase of treatment – appellant refused to participate in the Residential Treatment Unit which provides intensive treatment. Dr. Crawford explained that appellant has never taken responsibility for any of the sexual offenses he has committed.

Beyond cross-examining Dr. Crawford, appellant presented no defense. The jury deliberated less than 15 minutes and found beyond a reasonable doubt that appellant is a sexually violent predator.

## ISSUE

Does the SVP Act violate Article XII, Section 2 of the South Carolina Constitution?

## DISCUSSION

Appellant argues the SVP Act violates Article XII, Section 2 of the State Constitution. Specifically, appellant complains he should have been placed into this particular SVP program from the beginning of his criminal sentence. We disagree.

Article XII, Section 2 of the South Carolina Constitution states that the General Assembly "shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and **rehabilitation** of the inmates." S.C. Const. art. XII, § 2 (emphasis added). A statute is presumed constitutional and will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 134-35, 568 S.E.2d 338, 344 (2002).

In Sullivan v. S.C. Dep't of Corrections, 355 S.C. 437, 444, 586 S.E.2d 124, 127 (2003), this Court held that even if Article XII, Section 2 is read to require some rehabilitation for inmates, "it does not mandate any specific programs that must be provided by the General Assembly or the [DOC] and, more importantly, **it does not mandate any particular timetable for the furnishing of any rehabilitative services**." Id. at 444, 586 S.E.2d at 127 (emphasis added).

It is settled law that the SVP Act is civil in nature. See In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001). As to whether the SVP commitment process should be held earlier in an inmate's sentence, we have already found that if this was the requirement, then other inmates could complain that "holding a commitment hearing early in their sentence deprives them of the ability to voluntarily receive treatment and rehabilitation which would negate their being labeled as a sexually violent predator." In re Treatment and Care of Luckabaugh, 351 S.C. at 145, 568 S.E.2d at 349.

As we observed in Luckabaugh:

> Moving the determination to the beginning of an individual's prison sentence would undoubtedly result in more individuals being adjudicated as sexually violent predators. Since the prison system currently offers mental health treatment programs, it would be unwise as a matter of judicial policy to deprive an individual of the opportunity to seek such counseling, to progress in his treatment and to demonstrate that he is not in need of custodial treatment programs as a sexually violent predator at the conclusion of his sentence.

Id. at145, 568 S.E.2d at 350.

Accordingly, we find no merit to appellant's argument that the SVP Act is unconstitutional. The State Constitution does not mandate the provision of any specific type of rehabilitative program. Sullivan, supra. Moreover, the DOC indeed offers sex offender treatment programs, and if an

inmate avails himself of these programs during his incarceration, he could potentially be rehabilitated and avoid the further intensive treatment required by the SVP Act at the conclusion of a criminal sentence. See Luckabaugh, supra.

Accordingly, we hold the trial court correctly found that the SVP Act does not violate Article XII, Section 2 of the South Carolina Constitution.

**AFFIRMED.**

**TOAL, C.J., MOORE, PLEICONES and BEATTY, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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James William Spoone, Petitioner,

v.

State of South Carolina, Respondent.

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ON WRIT OF CERTIORARI

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

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Opinion No. 26529
Submitted June 26, 2008 – Filed August 11, 2008

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**AFFIRMED**

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Karen Ratigan, all of Columbia, for Respondent.

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**JUSTICE WALLER:** In this post-conviction relief (PCR) case, we granted certiorari to review the PCR court's order of dismissal. We affirm.

## FACTS

Pursuant to a written plea agreement, petitioner James William Spoone pled guilty to murder, first degree burglary, and possession of a weapon during the commission of a violent crime. Prior to the guilty plea, the State issued a notice of its intent to seek the death penalty. In accord with the plea agreement, the trial court sentenced petitioner to life without parole for the murder and a consecutive life term for the burglary.[1]

The plea agreement expressly stated the following:

> [Petitioner] agrees to waive any and all appeals, PCR applications, federal habeas petitions and any and all other methods of review of this guilty plea and sentence.

The agreement further stated that its "purpose and intent" was for petitioner to live the remainder of his natural life in prison without the possibility of parole. In addition, the State agreed to withdraw the notice of intent to seek the death penalty, but upon breach of the agreement by petitioner, the plea would be nullified and the State could once again pursue the death penalty.

At the plea hearing, petitioner stated he was 46 years old, had a ninth grade education, and worked as a pipe welder.[2] The trial court referenced the written plea agreement which was made an exhibit to the proceeding.

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[1] No sentence was imposed for the weapons charge. See S.C. Code Ann. § 16-23-490(A) (2003) (mandatory five-year sentence "does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime").

[2] Petitioner also stated he had been married, but the murder victim was his estranged wife. According to the facts recited at the plea hearing, petitioner went into his wife's son's house with a shotgun, found his wife hiding in the bathroom, and shot her three times. When arrested four hours later, he admitted the shooting to police.

Petitioner acknowledged that he had gone over the agreement with his attorneys and signed it. The following colloquy then occurred:

> Trial Court: Just so there's no question about the agreement. You are pleading guilty to … murder, … possession [of a weapon], … burglary first degree. Do you agree that you will waive all appeals, PCR applications, federal habeas corpus petitions and any other methods of review of your guilty plea and sentence today? Is that part of your agreement?
>
> Petitioner: Yes, sir.

Petitioner also responded affirmatively when the trial court asked if he understood that a request for either judicial review or early release would constitute a breach of the agreement. Finally, the trial court again asked petitioner about this term of his guilty plea:

> Trial Court: Do you understand that you have given up all of your rights as to appeal and to have this case further considered?
>
> Petitioner: Yes, sir.

The trial court found petitioner's decision to plead guilty was "freely, voluntarily, knowingly and intelligently made with the advice and counsel of attorneys with whom the defendant says he is satisfied."

After petitioner filed the instant action for PCR, the State moved for dismissal based on the written plea agreement. After a brief hearing, the PCR court granted the State's motion. In the order of dismissal, the PCR court noted the plea transcript reflected that: (1) the plea agreement was thoroughly explained to petitioner; and (2) petitioner's decision to enter the agreement was knowing and voluntary.

## ISSUE

Did the PCR court err in enforcing the written plea agreement wherein petitioner waived his rights to direct appeal, PCR, and habeas corpus relief?

## DISCUSSION

Petitioner concedes that under federal law, a waiver of the right to collateral review is permitted where the circumstances surrounding the waiver show it is knowing and intelligent. Petitioner argues, however, that the waiver here was not knowing and intelligent because there was no discussion at the plea proceeding about the extent of his understanding of the waiver. Thus, petitioner contends this matter should be remanded to the PCR court for a merits hearing on his ineffective assistance of counsel claims.[3]

The issue of whether the right to appellate and post-conviction review may be waived by a written plea agreement has not been addressed by South Carolina state courts.

Regarding plea bargains generally, this Court has recognized and followed federal precedent. See, e.g., State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994) (discussing Santobello v. New York, 404 U.S. 257 (1971) and United States v. Ringling, 988 F.2d 504 (4th Cir. 1993)). The Thrift Court explained that "a plea bargain rests on contractual principles," and therefore, "each party should receive the benefit of the bargain." Id.; accord State v. Dingle, 376 S.C. 643, 651-52, 659 S.E.2d 101, 106 (2008) (finding defendant received the benefit of his plea bargain).

As to a plea agreement containing a waiver of direct appeal rights, the Fourth Circuit has stated "[i]t is clear that a defendant may, in a valid plea agreement, waive [a federal statutory] right of appeal, just as more

[3] In petitioner's PCR application, he alleges ineffective assistance of trial counsel based on counsel's failure "to do a proper investigation of the facts and law of the case."

fundamental rights such as the right to counsel and the right to a jury trial may be waived." United States v. Wessells, 936 F.2d 165, 167 (4th Cir. 1991) (citations omitted).[4] Regarding a waiver of the right to **collateral review**, the Fourth Circuit has held there is "no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights" in a plea agreement. United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005) (citation and internal quotation marks omitted).

However, such a waiver will be held effective only if it is knowing and voluntary. Wessells, 936 F.2d at 167; Lemaster, 403 F.3d at 220; see also United States v. Teeter, 257 F.3d 14, 24 (3rd Cir. 2001) ("The baseline for any waiver of rights is that the defendant enter into it knowingly and voluntarily."). The requirement that the waiver be knowing and voluntary is used by all the federal circuits, albeit with some variations. See generally Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. Kan. L. Rev. 727 (2005).

To determine whether a waiver is effective in the Fourth Circuit, the court examines the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused. United States v. Broughton-Jones, 71 F.3d 1143, 1146 (4th Cir. 1995). In addition, the court will evaluate whether "the issue sought to be appealed falls within the scope of the waiver." United States v. Cohen, 459 F.3d 490, 494 (4th Cir. 2006), cert. denied 127 S.Ct. 1169 (2007).

In addition to federal court precedent, numerous state jurisdictions have upheld waivers of appellate rights and/or post-conviction relief, provided they were knowing, intelligent and voluntary. See, e.g., People v. Vargas, 17 Cal.Rptr.2d 445, 449 (Cal. Ct. App. 1993) ("an express waiver of the right of appeal made pursuant to a negotiated plea agreement is valid provided defendant's waiver is knowing, intelligent and voluntary"); Stahl v. State, 972 So.2d 1013, 1015 (Fla. Dist. Ct. App. 2008) (a defendant can waive his

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[4] Accord United States v. Teeter, 257 F.3d 14, 22 (3rd Cir. 2001) ("Since the Supreme Court repeatedly has ruled that a defendant may waive constitutional rights as part of a plea agreement, it follows logically that a defendant ought to be able to waive rights that are purely creatures of statute.") (citations omitted).

right to collateral attack when the waiver is expressly stated in the plea agreement and it is knowingly and voluntarily made); Allen v. Thomas, 458 S.E.2d 107, 108 (Ga. 1995) ("a waiver of a right to appeal or to seek post-conviction relief must be knowing, intelligent and voluntary"); Jackson v. State, 241 S.W.3d 831, 833 (Mo. Ct. App. 2007) ("A movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently."); People v. Seaberg, 541 N.E.2d 1022, 1026 (N.Y. 1989) (waiver of appellate rights is enforceable if it is voluntary, knowing and intelligent; to make this determination, "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused" must be considered).

Looking at the particular facts and circumstances of the instant case, including: (1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing, we find petitioner's waiver was voluntarily, knowingly, and intelligently made. Although petitioner only has a ninth grade education, the text of the written plea agreement was straightforward. Furthermore, the plea colloquy shows that the trial court specifically asked petitioner about the waiver both in the language of the plea agreement, as well as in plain language. Petitioner was represented by two attorneys at the trial level. Both lawyers attended the plea hearing and both signed the written plea agreement, along with petitioner himself.

Accordingly, we hold the PCR court correctly enforced the waiver and dismissed petitioner's PCR application.[5]

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[5] Petitioner argues the Fourth Circuit's opinion in Wessells supports his argument. In Wessells, the defendant had waived the right to directly appeal the sentence. The court found the waiver was unenforceable, however, because the plea court did not question the defendant "specifically concerning the waiver provision of the plea agreement" and the defendant "himself gave no indication of the degree to which he understood the waiver's import." Wessells, 936 F.2d at 168. In this case, however, the trial court did specifically question petitioner about the waiver

**AFFIRMED.**

**TOAL, C.J., MOORE, PLEICONES and BEATTY, JJ., concur.**

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provision more than one time and in more than one manner. Therefore, Wessells is clearly distinguishable.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Frank E. Willis, Appellant,

v.

Stephen J. Wukela and the South Carolina Democratic Party Board of State Canvassers of Municipal Primaries, Respondents.

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Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

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Opinion No. 26530
Submitted August 6, 2008 – Filed August 7, 2008

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APPEAL DISMISSED

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Dennis J. Lynch, of Nexsen Pruet, LLC, of Columbia; George D. Jebaily, of Jebaily Law Firm, of Florence; and James B. Richardson, Jr., of Columbia, for Appellant.

Steve Wukela, Jr., of Wukela Law Firm, of Florence; William Norman Nettles, of Sanders & Nettles, LLC, of Columbia, for Respondents.

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**PER CURIAM:** This election dispute concerns the Democratic Primary election for the office of the Mayor of Florence, which appellant, Frank Willis, lost by one vote to respondent, Stephen J. Wukela. We dismiss Willis' appeal.

FACTS

The City of Florence held its municipal primary elections on June 10, 2008, in conjunction with several other elections.[1] After Wukela was declared the winner of the Florence Democratic Mayoral Primary by a single vote, Willis filed a protest with the Florence Democratic Party. The Executive Committee of the City of Florence Democratic Party transferred its responsibility to certify the results of the election to the South Carolina Democratic Party. Following a lengthy hearing on June 21, the South Carolina Democratic Party Board of State Canvassers of Municipal Primaries voted to uphold the election results.

Willis filed a timely notice of appeal and the matter was heard before the circuit court on July 2. The circuit court judge issued an order affirming Wukela's certification on July 14. Willis filed a motion to alter or amend, which was denied on July 18.

Willis appealed to this Court and sought to expedite the appeal. Wukela filed a motion to dismiss the appeal. On July 28, the Court ordered that the parties file briefs pursuant to an expedited briefing schedule and indicated the Court would consider the motion to dismiss when it considered the appeal on the merits.

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[1] By agreement, city, county, state, and national primaries were held on the same day. The Florence County Election Commission conducted the mayoral primary. See S.C. Code Ann. § 5-15-145 (2004) ("Municipalities are authorized to transfer authority for conducting municipal elections to the county elections commissions.").

## ISSUE

Wukela argues in his motion to dismiss that the issue is moot because the winner of the primary must be certified on or before August 15, 2008. We agree. See e.g. Curtis v. State, 345 S.C. 557, 67, 549 S.E.2d 591, 596 (2001) (holding a case becomes moot when a ruling will have no practical effect upon the existing controversy).

## ANALYSIS

South Carolina Code Ann. § 7-13-350 (Supp. 2007), specifies two different, mandatory deadlines for certifying the winners of party primaries so that the winners may be placed upon the ballot for general or special elections. Section 7-13-350(A) provides in pertinent part:

> Except as otherwise provided in this section, the nominees in a party primary or party convention held under the provisions of this title by any political party certified by the commission for one or more of the offices, national, state, circuit, multi-county district, countywide, less than countywide**, or municipal to be voted on in the general election, held on the first Tuesday following the first Monday in November, must be placed upon the appropriate ballot** for the election as candidates nominated by the party by the authority charged by law with preparing the ballot if the names of the nominees are certified, in writing, by the political party chairman, vice-chairman, or secretary to the authority, for general elections held under Section 7-13-10, **not later than twelve o'clock noon on August fifteenth** or, if August fifteenth falls on Saturday or Sunday, not later than twelve o'clock noon on the following Monday; **and for a special or municipal general election, by at least twelve o'clock noon on the sixtieth day prior to the date of holding the election**, or if the sixtieth day falls on Sunday, by twelve o'clock noon on the following Monday . . . .

(Emphasis added).

Willis maintains the Democratic Party must certify its nominee for placement on the ballot by September 5, sixty days before the November 4 election, in accordance with the second portion of § 7-13-350. In support of this argument, Willis has presented the affidavit of Steven Love, Interim Director of the Florence County Voter Registration and Election Commission. Love states in his affidavit that a new primary could be conducted on August 26 in order for the time allotted for canvassing and certification of the results to run its course by September 5. He also testified at the hearing before the State Board of Canvassers that the Election Commission would need approximately thirty days to prepare for another election. Love states in his affidavit that, in order to hold an election by August 26, the Florence Voter Registration and Election Commission *must* receive a court order requiring such an election by no later than August 8.[2]

Wukela, on the other hand, asserts the first portion of the statute applies and, because the Florence municipal election is scheduled at the same time as the November 4 general election, the Democratic nominee must be certified by August 15. In support of this argument, Wukela points to City of Florence Municipal Ordinance 2008-04, which was passed in February 2008. Ordinance 2008-04 states, "[t]he General Election shall be held on November 4, 2008 . . . at which time the Mayor and two City Council members shall be elected at-large." The ordinance also mandates that "[p]olitical party primaries or conventions **must** certify nominees to the Municipal Election Commission **no later than noon on August 15, 2008**." (Emphasis added). Based on the above, Wukela maintains the matter was moot on or before July 17, provided a lead time of thirty days is necessary to organize and hold the election, as Love states in his affidavit.

A municipality may hold elections, primary or otherwise, whenever it wishes. S.C. Code Ann. § 5-15-50 (2004) ("Each municipal governing body may by ordinance establish municipal ward lines and the time for general and special elections within the municipality"); S.C. Code Ann. § 5-15-70 (2004)

[2] We note August 26 is actually eighteen, not thirty days, from August 8.

(noting each municipal body shall determine by ordinance the time for filing nominating petitions and holding primary elections or conventions). A plain reading of § 7-13-350 reveals that, when a municipality chooses to hold its election to coincide with the general election occurring on the first Tuesday following the first Monday in November, a winner **must** be certified no later than August 15. E.g. Sloan v. S.C. Bd. of Physical Therapy Examr's, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) (holding the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation).

Willis argues the sixty day rule applies because the August 15 date governs only general elections held pursuant to S.C. Code Ann. § 7-13-10 (1976), and § 7-13-10 governs general elections for federal, state, and county offices. However, Willis ignores the fact the City of Florence chose to hold its municipal election simultaneously with the federal, state, and county election, which was held pursuant to § 7-13-10. Moreover, changing the certification date by amended ordinance, as Willis is currently seeking to do, will have no effect on the date the results must be certified because the city cannot contravene the express requirement of the statute by ordinance. Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 487, 511 S.E.2d 361, 363 (1999) ("In order for there to be a conflict between a state statute and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other").

Based on Willis' statements in his return and his brief, together with Love's statements in his affidavit that Florence County needs substantial lead time before it can hold another election, holding another election is, for all intents and purposes, impossible. In Sasser v. S.C. Democratic Party, 277 S.C. 67, 69, 282 S.E.2d 602, 604 (1981), this Court noted that, by the very nature of the election system, contests of a primary election must be settled in time for the electorate to exercise their voting franchise at the general election set by law. Therefore, "[a]s a general rule, courts have held that they are without power to grant substantial relief once the time passes for the name of a contestant to be certified for the election of officers to be placed on the official ballot." Sasser, 282 S.E.2d at 604.

Moreover, the Court found in Sasser that § 7-13-350 provided that candidates nominated by party primary, except in cases of special and municipal elections, must be certified by September 18 (which has since been changed to August 15). Id. at 603. The Legislature amended the statute in 1998 and specifically added municipal elections to the classes of elections which may be scheduled at the same time as November general elections, from which the results of a primary must be certified by August 15. We hold the intent of the Legislature was clear in mandating that, if a municipal election is scheduled to coincide with a November general election, names of the party candidates must be certified by August 15. See N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 30 (2007) ("In interpreting a statute, our primary purpose is to ascertain the intent of the legislature").

## CONCLUSION

We dismiss the appeal with prejudice pursuant to § 7-13-350 and Sasser.

**TOAL, C.J., WALLER, PLEICONES, and KITTREDGE, JJ., concur. BEATTY, J., concurring in result.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Rodney L. Zurcher, Appellant,

v.

Richard J. Bilton, individually
and as agent and servant of
Woody Bilton Ford, Inc., and
Woody Bilton Ford, Inc., Respondents.

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

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Opinion No. 26531
Heard April 16, 2008 – Filed August 11, 2008

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**AFFIRMED**

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Timothy A. Domin and Michael B. McCall II, both of Clawson & Staubes, of Charleston, for Appellant.

E. Warren Moïse, of Grimball & Cabaniss, of Charleston, for Respondents.

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**CHIEF JUSTICE TOAL:** Appellant initiated a civil action against Respondents alleging various torts arising out of a physical altercation between the parties. The trial court granted Respondents' motion for

summary judgment as to each claim on the grounds that Appellant's *Alford* plea in a previous criminal proceeding collaterally estopped Appellant from litigating a civil claim based on the same facts as the criminal conviction. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

In June 2004, Appellant Rodney Zurcher ("Zurcher") approached Respondent Joey Bilton ("Bilton") in Bilton's office at the Woody Bilton Ford dealership to request a referral fee for recruiting a customer who had recently purchased a vehicle from the dealership. When Bilton refused to pay the fee, a physical altercation ensued which ultimately involved two female employees of the dealership who came to assist Bilton. Zurcher and Bilton immediately reported the incident to the local police department, each claiming that the other was the aggressor.

The solicitor charged Zurcher with three counts of simple assault and battery against Bilton and the two female employees. Subsequently, Zurcher filed a civil suit against Bilton and Woody Bilton Ford, Inc. (collectively, "Respondents") alleging assault and battery, false imprisonment, abuse of process, malicious prosecution, and intentional infliction of emotional distress. Respondents counterclaimed alleging assault and battery. Each party denied liability for the other's claims and further claimed self-defense.

The criminal charges against Zurcher went before the magistrates court in February 2006. Considering the presence of Bilton, the two female employees, and one additional witness to testify against him, and the "significant likelihood of being convicted on all three counts," Zurcher entered a guilty plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) on a single count of simple assault and battery in exchange for the dismissal of his remaining two assault and battery claims. The magistrate assessed the maximum fine, but did not impose a sentence.

Following Zurcher's criminal proceeding in magistrates court, Respondents filed a motion for summary judgment in the civil action. The trial court granted the motion for summary judgment as to all of Zurcher's

claims against Respondents and granted partial summary judgment as to Respondents' claims against Zurcher, leaving only the issues of proximate cause and damages. Specifically, the trial court ruled that Zurcher's previous *Alford* plea to simple assault and battery at the criminal proceeding collaterally estopped Zurcher from litigating the claims and counterclaim asserted at the subsequent civil proceeding, all of which hinged on whether Zurcher physically assaulted Bilton. This appeal followed.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR, and Zurcher raises the following issue for review:

> Did the trial court err in holding that a defendant who enters an *Alford* plea in a criminal proceeding is collaterally estopped from litigating the issue in a subsequent civil action based on the same facts underlying the plea?

## STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). Summary judgment is appropriate where there are no genuine issues 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 which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hanson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007).

## LAW/ANALYSIS

Zurcher argues that the trial court erred in holding that the entry of an *Alford* plea at a criminal proceeding collaterally estops a defendant from litigating the issue in a subsequent civil action based on the same facts underlying the plea. We disagree.

Under the doctrine of collateral estoppel, also known as issue preclusion, when an issue has been actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action whether on the same or a different claim. *S.C. Prop. and Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action. *See id.* This Court recently extended the doctrine of collateral estoppel by adopting the rule that "once a person has been criminally convicted, the person is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction." *Doe v. Doe*, 346 S.C. 145, 148, 551 S.E.2d 257, 258 (2001).

We find no legal or practical justification for excluding guilty pleas from the ambit of the doctrine of collateral estoppel. Although the defendant who enters a guilty plea has chosen a legal strategy which avoids a trial while the defendant who is adjudicated guilty has opted to take his chances at a contested trial, both are means to the same legal end: the imposition of the punishment prescribed by law. *See Sanders v. Leeke*, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970) ("A plea of guilty is a confession of guilt, made in a formal manner and has the same effect in law as a verdict of guilty . . . ."). For this reason, so long as a defendant has entered a guilty plea freely and voluntarily,[1] an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty. Accordingly, we hold that a defendant who enters a guilty plea may be collaterally estopped from litigating the same issue in a subsequent civil suit.

An *Alford* plea is not distinguishable from a standard guilty plea in this regard. An *Alford* plea – a guilty plea accompanied by an assertion of innocence – was held to be a constitutional admission of guilt in *North Carolina v. Alford*, 400 U.S. 25 (1970). The *Alford* court reasoned that so long as a factual basis exists for a plea, the Constitution does not bar

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[1] *See Gaines v. State*, 335 S.C. 376, 380, 517 S.E.2d 439, 441 (1999) (stating the constitutional standard governing the entry of guilty pleas).

sentencing a defendant who makes a calculated choice to accept a beneficial plea arrangement rather than face overwhelming evidence of guilt. 400 U.S. at 38.[2] Under this same reasoning, we find that the defendant must likewise accept the collateral consequences of that decision. Therefore, we hold that the entry of an *Alford* plea at a criminal proceeding has the same preclusive effect as a standard guilty plea.

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[2] In its analysis, the *Alford* court compared guilty pleas accompanied by an assertion of innocence with *nolo contendere* pleas, in which a defendant does not expressly admit guilt, yet waives the right to a trial and authorizes the court to treat him as guilty. *See* 400 U.S. at 35-37. We reiterate that the significance of *Alford* lies in the determination that the *Alford* class of guilty pleas is constitutionally valid. To this end, the *Alford* court's analogy is only intended to show that an *Alford* guilty plea is the constitutional equivalent of a *nolo* plea. The comparison in no way suggests that *Alford* pleas are the equivalent of *nolo* pleas for all practical purposes, particularly with respect to evidentiary standards which prohibit using *nolo* pleas as substantive evidence of guilt in a subsequent proceeding. *See* Rule 410(2), SCRE.

Our rules of evidence also distinguish *nolo contendere* pleas from *Alford* pleas in some circumstances. *See* Rule 609, SCRE (permitting prior convictions to be used for impeachment purposes and that for purposes of the rule, "a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to *North Carolina v. Alford*"). In light of this distinction, had the policy underlying the rules been to give *Alford* pleas the same non-preclusive effect on collateral review as *nolo* pleas, the drafters could have specified such in the rules governing the admissibility of prior convictions. *See* Rule 410, SCRE (providing that a *nolo* plea is inadmissible in any civil or criminal proceeding); *and* Rule 803(22), SCRE (excluding *nolo* pleas from the hearsay exception for judgments of previous convictions after a trial or upon a plea of guilty).

For these reasons, we find that any perceived similarity between *Alford* pleas and *nolo* pleas is irrelevant to the Court's determination in this case.

Applying this to the instant case, we find the trial court correctly determined that Zurcher was estopped from denying liability for the assault in the subsequent civil action. Zurcher had a full and fair opportunity to litigate the criminal assault and battery charge at the trial before the magistrate, and the testimony of the three witnesses against him who were present during the altercation clearly provided a sufficient factual basis for Zurcher's plea. Furthermore, as the trial court observed, Zurcher claimed no difficulties in procuring witnesses and no procedural limitations affecting his opportunity to litigate. That he deemed a plea of guilty to be the more appealing alternative at the criminal proceeding does not diminish the voluntariness of Zurcher's plea under the circumstances. Acting on the advice of competent counsel, Zurcher simply reasoned that the evidence weighed heavily against him and that he preferred to pay a fine for one charge of simple assault and battery rather than risk the imposition of three consecutive thirty-day sentences for three charges of assault and battery. Accordingly, we hold that Zurcher is bound by his *Alford* plea and is precluded from denying liability in the subsequent civil action with Bilton.[3]

## CONCLUSION

For the foregoing reasons, we affirm the trial court's decision holding that a party who has pleaded guilty under *Alford* in a previous criminal

[3] Only guilty pleas to "a crime punishable by death or imprisonment in excess of one year" are admissible under the hearsay exception found in Rule 803(22), SCRE. Therefore, it appears that Zurcher's guilty plea to simple assault and battery, a misdemeanor carrying a $500 fine or 30 days imprisonment, *see* S.C. Code Ann. §§ 22-3-540, -560 (2007), was inadmissible hearsay evidence in the first instance. Because Zurcher neither objected at trial nor appealed the issue on grounds of hearsay, this Court need not address the matter. We also note that Zurcher could have pleaded *nolo contendere* and altogether avoided this appeal as *nolo* pleas are permitted only for misdemeanor charges, S.C. Code Ann. § 17-23-40 (2003), and are inadmissible in any civil or criminal proceeding, Rule 410, SCRE, except for impeachment purposes, Rule 610, SCRE.

proceeding is collaterally estopped from litigating the issue in a subsequent civil action based on the same facts underlying the plea.

**MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Eric U. Fowler and
Melissa W. Dawn Fowler, Appellants/Respondents,

v.

Sallie Hunter, Gynecologic
Oncology Associates,
Selective Insurance Company
of South Carolina, and
Insurance Associates, Inc., Defendants,

Of whom: Selective Insurance
Company of South Carolina is, Respondent/Appellant,

and

Insurance Associates, Inc. is, Respondent.

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

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Opinion No. 4422
Heard June 4, 2008 – Filed July 8, 2008
Withdrawn, Substituted and Refiled July 30, 2008

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**REVERSED**

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Rodney M. Brown, of Fountain Inn, for Appellant/Respondents.

Andrew F. Lindemann, of Columbia, for Respondent/Appellant.

E. Matlock Elliott and Joshua L. Howard, of Greenville, for Respondent.

**KONDUROS, J.:** Eric and Melissa Fowler ("the Fowlers") appeal the dismissal of their assigned cause of action for professional negligence against Insurance Associates, Inc. ("Insurance Associates"). Selective Insurance Company of South Carolina, Inc. ("Selective") appeals the dismissal of its cross-claim for equitable indemnification against Insurance Associates. We reverse.

## FACTS

The Fowlers were seriously injured when the motorcycle they were riding was struck by a car driven by Sallie Hunter. The car was owned by Gynecologic Oncology Associates ("GOA") for use by Mrs. Hunter's husband, Dr. James Hunter. Auto-Owners Insurance Company insured the car under a business automobile policy with limits of one million dollars. At least two other policies potentially provided coverage. One was a commercial umbrella policy for four million dollars procured by GOA through Insurance Associates and issued by Selective. The other policy at issue was a personal catastrophic liability policy for two million dollars carried by the Hunters and also issued by Selective.

The Fowlers filed suit against Mrs. Hunter, and it was discovered that due to an inadvertent computer error by Insurance Associates, GOA's umbrella policy did not provide automobile liability coverage. The Fowlers then filed a declaratory judgment action to see what coverage was available under the above-referenced policies. The Hunters and GOA answered and filed cross-claims against Selective for reformation and against Insurance

Associates for professional negligence. Additionally, Selective filed a cross-claim against Insurance Associates for indemnity.

Eventually, the parties settled many of the claims in the two lawsuits. The Fowlers received one million dollars from GOA's automobile policy, two million dollars from the Hunter's personal umbrella policy, and an additional one and one-half million dollars from Selective. Additionally, the Hunters and GOA assigned their professional negligence claim against Insurance Associates to the Fowlers, and the Fowlers signed a covenant not to execute against the Hunters and GOA. The Hunters and GOA agreed to cooperate with the Fowlers in the prosecution of the professional negligence claim, and the Fowlers and Selective agreed to split equally any recovery from either the professional negligence or indemnification claim.

Insurance Associates filed a summary judgment motion seeking dismissal of the only remaining claims: the professional negligence claim assigned to the Fowlers and Selective's claim for indemnification. The circuit court granted these motions finding that because neither the Hunters, GOA, nor Selective could prove they were damaged by Insurance Associate's negligence, the claims failed. These appeals followed.

## STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrs., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). However, when a party has moved for summary judgment the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it. Rule 56(e), SCRCP. Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial. Id.

## LAW/ANALYSIS

### I. Professional Negligence

The Fowlers argue the circuit court erred in granting summary judgment to Insurance Associates as to their assigned claim for professional negligence. We agree.

The circuit court reasoned because the Hunters and GOA were insulated from execution of any judgment, the Fowlers, standing in the Hunter's shoes, could never prove damages flowing from the negligence of Insurance Associates. While this analysis is technically correct, the majority of courts having addressed this issue have elected to allow such an assigned claim to proceed. We are persuaded by the rationale set forth in those cases.

In Campione v. Wilson, 661 N.E.2d 658, 660-61 (Mass. 1996), an injured party settled with an insurer and insured for a stipulated amount of damages and a release of the insured. The Massachusetts Supreme Court determined that even though the settlement included a release, the injured party could proceed in prosecuting the insured's assigned negligence claim against the insurance brokers. Id. at 663. The court considered the competing policy considerations at play under these circumstances noting there is a risk of collusion between the settling parties even though there is benefit to allowing injured parties and tortfeasors to settle claims. Id. at 662-63. Nevertheless, the court rejected the "'somewhat metaphysical contention' that the legal basis for the claim against the insurer [and broker] disappeared when the insured became insulated from liability due to a release or a covenant not to execute." Id. at 662 (quoting Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128, 1132-33 (D.C. Cir. 1989)).

An examination of other jurisdictions reveals most courts are approving of settlement arrangements similar to the one in this case, so long as the risk of collusion is minimized. See Gray, 871 F.2d at 1133 (applying North Carolina law and allowing injured party to pursue assigned bad faith claim against insurer even though insured was insulated from liability by release); Damron v. Sledge, 460 P.2d 997, 999 (Ariz. 1969) (holding an assignment of the insured's bad faith claim plus a covenant not to execute was not ipso

facto collusive); United Servs. Auto. Ass'n v. Morris, 741 P.2d 246, 254 (Ariz. 1987) (holding settlement between insured and claimant in which insurer was to defend under reservation of rights did not violate policy's cooperation clause); Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524, 532-33 (Iowa 1995) (holding insured could still suffer damages from agent's negligence when settlement was coupled with a covenant not to execute that did not extinguish liability as would a release; therefore, assigned claim for agent's negligence would be valid); Glenn v. Fleming, 799 P.2d 79, 92-93 (Kan. 1990) (approving of a settlement between insured and injured party coupled with an assignment of a prejudgment claim and covenant not to execute when the settlement is entered into in good faith and the settlement amount is shown to be reasonable).

South Carolina has shown a willingness to depart from the common law in order to promote reasonable settlements between tortfeasors and injured parties. In Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971), our Supreme Court concluded the common-law rule regarding the release of one joint tortfeasor was not in the best interests of justice.

> Being untrammeled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.

Id. at 492, 179 S.E.2d at 914.

While acknowledging the inherent benefits of settlement, we also note South Carolina promotes the careful examination of settlement agreements to avoid the potential for complicity or wrongdoing.

> We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this

> Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.

Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007) (quoting Poston by Poston v. Barnes, 294 S.C. 261, 263-64, 363 S.E.2d 888, 889-90 (1987)).

In the instant case, there is little evidence of collusion between the settling parties. The injuries suffered in the case were extremely serious. Furthermore, the parties did not put a stipulated amount of damages in their agreement so as to reduce the appearance of collusion, and because they contemplated that the underlying tort claim would be tried to a conclusion.[1] The result of the settlement was the Fowlers were able to procure the three million dollars available under the other insurance policies in which coverage was not disputed, while litigation against a negligent party, Insurance Associates, was not foreclosed.[2] This was clearly the intent of the parties as shown by the express language of the settlement agreement and covenant not to execute. The catastrophic injuries suffered by the Fowlers begged a resolution that would give them the benefit of the uncontested proceeds promptly. In light of our State's willingness to place the interests of the injured party above such a technical application of the law, we believe it was inappropriate for the claim to be dismissed at the summary judgment stage. We therefore reverse the circuit court's grant of summary judgment in favor of Insurance Associates.

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[1] The Fowlers and Selective argued to the circuit court if a judgment in excess of the policy limits was required prior to determining the summary judgment motions, the motion hearing should be stayed and the underlying tort claim tried. However, the circuit court elected to proceed with ruling on summary judgment motions.

[2] The overall settlement received was four and one-half million dollars. However, as discussed further below, Selective contends one and one-half million dollars of the settlement was not payment from any particular policy.

## II. Equitable Indemnification

Selective contends the circuit court erred in granting summary judgment in favor of Insurance Associates regarding Selective's cross-claim for equitable indemnification. We agree.

Under South Carolina law, a party seeking equitable indemnification must show three things: "(1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999).

Under the settlement, the Fowlers received one and one-half million dollars from Selective that was not directly traceable to any policy. The circuit court determined Selective admitted liability under the commercial umbrella policy by making this payment. If so, Selective actually benefitted from the negligence of Insurance Associates. Had the automobile liability not been inadvertently excluded under the policy, the defendants' potential exposure would have been the full amount of the policy limits amounting to four million dollars.

Selective offered an alternative explanation for the one and one-half million dollar payment. Selective contends the payment was made as part of a global settlement to avoid a professional negligence claim asserted by the Hunters and GOA. Insurance Associates admitted its negligence in failing to request automobile coverage on the umbrella policy. If Insurance Associates was acting as an agent for Selective, Selective could be vicariously liable for that negligence. Consequently, Selective argues it settled that claim for one and one-half million dollars, paid to the Fowlers, and decided to pursue indemnification from Insurance Associates. We find Selective's position raises a question regarding the indemnification claim, but only if we can conclude Selective would not have issued the policy had the application been correctly submitted. In other words, if Selective would have issued the

policy anyway, it was not damaged by Insurance Associates' negligence as it would have been exposed for the full four million dollars.

As the moving party, Insurance Associates relied upon the deposition testimony of Roy Phillips indicating that Selective would have definitely issued the policy had it been submitted correctly to include automobile coverage. Insurance Associates also submitted a set of guidelines related to the "one and done" computer software program that allowed "agents" to automatically secure policies if certain criteria are met. In response, Selective submitted guidelines produced by Insurance Associates during discovery showing that a policy would not automatically be secured unless the underlying policy was also issued by Selective. In this case, the underlying policy was not issued by Selective, but by Auto-Owners.

We conclude the competing sets of guidelines raise a genuine issue of material fact precluding summary judgment. Further inquiry into the facts may show Selective would not have issued the policy without the automobile exclusion. If so, Selective's claim for indemnification as to the one and one-half million dollar settlement may prove viable. If Selective cannot produce such evidence, the claim will likely fail. However, we find the issue presented was too uncertain at this stage for the grant of summary judgment to be appropriate.

Finally, Insurance Associates contends Selective failed to mitigate its damages, barring its indemnification claim, by entering into the global settlement and not litigating coverage under the commercial umbrella policy. We disagree.

While Selective may have a viable coverage defense as to the Hunter's professional negligence claim, that defense was not a certainty. Had they not settled, Selective could have been found responsible for the full four million dollars contemplated under the policy. By settling, Selective made a calculated decision to minimize its own risk. Furthermore, this mitigated the potential damages Selective can seek via indemnification from Insurance Associates.

## CONCLUSION

We are persuaded settlements like the one in this case are favorable, so long as the risk of collusion is minimized. Therefore, we conclude the grant of summary judgment in favor of Insurance Associates should be reversed. Furthermore, we believe the existence of the competing guidelines created a genuine issue of fact regarding Selective's claim for indemnification making the grant of summary judgment inappropriate. Consequently, the decision of the circuit court is

**REVERSED.**

**HEARN, C.J., and SHORT, J., concur.**