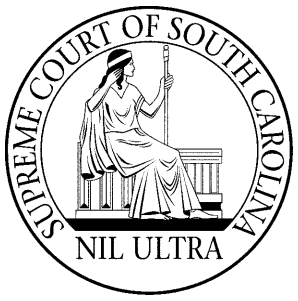

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
August 16, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Fussell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett, and Lawrence Redmond, Petitioners,

v.

The Estate of Eloise Pinckney Harris, Jerome C. Harris, as Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan, Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Martine A. Hutton, The Converse Company,

LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney, Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney, Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod, and all other persons unknown claiming any right, title, estate, interest or lien upon the real estate tracts described in the Complaint therein, Defendants,

of whom Martine A. Hutton is, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26865
Heard May 26, 2010 – Filed August 16, 2010

AFFIRMED

Donald Higgins Howe, of Howe & Wyndham, LLP, and Walter Bilbro, Jr., both of Charleston, for Petitioners.

Louis H. Lang, of Callison Tighe & Robinson, LLP, of Columbia, for Respondent.

Charles M. Feeley, of Summerville, for Guardian Ad Litem.

JUSTICE BEATTY: In this heirs' property dispute, the Court granted the petition of Sara Mae Robinson and others ("Petitioners") for a writ of certiorari to review the decision of the Court of Appeals in Robinson v. Estate of Harris, Op. No. 2008-UP-646 (S.C. Ct. App. filed Nov. 24, 2008). In this opinion, the Court of Appeals affirmed a circuit court order that granted summary judgment in favor of Martine A. Hutton on the grounds Petitioners' action to set aside a 1966 quiet title action was barred by the three-year statute of limitations as established by section 15-67-90 of the South Carolina Code,[1] Hutton is

[1] Section 15-67-90 provides:

> No judgment or decree quieting title to land or determining the title thereto, or adverse claims therein, shall be adjudged invalid or set aside for any reason, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced or application for leave to defend be made within three years from the time of filing for record a certified copy of such judgment or decree in the office of the clerk of court of the county in which the lands affected

a bona fide purchaser for value without notice pursuant to the recording statute as established by section 30-7-10 of the South Carolina Code,[2] and Petitioners' action was barred by the doctrine of laches. We affirm.

I. Factual/Procedural History

This action involves a portion of a 20-acre tract of land located on Fort Johnson Road, in James Island, South Carolina. The tract was formerly owned by Simeon B. Pinckney, who died intestate in 1921 and allegedly left a wife, Laura Pinckney, and two sons, Ellis and Herbert Pinckney, as his heirs.

The land held by Simeon B. Pinckney originated from a conveyance to him by deed executed in 1874 (and recorded in 1875) from Thomas Moore. The property was described as being 20 acres, more or less. In 1888, Simeon B. Pinckney conveyed 5 acres of this property to his wife, Isabella Pinckney, leaving approximately 15 acres. A survey conducted in 1923, however, found that exactly 14.3 acres remained.

> by such judgment or decree are situated or, in case of minors, within three years after coming of age.

S.C. Code Ann. § 15-67-90 (2005).

[2] Section 30-7-10 provides in relevant part:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded . . . are valid so as to affect the rights of subsequent . . . purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10 (2007).

In 1946, Laura Pinckney, Ellis Pinckney, and Herbert Pinckney executed two cross-deeds that divided the 14.3-acre parcel among themselves, creating a 4.3-acre tract and a 10-acre tract.[3] One of the 1946 cross-deeds conveyed the 4.3-acre tract to Herbert Pinckney and the other deed conveyed the 10-acre tract to Ellis Pinckney. In 1966, after Herbert Pinckney died intestate, Laura Pinckney Heyward brought a successful action to quiet title to the 4.3-acre tract held by Herbert.[4] None of the Petitioners or their predecessors-in-interest filed responsive pleadings in the 1966 proceeding.

As the result of subsequent conveyances, the 4.3-acre tract was ultimately divided into four lots. The owners of these lots are as follows: (1) The Converse Company (Lot #1); (2) Martine A. Hutton (Lot #2); (3) David Savage and Lisa M. Shogry-Savage (Lot #3); and

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[3] Petitioners gave a detailed account of their family's lineage dating back to the death of Simeon B. Pinckney. Essentially, Petitioners alleged they were the true heirs and subsequent-interest holders of Simeon B. Pinckney, descended through his true heirs, Samuel James Pinckney and Mary Pinckney. Petitioners claimed Laura Pinckney (who later assumed the married name of Heyward) was Samuel James Pinckney's sister-in-law. Based on this allegation, Petitioners asserted Laura Pinckney Heyward obtained the 1946 deeds by falsely claiming to be the wife of Simeon B. Pinckney (instead of Isabella Pinckney, Simeon B. Pinckney's "true spouse") and claiming that Simeon B. Pinckney's sole heirs were herself and her sons Herbert and Ellis Pinckney. According to Petitioners, Samuel James Pinckney was alive in 1946 and may have been living on a portion of the original 20-acre tract with his wife and children. However, Petitioners claimed that neither Samuel James Pinckney nor any of the other legitimate heirs could read or write and, thus, did not have notice of the 1946 deeds.

[4] By way of publication, Laura Pinckney Heyward served the 1966 quiet title action to "unknown persons." See S.C. Code Ann. § 10-2404 (1962) (precursor to S.C. Code Ann. § 15-67-40 (2005), which provides for service by publication for "unknown persons defendant" in an action to determine adverse claims to real property within this state); S.C. Code Ann. § 15-67-40 (2005) ("Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against nonresident defendants, upon the filing of an affidavit of the plaintiff, his agent or attorney, stating the existence of a cause of action to try adverse claims within this State.").

(4) Debbie (Shogry) Dinovo (Lot #4). The instant case involves the interests of Hutton ("Respondent").

On February 1, 2005, Petitioners filed an action to quiet title to several tracts of land located on James Island, including the 4.3-acre tract at issue in the instant case. In their Complaint, Petitioners sought "to establish their legitimate relationship as lineal descendants and heirs" of Simeon B. Pinckney. The first twenty-five named Petitioners claimed they were heirs of Simeon B. Pinckney, and the remaining Petitioners claimed they purchased interests in the property and were the legitimate owners of those interests.

In support of these claims, Petitioners alleged the 1946 deeds and 1966 action to quiet title were fraudulent and were undertaken without consideration for the rights or interests of Petitioners and other heirs. Specifically, Petitioners asserted the 4.3-acre tract was fraudulently conveyed to Herbert Pinckney in 1946 and, thereafter, wrongly passed by inheritance to his mother Laura Pinckney Heyward at Herbert's death. Additionally, Petitioners claimed Laura Pinckney Heyward fraudulently procured the 1966 quiet title action to the 4.3-acre tract when neither she nor Herbert Pinckney owned any interest in the tract. Finally, Petitioners alleged they did not become aware of the 1946 deeds, of the 1966 quiet title action, or of any other action affecting their title to the property until 2004.

Based on these allegations, Petitioners sought "(a) a determination of all owners of the four (4) tracts of property, . . . a determination of each owner's respective rights and interests in said tracts, and the quieting of the titles to these four (4) tracts and (b) the sale of the respective owners' interests in these four (4) tracts."

Respondent answered and filed a motion for summary judgment. In her answer, Respondent raised a number of affirmative defenses, including the doctrines of laches, stale demand, estoppel, waiver, bona fide purchaser for value, acquiescence, *res judicata*, collateral estoppel, and the applicable statute of limitations. In her motion for summary judgment, Respondent specifically relied on the circuit court's previous

grant of summary judgment as to predecessor-in-interest Shogry-Savage.[5]

In response to the motion for summary judgment, Petitioners argued their claim was not barred by section 15-67-90 given the 1966 quiet title action was the result of extrinsic fraud. Because they offered affidavits supporting their claim that the 1966 quiet title action was procured through fraud and forgery, Petitioners contended their action was distinguishable from the case of Yarbrough v. Collins, 301 S.C. 339, 391 S.E.2d 873 (Ct. App. 1990).[6]

After a hearing, the circuit court granted summary judgment in favor of Respondent. In so ruling, the circuit court relied on its previously-issued order granting summary judgment in favor of Shogry-Savage because: "Hutton is in a virtually identical position in regard to title to her property as was Ms. Shogry-Savage. Ms. Shogry-Savage is a bona fide purchaser for value without notice. Accordingly, so must be Hutton." Therefore, the circuit court found Petitioners' action was barred by the operation of section 15-67-90, the fact that

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[5] On June 2, 2006, the circuit court judge granted summary judgment in favor of David L. Savage and Lisa M. Shogry-Savage on the grounds that: (1) Petitioners' claims were barred by section 15-67-90, a three-year statute of limitations that prohibits setting aside a judgment quieting title to land "for any reason"; (2) Savage and Shogry-Savage are bona fide purchasers for value without notice pursuant to the recording statute as established by section 30-7-10; and (3) Petitioners' action was barred by the doctrine of laches. Because Petitioners were not parties to the 1966 quiet title action, the circuit court judge found the doctrines of collateral estoppel and *res judicata* were not applicable. This circuit court judge was the presiding judge on all four cases involving the 4.3-acre tract.

[6] In Yarbrough, the property claimant filed an action to vacate a seven-year-old judgment quieting title to approximately ten acres of land. Yarbrough claimed the judgment was procured through extrinsic fraud. Id. at 341, 391 S.E.2d at 874. The trial court granted summary judgment to the defendants on the ground the action was time-barred by section 15-67-90. Id. at 341, 391 S.E.2d at 875. On appeal, the Court of Appeals affirmed the trial court's decision. In so ruling, the court found that "[n]othing in this record demonstrates Yarbrough's knowledge regarding her claim of extrinsic fraud was any different in 1981 than it was in 1988." Id. at 342, 391 S.E.2d at 875.

Respondent is a bona fide purchaser for value without notice pursuant to section 30-7-10, and the doctrine of laches.

Petitioners appealed the circuit court's order to the Court of Appeals.

In a summary opinion, the Court of Appeals affirmed the decision of the circuit court. See Robinson v. Estate of Harris, Op. No. 2008-UP-646 (S.C. Ct. App. filed Nov. 24, 2008). In support of its decision, the court cited: (1) the three-year statute of limitations as codified in section 15-67-90; and (2) Yarbrough as interpreting section 15-67-90.

This Court granted Petitioners' request for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A.

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP; Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

B.

In essence, Petitioners contend summary judgment was improperly granted given that significant and material questions of fact exist relating to extrinsic fraud and forgery in the underlying 1966 quiet title action and the 1946 cross-deeds upon which the action was based.

In support of this contention, Petitioners argue the circuit court and the Court of Appeals erred in determining that section 15-67-90 constitutes an "absolute bar" to setting aside judgments quieting title to land. Because they submitted affidavits in support of their claims of extrinsic fraud and forgery, Petitioners assert their cause of action is distinguishable from Yarbrough and should not have been procedurally barred by the applicable statute of limitations.

C.

In analyzing Petitioners' arguments, we must determine whether section 15-67-90 constitutes an "absolute bar" to Petitioners' action or whether Petitioners' claim of extrinsic fraud supersedes the application of this statute of limitations.

This determination requires us to revisit our decision in Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). In Hagy, the biological parents brought an action in 1994 to set aside the 1992 adoption of their daughter on the ground that their consent to the adoption was induced by fraudulent statements made by the adoptive parents, who were also the biological mother's father and stepmother. Id. at 428-29, 529 S.E.2d at 716. In response, the adoptive parents defended on the merits and asserted the action was time-barred by section 20-7-1800 of the South Carolina Code, which at the time provided: "No final decree of adoption is subject to collateral attack for any reason after a period of one year following its issuance." Id. at 429, 529 S.E.2d at 716. The family court concluded the time bar did not apply to actions to set aside an adoption for fraud. The Court of Appeals reversed the family court's decision, finding section 20-7-1800 barred the action because it was

commenced more than one year after the final adoption decree was commenced. Id.

On appeal, this Court affirmed as modified the decision of the Court of Appeals. In so ruling, this Court considered the novel question of "whether a facially applicable statute of limitation will bar an action to set aside a judgment procured by extrinsic fraud." Id. at 430, 529 S.E.2d at 717.[7] The Court determined that a statute of limitations purporting to bar all actions to set aside a judgment would not limit "a court's inherent authority to set aside a judgment for extrinsic fraud." Id. at 431, 529 S.E.2d at 717. However, because Hagy failed to prove her consent was obtained by fraud, the Court affirmed the decision of the Court of Appeals. Id. at 433-34, 529 S.E.2d at 719.

We find Hagy supports Petitioners' contention that this Court, the Court of Appeals, and the circuit court have the inherent authority to set aside the 1966 quiet title action and the underlying 1946 cross-deeds if in fact they were procured as the result of extrinsic fraud. Moreover, a broad reading of Yarbrough indicates that a court could consider the ground of extrinsic fraud, if sufficiently proven, as affecting the application of section 15-67-90. See Yarbrough, 301 S.C. at 341-42, 391 S.E.2d at 875 (concluding property claimant's action to quiet title brought seven years after title clearance action was barred by section 15-67-90 but implicitly recognizing that extrinsic fraud, if proven, could operate to preclude application of the three-year statute of limitations).[8]

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[7] The Court referenced Yarbrough but noted that there was no comparable challenge to the statute of limitations in that case. Hagy, 339 S.C. at 430 n.5, 529 S.E.2d at 717 n.5.

[8] Based on our finding that section 15-67-90 is not an "absolute bar," we need not address Petitioners' issue as to whether this statute violates the due process clauses of our state and federal constitutions. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (stating no person shall be deprived of life, liberty, or property without due process of law).

In view of our conclusion, the question becomes whether Petitioners' submission of the affidavits is sufficient to withstand Respondent's motion for summary judgment based on Petitioners' claim of extrinsic fraud.

"A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" Hagy, 339 S.C. at 431, 529 S.E.2d at 717. Extrinsic fraud is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" Id. at 431, 529 S.E.2d at 717-18 (quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[R]elief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003). If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment. Center v. Center, 269 S.C. 367, 373, 237 S.E.2d 491, 494 (1977).

Intrinsic fraud is fraud which was presented and considered at trial. Chewning, 354 S.C. at 81, 579 S.E.2d at 610. "It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id.

Considering the facts of the instant case in the procedural posture of a motion for summary judgment, Petitioners offered evidence that arguably created a material question of fact regarding whether the 1946 cross-deeds and 1966 quiet title action were procured by extrinsic fraud.

Although Petitioners' affidavits are very detailed, they essentially outlined Petitioners' ancestry as direct descendants of Simeon B. Pinckney and his son Samuel James Pinckney. The affidavits indicate Laura Pinckney was not married to Simeon B. Pinckney and that Herbert and Ellis Pinckney were of no relation to Simeon B. Pinckney. The affidavits also provide that several of Petitioners' relatives had

lived on the subject property prior to the institution of the 2005 quiet title action. Additionally, the affidavits state Petitioners were unaware of the 1966 quiet title action and did not realize until late 2003 that portions of the 4.3-acre tract were under construction because the property was heavily wooded and the construction was "off the road."

D.

However, even assuming Petitioners offered sufficient evidence of extrinsic fraud to withstand Respondent's motion for summary judgment, this alone is not dispositive of Petitioners' appeal. Instead, this case presents a unique set of circumstances that operate to preclude Petitioners' action.

As evidenced by our decision in Hagy, this Court recognized that the doctrine of laches would be applicable in determining whether an action is time-barred even if extrinsic fraud is established. Hagy, 339 S.C. at 431 n.7, 529 S.E.2d at 717 n.7 (discussing the one-year statute of limitations for a collateral attack on an adoption decree and stating "[a]lthough not an issue in this case, the doctrine of laches will apply in determining whether such an action is barred"). We believe the instant case presents such a scenario.[9]

[9] The Court of Appeals affirmed the circuit court's order based on section 15-67-90. Petitioners, however, failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the circuit court's ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis. See Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (recognizing that where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); see also Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."). However, because this case presents us with an opportunity to address the applicability of the doctrine of laches to section 15-67-90, we have chosen to analyze the merits of this doctrine rather than merely rely on procedural rules to reach our ultimate disposition.

"Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." Jones v. Leagan, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct. App. 2009). The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Hallums, 296 S.C. at 199, 371 S.E.2d at 528.

Applying the foregoing to the facts of the instant case, we find Respondent established the requisite factors to bar Petitioners' action based on the doctrine of laches.

Here, Petitioners waited thirty-nine years to challenge the 1966 quiet title action. Although Petitioners claim they did not have notice of the 1966 quiet title action until 2004, their own affidavits appear to discount this claim. In the affidavits, Petitioners assert that one of their heirs paid the county property taxes on the Fort Johnson Road properties until at least 1988. If this was in fact the case, Petitioners would have received county tax documents that corresponded to the respective properties. After the property was sold, the subsequent purchasers would have then received these tax documents. In turn, Petitioners' failure to receive tax documents should have served as notice regarding a problem with their title to the property. Thus, given that the deeds and the quiet title action were publicly-recorded and documented, it was an unreasonable length of time for Petitioners to delay in instituting the 2005 quiet title action.

Additionally, Respondent would be undoubtedly prejudiced if Petitioners' claim is not barred by laches given she purchased her lot for significant consideration and has been in possession of it since 2001.

In reaching our decision, we have thoroughly considered and are empathetic to Petitioners' plight. However, given the specific facts of the instant case, we are compelled to hold the doctrine of laches precludes Petitioners from pursuing their claim. Here, Petitioners waited thirty-nine years to assert their rights regarding the 1966 quiet title action. We find such a flagrant and egregious delay represents the quintessential situation that the doctrine of laches was intended to protect. For this Court to hold otherwise, we would have to affirmatively reject this well-established equitable doctrine.

Our decision should not be construed as establishing a general rule. Instead, we believe under the proper facts a claim of extrinsic fraud could be utilized to successfully circumvent the three-year statute of limitations as established by section 15-67-90.[10]

III. Conclusion

Based on the foregoing, we find the circuit court properly granted Respondent's motion for summary judgment. Even assuming Petitioners sufficiently established their extrinsic fraud claim to avoid the three-year statute of limitations provided for in section 15-67-90, we hold the doctrine of laches operates to bar their claim. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

TOAL, C.J., KITTREDGE, J, Acting Justices James E. Moore and E. C. Burnett, III, concur.

[10] To conclude otherwise, we believe, would require property owners to check the title to their property every three years.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Huxfield Cemetery Association, Appellant,

v.

Bobby L. Elliott, Betty Sue McAllister, Charles C. Elliott, Buckie W. Elliott, Mary Lee E. Phillips and Larry Allen Elliott, Respondents.

Appeal from Georgetown County
Joseph M. Crosby, Special Referee

Opinion No. 26866
Heard May 27, 2010 – Filed August 16, 2010

REVERSED AND REMANDED

W.E. Jenkinson, III, and M. Amanda Harrelson Shuler, both of Jenkinson, Jarrett and Kellahan, of Kingstree, for Appellant.

Robert J. Moran, of Murrells Inlet, for Respondents.

JUSTICE KITTREDGE: This case concerns a three-acre tract of land known as Huxfield Cemetery and which party, Appellant or Respondents, may maintain control over the property. The special

referee treated this dispute as an action to try title and ruled that because Respondents had superior title over Appellant, Respondents were entitled to maintain control over the cemetery and were permitted to charge a burial fee. We reverse the special referee's order and hold Appellant has the right to maintain and control Huxfield Cemetery.

I.

In 1881, William Rowe conveyed a 500 acre tract of land to Samuel Wall by deed, excepting out "three acres near Carvers Bay Known as the Huxfield Graveyard to be used as a Public Burying Ground." From 1881 through 1999, Mount Zion Church managed and maintained the land and used it, without challenge, as a cemetery for its members. In 1999, at the request of the pastor for Mount Zion, who no longer wished to maintain separate accounts, an association of relatives and descendants of those buried in the cemetery assumed responsibility for collecting and accounting for donations made towards Huxfield Cemetery.

In March 2006, Respondent Bobby L. Elliott sent a letter to local funeral homes stating that as the heirs of R. L. Elliott, they were the owners of Huxfield Cemetery and would begin charging $500 per burial plot. In response, the association of relatives formally incorporated as Appellant Huxfield Cemetery Association for the purpose of preserving Huxfield Cemetery as a public burial ground. Appellant filed its articles of incorporation with the Secretary of State and designated Baylis E. Elliott as its registered agent and president.[1] Mount Zion issued a quit claim deed to Appellant transferring any property rights it had in Huxfield Cemetery. In 2007, Appellant filed a declaratory judgment action seeking an order declaring the rights of the parties with respect to Huxfield Cemetery.

[1] Baylis Elliott is related to Respondents. It appears a rift developed between members of the Elliott family, which ultimately led to this litigation.

At trial, Appellant presented Renee Dean, a real estate paralegal, as an expert in the field of title examination and abstract preparation to testify as to the chain of title. Dean testified that William Rowe transferred the deed conveying 500 acres, but carving out the three acre tract for Huxfield Cemetery, to Samuel Wall; Wall transferred the property to Thomas Cribb; Cribb transferred the property to W.F. Elliott; W.F. Elliott died intestate, and in 1893, the land was partitioned. Jacob Elliott obtained title to a portion of the partitioned tract that surrounds Huxfield Cemetery.

In 1944, Jacob Elliott conveyed the property to Susan Elliott. The next filing found with regard to this property was a "1956 map of 148 acres surveyed for the Estate of Susan Elliott."[2] Following Susan Elliott's death, her heirs brought a partition suit in which a 1961 map was filed. The 1961 map divided Susan Elliott's property into four tracts. Huxfield Cemetery is shown as a separate parcel, but Tract One surrounds it. Tract One was conveyed to R.L. Elliott. In 1978, a plat was recorded stating it was a "map of 2.25 acres of land in tax district no. 3 on which a cemetery is located – owned by R.L. Elliott." In 1995, R.L. Elliott issued a deed of distribution to Mary C. Elliott and Respondents conveying certain property including "The tract shown as CEMETERY on that" 1961 map. Mount Zion is not mentioned or referenced in the chain of title.

In addition to Dean's testimony, Appellant called Cyrus Snowden, who testified his mother served as the secretary/treasurer of Mount Zion. Snowden presented checks from 1964 and 1973 reflecting funds from Mount Zion's account that were used to maintain Huxfield Cemetery. Baylis Elliott testified he helped clean the cemetery from the time he was a child and was reimbursed by Mount Zion for his efforts. On cross-examination, Baylis admitted he, on behalf of Mount Zion, retained a lawyer in 1990 when they learned R.L. Elliott claimed he owned the property. The lawyer sent a letter to R.L. Elliott, in which the lawyer stated he was aware R.L. Elliott obtained title to

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[2] Huxfield Cemetery is identified on this map, but shown as a separate parcel.

Huxfield Cemetery following the partition suit of Susan Elliott's estate and requested a quit claim deed to Huxfield Cemetery. Baylis also admitted requesting Respondents' permission to erect a marker honoring Confederate veterans.

Although Respondents did not present any witnesses or introduce any evidence, the special referee ruled in their favor. The special referee first found this was an action to try title and that Huxfield Cemetery was a public burial ground. He found several statutes of limitations provided Respondents a defense to Appellant's claim including S.C. Code Ann. §§ 15-3-340, 350, 380 and 15-67-210, 220. The special referee found that because Respondents had established possession of the land under color of title, the burden shifted to Appellant to prove a claim to title, which Appellant failed to prove. *See Cummings v. Varn*, 307 S.C. 37, 41, 413 S.E.2d 829, 832 (1992) (holding the defendant in actual possession is regarded as the rightful owner until plaintiff proves perfect title and the plaintiff must recover on strength of his title, not the weakness of the defendant's title). Accordingly, the special referee ruled "Huxfield Cemetery is a public burial ground and shall remain so in perpetuity" and that Respondents were entitled to maintain control of Huxfield Cemetery and charge a burial fee.

II.

In our view, the special referee's order is based on an error of law. We begin with the parties' steadfast stipulation, which forms the basis for this litigation: the property was dedicated to the public in 1881 to be used as a public burying ground and the property may not (and will not) be used for any other purposes. Because this land is a cemetery, traditional property laws are not applicable. *See* 14 Am. Jur. 2d *Cemeteries* § 2 ("A cemetery is not subject to the laws of ordinary property."). Thus, an overview of property laws governing cemeteries is instructive.

Land may be dedicated to the public for cemetery purposes and no particular form or ceremony is required to accomplish such a

dedication. 14 Am. Jur. 2d *Cemeteries* § 17. "The intention of the owner of the land to dedicate it for a public cemetery, together with the acceptance and use of the same by the public, or the consent and acquiescence of the owner in the long-continued use of his or her lands for such purpose, are sufficient." *Id.* This principle of law on public cemetery dedications mirrors our case law on all types of public dedications. *See Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997) (holding in order to effectuate a public dedication, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use and there must be acceptance of such property by the public).

A public dedication will either be a statutory dedication or a common-law dedication. A statutory dedication is a dedication made in conformity with statutes providing for the dedication of lands to the public. 26 C.J.S. *Dedication* § 3. A statutory dedication operates as a grant and results in a conveyance of title to the grantee. 23 Am. Jur. 2d *Dedication* § 53. On the other hand, a common law dedication is the setting apart of lands for public use; it rests on public convenience and is based on public policy and good faith. 26 C.J.S. *Dedication* § 2. A common-law dedication does not pass the fee, but only an easement. *Frost v. Columbia Clay Co.*, 130 S.C. 72, 124 S.E. 767 (1924). That is, the public gets only an easement with the fee left in the dedicator. *Boyd v. Hyatt*, 294 S.C. 360, 367, 364 S.E.2d 478, 482 (Ct. App. 1988). As it applies to cemeteries, "[a] common-law dedication of land for a cemetery does not result in the extinguishment of the dedicator's title; the fee remains in him or her with a possibility of reverter on the abandonment of the cemetery . . . ." 14 Am. Jur. 2d *Cemeteries* § 17.

Although our jurisprudence is far from replete with cases concerning cemeteries, we have recognized that traditional property law principles do not apply to cemeteries. In *Kelly v. Tiner*, 91 S.C. 41, 74 S.E. 30 (1912), the trial court found the plaintiffs, whose family members were buried in a cemetery on the defendant's property, could not maintain an action against the defendant. This Court reversed and recognized the principle that a landowner holding fee title to the land does not have exclusive rights to use his land in any manner he desires:

"One who has dedicated land to the public for burial purposes, the dedication having been accepted, may be prohibited from defacing or meddling with the graves thereon, at the suit of anyone having relatives or friends buried there." *Id.* at 50, 74 S.E. at 33 (citing *Davidson v. Reed*, 111 Ill. 167 (1884)). Also in *Frost v. Columbia Clay Co.*, the Court acknowledged "as a general proposition, where ground has been dedicated to the public for use as a cemetery, the owner cannot afterward resume possession or remove the bodies interred therein, although he has received no consideration for its use, and the interments were made merely by his consent." 130 S.C. at 75, 124 S.E. at 768 (quoting *Ex parte McCall in re Little v. Presbyterian Church of Florence*, 68 S.C. 489, 492, 47 S.E. 974, 974 (1904)).

III.

This review of principles of law governing public cemeteries reveals that merely because an individual holds fee title to property, he does not have the exclusive right to control the land. For the reasons reflected above, the public, and specifically the heirs and descendants of the people buried on the property, have substantive rights in Huxfield Cemetery. "Whether the right of an heir to visit a cemetery is considered an easement, a license, or a privilege, it cannot be extinguished by a subservient fee owner through a conveyance to another." 14 Am. Jur. 2d *Cemeteries* § 38. Furthermore, this right "is a real right, not a servitude or usufruct, but an implied contractual relationship that binds the owner irrevocably." *Faust v. Mitchell Energy Corp.*, 437 So.2d 339, 342 (La. App. 1983). For these reasons, we hold the special referee erred in treating this matter as an action to try title and ruling in Respondents' favor merely because he found they had superior property rights in the land.

As stated above, Appellant has an easement interest in Huxfield Cemetery. The determination of the extent of a grant of an easement is an action in equity, and as such, a court may take its own view of the evidence. *Tupper*, 326 S.C. at 323, 487 S.E.2d at 190. Moreover, a court's equity powers are properly used in order to protect the rights of those owning lots in or having relatives buried in a cemetery. 14 Am.

Jur. 2d *Cemeteries* § 47. We make no ruling as to title or whether Respondents hold superior title. Even assuming Appellant does not hold fee title and assuming Respondents do, the parties have stipulated to the facts necessary for us to make a determination as to which party is entitled to maintain and control Huxfield Cemetery. Specifically, the parties agree that the property was dedicated as a public cemetery in 1881, that Mount Zion, and subsequently Appellant, assumed responsibility for Huxfield Cemetery from 1881 through 2006, and that Appellant is composed of relatives of those buried in Huxfield Cemetery.

We have found no South Carolina case on point,[3] however two cases from Alabama and Florida provide some guidance. In *Ebenezer Baptist Church, Inc. v. White*, 513 So.2d 1011 (Ala. 1987), Ebenezer Church acquired title in 1909 to land on which a cemetery was located. For years, family members of persons buried in the cemetery had assumed the duties of caring for the property. In 1984, Ebenezer Church attempted to take responsibility for the cemetery by clearing brush and announcing its intent to charge a burial fee. The circuit court granted the family members' request for an injunction and prohibited the church from charging a burial fee and altering the gravesites. In affirming the injunction, the Alabama Supreme Court noted, "Ebenezer Baptist Church has permitted and acquiesced in an indiscriminate use of the cemetery over the years. The church has never established rules and regulations regarding the use of monuments, mounds, or footstones and has never charged a burial fee." *Id.* at 1014.

Similarly, in *Mingledorff v. Crum*, 388 So.2d 632 (Fla. App.

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[3] Although *Kelly v. Tiner* and *Frost v. Columbia Clay Co.* offer guidance, they are not on point. In *Kelly* and *Frost*, the plaintiffs alleged the defendants were desecrating gravesites, while the defendants asserted the cemeteries had been abandoned. In this case, however, the parties are disputing the right to control the cemetery. Respondents agree the property must be used as a cemetery and there is absolutely no allegation Respondents have caused damage to any gravesite.

1980), family members of persons buried in a cemetery on the defendant's property brought suit against the defendant asking the court "to declare a right . . . to enclose and properly maintain the area and to have access" to the cemetery. The court reviewed the applicable property law regarding cemeteries and observed "[t]hese authorities and equitable principles, together with a recognition of the concern and sentiments of surviving descendents . . . dictate that the law observe and protect the rights of those survivors." *Id.* at 636. Accordingly, the court held that the family members had a right to maintain the cemetery. Importantly, however, the court also held "[c]oupled with these rights is a continual obligation to actually maintain the area and . . . otherwise abate any conditions which render any part of the area unhealthy or offensive to the senses." *Id.*

We find these cases persuasive and on point with the facts of this case. We hold Appellant is the proper party to maintain control over Huxfield Cemetery. Appellant and Mount Zion, Appellant's predecessor, have served as the caretaker for Huxfield Cemetery since 1881 without interruption or incident. The record reflects that Mount Zion took it upon itself to collect funds to maintain and preserve the cemetery from the initial dedication. No burial fee has ever been assessed against individuals wishing to bury their family members in Huxfield Cemetery. Respondents never attempted to assert any rights or regulate this cemetery in any way whatsoever until 2006 when they sent out notices declaring that a $500 per plot burial fee would now be assessed.[4] Furthermore, Appellant is a legitimate non-profit association formed for the exclusive purpose of preserving and maintaining Huxfield Cemetery and has filed the requisite documents with the Secretary of State establishing it as such. As a final matter, we follow the *Mingledorff* court's approach and hold that along with the right to control and maintain the property, Appellant also has a duty and responsibility to properly preserve and maintain Huxfield Cemetery.

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[4] Although there was some reference made indicating Respondents attempted to pay taxes on the property beginning in 1995, we give this little weight and view it as an attempt to posture for this litigation.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Estate of Michael L. Stokes, by and through Jennifer Stokes Spell, as the Duly Appointed Personal Representative, Appellant,

v.

Pee Dee Family Physicians, L.L.P., Mark S. Steadman M.D., Reginald S. Bolick, M.D., and Pee Dee Surgical Group, P.A., Defendants,

of whom Reginald S. Bolick, M.D. and Pee Dee Surgical Group, P.A. are Respondents.

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

Opinion No. 26867
Heard June 25, 2010 – Filed August 16, 2010

AFFIRMED

J. Edward Bell, III and Thomas W. Winslow, both of Bell Legal Group, of Georgetown, for Appellant.

Saunders M. Bridges, Jr., Aiken, Bridges, Nunn, Elliott & Tyler, PA, of Florence, for Respondents.

JUSTICE KITTREDGE: This direct appeal presents the following question: If "A" has been injured and has a known claim against Defendant, but fails to file suit within the statute of limitations, and A thereafter dies as a result of the injury, may A's estate file and maintain a wrongful death claim against Defendant? We answer the question, "No." We affirm the trial court's dismissal of Appellant's Complaint against Respondents.

I.

In October 2001, Michael L. Stokes consulted his family physician, Mark Steadman, M.D., about a mass on his thigh. Dr. Steadman diagnosed the mass as a superficial venous thrombosis (SVT), also known as a blood clot. In January 2002, Stokes's symptoms returned, and he again consulted Dr. Steadman, who ordered a venous Doppler study. Edward C. Floyd, M.D., read the Doppler results and also concluded that Stokes was suffering from SVT.

In July 2002, Dr. Steadman referred Stokes to a surgeon, Reginald S. Bolick, M.D., to determine whether surgery would alleviate Stokes's symptoms. Dr. Bolick examined Stokes and reviewed his records; he agreed that SVT was the proper diagnosis. As a precaution, Dr. Bolick ordered a CT scan of Stokes's chest and abdomen to rule out the presence of a hidden malignancy. The radiologist who read the CT scan found no evidence of malignancy.

In August 2002, Dr. Steadman referred Stokes to another surgeon, Arthur Cooler, M.D., for a second opinion regarding treatment options. Dr. Cooler examined Stokes, performed a Doppler study, diagnosed SVT, and advised Stokes that he could remove the thrombosis. In March 2003, Dr. Cooler performed surgery and the tissue was tested. What multiple doctors had diagnosed as a thrombosis was instead a "malignant leiomyosarcoma."

After the cancer was diagnosed on March 20, 2003, Dr. Cooler referred Stokes to oncologists and surgeons at MUSC for further treatment.

In August 2005, Stokes timely filed a medical malpractice action against Dr. Steadman and his medical practice, Pee Dee Family Physicians. Stokes's Complaint stated he "was diagnosed with sarcoma cancer" on March 20, 2003, and it alleged that Dr. Steadman's failure to properly diagnose Stokes's cancer was the proximate cause of his harm.

On December 12, 2006, Stokes died from complications related to the cancer. The probate court appointed Stokes's daughter, Jennifer Spell (Appellant), as personal representative for the estate. In November 2007, Appellant moved to amend the Complaint to add Dr. Bolick and Pee Dee Surgical Group, P.A. (Respondents) as defendants and to assert a claim under the Wrongful Death Act.

The Second Amended Complaint alleged:

> 6. At all times prior to March 20, 2003, the Defendants treated [Stokes's] condition as if it were a [SVT] or blood clot of the right thigh area.
>
> 7. Defendants failed to properly diagnose [Stokes's] condition which was ultimately diagnosed as metastatic sarcoma.
>
> 8. At the time [Stokes] was diagnosed with cancer, it had already spread and this type of cancer is generally incurable.
>
> 9. On or about March 20, 2003, [Stokes] was diagnosed with sarcoma cancer . . . .
>
> 10. Michael L. Stokes died on December 12, 2006.

Holding the three-year statute of limitations commenced on March 20, 2003, the trial court dismissed as untimely the wrongful death claim against Respondents. *See* S.C. Code Ann. § 15-3-545(A) (2005 & Supp. 2009). Appellant concedes the medical malpractice three-year statute of limitations

commenced on March 20, 2003, and acknowledges this limitation applies to Stokes.[1] Appellant contends, however, that a decedent's estate may revive a previously barred claim by invoking the three-year statute of limitations applicable to a wrongful death action. Appellant bases this argument on the following statutory language: "[In] an action under Sections 15-51-10 to 15-51-60 for death by wrongful act, the period [] begin[s] to run upon the death of the person on account of whose death the action is brought." S.C. Code Ann. § 15-3-530(6) (2005 & Supp. 2009).

II.

The Wrongful Death Act provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default *is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued,* shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

S.C. Code Ann. § 15-51-10 (2005 & Supp. 2009) (emphasis added).

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[1] The commencement of the statute of limitations, on March 20, 2003, is unchallenged as concerns Stokes's claims and is the law of the case. The statute of limitations begins to run on the date the injury resulting from the alleged wrongful conduct "either is discovered or may be discovered by the exercise of reasonable diligence." *Garner v. Houck,* 312 S.C. 481, 485, 435 S.E.2d 847, 849 (1993). It was unchallenged that the statute of limitations for all claims related to the misdiagnosis of Stokes's cancer began to run on March 20, 2003. It was also undisputed that on March 20, 2003, Stokes knew that Dr. Bolick was among the physicians who had misdiagnosed the cancer. "The date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations." *Gillman v. City of Beaufort,* 368 S.C. 24, 27-28, 627 S.E.2d 746, 748 (Ct. App. 2006).

A wrongful death action may be brought by the estate for the benefit of the decedent's heirs. S.C. Code Ann. § 15-51-20 (2005 & Supp. 2009). Our jurisprudence makes clear that if the decedent was barred from recovering damages for his injuries, the bar passes to the decedent's estate. Succinctly stated, if the decedent had no claim at his death, the estate has no claim. In one of our earlier cases, we construed the wrongful death statute as requiring that the decedent, prior to death, not be "debarred" from recovery:

> It seems to us that . . . the capacity of the deceased to maintain an action, based upon the injury which caused his death, is made the test of the right of the administrator to maintain the action provided for by the statute. Hence if the deceased has debarred himself by his contributory negligence, or by any other cause, from maintaining his action, based upon the injury which caused his death, it follows, necessarily, that his administrator is likewise barred of his right of action, which would otherwise be secured to him by the statute. *In all cases . . . the controlling question, therefore, is whether the deceased, if he had not died, could have maintained the action.*

Price v. Richmond & Danville R.R. Co., 33 S.C. 556, 560, 12 S.E. 413, 413-14 (1890) (emphasis added).

Although our precedent has not spoken directly to the statute of limitations issue, our law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued. *See Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 482-83, 242 S.E.2d 683, 685 (1978) (citations omitted), *overruled on other grounds, Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003) ("Under both the Virginia and South Carolina wrongful death statutes the test of the right of an administrator to maintain an action for wrongful death is whether the deceased could have maintained an action for the injury had he survived. . . . If [the] plaintiff's decedent had no right, at time of death, to maintain an action for personal injuries, then the right to maintain the present action could not be transmitted to her personal representative."); *Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) (quoting *Scott v. Greenville Pharm.*,

Inc., 212 S.C. 485, 489, 48 S.E.2d 324, 326 (1948)) (observing that "if the deceased never had a cause of action, none accrues under the wrongful death statute"); *Scott*, 212 S.C. at 489, 48 S.E.2d at 326 ("Of course, if the deceased never had a cause of action, none accrues under the wrongful death statute. The condition that the action be one which could have been maintained by the deceased if death had not ensued has reference to the circumstances attending the injury, and the nature of the wrongful act or omission which is made the basis of the action."); *Rish v. Seaboard Air Line Ry.*, 106 S.C. 143, 145, 90 S.E. 704, 704-05 (1916) (holding the wrongful death statute "limited the right of recovery to those cases in which the party injured would have been entitled to recover if death had not ensued").

The United States District Court of South Carolina, sitting in diversity, has addressed the very issue before us. In *Quattlebaum v. Carey Canada, Inc.*, the honorable and learned judge, Joe F. Anderson, Jr., correctly applied South Carolina law and dismissed a wrongful death claim because the decedent possessed no claim at his death. 685 F. Supp. 939 (D.S.C. 1988). Judge Anderson examined South Carolina's Wrongful Death Act, as well as the Act's historical derivation from Lord Campbell's Act. In granting summary judgment to the defendant, Judge Anderson reasoned:

> The right to bring a wrongful death claim is thus conditioned upon the decedent's right to maintain a claim or action. Under the terms of the wrongful death statute, the representative has no statutory right to pursue a wrongful death claim if the decedent's cause of action was barred by the statute of limitations.
>
> . . .
>
> The South Carolina court would no doubt find that the wrongful death statute contains language establishing a condition precedent to the right to bring a wrongful death claim. Therefore, a new statutory right is created by § 15-51-10 in the personal representative of the decedent which can only be maintained if the decedent, had he lived, could have maintained such an action. . . . Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, 'such as

> contributory negligence, a valid release, or similar acts on his part,' would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent's failure to file a timely claim against Carey Canada is an act, or omission, on his part which should defeat the right of recovery of his personal representative.

Id. at 940-42 (citations omitted). *Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.

We reaffirm today that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death. Appellant's reliance on the separate wrongful death statute of limitations is misplaced, for the wrongful death statute of limitations does not serve to revive a previously barred claim.[2] Section 15-3-530(6) is triggered only where it is first established that the decedent had a right of recovery at the time of death. If the decedent had a right of recovery at the time of death, then the wrongful death action must be filed within three years, which begins to run "upon the death of the person on account of whose death the action is brought." S.C. Code Ann. § 15-3-530(6).

III.

Because the decedent's claim against Respondents was barred at the time of his death, the trial court properly dismissed the claims against Respondents.

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[2] Appellant also relies on the concept of the accrual of a cause of action. To be sure, a wrongful death claim accrues only upon the death of the decedent. Yet, the concept of accrual of action under the Wrongful Death Act has no bearing on the effect of the decedent's lack of claim at the time of death.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Norman Starnes, Appellant.

Appeal from Lexington County
Lee S. Alford, Circuit Court Judge

Opinion No. 26868
Heard March 4, 2010 – Filed August 16, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, and Appellate Defender Elizabeth Franklin-Best, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General S. Creighton Waters, of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

JUSTICE KITTREDGE: This is a direct appeal in a death penalty case. Appellant Norman Starnes was charged with the murder of Bill Welborn and Jared Champlain.[1] At trial, Appellant represented himself. A jury found Appellant guilty of both murders and recommended the death penalty. In this direct appeal, Appellant argues the trial court erred in failing to give a voluntary manslaughter charge, raises issues regarding a capital defendant's right to self-representation, and asserts he did not knowingly and voluntarily waive his right to counsel. We affirm.

I.

Appellant owned a restaurant ("the restaurant") in Pelion, South Carolina. On January 8, 1996, Bill Welborn and Jared Champlain, friends of Appellant, came into the restaurant to eat and eventually left with Appellant to go to a local bar. When Bill and Jared did not return home that night, their girlfriends filed missing person reports. Police investigated the men's disappearance, but were unable to establish any leads until May 1996 when Appellant's girlfriend, Gwen Ott, contacted police and told them Appellant had killed Bill and Jared.

Gwen was working at the restaurant on January 8. After Appellant, Jared, and Bill left the restaurant, Appellant returned twice to get money out of the cash register. Appellant returned a third time with a mark on his temple and appeared very upset. He told Gwen that Bill had pistol-whipped him in the bathroom of the bar. Appellant retrieved his gun and bullets from a shelf in the kitchen and told her he was going to kill "them." When Appellant returned later, he told Gwen, "Let's go, that they were dead."

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[1] This was Appellant's second trial. We reversed Appellant's convictions and death sentence from his first trial due to the trial court's failure to give certain jury instructions. *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000).

Gwen testified Appellant drove her to his house, where she saw Jared's body in the front room and Bill's body in the bedroom. Appellant told Gwen that Jody Fogle had come over to facilitate a drug transaction and he saw Jared pull a gun on Jody. Appellant admitted to Gwen that he shot Jared and Bill. Gwen testified that Appellant removed all items from the men's pockets, placed the bodies in the trunk of his car, and cleaned the blood from the house before leaving. Appellant returned later that night and asked Gwen to follow him in a separate car to his uncle's property. When they arrived at the property, Gwen saw Jared's and Bill's bodies around the back of the house. Appellant kicked and urinated on the bodies, loaded them into the back of a pickup truck, and took them to the back of the woods on the property. During the drive home, Appellant threw his gun into the Edisto River.

From January until the bodies were discovered in May, Appellant assisted law enforcement in the search for the victims, even appearing on television pleading for any evidence that would help find his friends. Also during this period, Appellant received word of a foul odor on his uncle's farm. Appellant returned to his uncle's property, dug up the graves, and covered the bodies with lime in an effort to hide the smell. As noted, Gwen's tip led to the discovery of the bodies and the charges against Appellant.

Appellant elected to represent himself at trial and to testify in his own defense. Appellant testified that after he, Jared, and Bill left the restaurant, they went to a local bar. While in the bar's restroom, Bill came up behind Appellant, grabbed his throat, put a metal object to the back of his head,[2] and began yelling at Appellant about money Appellant allegedly stole from him. Later, Bill remarked to one of the bar's employees that she "better call the police because he was going to take [Appellant] up on Platt Springs Road and blow his F'in brains out."[3]

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[2] Appellant testified the object could have been a gun or a cigarette lighter.

[3] This employee testified for the defense and confirmed that Bill made this remark. She further testified she had heard a scuffle in the bathroom

After the three men left the bar, Bill told Appellant to take him to Jody's house to get drugs. Instead, Appellant dropped Bill and Jared off at Appellant's house and then picked up Jody and brought him back to the house. Appellant testified he heard Jared cussing and saw him pointing a gun at Jody. Appellant stated that he ran into the bedroom and retrieved his gun. As he exited the bedroom, Bill said "whoa" and was pointing a gun at him. Appellant testified he shot Bill, then he turned and shot Jared.

The defense called Jody to testify. On direct examination, Jody testified that Jared pulled a gun on him and asked him: "[W]here is the dope?" Jared told Jody he would kill him. Jody testified that Bill took the gun from Jared, and then Appellant shot them. On cross-examination, Jody admitted that Appellant unexpectedly arrived at his house and asked Jody to come back to his house to "watch his back" because he was having trouble with Bill and Jared. Appellant asked Jody if he had a gun with him, but Jody said he did not. Jody testified when he and Appellant arrived at the house, Appellant immediately went into the bedroom and began fumbling around. Jody maintained that Jared charged at him with the gun, but stated Bill took the gun from Jared and everyone calmed down. Jody testified Appellant came out of the bedroom and fired three shots at Bill and then fired at Jared. Jody demanded Appellant take him home.[4]

The trial court charged the jury on murder and self-defense, but refused to charge voluntary manslaughter. The jury found Appellant guilty of both murders. In the sentencing phase, the trial court gave three statutory aggravating circumstances charges: 1) the defendant committed the murders while in the commission of robbery while armed with a deadly weapon; 2) the defendant committed the murders while in the commission of larceny while armed with a deadly weapon; and 3) two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. Additionally, the trial court gave four statutory mitigating

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prior to this remark, which was apparently the earlier exchange between Bill and Appellant.

[4] Jody was convicted of two counts of accessory to murder.

circumstances: 1) the defendant had no significant criminal history; 2) the victims were participants in the defendant's conduct or consented to the act; 3) the defendant acted under duress or domination of another person; and 4) the defendant was provoked by the victims into committing the murders. The jury found the existence of all three aggravating circumstances beyond a reasonable doubt and recommended the death penalty.

II.

Appellant argues the trial court erred in failing to charge the jury on the law of voluntary manslaughter. We disagree. Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009).

To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter. *Id.* If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge. *Dempsey v. State*, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005).

We have consistently held that both heat of passion and sufficient legal provocation must be present at the time of the killing. *Wharton*, 381 S.C. at 215, 672 S.E.2d at 788. A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion. *See id.* (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, although the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked. *See State v. Pittman*, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation

arguably existed, there was no evidence the defendant was in a heat of passion). Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation.

Appellant bases his entitlement to a voluntary manslaughter charge on his testimony that when Bill pointed a gun at him, he felt threatened and was in fear. Appellant argues the threat of an imminent deadly assault was sufficient to entitle him to a voluntary manslaughter charge. Appellant cites to several cases from this Court to support this argument.

The State, which concedes the propriety of the self-defense charge, counters that our case law should not be read so broadly as to sanction a voluntary manslaughter charge that is based upon the mere testimony that the defendant was "afraid." While acknowledging that self-defense and voluntary manslaughter are not mutually exclusive, the State asserts "it does not follow that manslaughter should be charged simply because a defendant claiming self-defense testifies he was afraid." The State claims there was no evidence Appellant shot the victims in the heat of passion, and therefore, the trial court correctly refused to charge voluntary manslaughter.

Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given. Given Appellant's argument, which takes our case law and turns primarily fact-driven holdings into broad statements of law, we take this opportunity to clarify the law regarding how a defendant's fear following an attack or a threatening act relates to voluntary manslaughter.

Trial courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter,[5] especially where a defendant claims he acted in self-defense. This struggle may be due to this Court's opinions which, when taken out of the evidentiary context, appear to set no boundaries as to what circumstances give rise to "sudden heat of

[5] We acknowledge courts have also struggled with the interplay of murder and involuntary manslaughter, especially when there is evidence of self-defense or accident.

passion upon sufficient legal provocation." For example, in a particular fact setting, we have held an unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation. *See State v. Knoten*, 347 S.C. 296, 307, 555 S.E.2d 391, 397 (2001) ("There can be little argument that an unprovoked knife attack constitutes sufficient legal provocation to warrant the requested [voluntary manslaughter] charge."); *Pittman*, 373 S.C. at 573, 647 S.E.2d at 168 ("This Court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation.").

We also have held that fear resulting from an attack can constitute a basis for voluntary manslaughter. *See State v. Wiggins*, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) ("[F]ear can constitute a basis for voluntary manslaughter."). Yet the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction. We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *Pittman*, 373 S.C. at 572, 647 S.E.2d at 167. While the act or event "need not dethrone the reason entirely, or shut out knowledge and volition," it must cause a person to lose control. *Id.*

We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.

A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter – it will not justify it. This is the distinction between voluntary manslaughter and self-defense. We reiterate that evidence of self-defense and voluntary manslaughter may coexist and that a charge on self-defense **and** voluntary manslaughter may be warranted. *See State v. Gilliam*, 296 S.C. 395, 373 S.E.2d 596 (1988) (holding the evidence supported both a self-defense charge and a voluntary manslaughter charge).

Turning to the facts of this case, viewing the evidence in the light most favorable to Appellant, there is no evidence to support a voluntary manslaughter charge. Appellant testified when he turned around and saw Bill pointing a gun at him, "I shot Bill Welborn and then turned and shot Jared Champlin." He added, "I was scared and I was frightened. When Jared pulled the gun on Jody, it scared me." While this testimony is evidence that Appellant was in fear, there is no evidence Appellant was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. The only evidence in the record is that Appellant deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense.

Again, we emphasize self-defense and voluntary manslaughter are not mutually exclusive, and had there been evidence to support a finding of heat of passion upon sufficient legal provocation, Appellant would have been entitled to a voluntary manslaughter charge. The record is simply devoid of such evidence. In our view, to hold that Appellant was entitled to a voluntary manslaughter charge under the facts of this case would impermissibly blend the elements of voluntary manslaughter and self-defense. In effect, such a holding would render voluntary manslaughter a lesser-included offense of self-defense, for where there is an intentional killing based on fear alone, a defendant would be entitled to a voluntary manslaughter charge.

For these reasons, we hold the trial court properly refused to charge voluntary manslaughter.

III.

Appellant asks this Court to create a *per se* rule prohibiting capital defendants from representing themselves and to overturn *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998) and *State v. Brewer*, 328 S.C. 117, 492 S.E.2d 97 (1997) (both holding the defendant had a right to represent himself at his capital trial). We decline to do so.

The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no distinction between capital and non-capital defendants. *See* S.C. Const. art. 1, § 14. Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation. *See Farretta v. California*, 422 U.S. 806, 821 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."). The right to self-representation, however, is not absolute. The Constitution allows states to prohibit defendants from waiving their right to counsel if they are not competent to conduct trial proceedings by themselves. *See Indiana v. Edwards*, 554 U.S. 164 (2008) (holding a defendant may be competent enough to stand trial but not competent enough to waive his Sixth Amendment right to counsel and represent himself). Nevertheless, we believe a *per se* ruling forbidding capital defendants from representing themselves would violate both the South Carolina and United States Constitutions. Therefore, we decline Appellant's request to adopt such a rule in South Carolina.

IV.

Appellant argues he did not knowingly and voluntarily waive his right to counsel during the sentencing phase of his trial. We disagree.

In order to waive the right to counsel, the accused must be (1) advised of his right to counsel, and (2) adequately warned of the dangers of self-representation. *Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) (citing *Faretta*, 422 U.S. 806).

Appellant's waiver of counsel was addressed several times prior to trial. In the initial pre-trial hearing regarding Appellant's motion to proceed *pro se*, the record indicates the trial court methodically and carefully explained the dangers of self-representation and ensured that Appellant understood the various issues that would arise at trial. The trial judge inquired into Appellant's mental state and his knowledge of numerous aspects of a trial, including procedural rules, elements of the charges against him, and available defenses. After engaging in the thorough *Farretta* colloquy, the trial judge granted Appellant's request. At subsequent hearings, Appellant first withdrew his motion to proceed *pro se*, then made a motion for hybrid representation, and finally moved again to proceed *pro se*. At the third and final hearing on the motion, the trial judge again sternly warned Appellant of the dangers of self-representation.[6]

We find Appellant knowingly and voluntarily waived his right to counsel. Appellant was well aware of procedures in a death penalty case and knew he would be representing himself in both the guilt phase and the sentencing phase of trial. This was Appellant's second capital trial, and he specifically indicated to the trial court during a pre-trial hearing that he knew the trial could only proceed to the penalty phase if the jury returned a guilty verdict for murder.

Appellant thoroughly questioned potential jurors during *voir dire* and explained to them that a jury would first have to find him guilty before they reached the penalty phase. Appellant made reasonable and persuasive arguments to the trial court resulting in the qualification of several jurors,

[6] The trial court appointed the two lawyers who had represented Appellant at his first trial as stand-by counsel.

specifically citing to a United States Supreme Court opinion for support.[7] Additionally, during the State's case in chief, Appellant made proper and valid objections and conducted thorough cross-examinations of witnesses. In the presentation of his defense, Appellant called several witnesses, including the waitress who overheard Bill's threatening comments to Appellant, two witnesses who claimed they snorted methamphetamines and crystal meth with Bill three days before the killings, and Jared's fiancée who testified Bill was carrying a gun on the night of the killings.[8] Finally, in the mitigation phase of the trial, Appellant called several correctional officers to testify as to Appellant's good behavior, two ministers, several personal friends, and his mother.

We find Appellant had a clear understanding of the dangers of self-representation in the guilt phase and the sentencing phase of his trial, as the trial court repeatedly questioned him about his decision to represent himself. *See Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986))

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[7] In *Wainwright v. Witt*, the United States Supreme Court held the critical issue regarding the disqualification of a juror in a capital case is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U.S. 412, 433 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The State sought to disqualify those jurors who indicated they were more inclined to impose a life sentence. Appellant rebutted the State's request for disqualification by arguing, pursuant to *Wainwright*, these jurors did not say they could never give the death penalty and, therefore, should be qualified.

[8] Jared's fiancée first testified she did not remember whether Jared had a gun with him on the night of the killings. Appellant impeached her testimony by providing her with a copy of the transcript from Appellant's first trial in which she testified Jared was carrying a gun. *See* Rule 613(b), SCRE (providing conditions where a prior inconsistent statement may be admitted).

(recognizing that the ultimate test regarding the waiver of counsel is not the trial judge's advice; rather it is the defendant's understanding of the dangers inherent in self-representation). Accordingly, we hold Appellant knowingly and voluntarily waived his right to counsel.

V.

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review. We find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime. *See State v. Vazsquez*, 364 S.C. 293, 613 S.E.2d 359 (2005) (involving a double murder committed in the course of a robbery); *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (involving a double murder committed in the course of a burglary); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) (imposing the death penalty where murder was committed in the course of kidnapping, burglary, and robbery).

We affirm Appellant's convictions and sentence.

AFFIRMED.

TOAL, C.J., BEATTY and HEARN, JJ, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. I believe the trial court erred in failing to charge the jury on voluntary manslaughter. Consequently, I would reverse and remand for a new trial.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. See State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." See State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." Wharton, 381 S.C. at 214, 672 S.E.2d at 788.

At trial, the following evidence was presented from which the jury might have determined that Appellant committed manslaughter: testimony that, earlier in the day, Bill approached Appellant from behind, grabbed his throat, and put a metal object to his head; testimony that Bill said in Appellant's presence that he was going to take Appellant out on Platt Springs Road "and blow his F'in brains out;" Appellant's testimony that Bill and Jared were under the influence of methamphetamine on the night in question; and Appellant's testimony that Bill pointed a gun at Appellant just before Appellant shot him. Additionally, Appellant testified that he "didn't kill [Bill and Jared] with malice aforethought, with premeditation. . . . I was scared and I was frightened."

In my view, given the above evidence, it cannot be said that there was clearly "no evidence whatsoever tending to reduce the crime from murder to manslaughter." The jury could infer from the evidence that Appellant's fear resulted in an uncontrollable impulse to do violence. Compare State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (holding that judge properly charged jury on voluntary manslaughter where defendant testified he was in fear of the threat of physical assault).

The majority apparently decides that the evidence does not yield an inference that Appellant's fear resulted in an uncontrollable impulse to do violence. This is not an unreasonable conclusion but, as some evidence tending to establish the offense of manslaughter was presented at trial, it is a conclusion that the jury, not this Court, must reach.

I do not suggest that a voluntary manslaughter instruction must be given whenever the defendant testifies that he was in fear. However, in light of all the evidence presented here, Appellant met the standard to warrant the charge. Wharton, 381 S.C. at 214, 672 S.E.2d at 788. I would reverse.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Grinnell Corporation d/b/a
Grinnell Fire Protection, Petitioner,

v.

John Wood, Respondent,

and

American Home Assurance
Company, Petitioner,

and

Government Employees
Insurance Company, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Perry M. Buckner, Circuit Court Judge

Opinion No. 26869
Heard February 18, 2010 – Filed August 16, 2010

REVERSED

Amy M. Snyder, of Clarkson, Walsh, Terrell, and Coulter, PA, of Greenville; Charles C. Eblen, of Shook, Hardy and Bacon, LLP, of Kansas City, MO; Peter H. Dworjanyn, Christian Stegmaier, and Amy L. Neuschafer, all of Collins & Lacy, PC, of Columbia, for Petitioners.

David Wesley Whittington, of Knight Law Firm, LLC, of Summerville; Stephen F. DeAntonio, of DeAntonio Law Firm, LLC, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: In this case, the Court granted a writ of certiorari to review the court of appeals' opinion affirming the trial court's grant of summary judgment in favor of Respondents John Wood (Wood) and Government Employees Insurance Company (GEICO).

FACTS/PROCEDURAL BACKGROUND

On May 1, 2000, Wood was injured in an automobile accident during the course and scope of his employment with Appellant Grinnell Corporation d/b/a Grinnell Fire Protection (Grinnell). Grinnell is a wholly owned subsidiary of Tyco International, Inc. (Tyco). At the time of the accident, Wood was operating a vehicle owned by Grinnell and insured by its carrier, American Home Assurance Company (American Home). Wood successfully brought a claim against Grinnell for workers' compensation coverage.

Wood has also sought UM and UIM coverage in the civil law suit of *John Wood v. Lisa Ackerman and John Doe*, 2003-CP-08-615. In that action, which is currently pending, Wood served both American Home and GEICO,

his personal automobile insurance carrier. Grinnell filed this declaratory judgment action against Wood, GEICO, and American Home seeking a declaration that it had successfully rejected additional UM and UIM coverage under its policy with American Home. GEICO answered and filed a counterclaim against Grinnell and a cross-claim against American Home, asking for a reformation of Grinnell's policy to include additional UM and UIM coverage. Wood answered and filed a cross-claim against American Home seeking a reformation of the policy and damages for bad faith.

After discovery, Grinnell, GEICO, and Wood filed motions for summary judgment on the issues concerning the offer of UM and UIM and reformation of the policy. American Home joined Grinnell in its motion. The trial court granted summary judgment to Wood and GEICO finding that American Home failed to make a meaningful offer of UM and UIM to Grinnell. Thus, the trial court ordered the reformation of the policy to include additional UM and UIM coverage. The court of appeals affirmed the trial court's decision. *See Grinnell Corp. v. Wood*, 378 S.C. 458, 663 S.E.2d 61 (Ct. App. 2008).

We now turn to the facts surrounding the offer of additional UM and UIM coverage to Grinnell. Gerald M. Goetz (Goetz), in his capacity as Vice President of Risk Management for Tyco and its subsidiaries, procured the policy of insurance at issue in this matter. It is undisputed that Goetz was well educated and experienced in the areas of insurance and risk management. Goetz has a bachelor's degree from Seton Hall University, an associates degree in Risk Management from The Insurance Institute, and has taken graduate courses at the College of Insurance. He has worked in risk management for Tyco since 1978. The procurement of automobile policies for the company and its subsidiaries has been part of his job description since he began employment with Tyco. Moreover, Goetz's duties with Tyco include the procurement of all its global insurance policies and overseeing the risk management programs for the company. Goetz estimates that at the time he procured the policy at issue he procured twenty-two policies of insurance annually.

Goetz considers himself to be a sophisticated purchaser with regard to insurance policies. Further, he believes his educational and professional experience gave him a clear understanding of the liability coverage he intended to acquire for Grinnell.

Concerning the process of procuring the policy at issue, Tyco had been insured by AIG member companies, such as American Home, for some time. Goetz met with Tyco's broker to discuss renewal of its policy. Further, after the renewal meeting, Goetz oversaw Tyco's risk management department as it gathered exposure data and turned it over to the insurer to be used in the renewal process. Goetz testified that at the renewal meetings he specifically discussed Tyco's desire to limit optional UM and UIM coverage within the policies across all states.

At the time of the execution of the policy at issue, Goetz was fully aware of the options related to UM and UIM coverage. Goetz understood that in South Carolina he could purchase UM and UIM coverage up to liability limits. However, Goetz intended to decline optional UM and UIM coverage as part of his risk management strategy for Tyco. Goetz did not want optional UM and UIM coverage because it would have exposed Tyco to an additional $500,000 deductible per claim for UM and UIM.[1] Additionally, Goetz surmised that the individuals most likely to make UM or UIM claims would be employees, thus covered by workers' compensation for any actual injury. In short, Goetz intended to deny the offer of optional UM and UIM coverage because it would unnecessarily expose Tyco to additional liability.

Despite Goetz's expressed desire to decline optional UM and UIM coverage, he admittedly failed to correctly execute the denial form. Additionally, the form did not comply with S.C. Code Ann. § 38-77-350(A). Nonetheless, Goetz testified that he understood American Home's offer of additional UM and UIM and, in his view, the manner in which he rejected it conveyed that he did not wish to purchase such coverage.

[1] Tyco had a $500,000 deductible on all claims made against this policy of insurance. Claims for UM and UIM would not have been covered by this deductible, thus exposing Tyco to additional liability.

ISSUES

This Court granted a writ of certiorari and the parties present the following issue for review:

> Did the court of appeals err in holding American Home did not make a meaningful offer of UM and UIM insurance coverage?

STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.*

ANALYSIS

Grinnell and American Home argue the court of appeals erred in finding no meaningful offer of additional UM and UIM coverage was made and thus committed error in affirming the trial court's reformation of the insurance policy. We agree.

S.C. Code Ann. § 38-77-160 requires an insurer to offer UM and UIM coverage to the insured.[2] An insurer's offer of UM and UIM coverage must

[2] In pertinent part, this section states:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage

be "meaningful." *See Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 262-63, 626 S.E.2d 6, 12 (2005). Critically, "[t]he purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" *Id.* (citing *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005)). All law with respect to a meaningful offer of additional UM and UIM coverage must be applied so as to effectuate this stated purpose.

In *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), this Court enunciated a four-part test that is applied to determine whether an offer of UM and UIM was meaningful. *See Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556. The four criteria an insurer must meet in order for the offer to be considered meaningful are:

> (1) the insurer's notification process must be commercially reasonable, whether oral or in writing;
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> (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;
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> (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and

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> prescribed by section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

S.C. Code Ann. § 38-77-160 (2002).

(4) the insured must be told that optional coverages are available for an additional premium.

Id. at 521, 354 S.E.2d at 556.

In response to the *Wannamaker* decision, the South Carolina General Assembly enacted S.C. Code Ann. § 38-77-350, which establishes certain requirements for forms used by insurers in making offers of optional insurance coverages. Section 38-77-350(A) states:

> The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:
>
> (1) a brief and concise explanation of the coverage;
>
> (2) a list of available limits and the range of premiums for the limits;
>
> (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires;
>
> (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages;
>
> (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350(A). If the insurer's form complies with these requirements, section 38-77-350(B) provides a conclusive presumption in

favor of the insurer that the insured made a knowing waiver of the option to purchase additional coverages.[3]

Nonetheless, failure to comply with section 38-77-350(A) does not automatically require judicial reformation of a policy. Rather, even where an insured is not entitled to the presumption that it made a meaningful offer, it may prove the sufficiency of its offer by showing that it complied with *Wannamaker*. *See Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 420, 618 S.E.2d 909, 918 (2005) (holding whether a meaningful offer was made depends on the facts and circumstances of a particular case). Further, "evidence of the insured's knowledge or level of sophistication is relevant and admissible when analyzing, under *Wannamaker*, whether an insurer intelligibly advised the insured of the nature of the optional UM or UIM coverage." *Id*.

As stated previously, the requirement of a meaningful offer of additional UM and UIM coverage is intended to protect an insured. A meaningful offer of additional UM and UIM makes as certain as possible that an insured has actual knowledge of his options with respect to such coverages and is therefore able to make an informed decision with respect to his desired coverage. *Floyd*, 367 S.C. at 262-63, 626 S.E.2d at 12 (citing *Progressive Cas. Ins. Co.*, 362 S.C. at 352, 608 S.E.2d at 573 ("The purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'")).

We find that, under the particular facts of this case, American Home made a meaningful offer of additional UM and UIM coverage to Grinnell and thus the court of appeals erred in affirming the trial court's grant of summary judgment to Wood and GEICO.

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[3] Whether a form complies with the statutory requirements is a question of law for the court. *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 389 S.E.2d 657 (1990).

American Home concedes that its form did not comply with the requirements of section 38-77-350(A) and it is thus not entitled to the presumption that it made a meaningful offer of additional UM and UIM to Grinnell. If the only evidence presented in this record were the statutorily deficient and incorrectly executed offer form, the court of appeals opinion would have to be affirmed. However, the record presented in this case is replete with uncontroverted evidence that the insured knew its options with respect to additional UM and UIM coverage in South Carolina and made an informed decision as to the amount of coverage that best suited its needs. Because Goetz testified that he knew his options with respect to additional UM and UIM coverage in South Carolina and knowingly declined the offer, the court of appeals decision creates an absurd result.

The record in this matter contains evidence that a meaningful offer was made under *Wannamaker*. First, the record contains ample evidence that Goetz knew his options with respect to additional UM and UIM coverage, thus, based on the sophistication of the parties, American Home made a commercially reasonable offer to Tyco. Second, the offer form listed five different split limits for optional coverage and also included an additional line where Goetz could have elected to insert an amount other than those listed. Third, American Home discussed the nature of optional coverage with Goetz at each renewal period and Goetz specifically expressed his understanding of optional coverage. Fourth, the offer form indicated coverage was available at an additional premium. Therefore, given the facts of this case with respect to the parties' level of sophistication, we find that American Home made a meaningful offer of additional UM and UIM coverage to Grinnell.

CONCLUSION

We reverse the court of appeals' decision affirming the trial court's grant of summary judgment because, under the particular facts and circumstances of this case, American Home made a meaningful offer of UM and UIM coverage to Grinnell.

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

JUSTICE PLEICONES: I concur in the majority's decision to reverse the grant of summary judgment against American Home. As explained in my concurring opinion in Ray v. Austin, Op. No. 26858 (S.C. Sup. Ct. filed August 16, 2010)(Shearouse Adv. Sh. No. 32 at __), it is my opinion that where the insured does not dispute that the insurer made a meaningful offer of underinsured and/or uninsured motorist coverage as required by S.C. Code Ann. § 38-77-160 (2002), any request for reformation of the insurance contract must fail as a matter of law. In my opinion, in a situation such as the one presented here, where the insured's agent maintains he made a knowing and informed decision to reject additional coverage, there is no need to resort to the Wannamaker[4] factors or to determine whether American Home's form complied with S.C. Code Ann. § 38-77-350 (2002 and Supp. 2009). The purpose of requiring a meaningful offer is to protect the insured. See Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 608 S.E.2d 569 (2005). In my view, a declaration by the insured that it made its decision, knowing all of its options, ends the inquiry.

[4] State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Samuel Francis Crews, III, Respondent.

Opinion No. 26870
Heard November 3, 2009 – Filed August 16, 2010

DISBARRED

Lesley M. Coggiola, of Columbia, for Office of Disciplinary Counsel.

Joshua Snow Kendrick, of Columbia, for Respondent.

PER CURIAM: Following an investigation and hearing, a Hearing Panel of the Commission on Lawyer Conduct (Panel) found that Samuel Crews (Respondent) committed numerous acts of misconduct and recommended that Respondent be disbarred, ordered to pay costs of the proceedings, and ordered to pay restitution to clients and the Lawyers' Fund for Client Protection. Respondent now challenges the Panel's recommendation. As recommended by the Panel; we disbar Respondent, order him to pay restitution, and order him to pay the costs of the proceedings.

FACTS

The charges in this matter stem primarily from the complaints of two former clients. With respect to these matters, Respondent misappropriated client funds, put clients' personal property to his own

use, and engaged in various self-dealing transactions with regard to clients' real estate.

I. Client A

Respondent was referred to Client A by friends who were concerned about his state of health. Client A wished to execute a power of attorney (POA) so as to allow Respondent to handle his affairs while Client A was being treated for medical problems. At the time, assets owned by Client A or his father's estate[1] included a residence on Oceola Street (Oceola Street) in Columbia, three Certificates of Deposit, and various personal property.

(1) Oceola Street

In July 2001, Respondent filed an Inventory and Appraisment of the Probate Estate of Client A's father, which listed the appraised value of Oceola Street as $80,000. Client A inherited the property and, in February 2002, Respondent signed a Contract for Sale on Client A's behalf, with Client A as seller and MDR Properties, Inc. (MDR) as the buyer. Michael Reynolds, Respondent's office manager, was the president and sole owner of MDR. Client A testified that he was not informed that the property was being sold to Respondent's office manager.

The Contract set the purchase price at $68,000 to include a $500 deposit, a certified check payable at closing for $33,500, and a second mortgage in the amount of $34,000 payable over fifteen years. In May 2002, Respondent used his power of attorney to sign a deed transferring the property from Client A to MDR. Respondent recorded the deed that same month.

[1] Client A's father died around the time he contacted Respondent. Client A stood to inherit under the will.

Six months later, on November 7, 2002, Respondent's office manager, Michael Reynolds, resold the Oceola Street property for $92,000 on behalf of his corporations. From the proceeds of the sale, $68,000 was deposited that same day into Respondent's trust account for the benefit of Client A. Also on November 7, Respondent paid himself $7,500 in attorney's fees and $8,273.12 in "expenses" from the trust account, leaving $52,226.88 from the sale in the trust account for the benefit of Client A. That same day, MDR paid $15,000 to Main Properties, LLC (Main Properties), which is owned by Respondent. The following day, Respondent paid $15,000 to himself from the Main Properties account. None of these transactions were made known to or approved by Client A.

(2) Chateau de Ville Property

Again using his power of attorney, Respondent entered into a contract to purchase a condominium in Chateau de Ville in Columbia on behalf of Client A for $67,500. At the time, Respondent represented both Client A and the seller, an Estate. There is no evidence that either Client A or the heirs of the Estate were advised of the conflict.

In connection with the sale, $4,725 was paid to Sunvest Properties, Inc., as a real estate commission, and Sunvest then issued a check for $3,375 to Reynolds as his commission for the sale. Reynolds's commission was based on an exclusive right to sell contract signed on the same day that the contract to purchase was signed. The right to sell contract provided for a commission of seven percent.

In May 2002, Respondent signed a deed on the Chateau de Ville property on behalf of Client A, conveying the property from Client A to Main Properties. The deed specified consideration as $69,000. Respondent signed a note on behalf of Main Properties promising to pay Client A $69,000 plus interest.[2] Client A testified that he never

[2] Just over two months later, Respondent represented in documents submitted while applying for a loan that he owned the Chateau de Ville property but owed no money on it.

received any such payment. After the sale, Respondent rented the property and collected at least $16,000 in rent. He deposited $3,000 of rent into his trust account for the benefit of Client A and $13,000 into the checking account for Main Properties. Also after the sale, Respondent paid $3,189.10 from the trust account funds for Chateau de Ville regime fees.

Respondent paid $11,500 from trust account funds to Carolina Trucking, which performed demolition work for Respondent on several properties. The reference on the payment is "Portion of Chateau…" The owner of Carolina Trucking testified that he did not recall doing work at Chateau de Ville for Respondent, but Client A had no interest in any of the properties listed on the receipt.

(3) Accounting

After Client A filed a grievance with the Commission on Lawyer Conduct, Respondent was asked on a number of occasions to provide an accounting. In January 2004, Respondent was served with a subpoena requiring him to produce the accounting ledger for Client A no later than February 9, 2004. Respondent provided a client ledger for funds passing through the trust account on behalf of Client A and accounting journals for money market and checking accounts.

Client A's new attorney also requested a final accounting in January 2004. In December 2004, Respondent presented Client A with an affidavit for his signature which provided that Client A had been given a complete accounting on many occasions. Client A testified that Respondent brought the document by his home in the evening and read the document to him, though he would not allow Client A to read it. Nonetheless, Client A signed the affidavit. The following day, Respondent filed an accounting with the Probate Court. Client A was given an opportunity to review the accounting and indicated that he was satisfied with the accounting.

II. Client B

In January 2002, Respondent was retained by Client B to probate the estate of his deceased wife. Client B agreed to pay Respondent $175 per hour and $75 per hour for paralegal work. In February 2002, Respondent drafted a durable power of attorney naming himself as attorney-in-fact for Client B. The document included a provision empowering Respondent to deal with himself in his own individual capacity "in buying and selling of assets, in lending and borrowing money, and in all other transactions, irrespective of the occupancy of the same person of dual positions[.]" ODC alleges that Respondent used his authority as attorney-in-fact to put Client B's funds and property to Respondent's own personal use.

(1) H&R Block Account

In March 2003, Respondent, acting under the power of attorney, withdrew $330,431.49 from Client B's investment account at H&R Block. Respondent deposited the full amount into his trust account. Respondent explained to ODC that the funds were reinvested at Client B's request and direction. However, Respondent instead withdrew the funds and put them to his own personal use. Trust account records show payments from the trust account to the Crews Law Firm, Main Properties, and Respondent. Respondent also used trust account funds to satisfy various personal obligations.

(2) EverHome Mortgage Equity Line of Credit

In February 2004, Respondent used his power of attorney to obtain a line of credit at EverHome Mortgage Company for $100,000, secured by Client B's residence in Georgia. In the following months, Respondent deposited three checks totaling $92,500 from the equity line into the trust account and then issued checks from the trust account for his own benefit. Respondent explained that he obtained the funds with the consent of Client B for the purpose of qualifying Client B for a tax deduction, yet produced no evidence showing such consent.

(3) Hummingbird Drive

In January 2002, in connection with the probate of the estate of Client B's deceased wife, Respondent filed an Inventory and Appraisment of the residence on Hummingbird Drive in Lexington, South Carolina. The document listed the appraised value of the property as $182,000. Almost two months later, in March 2002, Client B signed a contract of sale for the Hummingbird Drive property, listing the purchase price as $65,000.[3] In May 2002, the parties signed a deed conveying the property from Client B to Main Properties for consideration of $62,000. In September 2002, Respondent filed an Amended Inventory and Appraisement with the Probate Court listing the appraised value of the Hummingbird Drive property as $65,000. Respondent admitted that he did not have an appraisal done prior to entering into the contract of sale.

Additionally, Respondent admitted that the terms of payment set forth in the contract of sale were not complied with. The contract provided that Main Properties was to pay $500 earnest money in the transaction, which would be held by the purchaser. The document also provided that Main Properties would pay $15,000 in cash or certified check at the closing. Respondent admitted that this payment was not made. Finally, the contract of sale provides that Main Properties would pay $49,500 on a note and mortgage. Respondent admitted that no

[3] Barbara Seymour testified at the hearing that ODC received one version of the contract for sale in the first set of documents sent by Crews's attorney. After ODC asked for any conflict waivers or disclosures, it received the second version of the contract for sale, which included the following language: "The Escrow Agent hereinabove referred to shall be **Crews Law Firm. Seller is aware Sam Crews owns Main Properties, LLC and approves this sale.**" (emphasis in original). The signature page appears to be the same on both documents. Respondent testified that he did not know if the page containing the conflict waiver was ever presented to Client B. Aside from this document, no evidence was presented to show that Client B consented to the conflict.

such note or mortgage was prepared. Respondent asserted that "payments were made to [Client B]" but could provide no way to identify such payments.

Respondent used $4,285.16, which was held in trust for the benefit of Client B, to pay for repairs and upkeep of the Hummingbird Drive property during the time that the property was owned by Main Properties. During this same time period, Main Properties rented the property and collected $5,173.96 in income. In June 2004, Main Properties sold the Hummingbird Drive property for $122,000 and Main Properties left the closing with $103,561.59.

(4) Mallard Apartments

Included in the estate of Client B's wife was an apartment complex on Howell Avenue in Columbia, which Respondent listed in a January 2002 Inventory and Appraisement at $560,000. Respondent and his office manager, Michael Reynolds, filed Articles of Incorporation establishing Mallard Apartments, LLC in February 2002. In March 2002, Thomas Watts & Associates completed an appraisal report for Palmetto State Bank in which it appraised the property at $840,000.

In May 2002, Client B signed a contract of sale for the apartments as the personal representative of his wife's estate. Reynolds signed on behalf of the purchaser, MDR. The purchase price was originally listed as $650,000, but was at some point reduced to $525,000. A third version of the contract, marked "revised contract" set the purchase price at $450,000 and listed the purchaser as Mallard Apartments, LLC.

Respondent obtained a $277,000 loan with which to purchase the property on which Client B signed a personal guaranty. Before advancing the funds, the bank required Respondent to pay an existing personal loan of $25,105. Respondent paid the personal loan off with funds from the new loan.

Of the funds remaining after payment of Respondent's personal loan, $102,000 was placed in the Crews Law Firm Trust Account on behalf of Client B, Respondent received $100,000 in legal fees, and $2,055 was paid to directly to Client B. The HUD-1 form filed for the sale listed settlement charges to the Seller of $39,442.50 and $102,000 paid to Seller. The form listed the amount of the $450,000 purchase price not covered by the loan and "settlement charges," approximately $308,000, as paid as "legal fee to Crews Law firm for Estate and other matters." Respondent later admitted signing a note to Client B in the amount of $300,000 representing the unpaid amount from the Mallard Apartments transaction. Respondent testified that he made "some payments" to Client B for the purchase of Mallard Apartments but did not know how much. In 2004, Respondent made three payments of $6,218 each to Client B from the trust account, which the Panel designated as payments for Mallard Apartments.

Respondent filed an amended inventory and appraisement with the Probate Court in September 2002. The following year, though Client B no longer owned the property, Respondent used $8,604.41 of Client B's funds from the trust account to pay property taxes on the Mallard Apartments property.

(5) Promissory Notes

In addition to the $300,000 note referenced above, Respondent prepared and signed seven promissory notes payable to Client B for amounts totaling $99,935. The notes matched payments or loans Respondent made to himself, his law firm, or Main Properties from the Client B funds in Respondent's trust account.[4] Respondent testified that he repaid some of this amount, but did not know how much.

[4] For example, in March 2003, Respondent signed a promissory note and personal guarantee for $35,000. He then issued a check to himself for $35,000 from the trust account and deposited it in the Main Properties account.

(6) Credit Card

Beginning in February 2003 and continuing through February 2004, Respondent was in possession of a Mastercard belonging to Client B. This was the same time period in which Client B was in the hospital and an assisted living facility. Though he had nothing in writing, Respondent explained that Client B told him to use the credit card "any way [Respondent] wanted to." Respondent admitted using the card to benefit Client B but also admitted using the card for his own personal uses. Respondent also admitted to allowing employees at his office use of the card, though he contended that such use was authorized only while transporting Client B. In all, Respondent charged over $19,000 to the card for personal and office expenses.[5] Respondent kept no written record of the purchases and paid the credit card bills with funds held in trust for Client B.

(7) Will

Respondent prepared and presented a will to Client B in which Respondent was named as a primary beneficiary and residual beneficiary. The will named Respondent as Personal Representative with Reynolds as substitute Personal Representative.

(8) Other

While Client B was hospitalized or living in an assisted living facility, Respondent removed items of personal property from a residence in Baxley, Georgia and from Hummingbird Drive. Respondent admitted putting some of these items to personal use.

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[5] Charges to the card included office supplies, criminal background checks associated with other client matters, clothing for Respondent and his family, pool supplies, dog supplies, repairs to his personal vehicles, garden supplies for Respondent's wife, meals, groceries, a camera, gun supplies, dental care, and a haircut.

Respondent also purchased a new 2002 Cadillac Escalade for $47,000. Though he paid the purchase price with proceeds from Client B's H&R Block investment account, the vehicle was titled in the name of Mallard Apartments, LLC. Respondent and his staff used the vehicle to transport Client B to various places at his request, but also made personal use of the Cadillac. Respondent later had the title and registration of the vehicle transferred to his own name and eventually transferred title to Client B, though using Respondent's office address. Respondent paid the taxes and fees on the vehicle using funds held in his trust account for Client B and paid for gas and maintenance using Client B's credit card.

Respondent also paid $550 per month and a total of $3,300 from Client B's funds to Main Properties as rent for property on Wilmot Avenue. During this time, Client B was a resident of an assisted living facility.

Respondent wrote a number of checks from the trust account to R. Sims Tompkins, DMD and Jay Longnecker. Tompkins verified that Client B is not a patient of his and Respondent's firm employed a Jay D. Longnecker.

(9) Legal Fees

Respondent provided ODC with legal fee invoices to Client B totaling $45,127. Respondent's records show that he received from Client B or paid himself from trust account funds $273,750 in legal fees.

III. Client C

In an additional matter, Respondent failed to diligently pursue Client C's probate matter, to properly supervise an associate to whom he had assigned the case, and to adequately communicate with Client C. Client C was not available to testify at the hearing and the Panel declined ODC's request to leave the record open to allow her deposition to be taken at a later date.

IV. Panel Findings

The Panel found numerous violations of the Rules of Professional Conduct (RPC) and recommended that Respondent be disbarred, ordered to pay costs, and ordered to pay restitution. Based on the above, the Panel found the following violations: Rule 1.7, RPC, Rule 407, SCACR, (conflict of interest with current client); Rule 1.8(a), RPC, Rule 407, SCACR, (lawyer shall not enter into a business transaction with client); 1.5, RPC, Rule 407, SCACR, (lawyer shall not collect an unreasonable fee); Rule 1.15, RPC, Rule 407, SCACR, (safekeeping of client property); Rule 8.4(b), RPC, Rule 407, SCACR, (misconduct for lawyer to commit criminal act reflecting adversely on lawyer's honesty); Rule 8.4(d), Rule 407, SCACR, (misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 8.1, RPC, Rule 407, SCACR, (lawyer in connection with disciplinary matter shall not knowingly make false statement of material fact; fail to cooperate with investigation); Rule 1.8(c), RPC, Rule 407, SCACR, (lawyer shall not solicit any substantial gift from client, including a testamentary gift); and Rule 417, SCACR, Rules for Lawyer Disciplinary Enforcement (RLDE) (financial recordkeeping).

STANDARD OF REVIEW

The findings of the Panel are entitled to great weight; however, this Court may make its own findings of fact and conclusions of law and is not bound by the Panel's recommendation. *In re Larkin*, 336 S.C. 366, 371, 520 S.E.2d 804, 806 (1999). This Court has the ultimate authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. *In re Long*, 346 S.C. 110, 112, 551 S.E.2d 586, 587 (2001).

DISCUSSION

On review, Respondent raises a number of procedural arguments and contends that the Panel erred in finding there was clear and

convincing evidence of such misconduct that disbarment was warranted. We disagree.

I. Panel's consideration of ODC's proposed report.

Respondent argues that the Panel erred in considering the proposed report submitted by ODC because it was untimely. We disagree.

At the close of the hearing, Respondent's counsel and ODC counsel proposed waiving closing arguments and submitting proposed reports within thirty days of receipt of the transcript of the proceedings, to which the Chairman agreed. The transcript was filed with the Commission on January 5, 2009 and ODC's proposed panel report was filed with the Commission on April 9, 2009 – outside of the 30-day window. Nevertheless, the Panel adopted ODC's proposed report. Respondent contends that this Court is required to strike the Panel Recommendation due to ODC's untimely submission and to adopt Respondent's proposed report as it was the only timely submission. Respondent cites no authority for the remedy he proposes.

Rule 14(b)(1), RLDE, Rule 413, SCACR, provides the chair of the Commission broad powers to extend or shorten time periods in disciplinary hearings. We find that whether to accept the proposed report was within the Panel's discretion and the Panel did not abuse that discretion here.

II. Testimony of Barbara Seymour

Respondent argues that the admission of Barbara Seymour's testimony before the Panel hearing was erroneous. We disagree.

(1) No error in allowing testimony

Seymour acted as an investigator and prosecuting attorney in the time leading up to the hearing. When ODC called Seymour to testify, Respondent objected based on Rule 3.7, RPC, Rule 407, SCACR. Rule

3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness unless certain exceptions are met.

In our view, a respondent at an investigative hearing may not ask the Panel to adjudicate an opposing attorney's compliance with the Rules of Ethics. An independent grievance filing may be made, but the Panel is not the correct forum. In any event, we find no abuse of discretion on the part of the Chairman. Seymour was included on Respondent's witness list submitted prior to trial and her testimony at trial was limited to presentation of facts, documents, and statements by Respondent obtained in the course of the investigation. Thus, we find no error in the admission of Seymour's testimony at the hearing.

(2) No error in not allowing Respondent's counsel access to Seymour's investigative file.

Respondent argued that he was entitled to access to Seymour's investigative file once she was presented as a witness. We disagree.

Rule 25, RLDE, Rule 413, SCACR, provides for the exchange of certain basic information regarding witnesses and for the exchange of other material "only upon good cause shown to the chair of the hearing panel." Rule 25(b), RLDE, Rule 413, SCACR. Whether to order the exchange of further information was therefore within the discretion of the Chair. Given that Seymour's testimony was limited to presentation of facts, documents, and statements by Respondent obtained in the course of the investigation, and that she was not permitted to testify as to her observations, opinions, or conclusions, we find that the Chair did not abuse its discretion in finding no good cause for production of the investigative file.

(3) No error in denying Respondent a continuance and right to depose Seymour.

Respondent argues he had a right to a continuance and to depose Seymour once she was presented as a witness. We disagree.

Rule 25(c), RLDE, Rule 413, SCACR, addresses depositions and provides that depositions "shall only be allowed if agreed upon by the disciplinary counsel and the respondent or if the chair of the hearing panel . . . grants permission to do so based on a showing of good cause." Rule 25(c), RLDE, Rule 413, SCACR. The Chairman acted within his discretion in refusing to allow Respondent to depose Seymour.

III. Hearsay Documents

During Seymour's testimony, certain documents produced in the course of the investigation were admitted. Respondent argues that particular documents, each submitted to ODC by his counsel, were hearsay. We disagree.

Specifically, Respondent objected to the admission of the following: (1) a trust account ledger for the Client A account; (2) a statement for an account for Client A maintained outside of the trust account; (3) a statement for the Client A checking account; and (4) a list of outstanding balances owed to Client A's doctors. We find that the Panel did not err in refusing to bar the admission of the documents as hearsay. Respondent provided the documents in response to a subpoena requiring him to submit, among other things, an accounting ledger for Client A maintained in compliance with Rule 417 of the South Carolina Appellate Court Rules. The exhibits in question are, therefore, presumably what Respondent represents as his own work and records. The work product of Respondent is not hearsay. *See* Rule 801(d)(2), SCRE, ("A statement is not hearsay if . . . (2) The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity[.]"). Moreover, because Respondent prepared and submitted the documents, Respondent arguably asserted a belief in their validity. *See* Rule 801(d)(2), SCRE, ("A statement is not hearsay if . . . (2) The statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth[.]").

For these reasons, we find that the Panel did not err in admitting the documents.

IV. Evidence to Warrant Disbarment

Respondent contends that there is no clear and convincing evidence to warrant disbarment. We disagree.

Respondent notes that the burden of proof rests with ODC and contends that ODC failed to meet its burden. We find overwhelming evidence to warrant disbarment. ODC showed through the presentation of numerous documents that Respondent drafted agreements containing inherent conflicts, put client property to his own personal use, misappropriated funds, engaged in improper real estate transactions with clients, failed to maintain proper records of receipt and disbursements of client funds, and failed to maintain records of his handling of client real and personal property. This Court has disbarred attorneys for similar misconduct. *See, e.g., In the Matter of Cunningham*, 371 S.C. 503, 640 S.E.2d 461 (2007) (disbarment warranted for attorney who misappropriated $70,000.00 from estate while acting as personal representative and failed to maintain accounts); *In the Matter of Murphy*, 367 S.C. 338, 626 S.E.2d 333 (2006) (disbarment appropriate for attorney who misappropriated $65,000.00 from trust account).

V. Restitution to Clients and Reimbursement to Lawyers' Fund

Respondent argues that the Panel erred in recommending restitution to Client A and Client B where both have resolved malpractice actions against Respondent. Respondent also objects to the Panel's recommendation that he pay the Lawyers' Fund for Client Protection. We disagree with Respondent as to both arguments.

(1) Res Judicata and Collateral Estoppel

The Panel recommended that Respondent be required to pay $127,137.97 to Client A and $1,221,769.80 to Client B. The Panel noted that Respondent should receive a credit towards restitution for the amount he paid to satisfy the civil judgment Client A obtained against him in his malpractice action.

Both Client A and Client B filed civil actions against Respondent asserting claims of legal malpractice, fraud, and conversion. A jury awarded Client A $40,215.56 on the legal malpractice claims. Following Client B's death, his estate elected not to pursue the claim and the case was dismissed. Respondent contends that the Panel is "barred by the principles of *res judicata* and collateral estoppel from awarding additional damages to the parties in this proceeding."

Res judicata is a rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and, as to them, constitutes an absolute bar to a subsequent action. Black's Law Dictionary 1174 (5th ed. 1979). To establish *res judicata*, the following elements must be shown: (1) identities of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *See Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992). We note that Respondent proposes the use of the doctrine of *res judicata*, not to bar an action, but to bar certain damages. *Res judicata* is not the proper vehicle for the remedy Respondent seeks. Moreover, Respondent has failed to establish the requisite elements for *res judicata*. Specifically, Respondent has failed to establish similarity of the parties, as Client A and Client B are not parties to the instant case, and similarity of issues, as the instant action focuses on misconduct. *Matter of Babilis*, 951 P.2d 207, 217 (Utah 1997) ("Because enforcement of attorney discipline matters implicates public interests that transcends the personal interests of [the clients], the Bar is not acting on behalf of [the clients] but is acting to enforce sanctions in its own right."). Consequently, *res judicata* does not apply to bar restitution in this matter.

Respondent also argues that restitution to Client A and Client B is barred by collateral estoppel. Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was actually litigated and determined by a valid and final judgment in a prior suit. *See Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). As noted above, the issue in the instant case is Respondent's alleged misconduct, and restitution is a sanction that follows from a finding of misconduct. *See In re Ruffin*, 382 S.C. 598, 677 S.E.2d 25 (2009) ("We hold disbarment without retroaction, costs, and restitution are warranted sanctions."); *see also* Rule 7(b)(7), RLDE, Rule 413, SCACR, (recognizing restitution as a sanction for misconduct). The issue of alleged misconduct could not have been litigated in the legal malpractice action as "the duty of adjudging the professional conduct of members of the Bar and taking appropriate disciplinary action rests exclusively with this Court." *In re Ruffin*, 382 S.C. at 604, 677 S.E.2d at 28 (citing *In the Matter of Hines*, 275 S.C. 271, 273, 269 S.E.2d 766, 767 (1980)). Consequently, collateral estoppel does not apply to bar restitution in this matter.

We find that the amount of restitution recommended by the Panel to be made to Client A and Client B is appropriate. Respondent challenged the appropriateness of restitution, not the amount of restitution recommended by the Panel. Thus, finding no bar to ordering Respondent to make restitution, we adopt the recommendation of the Panel in so far as it concerns restitution to Client A and Client B.[6]

[6] Even if Respondent had challenged the amount of restitution recommended by the Panel, we see nothing in the record to indicate he kept sufficient records to support such an argument. *See In the Matter of Miles*, 335 S.C. 242, 247, 516 S.E.2d 661, 663 (1999) ("When disciplinary counsel presents clear and convincing evidence of trust account violations or other inadequate recordkeeping a lawyer's records must be sufficiently detailed to overcome the allegations.").

(2) Restitution to the Lawyers' Fund

In addition to restitution to Client A and Client B, the Panel Report recommended restitution should be made to the Lawyers' Fund for Client Protection (Lawyers' Fund) for funds paid from Respondent's trust accounts for commission on the sale of Chateau de Ville and funds paid to Client B for the sale of Mallard Apartments.

Respondent objects to the recommended restitution to the Lawyers' Fund because he claims he did not have knowledge of the payments or an opportunity for a hearing before payments were made. However, as noted by ODC, the Panel Report makes no finding that the Lawyers' Fund made payments to Client A and Client B. Instead, the Panel recommended that Respondent be ordered to deposit with the Lawyers' Fund an amount equal to the payments he made to Sunvest Properties as commission for the sale of Chateau de Ville and to Client B for the sale of Mallard Apartments. ODC notes that these payments were made from Crews's trust account from unidentified funds and "[s]ince this money has not been identified, it is appropriate to require Respondent to make an equivalent deposit with the Lawyers' Fund in the event claims are filed on behalf of the client or clients to whom it belongs."

Pursuant to Rule 7(b)(10), RLDE, this Court has broad powers to impose sanctions.[7] We find that, due to the severity of Respondent's misconduct and the possibility that a claim will be made against the Lawyers' Fund for the funds at issue, requiring him to pay restitution to the Lawyers' Fund in the amount recommended by the Panel is appropriate.

[7] *See* Rule 7(b)(10), RLDE ("Misconduct shall be grounds for one or more of the following sanctions: . . . (9) any other sanction or requirement as the Supreme Court may determine is appropriate").

CONCLUSION

This matter involved the aggravated misconduct of an attorney who engaged in egregious, predatory behavior, taking advantage of and causing great detriment to his clients. Respondent took vast, yet unchecked, power over the affairs of the clients at issue. Respondent used these powers for his benefit, but to the detriment of the clients. When a lawyer acquires fiduciary duties over his clients' affairs, as is the case in this matter, he must meticulously account for his handling of the client's real and personal property. Respondent failed to keep account of his handling of his clients' financial transactions, hiding the great detriment he caused them. Any friendship Respondent gave to the clients at issue here, as he claims to have provided them, is no substitute for the great harm he caused them.

For these reasons, we adopt the Panel's recommendation to disbar Respondent. Further, we order him to pay restitution in the following amounts: $86,922.41[8] to Client A, $1,221,769.80 to Client B, and $23,379.00 to the Lawyers' Fund for Client Protection. Finally, we order Respondent to pay the costs of the proceedings.

Within ninety (90) days of the date of this opinion, the Commission and Respondent shall enter into a restitution agreement which complies with the directives of this order. Further, within (30) days of the date of this opinion, Respondent is ordered to reimburse the Commission and the Office of Disciplinary Counsel for costs incurred in this matter.

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[8] The Panel recommended that Respondent be ordered to pay $127,137.97 in restitution to Client A, yet be credited the amount Client A received as a result of a civil suit against Respondent. The amount Client A received in the civil suit against Respondent was $40,215.56. The amount we order Respondent to pay Client A in restitution reflects this credit. Additionally, however, credited to the amount Respondent pays to Client A in restitution should be the amount, if any, the Lawyers' Fund may have paid to Client A with respect to this matter.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Steven V. Bixby, Appellant.

Appeal from Abbeville County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 26871
Heard November 18, 2009 – Filed August 16, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Appellate Defender LaNelle C. DuRant, both of Columbia; Ernest Charles Grose, Jr., of Greenwood, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Jerry Peace, of Greenwood, for Respondent.

CHIEF JUSTICE TOAL: Steven V. Bixby was charged with the murder of Abbeville County Deputy Sheriff Danny Wilson and Abbeville

County Magistrate's Constable Donnie Ouzts. Bixby was tried by a jury on two counts of murder and related charges. The jury found him guilty of all charges and recommended that he be sentenced to death. The trial judge imposed the death penalty. This appeal followed. We affirm.

FACTS/PROCEDURAL BACKGROUND

In December 2003, while working on a construction project in Abbeville County, officials from the South Carolina Department of Transportation (SCDOT) encountered the Bixby family. In order to expand SC-72, the SCDOT planned to take advantage of a right of way it held across the Bixbys' property. The Bixbys did not believe that the SCDOT held a right of way across their property and, beginning on December 4, 2003, threatened violence to prevent any construction on their land. These threats culminated in the murders of Deputy Wilson and Constable Donnie Ouzts on Monday, December 8, 2003.

The following is a chronological description of the events which resulted in the murders:

Thursday, December 4, 2003

On the morning of December 4, 2003, SCDOT officials first met the Bixby family after discovering someone had tampered with the surveyor's stakes on the family's property. SCDOT Construction Superintendent Glen McCaffrey approached the Bixby home to discuss the road widening project. McCaffrey was accompanied by fellow SCDOT employees Dale Williams and Mike Hannah.

Superintendent McCaffrey showed the construction plans to Appellant, his mother, Rita Bixby, and father, Arthur Bixby, and attempted to persuade them that the SCDOT held a right of way across their property. The Bixbys responded with threats of violence and claimed they would fight to the death if anyone tried to do any construction work on the property.[1] Right of Way

[1] With respect to this encounter, McCaffrey testified:

Agent Williams told them that SCDOT officials would have to get the Sheriff involved, to which the Bixbys responded that they would kill law enforcement officials if anyone "trespassed" on their property.

SCDOT officials McCaffrey, Williams, and Hannah went to the Sheriff's department, reported the encounter, and conveyed that there was a "serious situation" at the Bixby home. Because these men feared the Bixbys' threats, they requested that an officer be assigned to mediate the situation.

Friday, December 5, 2003

Around noon on Friday, December 5, 2003, Appellant discussed the road construction project with Dr. Mark Horton, a dentist whose office was near the Bixby home. Steven Bixby and Dr. Horton talked about dealings with the SCDOT. Horton told Steven Bixby that he had hired an attorney and that Dr. Horton, his lawyer, and the SCDOT had set a time to discuss the construction's impact on Horton's property. Describing his conversation with Appellant, Horton testified as follows:

> . . . first he told me that he was from New Hampshire and he said that, you know, their motto was something like, you know, if I can't – I'd rather be dead if I can't be free, something like that. And at one point he said that, I've got something that's going to blow this whole project out of the water, and I took that to mean that he had some information or something. But he was becoming somewhat agitated and I kept telling him that, well, I

> . . . their issue, what they told me, was that nobody was going to come near their property, nobody was going to do any work in that area there. They said that it was their property; they would – they started cursing at that time stating that they would fight till the last breath and there'd be hell to pay if anybody stepped on their property and/or try to do any work, construction work, on their property.

> thought it best if he'd get an attorney and look over his situation and see if they could resolve it. So basically I wished him well and told him that you need to get an attorney, that I had to get one, and I hoped that things would get resolved. But you know, he did seem agitated and he said at one point I think that, they'll take my land over my cold, dead body.

At approximately 3:30 p.m., SCDOT Superintendent McCaffrey contacted Rita Bixby, informing her that he had documents concerning the right of way. Also on the phone with McCaffrey were Williams, Hannah, and Joe McCurry, a fellow SCDOT employee. McCaffrey requested that the Bixbys and SCDOT officials meet the following Monday (December 8, 2003) to discuss the right of way. Rita responded by saying, "Anything you got is lies." Although eventually agreeing to the December 8, 2003 meeting, Rita said that if the men wanted to show her the documents they could meet her at the family's home in five minutes. Three of the SCDOT officials left to meet with Rita. Williams, however, refused to go because he feared the situation might become violent.

When the SCDOT officials arrived at the Bixby home, Rita told them that the documents were forgeries and threatened that her family "would fight till the last breath and there would be hell to pay." She demanded that no construction take place. McCaffrey said they would have to come back with a deputy. Rita replied that the Sheriff's department had no authority over them on private property.

Sunday, December 7, 2003

On the evening of December 7, 2003, Appellant, Steven Bixby went to a social gathering at the home of Alane Taylor, his former girlfriend. Appellant told Alane, "Tomorrow is the day." Alane asked Steven to explain and he said, "We have all the guns loaded in my dad's house and if anybody comes in the yard we will shoot and if the shooting starts I won't come out alive." Steven also said that this had been planned for some time and that his mother Rita planned to take his brother to Steven's apartment while Steven

and Arthur stayed at the house. Alane attempted to talk Steven out of his planned violence.

Additionally, while at Alane's house, Appellant told Alane's daughter, Dana Newton, he intended to shoot law enforcement if they came on his parents' property. Newton testified that Appellant said, "I will, I'll blow their mother f****** heads off if they step one step onto my parent's property. I will."

Alane and Dana called Abbeville Deputy Barry New, a relative, and told him about Steven Bixby's comments. They said they were concerned that harm would come to anyone that went to the Bixby home. Deputy New called his supervisor and left a message conveying the warnings.

Monday, December 8, 2003

At 8:30 a.m. on Monday, December 8, 2003, Deputy Wilson met with SCDOT officials McCaffrey, Williams, and Hannah to discuss SCDOT's prior confrontation with the Bixbys and plan for that morning's meeting with the family. After discussing the matter, Deputy Wilson headed straight to the Bixby home. SCDOT officials Williams and Hannah left shortly thereafter.

As Williams and Hannah approached the Bixby home in their vehicle, they noticed that Deputy Wilson's car was in the driveway.[2] However, Deputy Wilson was nowhere to be seen. Williams and Hannah drove past the Bixby home for fear that it was not safe. They drove past again and noticed that the blinds were closed but peep holes were cut into them. The third time they drove past the house they saw Appellant standing in the doorway holding a pistol in one hand and a rifle in the other.

At around 9:30 a.m., Appellant placed a phone call to his mother, Rita, who was at Appellant's apartment with his brother. Appellant informed Rita that the shooting had begun. Rita placed phone calls to the Governor's office,

[2] The men could tell the car was running because they could see exhaust in the cold morning air.

the Attorney General's office, and Dr. Craig Gagnon, a family friend and local chiropractor. Dr. Gagnon went to the Bixby residence.

Arriving at the Bixby home at approximately 9:40 a.m., Dr. Gagnon saw two law enforcement officers standing in the front yard of the Bixby home. He heard a shot come from the home and saw Constable Ouzts fall to the ground, mortally wounded. As news of the confrontation spread, several officers arrived and were able to retrieve Constable Ouzts's body. Additionally, the South Carolina Law Enforcement Division (SLED) dispatched approximately fifty agents and tactical support.

After determining Rita's whereabouts, David Alford, an investigator with the Abbeville County Sheriff's Department, apprehended her at Appellant's apartment and transported her to a temporary command center near the Bixby home. While at the command center, Rita refused to help Alford and the SLED agents diffuse the situation stating, "Why would I want to help you, I wanted to be inside with them today but they made me stay outside to tell the world why they died." All other attempts to contact Appellant and his father inside the home were unsuccessful.

At approximately 7:30 p.m., SLED sent robots equipped with cameras toward the house where they were able to peer through a window. The cameras captured footage of Deputy Wilson, who was face down on the floor of the Bixbys' living room with his hands cuffed behind him. He was dead. A team of officers entered the home and retrieved Deputy Wilson's body, which was already stiff from rigor mortis.

At approximately 8:55 p.m., SLED sent another robot into the Bixby home. Arthur fired a shot at the robot, and he and Appellant began firing at the officers outside the house. The officers returned fire and shot tear gas into the home.

The gun fight continued until at approximately 9:25 p.m. when Appellant surrendered and notified police that Arthur was wounded. Again, a robot was sent into the house. Video transmitted by the robot confirmed that

Arthur had been shot and was sitting on the bathroom floor surrounded by weapons. At approximately 11:00 p.m., Arthur crawled into the living room and surrendered to authorities.

In August 2004, Appellant was indicted by an Abbeville County Grand Jury on one count of conspiracy to commit murder, one count of kidnapping, two counts of murder, one count of possession of a firearm or knife during the commission of a violent crime, and twelve counts of assault with intent to kill. The State sought the death penalty for the murders of Deputy Wilson and Constable Ouzts.

A jury trial began on February 14, 2007. On February 18, 2007, the jury returned a verdict of guilty as charged on each count. At the end of the penalty phase, the jury recommended that Appellant be sentenced to death. The trial judge sentenced Appellant to death finding the evidence warranted the penalty and the sentence was not imposed as a result of prejudice, passion, or any other arbitrary factor.[3]

ISSUES

Appellant presents the following issues for review:

Guilt Phase

I. Did the trial court err when, during jury qualification, it prevented defense counsel from instructing potential jurors as to the definition of murder?

[3] The trial judge also imposed five consecutive ten year sentences for Appellant's convictions of assault with intent to kill, a five year sentence for conspiracy, to run consecutive to the assault convictions, and seven concurrent ten year sentences for the remaining assault with intent to kill convictions.

II. Did the trial court err when it refused to allow the defense to present a witness who was prepared to testify concerning his search for rights-of-way to the Bixby property?

III. Did the court of appeals err when it 1) ruled that the South Carolina wiretap statute was constitutional, 2) ruled that SLED complied with the wiretap statute, and 3) declined to convene an evidentiary hearing to determine if SLED complied with the notification requirements of the wiretap statute?

IV. Did the trial court err when it refused to allow Rita to testify as to her experience in New Hampshire concerning property disputes?

V. Did the trial court err when it allowed various witnesses to testify regarding certain out-of-court statements made by Rita?

VI. Did the trial court err when it refused to charge the jury that the State had the burden of disproving each of the elements of self-defense?

Penalty Phase

VII. Did the trial court err when, during the penalty phase, it admitted into evidence a videotape of Deputy Wilson's funeral service?

VIII. Did the trial court err when it declined to rule that the court-ordered mental evaluation of Appellant violated the Fifth Amendment to the United States Constitution and Article I, §12 of the South Carolina Constitution?

STANDARD OF REVIEW

Generally, "[i]n criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

LAW/ANALYSIS

I. Jury Qualification

Appellant argues that the trial judge abused his discretion when he did not allow defense counsel to probe jurors concerning the definition of "murder" because this ruling prevented him from ascertaining each potential juror's qualification with regard to their views on capital punishment. We disagree.

Jury qualification began on February 5, 2007 and was completed on February 12, 2007. As part of this qualification, each potential juror completed extensive juror questionnaires designed to elicit general, personal information, and probe for bias and predisposition. The questionnaires contained specific questions concerning each potential juror's view on the death penalty.

Counsel received the answers to these questionnaires, was present during the trial court's questioning of the potential jurors, and was permitted to ask questions of each potential juror. During the first portion of defense counsel's questioning of the potential jurors, counsel instructed each person on the definition of murder, as opposed to self-defense. Over counsel's objection, the trial judge instructed him to cease instructing each potential juror as to the definition of murder.

With regard to the jury actually impaneled, defense counsel did not move to disqualify any of the named jurors during individual panel

qualification and, critically, defense counsel used only seven of the ten available strikes during jury selection.

"The scope of *voir dire* and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Stanko*, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008). Furthermore, "[i]t is well established that a trial court has broad discretion in conducting the *voir dire* of the jury and particularly in phrasing the questions to be asked." *United States v. Jones*, 608 F.2d 1004, 1009 (4th Cir. 1979). "To constitute reversible error, a limitation on questioning must render the trial fundamentally unfair." *Stanko*, 376 S.C. at 576, 658 S.E.2d at 97.

Procedurally Barred

Where counsel fails to exhaust all strikes, appellate review of juror qualification issues is barred. *See State v. Tucker*, 324 S.C. 155, 163, 478 S.E.2d 260, 264 (1996) (holding "[f]ailure to exhaust all of a defendant's peremptory strikes will preclude appellate review of juror qualification issues"). Because defense counsel used only seven of the ten available strikes during jury selection, review of this issue is barred.

Actual Jurors Were Qualified Without Objection

Nonetheless, even if this issue is not procedurally barred because of Appellant's failure to exhaust all of his peremptory strikes, his arguments concerning jury qualification are without merit.

"[A]ny claim that a jury was not impartial must focus on the juror who ultimately sat at the trial." *Tucker*, 324 S.C. at 162-63, 478 at 264 (citing *Ross v. Oklahoma*, 487 U.S. 81 (1988)). As mentioned previously, defense counsel did not move to disqualify any of the jurors actually impaneled. In our view, the qualification of jurors was extensive and defense counsel did not challenge the qualification of the impaneled jurors because he had sufficient information from both their answers to the detailed questionnaires and his questioning to determine that each was qualified. Thus, Appellant's

argument is without merit and, in addition, is barred because he failed to raise any issue with respect to the qualification of the impaneled jurors.

With respect to Appellant's arguments concerning voir dire, the dissent reasons that the trial judge committed reversible error because counsel was not given sufficient latitude to instruct the potential jurors as to the legal definition of murder. We are not persuaded by this position because such information is disseminated to jurors by way of jury instructions, not questioning on voir dire.[4] For these reasons, we find that the trial judge did not commit reversible error when he refused to allow defense counsel to probe jurors concerning the definition of murder.

II. Title Abstract Witness

Appellant argues the trial court committed reversible error when it refused to allow a defense witness to testify about his search for records concerning the right of way at issue. We disagree.

Appellant attempted to present the testimony of Patrick White (White), who was retained by Appellant to conduct a title abstract on the Bixby property. Appellant wanted to establish, through White's testimony, that he had a good faith belief that there was no right of way on the Bixby property. Further, Appellant wanted to rebut the State's argument that the records concerning the right of way were easily accessible to the public. The State objected to the witness's testimony as irrelevant.

During an *in camera* hearing, title abstractor White's testimony was proffered to the trial judge. White said that he found no record of any easements, encroachments, or rights-of-way pertaining to the Bixby property

[4] Even if we agreed with its position on this issue, curiously, the dissent would remand the matter for a new sentencing phase only. When an error occurs in juror selection, ordinarily it requires a reversal of the guilt as well as the penalty phase.

filed at the Abbeville County Clerk of Court's office. The trial judge asked White if he was familiar with S.C. Code Ann. § 57-5-570 (1993), which requires that copies of highway plans with right of way designation be maintained in the tax assessor's office for each county. White replied that he was not familiar with this statutory provision and that he did not search the tax assessor's office for a record of the right of way. The trial judge ruled that White's testimony was irrelevant and inadmissible because White was unaware of section 57-5-570 and did not conduct a complete search for the public record of the rights-of-way on the Bixby property.[5]

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. White's testimony was not relevant to the defense's position because he only looked for records of the right of way at the Abbeville County Clerk of Court's office. Because White did not search for a record of the right of way in the county tax assessor's office where S.C. Code § 57-5-570 requires that they be maintained, his testimony did not have the tendency to make it more or less probable that 1) Appellant had a good faith belief that there was no right of way on his family's land, and 2) the records concerning the right of way were not easily accessible to the public.

In any event, even if White's testimony were relevant, its exclusion by the trial court was appropriate pursuant to Rule 403, SCRE, because it would have misled the jury.[6] White's testimony that he did not find any record of the right of way at the court house would only lead the jury to believe that a right of way should have been recorded at the clerk of court's office, which is contrary to state law.

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[5] Specifically, the trial judge, said, "the witness didn't go to the maintenance shed so he doesn't know if its public knowledge or it's available."

[6] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

III. Court of Appeals' Order

At trial, SLED Chief Robert Stewart (Chief Stewart) testified that during the standoff he "called Chief Justice Jean Toal and Circuit Court Judge Johnson to get the necessary authority to begin intercepting any calls that were coming into or out of the [Bixby] house to try to determine what was going on in the house." Judge Johnson made the following notation on his calendar for December 8, 2003:

> Talked to Chief Stewart, 2:48. [Illegible] 2 different. Mother and brother somewhere else. Steven Vernon Bixby w/father. & mother & brother somewhere. Authorized 2 wiretaps.

SLED initiated the wiretap at 4:54 p.m. At approximately 8:55 p.m. the line became open and recorded heavy gun fire and Appellant's eventual surrender. Consistent with S.C. Code Ann. § 17-30-95 (2002), on December 10, 2003, Judge Johnson entered an order authorizing the emergency interception of wire and electronic communications.

Appellant filed a motion in the trial court to suppress the evidence obtained from the wiretap. This motion was denied. Appellant then petitioned the court of appeals for a motion to suppress the evidence and requested an evidentiary hearing on the matter. The court of appeals declined to conduct an evidentiary hearing and denied Appellant's motion to suppress. At trial, the tape recording of gun fire and Appellant's surrender obtained by the wiretap was played for the jury.

Appellant argues the court of appeals erred when it 1) ruled that the South Carolina wiretap statute does not violate the Fourth Amendment to the United States Constitution or the right to privacy in the South Carolina Constitution, 2) ruled that SLED complied with the notification requirements in the South Carolina wiretap statute, and 3) denied Appellant's request for an evidentiary hearing on his motion to suppress the evidence gathered in the wiretap. As to all of these arguments, we disagree.

Constitutionality of Wiretap Statute

Appellant argues that the court of appeals erred when it determined the emergency provisions of the South Carolina wiretap statute, S.C. Code Ann. § 17-30-95 (2002), do not violate the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution. Appellant argues that the emergency provisions are unconstitutional because they allow a judge to approve a wiretap without a probable cause determination. Section 17-30-95 states:

> (A) Notwithstanding any other provision of this chapter, any agent of the South Carolina Law Enforcement Division specifically designated by the Attorney General or his designated Assistant Attorney General may intercept the wire, oral, or electronic communication if an application for an order approving the interception is made within forty-eight hours after the interception begins to occur, and the agent determines that more likely than not:
>
> (1) an emergency exists that involves an offense provided for in Section 17-30-70[7] and an immediate danger of death or serious physical injury to any person or the danger of escape of a prisoner and requires that a wire, oral, or electronic communication be intercepted before an order authorizing the interception can, with due diligence, be obtained; and
>
> (2) there are grounds upon which an order could be entered under this chapter to authorize the interception.
>
> (B) In the absence of an order, the interception must immediately terminate when the communication sought is obtained or when

[7] Relevant offenses included in S.C. Code Ann. § 17-30-70(1) (2002) are murder, assault and battery with intent to kill, kidnapping, and voluntary manslaughter.

> the application for the order is denied, whichever is earlier. If the application for approval is denied, or in any other case in which the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted must be treated as having been obtained in violation of Section 17-30-20, and an inventory must be served as provided for in Section 17-30-100(E) on the person named in the application.
>
> (C) Agents of the South Carolina Law Enforcement Division designated to intercept wire, oral, or electronic communications pursuant to this section must have completed training provided by SLED pursuant to Section 17-30-145.
>
> (D) A judge of competent jurisdiction must be notified orally of the intent to begin the interception of any wire, oral, or electronic communication when an emergency exists pursuant to the provisions of this section before any interception is conducted. The judge must make a written record of this notification.

Appellant does not argue that the emergency circumstances contemplated by the statute did not exist. He argues that section 17-30-95(D) is unconstitutional because it allows a wiretap to begin upon oral notification of a "judge of competent jurisdiction."[8]

Appellant's argument has no merit because the commencement of a wiretap after oral notification of a judge of competent jurisdiction is akin to a warrantless search conducted when exigent circumstances demand immediate action, a practice the United States Supreme Court and this Court have established is constitutional. *See Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (recognizing that "warrantless entry by criminal law enforcement official may be legal when there is compelling need for official action and no

[8] A "judge of competent jurisdiction" is "a circuit court judge designated by the Chief Justice of the Supreme Court of the State of South Carolina." S.C. Code Ann. § 17-30-15(8) (2002).

time to secure a warrant"); *State v. Brown*, 289 S.C. 581, 586, 347 S.E.2d 882, 884 (1986) (opining that "[t]he exigent circumstances doctrine is an exception to the Fourth Amendment's protection against searches conducted without prior approval by a judge or magistrate"). Because the commencement of a wiretap upon oral notification of a judge is only allowed in the emergency circumstances specifically outlined in the statute, the wiretap statute is constitutional under the exigent circumstances doctrine.

SLED Compliance with Notification Procedures

Alternatively, Appellant argues that the court of appeals erred in ruling that SLED complied with the notification requirements of S.C. Code Ann. § 17-30-95 (2002). Specifically, Appellant argues that SLED did not follow the procedures of the wiretap statute because there is no evidence in the record that Chief Justice Toal designated Judge Johnson as a "judge of competent jurisdiction" to authorize an emergency wiretap. Appellant's argument is without merit.

Section 17-30-95(D) states, "[a] judge of competent jurisdiction must be notified orally of the intent to begin the interception of any wire, oral, or electronic communication when an emergency exists pursuant to the provisions of this section before any interception is conducted." A "judge of competent jurisdiction" is defined as a circuit court judge designated by the Chief Justice. *See* S.C. Code Ann. § 17-30-15(8) (2002). At the time he was notified of SLED's intent to commence a wiretap at the Bixbys' property, Judge Johnson was assigned, by order of the Chief Justice, to be Chief Administrative Judge of the Eight Judicial Circuit.[9] S.C. Code Ann. § 14-5-350 provides:

> . . . judges shall have at chambers in any county within the circuit in which . . . they are assigned to hold court all powers and jurisdiction which they have and exercise in open court in any county within such circuit. . . .

[9] Administrative Order of the Chief Justice, September 23, 2002.

Abbeville County, where the wiretap occurred, is in the Eighth Judicial Circuit. Therefore, Judge Johnson was designated by Chief Justice Toal as a judge of competent jurisdiction for the purposes of notification under section 17-30-95(D).

Additionally, Appellant argues that SLED did not follow the procedures of the wiretap statute because it could have received written authorization from Judge Johnson who was holding court nearby in Greenwood. Simply put, written authorization is not required by the statute when emergency circumstances exist. The record makes clear that the situation was an emergency as contemplated by the statute; therefore, this argument is without merit.

Denial of Evidentiary Hearing

Appellant argues that the court of appeals erred when it declined to conduct an evidentiary hearing concerning the validity of the wiretap. When it issued its order in this matter, the court of appeals was serving as a "reviewing authority" pursuant to S.C. Code Ann. § 17-30-110(A) (2002), which provides that a "reviewing authority may, in its discretion, conduct a hearing and require additional testimony or documentary evidence." Appellant claims that there are certain factual issues that the pleadings failed to resolve. Specifically, Appellant argues the court of appeals should have conducted fact finding with respect to the designation of Judge Johnson to receive oral notification under section 17-30-95(D) and whether SLED could have received written authorization to conduct the wiretap at issue.

Appellant's argument in this respect is without merit. First, as is made clear above, Judge Johnson was the Chief Administrative Judge for the Eighth Judicial Circuit. Therefore, it cannot be said that the court of appeals abused its discretion by declining to conduct an evidentiary hearing with respect to this issue. Second, it is clear from the record that the situation at the Bixby residence was an emergency as contemplated by the statute. Appellant argues that SLED had enough personnel in the area to drive to

Greenwood where Judge Johnson was holding court and receive written authorization to conduct a wiretap. The statute simply did not require written authorization in this situation. Therefore, Appellant's argument is entirely without merit.

IV. Rita Bixby's Experience in New Hampshire

Appellant argues the trial court committed reversible error when it refused to allow Rita to testify concerning her experience handling property disputes in New Hampshire. We disagree.

As part of its case-in-chief in the guilt phase, the State presented evidence that the Bixby family never hired an attorney to act as their agent in the dispute with SCDOT. At trial, Rita testified that she had enough experience to deal with the legal aspects of the situation on her own, thus she did not need an attorney. Defense counsel then asked Rita to explain her prior "experience" handling property disputes. The State objected to this question as irrelevant and the trial court sustained the objection.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. We find that evidence concerning the details of Rita's handling of property disputes in New Hampshire is irrelevant to why her family did not hire an attorney to act as their agent in the dispute with the SCDOT. When the State made an issue out of the fact that the Bixbys could have hired an attorney but did not, it was certainly relevant for counsel to ask Rita if she thought she was capable of handling the dispute and, if so, why. This question was posed to Rita and she answered it.

Nonetheless, Appellant argues that Rita should have been able to testify concerning the details of the matters in which she was involved in New Hampshire. The record demonstrates that Rita simply wanted to testify as to her views of government and the Constitution, a matter that is not relevant to the question of why she did not hire an attorney.

V. Admission of Rita Bixby's Out-of-Court Statements

Appellant argues that the trial court erred when it allowed Deputy Alford; Appellant's former girlfriend, Alane Taylor; and Sheriff Goodwin to testify about certain out-of-court statements made by Rita. We disagree.

Rule 613(b), SCRE, states:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement.

Appellant argues that the State failed to lay a proper foundation pursuant to Rule 613(b), SCRE, for the testimony of Deputy Alford, Ms. Taylor, and Sheriff Goodwin. Appellant's argument is without merit.

Alford

Deputy Alford was one of the law enforcement officers who apprehended Rita at Appellant's apartment and spoke with her at the temporary command center. At trial, the State questioned Rita with respect to her interaction with Deputy Alford. Rita denied speaking to Deputy Alford on the morning of the murders. Additionally, she denied knowing who Deputy Alford was and denied telling anyone that she was not in the house at the time of the murders because she needed "to tell the world" why Appellant and Arthur were killed.

The State called Deputy Alford to testify concerning his interaction with Rita on the morning of the murders. Alford testified:

> And during the course of the conversation back and forth with Mrs. Bixby one of the officers – I believe it was one of the SLED

> agents – asked her, said, ma'am, would you please just pick up the phone, call the house, and try to help us out. Tell them to come out, enough hurt's been done, just put the guns down and come out. And her exact statement was, and I quote, why would I want to help you, I wanted to be inside with them today but they made me stay outside to tell the world why they died, unquote.

Appellant's argument is without merit because the State laid a proper foundation for Deputy Alford's testimony under Rule 613(b). The series of questions asked of Rita concerned the substance of the statement, the time and place it was made, and the person to whom it was made. Once Rita denied making the statement, the State had laid a foundation to ask Alford about the statement.

Taylor

Alane Taylor was Appellant's former girlfriend. The record indicates that Alane spoke with Rita on the telephone the morning of the murders at issue.

On cross-examination, the State asked Rita if she recalled receiving a phone call from Alane. Rita admitted that she received this phone call. The State specifically asked if she recalled making the following statements to Alane during that phone call:

1) Appellant told her to take his brother and leave the home,
2) Appellant had shot a deputy,
3) She was proud of Appellant for standing up for her rights,
4) She wanted to be present for the shooting, and
5) She would have shot someone if she had been at her home.

Rita denied making each of these statements.

The State called Alane as an impeachment witness. The trial judge found the State laid a proper foundation under Rule 613(b), SCRE. Taylor

testified that she tape recorded the phone conversation with Rita. After the tape was played for the jury, Alane testified that it was genuine and Rita actually said all of the aforementioned things to her.

The record clearly reflects that Rita admitted having the conversation at issue but specifically denied making the statements later testified to by Taylor. Thus, the State laid a proper foundation under Rule 613(b), SCRE, and we find that Appellant's argument is entirely without merit.

Sheriff Goodwin

The record indicates that Rita spoke to Sheriff Goodwin from Dr. Gagnon's phone on the morning of the incident. The State questioned Rita concerning this conversation. Rita admitted speaking with Sheriff Goodwin from Dr. Gagnon's phone. However, she denied that the Sheriff begged her "to call Arthur and Steven and ask them to come out." Rita claimed that the phone conversation was "cut off" due to a "dead spot" and denied hanging up on the Sheriff.

Over Appellant's objection, Sheriff Goodwin testified concerning the telephone conversation with Rita on December 8, 2003. He said:

> After arriving at the scene on – at 4 – at the Bixby resident [sic] and after talking to some bystanders there, Doctor Craig Gagnon, I made a call to the resident [sic] of the Bixby with no answer. Mr. Gagnon, Doctor Gagnon said to me I can get her on the telephone. I talked to Mrs. Rita Bixby. And after talking to Mrs. Rita Bixby I asked her and pleaded with her would she please call the resident [sic] where [Appellant] and Arthur Bixby was and asked her would she ask [Appellant] and Arthur to come out and let's talk about what was going on out there on this particular day. And after talking to Mrs. Bixby for a while, she got calling me – that she had called the Attorney General's Office, she had called the other office. But I stated to Mrs. Bixby, I said, Mrs. Bixby, but you never called the Abbeville County Sheriff office, would

> you please call [Appellant] and Arthur and ask them to come out and let's talk about what's going on at the resident [sic] at the time . . . She hung up the telephone on me.

Appellant does not contest that Rita was apprised of the time and place of the statement or to whom it was made. Nonetheless, Appellant argues that Rita was not apprised of the substance of the statement she made to Sheriff Goodwin and thus a proper foundation was not laid under Rule 613(b), SCRE.

Rita was specifically asked, "[d]id Sheriff Goodwin not beg you to call Arthur and Steven and ask them to come out?" Rita denied that she was ever asked this question by Sheriff Goodwin. Additionally, Rita was asked "[d]idn't you really hang up on him?" Rita denied that she hung up on Sheriff Goodwin. Sheriff Goodwin's testimony concerning Rita's statements to him was limited to the fact that he asked her to call Steven and Arthur and that Rita hung up on him. Therefore, the record clearly indicates that Rita was apprised of the substance of the statement at issue and therefore Appellant's argument is without merit.

VI. Jury Charge on Self-Defense

Appellant argues that the trial court erred when it declined to charge the jury that the State had the burden of disproving each element of self-defense. We disagree.

Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt. *State v. Burkhart*, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002). There are four elements required by law to establish a case of self-defense. *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). The four elements are:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious

> bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

Id. "When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." *Burkhart*, 350 S.C. at 261, 565 S.E.2d at 303. The trial judge charged the jury on self-defense as follows:

> Now the issue of self-defense has been raised in this case. Self-defense is a complete defense, and if it is established you must find the defendant not guilty of murder. The State has the burden of proof in this case, and this includes proving the absence of the elements of self-defense beyond a reasonable doubt.

Because all the elements are required to establish self-defense, we are not persuaded by Appellant's argument. It is an axiomatic principle of law that the defense has not been established if any one element is disproven. A jury charge on this issue should state 1) the State has the burden of disproving self-defense and 2) this burden is carried by disproving any one of the four elements by proof beyond a reasonable doubt. We find that the charge issued by the trial judge complied with these requirements.

VII. Funeral Videotape

Appellant argues the trial court erred when, during the sentencing phase of his trial, it admitted a seven minute video showing portions of Deputy Wilson's funeral. We disagree.

The video at issue here contained footage that showed the folding of an American flag over the closed coffin; the playing of "Taps" on a trumpet; footage of mourners; and a recording of a fictional 911 call in which Deputy Wilson is given permission to "return home," a tradition at law enforcement funerals. Over Appellant's objection, the trial judge concluded that the video was admissible because it went to the question of the victim's uniqueness, showed the harm committed by Appellant, and showed the impact of the victim's death on his family and the community.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his ruling will not be disturbed absent a showing of probable prejudice." *State v. Ard*, 332 S.C. 370, 378, 505 S.E.2d 328, 332 (1998). Nonetheless, S.C. Code Ann. § 16-3-25(C)(1) establishes that a death sentence must be vacated if it was "imposed under the influence of passion, prejudice, or any other arbitrary factor."

Appellant argues that the admission of the video introduced an arbitrary factor into the sentencing phase of his trial in violation of S.C. Code Ann. § 16-3-25(C)(1) and the Eight Amendment. *See State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (finding that the prosecution's improper closing argument that utilized a dramatic, mock funeral warranted a new trial). In reply, the State relies on *Payne v. Tennessee*, 501 U.S. 808 (1991), and argues that the video was admissible as "victim impact" evidence and did not unduly prejudice Appellant.

Turning to Appellant's argument, in *Northcutt*, this Court vacated Northcutt's death sentence holding that a staged funeral procession in which the solicitor draped a large, black shroud over a baby crib and dramatically

wheeled it out of the courtroom introduced an arbitrary factor into the sentencing phase of the defendant's trial. The instant matter is distinguishable from *Northcutt* for one major reason: the video showed events that actually took place, whereas the *Northcutt* funeral was a staged dramatization.[10] A staged funeral procession in which a solicitor dramatically and in person drapes a shroud over a baby's crib has more of a tendency to elicit passion and prejudice than a videotape showing excerpts from a victim's actual funeral.

Turning to the State's argument, a State may conclude that victim impact evidence "is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 501 U.S. at 827. Victim impact evidence demonstrates "the loss to the victim's family and to society which has resulted from the [victim]'s homicide." *Id*. at 822. We find the videotape at issue was victim impact evidence because it showed the traditional trappings of a law enforcement officer's funeral, demonstrating the general loss suffered by society. Additionally, the video showed footage of actual mourners, displaying for the jury the specific impact of the murder on particular members of society. Thus, we hold the video was victim impact evidence pursuant to *Payne*.

Nonetheless, this evidence is subject to Rule 403, SCRE, which states that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We find the probative value of the videotape was not substantially outweighed by the danger of unfair prejudice. As the trial judge ruled, the videotape was relevant to show the uniqueness of the victim, the harm committed by Appellant, and the impact of the victim's death on his family and society.

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[10] Appellant correctly asserts that the 911 call played at Deputy Wilson's funeral was a dramatization. However, unlike the solicitor's dramatization at issue in *Northcutt*, the dramatized 911 call was part of Deputy Wilson's funeral service and is relevant to victim impact.

Additionally, deference is due to the trial court's admission of the evidence. After all, "[a] trial judge has considerable latitude in ruling on the admissibility of evidence and his ruling will not be disturbed absent a showing of probable prejudice." *Ard*, 332 S.C. at 378, 505 S.E.2d at 332. In our view, it is not probable that Appellant was prejudiced by the State's presentation of the videotape at issue to the jury.

The dissent would reverse Appellant's capital sentence because the video was moving and could have caused the jurors to feel sympathy for the mourners and "outrage at the person who inflicted the suffering." Under the law, simply saying that evidence such as this was "moving" is not enough to require reversal of a capital sentence. Addressing this issue before, we have said:

> The appellant has the burden of showing that any alleged error deprived him of a fair trial. The relevant question is whether the solicitor's action so infected the trial with unfairness as to make the resulting conviction a denial of due process. The Court must review the argument in the context of the entire record.

State v. Finklea, Op. No. 26843 (S.C. Sup. Ct. filed July 26, 2010) (Shearouse Adv. Sh. No. 29 at 66) (citing *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)). In our view, there is no evidence in the record sufficient to establish a finding of prejudice. Thus, we are not persuaded by the dissent's reasoning and affirm the decision of the trial court.

VIII. Mental Evaluation

Appellant argues that the trial court's order compelling him to submit to a mental evaluation violated his Fifth Amendment right against self-incrimination. We disagree.

Prior to the sentencing phase of the trial, defense counsel indicated that Appellant intended to present mitigation evidence concerning his mental health. Upon the State's motion, the trial court ordered Appellant to submit

to a mental health examination pursuant to *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000). In order to protect Appellant, the trial court ordered that 1) the report would be sealed from the State until evidence concerning Appellant's mental state was presented by him in the sentencing phase, 2) defense counsel was allowed to be present during the evaluation and he could object to any question posed to Appellant by the examiner, and 3) any inculpatory statements made by Appellant during the evaluation would not be revealed in the report.

Self-Incrimination

A criminal defendant has a right against self-incrimination. U.S. Const. amend. V; S.C. Const. art. I, § 12. Additionally, a capital defendant has a federal constitutional right to present any relevant mitigation evidence. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). Accordingly, S.C. Code Ann. § 16-3-20(C)(b) (2007) provides that evidence which tends to establish or rebut any mitigating factors[11] may be offered during the sentencing phase of a capital proceeding.

This court has established that when a defendant indicates that he intends to offer evidence concerning his mental health during the guilt phase

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[11] In the instant case, the trial judge ordered the jury to consider, among others, the following statutory mitigating factors:

1. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. The defendant acted under the duress or domination of another person.
3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
4. The defendant's adaptability to prison life.

These factors come directly from S.C. Code Ann. § 16-3-20(C)(b) (2007).

of his trial, he has opened the door to the issue. *See Locklair*, 341 S.C. at 365, 535 S.E.2d at 427. Further, where a trial court is under the impression that a criminal defendant's mental condition will be an issue at trial, it has the inherent authority to order an independent mental evaluation of that defendant. *Id*. at 364, 535 S.E.2d at 427. Under such circumstances, ordering a criminal defendant to submit to a mental evaluation does not violate his right against self-incrimination. *Id*.

Appellant argues that *Locklair* does not apply to the instant matter because the facts of that case concerned mental health relative to competency to stand trial, not the statutory mitigating factors at issue in a sentencing phase. Appellant is correct. Nonetheless, we must address whether a court can order a criminal defendant to submit to a mental health evaluation where that defendant indicates his intent to introduce evidence concerning his mental health during the sentencing phase of his trial. This is a novel issue in South Carolina. We answer the question in the affirmative. We find persuasive the reasoning of the Pennsylvania Supreme Court in *Commonwealth v. Sartin*, 561 Pa. 522, 751 A.2d 1140 (2000).

In *Sartin*, the Pennsylvania Supreme Court upheld a trial court's order compelling a criminal defendant to submit to a mental health evaluation after he indicated an intent to present evidence concerning his mental health in his mitigation case during the sentencing phase of his trial. *Sartin*, 561 Pa. at 529, 751 A.2d at 1144. The Court recognized that a court ordered mental evaluation in such circumstances could potentially tread upon a defendant's Fifth Amendment right. *Id*. Thus, the Court held that certain procedural safeguards should be utilized to protect the defendant and ordered that the results of the ordered evaluation be placed under seal until the commencement of the penalty phase. *Id*. at 525, 751 A.2d at 1141.

Turning to the facts of this case, we find that the trial court's order compelling Appellant to submit to a mental evaluation did not violate his Fifth Amendment right against self-incrimination because 1) he indicated an intent to present mental health evidence during the sentencing phase and 2)

the trial court utilized procedural safeguards to protect against any self-incrimination.

Transactional Immunity

Appellant argues that he is entitled to transactional immunity because the trial court ordered him to participate in a mental health evaluation and compelled him to answer questions about the facts of his case. We disagree.

The term "transactional immunity" describes an agreement by the government not to prosecute an individual for particular crimes in exchange for self-incriminating testimony or information. *See Piccirillo v. New York*, 400 U.S. 548 (1971). Appellant's argument relies solely on his reading of *State v. Thrift*, 312 S.C. 282, 301 S.E.2d 341 (1994) (holding that the South Carolina Constitution requires that a person compelled to provide the government with self-incriminating testimony be granted immunity from any prosecution for a transaction or offense to which the person's testimony relates). In *Thrift*, this Court opined:

> If the government desires to obtain a statement from a citizen which might incriminate him, the government has two options. First, it may obtain from the citizen a voluntary waiver of his right of silence. . . . The second option the government has if it desires to require a citizen to testify against himself is to grant the citizen immunity from prosecution.

312 S.C. at 297, 301 S.E.2d at 350.

This matter is clearly distinguishable from *Thrift*. In *Thrift*, the defendants were actually compelled to testify against themselves before a state grand jury. Here, however, Appellant was not compelled to offer self-incriminating testimony during his mental evaluation, thus transactional immunity cannot exist. Appellant's attorney was present at his mental evaluation and was able to object to any questions. Furthermore, by order of the court, any inculpatory statements which may have been in the report were

redacted. Because Appellant was not compelled to testify against himself, the court-ordered mental evaluation did not confer transactional immunity upon him.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review. We find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

CONCLUSION

For the aforementioned reasons, we affirm Appellant's death sentence.

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

JUSTICE PLEICONES: I respectfully dissent and would reverse appellant's capital sentences. I find reversible error in the trial judge's limitation of voir dire and in his decision to admit the funeral video. I would therefore reverse and remand for a new sentencing proceeding.

I. Voir Dire

Appellant contends the trial judge committed reversible error when, mid-voir dire, he refused to allow counsel to continue to explore the potential jurors' understanding of the definition of murder. The majority first holds this issue is not preserved because appellant did not exhaust his peremptory challenges. I disagree with this preservation ruling: appellant's contention is that the trial court's limitation of voir dire denied him the information necessary to decide whether to challenge a juror for cause, or whether to exercise a peremptory challenge should it be necessary. See State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (purpose of voir dire is not only to determine whether a juror is subject to a challenge for cause, but also to allow the parties to elicit information which will allow them to intelligently exercise their peremptory strikes). Appellant's failure to exhaust his strikes cannot be a procedural bar where his contention is that the trial judge's ruling deprived him of the very information he needed to intelligently exercise these strikes.

The issue was preserved when appellant objected to the curtailment of voir dire, and the number of peremptory challenges used is irrelevant. The majority also appears to hold that all jurors seated were qualified based upon their answers to the pretrial questionnaire and because the questioning permitted by the trial judge was sufficient. I disagree.

While the scope of voir dire is generally left to the trial judge's discretion, it is reversible error to limit questions in a manner that renders the trial fundamentally unfair. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008) citing Mu'Min v. Virginia, 500 U.S. 415 (1991). A prospective juror in a capital case must be excused for cause when his beliefs or attitudes against capital punishment would render him unable to return a verdict

according to law, S.C. Code Ann. § 16-3-20(E) (2003), or when his views on capital punishment would prevent or substantially impair his ability to act in accordance with his oath and the judge's instructions. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007) (internal citations omitted).

As we have acknowledged, a juror may affirmatively answer the inquiry "whether she would consider all the evidence before deciding the appropriate sentence," but upon further inquiry reveal that the only evidence that would cause her to return a life sentence would be that the killing was done unintentionally or in self-defense. State v. Evins, *supra*. The early voir dire in this case, where the judge permitted the potential jurors to be questioned about their understanding of the definition of murder, led to a number of jurors being dismissed for cause despite their initial indication that they could return either a life or a death sentence.[12] There can be no question but that this jury pool contained a number of individuals who equated all killings with murder, but who upon learning that murder was not an accident, a killing in self-defense, or a "passion killing," were not willing to entertain the possibility of a life sentence. Once the trial judge refused to allow appellant to define murder for these venirepersons, and declined appellant's request that the trial judge himself define that term, appellant was left without the means to make informed decisions about challenges for cause or the exercise of his peremptory challenges.

In Morgan v. Illinois, 504 U.S. 719 (1992), the Supreme Court held that a capital defendant was constitutionally entitled to challenge for cause any juror who would automatically vote for death. The Court held:

[12] E.g., Mr. Ellifrits affirmed to the trial judge that he could return either a life or a death sentence. On appellant's voir dire, after having murder defined, he stated that all cold blooded murderers, i.e. those who did not kill in self-defense or by accident, deserved death. Mr. Rollings also affirmed to the trial judge that he could return either sentence. On voir dire, however, after having murder defined and distinguished from other types of killings, he testified that all murderers deserve a death sentence.

> We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.

The Court recognized that voir dire was the only method by which these jurors could be detected, explicitly rejecting the state's contention that "general fairness" and "follow the law" questions were sufficient:

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. See *Turner v. Murray*, 476 U.S., at 34-35, 106 S.Ct., at 1687-1688 (plurality opinion). It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in

> light of the ease with which that risk could have been minimized." *Id*., at 36, 106 S.Ct., 1688 (footnote omitted). Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

In my opinion, the trial judge's mid-voir dire ruling, denying appellant the opportunity to discern which jurors would in fact be able to follow their oath and instructions, denied appellant his right to a fair sentencing proceeding, and requires that we reverse his capital sentences. It is not reasonable to expect that laypersons in the venire enter the courtroom with an understanding the legal definition of "murder."

II. Funeral Videotape

The majority affirms because it finds the video tape of Deputy William's funeral was properly admitted as victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), and because it finds the dramatization of the 911 call admitted as evidence less inflammatory than a staged funeral procession conducted during the State's closing argument. Compare State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). I would reverse.

In my opinion, the video did not demonstrate anything about the victim's uniqueness, or the impact of his loss on his family or friends or on community groups with which he had been involved. Instead, the video contains a staged 911 call which, we are informed, is standard at law enforcement funerals and thus not related to Deputy Wilson as an individual. Moreover, video of unidentified mourners does not demonstrate the impact of Deputy Wilson's death on his family or friends,[13] but rather reflects the affect

[13] The majority holds the video demonstrated the impact of Deputy Wilson's death on the community. In my opinion, this is a misapprehension of victim impact evidence. It is permissible to present evidence, through the testimony of the deceased's friends or family, of the impact of the decedent's loss,

of unidentified persons attending the funeral. Payne evidence is intended to show the lasting consequences of victim's death, while a funeral video merely preserves the visible expressions of grief exhibited by persons attending the service.

Under Payne, the jury is constitutionally permitted to consider "the specific harm caused by the crime in question" through the introduction of "evidence about the victim and about the impact of the murder on the victim's family." In my view, Payne evidence must be presented through testimony of those who have suffered as a result of the victim's death. Cf. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (Payne permits victim impact evidence in the form of testimony). I find the video tape, including the staged 911 call, did not constitute Payne evidence.

Unlike the majority, I find appellant suffered prejudice as the result of this improper evidence. I venture to say there are few individuals who could view this video without themselves being moved both by sympathy for the mourners and by outrage at the person who inflicted this suffering. Even if appellant did not suffer prejudice, I would hold the admission of this video violated the statutory prohibition of a death sentence "imposed under the influence of passion, prejudice, or any other arbitrary factor," S.C. Code Ann. § 16-3-25(C)(1) (2003), and thus requires that we reverse the sentencing proceeding.

CONCLUSION

I would reverse appellant's capital sentences and remand for a new sentencing proceeding, at which the funeral video would not be admissible.

WALLER, J., concurs.

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including the loss to the community. There is no general "community impact loss" component of victim impact evidence under Payne.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ronnie W. Wilson, Appellant.

Appeal From Georgetown County
Paul M. Burch, Circuit Court Judge

Opinion No. 4723
Submitted May 3, 2010 – Filed August 11, 2010

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia; for Appellant.

Assistant Attorney General Christina J. Catoe, of Columbia, and Solicitor J. Gregory Hembree, of Conway; for Respondent.

THOMAS, J.: Ronnie W. Wilson appeals his convictions for criminal domestic violence of a high and aggravated nature (CDVHAN) and kidnapping, arguing the trial court erred in refusing to grant a mistrial after a prosecuting witness testified to Wilson's prior bad acts. We affirm.[1]

FACTS

Wilson was indicted for CDVHAN, possession of a weapon during the commission of a violent crime, first-degree burglary, and kidnapping.

In limine, Wilson moved for the exclusion of the victim's testimony referencing alleged prior abuse by Wilson. Specifically, Wilson argued a 2004 incident which the victim mentioned in a videotaped statement could not be introduced. The solicitor acquiesced and stated, "I've spoken to my victim . . . she understands that that would be a prior bad act which could not be elicited on direct examination." However, on direct examination, after describing her relationship with Wilson, when asked if there was anything else the jury needed to know about their relationship, the victim answered:

> Other than, you know, I had on several attempts left him . . . when I realized that he, that there was going to be a problem with him being violent towards me I chose to try to end the relationship so that there would not be any altercations.
>
> There was one time that he did grab me by my neck. There were physical bruises . . . .

Wilson objected and moved for a mistrial, arguing the parties agreed to exclude evidence of the 2004 incident. The State argued the mistrial motion should be denied because the victim did not reference the 2004 incident.[2]

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[1] This appeal is decided without oral argument pursuant to Rule 215, SCACR.

[2] The victim was asked whether the abuse she mentioned occurred in 2004, and she explained it happened after 2004.

The trial court denied the motion, finding the victim said nothing about 2004 and little harm was done. The State mentioned it would have no objection to a curative instruction, but Wilson declined such an instruction stating, "I'd rather leave it alone[.]" The jury found Wilson guilty of CDVHAN and kidnapping, and he received concurrent sentences of ten years and twenty-two years, respectively. This appeal followed.

ISSUE ON APPEAL

Wilson argues the trial court erred in failing to grant his motion for a mistrial.

LAW/ANALYSIS

As a threshold issue, the State argues Wilson's allegation that the trial court erred in failing to grant his motion for a mistrial is not preserved. We disagree.

The State maintains that in order for Wilson to preserve his allegation of error, he was required to move to strike the offensive testimony, request or accept the trial court's offer of a curative charge, and then if unsatisfied renew his motion for a mistrial. The State cites State v. Patterson for the proposition that an issue is not preserved where counsel does not move to strike testimony and does not request a curative instruction. 324 S.C. 5, 482 S.E.2d 760 (1997). The State also cites State v. Ferguson to argue that a party moving for a mistrial must make a contemporaneous objection to the sufficiency of a curative charge and/or renew his motion for a mistrial following the instruction. 376 S.C. 615, 658 S.E.2d 101 (Ct. App. 2008). The State further relies on State v. Jones for the general rule that a curative charge is generally considered to cure any error, and thus avers by failing to request or accept the trial court's curative charge, Wilson's argument has in essence been waived. 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996). We find the State's argument on appeal misapprehends the law as it pertains to this case.

Appellate courts have recognized that an issue will not be preserved for review where the trial court *sustains* a party's objection to improper

testimony and the party does not subsequently move to strike the testimony or for a mistrial. Patterson, 324 S.C. at 18, 482 S.E.2d at 766 (emphasis added); see also State v. Wingo, 304 S.C. 173, 177-78, 403 S.E.2d 322, 325 (Ct. App. 1991) (stating that a motion to strike is necessary where a question is answered before an objection may be interposed, even after the objection has been sustained). The rationale for this rule is clear; without a motion to strike or motion for a mistrial, when the objecting party is sustained, he has received what he asked for and cannot be heard to complain about a favorable ruling on appeal. See State v. Primus, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000) (stating "the cases are legion in holding *if an appellant objects and the objection is sustained* but he does not move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain on appeal") (emphasis original) overruled on other grounds by State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002). When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue. Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review. See, e.g., State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (indicating a curative charge is generally deemed to cure an allegation of error).

On the other hand, when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error. The South Carolina Supreme Court has stated:

> It is argued however that the issue of improper closing argument by plaintiff's counsel was not preserved for review. It is contended that the failure of defendant's counsel to request a curative instruction, a mistrial or new trial after his objection had been *overruled* is fatal. This Court has held in Bowers v. Watkins Carolina Express, Inc., 259 S.C. 371, 376, 192 S.E.2d 190[192 (1972)], that motions for mistrial or new trial in such circumstances would

> be futile and are not necessary to preserve a timely objection for review. By the same logic it would be both futile and nonsensical for counsel to request curative instructions from a trial court which has already ruled an argument to be proper.

City of Columbia v. Myers, 278 S.C. 288, 289, 294 S.E.2d 787, 788 (1982) (emphasis added); see State v. McFadden, 318 S.C. 404, 410, 458 S.E.2d 61, 65 (Ct. App. 1995) (finding an appellant's allegation of error to be waived because after the trial court sustained the objection to the offensive testimony the sustained party did not thereafter move to strike it). By the same reasoning, in overruling an objection the trial court rejects the allegation of error and rules the evidence proper and admissible. In this vein, because the admission of proper evidence requires no curative charge, an overruled party is under no obligation to accept a curative instruction in order to preserve the issue for our review. See Myers, 278 S.C. at 289, 294 S.E.2d at 788 (labeling motions and further objections made after the trial judge has overruled an objection to be both futile and nonsensical).

Admittedly, shortened statements of the rule on this issue may lend to confusion on the matter. See State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) ("In rejecting the trial court's offer to strike the testimony or give a curative instruction, [the appellant] waived any complaint he had to the challenged testimony."). In Watts, although the motion for mistrial was denied, the court notes the trial court offered a curative charge. Id. As admissible evidence requires no curative charge, the trial court must have sustained the evidentiary objection which supported the motion for mistrial. Further, the Watts court cites only to Wingo for the specific proposition that an issue is not preserved "where [the] defendant did not move to strike the testimony after his objection was *sustained*." Id. (emphasis added). Additionally, in State v. Tucker, the appellant argued he was deprived of a fair trial because the State allegedly made inappropriate statements in closing argument. 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). In responding to this argument the appellate court simply stated: "[i]nitially, Appellant has waived this issue because he refused the trial judge's offer of a curative instruction." Id. Although completely unclear whether any underlying objection was made at all, let alone whether it was

sustained or overruled, the court cited specifically and solely to Watts for the much shortened rule statement that "[an appellant] waives objection if [a] curative instruction is refused." Id. However, despite abbreviating the language of the law, these cases make no clear indication of a departure from the established rule and rationale of Myers to warrant application of this rule to circumstances in which an objecting party is overruled.

In this case, Wilson objected to the introduction of the testimony and moved for a mistrial simultaneously. A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial. See State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and . . . prejudice in order to be entitled to a mistrial."). Although the trial court briefly touched on the issue of prejudice, it overruled Wilson's objection and admitted the testimony. Therefore, because Wilson's objection was overruled, he was not required to make another motion for mistrial or under any obligation to accept a curative charge.

Accordingly, we find Wilson's allegation of error is preserved for our review, and we herein address the merits.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. (internal citations omitted). A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial. Id. "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." White, 371 S.C. at 447-48, 639 S.E.2d at 164. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." Id. at 447, 639 S.E.2d at 164.

In this case, although it would appear the trial transcript is in excess of four hundred pages, the record on appeal consists of only twenty-five pages, including (1) the *in limine* agreement to exclude prior bad act evidence, (2) the portion of the victim's testimony preceding Wilson's objection, (3)

Wilson's objection and the arguments regarding mistrial, and (4) the indictments. The record indicates nothing of whether additional witnesses testified or if other evidence, such as photographs, was admitted. Accordingly, even assuming for the sake of argument that the admission of the testimony was error, we find no indication of prejudice in the record. See id. at 448, 639 S.E.2d at 164 (indicating prejudice must be based on review of the entire record).

CONCLUSION

Because we find no prejudice, the trial court's denial of Wilson's motion for a mistrial is

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Harold Orr, III, Appellant.

Appeal From Charleston County
John C. Few, Circuit Court Judge

Opinion No. 4724
Heard May 19, 2010 – Filed August 11, 2010

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

LOCKEMY, J.: Harold Orr, III appeals his convictions for first-degree criminal sexual conduct with a minor and committing a lewd act upon a minor, arguing the trial court erred in (1) denying his motion for a mistrial, (2) limiting his cross-examination of Sheila Sheppard, and (3) failing to require Officer Paulson to testify at trial pursuant to Rule 6, SCRCrimP. We affirm.

FACTS

Orr was indicted for first-degree criminal sexual conduct with a minor and committing a lewd act upon a minor in Charleston County. The State alleged Orr sexually assaulted his wife's nine-year-old granddaughter (the victim) on November 25, 2003.[1] At trial, the victim testified Orr sexually assaulted her while she was sleeping on the couch in the home Orr shared with her grandmother. According to the victim, Orr removed her shorts, pushed her underwear to the side, and began "licking" her "private part." Sheila Sheppard, Orr's wife and the victim's grandmother, testified she walked into the living room and saw Orr "having oral sex" with the victim. Sheppard stated she then hit Orr on the head with a cordless telephone and he ran out of the house.

While police officers were on the scene, Orr returned to the house. When he entered, the victim and Sheppard both identified him as the person who assaulted the victim, and he was taken into custody. The victim was transported to the hospital for a sexual assault examination. Other than a small abrasion near the hymen, the victim's examination was normal. The victim's clothes were taken into evidence and later testing by the South Carolina Law Enforcement Division (SLED) indicated the presence of saliva and male DNA in the victim's underwear. Further testing revealed Orr's DNA matched the DNA found in the victim's underwear. The jury found Orr guilty of first-degree criminal sexual conduct with a minor and committing a lewd act upon a minor. Orr was given concurrent sentences of twenty-five

[1] Orr's first trial ended in a mistrial after the jury was unable to reach a verdict.

years' imprisonment for the criminal sexual conduct charge and fifteen years' imprisonment for the lewd act charge. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this court is bound by the trial court's factual findings unless they are clearly erroneous. Id. "On review, this [c]ourt is limited to determining whether the circuit court abused its discretion." State v. Simmons, 384 S.C. 145, 158, 682 S.E.2d 19, 26 (Ct. App. 2009). "This [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence." Id.

LAW/ANALYSIS

I. Motion for Mistrial

Orr argues the trial court erred in denying his motion for a mistrial. We find this issue is not preserved for our review.

Officer Austin Rogers of the North Charleston Police Department testified Orr returned to the house while he and another officer were still on the scene. Officer Rogers testified:

> Rogers: I approached Mr. Orr, who after --- I don't know if I can say what he said to me ---
>
> Solicitor: No. That's hearsay.

Officer Rogers then testified he placed Orr under investigative detention and escorted him out of the house and into his patrol car. Later, during cross-examination, Orr requested an in camera hearing. During the hearing, Orr read a portion of the transcript from the Jackson v. Denno hearing at his first trial, at which Officer Rogers testified Orr told him "he just wanted to straighten things out," and that he "didn't do anything." Orr informed the trial

court he wanted to ask Officer Rogers about Orr's statement in order to elicit that specific response. The State argued Orr's statement was hearsay. Orr maintained his statement was an excited utterance, and thus, an exception to the hearsay rule. Orr argued his statement was an excited utterance because he was under stress after being accused of sexually assaulting the victim and seeing the police at his house.

The trial court sustained the State's objection to the admission of Orr's statement and ruled it was not an excited utterance. The trial court found it was not an excited utterance because if it were then any self-serving statement made "at or near the time of an arrest . . . would qualify for admission under the excited utterance exception." Orr then expressed concern over the jury's impression after Officer Rogers was not allowed to testify as to what Orr said upon entering the house. The trial court agreed to give the jury a curative instruction. Orr declined a curative instruction, arguing it would only draw more attention to the issue. Subsequently, Orr made a motion for a mistrial.

On appeal, Orr maintains the trial court erred in denying his motion for a mistrial. By rejecting the trial court's offer to give a curative instruction, Orr waived any challenge to Officer Rogers' testimony on appeal. See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 11, 466 S.E.2d 727, 732 (1996) (finding party waived right to complain of error when trial court's offer of curative instruction refused); see also State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996) (finding issue unpreserved when defendant refused trial court's curative instruction); State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) ("In rejecting the trial court's offer to strike the testimony or give a curative instruction, [the defendant] waived any complaint he had to the challenged testimony."). Accordingly, we affirm the trial court's decision to deny Orr's motion for a mistrial.

II. Cross-Examination of Sheppard

Orr argues the trial court erred in refusing to allow him to cross-examine Sheppard regarding allegations of infidelity in their marriage. We disagree.

During his cross-examination of Sheppard, Orr requested an in camera hearing to proffer testimony regarding infidelity allegations in his marriage to Sheppard. Orr argued it was his intent to show there was distrust in the marriage and that Sheppard had a bias against him. During the in camera hearing, Sheppard admitted she had accused Orr of cheating; however, she testified Orr had never accused her of cheating. Orr then read Sheppard's testimony from the transcript of his first trial at which Sheppard admitted Orr had accused her of cheating. When asked whether her previous testimony was accurate, Sheppard testified: "[Orr] never accused me of cheating. I mean, he had his assumption, but he never brought it to me." The trial court excluded Sheppard's prior testimony and found that because she denied any bias, Orr would be unable to elicit any evidence of bias in front of the jury. Furthermore, the trial court ruled Orr could not introduce Sheppard's prior testimony as an inconsistent statement because the infidelity issue was not material to Orr's prosecution. The trial court also noted Orr failed to establish a timely nexus between the accusations of infidelity and the assault on the victim.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Page, 378 S.C. 476, 481, 663 S.E.2d 357, 359 (Ct. App. 2008). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. Pursuant to Rule 608(c), SCRE: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Because Sheppard denied Orr had ever accused her of infidelity in her proffered testimony, Orr was unable to demonstrate any bias or motive existed. Orr also failed to show the allegations of infidelity occurred within a reasonable time before Orr was charged with sexually assaulting the victim. Therefore, the trial court did not abuse its discretion in excluding Sheppard's testimony regarding infidelity.

III. Chain of Custody

Orr argues the trial court erred in failing to require Officer Brandy Paulson to testify at trial pursuant to Rule 6, SCRCrimP. We find this issue is not preserved for our review.

A blood sample was collected from Orr for comparison purposes. At trial, Robin Taylor, a forensic DNA analyst at SLED, testified as to the chain of custody regarding the suspect kit that contained Orr's blood sample. When Taylor was asked who delivered the suspect kit to SLED, Orr objected on the basis that Officer Paulson's signature on the package was hearsay. The State argued the chain of custody only had to be established as far as practical and explained that Officer Paulson was bedridden with a broken ankle. The trial court ruled that Taylor's testimony regarding the signature was not hearsay. The trial court noted that Officer Paulson's signature was not "an out of court statement offered to prove its truth," but rather it was "an out of court act that [was] testified to and explained by several different witnesses."

Orr maintains Officer Paulson was required to appear and testify pursuant to Rule 6, SCRCrimP, after Orr objected to Taylor's testimony. At trial, Orr did not object to Taylor's testimony regarding Officer Paulson's signature based on an insufficient chain of custody. Instead, Orr's objection was based on hearsay. At no time did Orr raise Rule 6, SCRCrimP, or assert that Officer Paulson was required to testify. Thus, this issue is not preserved for our review. See State v. Moore, 357 S.C. 458, 464, 593 S.E.2d 608, 612 (2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for review); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Ashenfelder, Respondent-Appellant,

v.

City of Georgetown, Appellant-Respondent.

Appeal From Georgetown County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4725
Heard December 10, 2009 – Filed August 11, 2010

APPEAL DISMISSED

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

David J. Gundling, of Pawleys Island, for Respondent-Appellant.

PER CURIAM: In this cross-appeal, the City of Georgetown (the City) alleges the trial court erred in denying its directed verdict motions on David Ashenfelder's causes of action for conversion and prescriptive easement. Ashenfelder alleges the trial court erred in granting directed verdicts on his causes of action for adverse possession, declaratory judgment, estoppel,

trespass, and inverse condemnation prior to the declaration of a mistrial. We dismiss the appeal as premature.

FACTS/PROCEDURAL BACKGROUND

A vehicle struck and severely damaged a billboard in Georgetown operated by Ashenfelder. Prior to the accident, Ashenfelder never formally sought a sign permit from the City. After the accident, the City removed and disposed of the damaged billboard and Ashenfelder inquired as to the possibility of rebuilding the billboard. The City informed Ashenfelder that the billboard was located on city property and that the City would not issue a permit allowing him to rebuild.

Ashenfelder originally filed suit against the City asserting certain federal constitutional claims along with state law claims. The City removed the action to the United States District Court for the District of South Carolina. Subsequently, the district court dismissed Ashenfelder's federal claims and remanded the state law claims to the circuit court. Upon remand, Ashenfelder amended his complaint to add Lucien Bruggeman as an additional defendant. In his second amended complaint, Ashenfelder asserted causes of action for adverse possession and prescriptive easement against Bruggeman; he also asserted causes of action for conversion, negligence, trespass, estoppel, declaratory judgment, and inverse condemnation against the City.

The case proceeded to trial, and the City moved for directed verdicts on all causes of action at the close of Ashenfelder's case. The trial court directed a verdict and dismissed Ashenfelder's causes of action for adverse possession, declaratory judgment, estoppel, negligence,[1] trespass, and inverse condemnation. The trial judge denied the City's motion for a directed verdict on Ashenfelder's claims for conversion and prescriptive easement. After the jury was unable to reach a verdict, the trial court declared a mistrial and

[1] Ashenfelder did not address the ruling on his cause of action for negligence in his statement of issues on appeal. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.").

denied the City's renewed directed verdict motions on the remaining two causes of action. The City and Ashenfelder both appealed.[2]

STANDARD OF REVIEW

An appellate court may determine the question of appealability of a decision from a lower court as a matter of law. See S.C. Code Ann. § 14-3-330 (1976 & Supp. 2009) (creating appellate jurisdiction in law cases); S.C. Code Ann. § 14-8-200(a) (Supp. 2009) (setting forth the appellate jurisdiction of the court of appeals); City of Newberry v. Newberry Elec. Coop., Inc., 387 S.C. 254, 256, 692 S.E.2d 510, 512 (2010) ("Statutory interpretation is a question of law."). Even if not raised by the parties, this court may address the issue of appealability *ex mero motu*. Main Corp. v. Black, 357 S.C. 179, 180-81, 592 S.E.2d 300, 301 (2004) (affirming an order issued by the court of appeals *ex mero motu* dismissing an interlocutory appeal); St. Francis Xavier Hosp. v. Ruscon/Abco, 285 S.C. 584, 586, 330 S.E.2d 548, 549 (Ct. App. 1985) (addressing the question of appealability even though neither party raised the issue).

LAW/ANALYSIS

The City alleges the trial court erred in denying its directed verdict motions on Ashenfelder's causes of action for conversion and prescriptive easement. In his cross-appeal, Ashenfelder alleges the trial court erred in directing verdicts on his causes of action for adverse possession, declaratory judgment, estoppel, trespass, and inverse condemnation.

This case presents a question as to the effect of a mistrial on appealability in a case with multiple claims and multiple defendants where the court directs a verdict on some, but not all, claims prior to the mistrial. Jurisprudence as to a mistrial holds:

> A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999). It

[2] Bruggeman did not appeal.

> leaves the parties "as though no trial had taken place." Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (rulings of trial judge in proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results "in no binding adjudication of the rights of the parties." Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948).

State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009). A mistrial based on the failure of a jury to agree is not directly appealable. Keels, 213 S.C. at 572-73, 50 S.E.2d at 705. The denial of a directed verdict is not appealable until after final judgment. Id. at 573, 50 S.E.2d at 705.

Section 14-3-330 controls the right of appeal. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006).

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the

> action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (emphasis in original). The court of appeals also exercises its appellate jurisdiction under this statute. S.C. Code Ann. § 14-8-200(a) ("This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case.").

The appellate courts of our state have addressed the appealability of final decisions of the trial courts. See, e.g., Lewis v. State, 368 S.C. 630, 631, 630 S.E.2d 464, 464 (2006) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.") (quoting Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1884)); Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988) (finding an interlocutory order is appealable under S.C. Code Ann. § 14-3-330(1) only if it involves the merits, i.e. it "finally determines some substantial matter forming the whole or a part of some cause of action or defense . . . .") (quoting Henderson v. Wyatt, 8 S.C. 112, 112 (1877)); Lakes v. State, 333 S.C. 382, 384-85, 510 S.E.2d 228, 230 (Ct. App. 1998) ("An appellate court has jurisdiction to review an order affecting a substantial right when the order has the effect of discontinuing the action or preventing an appealable judgment.") (citing S.C. Code Ann. § 14-3-330(2)(a) (Supp. 1997)); Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93-94, 529 S.E.2d 11, 13 (2000) (stating that the court does not generally allow immediate

appellate review of the denial of any motions made pursuant to Rules 12(b) or 12(c), SCRCP); Bank of N.Y. v. Sumter County, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010) (noting it is well-settled that an order denying summary judgment is never reviewable on appeal) (citing Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003)); Keels, 213 S.C. at 573, 50 S.E.2d at 705 (holding an order refusing to direct a verdict is not appealable until after final judgment).

Because the trial court denied the City's motions for directed verdict, the City's issues on appeal are not immediately appealable. See Keels, 213 S.C. at 573, 50 S.E.2d at 705. As to Ashenfelder's cross-appeal, this case further presents an opportunity to address the effect, if any, of Rule 54(b) of the South Carolina Rules of Civil Procedure upon our jurisprudence. Rule 54(b) states:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is *subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.*

Rule 54(b), SCRCP (bold emphasis in original) (italicized emphasis added).

In Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990), the supreme court considered the impact of Rule 54(b) where the appellant failed to immediately appeal a partial grant of summary judgment. The process of directing entry of judgment on one or more, but less than all, claims under Rule 54(b) is referred to as certification. Link, 302 S.C. at 4, 393 S.E.2d at 177. The court noted that an order which is immediately appealable by statute is not rendered unappealable because it has not been certified under Rule 54(b). Id. Ultimately, the court found the appellant was entitled, pursuant to section 14-3-330(1), to wait until there was a final judgment against him to appeal the partial grant of summary judgment. Id. at 6, 393 S.E.2d at 179. However, the court recognized:

> This Court has not had occasion to address the effect of granting a Rule 54(b) certification on appealability. Until the adoption of the South Carolina Rules of Civil Procedure, "final judgment" was a term of art denoting the disposition of *all* issues in the action. This is the definition which has traditionally been applied to the term "final judgment" in [section] 14-3-330(1). Rule 54(b) certification purports to alter the definition of "final judgment" by allowing a final judgment to be entered on certain claims before disposition of the entire case. Until this Court determines whether granting certification mandates an immediate appeal, the safer course is to immediately appeal any order certified under Rule 54(b).

Id. at 5 n.3, 393 S.E.2d at 178 n.3 (emphasis in original) (internal citations omitted).

The supreme court specifically indicated in Link that it has not yet addressed the effect of certification by a trial court. Id. Even though the partial decision herein was not certified by the trial court, this case involves an additional concern under Rule 54(b) that was not addressed in Link. The rule specifically states that when fewer than all claims have been adjudicated, "the order or other form of decision is subject to revision at any time before

the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), SCRCP. Because the directed verdicts on Ashenfelder's causes of action for adverse possession, declaratory judgment, estoppel, trespass, and inverse condemnation are subject to revision under Rule 54(b) in the absence of certification, we need not yet reach whether the decisions are immediately appealable under section 14-3-330. In essence, we are one step removed from the question of whether section 14-3-330 is controlling, as noted in Link, because we do not yet have a decision that dons a veil of appealability due to the potential for revision. Appellate courts should not delve into the realm of reviewing decisions that may be altered by the trial judge. See, e.g., State v. Glenn, 285 S.C. 384, 385, 330 S.E.2d 285, 285-86 (1985) (finding appellate review speculative when the trial judge is free to alter his ruling).

A trial judge may direct a verdict where there are no material facts in dispute and the case presents only a question of law. Rule 50(a), SCRCP; Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). However, that decision is still subject to revision at any time before entry of that judgment by the clerk when the directed verdict is not certified and other claims in the action have not yet been adjudicated:

> The trial judge, under our procedure, is afforded many opportunities to change his mind. For instance, no authority is needed for the proposition that a trial judge, even after judgment, has the right to grant a new trial based upon his reconsideration of a previous motion for directed verdict and of course many other illustrations could be given of a trial judge's right to reconsider decisions he has made during the course of a trial and before final judgment is entered.

PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 335 (Ct. App. 1988); see also Rule 54(b), SCRCP; Grooms, 246 S.C. at 514, 144 S.E.2d at 910 ("When the trial of this case was thus terminated, the status of the litigation and of the parties became the same as though no trial had taken place.").

Moreover, this court has had the opportunity to explore the application of Rule 54(b), finding the time to file post-trial motions did not begin to run until all claims had been adjudicated, where there was no "express determination" that there was no reason for delay in entering judgment on the previously adjudicated claims. Holroyd v. Requa, 361 S.C. 43, 53-54, 603 S.E.2d 417, 422 (Ct. App. 2004). This court has also held that Rule 54(b) does not require certification, but if the court chooses to certify a judgment, it must do so in a definite and unmistakable manner. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct. App. 2002). Federal Rule 54(b) is substantially similar to the South Carolina rule. See Fed. R. Civ. P. 54(b). Under the federal rule, "[a]bsent a certification under Rule 54(b) any order in a . . . multiple[]claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2654 (3d ed. 2010). "[A]n appeal from a decision adjudicating a portion of the case must be dismissed." 10 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2660 (3d ed. 2010).

As previously indicated, in the context of a mistrial in a case involving multiple claims, Rule 54(b) suggests that the directed verdicts on some claims may not be final because these decisions are subject to revision. While it may be possible for us to harmonize the rule with mistrial jurisprudence by limiting its impact to evidentiary or similar trial decisions, the specific language of Rule 54(b) is much broader as it addresses any decision or order, however designated; ultimately, we may wish to review the need to revise the rule if we do not wish to accept its parameters or if it is inconsistent with desired appellate jurisprudence. In addition, we recognize that there are judicial economy arguments under either interpretation; however, the scope of the rule greatly assists the appellate review process, especially in a situation where the record does not include the entry of any written decision on the partial judgment. Similarly, judicial economy is thwarted if trials are stopped upon appeal of a partial directed verdict after presentation of the plaintiff's case.

In this matter, no judgment was ever entered by the clerk and, as indicated, no written or form order memorialized the directed verdicts. See

Serowski v. Serowski, 381 S.C. 306, 315, 672 S.E.2d 589, 594 (Ct. App. 2009) ("Until written and entered, a court has discretion to modify or amend a ruling."). Rather, the only order entered was a form order declaring a mistrial. See Rule 58(a)(2), SCRCP ("Subject to the provisions of Rule 54(b) . . . the court shall promptly prepare the form of the judgment . . . and after review and approval by the court, the clerk shall promptly enter it."). Therefore, because the decision is subject to revision pursuant to Rule 54(b) and because there is neither a written order memorializing the directed verdicts under Rule 58(a)(2) nor entry of an order, the only judgment in this case is the order declaring a mistrial. See Rule 77(d), SCRCP; Grooms, 246 S.C. at 514, 144 S.E.2d at 910.

Rule 54(b), without conflicting with Link, affords the trial court an opportunity to exercise its discretion to make sure there will be no need to revise a directed verdict or any other decision. Aside from a hung jury, it is possible for a court to grant a mistrial based on its own recognition of error in earlier rulings or in the proceedings. See Ford v. State Ethics Comm'n, 344 S.C. 642, 645, 545 S.E.2d 821, 823 (2001) ("There is no dispute a trial court has the discretion to change its mind and amend its oral ruling."); PPG Indus., Inc., 297 S.C. at 183-84, 375 S.E.2d at 335 (discussing the many opportunities of the trial court to change its mind). Thus, the rule affords the court the opportunity to correct its prior rulings or address any fairness or other concerns about the trial proceedings. Pursuant to the process of certification, the appellate courts of this state need not question whether or not the possibility of revision exists. Moreover, this requirement does not present an onerous burden upon trial counsel because a motion to certify need not be extensive, if such motion is desired. Importantly, the analysis herein does not preclude entry of an order maintaining the earlier directed verdicts; instead, the focus of the rule invites a determination by the trial court that the decision is no longer subject to revision. Once we are assured that the possibility of revision no longer exists, then we may proceed to analyze whether a decision is appropriate for appeal under Link and section 14-3-330.[3]

[3] We are hesitant to apply a ten-day cap on revision of the court's oral rulings because that ten-day period is also necessarily tied to the entry of a written order. See Leviner v. Sonoco Prods. Co., 339 S.C. 492, 494, 530 S.E.2d 127,

Turning to the case at hand, the directed verdicts on Ashenfelder's claims remain subject to revision. There is no written order directing the clerk to enter judgment, as required by the Rules of Civil Procedure. See Rule 58(a), SCRCP ("A judgment is effective only when so set forth and entered in the record.").

Without prejudice, the appeal in this matter is hereby

DISMISSED.

WILLIAMS, PIEPER, and LOCKEMY, JJ., concur.

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128 (2000) (stating that a trial judge has only ten days from entry of judgment to alter or amend an earlier order absent an indication that a more full and complete order or judgment is to follow).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Government Employees Insurance Company, Respondent,

v.

Eugene John Draine, Appellant.

Appeal from Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 4726
Heard May 19, 2010 – Filed August 11, 2010

AFFIRMED

Robert B. Ransom, of Columbia, for Appellant.

Bonum S. Wilson, III, of Charleston, for Respondent.

GEATHERS, J.: In this appeal, Eugene Draine argues that the circuit court erred by refusing to reform his automobile insurance policy with the Government Employees Insurance Company (GEICO) to provide for

underinsured motorist (UIM) coverage in an amount equal to his liability coverage. Specifically, Draine contends that section 38-77-350(E) of the South Carolina Code (2002) required GEICO to add UIM coverage to his policy when, in renewing his policy, he failed to return an executed UIM offer form within thirty days after receiving it from GEICO. We affirm.

FACTS/PROCEDURAL HISTORY

The facts in this case are undisputed. Sometime in early 2003, Draine decided to switch his automobile insurance coverage from Farm Bureau Insurance to GEICO. In March 2003, GEICO sent Draine the documentation necessary to add him as a policyholder. Included therein was a form offering UIM coverage. On March 20, 2003, Draine completed the UIM offer form, rejecting all UIM coverage. The parties have stipulated that this March 2003 offer and rejection of UIM coverage complied with all aspects of South Carolina law.

Upon receipt of the completed UIM offer form and the required premium, GEICO issued an automobile insurance policy to Draine that did not include UIM coverage. In 2004, Draine's policy was renewed and, as before, it did not include UIM coverage.[1]

On January 26, 2005, GEICO sent Draine materials so that his policy could again be renewed. Included in the documents that GEICO provided to Draine was a UIM offer form. Like the 2003 offer form, the 2005 offer form contained the following two provisions:

> 1. **IF YOU ARE A NEW APPLICANT AND DO NOT SIGN AND RETURN THIS FORM**, we will include Uninsured Motorist and Underinsured Motorist limits equal to your Bodily Injury and Property Damage Liability limits. This may result in a change to your premium.

[1] The record is unclear as to whether Draine was offered UIM coverage when he renewed his policy in 2004.

> 2. **IF YOU ARE A CURRENT SOUTH CAROLINA POLICYHOLDER**, you must complete, sign and return this form only if you want to make changes to your policy.

Draine did not complete the offer form or return it to GEICO. Instead, Draine delivered to GEICO a check for the premium necessary to renew his existing policy, which included $25,000 in liability coverage but no UIM coverage.

GEICO subsequently renewed Draine's policy. The dates of coverage provided by the renewed policy were March 11, 2005 through September 11, 2005.

On March 13, 2005, Draine was involved in an automobile accident caused by another driver. As a result of the accident, Draine incurred damages in excess of the other driver's liability insurance coverage. After settling his claim against the driver, in exchange for a covenant not to execute, Draine submitted a claim to GEICO for UIM benefits. GEICO declined to pay the claim on the ground that Draine's policy did not include UIM coverage.

Thereafter, GEICO filed a declaratory judgment action seeking a judicial determination that Draine was not entitled to UIM benefits. Draine answered and counterclaimed, arguing that his policy should be reformed to include $25,000 in UIM coverage. Draine contended that such relief was appropriate under section 38-77-350(E) of the South Carolina Code (2002) because GEICO's 2005 renewal materials included a UIM offer form, which he had not returned.

The case proceeded to a non-jury trial before the circuit court, where it was tried on stipulated facts, exhibits, and the arguments of counsel. In an order filed July 2, 2008, the circuit court granted judgment in favor of GEICO, concluding that reformation of Draine's policy was not warranted.

Specifically, the circuit court found that "a common sense reading" of section 38-77-350 demonstrated that the legislature intended to restrict subsection (E) of that statute to "new applicants." Additionally, the circuit court found that reformation of Draine's policy was not warranted under contract law because (1) Draine never intended to change his policy to add UIM coverage and (2) Draine was sophisticated with regard to such matters and thus could not have been confused by the 2005 UIM offer form. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err by holding that section 38-77-350(E) of the South Carolina Code (2002) did not mandate the reformation of Draine's automobile insurance policy to include $25,000 in UIM coverage?

STANDARD OF REVIEW

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999). "In such cases, the appellate court owes no particular deference to the trial court's legal conclusions." Id.

LAW/ANALYSIS

Automobile insurance carriers like GEICO are required to offer "at the option of the insured" UIM coverage up to the limits of the insured's liability coverage. S.C. Code Ann. § 38-77-160 (2002). Section 38-77-350 of the South Carolina Code (2002 & Supp. 2009) sets forth specific requirements regarding the offering of optional coverages, such as UIM coverage.

In the present case, Draine contends that, under section 38-77-350(E), GEICO was required to add UIM coverage to his policy when he failed to return the UIM offer form that he received as part of GEICO's 2005 renewal materials. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Blackburn v. Daufuskie Island Fire Dist., 382 S.C. 626, 629, 677 S.E.2d 606, 607 (2009). In ascertaining legislative intent, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)).

The statute in question here, section 38-77-350, reads as follows:

> (A) The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered: [the required contents of the form are omitted for brevity].
>
> (B) If this form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured's failure to purchase optional coverage or higher limits.
>
> (C) An automobile insurer is not required to make a new offer of coverage on any automobile

> insurance policy which renews, extends, changes, supersedes, or replaces an existing policy.
>
> (D) Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits and no person, including, but not limited to, an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by the named insured.
>
> (E) If the insured fails or refuses to return an executed offer form within thirty days to the insurer, the insurer shall add on uninsured motorist and underinsured motorist coverages with the same policy limits as the insured's liability limits.

S.C. Code Ann. § 38-77-350 (2002 & Supp. 2009) (emphases added).

Under section 38-77-350(E), an insurer is required to add UIM coverage to an insured's policy when "the insured fails or refuses to return an executed offer form within thirty days to the insurer." S.C. Code Ann. § 38-77-350(E) (2002). Here, it is undisputed that Draine timely returned an executed offer form rejecting UIM coverage when he initially became insured with GEICO in 2003. Although Draine did not return the 2005 UIM offer form he received when renewing his policy, section 38-77-350(E) does not expressly require an insured to return an executed offer form every time one is provided in order to avoid the addition of UIM coverage. Rather, it merely provides that "an executed offer form" must be returned "within thirty days."[2]

[2] While section 38-77-350(E) does not specify the event that triggers the commencement of the thirty-day time period, it is reasonable to presume that the legislature intended for the triggering event to be an event mentioned in the statute. See S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991) ("[W]ords in a statute must be construed in context."). For reasons discussed herein, we conclude that section 38-77-350(E)'s thirty-day time period is triggered by the provision of offer forms to "new applicants" as set forth in

Draine nonetheless contends that if an insurer provides an existing insured with a UIM offer form when the insured renews his coverage, the insurer must add optional UIM coverage if the insured does not timely return the form, even if the insured had previously rejected UIM coverage. We disagree. In our view, reading section 38-77-350 as a whole leads to the conclusion that GEICO was not required to add UIM coverage to Draine's policy when Draine failed to return the UIM offer form he received when he renewed his policy in 2005. Moreover, we find that such an interpretation is consistent with the purpose and design of section 38-77-350.

A. Subsections (A) and (C) of Section 38-77-350

The underlying premise of Draine's argument in this case is that the term "form" in subsection (E) of section 38-77-350 includes UIM offer forms that are provided to insureds who are renewing their existing policies. However, when that subsection is read in conjunction with subsections (A) and (C) of section 38-77-350, it becomes apparent that Draine's premise is flawed.

Section 38-77-350(A), which sets forth the basic requirements for the UIM offer form, provides guidance as to what the legislature meant when it used the word "form" in section 38-77-350(E). See IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning."); Busby v. State Farm Mut. Auto. Ins. Co., 280 S.C. 330, 333, 312 S.E.2d 716, 718 (Ct. App. 1984) ("Where the same word is used more than once in a statute it is presumed to have the same meaning throughout unless a different meaning is necessary to avoid an absurd result."). Importantly, section 38-77-350(A) states that the offer form must be used for "new applicants." S.C. Code Ann. § 38-77-350(A) (Supp. 2009). Additionally, it provides that the form must be used "in offering optional coverages required to be offered pursuant to law." Id. (emphasis added).

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section 38-77-350(A), rather than by the provision of offer forms to existing policyholders—an event not contemplated by the statute.

In the present case, Draine was not a "new applicant" when GEICO sent him a UIM offer form in 2005. In the context of UIM cases, this court has construed the term "new applicant" as meaning "those who . . . never had an opportunity to reject UIM coverage." See McDonald v. S.C. Farm Bureau Ins. Co., 336 S.C. 120, 124, 518 S.E.2d 624, 626 (Ct. App. 1999). Here, at the time that Draine initially became a GEICO policyholder in 2003, he was properly offered UIM coverage, which he rejected. Therefore, when Draine sought to renew his existing policy in 2005, he did not constitute a "new applicant" as contemplated by section 38-77-350(A).

Moreover, as Draine concedes, UIM coverage was not "required to be offered pursuant to law" when he renewed his policy in 2005. Section 38-77-350(C) expressly provides that "[a]n automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy." S.C. Code Ann. § 38-77-350(C) (2002) (emphases added). Although this court has held that section 38-77-350(C) is inapplicable when the insurer has not made a previous effective offer of optional coverage,[3] in this case, it is undisputed that GEICO's 2003 offer of UIM coverage was effective. Accordingly, GEICO was not required to offer UIM coverage to Draine when he renewed his policy in 2005. See Burnet R. Maybank, III et al., The Law of Automobile Insurance in South Carolina IV-37 (4th ed. 2000) ("The insurer is not required to make another offer of optional coverages pursuant to [section 38-77-350] at renewal time provided a properly completed and executed form has been previously obtained from the insured being renewed.").

Because section 38-77-350(A) does not require an insurer to provide a UIM offer form to an insured who is renewing an existing policy, it is

[3] See Antley v. Noble Ins. Co., 350 S.C. 621, 635-36, 567 S.E.2d 872, 879-80 (Ct. App. 2002) (holding an insurer could not rely upon section 38-77-350(C) to avoid the reformation of its insured's policy to include uninsured motorist coverage when the insurer failed to present any evidence that it previously made a meaningful offer of such coverage to the insured).

questionable whether the legislature intended for section 38-77-350(E) to apply in such a situation. Cf. Howell v. U.S. Fid. & Guar. Ins. Co., 370 S.C. 505, 509-10, 636 S.E.2d 626, 628-29 (2006) (concluding that because liability coverage for hired and non-owned vehicles is not statutorily required, an insurer providing only that type of voluntary coverage need not comply with section 38-77-160's requirement to offer UIM coverage). While section 38-77-350(E) uses the general term "form," a basic rule of statutory construction is that "general words—and it makes no difference how general—will be confined to the subject treated of." Henderson v. McMaster, 104 S.C. 268, 272, 88 S.E. 645, 646 (1916); see also Beattie v. Aiken County Dep't of Soc. Servs., 319 S.C. 449, 452, 462 S.E.2d 276, 278 (1995) ("An entire code section should be read as a whole so that phraseology of an isolated section is not controlling."). Absent legislative intent to the contrary, a statutory term should not be given a more expansive construction in one subsection of the statute than in another subsection. See Gustafson v. Alloyd Co., 513 U.S. 561, 572-73 (1995) (rejecting the argument that the word "prospectus" had a broader meaning in one section of the Securities Act of 1933 than in another section). Thus, because section 38-77-350(A)'s use of the term "form" does not encompass non-required UIM offer forms given during the renewal process, it is unlikely that section 38-77-350(E)'s use of that term should include such forms.

B. Subsections (B) and (D) of Section 38-77-350

Section 38-77-350(B) provides further support for the conclusion that Draine's policy should not be reformed to add UIM coverage. Pursuant to section 38-77-350(B), if an insured executes a properly completed offer form that complies with section 38-77-350(A), the insurer cannot be held liable under the policy for the insured's failure to purchase UIM coverage. S.C. Code Ann. § 38-77-350(B) (Supp. 2009).

Here, the parties have stipulated that, in 2003, Draine properly rejected UIM coverage by executing an offer form that complied with all aspects of South Carolina law. While Draine did not execute the UIM offer form that he received when he renewed his coverage in 2005, section 38-77-350(B)

expressly references the "form" described in section 38-77-350(A).[4] As noted above, section 38-77-350(A)'s use of the term "form" does not include non-required UIM offer forms given during the renewal process. Therefore, because GEICO properly offered, and Draine properly rejected, UIM coverage in 2003 when Draine was a "new applicant," section 38-77-350(B) appears to preclude us from holding GEICO liable under Draine's policy for Draine's failure to purchase UIM coverage.

Like section 38-77-350(B), section 38-77-350(D) also provides support for the conclusion that the legislature did not intend for an insurer to be held liable in a case like the one presented here. Under section 38-77-350(D), an insurer satisfies his duty to offer UIM coverage by complying with the relevant provisions of section 38-77-350, and the insurer cannot subsequently be held liable in an action for damages on account of the insured's rejection of UIM coverage. See S.C. Code Ann. § 38-77-350(D) (2002). Here, it is undisputed that GEICO properly complied with section 38-77-350 when it initially offered UIM coverage to Draine in 2003 and that he expressly rejected UIM coverage at that time. Although it is true that GEICO offered Draine optional coverage again when he renewed his policy in 2005, Draine made no indication that he wanted to purchase UIM coverage. Accordingly, based upon sections 38-77-350(B) and (D), we conclude that GEICO should not be held liable in any way for Draine's failure to purchase UIM coverage.

C. Purpose and Design of Section 38-77-350

We believe that our interpretation of section 38-77-350 is consistent with the purpose and design of the statute. The South Carolina Supreme Court has explained that "[t]he purpose of requiring automobile insurers to

[4] Section 38-77-350(B) begins by referring to "this form." See § 38-77-350(B) (emphasis added). By doing so, section 38-77-350(B) specifically references the use of the word "form" in section 38-77-350(A). Cf. Alvarez, 546 U.S. at 34 (explaining that the phrase "said principal activity or activities" in one subsection of a statute was an explicit reference to the use of the term "principal activity or activities" in the immediately preceding subsection of the statute).

make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 262-263, 626 S.E.2d 6, 12 (2005) (quoting Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005)) (emphasis added). When an insured does not return a UIM offer form, the insurer cannot be certain that the insured actually made a decision regarding UIM coverage. Accordingly, the legislature has chosen to create a statutory presumption that the insured desires coverage in such cases. Here, however, Draine unquestionably made an informed decision rejecting UIM coverage in 2003. See § 38-77-350(B) (providing that if UIM coverage is offered and rejected in accordance with section 38-77-350, then it is "conclusively presumed" that an "informed" choice was made). In view of that fact, it does not make sense to presume that Draine desired UIM coverage in 2005 merely because he failed to return the UIM offer form he received when he renewed his policy that year.

A somewhat similar conclusion was reached by this court in United Services Automobile Ass'n v. Litchfield, 356 S.C. 582, 590 S.E.2d 47 (Ct. App. 2003). In that case, the court addressed whether it was appropriate to reform an insured's automobile insurance policy to include UIM coverage when the insured previously informed her insurer that she wanted to drop her UIM coverage. The insured contended the policy should be reformed because the insurer did not make a valid offer of UIM coverage when she purchased her policy. Id. at 584, 590 S.E.2d at 48. On appeal, this court, without addressing the validity of the insurer's offer, concluded the policy should not be reformed to include UIM coverage. The court explained that finding in favor of the insured "would make no sense" given that the insured had previously contacted the insurer "for the specific purpose of dropping [UIM] coverage." Id. at 584, 590 S.E.2d at 49.

Here, like in Litchfield, it would not make sense to hold that Draine's failure to return the 2005 UIM offer form dictated the addition of UIM coverage to Draine's policy given that (1) Draine had expressly rejected GEICO's legally compliant offer of UIM coverage just two years earlier and

(2) the 2005 UIM offer form specifically advised current South Carolina policyholders like Draine that they were required to return the form "only if you want to make changes to your policy." (emphasis added). Taken together, these two facts lead to the inescapable conclusion that Draine made an informed decision to reject UIM coverage. Therefore, finding that Draine is not entitled to reformation of his policy does not offend section 38-77-350's purpose of protecting insureds from uninformed decisions regarding optional coverages.

CONCLUSION

For the foregoing reasons, we hold that section 38-77-350(E) did not require GEICO to add UIM coverage to Draine's policy when Draine failed to return the UIM offer form he received as part of GEICO's 2005 renewal materials.[5] Accordingly, the circuit court's decision is

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

[5] Because Draine's remaining arguments are all premised upon a contrary construction of section 38-77-350(E), we decline to discuss those arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).