Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

October 5, 2005
M E D I A R E L E A S E

Public hearings have been scheduled to begin on **Tuesday, December 6, 2005,** commencing at **10:00 a.m.** regarding the qualifications of the following candidates for judicial positions:

SUPREME COURT

Seat 2	**The Honorable Costa M. Pleicones**, Columbia, S.C.

COURT OF APPEALS

Seat 8	**The Honorable Thomas E. Huff**, North Augusta, S.C.

CIRCUIT COURT

Third Judicial Circuit, Seat 2	**George C. "Buck" James, Jr.**, Sumter, S.C.
Fourth Judicial Circuit, Seat 2	**The Honorable J. Michael Baxley**, Hartsville, S.C.
Fifth Judicial Circuit, Seat 2	**The Honorable L. Casey Manning**, Columbia, S.C.
Seventh Judicial Circuit, Seat 2	**The Honorable Roger L. Couch**, Spartanburg, S.C.
Eighth Judicial Circuit, Seat 2	**The Honorable James W. Johnson, Jr.**, Clinton, S.C.
Ninth Judicial Circuit, Seat 2	**The Honorable Daniel F. Pieper**, Hanahan, S.C.
Tenth Judicial Circuit, Seat 2	**The Honorable Alexander S. Macaulay**, West Union, S.C.
Eleventh Judicial Circuit, Seat 1	**The Honorable William P. Keesley**, Edgefield, S.C.
Thirteenth Judicial Circuit, Seat 2	**The Honorable John C. Few**, Greenville, S.C.
Fourteenth Judicial Circuit, Seat 1	**The Honorable Perry M. Buckner, III**, Walterboro, S.C.
Fourteenth Judicial Circuit, Seat 2	**The Honorable Curtis L. Coltrane**, Hilton Head Island, S.C. **Diane P. DeWitt**, Beaufort, S.C. **Darrell Thomas Johnson, Jr.**, Hardeeville, S.C. **Carmen Tevis Mullen**, Hilton Head Island, S.C. **Thomas C. Taylor**, Hilton Head Island, S.C.

FAMILY COURT

Thirteenth Judicial Circuit, Seat 1	**Rochelle Y. Williamson**, Greer, S.C.

MASTER IN EQUITY

Lexington County	**Timothy G. Driggers**, Lexington, S.C. **D. Shawn Graham**, Lexington, S.C. **James O. Spence**, Lexington, S.C. **Harold L. Swafford**, Lexington, S.C.

ADMINISTRATIVE LAW COURT

Seat 6	**The Honorable Ralph K. "Tripp" Anderson, III**, Columbia, S.C.

RETIRED

Circuit Court	**The Honorable Thomas L. Hughston, Jr.**, Charleston, S.C.
Circuit Court	**The Honorable Howard P. King**, Sumter, S.C.

Persons desiring to testify at public hearings shall furnish written notarized statements of proposed testimony. These statements must be **received by 12:00 noon on Friday, November 18, 2005.** The Commission has witness affidavit forms that may be used for proposed testimony. While this form is not mandatory, it will be supplied upon request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, 104 Gressette Building, Post Office Box 142, Columbia, South Carolina 29202.

All testimony, including documents furnished to the Commission, must be submitted under oath. Persons knowingly giving false information, either orally or in writing, shall be subject to penalty.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

Questions concerning the hearing and procedures should be directed to the Commission at (803) 212-6092.

* * *

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39

October 17, 2005

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stonhard, Inc., Plaintiff,

v.

Carolina Flooring Specialists, Inc., Daniel Parham, and Manuel T. Parham, Defendants.

Opinion No. 26047
Heard June 15, 2005 - Filed October 10, 2005

CERTIFIED QUESTIONS ANSWERED

Bradford Neal Martin, Laura W.H. Teer, and William S.F. Freeman, all of Walker Martin & Reibold, of Greenville, for Plaintiff.

W. Andrew Arnold and Brian E. Arnold, both of Arnold & Arnold, of Greenville, for Defendants.

CHIEF JUSTICE TOAL: Pursuant to Rule 228, SCACR, we accepted the following questions on certification from the United States District Court for the District of South Carolina:

I. May a non-compete agreement that contains a New Jersey choice-of-law provision but no geographical limitation be reformed (or "blue penciled") in accordance with New Jersey law and then enforced in South Carolina?

II. May a non-compete agreement that is reformed (or "blue penciled") under New Jersey law apply to support an award of damages for breaches occurring prior to the time the agreement is reformed?

III. Does South Carolina law allow a court to grant equitable relief extending the term of a non-compete agreement beyond its stated expiration date?

We answer all three questions in the negative.

FACTUAL/PROCEDURAL BACKGROUND

Stonhard, Inc. (Stonhard) sued Carolina Flooring Specialists, Inc., Daniel Parham, and Manuel Parham (Defendants) alleging, among other things, that Defendants violated the terms of a non-compete agreement.[1] Stonhard is a flooring company that uses a bidding process to gain customers. Stonhard alleges that Defendants established a competing flooring business (Carolina Flooring) while still employed at Stonhard, and used their knowledge of Stonhard's pricing policy to marginally underbid Stonhard on several occasions. After Stonhard became aware of this conduct, Defendants were fired. Since then, Defendants have continued to operate Carolina Flooring.

While employed at Stonhard, Defendants signed a non-compete agreement which provides:

> During my employment with Stonhard, and for a period of one (1) year subsequent to termination of employment with Stonhard, regardless of the reason for such termination, I shall not compete with Stonhard by engaging in any activity similar to the activities I undertake during the course of my employment with Stonhard.

[1] The enforcement of the non-compete agreement forms the subject of the questions before this Court.

The agreement also contained a choice-of-law provision stating that New Jersey law applied.

LAW/ANALYSIS

I. Reformation of Non-Compete Agreement

The first question is whether a non-compete agreement which does not contain a geographical limitation may be reformed or "blue penciled" according to New Jersey law and then enforced in South Carolina. The answer to this question is no.

Terms in a non-compete agreement may be construed according to the law of another state. *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-42 (1961). But if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement. *Id.*

Under New Jersey law, a court may modify or "blue pencil" a non-compete agreement so as to make its terms reasonable. *Karlin v. Weinberg*, 390 A.2d 1161, 1168 (N.J. 1978). For example, when a geographical limitation in a non-compete agreement is overly broad, a court may decrease the limitation to make it reasonable, while at the same time continuing to enforce other terms in the agreement. *Id.*; *see also The Community Hosp. Group, Inc. v. More*, 869 A.2d 884, 900 (N.J. 2005) (holding that the lower court should have decreased the geographical limitation in the non-compete agreement, and courts should not hesitate to partially enforce an agreement when it is reasonable to do so); *Solari Indus., Inc. v. Malady*, 264 S.2d 53, 61 (N.J. 1970) (adopting a rule permitting "the total or partial enforcement of noncompetitive agreements to the extent reasonable under the circumstances").

In the present case, the non-compete agreement does not contain a geographical limitation, and we have been unable to find a single case from New Jersey in which a court has added a geographical term when one was previously omitted. We hold, therefore, that the contract may not be

reformed or blue-penciled so as to add an entirely new term to which neither of the parties agreed.

Because we find no term that may suffice as a substitute for a geographical restriction so as to render the covenant reasonable, we hold that the covenant is unenforceable as against public policy. *See Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 548 S.E.2d 207 (2001) (holding that a covenant not to compete is enforceable if it is not detrimental to the public interest, is reasonably limited as to time and territory, and is supported by valuable consideration). The agreement fails to limit the covenant to a particular geographical area. To add and enforce such a term requires this Court to bind these parties to a term that does not reflect the parties' original intention. Therefore, we hold that the covenant, despite any reformation, is void and unenforceable as a matter of pubic policy.

II. Damages

The second certified question is: (1) whether New Jersey law would allow damages to be assessed from the time the alleged breach of the covenant commenced, rather than from the time the covenant is reformed, if reformed; and (2) whether such an award is against South Carolina public policy.

We have no case in South Carolina or from the Fourth Circuit that has granted any relief other than injunctive relief for breach of a covenant not to compete. We are also unwilling to hold a party liable for breach of contract when the contract was void at the time of the alleged breach. The Second Circuit has ruled that an assessment of damages should relate back to the date the employment relationship was breached, in the same manner as a preliminary injunction. *A. N. Deringer, Inc. v. Strough*, 103 F.3d 243 (2d Cir. 1996).

Because we have held that the covenant is unenforceable, the answer to this certified question is no.

III. Extending the Expiration Date

Stonhard argues that equity and South Carolina public policy allows the district court to extend the expiration date of the covenant beyond the one-year time period after the Defendants' termination of employment, which is provided in the contract. We disagree.

Even if equity and public policy allowed this Court to extend the time period of the covenant, the parties' original agreement fails to provide any guidance as to exactly how long the covenant's expiration date could be extended. The covenant provides that, should Defendants' employment be terminated, Defendants will not compete with Stonhard for one year after the date of termination.

Accordingly, any extension of the time period would be against public policy, because it would be arbitrary and set precedent allowing a court to disrupt a party's private right to contract.

CONCLUSION

We hold that the non-compete agreement may not be reformed in accordance with New Jersey law and then enforced in South Carolina. The absence of a geographical limitation makes the agreement void as a matter of law. New Jersey's "blue penciling" law, though appearing to provide a court with the discretion to rewrite unreasonable provisions, does not allow a provision to be written into a covenant when such a provision never previously existed. Even if the agreement could be reformed in this manner under New Jersey law, the agreement would be unenforceable in South Carolina because the very act of adding a term not negotiated and agreed upon by the parties violates public policy.

Therefore, the answer to each certified question is no.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I agree that New Jersey would not permit this non-compete clause to be "blue-penciled" to include a geographical limitation, and that therefore the answer to the first certified question is "No." Accordingly, I join only Part I of the majority's decision as I would not reach the remaining questions.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hitachi Electronic Devices (USA), Inc., Respondent,

v.

Platinum Technologies, Inc., Platinum Technology Financial Services, Computer Associates International, Inc., NewCourt Financial USA, Inc., and CIT Group, Inc., Defendants,

Of which Platinum Technologies, Inc., Platinum Technology Financial Services, and Computer Associates International, Inc. are Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 26048
Heard September 20, 2005 - Filed October 17, 2005

REVERSED

H. Donald Sellers, Boyd B. Nicholson, Jr., and Joel M. Bondurant, Jr., all of Haynsworth Sinkler Boyd, PA, of Greenville, for Petitioners.

William S. Brown and Henry M. Burwell, both of Nelson Mullins Riley & Scarborough, of Greenville, for Respondent.

JUSTICE PLEICONES: This is a breach-of-contract action involving a contract for the sale of goods. By consent of the parties, the action was tried by a master-in-equity, who ordered judgment for the petitioners (the Seller) and the other defendants. In an unpublished opinion, the Court of Appeals affirmed in part and reversed in part and remanded the case for trial. Hitachi Elec. Devices (USA), Inc. v. Platinum Tech., Inc., Op. No. 2003-UP-766 (S.C. Ct. App. filed December 31, 2003). We granted a writ of certiorari and now reverse the decision of the Court of Appeals.

FACTS

The Seller sold goods to the respondent (the Buyer). The sales contract contained a warranty of performance, but the contract also provided for a particular remedy in the event of a breach of that warranty: repair the goods, replace the goods, or refund the purchase price.[1]

Approximately one year after taking delivery of the goods, the Buyer returned them to the Seller claiming rejection of the goods as non-conforming and demanding a refund of the purchase price. The Seller refused, and the Buyer brought this action.

The master ruled in favor of the Seller. The master held that the Buyer had accepted the goods because the Buyer had failed to reject them within a reasonable time after their delivery, as required by article 2 of the Uniform

[1] We hereinafter refer to this remedy as the "repair or replace remedy."

Commercial Code[2] (the U.C.C. or the Code). See S.C. Code Ann. § 36-2-602(1) (2003). The master also held that the Buyer had failed to give notice of breach to the Seller within a reasonable time after taking delivery, another article 2 requirement. See S.C. Code Ann. § 36-2-607(3)(a) (2003). Consequently, the master held, the Buyer was prevented from maintaining its breach-of-contract action.

The Court of Appeals reversed. The court affirmed the master's holdings that the Buyer had accepted the goods and failed to give seasonable notice of breach. The court disagreed, however, that the failure to give seasonable notice of breach prevented the Buyer from maintaining its action. According to the court, the failure prevented the Buyer from pursuing remedies specifically listed in article 2, but not from maintaining its action as a common-law breach-of-contract action in pursuit of the repair-or-replace remedy and common-law remedies. The court therefore remanded the case for trial on whether the Seller breached and whether the Buyer was entitled to the contractual remedy, common-law remedies, or both.[3]

ISSUES

I. Whether failure to give timely notice of breach to its seller prevents a buyer of goods from pursuing a contractual remedy intended by the parties to substitute for U.C.C. article 2's default remedies.

II. Whether a buyer can bring a common-law action to recover common-law remedies for breach of a U.C.C. article 2 warranty.

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[2] S.C. Code Ann. §§ 36-2-101 to -725 (2003).

[3] Seven members of the Court of Appeals declined to rehear the case *en banc*.

ANALYSIS

At this point in the litigation, there is no dispute that article 2 of the U.C.C. applies to the transaction or that the warranty allegedly breached is an article 2 warranty. Likewise, there is no dispute that the Buyer accepted the goods. Acceptance, however, "does not of itself impair any other remedy provided by [article 2] for nonconformity." S.C. Code Ann. § 36-2-607(2) (2003). A buyer who has accepted non-conforming goods can, in limited circumstances, revoke acceptance, or he can recover damages for breach of warranty. S.C. Code Ann. §§ 36-2-608 and -714 (2003).

To revoke acceptance or recover damages, however, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy ...." § 36-2-607(3)(a). There is currently no dispute that the Buyer failed to seasonably notify the Seller of the alleged breach of warranty. Only the effect of this failure is disputed.

I. THE REPAIR-OR-REPLACE REMEDY

The Buyer's failure to give seasonable notice of breach prevents the Buyer from pursuing the repair-or-replace remedy provided in the parties' contract. The Court of Appeals' holding to the contrary is reversed.

As quoted above, article 2 states that a buyer who has failed to give seasonable notice of breach is "barred from any remedy." § 36-2-607(3)(a). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. ... Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted). The phrase "any remedy" in section 36-2-607(3)(a) is plain and unambiguous; it encompasses all potential remedies for breach of an article 2 contract. There is no dispute that the repair-or-replace remedy was crafted as a remedy for breach of the parties' article 2 contract, so the

Buyer's failure to comply with section 36-2-607(3)(a) bars the Buyer from this remedy.

The Court of Appeals' opinion misapprehends that although article 2 permits parties to substitute remedies for article 2's default remedies,[4] the contract remains an article 2 contract. Every other provision of article 2 continues to apply unless the provision is not mandatory and the parties opt out of it. In fact, most sections of the U.C.C. merely provide default terms that can be altered by agreement; only a few are mandatory.[5]

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[4] Article 2 permits parties to agree to "remedies in addition to or in substitution for those provided in [article 2] and [] limit or alter the measure of damages recoverable under [article 2], as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." S.C. Code Ann. § 36-2-719(1)(a) (2003).

[5] Section 36-1-102(3) states the following:

> The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

S.C. Code Ann. § 36-1-102(3) (2003).

Section 36-1-102(4) adds that "[t]he presence in certain provisions of this act of the words 'unless otherwise agreed' or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3)." S.C. Code Ann. § 36-1-102(4) (2003).

Here, the parties could have agreed that section 36-2-607(3)(a) would not apply in the event of breach. The parties could have agreed that notice of breach would not be required at all, or they could have agreed upon a specific method of giving notice and a specific time frame within which to give it. Since the parties did not opt out of section 36-2-607(3)(a), seasonable notice of breach of warranty was a condition precedent to the Seller's obligation to fulfill its remedial promise to repair, replace, or refund.

II. COMMON-LAW REMEDIES

We also reverse the Court of Appeals' holding that the Buyer's failure to comply with section 36-2-607(3)(a) did not prevent it from pursuing common-law remedies for the alleged breach of warranty.

As we have stated, the phrase "any remedy" in section 36-2-607(3)(a) is plain and unambiguous. It is broad enough to encompass common-law remedies. Thus, a party to an article 2 contract must give seasonable notice of breach in order to recover common-law remedies for breach of that article 2 contract. Here, the Buyer failed to give seasonable notice, so it cannot recover.

Notwithstanding lack of seasonable notice, the Buyer cannot recover the common-law remedies it seeks for a simpler reason: they do not exist. The Buyer alleges that the Seller breached this article 2 contract by breaching its warranty of the goods' performance. Remedies for this type of breach are available exclusively under article 2 of the Code.

Only where the U.C.C. is incomplete does the common law provide applicable rules. On this point, South Carolina Code section 36-1-103[6] states the following:

> Unless displaced by the particular provisions of [the

[6] S.C. Code Ann. § 36-1-103 (2003).

> U.C.C.], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.

Displacement occurs when one or more particular provisions of the U.C.C. comprehensively address a particular subject. Flavor-Inn, Inc. v. NCNB Nat'l Bank of S.C., 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992) (discussing Equitable Life Assurance Soc'y of the U.S. v. Okey, 812 F.2d 906, 908-911 (4th Cir. 1987) (applying South Carolina law and explaining that comprehensive treatment of a particular subject by the U.C.C. renders the common law displaced)).

Article 2 comprehensively addresses a buyer's remedies for breach of warranty. A buyer's first recourse is to reject the non-conforming goods. See S.C. Code Ann. § 36-2-601(a) (2003). In some cases, a buyer who has accepted non-conforming goods may revoke his acceptance. See § 36-2-608. Generally, however, the remedy is damages,[7] and the usual measure "is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." S.C. Code Ann. § 36-2-714(2) (2003). Article 2 recognizes, however, that in some cases other methods of calculating damages may be more appropriate, and article 2 permits use of any method reasonable under the circumstances. S.C. Code Ann. § 36-2-714(1)-(2) (2003). In addition, article 2 permits recovery of incidental and consequential damages. S.C. Code Ann. §§ 36-2-714(3) and -715 (2003). This comprehensive system of remedies for breach of warranty displaces the common law. Consequently, the Buyer cannot pursue common-law remedies for the Seller's alleged breach of warranty.

[7] The Buyer seeks damages in this case. In fact, the Buyer argues that it is entitled to damages under the common law in addition to the repair-or-replace remedy. Notwithstanding the lack of merit in its arguments for any recovery, the Buyer does not explain why it believes it is entitled to a double recovery.

CONCLUSION

This case involves a contract governed by article 2 of the U.C.C. The Court of Appeals' holding that the Buyer's failure to comply with Code section 36-2-607(3)(a) did not prevent the Buyer from pursuing a contractual or common-law remedy, or both, would effectively render article 2 pointless with respect to breach-of-warranty claims. The decision of the Court of Appeals is therefore

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leroy E. Glaze, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Beaufort County
Gerald C. Smoak, Trial Judge
John M. Milling, Post-Conviction Judge

Opinion No. 26049
Submitted September 22, 2005 - Filed October 17, 2005

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

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

JUSTICE PLEICONES: We granted a writ of certiorari to review the denial of post-conviction relief (PCR) to Petitioner Leroy E. Glaze (Petitioner). We affirm.

FACTS

Petitioner pleaded guilty to distribution of crack cocaine. During sentencing, Petitioner's attorney, the State, and the court agreed that Petitioner's pleas rendered him a three-time offender, meaning the sentence was subject to enhancement.[1] Petitioner was on probation for a South Carolina crack-possession conviction and had a prior conviction from New Jersey for possession of marijuana.

The trial court first revoked Petitioner's probation and imposed a five-year sentence for the crack-possession conviction. The trial court also sentenced Petitioner to ten years imprisonment for the crack distribution. The sentences were to run concurrently.

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[1] For a first offense of crack distribution, a person "must be sentenced to a term of imprisonment of not more than fifteen years and fined not less than twenty-five thousand dollars." S.C. Code Ann. § 44-53-375(B)(1) (2002). "[F]or a second offense or if, in the case of a first conviction ... the offender has been convicted of any of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not more than twenty-five years and fined not less than fifty thousand dollars." S.C. Code Ann. § 44-53-375(B)(2) (2002). "[F]or a third or subsequent offense or if the offender has been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not more than thirty years and fined not less than one hundred thousand dollars." S.C. Code Ann. § 44-53-375(B)(3) (2002).

At the PCR hearing, Petitioner argued that trial counsel was ineffective for failing to object to Petitioner's being sentenced as a three-time offender. Petitioner asserted that his New Jersey conviction for marijuana possession should not have been considered and that he therefore should have been sentenced as a two-time offender. Petitioner claimed that as the maximum sentence for a three-time offender is greater than that for a two-time offender, the trial court's sentencing decision was affected by an error of law.

The basis for Petitioner's argument was that because the sentence for the New Jersey marijuana conviction violated his right to counsel under the Fourteenth Amendment,[2] the conviction could not be used to enhance his present sentence. In the New Jersey trial, Petitioner was an indigent defendant and had neither waived his right to counsel nor been afforded counsel by the state. He had spent ten days in jail awaiting trial because he could not post bail. According to Petitioner, when the New Jersey court sentenced him to "time served," the court ran afoul of Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), in which the United States Supreme Court held that absent a valid waiver, an indigent defendant convicted of a misdemeanor without the assistance of counsel cannot be sentenced to any term of imprisonment. Consequently, Petitioner claimed, under Nichols v. United States, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), the New Jersey marijuana conviction could not constitutionally be used to enhance his South Carolina sentence for crack-distribution.

The PCR court held that trial counsel was not ineffective for failing to object to Petitioner's being sentenced as a three-time offender. The court held that the sentence for the New Jersey conviction was constitutional under Scott v. Illinois and that the conviction was therefore permissibly used for

[2] The right to counsel under the Sixth Amendment to the United States Constitution applies in state courts through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

sentence enhancement under Nichols v. United States. Thus, the court denied PCR.

ISSUE

Whether the PCR court erred in holding that trial counsel was not ineffective for failing to object to the trial court's sentencing Petitioner as a three-time offender.

ANALYSIS

"To establish a claim of ineffective assistance of counsel, the PCR applicant must establish that trial counsel's representation fell below an objective standard of reasonableness *and* that, but for counsel's errors, there is a reasonable probability the result would have been different." Patterson v. State, 359 S.C. 115, 117, 597 S.E.2d 150, 151 (2004) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)) (emphasis added). On review, the Court must affirm the factual findings of the PCR court if there is any probative evidence to support them. The Court must reverse the PCR court's decision if based on an error of law. Hall v. Catoe, 360 S.C. 353, 359, 601 S.E.2d 335, 338 (2004).

In this case, Petitioner does not argue that the PCR court's factual findings are unsupported by the evidence. Rather, the case turns on a narrow issue of law: whether an indigent defendant convicted of a misdemeanor is unconstitutionally denied the right to counsel if he is sentenced to time served after neither waiving his right to counsel nor being provided counsel by the state. We hold that he is not. Consequently, Petitioner's time-served sentence was constitutional. Trial counsel had no reason to object to the use of Petitioner's marijuana conviction as a sentence enhancer, thus counsel's performance was not deficient.

In Argersinger v. Hamlin, the United States Supreme Court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. 25, 37, 92 S. Ct. 2006,

2012, 32 L. Ed. 2d 530, 538 (1972). In Scott v. Illinois, the Court clarified that when imprisonment is an authorized punishment but is not actually imposed on an unrepresented defendant convicted of a misdemeanor, there is no abrogation of the right to counsel. 440 U.S. at 373-74, 99 S. Ct. at 1162, 59 L. Ed. 2d at 389. In other words, actual imprisonment is the event that triggers the right to counsel. Id. Moreover, in Nichols v. United States, the Court held "that an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S. at 748-49, 114 S. Ct. at 1928, 128 L. Ed. 2d at 755.

Here, Petitioner argues that he was in fact imprisoned for the uncounseled marijuana conviction. After he was arrested, he was unable to post bail and therefore spent ten days in jail while his trial was pending. According to Petitioner, when he was sentenced to time served, he was actually sentenced to a ten-day term of imprisonment; he had just already served it. Because he was not provided an attorney, Petitioner claims, the time-served sentence was invalid under Scott and it was therefore improper under Nichols for the sentencing judge to consider the marijuana conviction.

Although Petitioner was nominally sentenced to prison for an uncounseled conviction, his time-served sentence was not in violation of Scott. Petitioner's proposed application of Scott and Nichols would do nothing to prevent uncounseled losses of liberty. For example, if Petitioner had not been sentenced to time served, but rather to a fine, then he would now have no basis for saying that the marijuana conviction was improperly used for sentence enhancement. A fine for an uncounseled misdemeanor conviction is perfectly valid under Scott, so the conviction would have been available as a sentence enhancer under Nichols. Nevertheless, Petitioner still would have spent those ten days in jail.

The proper inquiry under Scott is whether the uncounseled misdemeanor conviction actually resulted in confinement. Compare Nicholson v. State, 761 So.2d 924, 930-31 (Miss. Ct. App. 2000) (holding that a conviction which resulted in a time-served sentence can be used for sentence enhancement), with State v. O'Neill, 140 Ohio App. 3d 48, 746

N.E.2d 654 (Ct. App. Ohio 7 Dist. 2000) (holding that such a conviction cannot be used for sentence enhancement). The reason that Petitioner spent ten days in jail is he was charged with a misdemeanor and could not post bail. He was subjected to no period of confinement as a result of his uncounseled marijuana conviction, so his time-served sentence did not violate the constitution. Trial counsel therefore had no reason to object based on Nichols to Petitioner's being sentenced as a three-time offender. Trial counsel's performance was therefore not deficient.

CONCLUSION

Petitioner did not receive ineffective assistance of counsel. The denial of PCR is

AFFIRMED.

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

The Supreme Court of South Carolina

In the Matter of
Thomas Joseph Hummel, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking that respondent be transferred to incapacity inactive status pursuant to Rule 28, RLDE, Rule 413, SCACR, and requesting appointment of an attorney to protect the interests of his clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent is placed on incapacity inactive status until further order of the Court.

IT IS FURTHER ORDERED that LeRoy Laney, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Laney shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Laney may make disbursements from respondent's

trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that LeRoy Laney, Esquire, has been duly appointed by this Court.

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

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

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

Columbia, South Carolina
October 14, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Danny Orlando Wharton, Appellant.

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

Opinion No. 4014
Heard January 13, 2005 – Filed July 5, 2005
Withdrawn, Substituted and Refiled October 10, 2005

REVERSED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; Solicitor Robert M. Ariail, of Greenville, for Respondent.

BEATTY, J.: Danny Orlando Wharton was convicted of voluntary manslaughter and possession of a weapon during the commission of a violent

crime. He appeals, arguing the trial judge erred in: (1) charging the law of voluntary manslaughter; (2) failing to charge the jury on the law of involuntary manslaughter; and (3) failing to charge the jury on the law of accident. We reverse.

FACTS

Danny Orlando Wharton and several of his friends were at a neighbor's house playing cards when his ex-girlfriend, Pam Suber, confronted him about his new girlfriend. The two began arguing, and several people gathered around to break up the argument. Suber left the area after the argument, while five or six people, including Wharton's best friend, Chris Luster, and Clifton "Smokey" Shaw, attempted to calm Wharton down. Wharton resisted the attempts to calm him down and did not want to be touched. At some point, he exchanged words with Shaw about Suber. Wharton retrieved a gun from a vehicle parked nearby. Shaw told his girlfriend to take his son home out of the way. He then approached Wharton in an aggressive manner. The two continued to argue. Shaw placed his necklace beneath his shirt collar to prepare for a physical altercation and Wharton pulled the gun out. According to Shaw, who was the object of the argument, Wharton pulled the gun out like he was trying to shoot it into the air. Shaw testified that he turned and lay down, the gun discharged, and Luster, who was attempting to end the argument between Wharton and Shaw, was fatally shot. A witness testified that Wharton was shocked that Luster was shot.

Wharton was indicted for murder and possession of a weapon during the commission of a violent crime. The State requested a jury charge on murder and voluntary manslaughter. Wharton opposed the voluntary manslaughter charge. He argued alternatively that if the judge gave the voluntary manslaughter charge, he was entitled to a charge on involuntary manslaughter and accident. The judge denied the requests, and the jury was charged on the law of murder, voluntary manslaughter, and possession of a weapon during the commission of a violent crime.[1] The jury found Wharton

[1] In fact, the jury was charged twice with the law of voluntary manslaughter because the jury requested the definition of manslaughter and asked whether

guilty of voluntary manslaughter and possession of a weapon during the commission or attempt to commit a violent crime. The judge sentenced him to prison for a total of fifteen years. This appeal followed.

STANDARD OF REVIEW

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "Only the law applicable to the case should be charged to the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." Id.

LAW/ANALYSIS

Wharton argues the trial judge erred in charging the jury on voluntary manslaughter. We agree.

Voluntary manslaughter is the "unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation." Knoten, 347 S.C. at 302, 555 S.E.2d at 394. Both heat of passion and sufficient legal provocation must be present for the killing to constitute voluntary manslaughter. Id.; State v. Cole, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000). Sufficient legal provocation must come from the victim, not from a third party. Harris, 354 S.C. at 387, 581 S.E.2d at 156. To constitute sufficient legal provocation to support a voluntary manslaughter charge, the

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involuntary manslaughter was an option. The jury was also charged three times with the law of transferred intent after the jury requested a clarification and a question arose regarding whether or not transferred intent could be used for voluntary manslaughter. See Harris v. State, 354 S.C. 382, 387, 581 S.E.2d 154, 156 (2003) ("Sufficient provocation necessary to justify a voluntary manslaughter charge *must come from the victim and not be transferred from a third party to the victim.*").

provocation "must come from some act of or related to the victim." State v. Locklair, 341 S.C. 352, 363, 535 S.E.2d 420, 425 (2000).

We find no evidence of sufficient legal provocation that would support a charge of voluntary manslaughter. The pertinent facts are undisputed as to the lack of provocation by the victim, Chris Luster. Although Wharton was arguing with Shaw at the time of the shooting, the evidence elicited at trial showed there was never any argument or discord between Wharton and Luster.

The State argues, however, that the principle of transferred intent is applicable. This argument is unavailing. As previously discussed, sufficient provocation necessary to justify a voluntary manslaughter charge must come from the victim and not transferred from a third party. Harris, 354 S.C. at 387, 581 S.E.2d at 156; Locklair, 341 S.C. at 363, 535 S.E.2d at 425. Further, "[w]here death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996); State v. Cooley, 342 S.C. 63, 68, 536 S.E.2d 666, 669 (2000). Here, Wharton and Shaw were only arguing. Thus, there was no legal provocation to transfer. Moreover, transferred intent does not supplant the necessary element of legal provocation required for voluntary manslaughter.

Because there is no evidence of sufficient legal provocation, the trial judge should not have given a voluntary manslaughter instruction. Wharton was clearly prejudiced because he was found guilty of voluntary manslaughter. Accordingly, we reverse Wharton's conviction for voluntary manslaughter.

Further, Wharton's conviction for voluntary manslaughter was a prerequisite to his conviction for possession of a firearm during the commission of a violent crime. See S.C. Code Ann. § 16-23-490(E) (2003) (noting that the additional punishment for possession of a firearm during the commission of a violent crime may not be imposed unless the defendant is convicted of the underlying violent crime); State v. Taylor, 356 S.C. 227, 235 n.4, 589 S.E.2d 1, 5 n.4 (2003) (noting that defendant's conviction for

possession of a weapon during the commission of a violent crime must be reversed where the court was reversing defendant's murder conviction). Thus, because we reverse the voluntary manslaughter conviction, we necessarily must reverse the conviction for the weapon charge.

Having reversed the trial court on the voluntary manslaughter charge, we need not address appellant's remaining issues.

CONCLUSION

Because the trial judge erred in charging the law of voluntary manslaughter, Wharton's convictions and sentences are

REVERSED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lana Odom Blackmon, Individually and as Personal Representative of the Will and Estate of J. B. Blackmon, Jr., Deceased, Appellant,

v.

Jennifer B. Weaver, Edmund Cole Weaver as Trustee for Nicholas Weaver, Mary Heath and J. B. Blackmon, III, Respondents.

Appeal From Darlington County
A. Victor Rawl, Circuit Court Judge

Opinion No. 4030
Heard October 13, 2004 – Filed October 17, 2005

REVERSED

B. Michael Brackett, of Columbia, for Appellant.

Adele Jeffords Pope, of Columbia, for Respondents.

STILWELL, J.: Lana Blackmon, the personal representative and a beneficiary under her late husband's will, requested the probate court to construe the will. After removal to the circuit court, the judge construed the will to grant Lana an estate less than one for life and removed her as personal representative. Lana appeals, and we reverse.

FACTS

J.B. Blackmon and Lana Odom were married in February 2000 after a courtship lasting approximately six years. It was J.B.'s fourth marriage and Lana's third. Prior to the marriage, J.B. had been diagnosed with terminal cancer and in February of 2001, he died. J.B.'s will named Lana personal representative and devised to her an interest in the estate. The will also devised interests to J.B.'s three children from his first marriage, Jennifer Weaver, Mary Heath, and J.B. Blackmon, III. The nature of the parties' interests in the estate property is at the heart of this action. J.B.'s will reads in pertinent part:

> **SECOND**: I give, devise and bequeath all of my property whether real, personal or mixed, whatsoever and wheresoever situate, whether now owned by me or to me or hereafter acquired by me, to my wife, **LANA ODOM BLACKMON** for and during her natural life or until such time as she no longer desires the property.
>
> **SIXTH:** That if the desire of my wife to sell any or all of my property and assets then my **wife, MARY B. HEATH, J.B. BLACKMON, III AND JENNIFER B. WEAVER,** shall share equally in the sale of such assets or proceeds from the sale of such assets.

Lana argues she has a life estate in all of J.B.'s property pursuant to these provisions. The children take the position that J.B.'s devise does not

permit Lana to dispose of some of the assets, specifically the family farm and certain stocks.

STANDARD OF REVIEW

An action to construe a will is an action at law. NationsBank of S.C. v. Greenwood, 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App. 1996). An action to remove a personal representative is equitable in nature. Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993). When legal and equitable causes of action are maintained in one suit, the court is presented with a divided scope of review. Perry v. Heirs at Law and Distributees of Gadsden, 313 S.C. 296, 300 n.3, 437 S.E.2d 174, 177 n.3 (Ct. App. 1993) (aff'd as modified, 316 S.C. 224, 449 S.E.2d 250 (1994)). On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence. Id. at 86, 221 S.E.2d at 775-76.

LAW/ANALYSIS

I. Will Construction

Lana argues the trial court erred in construing the will to grant her a limited right of use and enjoyment in the family farm and related personal property. We agree.

Lana requests that this court construe her interest as a life estate with the power of disposition. Our courts have previously recognized such an interest. See Johnson v. Waldrop, 256 S.C. 372, 374-76, 182 S.E.2d 730, 731 (1971) (finding a life estate with a complete power to dispose and consume); Thomason v. Hellams, 233 S.C. 11, 15, 103 S.E.2d 324, 325 (1958) (holding that "[a] deed, devise or bequest for life with power of disposition and remainder to another (of such property as is not disposed of by the first taker) is valid."). In this case, the trial court took a clear provision of the will

creating a life estate and then reduced it by construing the language of a subsequent provision. We refuse to do so.

Item two reads as follows: "I give, devise and bequeath all of my property . . . to my wife . . . for and during her natural life." These words clearly indicate J.B.'s intent to give a life estate in all of his property to Lana. Where the wording of a will is clear and unambiguous, the testator's intention must be ascertained from the language utilized. Shelley v. Shelley, 244 S.C. 598, 602, 137 S.E.2d 851, 853 (1964). There is no special language required for the creation of a life estate; courts will look to the intention of the creator of the estate. See 28 AM. JUR. 2D Estates § 67 (2005). The trial court, relying on the limiting language "or until such time as she no longer desires the property," determined that J.B. granted Lana only the limited right of use and enjoyment to the property. However, we do not believe this was a correct application of the law. "[W]here an estate or interest is given in words of clear and ascertained legal signification, it shall not be enlarged, cut down, or destroyed by superadded words in the same or subsequent clauses, unless they raise an irresistible inference that such was the intention." McGirt v. Nelson, 360 S.C. 307, 311, 599 S.E.2d 620, 622 (Ct. App. 2004) (internal citations omitted).

J.B.'s intent is further evidenced by an examination of item six. Item six unequivocally grants Lana the authority to dispose of the entirety of the estate's assets subject to J.B.'s children receiving a portion of the proceeds of any sale. To hold, in the face of this language, that Lana was not given the right to dispose of the property would require us to completely ignore this provision as it is written. To do so would be error. See Hays v. Adair, 267 S.C. 291, 296, 227 S.E.2d 665, 667-68 (1976) (stating that "[a] proper construction seeks to harmonize the various provisions and a construction which gives meaning to all should be preferred over one which renders some provisions meaningless."); see also May v. Riley, 279 S.C. 248, 250-51, 305 S.E.2d 77, 78 (1983) (considering two provisions and concluding that neither can be ignored).

A court may not "by judicial construction make a will for the decedent that he has not made for himself." Guaranty Bank & Trust Co. v. Byrd, 287

S.C. 96, 99, 337 S.E.2d 231, 233 (Ct. App. 1985) (quoting Coffman v. Coffman, 85 Va. 459, 466, 8 S.E. 672, 675 (1888)), rev'd on other grounds, 292 S.C. 187, 355 S.E.2d 529 (1986). Because the language of J.B.'s will clearly shows his intent to grant his wife a life estate with the power of disposition, we reverse the ruling of the trial court.

II. Removal of Personal Representative

Lana also argues the trial court erred in removing her as personal representative. We agree.

Section 62-3-611(b) of the South Carolina Code (1976) governs removal of a personal representative, and allows for removal when it is in the best interest of the estate, when the personal representative mismanages the estate, or when the personal representative fails to perform any duty pertaining to the office. However, there is a strong deference shown to the personal representative chosen by the testator. "The Courts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated." Smith v. Heyward, 115 S.C. 145, 164, 105 S.E. 275, 282 (1920). The power to remove a personal representative "should be executed with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud." Id. at 164-65, 105 S.E. at 282.

The trial court removed Lana as personal representative because she requested the court to construe the will and took a position that strongly favored her own interests. The court also cited Lana's failure to timely act to collect a $70,000 debt owed to the estate and her hostility toward other beneficiaries. The trial court found this hostility was displayed by failing to allow access to the family house and farm.

A review of the record shows Lana had, in fact, disclosed the existence of the debt on the estate inventory. In addition, Lana was in the process of obtaining a default judgment against the debtor, which would allow her to

proceed with collection efforts on behalf of the estate. As for any failure to timely obtain the judgment, Lana testified she talked to approximately six attorneys regarding the debt and found it difficult to obtain anyone to represent the estate in the action. Therefore, it appears that Lana has neither mismanaged the estate nor failed to perform a required duty.

Regarding hostility between Lana and other beneficiaries, Lana admits she ceased talking to Jennifer Weaver because of conflict between the two. However, it is uncontested that on one occasion Lana allowed the children to walk through the house and take some items. Later, Lana delivered other items to one of the daughters. The mere existence of conflict between a personal representative and a beneficiary is an inadequate reason for removal of the personal representative. Without a showing of fault, the court will not remove a personal representative simply because the parties do not get along. Reed v. South Carolina Nat'l Bank, 293 S.C. 357, 360 S.E.2d 527 (Ct. App. 1987) (discussing a trustee rather than a personal representative). Therefore, we find the trial court erred in ordering the removal of Lana as personal representative.

CONCLUSION

Because the plain language of the will grants a life estate with the right of disposition, and because the request to remove the personal representative was without merit, the decision of the trial court is

REVERSED.

BEATTY, J., concurs.

SHORT, J., dissents in part in a separate opinion.

J. Short, dissenting in part: Although I agree with the majority that the trial court erred in removing Lana as personal representative, I disagree with the majority's determination of Lana's interest and find that J.B. intended for her to have a life estate in all of his property. Furthermore, I

believe he intended for her to have the power to sell any property not otherwise described specifically in paragraphs three and five of the will; however, should she sell any of the remaining assets she should share the proceeds as provided for in the will. Although the will is inadequately drawn, my construction would attempt to harmonize its provisions and give somewhat equivalent effect to each provision so as to effectuate J.B.'s intent.

Lana requests this court to construe her interest as a life estate because our courts have previously recognized a grantee may have a life estate coupled with the power to dispose. See Johnson v. Waldrop, 256 S.C. 372, 375, 182 S.E.2d 730, 731 (1971) (finding a life estate with a complete power to dispose and consume); Thomason v. Hellams, 233 S.C. 11, 15, 103 S.E.2d 324, 325 (1958). In Johnson and Thomason, separate provisions in each will clearly created the life estates with the power to dispose while in the instant case, this court would have to take an ordinarily clear and separate provision of the will and limit it by a subsequent provision to construe such an interest. "In determining the testator's intent, the [c]ourt should read the will as a whole and attempt to harmonize all its provisions." May v. Riley, 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983). "An interpretation that fits into the whole scheme or plan of the will is the most apt to be the correct interpretation of the intent of the testator." Kemp v. Rawlings, 358 S.C. 28, 34, 594 S.E.2d 845, 849 (2004).

The court's primary purpose when construing a will is to consider the will as a whole and arrive at the testator's intention. Shelley v. Shelley, 244 S.C. 598, 601, 137 S.E.2d 851, 853 (1964). This court must determine from paragraphs two, three, five, and six of J.B.'s will what type of estate J.B. granted to Lana.[1] The lower court determined the will's language limited

[1] In addition to the second and sixth paragraphs of the will referred to in the majority opinion, J.B.'s will provides, in pertinent part:

> Third: Then I give, devise and bequeath to my daughter, Jennifer B. Weaver, my farm and home and all personal property held for the benefit of such real

Lana's interest to "her natural life or until such time as she no longer desires the property." Although the court granted Lana a limited right of use and enjoyment, a plain reading of paragraph two clearly indicates J.B. intended to give Lana a life estate in all of his property. There is no special language required for the creation of a life estate and courts look to the intention of the creator of the estate. See 28 Am. Jur. 2d Estates § 67 (2000). The "for and during her natural life" language attests to J.B.'s intent to create a life estate in favor of his wife.

Paragraph three, which begins with the word "[t]hen," indicates J.B.'s desire for his daughter Jennifer to follow Lana's interest in the family farm after Lana dies or no longer desires the property. A plain reading of paragraph three presents the probability that J.B. contemplated that he was arranging for Lana to remain on the property, which in fact was the marital home, until she no longer desired to live there. Should that time come before

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> property. If Jennifer B. Weaver, is deceased at the time of the death of my wife or at the time my wife desires to no longer use the property, then to Edwin Cole Weaver as Trustee for my grandson, Nicolas Weaver to be held until he reaches the age of eighteen (18) and then conveyed to him as Tenants in Common.
>
> . . . .
>
> Fifth: Also at the time of the death of my wife or at such time as she no longer desires the property, I give and bequeath to my children, Mary B. Heath, and J.B. Blackmon, III, all of my interest in PLM V and VI including any earnings or cash attached to such interest along with such principal which may arise at maturity. If either of my children predecease my wife at the time of her death or when she no longer desires this property then the remainder shall be divided between the surviving child and Jennifer B. Weaver.

her death, it is reasonable to assume that he provided that it should then pass to his daughter, rather than Jennifer having to wait until Lana's death. More explicitly, paragraph three grants Nicolas Weaver, Jennifer's son, the property if Jennifer "is deceased at the time of the death of my wife or at the time my wife desires to no longer use the property . . . ." This statement signifies the unmistakable intent on the part of J.B. for the farm to remain in the family by contemplating no scenario for the transfer of the farm beyond the death or voluntary surrender by Lana by deeming it to pass to not one, but to a second generational heir, should the first bequest fail.

Paragraph five grants Mary Heath and J.B. Blackmon, III, J.B.'s other children, an interest in the PLM partnerships and uses identical language as paragraph three as to when they take the property. The "no longer desires the property" language in paragraphs three and five underscores J.B.'s desire for his children to receive these paragraphs.

Paragraph six creates the problematic portion of the will by providing for proceeds distribution should Lana desire "to sell any or all of my property and assets." (emphasis added). Read alone, paragraph six grants Lana the authority to dispose of the entirety of the estate's assets unconditionally, subject to J.B.'s children receiving a portion of the proceeds of any sale. If allowed such weight and analyzed with the entire will, paragraph six seems to limit taking of the interests in paragraphs three and five by the cited beneficiaries to two scenarios: Lana dying before selling the property or Lana voluntarily relinquishing her rights to the property during her lifetime. A fundamental rule of construction of wills is that the court makes every effort to give effect to every provision of the will and endeavors to reconcile two apparently inconsistent provisions rather than to give effect to one over the other. Shelley, 244 S.C. at 601-03, 137 S.E.2d. at 853. Under this analysis, Lana's decision to sell the farm would reduce Jennifer's potential interest in the farm from fee simple to a mere shared portion of the proceeds. The clear intent of paragraph three belies this result, and I do not believe J.B. intended paragraph six to supersede the other paragraphs of the will.

The lower court heard testimony that the farmhouse was built in 1822 and had been bought by J.B.'s grandfather in 1937. J.B. grew up on the farm,

known as “White Plains” from the time he was ten years old and after he returned to live there, he worked to place the house on the National Register of Historic Places. The record is clear and both sides agree that J.B. had a great deal of fondness for the property; therefore, I find that he did not intend to give Lana the power to dispose of White Plains. I find J.B. included paragraph six in the will to permit Lana to sell various assets for her support as needed, but I believe J.B. did not contemplate the sale of either the PLM partnerships or White Plains to satisfy this commitment.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rhonda W. Browning, Respondent,

v.

Gregory W. Browning, Appellant.

Appeal From Florence County
A. E. "Gene" Morehead, III, Family Court Judge

Opinion No. 4031
Submitted September 1, 2005 – Filed October 17, 2005

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED IN PART

Spencer Andrew Syrett, of Columbia, for Appellant.

James M. Saleeby, Sr., of Florence and Marian D. Nettles, of Lake City; for Respondent.

BEATTY, J.: In this domestic contempt action, Gregory W. Browning (Husband) appeals the family court's order, arguing the court erred in: (1) finding Husband in contempt for failing to timely comply with the parties'

Property Settlement Agreement; (2) ordering Husband to submit to a medical examination so that Rhonda W. Browning (Wife) could obtain a life insurance policy on Husband; (3) addressing issues regarding a life insurance policy for the benefit of the parties' emancipated son; and (4) awarding Wife attorney's fees. We affirm in part, reverse in part, and modify in part.[1]

FACTS

Husband and Wife were married on August 16, 1975, and had one child during the marriage. On September 15, 2000, the parties separated. Prior to a hearing for temporary relief, the parties entered into a Property Settlement Agreement (Agreement) on March 7, 2001. By order dated May 29, 2001, the family court approved the Agreement. The parties were later divorced on July 8, 2002.

On February 2, 2004, Wife filed an action seeking to hold Husband in contempt for violating the Agreement. In her amended complaint, Wife alleged, inter alia, Husband: (1) failed to pay Wife her one-half share of the equity in the former marital home within thirty days of Wife vacating the home; (2) refused to submit to a medical examination in order that Wife could obtain a life insurance policy on Husband; and (3) failed to provide proof of coverage to Wife regarding a $2,000,000 life insurance policy for the benefit of the parties' emancipated son. In conjunction with these assertions, Wife also requested Husband pay her attorney's fees as well as interest for the seven-month period that Husband delayed in paying her share of the former marital home. In his Answer, Husband denied the allegations and sought, as a counterclaim, for the court to find Wife in contempt for failing to comply with several provisions of the Agreement.

After a hearing, the family court issued an order in which it: (1) found Husband failed to pay Wife, within the prescribed thirty-day period, her one-

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

half interest in the former marital home; (2) ordered Husband to pay twelve percent interest for the seven-month period that he delayed in paying Wife her $175,000 share; (3) ordered Husband to submit to a medical examination so that Wife could procure a life insurance policy on Husband; (4) ordered Husband to provide proof of insurance coverage in which he indicated that the parties' emancipated son was the beneficiary of a $2,000,000 life insurance policy; and (5) awarded Wife attorney's fees in the amount of $2,700.[2] Husband appeals.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Dearybury v. Dearybury, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999). Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

DISCUSSION

I. Contempt

Husband argues the family court erred in finding him in contempt and awarding Wife twelve percent interest for the seven months he delayed in paying Wife her interest in the marital home. Although Husband admits that he failed to timely pay Wife her share, he contends the seven-month delay was not willful given Wife created the delay. Specifically, he claims he was

[2] We note the family court ruled on several other issues regarding the Agreement. However, we need not list or address them given these rulings are not pertinent to the instant appeal.

unable to immediately refinance the mortgage with which to pay Wife because, unbeknownst to him, Wife opened several credit accounts in his name. Husband asserts financing was not approved until these accounts were resolved and Wife completed information required for refinancing.

"The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings." In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). Contempt results from a party's willful disobedience of a court order. Smith v. Smith, 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct. App. 2004); S.C. Code Ann. § 20-7-1350 (Supp. 2004) (A party may be found in contempt of court for the willful violation of a lawful court order.). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001) (quoting Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)). "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman, 348 S.C. at 119, 557 S.E.2d at 705.

"In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004). "Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order." Widman, 348 S.C. at 120, 557 S.E.2d at 705.

"A trial court's determination regarding contempt is subject to reversal where it is based on findings that are without evidentiary support or where there has been an abuse of discretion." Henderson v. Puckett, 316 S.C. 171, 173, 447 S.E.2d 871, 872 (Ct. App. 1994). "Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion." Hawkins, 359 S.C. at 503, 597 S.E.2d at 900. "An abuse of discretion occurs either when the court

is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

We find the family court did not abuse its discretion in holding Husband in contempt. Pursuant to the terms of the Agreement, Wife was permitted to reside in the marital home until the parties' son enrolled in college. Wife then had thirty days to vacate the home. At that point, Husband was given the option of purchasing Wife's one-half share of the equity in the marital home. On January 1, 2002, Husband informed Wife that he intended to exercise this option. In compliance with the Agreement, Wife vacated the marital home on September 17, 2002. Thus, Husband was required to pay Wife her $175,000 equity share by October 17, 2002. Husband did not, however, pay Wife until approximately seven months later on May 16, 2003.

Although Husband violated the Agreement by failing to strictly comply with the thirty-day time period, we find Husband did not willfully cause the entire seven-month delay. Husband's mortgage broker testified Husband initiated the process to refinance the marital home in 2002. He further testified there was a "short delay" in the process due to Husband's credit score, which had been adversely affected by accounts Wife had apparently opened without Husband's knowledge. Additionally, he stated the remaining delay resulted because Wife did not sign over title to the property for several months after the quitclaim deed to the home was sent to her attorney's office. He testified the deed was sent to her attorney in October or November of 2002 and was returned to Husband in February 2003. He stated there was no explanation for this delay and that the refinancing loan went through within three and a half weeks after the deed was received. Wife also did not offer any explanation for the delay.

Because Wife did not expeditiously sign and return the quitclaim deed, we find Husband should not be penalized for the time period preceding his receipt of the deed in February 2003. Accordingly, we modify the family

court's order and award Wife interest in the amount of $5,250, which represents the three-month delay between February 2003 and May 2003.[3]

II. Life Insurance

A.

Husband argues the family court erred in requiring him to submit to a medical examination in order that Wife could obtain a life insurance policy on his life. Because Wife's right to alimony had ended and all of the parties' property claims had been settled, Husband asserts Wife no longer has an insurable interest in his life. Thus, he contends he should not be forced to assist Wife in procuring the life insurance policy. We find the court erred as a matter of law.

"Whether a property settlement agreement should be deemed to bar the divorced wife from receiving insurance benefits is a question of the construction of the agreement itself." Estate of Revis v. Revis, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997). When parties merge their settlement agreement into a decree, the family court transforms it from a contract between the parties to a decree of the court. Emery v. Smith, 361 S.C. 207, 214, 603 S.E.2d 598, 601 (Ct. App. 2004). "Thereafter, the agreement, as part of the court order, is fully subject to the family court's authority to interpret and enforce its own decrees." Id. at 214, 603 S.E.2d at 601-02.

In order to analyze this issue, we must consider the controlling provision of the Agreement within the context of general insurance law regarding an insurable interest. The Agreement states in pertinent part:

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[3] $175,000 x 12% x 3/12 = $5,250. See S.C. Code Ann. § 34-31-20(B) (Supp. 2004) ("All money decrees and judgments of courts enrolled or entered shall draw interest according to law. The legal interest is at the rate of twelve percent a year."). We note the General Assembly amended this subsection on March 21, 2005. This amendment, however, applies to all judgments entered on or after July 1, 2005. Act No. 27, 2005 S.C. Acts 119.

> The husband and wife each grant to the other the right to maintain an insurable interest insuring the others [sic] life. [Husband] has the right to insure [Wife's] life he shall own the policy and be responsible for paying all the premiums. [Wife] likewise may insure [Husband's] life she will likewise own the policy and she will be responsible for the premiums.

In terms of what is required to obtain a policy of insurance, our appellate courts have stated:

> In this country, it is a rule of law that one cannot insure for his own benefit the property of another in which he has no interest. Insurance law accepts as a settled rule that an insured must possess an interest of some kind in the subject matter of the policy . . . . In order to recover on a policy of insurance, the insured must prove an insurable interest in the property both at the time the policy is issued and becomes effective and at the time of the loss.

Powell v. Insurance Co. of N. America, 285 S.C. 588, 589-90, 330 S.E.2d 550, 551-52 (Ct. App. 1985)(citations omitted); see Warren v. Pilgrim Health & Life Ins. Co., 217 S.C. 453, 456, 60 S.E.2d 891, 893 (1950)("[O]ne cannot obtain valid insurance upon the life of another in whom he has no insurable interest."). Where an insurable interest does not exist at the time the contract for insurance was made, the insurance contract is void from its inception. Abraham v. New York Underwriters Ins. Co., 187 S.C. 70, 78, 196 S.E. 531, 534 (1938). Additionally, this court has stated:

> Policies will be maintained where it is clear that the party insured had an interest which would be injured in the event the peril insured against should happen. It is not necessary to constitute an insurable interest that the interest be such that the event insured against would necessarily subject the insured to loss; it is sufficient that it might do so, and that pecuniary injury would be the natural consequence.

Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 404, 426 S.E.2d 823, 826 (Ct. App. 1993).

> An "insurable interest" has been defined as follows:
>
> > It may be said, generally, that any one [sic] has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. An insurable interest in property is any right, benefit or advantage arising out of or dependent thereon, or any liability in respect thereof, or any relation to or concern therein of such a nature that it might be so affected by the contemplated peril as to directly damnify the insured.

Benton, 310 S.C. at 403, 426 S.E.2d at 825 (quoting Crook v. Hartford Fire Ins. Co., 175 S.C. 42, 48, 178 S.E. 254, 257 (1935)); see Hack v. Metz, 173 S.C. 413, 418, 176 S.E. 314, 316 (1934)("A person can have no insurable interest where his only right arises under a contract which he had no authority to make."). "An insurable interest is in the nature of an inchoate right, everpresent [sic] for perfection in those who possess the right, but never perfected until all legal requirements have been performed." Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 20, 135 S.E.2d 362, 364 (1964) (citation omitted).

When the parties entered into the Agreement, Wife was entitled to twenty-four months of alimony. Because Wife was receiving alimony, she had an insurable interest in Husband's life. See Wooten v. Wooten, 364 S.C. 532, 548, 615 S.E.2d 98, 106 (2005) ("It is a settled proposition of law that a former wife who is entitled to alimony has an insurable interest in her former husband's life. The parties in a divorce proceeding may agree, in a private agreement subsequently merged into the court's order, that a payor spouse shall maintain life insurance to secure an award of alimony.")(citation omitted). However, once this obligation ended, Wife no longer had an

insurable interest nor, can we discern from the record, a pecuniary interest.[4] See Roberts v. Southwestern Life Ins. Co., 244 S.W.2d 302, 307 (Tex. Civ. App. 1951) (recognizing "upon divorce and termination of insurable interest, a policy cannot be beneficially owned by one divorced spouse on life of the other on basis of past relationship").

Significantly, this case does not present a scenario where Husband seeks to eliminate Wife as a beneficiary for an existing policy. Instead, Wife is attempting to obtain a new life insurance policy on Husband after his financial obligation to her has ceased. Cf. Estate of Revis, 326 S.C. at 477, 484 S.E.2d at 116 ("Although a divorce does not itself affect a beneficiary's right to insurance proceeds, it is generally recognized that a beneficiary may contract this right away through a separation or property settlement agreement, even if the beneficiary designation is not formally changed."); Duncan v. Investors Diversified Servs., Inc., 285 S.C. 467, 470, 330 S.E.2d 295, 296 (1985) (stating "divorce does not of itself operate to defeat the beneficiary's claim"); Hughes v. Scholl, 900 S.W.2d 606, 607 (Ky. 1995) (recognizing "divorce alone does not disturb a former spouse's status as an insurance policy beneficiary").

Furthermore, we believe ordering Husband to submit to a medical examination against his will, i.e., forcing him to consent, where there is no insurable interest would violate public policy. See Ramey, 244 S.C. at 22, 135 S.E.2d at 365 (It is well settled that "[a] policy of insurance taken out on the life of another without his knowledge or consent is void and against public policy in that it might be a fruitful source of crime.")(emphasis added); Hack, 173 S.C. at 418, 176 S.E. at 316 ("It has been broadly stated that

[4] We note Wife contends that she has an insurable interest in Husband's life because she is potentially liable for any debt associated with Husband's medical practice. We disagree with this contention given Wife, in the Agreement, specifically waived any interest in Husband's practice and Husband agreed to indemnify Wife for any payments associated with the practice. Moreover, Wife's claim of potential liability is vague at best. She offers no specific debt or liability she has as a result of Husband's medical practice.

insurance taken out on the life of another, without the latter's consent is against public policy and void.")(citation omitted).

Additionally, we reject Wife's assertion that Husband consented to a perpetual insurable interest by entering into the Agreement. See Abraham, 187 S.C. at 78, 196 S.E. at 534 (recognizing "[n]either the doctrine of waiver nor the doctrine of estoppel can be invoked to give legality" to a contract where there exists no insurable interest, and thus, is absolutely null and void from its inception).

Because Wife lacked an insurable interest, we find ordering Husband to consent to a medical examination would violate public policy. Accordingly, we hold the family court erred regarding the life insurance policy for the benefit of Wife. See Elmore v. Life Ins. Co. of Virginia, 187 S.C. 504, 508-09, 198 S.E. 5, 7 (1938) ("One cannot, by his own act, procure a valid enforceable policy of insurance for his own benefit upon the life of another in which he has no insurable interest; that such a contract of insurance is void in its inception and unenforceable on grounds of public policy, being a mere wagering contract.")(citation omitted); Henderson v. Life Ins. Co. of Virginia, 176 S.C. 100, 113-14, 179 S.E. 680, 685-86 (1935)("The law does not allow one who has no insurable interest in the life of another, to insure it for his benefit, for the reason that it is a mere wager and holds out a temptation to fraud, the insurer having no interest in the life of the assured and having a direct interest in his death.") (citations omitted). Once the obligation of support is extinguished there is no insurable interest of right and the acquisition of any new insurance policy must be with the consent of the insured spouse or former spouse.

B.

Husband argues the family court erred in ordering additional requirements for the life insurance policy on Husband's life for the benefit of the parties' emancipated son.

As evidenced by the terms of the Agreement, Husband owned a $2,000,000 life insurance policy issued on March 3, 1993, which designated

the parties' son as the beneficiary. The Agreement further provided that Husband was required to provide Wife with written documentation verifying that son remained as beneficiary. In her contempt action, Wife requested the family court order Husband to provide her with proof of coverage and beneficiary designation. She also sought proof that Husband's cash withdrawal from the policy had not reduced the face amount. In ruling on this issue, the family court held that Wife could request, and Husband must provide, verification of insurance coverage and beneficiary designation at reasonable periodic intervals. The court also limited Husband to a total of $295,826 in withdrawals from this policy and further found the policy should remain in effect with no time limitations.

We find, and Wife concedes, the court granted relief beyond that which was requested in Wife's pleadings. During the hearing, Husband informed the court that the $2,000,000 life insurance policy was still in effect and the parties' son was the designated beneficiary. Because this information sufficiently satisfied the relief Wife requested in her pleadings, the court's additional rulings regarding the policy constituted error. Accordingly, we reverse the court with respect to ordering Husband: (1) to maintain the policy in apparent perpetuity; (2) to provide Wife or the son continuing coverage and beneficiary information; and (3) to limit his cash withdrawals from the policy. See Bass v. Bass, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) (holding the family court cannot award relief that is not contemplated by the pleadings).

III. Attorney's Fees

Finally, Husband asserts the family court erred in awarding attorney's fees to Wife. He argues the award of attorney's fees should be vacated if this court rules in his favor on the issues that he has raised on appeal.

"An award of attorney's fees and costs is a discretionary matter not to be overturned absent abuse by the trial court." Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). In deciding whether to award attorney's fees, the family court should consider: (1) the parties' ability to pay their own fee; (2) the beneficial results obtained by counsel; (3) the

respective financial conditions of the parties; and (4) the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). The factors the family court should consider in awarding reasonable attorney's fees and costs include: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Although we have ruled in favor of Husband on several issues, this alone is not dispositive of our decision regarding the award of attorney's fees to Wife. First, Wife prevailed on several issues at trial. Secondly, Husband's failure to comply with the terms of the Agreement necessitated Wife filing the action for contempt. For example, Husband concedes he delayed in transferring the parties' mountain property and beach property to Wife. Finally, the court properly considered the requisite factors and exercised its discretion in limiting Wife's award to $2,700 despite her request for $3,700. Accordingly, we decline to vacate Wife's award of attorney's fees.

CONCLUSION

Based on the foregoing, we affirm the decision of the family court holding Husband in contempt and awarding Wife attorney's fees. We reverse the court's order requiring Husband to submit to a medical examination so that Wife could procure an insurance policy on his life. Additionally, we reverse the court's decision ordering Husband to provide additional information to Wife concerning a life insurance policy for the benefit of the parties' emancipated son. Finally, we modify the court's order with respect to the amount of the award of post-judgment interest to Wife.

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED IN PART.

GOOLSBY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

A & I, Inc., Respondent,

v.

Bobby T. Gore, Edward Edelen and Sun Deck Condominiums Home Owners Associations, Inc., Defendants,

Of Whom Bobby T. Gore is the Appellant.

Appeal From Horry County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 4032
Submitted September 1, 2005 – Filed October 17, 2005

AFFIRMED

Gene McCain Connell, Jr., of Surfside Beach, for Appellant.

Daniel J. MacDonald, of Myrtle Beach, for Respondent.

BEATTY, J.: Bobby Gore appeals the circuit court's decision to affirm the magistrate court verdict in favor of A&I. He argues a new trial should have been granted because the magistrate's return violated statutory mandates, the return was prepared ex parte, and the tapes of the original proceeding were lost. He also argues the circuit court erred in failing to grant a continuance. We affirm.

FACTS

Gore owned three apartments at the Sun Deck Horizontal Property Regime. The master deed provided that apartment owners were responsible for any problems with interior walls and for maintenance and repairs on appliances and equipment "including any fixtures and/or their connections required to provide water, light, power, telephone, sewage, and sanitary service to his apartment." The deed further provided that the Sun Deck Horizontal Property Regime Homeowners Association ("HOA") was responsible for maintaining and repairing the common elements of the regime, including all plumbing located in the common elements. "Common elements" was defined to include load-bearing walls and pipes.

Gore began experiencing water infiltration problems in his downstairs apartment, Apartment C. He contacted A&I to locate and repair the leak, and A&I subcontracted Four Star Plumbing to perform the work. After Four Star Plumbing employee Steve Beatty cut holes in the wall and ceiling of Apartment C, the source of the water damage to Apartment C was eventually determined to be a leaky washing machine valve in Gore's upstairs apartment, Apartment H. The valve was replaced, and the leaking stopped. Four Star Plumbing also suggested that the washing machine valve in Edward Edelen's adjacent apartment be replaced. Edelen agreed and paid for the repairs. After replacing the valve in Apartment H but prior to patching and repairing the walls and ceiling in Gore's apartments, A&I requested payment from Gore. Gore refused, believing the damages were to internal water pipes that were part of the common area of the regime. Thus, he believed the repairs were the responsibility of the HOA. Gore refused A&I further access to his apartments to complete the repairs to the ceiling and walls.

A&I eventually brought an action in magistrate court against Gore, Edelen as president of the HOA, and the HOA for the money owed on the repairs. The day of the trial, Gore orally requested a continuance and a jury trial, and the magistrate denied both requests. Several parties testified before the magistrate, including Lenny Green, an estimator for A&I; Rod Tressle, an employee of A&I; Edelen; and Steve Beatty, employee of Four Star Plumbing. Green, Tressle, and Edelen testified that prior to agreeing to perform the work, they were all present at a meeting held by A&I with Gore to establish the terms. According to Green, Tressle, and Edelen, Gore agreed to pay for the work necessary to investigate and repair the leak. Gore attempted to cross-examine Edelen regarding other litigation in which Edelen was involved, but the magistrate refused to allow the questioning.[1] Gore also testified, denying the meeting or the agreement ever took place.

After hearing testimony from the parties, the magistrate determined that Gore made a direct agreement with A&I to pay for the repair costs. Thus, the magistrate found that it was irrelevant if the master deed provided that the particular repairs were something for which the HOA must pay. The magistrate found for A&I and ordered Gore to pay $2,257.74, plus interest and court costs.

Gore filed his notice of appeal to the circuit court, arguing that the magistrate court erred in failing to: (1) grant him a jury trial and a continuance; (2) allow him to cross-examine Edelen regarding past litigation; and (3) hold the HOA responsible for the charges due on the repairs. The magistrate court contacted counsel for A&I and informed him that the tapes of the magistrate court trial could not be transcribed. The magistrate court requested that A&I's counsel draft a proposed return. Counsel for A&I drafted a proposed return and submitted it to the magistrate court. The magistrate signed the return and submitted it to the circuit court. Gore's

[1] This fact is not found in the magistrate's return and is an issue on appeal. Gore argued before the circuit court that the return failed to note the attempt to cross-examine Edelen. Counsel for A&I did not dispute the fact that the attempt to cross-examine Edelen occurred or the failure of the return to include that fact.

counsel was not contacted by the magistrate court regarding the problems with the tapes, was not asked to submit a proposed return, and was not served with a copy of the return.

A hearing was held before the circuit court on July 21, 2004. Gore's counsel objected that a return had not been filed in the case. Counsel for A&I informed the court that the magistrate court contacted him to prepare a submittal for the return because the tapes of the trial were of such poor quality they could not be transcribed and the magistrate "was going to have to create a return from his notes." Gore's counsel was then provided a copy of the return and given an opportunity to review it prior to arguing the appeal. Gore's counsel argued the return was insufficient because it did not note that the magistrate prohibited Gore from cross-examining Edelen regarding other lawsuits in which he was involved. Gore argued he never made an agreement to pay for the repairs. He also argued the master deed to Sun Deck Condominiums provided that Gore would not be responsible for damage to common areas, Gore should not have been liable to pay A&I even if he had made an agreement otherwise, and the HOA was responsible for the payments.

The circuit court found no abuse of discretion for the magistrate to deny cross-examination of Edelen regarding other lawsuits. The court ruled from the bench that there was adequate testimony to support the magistrate's findings regarding Gore's agreement to be responsible for the repair charges. Finally, the court held that the magistrate did not abuse his discretion in denying Gore's motions for a jury trial and a continuance. The appeal was dismissed, and a form order was signed that day.

On August 24, 2004, Gore filed a notice of appeal from the July 21, 2004 form order. A formal written order outlining the circuit court's decision to affirm was filed August 19, 2004. The notice of appeal does not refer to the formal August 19, 2004 order.

STANDARD OF REVIEW

On appeal from the magistrate court, the circuit court may make its own findings of fact. S.C. Code Ann. § 18-7-170 (1985) ("In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact."). Where the circuit court has affirmed the magistrate court decision, this court looks to whether the circuit court order is "controlled by an error of law or is unsupported by the facts." Parks v. Characters Night Club, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001). "The Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the magistrate's judgment and there are no facts that show the affirmance was influenced by an error of law." Id.

LAW/ANALYSIS

I. Magistrate's Return

Gore argues the circuit court erred in failing to reverse the magistrate and order a new trial because: (1) the return did not comply with section 18-7-60 of the Code of Laws; (2) it was error for the magistrate to direct A&I's counsel to prepare the return ex parte; and (3) the judgment should have been vacated when the tapes were insufficient. We disagree.

A. Compliance with S.C. Code Ann. § 18-7-60 (1985)

Gore asserts the magistrate's return failed to comply with section 18-7-60 because the section requires the magistrate, not a party, to prepare and file the return. He argues that public policy requires the magistrate, as an unbiased judicial official, must prepare the return. Because A&I prepared the return, he argues the circuit court should have ordered a new trial.

In order to evaluate the effect of this section, we must apply statutory construction rules. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or

expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

When a party appeals to the circuit court from a magistrate court order, the magistrate court "shall thereupon, after ten days and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court." S.C. Code Ann. § 18-7-60 (1985). If the return is deemed defective, "the appellate court may direct a further or amended return as often as may be necessary and may compel a compliance with its order." S.C. Code Ann. § 18-7-80 (1985); see Chapman v. Computers, Parts, & Repairs, Inc., 334 S.C. 387, 390, 513 S.E.2d 120, 122 (Ct. App. 1999) (holding that where the magistrate's return is inadequate, the appropriate remedy is for the circuit court to direct the magistrate to file an amended return instead of remanding for a new trial).

Section 18-7-60 requires the magistrate to "make a return to the appellate court" within a certain time period, but it does not indicate it would be error for the magistrate to seek assistance in drafting the return. Because a plain reading of this section does not forbid the magistrate from seeking assistance where, as here, there were problems with the recording of the trial, we find such consultations do not violate the statute. In this case, there is no question that the magistrate filed a return, and thus, the magistrate complied with the statute.

Further, Gore's only complaint below regarding the sufficiency of the return was the failure to include the magistrate's refusal to allow him to cross-examine Edelen about other litigation. Gore sought to use cross-examination to show that Edelen was not credible. The circuit court found the return was adequate for reviewing Gore's grounds on appeal. The court further found that because cross-examination is a matter within a court's discretion, the magistrate did not err in refusing to allow Gore to cross-

examine Edelen about something not normally allowed for impeachment purposes. We agree with this finding.

Additionally, the circuit court found in the formal order that Edelen's testimony was cumulative to other witnesses regarding Gore's promise to pay for the charges associated with the repairs. Challenging the credibility of Edelen would not change the testimony of the other witnesses regarding Gore's promise. See Fields v. Reg'l Med. Center Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (finding that to warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and that there was a reasonable probability the jury's verdict was influenced by the evidence or lack thereof). Thus, we agree with the circuit court that Gore can point to no prejudice suffered by the failure to cross-examine Edelen.

Finally, we find that if the circuit court had found the return was deficient, the appropriate remedy would have been for the court to request an amended return from the magistrate, not order a new trial. S.C. Code Ann. § 18-7-80 (1985); Chapman, 334 S.C. at 390, 513 S.E.2d at 122. Here, the court found the return was sufficient to allow it to address Gore's issues on appeal. Gore does not appeal this finding. Accordingly, the finding that the return was sufficient is the law of the case. ML-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472.

Because the magistrate complied with the mandates of section 18-7-60 by filing a return and there was no basis to support ordering a new trial, we find no error with the circuit court's decision to affirm the magistrate court and to deny a new trial.

B. Ex Parte communications

Gore argues the magistrate erred in allowing A&I's counsel to prepare the return ex parte, and the prejudice he suffered from such a communication mandated a new trial.

Ex parte communications are strongly disfavored. Bakala v. Bakala, 352 S.C. 612, 623, 576 S.E.2d 156, 162 (Ct. App. 2003). However, "prejudice must be shown to obtain a reversal on this ground." Id.; see Burgess v. Stern, 311 S.C. 326, 331, 428 S.E.2d 880, 884 (1993) (finding no prejudice from a judge's ex parte communication with one party for assistance in drafting a final order where the judge's order was supported by the evidence). "While this Court explicitly condemns ex parte communications, we do not adopt, per se, the view that all orders consequently emanating therefrom in part or in whole are rendered invalid." Burgess, 311 S.C. at 331, 428 S.E.2d at 884.

Initially, we note that this issue is not preserved for appellate review. Although Gore questioned the validity pursuant to statute of allowing A&I to draft the return, Gore never argued before the circuit court that he was entitled to a new trial due to the ex parte communication. Issues not raised to or ruled upon by the lower court are not preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

In any event, we find Gore did not suffer any prejudice from the ex parte communications. The return was drafted well after the magistrate issued his written order. The return contained much of the same language as found in the order, with the addition of the summaries of testimony. Further, although the return failed to indicate that the magistrate refused to allow cross-examination of Edelen regarding other litigation, Edelen's testimony was merely cumulative to that of other witnesses. Thus, discrediting Edelen would not have affected the outcome of the trial. Gore did not dispute the accuracy of the rest of the return, and he failed to show that he was prejudiced by the ex parte communication.

Although the unfortunate ex parte communication between the magistrate and A&I's counsel is strongly disfavored, we find no prejudice suffered by Gore. Accordingly, the circuit court did not err by not granting a new trial and by affirming the magistrate court.

C. Lost tapes

Citing McKinley Music v. Glymph, 100 S.C. 200, 84 S.E. 715 (1915), Gore argues the circuit court erred in failing to grant him a new trial because the tapes of the magistrate court proceeding were lost. He argues that because the magistrate does not have records to make an amended return, the circuit court should have granted a new trial.

In McKinley Music, the magistrate court found in favor of the defendant, and the plaintiff appealed the verdict to the circuit court. The circuit court reversed, ordering a new trial because the defendant's testimony "was not fully taken down." McKinley, 100 S.C. at 202, 84 S.E. at 716. The supreme court affirmed, finding that an "amended or further return by the magistrate would not have been effective to supply testimony which had not been 'taken down.'" Id.

We find McKinley does not apply in the present case. The circuit court held the return was sufficient to address the issues Gore raised on appeal. Gore does not appeal that finding, and, as previously discussed, it is the law of the case. The return did not leave out any testimony. The only information omitted from the return was the magistrate's decision on questioning. Further, there is no evidence in the record that the magistrate lost the tapes of the proceeding or his notes. The arguments before the circuit court were that the magistrate had his notes and poor quality tapes, but he wanted submissions from counsel to aid him in preparing the return. Accordingly, we find the circuit court did not err in refusing to grant a new trial pursuant to McKinley.

II. Continuance

Gore argues the circuit court erred by requiring him to review the return and argue the case at the hearing despite the fact that the return was never properly served on him. We disagree.

This issue is not properly before us. Gore did not request a continuance when he was given a copy of the magistrate's return for the first time at the

appellate hearing before the circuit court. Because the lower court was not given the opportunity to consider whether Gore was entitled to a continuance, this issue is not preserved. Staubes, 339 S.C. at 412, 529 S.E.2d at 546 (holding issues not raised to and ruled upon by the lower court are not preserved for appellate review).

In any event, Gore's argument also fails on the merits. The decision to grant or deny a continuance is a matter within the lower court's discretion. Graybar Elec. Co. v. Rice, 287 S.C. 518, 520, 339 S.E.2d 883, 884 (Ct. App. 1986). Absent an abuse of discretion, the court's decision to deny a continuance will not be disturbed on appeal. Hamm v. South Carolina Pub. Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994).

Nothing in the record indicates that Gore was prejudiced by going forward with his appellate argument before the circuit court. He was given time to review the magistrate's return, and he informed the court that he excepted to the absence of the magistrate's ruling on cross-examination. Despite the return's failure to include a reference to the magistrate's ruling, the circuit court was able to rule upon Gore's complaint on appeal concerning this issue. The court found that because the decision to allow certain questioning was discretionary, there was no error for the magistrate to prohibit Gore's questioning about unrelated litigation. Reviewing these facts, we find no abuse of discretion in the failure to grant a continuance.

CONCLUSION

We find the magistrate's return complies with section 18-7-60, Gore was not prejudiced by ex parte contact between the magistrate and A&I's counsel, and the circuit court did not err in failing to grant a new trial pursuant to McKinley due to problems with the magistrate's tapes. Further, we find no error with the circuit court's failure to grant a continuance.

Accordingly, the circuit court's affirmance of the magistrate court's verdict is

AFFIRMED.[2]

GOOLSBY, and SHORT, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Cornelius Washington, Appellant.

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

Opinion No. 4033
Heard September 13, 2005 – Filed October 17, 2005

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

STILWELL, J.: Cornelius Washington appeals his conviction for murder, raising two evidentiary issues. We affirm.

FACTS

Washington was involved in a ten-year relationship with Andreia Cropper, ending in April or May of 2002. After the breakup, Cropper met Roy Cotman, a security guard. On August 28, 2002, Cropper and Cotman spent the day together, looking at apartments and fishing. When Cotman drove Cropper home that evening, Washington was waiting in the parking area. Soon after Cotman and Cropper's arrival, Washington stabbed Cotman. Cropper and Washington testified to different versions of the events surrounding the stabbing.

Cropper's Version of the Facts

As Cropper exited Cotman's vehicle, Washington hit Cropper's head with his fist. Cropper noticed knives in Washington's hands. Cropper ran to the door of her mother's home, knocked, and kicked the door. Washington stated, "There's no need knocking on the door because your mama, she ain't there. She's over at your aunt's house." Washington then began yelling at Cotman. Cropper told Washington to leave Cotman alone "because he had nothing to do with it." Washington leaned into the driver's side of Cotman's vehicle. Cropper grabbed the back of Washington's shirt and pulled him out of the car. Cropper next saw Cotman lying on the ground behind the car with blood on his shoulders.

Washington's Version of the Facts

When Cropper exited Cotman's vehicle, Washington stated, "Oh, still messing around with him, huh?" Cotman backed out of the parking area, but returned because Cropper and Washington began arguing. Cotman opened the door of his car and said, "Leave her alone." Cotman exited his vehicle, turned on the interior light of the vehicle, and bent over to look under the seats. Washington said, "I hope you're not going to get a weapon to hurt me." Cotman did not reply. Washington repeated, "I hope you not be

looking for no weapon to hurt me with." Cotman opened the back door of his vehicle and started searching under the back seats. Washington said, "Man, I not gonna let you get nothing out of that car to hurt me with." After warning Cotman a few more times, Washington unbuckled his knife and walked toward the car. Cotman jumped up and turned around. Washington began "swinging" his arms at Cotman because he thought Cotman might have a gun. After Cropper pulled Washington away from Cotman, Cotman walked toward the trunk and fell to the ground. Washington testified he did not realize Cotman was injured until Cotman "fell on his face." Before leaving the scene, Washington placed Cotman into the vehicle.

Other Facts

When police officers arrived at the scene, they found Cotman bleeding profusely and lying face down in the back seat of his car. An EMS paramedic testified Cotman was not breathing and had no pulse. EMS transported Cotman to the hospital where he was pronounced dead. A forensic pathologist testified Cotman suffered a stab wound above the collarbone, a stab wound on his chin, and two cuts on his right forearm.

Corporal Scott Kiblock of the Charleston Police Department was present at the crime scene. Kiblock drove Cropper to the Charleston Police Department headquarters to obtain her written statement. The interview process began approximately ninety minutes after the stabbing. During the interview, Cropper was noticeably upset and crying.

Officer Jeffrey Miller, a crime scene technician, investigated the scene and found blood on the front passenger seat, on the rear passenger seat, down the passenger side of the vehicle, and on the trunk. Officer Miller found no blood on the driver's seat or the interior panel of the driver's side. In addition, Officer Miller found a gun and a knife in the trunk of the vehicle. The gun was issued to Cotman in connection with his employment as a security guard.

Police officers found Washington shortly after the murder and arrested him. The officers found two knives on Washington. One knife had Cotman's blood on the blade.

The case proceeded to trial on August 25, 2003. Cropper, Washington, Officer Miller, Corporal Kiblock, and several other witnesses testified. The jury convicted Washington of murder. We affirm.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-19 (Ct. App. 2004).

LAW/ ANALYSIS

I. Exclusion of Gun and Knife

Washington argues the trial court erred in refusing to admit evidence of the gun and knife found in the trunk of Cotman's vehicle, alleging it was relevant to his claim of self-defense. We disagree.

Relevant evidence is "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. "To establish self-defense, the defendant must establish: (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger." State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997).

Cropper proffered testimony about the gun and knife. Cropper testified Cotman carried a firearm in his vehicle because he was a security guard. She further testified Cotman's gun was in the trunk of his car on the day of the murder because "he knew that I didn't like guns." When asked whether Cotman was armed with the gun at any point, Cropper responded: "No, it was in the trunk of his car." She added she never saw the trunk open. Cropper had no knowledge concerning the knife found in the trunk. Officer Miller also proffered testimony, stating he found the gun and knife in the trunk of Cotman's vehicle.

Washington testified Cotman exited his vehicle and searched underneath the front and back seats. Washington stated: "most people, like my grandfather and them, they carry they gun under the car seat, you know. So I don't see no other reason . . . for him to be . . . [looking] under the seat."

The trial court refused to admit testimony regarding the weapons found in the trunk of the vehicle on the ground of relevancy. The trial court found: "The Defense . . . has not been precluded from presenting a defense of self-defense or from presenting evidence of self-defense. The Court has merely made a ruling regarding the admissibility of the gun and knife that were found in a locked trunk." The trial court concluded the weapons were not "relevant or probative to any issue in this case."

Washington contends evidence of the gun and the knife in the trunk was relevant to show he reasonably believed he was in imminent danger. There is no evidence in the record, however, indicating Washington knew Cotman had weapons in his trunk on the day of the stabbing, nor is there evidence Washington was aware Cotman ever carried a weapon in his trunk. Furthermore, there is no evidence that Cotman searched his trunk prior to the stabbing. In fact, there was blood on the trunk, indicating that when Cotman approached the trunk, he had already been stabbed.

Finally, Washington presented his claim of self-defense. He testified to his own experience and his grandfather's custom of keeping weapons in vehicles. He explained his belief, at the time of the incident, that Cotman might have a weapon in the car. The trial court charged the jury on the law

of self-defense. Under these facts, we find no prejudicial error by the trial court in excluding evidence regarding weapons found in Cotman's trunk.

II. Hearsay, the Excited Utterance Exception, and Testimonial Evidence

Washington also argues the trial court erred in allowing Corporal Kiblock to testify regarding the contents of Cropper's written statement. The trial court found the statement qualified as an excited utterance. Washington argues the trial court erred in admitting the testimony because it was hearsay, was not an excited utterance, and it improperly bolstered Cropper's testimony. We find no reversible error.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is inadmissible as evidence unless an exception applies. State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996). One exception is the excited utterance exception. Rule 803, SCRE.

"Three elements must be met to show a statement is an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of the excitement; and (3) the stress must have been caused by the startling event or condition. The court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception." State v. Davis, 364 S.C. 364, 402-03, 613 S.E.2d 760, 780-81 (Ct. App. 2005) (internal citations omitted). The rationale for the excited utterance exception lies in the special reliability accorded to a statement uttered in spontaneous excitement that suspends the declarant's powers of reflection and fabrication. Id. at 403, 613 S.E.2d at 781. The passage of time between the startling event and the hearsay statement is not necessarily a dispositive factor. State v. Blackburn, 271 S.C. 324, 328, 247 S.E.2d 334, 336 (decided prior to the adoption of the Rules of Evidence and discussing the "excited utterance" exception as res gestae; noting that a time interval of over one hour, and up to eleven hours, did not necessarily eliminate a statement as part of the res gestae).

In the instant case, the stabbing was clearly a startling event. There is evidence Cropper was under stress caused by the stabbing at the time she made her statement. Corporal Kiblock testified in camera that the statement began approximately ninety minutes after the incident. According to Kiblock, Cropper was "extremely upset and distraught" as she gave her statement. She cried throughout the statement, stopping at times to regain her composure. Finally, the stress was caused by the startling event of her ex-boyfriend stabbing her new boyfriend.

In addition, although Washington argues that a "narrative" statement given to police is inadmissible under this exception, numerous South Carolina cases have held otherwise. See State v. Burdette, 335 S.C. 34, 43, 515 S.E.2d 525, 530 (1999) (providing an extensive list of instances in which the court has admitted statements to police pursuant to the former common law res gestae exception).

Washington relies in part on Crawford v. Washington, 541 U.S. 36 (2004), an important case decided by the United States Supreme Court subsequent to Washington's trial. However, we find Crawford does not apply. In Crawford, the prosecution introduced tape-recorded statements made to police by Crawford's wife, Sylvia. Id. at 38-40. Resorting to the application of the marital privilege, which generally bars a spouse from testifying without the other spouse's consent, Sylvia did not testify at trial, and was therefore considered an unavailable witness. Id. at 40. On appeal, the court concluded that when the declarant is unavailable, hearsay statements that are testimonial in nature can be admitted into evidence only when the declarant has previously been subjected to cross-examination. Id. at 68. The court's analysis was rooted in a defendant's Sixth Amendment[1] right to confrontation. In the instant case, had Cropper been unavailable as a witness at trial, Crawford would be controlling and the admission of her statement likely error.[2] However, because Cropper was available and did in

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI.

[2] Although the Supreme Court failed to define what constitutes a testimonial statement, it concluded, "[s]tatements taken by police officers in

fact testify at trial, a confrontation clause analysis under Crawford is not required.

We agree with Washington that Cropper's statement constituted hearsay. However, we find, like the trial court, that the statement qualified for admission under the excited utterance exception. Finally, we find the statement did not improperly bolster Cropper's testimony, as her statement contained numerous differences compared to her direct testimony. See Ingle v. State, 348 S.C. 467, 474, 560 S.E.2d 401, 404 (2002); Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).

CONCLUSION

For the reasons stated herein, the trial court's decision is

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.

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the course of interrogations are . . . testimonial under even a narrow standard." Crawford, 541 U.S. at 52.