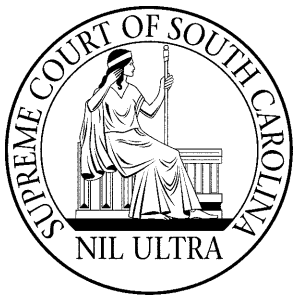

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

January 27, 2004

ADVANCE SHEET NO. 4

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

	Page
25772 - Main Corporation v. J. Thomas Black	15
25773 - Willie Robertson, et al. v. First Union National Bank, etc., et al.	20
25774 - Sunset Cay, LLC v. The City of Folly Beach	22
25775 - David E. Thompson v. State	37
25776 - State Auto Property, et al. v. David W. Raynolds, et al.	42
25777 - Angel Ann Brown Gilliland v. John Doe, an unknown motorist	50
25778 - Ferrell Cothran, et al. v. Alvin Brown	56
25779 - Esau Heyward v. Samuel Christmas	63
25780 - Jerry B. McKee v. State	71
Order - In Re: Amendments to Rule 4(f)(4) of Rule 413 and 502 , SCACR	83

UNPUBLISHED OPINIONS

2004-MO-003 - Alfred W. LaSure v. State
(Edgefield County - Judge Gary E. Clary and Judge G. Thomas Cooper, Jr.)

2004-MO-004 - Jody Bryant v. State
(Orangeburg County - Judge Diane Schafer Goodstein and Judge Luke N. Brown

PETITIONS - UNITED STATES SUPREME COURT

25704 - Charles Sullivan v. SC Dept. of Corrections	Denied 01/20/04
25706 - David Gibson and Donnie Gibson v. State	Pending

PETITIONS FOR REHEARING

25761 - ReDonna Maxwell v. Beverly Genez and John Doe	Denied 01/23/04
25762 - State v. Kenneth Curtis	Pending
25763 - State v. John Boyd Frazier	Pending
25768 - In the Matter of C. T. Wolf	Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

25755 - Cheap-O's Truck Stop v. Chris Cloyd Granted

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

3727-Wade M. Jenkins v. Janna Grooms Watkins Jenkins 84

3728-The State v. Bynum Rayfield 91

UNPUBLISHED OPINIONS

2004-UP-24-The State v. Leonard Lee Foster
(Cherokee, Judge Gary E. Clary)

2004-UP-25-The State v. Donnie Allen Dooley
(Aiken, Judge James C. Williams, Jr)

2004-UP-026-The State v. Richard Ellisor
(Lexington, Judge James R. Barber, III)

2004-UP-027-The State v. Christy Lanisha Harrison
(Florence, Judge James E. Brogdon, Jr.)

2004-UP-028-Gina Marlowe McDowell v. Kevin L. McDowell
(Horry, Judge James F. Fraley, Jr.)

2004-UP-029-City of Myrtle Beach v. S.C. Dep't of Transportation and
Topp, Inc. d/b/a Mr. Sub
(Horry, Judge J. Stanton Cross, Master in Equity)

2004-UP-030-Jerry Meehan v. Mary Elizabeth Meehan et al.
(Anderson, Judge James W. Johnson, Jr.)

2004-UP-031-Ex parte: Karen Clark v. The State In Re: In the interest of Lauren
C.F.
(Richland, Judge H. Bruce Williams and Judge Leslie K. Riddle)

2004-UP-032-The State v. Ronald Brewer
(Dorchester, Judge Diane Shafer Goodstein)

2004-UP-033-Wedgefield Plantation Association v. Cindy M. Chavis and Charles J. Chavis
(Georgetown, David J. Mills, Special Referee)

2004-UP-034-Sherman Woodson and Mary Ann Woodson v. Steven Todd Golden
(Anderson, Judge Georgia V. Anderson)

2004-UP-035-S.C. Dep't of Social Services v. Jessica Forelifer and Christopher Ashton Boyer
(Hampton, Judge Jane D. Fender)

2004-UP-036-The State v. Boyce Travon Suber
(Greenville, Judge C. Victor Pyle, Jr.)

2004-UP-037-The State v. Alejandro Perez
(Saluda, Judge William P. Keesley)

2004-UP-038-The State v. Jonathan Toney, Jr.
(Sumter, Judge Clifton Newman)

2004-UP-039-SPD Investment Company, LLC v. The County of Charleston et al.
(Charleston, Judge Roger M. Young)

2004-UP-040-Robert C. Spinner and Shirley Spinner v. William Adams and Celeste Adams
(York, Judge John Buford Grier)

2004-UP-041-The State v. Kenneth M. Turner
(Spartanburg, Judge J. Derham Cole)

2004-UP-042-The State v. Michael Angel White
(Lexington, Judge Marc H. Westbrook)

2004-UP-043-The State v. Scott Ellison
(Richland, Judge Henry F. Floyd)

2004-UP-044-The State v. Randall Theodore Adkins
(Anderson, Judge J. Cordell Maddox, Jr.)

2004-UP-045-The State v. Craig L. Atchinson #1
(Newberry, Judge James W. Johnson, Jr.)

2004-UP-046-Albert Gerald Graham v. Joyce Carlene Graham
(Horry, Judge Mary E. Buchan)

2004-UP-047-Matrix Capital Bank v. Earl Brooks a/k/a Earl Lawrence Brooks, Jr. et al.
(Orangeburg, Judge Olin D. Burgdorf, Master in Equity)

2004-UP-048-The State v. Daniel Moorer
(Dorchester, Judge Diane Schafer Goodstein)

2004-UP-049-Ann Fried v. Dennis A. Fried
(Charleston, Judge Judy C. Bridges)

2004-UP-050-James Lindsey v. Spartan Roofing Company, Inc.
(Spartanburg, Judge John W. Kittredge)

2004-UP-051-David J. Frantzis v. Kristen B. Frantzis
(Berkeley, Judge Wayne M. Creech)

2004-UP-052-Joe Louis Miller, Sr., individually and as legal guardian of Joe Louis Miller, Jr., and Sophia Miller, both minors v. Sherah L. Stark
(York, Judge Lee S. Alford)

2004-UP-053-The State v. Anthony Willard Coe
(Richland, Judge William P. Keesley)

2004-UP-054-Leroy Canzater v. City of Columbia
(Richland, Judge James R. Barber)

PETITIONS FOR REHEARING

3684-State v. Sanders	Pending
3691-Perry v. Heirs of Charles Gadsden	Denied 1/22/04
3693-Evening Post v. City of North Charleston	Pending
3696-Goodwin v. Johnson	Pending
3699-Rich v. Walsh et al.	Denied 1/22/04
3701-Sherman v. W & B Enterprises, Inc.	Pending

3703-Sims v. Hall	Pending
3705-SCDOT v. Thompson	Denied 1/22/04
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg County	Pending
3708-State v. Blalock	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G&P Trucking v. Parks Auto Sales	Pending
3713-State v. Bryson	Pending
3716-Smith v. Doe	Pending
3717-Palmetto Homes v. Bradley	Pending
3718-McDowell v. Travelers Property	Denied 1/22/04
3719-Schmidt v. Courtney	Pending
3720-Quigley v. Rider	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-620-Ex parte Reliable Bonding (Sullivan)	Pending
2003-UP-634-County of Florence v. DHEC et al.	Pending
2003-UP-640-State v. Bobby Joe Brown #1	Pending
2003-UP-655-TCF Corp. v. Stadium Club Partners	Denied 1/22/04

2003-UP-657-Wood v. Wood	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Denied 1/22/04
2003-UP-664-SCDSS v. Gathings	Denied 1/22/04
2003-UP-666-Florence Steel Erectors v. S.C. Second Injury Fund	Pending
2003-UP-669-State v. Owens	Denied 1/22/04
2003-UP-672-Addy v. Attorney General	Denied 1/22/04
2003-UP-678-SCDSS v. Jones	Denied 1/22/04
2003-UP-686-Melette v. Hannaford Bros.	Denied 1/22/04
2003-UP-687-State v. Gwinn	Denied 1/22/04
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-694-State v. Stokes	Denied 1/22/04
2003-UP-696-State v. Richardson	Pending
2003-UP-697-Welborn v. Pharr Yarns	Denied 1/22/04
2003-UP-703-Beaufort County v. Town of Port Royal	Denied 1/22/04
2003-UP-705-State v. Floyd	Denied 1/22/04
2003-UP-706-Brown v. Taylor	Denied 1/22/04
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-716-State v. Perkins	Denied 1/22/04

2003-UP-718-Sellers v. C. D. Walters	Denied 1/22/04
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-743-State v. Gregory	Denied 1/23/04
2003-UP-745-Doe v. Fisher	Denied 1/22/04
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3565-Ronald Clark v. SCDPS	Pending
3585-State v. Murray Roger Adkins, III	Pending
3588-In the Interest of Jeremiah W.	Pending
3596-Collins Ent. v. Coats & Coats et al.	Pending
3599-State v. Grubbs	Pending
3600-State v. Lewis	Pending
3602-State v. Al-Amin	Pending
3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending

3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending
3623-Fields v. Regional Medical Center	Pending
3626-Nelson v. QHG of S.C. Inc.	Pending
3627-Pendergast v. Pendergast	Pending
3629-Redwend Ltd. v. William Edwards et al.	Pending
3633-Murphy v. NationsBank, N.A.	Pending
3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3640-State v. Adams	Pending
3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart Stores	Pending
3646-O'Neal v. Intermedical Hospital	Pending
3647-State v. Tufts	Pending
3649-State v. Chisolm	Pending
3650-Cole v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Pending
3655-Daves v. Cleary	Pending

3656-State v. Gill	Pending
3658-Swindler v. Swindler	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
3671-White v. MUSC et al.	Pending
3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending
2002-UP-670-State v. Bunnell	Pending
2002-UP-734-SCDOT v. Jordan	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-111-State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-113-Piedmont Cedar v. Southern Original	Pending

2003-UP-116-Rouse v. Town of Bishopville	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending
2003-UP-161-White v. J. M Brown Amusement	Pending
2003-UP-196-T.S. Martin Homes v. Cornerstone	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-245-Bonte v. Greenbrier Restoration	Pending
2003-UP-270-Guess v. Benedict College	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Panther v. Catto Enterprises	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-348-State v. Battle	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-376-Heavener v. Walker	Pending

2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-404-Guess v. Benedict College (2)	Pending
2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Bates v. Fender	Pending
2003-UP-433-State v. Kearns	Pending
2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-State v. Nellis	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending

2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-508-State v. Portwood	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
0000-00-000-Hagood v. Sommerville	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Main Corporation and B. J. Johnson, Petitioners,

v .

J. Thomas Black, Ronnie M. Givens, George S. Maroska, C. Dennis McKittrick, Berlin G. Meyers, Jr., Thomas W. Myers, Sr., William D. Price, M.D., Rutherford P.C. Smith and Lloyd B. Williams, Jr., individually and as Partners in the Summerville Town Square Partnership, A South Carolina General Partnership, and the Summerville Town Square Partnership, a South Carolina General Partnership, Alexander's Station Limited Partnership, The Williams Co., Inc., General Partner & other unknown, Defendants,

Of Whom J. Thomas Black, Ronnie M. Givens, George S. Maroska, C. Dennis McKittrick, Berlin G. Meyers, Jr., Thomas W. Myers, Sr., William D. Price, M.D., Rutherford P.C. Smith and Lloyd B. Williams, Jr., individually and as Partners in

the Summerville Town Square Partnership, A South Carolina General Partnership, and the Summerville Town Square Partnership, a South Carolina General Partnership, Alexander's Station Limited Partnership, The Williams Co., Inc., General Partner are, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Jackson V. Gregory, Circuit Court Judge
Dennis O'Neill, Arbitrator

Opinion No. 25772
Heard December 3, 2003 – Filed January 20, 2004

AFFIRMED AS MODIFIED

James Earle Reeves, of Summerville, for Petitioners.

Mary L. Arnold, of Mt. Pleasant, for Respondents.

JUSTICE PLEICONES: We granted certiorari to determine whether the Court of Appeals properly dismissed an appeal from a binding arbitration order. We affirm as modified.

FACTS

Petitioners brought suit against respondents to determine title to a strip of land located behind petitioners' property. The parties consented to an order issued by the trial judge referring the case to binding arbitration. In the order, the trial judge stated, among other things, that the parties consented to "any appeal of the arbitrator's finding to be directed to the South Carolina Court of Appeals, pursuant to the South Carolina Appellate Court Rules."[1] The arbitrator issued an award, and petitioners filed a motion to amend the arbitration award with the arbitrator, and the arbitrator denied the motion. No motion was filed with the circuit court.

Petitioners filed a notice of appeal of the arbitrator's ruling with the Court of Appeals. The Court of Appeals issued an order dismissing the appeal ex mero motu stating that "S.C. Code Ann. § 15-48-200 (Supp. 2001) governs the appealability of orders respecting arbitration and specifically enumerates the orders which may be appealed…The statute governing arbitration does not provide for an appeal to this court directly from the award of the arbitrator." The Court of Appeals dismissed the appeal without prejudice.

ISSUE

Did the Court of Appeals err in dismissing an appeal of an arbitrator's order on the grounds that it lacked jurisdiction?

ANALYSIS

The Court of Appeals did not err in dismissing the appeal of the arbitrator's order, as there was no court order that can be the subject of an appeal. In the case at hand, the parties consented to arbitration, and the trial judge ordered the case to be sent to an arbitrator. At that point, the circuit court was divested of jurisdiction over the case. See Mills v. William Clarke

[1] The trial judge did not state which Appellate Rule provides for such an appeal.

Jeep Eagle, Inc., 321 S.C. 150, 152, 467 S.E.2d 268, 269 (Ct. App. 1996)(Once a party files a motion to confirm an arbitration award with the circuit court, the circuit court *resumes jurisdiction* of the case)(emphasis supplied).

Under the Uniform Arbitration Act, a party may move the circuit court to confirm an award,[2] vacate an award,[3] or modify or correct an award.[4] Neither the petitioners nor the respondents have moved before the circuit court pursuant to any of these statutory provisions. Therefore, the circuit court has not *resumed* jurisdiction over the case. Mills, 467 S.E.2d at 269. In essence, the case has not reentered the judicial system until the parties choose to have the award ruled upon in some way by the circuit court.

South Carolina Code Ann. § 15-48-180 (Supp. 2002) states that making an agreement providing for arbitration in South Carolina confers jurisdiction on the court to "enforce the agreement under this chapter and to enter judgment on an award thereunder." The only appeals that may be taken under the Uniform Arbitration Act are from orders issued by the circuit court pursuant to S.C. Code Ann. § 15-48-200 (Supp. 2002). If the circuit court has not resumed jurisdiction and issued one of the orders enumerated in Section 15-48-200, there is no court order that can be the subject of an appeal. Since the circuit court did not resume jurisdiction over the case, the Court of Appeals cannot have jurisdiction over the case. S.C. Code Ann. § 14-8-200 (a) (Supp. 2002) (The Court of Appeals "shall have jurisdiction over any case in which an appeal is taken *from an order, judgment, or decree of the circuit or family court*") (emphasis supplied).

CONCLUSION

The trial judge stated in his Consent Order to Arbitrate that any appeal of the arbitrator's findings be directed to the South Carolina Court of

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[2] S.C. Code Ann. § 15-48-120 (Supp. 2002).

[3] S.C. Code Ann. § 15-48-130 (Supp. 2002).

[4] S.C. Code Ann. § 15-48-140 (Supp. 2002).

Appeals. Petitioners followed these directions, and filed the appeal with the South Carolina Court of Appeals, even though jurisdiction was not resumed by the circuit court. We affirm the dismissal of the appeal by the Court of Appeals. However, due to the exceptional circumstances in this case, we dismiss the case without prejudice to any party's right to take any action allowed by S.C. Code Ann. §§ 15-48-120, et. seq. (Supp. 2002). The timing deadlines required under Sections 15-48-120, et. seq. were tolled during the period of this appeal.

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Willie Robertson, Raymond Brown and Richard Pinckney, individually and d/b/a Hollywood Financial Enterprises, Inc., Petitioners,

v.

First Union National Bank formerly known as First Union National Bank of South Carolina and Atlantic Appraisals, Respondents,

v.

United States of America by and through its agency, The Department of Treasury-Internal Revenue Service, South Carolina Department of Revenue and Taxation, Charleston County Business License User Fees Department, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25773
Heard November 18, 2003 - Filed January 27, 2004

DISMISSED AS IMPROVIDENTLY GRANTED

Edward M. Brown, of Edward M. Brown & Associates, of Charleston, for Petitioners.

Joe S. Dusenbury, Jr., of the South Carolina Department of Revenue, of Columbia; LaVerne H. Manning, of the U.S. Attorney's Office, of Columbia; Samuel W. Howell, IV, of Howell & Linkous, of Charleston; Stephen P. Groves, Sr., and H. Michael Bowers, of Nexsen, Pruet, Jacobs, Pollard & Robinson, of Charleston; W. Andrew Gowder, Jr., and Amanda Rajsich, of Pratt-Thomas, Epting & Walker, of Charleston, for Respondents.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002). After careful consideration, we dismiss certiorari as improvidently granted.

DISMISSED.

TOAL, C.J., MOORE, WALLER, PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sunset Cay, LLC, Appellant,

v.

The City of Folly Beach, Respondent.

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

Opinion No. 25774
Heard December 4, 2003 - Filed January 27, 2004

REVERSED

John M.S. Hoefer and K. Chad Burgess, both of Willoughby & Hoefer, PA, of Columbia, for Appellant.

Sandra J. Senn and Stephanie P. McDonald, both of Charleston, for Respondent.

JUSTICE BURNETT: This case presents the issue of whether a municipality is required by the state Constitution and statutes to provide sewer service to all residents when it provides such service to any resident.

FACTS

In 1983, city council of the City of Folly Beach ("City") enacted an ordinance authorizing the construction of a sewer system following approval of the plan in a voter referendum. City built a system serving the central commercial district, using mostly state and federal grant monies. The system collects untreated wastewater and pumps it across the Folly River to an interconnection with the James Island Public Service District. The wastewater is then transported to the Charleston Commission for Public Works treatment and disposal.

In 1984, City adopted Ordinance No. 84-13, which governs the operation and extension of the sewer system. User charges fund the operation and maintenance of the system. Extensions must be funded and constructed by the person requesting them. Detailed plans of proposed extensions prepared by a registered engineer must be submitted to City for approval.

In February 2000, City enacted Ordinance No. 29-99, which stated "[t]here shall be no expansion of the sewer system beyond the commercial, C-1 and C-2, districts within the corporate boundaries of the City of Folly Beach . . . without an affirmative vote of the Folly Beach City Council." In July 2000, City enacted Ordinance No. 14-00, which stated "sewer service shall not be extended outside of the existing C-1 and C-2 Districts to serve any additional buildings or residential units except residential units adjacent to the existing taps on the original gravity sewer line at the time of this ordinance." The ordinance preamble notes the original grants were to provide sewer service to the central commercial district; that it is not possible to foresee increased demands within that district; that City depends on two other entities to transport and treat the waste; and that City "is facing significant capital and overhead increases just to service the existing sewer."[1]

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[1] In April 2003, City amended the ordinance at issue in this appeal, codified at § 52.104 of the city ordinances, to add the phrase "without an affirmative vote of the City Council." City asserts it passed the

In September 2001, Developer acquired about seven acres of land located within City's limits. Developer bought the property from the O'Rourks, who had tried but failed to obtain sewer service from City. Developer has paid city taxes on the property. Developer proposes to build eight residential duplexes on the property, but needs sewer service to do so. Without sewer service, Developer may be limited to building fewer duplexes with septic tanks.

Developer's property is located at the far western end of the island. The extension would require some 4,000 feet of new pipeline – equal to the amount already in place to serve the central commercial district. The extension would serve few residences and likely would require boring through sensitive marshlands. It would require one or more additional pumping stations and additional staff, maintenance, and operating expenses, City asserts. The residents of Folly Beach neither need nor desire an island-wide sewer system "for a myriad of ecological and financial reasons," City contends.

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amendment in response to Developer's lawsuit and to state the obvious – that council could change the ordinance or allow extensions. Section 52.104 in its present form states:

> The sewer service shall not be extended outside of the existing C-1 and C-2 Districts to serve any additional buildings or residential units except residential units adjacent to the existing taps on the original gravity sewer line at the time of this ordinance <u>without an affirmative vote of the City Council</u>.

On appeal, Developer initially focused on the version of the ordinance that does not contain the underlined phrase. City responded the 2003 amendment makes the appeal moot. In reply, Developer clarified it has challenged <u>all</u> ordinances purporting to limit expansion of the sewer system. We agree with Developer that the case is not moot. We focus our analysis on the present version of the ordinance contained in this footnote.

Developer's property is zoned C-3 (marine commercial). Developer asserts the system has been extended at least ten times over the years to serve various commercial and residential properties, including at least one property zoned C-3 that is not located within the central commercial district. City concedes the system has been expanded, but asserts the system still is largely confined to the core commercial district as originally planned. Expansion of the system apparently has been a controversial issue among residents since it was built, with the majority of residents and council members choosing to limit expansion and the development likely to follow.

In March 2002, Developer's attorney wrote City, asking it "to acknowledge that it will accept the extension of sanitary sewer facilities" to Developer's property, with Developer funding the cost of the extension. City responded by letter, saying it "cannot extend the system or accept any extension under the existing ordinance," but Developer was welcome to request an extension from city council.

In April 2002, Developer brought a declaratory judgment action against City, alleging City is required to provide sewer service under the state Constitution and statutes and asking the court to enjoin enforcement of ordinances limiting expansion of the sewer system outside the central commercial district. Developer filed a motion for partial summary judgment, seeking a declaration that the ordinances on their face are contrary to state law and unconstitutional, and an order enjoining enforcement of the ordinances. The City subsequently filed a motion for summary judgment, contending the ordinances are valid under the state Constitution and statutes.

The circuit court dismissed the case without prejudice, ruling Developer's statutory and constitutional challenges to the ordinances were not ripe for review under the Uniform Declaratory Judgments Act. Developer timely filed a Rule 59(e), SCRCP, motion, arguing the issues were ripe for review and asking the Court to address them. The circuit court denied the Rule 59 motion. This appeal follows.

ISSUES

I. Did the circuit court err in ruling that Developer's statutory and constitutional challenges to the City's ordinance were not ripe for review under the Uniform Declaratory Judgments Act?

II. Does the City have the power, pursuant to the state Constitution and statutes, to enact an ordinance that on its face limits expansion of the sewer system unless city council affirmatively votes to approve an expansion?

III. Does an ordinance limiting expansion of the City's sewer system unless city council affirmatively votes to approve an expansion violate Developer's constitutional right to equal protection under the law?

IV. Does an ordinance limiting expansion of City's sewer system unless city council affirmatively votes to approve an expansion violate Developer's constitutional right to substantive due process of law?

DISCUSSION

I. Declaratory Judgment Act

City contends Developer was required to submit an application, including a detailed construction proposal prepared by a registered engineer, and follow the extension process outlined in the ordinance. Developer's one letter asking City to acknowledge it would grant an extension and City's one letter in response did not constitute an application, City asserts. The circuit court declined to rule on the merits of Developer's arguments, and agreed with City the case was not ripe for review because Developer had not applied for a sewer extension.

Developer argues the circuit court erred in ruling its statutory and constitutional challenges to City's ordinance were not ripe for review under the Uniform Declaratory Judgments Act. See S.C. Code Ann. §§ 15-53-10 to -140 (1976 & Supp. 2002). Developer asserts its challenges to the ordinance were ripe for review because the record was sufficiently developed and "there would be no point in [Developer] exhausting a remedy that does not exist." We agree.

The Declaratory Judgments Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20 (1976). "Any person . . . whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (1976); see also Rule 57, SCRCP.

Despite the Act's broad language, it has its limits. An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act. Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970); City of Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957). A declaratory judgment should not address moot or abstract matters. Waller v. Waller, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951).

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. Power v. McNair, 255 S.C. at 154, 177 S.E.2d at 553. "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Power v. McNair, 255 S.C. at 154, 177 S.E.2d at 553; Graham v. State Farm Mutual Automobile Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995)

(same); Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (same).

The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. Waller, 220 S.C. at 223, 66 S.E.2d at 882. The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship. Graham, 319 S.C. at 71, 459 S.E.2d at 845; Power, 255 S.C. at 154, 177 S.E.2d at 553; Waller, 220 S.C. at 223, 66 S.E.2d at 882; Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 16, 567 S.E.2d 881, 888-89 (Ct. App. 2002).

Our courts have found the existence of a justiciable controversy, for example, in determining whether a vehicle insurance policy should be reformed to include underinsured motorist coverage, Graham, supra; in determining whether the consolidation of two municipalities resulted in the merger of municipally owned utility systems, City of Columbia, supra; in the determination of heirs' contingent or vested interest under a will, Waller, supra; in deciding whether the court should issue a writ of mandamus directing the sheriff to accept a non-cash bid at a judicial sale, Holden, supra; and in a dispute involving homeowners' challenge to amendments of their subdivision's restrictive covenants, Pond Place Partners, supra.

Furthermore, we agree with Developer that a party is not required under the Declaratory Judgments Act to spend time and money complying with what allegedly is an invalid or unconstitutional ordinance. See Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 455, 415 S.E.2d 801, 805 (1992) (finding a justiciable controversy in a pre-election review of a voter-initiated ordinance and reasoning that, when an ordinance is alleged to be facially defective, "it is wholly unjustified to allow voters to give their

time, thought, and deliberation to the question of desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain") (quoting Schultz v. City of Philadelphia, 122 A.2d 279, 283 (1956)).

A justiciable controversy exists in the present case. City has enacted an ordinance limiting the expansion of its sewer system. Developer, a city resident, has purchased property within the City and wishes to build houses on it. Developer's plans are directly affected by the ordinance at issue. Developer has challenged the validity of the ordinance on statutory and constitutional grounds. The controversy is real and substantial; it is not contingent, abstract, or hypothetical. The validity of the ordinance and the parties' rights under it as they presently exist will be resolved by our decision.

II: Power to enact and validity of challenged ordinance

Developer argues City does not have the power to enact an ordinance that on its face limits expansion of the sewer system unless city council affirmatively votes to approve the expansion. City does not have the discretion to preclude residents of particular areas from obtaining a sewer extension because it has a statutory and constitutional duty to make such service equally available to all residents if it is available to any, Developer argues. We disagree.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999). The burden of proving the invalidity of an ordinance is on the party attacking it. Id. Determining whether an ordinance is valid is a two-step process. First, the Court must determine whether a municipality has the power to adopt the ordinance. If no power exists, the ordinance is invalid. Second, the Court must determine whether the ordinance is consistent with the Constitution and general laws of this state. Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563

S.E.2d 651, 654 (2002); Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000).

The Constitution provides, in pertinent part, that "[a]ny incorporated municipality may, upon a majority vote of the electors of such political subdivision who shall vote on the question, acquire by initial construction or purchase and may operate gas, water, sewer, electric, transportation or other public utility systems and plants." S.C. Const. art. VIII, § 16 (emphasis added).

"Each municipality of the State . . . may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State . . . respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving the health, peace, order, and good government in it. . . ." S.C. Code Ann. § 5-7-30 (Supp. 2002). See also Hospitality Ass'n of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995) (only limit on broad grant of power to municipalities in § 5-7-30 is the regulation or ordinance be consistent with the Constitution and general laws).

More specifically, "any city or town may . . . [c]onstruct, purchase, operate and maintain waterworks and electric light works within or without, partially within and partially without, their corporate limits for the use and benefit of such city or town and the inhabitants thereof. . . ." S.C. Code Ann. § 5-31-610 (1976) (emphasis added). "Upon the written request of any property owner requesting the city or town to extend to him water and sewer service and agreeing to pay the cost thereof the city or town may provide such service. . . ." S.C. Code Ann. § 5-31-1510 (1976) (emphasis added). A municipality may impose charges and assessments on users and specified property owners to fund the cost of constructing, operating, and maintaining a sewer system. S.C. Code Ann. § 5-31-2010 to -2040 (1976).

No constitutional or statutory provision imposes a duty on City to provide sewer service to all residents if it provides such service to any. The provisions consistently use the permissive term "may."

See Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 365, 307 S.E.2d 223, 224 (1983) (agreeing with lower court's ruling that legislature used the word "may" in statute as permissive and not mandatory); Graham v. Alliance Ins. Co., 192 S.C. 370, 6 S.E.2d 754, 755 (1940) (statute providing persons interested in controversy "may" be made defendants is permissive and not mandatory).

Moreover, § 5-31-610 specifically states that utility services may be provided "partially within" corporate limits. The Legislature has recognized that a municipality – for financial or other legitimate reasons – may be able to provide sewer service or other utilities for only part of its residents. See, e.g., Riverwoods, 349 S.C. at 384, 563 S.E.2d at 654 ("cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the Legislature").

The circuit court correctly noted any resident must be able to apply for sewer service, as Developer is free to do in this case. However, the decision whether to grant a sewer extension request generally must be left to the sound discretion of municipal leaders, who are charged with considering all the various factors, including financial and economic implications, aesthetic and environmental concerns, feasibility of a particular plan, and the effect of an extension on the municipality's long-range zoning, planning, or organization. See Annot. Right to Compel Municipality to Extend Its Water System, 48 A.L.R.2d 1222 (1956) (citing cases in which courts have concluded, although a city-owned water system should impartially supply all applicants who are similarly situated, it generally has been held a municipality has the discretion to decide whether to extend its system to an entirely new section within its limits; municipality usually cannot be compelled to do so at the instance of a prospective consumer, at least if its basis for refusing is in any way reasonable and does not involve any abuse of discretion or arbitrary or fraudulent action).

Developer relies primarily on three cases in support of its argument, asserting they stand for the proposition that a city-owned utility has a duty to make service available to all its residents: Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911); Looper v. City of

Easley, 172 S.C. 11, 172 S.E. 705 (1934), overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985); and Sloan v. City of Conway, 347 S.C. 324, 555 S.E.2d 684 (2001).

In Childs, a non-resident water customer sought an injunction to prevent the city of Columbia from cutting off his water or increasing his rates. In rejecting the customer's contract-based arguments and explaining the different status of residents and non-residents, the Court stated: "The statute passed in pursuance of the constitutional provision[2] . . . expressed the limitation of duty to residents of the city implied in the Constitution by the provision that the construction and operation of municipal waterworks should be 'for the use and benefit of said cities and towns and its citizens.'" Childs, 87 S.C. at 570, 70 S.E.2d at 298.

In Looper, the Court rejected a non-resident business owner's attempt to hold the city-owned electrical utility liable in contract or tort for failing to install equipment designed to prevent fires caused by lightning strikes on the power lines. The Court noted that the provision of electricity to either residents or non-residents was a governmental function, but "the main difference is that the municipal authorities may be required to furnish the inhabitants of the municipality, while they may not be forced to furnish those living beyond the limits of the municipality." Looper, 172 S.C. at 15, 172 S.E. at 706-707.

In Sloan, the Court rejected various challenges to a municipality's decision to charge higher water rates to non-residents than residents. Relying on Childs, the Court again noted the distinction between residents and non-residents in relations with a city-owned utility.

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[2] The statute and constitutional provision under consideration in Childs were the predecessors of S.C. Code Ann. § 5-31-610 and S.C. Const. art. VIII, § 16.

Developer's reliance on Childs, Looper, and Sloan is misplaced. None of those cases in any way suggests a municipality has a duty to provide a given utility service to everyone if it provides it to anyone. At most, Childs can be read to say that a municipality owes a duty to its residents to operate a publicly owned utility for the use and benefit of the residents. The word "duty" is not mentioned in Looper, although the Court noted in passing that a municipality "may" be required to provide a given service to residents but not non-residents. Sloan simply reiterates that residents and non-residents do not always stand on equal footing when dealing with a city-owned utility.

City properly exercised its legislative power to enact the challenged ordinance, and the ordinance is not contrary to the cited statutory or constitutional provisions.

III. Equal protection

Developer contends an ordinance limiting expansion of City's sewer system unless city council affirmatively votes to approve an expansion violates its constitutional right to equal protection under the law. City has treated residents outside the C-1 and C-2 districts as "second-tier inhabitants." The pertinent class includes "all of City's inhabitants," and City's failure to treat all of them alike under similar circumstances violates the equal protection clause, Developer argues. We disagree.

No person shall be denied the equal protection of the laws. S.C. Const. art. I, § 3. To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. Jenkins v. Meares, 302 S.C. 142, 146-147, 394 S.E.2d 317, 319 (1990)). The rational basis standard, not strict scrutiny, is applied in this case because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage. See Fraternal Order of Police v. S.C. Dep't of Revenue, 352 S.C. 420, 433, 574

S.E.2d 717, 723 (2002); Bryant v. Town of Essex, 564 A.2d 1052, 1056 (Vt. 1989) (provision of sewer service does not implicate fundamental right).

A legislative enactment will be sustained against constitutional attack if there is any reasonable hypothesis to support it. Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 504, 331 S.E.2d 335, 338-39 (1985) (citing Thomas v. Spartanburg Ry., Gas & Elec. Co., 100 S.C. 478, 85 S.E. 50 (1915)). The Court must give great deference to a legislative body's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue. Furthermore, "[t]he classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge." Foster v. South Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992).

In this case, City has created two classes – one consisting of residents inside the C-1 and C-2 districts and one consisting of residents outside those districts. City generally has treated residents within each of those classes alike under similar circumstances, although City admits it previously has extended sewer service to at least one property in a C-3 district.

The legislative purposes sought to be achieved by City's classifications are (1) the provision of sewer service to residents primarily located within City's central commercial district and (2) limiting substantial expansion of sewer service because the majority of council members and residents wish to prevent or limit the additional operating and maintenance costs, environmental impact, and development likely to follow. Thus, the classifications bear a reasonable relation to the legislative purposes because they accomplish those purposes.

Furthermore, the classifications rest on rational bases – providing sewer service to a limited area due to the financial burden of additional operating and maintenance costs for all users, aesthetic and

environmental concerns, and the effect on City's long-range zoning, planning, or organization. The challenged ordinance does not violate Developer's right to equal protection under the law.

IV. Substantive due process

Developer argues an ordinance limiting expansion of City's sewer system unless city council affirmatively votes to approve an expansion violates its constitutional right to substantive due process under the law. We disagree.

No person shall be deprived of life, liberty, or property without due process of law. S.C. Const. art. I, § 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Worsley Companies, Inc. v. Town of Mt. Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000). A property owner does not have a protected property interest in connecting to a sewer line. Id. As explained in Issue 2, the state Constitution and statutes generally grant a municipality the discretion to decide whether to extend sewer service to additional residents within its corporate boundaries. Cf. Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir. 1983) (finding a property interest was protected by substantive due process where a developer was entitled to issuance of a building permit upon presentation of application and plans showing a use expressly permitted under then-current zoning ordinance).

We recently held that the standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government. R.L. Jordan Co. v. Boardman Petroleum, Inc., 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000). "The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 140, 568

S.E.2d 338, 347 (2002) (internal quotes omitted). We apply this same standard in reviewing challenges to a municipal ordinance.

Developer's argument fails for two reasons. First, Developer does not have a cognizable property interest in sewer service that is rooted in state law. Second, the ordinances at issue in this case bear a reasonable relationship to a legitimate interest of government. City has a legitimate interest in controlling the expansion of its sewer system due to the financial burden of additional operating and maintenance costs for all users, aesthetic and environmental concerns, and the effect on City's long-range zoning, planning, or organization. City has not acted arbitrarily or wrongfully in enacting the ordinances. The challenged ordinance does not violate Developer's right to substantive due process under the law.

CONCLUSION

We conclude (1) a justiciable controversy exists in the present case, such that review of Developer's challenge to the facial validity of the ordinance is appropriate under the Declaratory Judgments Act; (2) City properly exercised its legislative power to enact the challenged ordinance, and the ordinance is not contrary to statutory or constitutional provisions; and (3) the challenged ordinance does not violate Developer's constitutional rights to equal protection and substantive due process under the law.

REVERSED.

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David E. Thompson, Petitioner,

v.

State of South Carolina, Respondent.

Appeal from Dillon County
B. Hicks Harwell, Jr., Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 25775
Submitted September 25, 2003 - Filed January 27, 2004

DISMISSED

Katherine Carruth Link, and South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief of Capital & Collateral Litigation Donald J. Zelenka, and Assistant Attorney General B. Allen Bullard, Deputy Assistant Attorney General William Bryan Dukes, all of Columbia, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to consider whether the circuit court was without subject matter jurisdiction to accept petitioner's plea to two counts of criminal conspiracy. We now dismiss the writ as improvidently granted.

FACTS

Petitioner Thompson was indicted in January 1994 for murder, armed robbery, and two counts of criminal conspiracy for his participation in the murder of seventy-three-year-old Lula Mae Bass who was brutally beaten and stabbed to death in her home. The State gave notice of its intent to seek the death penalty. After extensive jury voir dire, petitioner decided to plead guilty. He was sentenced to life without parole for thirty years on the murder charge, a consecutive sentence of twenty-five years for armed robbery, and a consecutive "joint sentence" of five years for the two conspiracy counts.

In 1997, petitioner commenced this post-conviction relief (PCR) action alleging several grounds for relief. The PCR judge found these allegations without merit. Petitioner then sought a writ of certiorari in this Court claiming for the first time that the trial court was without subject matter jurisdiction because the indictments charging him with criminal conspiracy are insufficient.

ISSUE

Are the indictments sufficient to confer subject matter jurisdiction?

DISCUSSION

The indictments for criminal conspiracy allege as follows:

CRIMINAL CONSPIRACY
(16-17-410)

> That [petitioner] did in Dillon County on or about January 30, 1992, unlawfully and wilfully unite, combine, conspire, confederate, agree to commit the offense of Armed Robbery.
>
> Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

CRIMINAL CONSPIRACY
(16-17-410)

> That [petitioner] did in Dillon County on or about January 30, 1992, unlawfully and wilfully unite, combine, conspire, confederate, agree to commit the offense of Murder.
>
> Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Petitioner first contends these indictments are insufficient because they do not allege all the elements of criminal conspiracy. Failure to sufficiently allege all the elements of the offense is a jurisdictional defect that cannot be waived. Hooks v. State, 353 S.C 48, 577 S.E.2d 211 (2003); *see also* State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993) (indictment that does not allege element of offense is insufficient to confer jurisdiction). Accordingly, this contention may be raised for the first time in this Court. State v. Hooks, *supra.*

Conspiracy is a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by illegal means. S.C. Code Ann. § 16-17-410 (Supp. 2002). The body of each indictment simply states that petitioner did "unite, combine,

conspire, confederate, [and] agree to commit" the alleged offense. Petitioner complains this language is insufficient to allege conspiracy because it does not specify "with another or others."

By definition the words "combine," "unite," "conspire," "confederate," and "agree" all imply an action with another. *See* State v. Joseph, 351 S.C. 551, 571 S.E.2d 280 (2002) (finding words of indictment encompassed within meaning of words used in statute charged). Assuming, however, that these words alone do not sufficiently indicate an agreement between two or more persons, the titles of the indictments both cite § 16-17-410. As we recently clarified, the title of an indictment may be considered in determining the indictment's sufficiency as a whole. State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003). The language in the body of each indictment together with the reference to the statute in each title sufficiently alleges all the elements of criminal conspiracy.

Petitioner further contends these indictments are insufficient because they do not identify the victim and the co-conspirator, nor do they specify facts upon which the charges are based.

Not all defects in an indictment involve subject matter jurisdiction. Non-jurisdictional defects apparent on the face of the indictment must be timely raised as required by S.C. Code Ann. § 17-19-90 (2003)[1] or they are waived. Hooks v. State, *supra*; State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963). While the failure to

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[1]This section provides:

> Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.

This section applies whether the defendant goes to trial or pleads guilty. State v. Hooks, *supra.*

allege certain circumstances of the crime may be ground to quash an indictment for insufficient notice,[2] such a defect does not necessarily implicate the court's subject matter jurisdiction which is satisfied so long as the elements of the offense are sufficiently stated.

Here, the alleged defects regarding the victim's name, the co-conspirator's identity, and the particular details of the conspiracy are defects that are facially apparent and do not involve the elements of the offense. *See* State v. McGill, 191 S.C. 1, 3 S.E.2d 257 (1939) (issues concerning the victim's name in an indictment do not involve the court's jurisdiction); State v. Hightower, 221 S.C. 91, 69 S.E.2d 363 (1952) (co-conspirators need not be named); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952) (facts detailing a conspiracy are not required). Because these defects are not jurisdictional, petitioner cannot raise them for the first time now.

DISMISSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, concur.

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[2]Our discussion of circumstances of the crime includes venue. A defect in venue may be raised by a timely motion to quash. *See, e.g.,* State v. Montgomery, 246 S.C 545, 144 S.E.2d 797 (1965) (lower court erred in denying timely motion to quash where indictment did not name illegitimate child who was subject of action for nonsupport); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952) (motion to quash properly denied where indictment sufficiently alleged venue). Venue does not relate to the court's subject matter jurisdiction. State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992). We note that language in McIntire speaks of the allegation of the county where the crime occurred as necessary to "lay the jurisdiction of the court." This loose reference to "jurisdiction" instead of the proper term "venue" has mistakenly joined venue with subject matter jurisdiction in at least one later case. *See* Jones v. State, 333 S.C. 6, 507 S.E.2d 324 (1998). McIntire and Jones are overruled to the extent they conflict with our discussion of subject matter jurisdiction herein.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State Auto Property and Casualty Insurance Company, Petitioner,

v.

David W. Raynolds, Sherry B. Raynolds, Harold Turner and Catherine Turner, Defendants,

Of Whom David W. Raynolds and Sherry B. Raynolds are Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Thomas J. Ervin, Circuit Court Judge

Opinion No. 25776
Heard November 19, 2003 - Filed January 27, 2004

REVERSED

C. Stuart Mauney and Jennifer D. Eubanks of Gallivan, White and Boyd, P. A., of Greenville, for Petitioner.

Robert C. Childs, III and Laura W. H. Teer of Mitchell, Bouton, Yokel & Childs, of Greenville, for Respondents.

TOAL, C. J.: Petitioner State Auto Property and Casualty Insurance Company ("State Auto") asserts that the Court of Appeals erred when it held that insured David and Sherry Raynolds ("the Raynolds"), were entitled to coverage and a defense for a third party's personal injury that occurred at the Raynolds' home. State Auto also seeks to overturn the trial court's decision awarding the Raynolds attorney's fees. We now reverse the Court of Appeals and hold that the Raynolds were not entitled to coverage, a defense, or attorney's fees.

FACTUAL/PROCEDURAL BACKGROUND

The Raynolds are a couple who breed, rear, and sell Akita show dogs in Spartanburg. David is a retired engineer, and he and his wife Sherry operate a retail cosmetic business.

The Raynolds have invested a considerable amount of time and money in their dogs. Since 1989, the Raynolds have attended between 40 and 70 dog shows per year, and they are members of the Akita Club of America. They have constructed separate, eighty-square-foot kennels for each dog. They converted their garage into a facility for bathing and grooming the dogs, purchased a specialized canine treadmill to condition the dogs, and acquired a recreational vehicle for transporting themselves, their equipment, and their dogs to shows. They deducted many of the costs of raising, training, and showing their dogs as "Schedule C" business expenses and depreciated items such as the R.V., clothing purchased for the shows, and the canine treadmill on their tax return.[1]

The Raynolds advertise their puppies in various newspapers and publications under the name "Ko-Akita Kennels." The Raynolds also

[1] Their tax return showed $3,500 in receipts related to Ko-Akita Kennels, with similar expense deductions.

have business cards for "Ko-Akita Kennels," as well as, grossed $5,000 to $12,000 a year since they began operation.

This case arose after one of the Raynolds' dogs, Emperor, bit Harold Turner ("Turner"), a professional dog-handler, at the Raynolds' home on April 6, 1996. When Turner sued, State Auto defended the Raynolds under a reservation of rights. During the time it defended the Raynolds, State Auto sought a declaratory judgment, seeking to deny the Raynolds coverage and a defense based on the "business pursuits" exclusion in the policy. The exclusion provides:

> Medical Payments to others do not apply to bodily injury or property damage… (b) arising out of or in connection with a business engaged in by an insured. This exclusion applies but is not limited to an act or omission regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the business.

At trial, the court applied the two-pronged test set forth in *Faddin v. Cambridge Mut. Fire Ins. Co.* to determine whether the Raynolds were engaged in a business pursuit. 274 N.Y.S.2d 235 (N.Y. App. Div. 1967). The trial court found the Raynolds were not engaged in a "business pursuit" and that State Auto was required to defend the Raynolds and provide coverage up to the policy's limits. In addition, the trial court denied the Raynolds' claim for attorney's fees. The Court of Appeals affirmed the trial court as to State Auto's obligations but reversed on the issue of attorney's fees. *State Auto v. Raynolds*, 350 S.C. 108, 564 S.E.2d 677 (Ct. App. 2002).

The following issues are before this Court:

I. Did the Court of Appeals err in finding that the Raynolds' activities did not satisfy the "business pursuits" test of *Faddin*?

II. Did the Court of Appeals err in awarding the Raynolds attorney's fees?

LAW/ANALYSIS

I. Business Pursuits Test

South Carolina has not developed a test for determining whether activities are a "business pursuit" and thus fall under a homeowners insurance policy exclusion.[2] Courts in other jurisdictions have developed a plethora of tests yielding varied results. In this case, the lower courts applied the two-prong test developed in *Faddin*. 274 N.Y.S.2d at 241. We now hold that this was the proper test to apply.

Under the *Faddin* test, an insurance provider can establish that an insured's conduct falls within a "business pursuits" exclusion if the provider proves two elements: continuity and profit motive.

A. Continuity Prong

Petitioner argues that the Court of Appeals erred in holding that the Raynolds' activities did not meet the continuity prong of *Faddin*. We agree.

The court in *Faddin* defined "continuity" as "a customary engagement or a stated occupation." *Id.* *Faddin* does little to explain whether a part-time activity could satisfy the continuity prong. However, in a later case, the New York Court of Appeals clarified the *Faddin* test: "for the purposes of the 'business pursuit' exclusion, the

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[2] However, South Carolina law has established that a court will construe contract exclusion provisions in favor of the insured when the exclusion is ambiguous. *Boggs v. Aetna Cas. and Sur. Co*., 272 S.C. 460, 252 S.E.2d 565 (1979). Nevertheless, courts are not to "torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994).

'business' engaged in by [the insured] need not necessarily be limited to his sole occupation or employment…." *Shapiro v. Glens Falls Ins. Co*., 365 N.Y.S.2d 892 (N.Y. App. Div. 1975), *aff'd* 347 N.E.2d 624 (N.Y. 1976).

Although courts have defined "continuous" in various ways, a majority of courts have held that a "part-time" activity *may* constitute a business pursuit for insurance coverage purposes. For example, in *Wiley v. Travelers Ins. Co*., the plaintiff was bitten when he went to the defendant's house to buy a Saint Bernard puppy. 534 P.2d 1293 (Okla. 1974). The Oklahoma Supreme Court held that the defendant was engaged in the business of selling puppies even though he was a full-time salesman. *Id*. at 1298.

Other jurisdictions have found that part time activities constitute business pursuits. *See Allstate Ins. Co. v. Crouch*, 666 A.2d 964 (N.H. 1995) (an insured's long-standing hobby of automobile repair constituted a business pursuit); *Nationwide Mut. Fire Ins. Co. v. Nunn,* 442 S.E.2d 340 (N.C. App. 1994) (insured's operation of a bed and breakfast that operated for three months out of the year was a "business pursuit"); *Williams v. State Farm & Cas. Co*., 509 N.W.2d 294 (Wis. 1993) (insured, who was a part-time investor in the stock market, was engaged in a business); *Heggen v. Mountain W. Farm Bureau Mut. Ins. Co*., 715 P.2d 1060 (Mont. 1986) (insured, who participated in a jack steer-roping contest, was engaged in a business); *State Farm & Fire Cas. Co. v. Moore*, 430 N.E.2d 641 (Ill. App. 1981) (insured's part-time babysitting constituted a "business pursuit").

In the present case, the parties do not dispute that Ko-Akita Kennels is not the Raynolds' primary occupation. As noted earlier, Mr. Raynolds is a retired engineer, and he and Mrs. Raynolds maintain a retail cosmetic business. Given the amount of time and resources that the Raynolds have contributed to the care, sales, and breeding of their dogs, however, we hold that an activity may be continuous even though it is a "part-time" activity or a secondary occupation.

The Raynolds have been breeding, showing, and selling Akitas for almost fifteen years. Mr. Raynolds spent approximately 120 hours a month caring for the dogs. He also attended dog shows two times a month, each show lasting two to three days. The Raynolds have also spent a considerable amount of time customizing their property to care for the dogs.

The Raynolds' activities represent a "customary activity or a stated occupation" within the meaning of *Shapiro.* Therefore, the continuity prong of *Faddin* is satisfied.

B. Profit-Motive Prong

State Auto argues that the Court of Appeals erred in holding that the Raynolds' activities did not meet the profit-motive prong of the *Faddin* analysis. We agree.

The profit-motive prong of *Faddin* may be satisfied when the activity in question is "shown to be such an activity as a means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit, commercial transactions or engagements." *Faddin,* 274 N.Y.S.2d at 241.

The Court of Appeals held that the Raynolds did not have a profit motive as to their activities with the dogs primarily because they never made an actual profit. *State Auto v. Raynolds*, 350 S.C. 108, 564 S.E.2d 677 (Ct. App. 2002). However, we recognize that the concepts of profit motive and actual profit are not identical and while the Raynolds' overall income from selling or breeding the dogs may not have produced a profit, evidence suggests that they at least had a motive to cover their costs.

The Raynolds filed losses for "Profit or Loss from Business" under Schedule "C" of their federal income tax return pursuant to 26 U.S.C. §162 (2003) as to their dog breeding and selling expenses. Courts in other jurisdictions have held that seeking such tax advantages is evidence of a profit motive. *See Heggan,* 715 P.2d at 1060 (holding

that the use of business deductions pursuant to steer roping activities indicated a profit motive despite a lack of actual profit); *Pacific Indem. Ins. Co. v. Aetna Cas. and Surety Co.,* 688 A.2d 319 (Conn. 1997) (holding that activities related to boarding horses constituted a business pursuit where the insured depreciated items and deducted expenses, evidencing a profit motive).

Since 1989, the Raynolds have attended between 40 and 70 dog shows a year. Mr. Raynolds testified that he showed his dogs in an attempt to build their reputation, which increases the value of the dogs for purposes of stud fees and breeding prices.

The Raynolds also publicly advertised the sale and breeding prices of their dogs under the name "Ko-Akita Kennels," and they have sold puppies for substantial amounts of money.

Several jurisdictions have held that actual profit is not necessary to satisfy the profit-motive prong. In *Pacific Indem. Ins. Co. v. Aetna Cas. and Surety Co.*, *supra*, the Connecticut Supreme Court held an insured need not show an actual profit to be engaged in a business pursuit. *Id. Also see Wiley,* 534 P.2d 1293, 1295 (Okla. 1974) ("Profit motive, not actual profit, makes a pursuit a business pursuit").

Many businesses are not profitable, but they are businesses nonetheless. Therefore, we hold that the Raynolds' activities satisfy the profit-motive prong.

II. Attorney's Fees

State Auto argues that the Court of Appeals erred in awarding attorney's fees to the Raynolds. This issue is moot.

It is well-settled in South Carolina that when a defendant insured prevails in a declaratory judgment action, the insured is entitled to recover attorney's fees. *Hegler v. Gulf Ins. Co*., 270 S.C. 548, 243 S.E.2d 443 (1978). However, in this case, the Raynolds did not prevail and therefore, the issue is moot.

CONCLUSION

We now reverse the Court of Appeals on the "business pursuits" issue holding that the Raynolds were involved in a business pursuit; Turner's injuries were connected to that pursuit; State Auto properly denied coverage pursuant to an enforceable exclusion; and thus, the issue of attorney's fees is moot.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Angel Ann Brown Gilliland, Petitioner,

v.

John Doe, an unknown motorist, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Alison Renee Lee, Circuit Court Judge

Opinion No. 25777
Heard December 3, 2003 – Filed January 27, 2004

REVERSED

Bryan D. Ramey, of Bryan D. Ramey & Associates, P.A., of Piedmont and John S. Nichols, of Bluestein & Nichols, of Columbia, for Petitioner.

Samuel C. Weldon, of Clarkson, Walsh, Rheney & Turner, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Angel Gilliland ("Petitioner") sought coverage for personal injuries she sustained from a car accident involving an unknown driver. At trial, Gayle Norris ("Norris") testified that she saw Petitioner's

accident. The parties dispute whether this witness testimony implicated the unknown car's involvement in Petitioner's accident. The jury awarded Petitioner actual and punitive damages. Respondent made a motion for JNOV, which was denied. The Court of Appeals later reversed and granted the JNOV on grounds that Norris's testimony did not satisfy S.C. Code § 38-77-170 because she was unable to provide evidence that the unknown car caused Petitioner's accident. *Gilliland v. Doe*, 351 S.C. 497, 570 S.E.2d 545 (Ct. App. 2002). Petitioner seeks this Court's review of that ruling.

FACTUAL/PROCEDURAL BACKGROUND

At trial, Petitioner testified that on the night of March 29, 1996, as she was leaving a grocery store in Greenville, SC, two young men waved at her from a pick-up truck. As she drove from the store, the boys began to follow her.

Soon after Petitioner turned north on Berea Drive, the boys began to closely pursue her vehicle. She testified that they "rode her bumper" for a two-mile stretch. Petitioner sped up in a frightened attempt to get away from the boys' truck. As she accelerated, Petitioner lost control of her car, ran off the road, and hit a tree. Upon impact, she suffered substantial bodily injuries and spent nine days in the hospital.

Petitioner testified that the boys' truck never made contact with her car and that the boys "backed off" once she began to lose control.

The investigating officer testified that when he questioned Petitioner at the scene of the accident, she told him that she was run off the road by an unknown vehicle.

During the accident, Gayle Norris was stopped at a nearby intersection. She testified that she saw the lights of two cars as the cars came around the curve. She also testified that after the accident, she saw the lights of the car behind Petitioner's "arc through a field" as if it were making a U-turn.

After the jury returned a verdict for Petitioner, Respondent made a JNOV Motion, which Judge Alison Lee denied. The Court of Appeals reversed Judge Lee's ruling and granted the JNOV. Petitioner asks the following on appeal:

> **Did the Court of Appeals err when it granted Respondent's JNOV because Norris's testimony did not meet the "independent witness" requirements of § 38-77-170?**

LAW/ANALYSIS

Petitioner argues that the Court of Appeals erred when it granted Respondent's JNOV Motion. We agree.

This Court recently reiterated the standard for appellate review of JNOVs:

> …[u]nder the state standard the trial court should not grant JNOV where the evidence yields more than one inference. An appellate court may not overturn the decision of the trial court, under the state standard, if there is any evidence to support the trial court's ruling

Rogers v. Norfolk Southern Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). We have also held that "[i]n ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

The Legislature first enacted a "John Doe" statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions. The initial safeguard was a requirement that the

unknown vehicle make "physical contact" with the plaintiff's car. Act No. 312, 1963 S.C. Acts 535.

Then in 1987, the Legislature amended the statute once again to allow insureds to bring a "John Doe" action regardless of physical contact as long as an independent person witnessed the accident. Act. No. 166, 1987 S.C. Acts 1122.

In 1989, the Legislature again amended the statute to require that the independent witness provide the court with a signed affidavit attesting to the unknown vehicle's involvement in the accident.

This Court must now determine to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in "John Doe" actions.

South Carolina Code § 38-77-170 (Supp. 2002) provides:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or **the accident must have been witnessed by someone other than the owner or operator of the insured vehicle**; provided however, the witness must sign an affidavit **attesting to the truth of the facts of the accident** contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the

> driver of the other vehicle at the time of the accident.

In *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106, (1992) this Court indicated that the statute required an independent witness to attest to facts that provide at least some causal connection between an unknown driver and the accident. The Court provided that the adequacy of the "causal connection" should pass the same test used in determining whether an injury or damage arose out of the ownership, maintenance, or use of the uninsured vehicle. *Id.* at 275, 422 S.E.2d at 110. The Court explained that this test regarding the sufficiency of the evidence is "something less than proximate cause and something more than the vehicle being the mere site of the injury." *Id.* at 272, 422 S.E.2d at 108 (citing *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987)).

Based on the test set forth in *Howser*, § 38-77-170(2) may be satisfied even though an independent witness fails to provide a clear answer to the question of proximate cause. *Howser* suggests that § 38-77-170(2) should be interpreted liberally. This Court arguably abandoned a liberal interpretation of § 38-77-170(2) in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002).

In *Collins*, this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, *Collins* suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to *Collins*, is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the statute's purpose. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept

it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

In the case at hand, the Court of Appeals held that the witness must "be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." *Gilliland*, 351 S.C. at 500, 570 S.E.2d at 548. We agree that this analysis is consistent with *Howser* and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2). However, the Court of Appeals found that Norris failed to attest to the existence of an unknown vehicle. *Gilliland*, 351 S.C. at 498, 570 S.E.2d at 546. We find the record includes sufficient evidence that an unknown vehicle was involved in Petitioner's accident.

In *Marks v. Indus. Life & Health Ins. Co*., 212 S.C. 502, 505, 48 S.E.2d 445, 446, this Court held that "[t]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty."

We now hold that the testimony of Gayle Norris contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury.

CONCLUSION

We believe that the record includes sufficient circumstantial evidence for the jury to find the requisite causation necessary to satisfy § 38-77-170(2). We therefore reverse the Court of Appeals and reinstate the trial court's judgment for Petitioner.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ferrell Cothran, Personal Representative of the Estate of Douglas H. McFaddin, Respondent,

v.

Alvin Brown, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Clarendon County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25778
Heard November 6, 2003 - Filed January 27, 2004

REVERSED

William B. Woods, Donna Seegars Givens and Darra James Vallini, all of Woods & Givens, LLP, of Lexington, Samuel R. Clawson and Timothy A. Domin, both of Clawson & Staubes, of Charleston, for Petitioner.

Daniel Holt Shine, of Shine Law Offices, of Dillon; Gedney M. Howe, III, of Law Offices of Gedney M. Howe, III, P.A., of Charleston; John C. Land, of Land, Parker & Welch, P.A., of Manning, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' opinion in Cothran v. Brown, 350 S.C. 352, 566 S.E.2d 548 (2002). We reverse.

Petitioner, Alvin Brown (Brown), pled guilty to reckless homicide, pursuant to S.C. Code Ann. § 56-5-2910 (1976), in connection with the death of Douglas J. McFaddin (McFaddin). Respondent, Ferrell Cothran, as personal representative of McFaddin's estate, filed a civil action asserting wrongful death and survival claims against Brown. The trial court granted partial summary judgment for McFaddin's estate on the issue of liability, finding Brown's guilty plea estopped him from denying civil liability. A panel of the Court of Appeals reversed. The Court of Appeals subsequently granted Cothran's Petition for Rehearing *en banc* to consider whether Brown should be judicially estopped from asserting comparative negligence in this civil proceeding. A majority of the Court of Appeals held Brown to be judicially estopped from contesting liability. The majority also adopted the "competing affidavit" rule.

ISSUES

I. Did the Court of Appeals err in applying the doctrine of judicial estoppel to preclude Brown from asserting a comparative negligence defense in a civil proceeding when Brown had previously entered a guilty plea to criminal charges arising from the same automobile accident?

II. Did the Court of Appeals err in finding Brown's second affidavit did not merit consideration for summary judgment purposes?

I.

This matter arose out of an automobile accident. Brown was driving his vehicle east on Rainbow Lake Road in Clarendon County on the night of December 2, 1995. McFaddin had parked his westbound truck on

the eastbound shoulder near the curve of the road with the vehicle headlights on. Brown entered the left-hand curve, saw the headlights on McFaddin's vehicle, swerved to his right off the paved surface of the road, striking McFaddin, who was standing outside his vehicle calling his dogs after a day of hunting. Brown was given a chemical test of his breath which registered an alcohol concentration of .17 percent. Brown told officers at the scene that, as he came around the curve, he saw headlights in his lane and swerved to the right, striking McFaddin and colliding with McFaddin's vehicle.

At the plea hearing, Brown admitted his guilt and explained to the plea judge that he was blinded by the headlights on McFaddin's vehicle. Plea counsel presented Brown's statement to the officer at the scene, as well as a map, survey, and video recreation of the accident scene to illustrate the position of McFaddin's vehicle. The recreation demonstrated the appearance of the headlights from Brown's perspective. Brown believed McFaddin's vehicle was traveling in Brown's lane and a head-on collision was imminent.

In the civil proceeding, Cothran argued Brown's comparative negligence defense was inconsistent with his plea of guilty in the criminal proceeding. Brown's counsel presented the investigating officer's report and photographs of the accident scene. Additionally, Brown's counsel presented two affidavits, one by Brown, and one by Maechearda McCray.[1]

Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. See Colleton Reg. Hosp. v. MRS Med. Rev. Systs., 866 F.Supp. 896, 900 (D.S.C. 1994). The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary. See Hawkins v. Bruno Yacht Sales, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003).

[1] McCray's affidavit states McCray saw Brown before the accident and Brown did not appear to be drunk. Additionally, McCray stated he returned to the accident scene with Brown and McFaddin's vehicle was positioned in such a way that its headlights blinded oncoming cars, making a head-on collision seem imminent to vehicles traveling in Brown's direction.

In Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997), we formally adopted the doctrine of judicial estoppel as it relates to matters of fact, not law. For the following reasons, we reverse the Court of Appeals' application of judicial estoppel.

This Court has not previously explicitly delineated the requirements for the application of judicial estoppel. We now adopt the following elements necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. See Carrigg v. Cannon, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001).

The evidence in this matter fails to satisfy the first, fourth and fifth elements.

As to the first element, Brown has consistently maintained McFaddin's vehicle was parked in such a way that the vehicle's headlights blinded and confused him. His position at the accident scene, the guilty plea proceeding and the summary judgment hearing has been consistent.

In concluding Brown was judicially estopped from contesting liability, the Court of Appeals focused on a statement made by Brown's plea counsel at the plea hearing. At the plea hearing, Brown admitted fault and also stated he was blinded by McFaddin's headlights. His plea counsel attempted to clarify Brown's position.[2] Plea counsel's statement was an attempt to reinforce his client's acceptance of fault to ensure the successful entry of the guilty plea. It is not surprising that counsel made such an effort

[2] Brown's plea counsel stated, in part, "You know, he's not trying to indicate to you or to anyone else in this courtroom that [McFaddin] caused the accident or had anything to do with the accident."

under these circumstances to encourage the sentencing judge to accept the plea.

The doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case. The application of judicial estoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court. In the context of the entire plea proceeding, Brown's counsel's statements, which were intended to reinforce his client's acceptance of fault for the criminal charge, do not represent a different factual scenario than the one continuously set forth by Brown in both the plea and summary judgment hearings.

As to the fourth element, Brown has consistently maintained he was blinded by McFaddin's headlights. We find no evidence Brown sought to intentionally mislead the trial court. To the contrary, Brown has repeatedly stated the position of McFaddin's vehicle was a contributing cause of the accident. In both the plea and summary judgment hearings, Brown submitted evidence supporting this contention.

As to the fifth element, McFaddin's conduct is not germane to Brown's guilty plea. The plea judge was not required to consider McFaddin's negligence, if any, in any regard with Brown's guilty plea. Brown is bound by his factual admissions at his guilty plea. By virtue of that plea, Brown admitted he is criminally responsible for McFaddin's death. He cannot, thereafter, deny liability in a civil proceeding. See Doe v. Doe, 346 S.C. 145, 148, 551 S.E.2d 257, 258 (2001) (holding that once a person is criminally convicted he is collaterally estopped from relitigating his guilt in a subsequent civil proceeding if the civil proceeding is based on the same facts underlying the criminal conviction). However, because McFaddin's relative fault, if any, was not at issue in the guilty plea, Brown is entitled to contest it in a subsequent civil proceeding. Brown's guilty plea is not totally inconsistent with his comparative negligence defense in the civil proceeding because McFaddin's negligence, if any, was not an issue for consideration by the judge at the plea hearing. McFaddin's negligence, if any, under a theory of comparative negligence is a question for the jury.

II.

Although unnecessary for resolution of this appeal, for the benefit of the Bench and Bar, we address the "competing affidavit" rule, also commonly referred to as the "sham affidavit" rule. Brown argues the Court of Appeals erred in affirming the trial court's grant of summary judgment on the additional sustaining ground that Brown presented no evidence of McFaddin's negligence. Brown argues, *inter alia*, the court erred in disregarding his second affidavit. Brown signed two affidavits. In his first affidavit, Brown stated he struck McFaddin as a result of his alcohol consumption. In his second affidavit, Brown stated he was not drunk at the time of the accident, although he had been consuming alcohol, and the cause of the accident was his inability to determine the position of McFaddin's vehicle.

We find persuasive the reasoning of federal case law. Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement. See Margo v. Weiss, 213 F.3d 55, 63 (2nd Cir. 2000); Rohrbough v. Wyeth Labs. Inc., 916 F.2d 970, 976 (4th Cir. 1990); Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 705 (3rd Cir. 1988).

In distinguishing between a sham affidavit and a correcting or clarifying affidavit, the following considerations provide guidance: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in

relation to summary judgment, the second affidavit is submitted. See Pittman v. Atlantic Realty Co., 754 A.2d 1030, 1042 (Md. 2000).[3]

Although our finding on the competing affidavit rule is not necessary for resolution of this matter, we conclude the Court of Appeals misapplied the rule under the facts of this case. The competing affidavit rule is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact. See Hancock v. Bureau of Nat'l Affairs, 645 A.2d 588, 591 (D.C. Cir. 1994). Brown did not intend to create a sham issue. Brown has consistently asserted throughout the criminal and civil proceedings that he was blinded by the headlights of McFaddin's vehicle. Therefore, it cannot be said Brown's second affidavit was admitted for the sole purpose of creating a "sham" issue of fact.

REVERSED.

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

[3] The considerations developed by the Maryland Supreme Court primarily address the factual circumstance in which a party or witness has been deposed and subsequently submitted an affidavit in contradiction of the previous deposition testimony. We have modified the language to include the current factual scenario, where a party has submitted an affidavit conflicting with prior sworn testimony.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Esau Heyward, Respondent,

v.

Samuel Christmas, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25779
Heard December 4, 2003 – Filed January 27, 2004

REVERSED

John E. James, III, and George C. James, Jr., of Lee, Erter, Wilson, James, Holler and Smith, of Sumter, for petitioner.

Dwight Christopher Moore, of Sumter; John Dennis Delgado and Kathrine Haggard Hudgins, both of Columbia, for respondent.

JUSTICE MOORE: We granted certiorari to review the Court of Appeals' opinion[1] finding the trial court erred by granting petitioner Samuel Christmas a directed verdict. We reverse.

FACTS

Respondent brought a civil action against petitioner Samuel Christmas, a South Carolina Highway Patrol trooper, alleging excessive force and illegal seizure pursuant to 42 U.S.C. § 1983[2] and alleging other causes of action. After the other actions were dismissed, a trial was held on the § 1983 cause of action.

On February 16, 1996, respondent, who had been drinking at a bar, asked his cousin, Ronald Brunson, to give him a ride home. During the ride, a Pinewood police officer attempted to pull Brunson over. Brunson refused to stop and shots were fired from the car towards the officer. Several officers, including Trooper Christmas, were dispatched to assist the Pinewood police in the car chase. Brunson's car was eventually stopped at a roadblock.

Once the car stopped, the officers exited their cars and instructed Brunson and respondent to exit the vehicle with their hands up. Brunson exited from the driver's side with his hands in the air. He held a Coke can in

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[1]Heyward v. Christmas, 352 S.C. 298, 573 S.E.2d 845 (Ct. App. 2002).

[2]42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

one of his hands. Because Brunson did not exit with a weapon, Trooper Christmas concluded the gun was still in the car or on respondent's person. Respondent did not exit the car or raise his hands as instructed by the officers.

While another officer secured Brunson, Trooper Christmas approached the driver's side of the car. He testified he saw respondent in the passenger seat and that he could not see respondent's hands because they were tucked under his thighs. He testified he had the best view of respondent because the door was open between him and respondent.

Holding his gun in his right hand, Trooper Christmas placed his left knee on the driver's seat and reached through the car to extract respondent from the car. Trooper Christmas testified respondent did not raise his hands until he reached in the car to grab him. While trying to extract respondent from the car, respondent's weight shifted causing Trooper Christmas to stumble. When the weight shifted, Trooper Christmas testified he instinctively re-gripped his hand and accidentally pulled the trigger, shooting respondent in the thigh. Trooper Christmas testified respondent did not resist while being pulled from the car and that the entire event occurred in a matter of seconds.

Trooper Christmas testified he did not holster his gun while trying to pull respondent from the car because he had a new holster that was not properly broken in. He testified he was worried the gun would either fall out of the holster or that he would not be able to retrieve it quickly if he needed to do so. He stated if there had not been a known weapon inside the car, he would have holstered his gun.

Respondent called Rick Johnson as an expert in law enforcement. Johnson testified Trooper Christmas's actions were unreasonable because he should not have approached the car after Brunson was subdued. Johnson stated Trooper Christmas placed himself and other officers in jeopardy and that there was adequate time for Trooper Christmas to take time to assess the situation. Johnson testified the reasonable approach would have been to stay in a protected position behind the door of one of the police cars and use the

public address system to order respondent out of the car.[3] He also testified that coming across the driver's side of the car and extracting respondent with one hand was unreasonable because Trooper Christmas would have lacked control of his gun and of respondent. On cross-examination, Johnson admitted he had the benefit of 20/20 hindsight.

Following the close of the evidence, the trial court granted Trooper Christmas's directed verdict motion based on the Fourth Amendment and qualified immunity. The Court of Appeals reversed and remanded for a new trial.

ISSUE

Did the Court of Appeals err by reversing the trial court's decision granting Trooper Christmas's directed verdict motion?

DISCUSSION

On review of a ruling granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. Quesinberry v. Rouppasong, 331 S.C. 589, 503 S.E.2d 717 (1998). If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury. *Id.*

Our decision is controlled by the United States Supreme Court's decision in Graham v. Connor, 490 U.S. 386 (1989). Quesinberry, 331 S.C. at 594-595, 503 S.E.2d at 720. Graham held all claims that law enforcement officers used excessive force in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the reasonableness standard of the Fourth Amendment to the United States Constitution, which

[3]Trooper Christmas testified he was trained to remain in a protected position when dealing with a known or suspected felon and that he could have done so in this case. He further testified he had been trained to use the public address system in felony car stops.

states that people have a right to be secure in their persons against unreasonable seizures. *Id.* at 595, 503 S.E.2d at 720.

> Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is resisting arrest or attempting to evade arrest by flight.
>
> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the

> amount of force that is necessary in a particular situation.

Id. (quoting Graham, 490 U.S. at 396-97 (internal quotations and citations omitted)).

Looking at all the facts and circumstances that existed during the event in question, Trooper Christmas's action of entering the car to extract respondent with his gun drawn was objectively reasonable. First, the crime was severe. Several shots had been fired from the car at one of the pursuing officers. At the time, Trooper Christmas did not know whether respondent or Brunson was responsible for the shooting.

Second, because Brunson exited the car without the weapon used in the crime, Trooper Christmas reasonably concluded the gun was either still in the car or in respondent's possession. *See* Anderson v. Russell, 247 F.3d 125 (4th Cir.), *cert. denied*, 534 U.S. 949 (2001) (officer not required to see object in suspect's hand before using deadly force); Pleasant v. Zamieski, 895 F.2d 272 (6th Cir.), *cert. denied*, 498 U.S. 851 (1990) (not knowing what, if anything, plaintiff had with him in car, it was reasonable for officer to draw gun and failure to holster gun was not unreasonable under circumstances where plaintiff could have escaped if had holstered gun). Therefore, respondent could have posed a threat to the safety of Trooper Christmas and the other officers.

Third, respondent did not comply with the officers' orders to exit the car with his hands raised. *See* Saucier v. Katz, 533 U.S. 194 (2001) (if officer reasonably, but mistakenly, believed suspect was likely to fight back, officer justified in using more force than in fact needed; officers can have reasonable, but mistaken, beliefs as to facts establishing existence of exigent circumstances and in those situations courts will not hold they have violated Constitution); Brown v. Gilmore, 278 F.3d 362 (4th Cir. 2002) (reasonable for officers to believe suspect who had already disobeyed one direct order would balk at being arrested). Further, because the police had already been led on a car chase, there was still a possibility respondent could attempt to continue to evade arrest by fleeing.

As Trooper Christmas testified, these events occurred within a matter of seconds. As a result, Trooper Christmas was forced to make a split-second judgment about entering the car to remove respondent with his gun drawn. Understandably, Trooper Christmas did not want to holster his gun due to his fear he might be unable to retrieve it quickly if the gun was needed. *See* Graham v. Connor, *supra* (police officers often forced to make split-second judgments about amount of force necessary in particular situation in tense and rapidly evolving circumstances); Pleasant v. Zamieski, *supra* (court could not say officer's failure to holster gun was unreasonable under circumstances; had officer taken time to holster gun, plaintiff would have escaped).

While Trooper Christmas could have placed himself in a protective position and could have used the public address system to give orders to respondent, considering those facts is exactly the type of analysis prohibited by Graham.[4] *See* Graham, *supra* (reasonableness of particular use of force must be judged from perspective of reasonable officer on the scene, rather than with 20/20 hindsight); Anderson v. Russell, *supra* (declined to adopt 20/20 hindsight to second guess officer's decision to shoot rather than take cover, given officer reasonably believed his life to be in imminent danger).

The Court of Appeals erred by reversing the trial court's decision to grant Trooper Christmas's directed verdict motion because the evidence was only susceptible to the inference that Trooper Christmas's actions in seizing respondent were reasonable. *Cf.* Quesinberry, *supra* (evidence susceptible to

[4]Respondent's argument that Trooper Christmas acted unreasonably because his actions placed the other officers in jeopardy is without merit. *See* Howerton v. Fletcher, 213 F.3d 171 (4th Cir. 2000) (question is not whether officer acted reasonably vis-à-vis world at large; rather, question is whether officer acted reasonably as against plaintiff).

more than one reasonable inference, case should be submitted to jury).[5] Therefore, the decision of the Court of Appeals is

REVERSED.

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

[5]Because we find the trial court properly granted Trooper Christmas's directed verdict motion pursuant to the Fourth Amendment, we do not address the trial court's decision granting the motion on the basis of qualified immunity.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jerry B. McWee, Petitioner,

v.

The State of South Carolina, Respondent.

ORIGINAL JURISDICTION

Opinion No. 25780
Heard September 23, 2003 - Filed January 27, 2004

WRIT DENIED

John F. Hardaway and Melissa Jane Reed Kimbrough, both of Columbia, for Petitioner.

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

JUSTICE BURNETT: Petitioner, a death row inmate who has exhausted his state remedies, seeks a writ of habeas corpus contending the denial of his request for a parole eligibility charge at trial was "a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (emphasis in original) (internal citation omitted). We deny the writ.

FACTS

Petitioner was convicted of murder and armed robbery and was sentenced to death. His direct appeal was affirmed. State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied 519 U.S. 1061, 117 S.Ct. 695, 136 L.Ed.2d 618 (1997). His application for post-conviction relief was denied and this Court declined to issue a writ of certiorari to review that decision. Petitioner received no relief from the federal courts, see McWee v. Weldon, 283 F. 3rd 179 (4th Cir.), cert. denied 537 U.S. 893, 123 S.Ct. 162, 154 L.Ed.2d 158 (2002), and has now filed this petition for a writ of habeas corpus in this Court's original jurisdiction. See Butler v. State, supra.

Petitioner's habeas petition involves the trial court's refusal to give a parole eligibility charge during the penalty phase of petitioner's capital trial. Prior to jury voir dire, petitioner's attorneys inquired whether the trial judge would instruct the jury that petitioner would be parole eligible after service of thirty years. The trial judge indicated he would give such a charge. At the beginning of the penalty phase, however, the trial judge stated he would not instruct the jury on petitioner's parole eligibility. Accordingly, during his initial charge in the penalty phase, the trial judge told the jury that the terms "life imprisonment" and "death penalty" were to be given their plain and ordinary meanings. After some deliberation, the jurors inquired whether a defendant who received a life sentence was required to serve a minimum number of years before becoming eligible for parole. The trial judge reiterated the "plain and ordinary meaning" charge. Petitioner again requested the jury be instructed as to his parole eligibility; the judge again denied the request.

On direct appeal, petitioner argued the trial judge's refusal to give the parole eligibility charge was a violation of his due process and Eighth Amendment rights. The Court held the issue was not properly preserved for review since petitioner failed to assert any constitutional basis for the charge at trial. State v. McWee, supra. Nevertheless, the Court addressed the merits of petitioner's claims, ruling that because petitioner was

eligible for parole, his due process rights were not infringed.[1] In addition, the Court held petitioner's Eighth Amendment protections were not violated. Finally, the Court found that petitioner failed to demonstrate any fundamental unfairness as the result of the trial judge's ultimate decision not to give a parole eligibility charge.

ISSUE

Does the denial of petitioner's request for a parole eligibility charge warrant the grant of a petition for a writ of habeas corpus?

ANALYSIS

Habeas relief will be granted only for a constitutional claim rising to the level of "a violation, which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Green v. Maynard, 349 S.C. 535, 538, 564 S.E.2d 83, 84 (2002), quoting Butler v. State, supra. "[N]ot every intervening decision, nor every constitutional error at trial will justify issuance of the writ." Id. A writ of habeas corpus will only be granted under "unique and compelling circumstances." Id. Habeas corpus is available only when other remedies are inadequate or unavailable. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998).

The Court has previously reviewed and denied petitioner's present claim. In his direct appeal, the Court determined petitioner's failure

[1] The Court relied on cases holding that where a capital defendant is parole ineligible and his future dangerousness is at issue, due process requires a charge on parole ineligibility. See Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995) cert. denied 516 U.S. 1080, 116 S.Ct. 789, 133 L.Ed.2d 739 (1996); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), cert. denied 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096 (1995), overruled on other grounds, State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995).

to receive a parole eligibility charge was neither a violation of due process nor the Eighth Amendment. State v. McWee, supra. The Fourth Circuit Court of Appeals concurred in its denial of petitioner's federal habeas application. McWee v. Weldon, supra. No controlling constitutional law has since been created holding otherwise. See Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001) (whenever future dangerousness is at issue in capital sentencing proceeding under South Carolina's sentencing scheme, due process requires jury be informed that life sentence carries no possibility of parole). There is simply no constitutional requirement that a parole eligible defendant receive a parole eligibility instruction.

The current case is both factually and legally distinguishable from Butler v. State, supra, where habeas relief was granted. After Butler was tried, his direct appeal affirmed, and his application for post-conviction relief denied, the Court issued several decisions stating a defendant's Fifth Amendment rights are violated if the trial judge pressures a defendant into testifying. See State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986); State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985).

Subsequently, Butler filed a habeas petition on the basis the trial judge had coerced him into testifying.[2] The Court noted Butler "seeks to take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of state post-conviction relief proceedings." Butler, 302 S.C. at 468, 397 S.E.2d at 88. The Court stated:

> We caution that not every intervening decision, nor every constitutional error at trial will justify issuance of the writ. Rather, the writ will issue only under circumstances where there has been a "violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Although we do not condone the delay in calling this grave constitutional error to our attention, under the unique and compelling circumstances of this case we grant petitioner relief.

[2] At some point, Butler's federal reviews were exhausted.

Id. (italic in original) (internal citation omitted).

The Court granted Butler extraordinary relief. It emphasized the trial judge was unaware Butler was mentally retarded and it expressed concern that Butler may not have understood the trial proceedings.

Furthermore, this case is dissimilar to Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001), in which the Court granted habeas relief to an applicant after concluding his due process rights were violated by an unduly coercive Allen[3] charge. The Court found it was the combination of the constitutional violation *and* other circumstances which compelled it to conclude the applicant had been denied fundamental fairness shocking to the universal sense of justice.

Petitioner notes that, despite the trial judge's "plain and ordinary meaning" charge during the initial penalty phase instructions, the jury returned with a parole eligibility question. Petitioner suggests that, after his appeal was decided, we created new law holding it is misconduct for a jury to fail to "rely solely upon the court's instructions for the law." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000).

It has always been the law that the jury must confine its consideration to the law as given by the trial judge. S.C. Const. art. V, § 21 (the judge shall declare the law).[4] On direct appeal, petitioner could have

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[3] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

[4] See also standard language which appears in jury charges ("As the presiding judge, I am the sole judge of the law of this case, and it is your duty as jurors to accept and apply the law as I now state it to you. If you already have any idea as to what the law is or what the law ought to be and it does not agree with what I now tell you the law is, you must abandon this idea because you are sworn to accept the law and apply the law exactly as I state it to you.").

readily challenged the jury's misconduct in considering matters contrary to the trial judge's instruction, but he did not do so. Accordingly, the misconduct by petitioner's jury does not "in the setting" - - petitioner's trial and its reviews - - constitute a violation shocking to the universal sense of justice.

Put simply, failure to charge the jury that petitioner was parole eligible is not shocking to the universal sense of justice. Clearly, petitioner's constitutional rights were not violated by the trial judge's refusal to give a parole eligibility charge; moreover, there have been no intervening circumstances by way of new law, after-discovered evidence, or any other alleged fact, which, in the setting, warrants the issuance of a writ of habeas corpus.[5] We deny the petition.

WRIT DENIED.

TOAL, C.J., and WALLER, J., concur. PLEICONES, J., dissenting in a separate opinion in which Acting Justice G. Thomas Cooper, Jr., concurs.

[5] Approximately eight years after petitioner's trial, the General Assembly amended the capital sentencing statute to provide that the trial judge must charge the applicable parole eligibility statute when requested by the defendant. S.C. Code Ann. § 16-3-20 (Supp. 2002). The amendment, generated after years of legal debate concerning the relevance of parole *in*eligibility, does not, under the circumstances presented here, constitute a denial of fundamental fairness shocking to the universal sense of justice.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the denial of petitioner's request for a parole eligibility charge at his capital trial was "a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (emphasis in original) (internal citation omitted). Accordingly, I would grant the writ of habeas corpus and remand the matter to Aiken County for a new sentencing proceeding.

FACTS

Prior to *voir dire*, petitioner's attorneys asked the trial judge whether he would charge the jury that, were it to find an aggravating circumstance yet recommend a life sentence, petitioner would be required to serve thirty years before becoming eligible for parole.[6] Had petitioner received a life sentence, he would have been seventy-one years old when he first became parole-eligible. Although the trial judge indicated he would give such a charge and the solicitor at one point agreed, the trial judge subsequently informed the parties, prior to the commencement of the penalty phase, that no such charge would, in fact, be given.

The trial judge also denied petitioner's attorneys' request to *voir dire* potential jurors regarding their views of parole eligibility for murderers who do not receive a death sentence. Despite the lack of any inquiry, the record reflects that fourteen of the thirty-nine jurors *voir dired* raised the issue of parole eligibility themselves: five of these fourteen individuals were seated on petitioner's jury.

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[6] At the time of his capital trial, petitioner would have been parole eligible after serving thirty years had his sentencing jury found an aggravating circumstance, but returned a life sentence. Following this trial, however, petitioner pled guilty to a second murder and received a thirty-year sentence. This second conviction for a violent offense renders petitioner parole ineligible. See S.C. Code Ann. § 24-21-640 (Supp. 2002). As the result of this second plea, petitioner will not be eligible for parole if his resentencing jury returns a life sentence. Id.

During his initial charge in the penalty phase, the trial judge told the jury that the terms 'life imprisonment' and 'death penalty' were to be given their plain and ordinary meanings. Despite this charge, the jurors returned approximately two minutes after beginning their deliberations asking whether a defendant who received a life sentence was required to serve a minimum number of years before becoming eligible for parole. The trial judge reiterated the 'plain and ordinary meaning' charge. Petitioner's attorneys again asked that the thirty-year parole eligibility charge be given, and the judge again declined.

On direct appeal, petitioner argued the trial judge's refusal to give the parole eligibility charge was a violation of petitioner's Due Process and Eighth Amendment rights. The Court held the issue was not properly preserved for review since petitioner failed to assert any constitutional basis for the charge at trial. State v. McWee, *supra*. Despite this issue preservation bar, the majority opined that petitioner's Due Process rights were not violated since he was not entitled to the charge because petitioner was, in fact, parole eligible.

ANALYSIS

The extraordinary relief afforded by Butler habeas corpus is available "to those who have, for whatever reason, been utterly failed by our criminal justice system." State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). While "not every intervening decision, nor every constitutional error at trial will justify issuance of the writ," it will issue "where there has been a violation which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, *supra*.

In this case, petitioner relies on the particular events that occurred at his trial and on the evolution of the law regarding parole eligibility charges to argue that his sentencing proceeding was, in hindsight, fundamentally unfair. Since this is a capital case, the Court must be especially concerned with the reliability of the jury's sentencing decision. As we recognized when granting another capital inmate resentencing upon a Butler petition, the United States Supreme Court has held " the qualitative difference between death and other

penalties calls for a greater degree of reliability when the death sentence is imposed." Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001) citing Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed. 2d 568 (1988) (internal citations omitted).

Petitioner points to the fact that a number of jurors, *sua sponte*, raised the issue of parole eligibility during *voir dire*. He also notes that, despite the trial judge's prophylactic 'plain and ordinary meaning' charge during the initial sentencing phase instructions, the jury returned almost immediately with a parole eligibility question. Thus, the record establishes that petitioner's jurors began their sentencing deliberations with a discussion of parole eligibility despite being instructed that it was not to be a factor in their decision.

The majority holds that this Court already considered petitioner's present claim, and denied it on direct appeal. They characterize petitioner's claim as a "constitutional requirement that a parole eligible defendant receive a parole eligibility instruction." I agree that this was the Due Process claim the Court considered and rejected on direct appeal, and I agree that petitioner had no constitutional entitlement to such a charge. I believe petitioner's current claim is different: Whether the denial of petitioner's jury charge request denied him the fundamental fairness guaranteed by the Due Process Clause? I would hold that it did.

The majority goes on to hold that petitioner's claim is both factually and legally distinguishable from Butler v. State. I find the differences unremarkable.

In Butler, the Court granted relief in part, because, after Butler's direct appeal had been decided, the Court issued several opinions holding that a defendant's Fifth Amendment rights were violated when the trial judge coerced the defendant's decision whether to testify. Butler v. State, *supra*. Here, after petitioner's direct appeal had been decided, this Court explicitly held that it was misconduct for a juror to fail to "rely solely upon the Court's instructions for the law." State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000).

The majority discounts the impact of the intervening Harris decision on petitioner's claim, noting that "it has always been the law that a jury must confine its consideration to the law as given by the trial judge." The majority finds further support for this long-standing truth in our standard jury charge. Thus, the majority distinguishes the facts upon which Horace Butler received relief from those upon which petitioner bases his claim.

That a defendant could not, consistent with the State or Federal constitutions, be coerced in deciding whether to testify at his criminal trial was well settled before Butler was tried. U.S. Const. amend. V; S.C. Const. art. I, § 12; e.g., State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979). In addition, the standard jury instruction, charged to Butler's jury, has since at least 1892 included language that no adverse inference may be drawn from a criminal defendant's failure to testify. State v. Howard, 35 S.C. 197, 14 S.E. 481 (1892).

In my opinion, if this standard jury charge language did not negate the error in Butler's trial, then the standard jury instruction given in petitioner's trial that 'the jury is to follow the law' does not vitiate petitioner's claim. While it is speculative to assume that Butler's jury disregarded this charge, there can be no doubt that petitioner's jury disregarded its instructions. Further, while I recognize that the intervening jury misconduct decision in State v. Harris, *supra*, did not represent a change in our law, neither did the intervening decisions upon which the Court relied in granting Butler relief. Rather, in Butler's case and in petitioner's case, the Court's intervening decisions identified particular acts as a violative of long-standing principles of constitutional law. Finally, it is somewhat misleading for the majority to suggest that petitioner should, or could, have readily challenged the jury's misconduct on direct appeal. His attorneys lodged no such specific objection to the jury's action, and thus no 'misconduct' claim was preserved for that appeal.[7] E.g., State v. Dunbar, ___ S.C. ___, 587 S.E.2d 691 (2003) (issue must be raised and ruled upon to be preserved for direct appeal).

[7] I say this not to fault petitioner's trial attorneys. When the jury returned with their parole eligibility question almost immediately after beginning

In addition to these 'unique and compelling circumstances,' [8] petitioner also relies upon the General Assembly's amendment of the death penalty statute. S.C. Code Ann. § 16-3-20 (Supp. 2002). The amended statute provides that capital defendants are entitled to have their juries charged on parole eligibility or ineligibility. Trial judges must charge parole ineligibility when requested by either the defendant or the State. § 16-3-20(A). Further, the statute now provides that "In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute." Id. As petitioner correctly points out, only individuals who committed a murder before 1995 could be parole eligible.[9] Petitioner contends that this provision in the amended statute establishes that the legislature intended a parole eligibility charge be given in cases where a pre-1996 capital murderer is granted a resentencing after the amendment's effective date. See also State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (Court indicated § 16-3-20 is to be given 'retroactive' effect). Upon retrial, petitioner has the absolute right pursuant to § 16-3-20(A) to request that his sentencing jury be given accurate parole information.

CONCLUSION

A Butler habeas corpus petition requires that this Court review the merits of the petitioner's claim "in [its] setting." While Butler relief is not confined to those inmates under a sentence of death, the Court must continue to be mindful when reviewing a claim that a capital sentencing proceeding was 'fundamentally unfair' of the qualitative differences between a death sentence and other criminal punishments, and of the greater degree of reliability the Constitution requires before this sentence may be imposed.

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deliberations, the attorneys used this question as the basis for (yet again) seeking a parole charge.

[8] Petitioner's repeated requests for a parole eligibility charge; a trial jury, with an overt interest in this issue, unable to accept the judge's instructions not to consider it; and our intervening juror misconduct decision.

[9] 1995 Act No. 83 (possible sentences for murder are death, life without the possibility of parole, or thirty year mandatory minimum, also without the possibility of parole).

Lowenfield v. Phelps, *supra*; Tucker v. Catoe, *supra*. I do not suggest that the Court should relax the Butler requirement that "the universal sense of justice" be shocked before the writ will issue, but merely to emphasize that the setting of this petitioner's claim is a capital sentencing proceeding.

In addition to this setting, petitioner's case involves incontrovertible evidence of what we now know to be 'juror misconduct': the jury's injection of parole eligibility into its deliberations in the face of a prophylactic 'plain and ordinary meaning' charge. Further, the General Assembly has now declared that all capital sentencing juries shall, upon request, be charged accurate parole eligibility information. Petitioner has been unrelenting in seeking just such a charge.

On direct appeal, the Court rejected petitioner's Due Process claim because he was not entitled under that constitutional provision to the jury charge he sought. The question we are asked to decide now is different: Whether the denial of petitioner's jury charge request was, in the setting, fundamentally unfair. Because of "the unique and compelling circumstances of this case," I would grant the petition for a writ of habeas corpus. To do otherwise would result in an 'utter failure of our criminal justice system,' which provides for a Butler petition in order to permit this Court a final opportunity to review the fundamental fairness of a criminal proceeding.

I respectfully dissent.

Acting Justice G. Thomas Cooper, Jr., concurs.

The Supreme Court of South Carolina

RE: Amendments to Rules 4(f)(4) of Rule 413 and 502, SCACR.

O R D E R

Two errors have been found in the amendments to Rule 413 and 502 approved this last summer and effective September 1. Pursuant to Art. V, § 4, of the South Carolina Constitution, the final clause of Rule 4(f)(4), Rule 413, and of Rule 4(f)(4), Rule 502, SCACR is amended to read:

"prior to the filing of formal charges."

This amendment shall be effective March 1, 2004.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 23, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wade M. Jenkins, Respondent,

v.

Janna Grooms Watkins Jenkins, Appellant.

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 3727
Submitted December 8, 2003 – Filed January 27, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Cynthia Barrier Castengera, of Newland, N.C. and
David Dusty Rhoades, of Charleston, for Appellant.

Joseph P. Cerato, of Charleston, for Respondent.

CURETON, A.J.: In this domestic action, Janna Grooms Watkins Jenkins ("Wife") appeals the family court's award of attorney fees and alimony, arguing the amounts are insufficient and should have included post-

judgment interest. Wife also appeals the family court's decision awarding Wade M. Jenkins ("Husband") a portion of Wife's IRA, as well as reimbursement for sums expended on the marital home. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife were married in March 1987 and separated in October 1997. They have no children. Husband instituted an action for separate maintenance and support against Wife in January 1998. The family court granted the parties a divorce based on one year's continuous separation, ordered Husband to pay Wife $2,700 per month in rehabilitative alimony for one year, equitably apportioned marital property, and awarded Wife $9,301.61 in attorney fees. After an appeal by Husband and cross-appeal by Wife, this court affirmed in part, reversed in part, and remanded. This court ordered the family court to award permanent periodic alimony instead of rehabilitative alimony; to determine Husband's entitlement to part of Wife's IRA; to consider Husband's entitlement to reimbursement for certain sums paid; and to reconsider attorney fees awarded to Wife.[1] We denied Husband's petition for rehearing and the supreme court denied Husband's petition for writ of certiorari.

On remand, the family court awarded Wife $1,800 permanent periodic alimony per month and ordered Husband to pay $200 per month toward his $23,400 alimony arrearage; ordered Wife to pay Husband $2,250 for his share of Wife's IRA; ordered Wife to reimburse Husband $4,222.61; and ordered Husband to pay 75% of Wife's attorney fees. The court did not award interest on the alimony arrearage or Wife's attorney fee award. After Wife's request for reconsideration, the court ruled interest should run on the alimony arrearage from the date of the order regarding remand. The court again denied the award of interest on the attorney fees. Wife appeals.

[1] Jenkins v. Jenkins, 345 S.C. 88, 545 S.E.2d 531 (Ct. App. 2001).

STANDARD OF REVIEW

In appeals from the family court, this Court has the authority to find facts in accordance with our view of the preponderance of the evidence. Greene v. Greene, 351 S.C. 329, 335, 569 S.E.2d 393, 397 (Ct. App. 2002). This broad scope of review does not require us to disregard the findings of the family court. Id. Neither are we required to 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. Id. The award of alimony rests within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of that discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). "Alimony is a substitute for the support which is normally incident to the marital relationship." Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988).

LAW/ANALYSIS

I. Attorney Fees

Wife argues the family court erred by not awarding her full attorney fees and costs. We disagree.

The award of attorney fees is left to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. Smith v. Smith, 308 S.C. 492, 496, 419 S.E.2d 232, 234-35 (Ct. App. 1992). We find the trial judge acted within her discretion in awarding Wife 75% of her attorney fees and costs. On remand from this court, the trial judge correctly considered the factors for awarding attorney fees set out in Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991), particularly the beneficial results obtained by Wife's attorney. Because the family court properly exercised its discretion in awarding attorney fees, we affirm the award.

II. Post-Judgment Interest on the Attorney Fee Award

Wife contends the family court erred by not awarding post-judgment interest on her award of attorney fees. We agree.

In Casey v. Casey, 311 S.C. 243, 428 S.E.2d 714 (1993), the supreme court held post-judgment interest should apply to equitable distribution awards. Later, in Christy v. Christy, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994), this court stated, "[t]he cash award of attorney's fees in this case is similar to the fixed award of money in Casey and we see no reason to distinguish the attorney's fee award from the fixed equitable distribution money award." Id. at 153, 452 S.E.2d at 5. In Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000), the supreme court established the rule for post-judgment interest in a case involving equitable distribution. The court held, "when a money judgment is finalized, whether in a lower court or in an appellate court, the interest on that amount, whether it has been modified upward or downward or remains the same, runs from the date of the original judgment." Id. at 104, 529 S.E.2d at 19. Based on the rule set out in Calhoun, and the correlation made in Casey between attorney fees and equitable distribution awards, we find Wife is entitled to post-judgment interest on her award of attorney fees.

South Carolina Code Ann. § 34-31-20(B) (Supp. 2002) provides all money decrees shall draw interest at the rate of 12% per year. However, this statute was amended, effective January 1, 2001; therefore, the 12% interest rate only applies to causes of action arising or accruing on or after January 1, 2001. 2000 S.C. Act No. 344, § 4. Because this action arose prior to January 1, 2001, the applicable interest rate is 14% per annum. See S.C. Code Ann. § 34-31-20(B) (Supp. 2000). Therefore, Wife is entitled to post-judgment interest on her attorney's fee award at the rate of 14% per annum from date of entry. We remand this issue to the family court for a calculation of the amount of post-judgment interest Husband owes on the attorney fees award.

III. Alimony

Wife claims the family court erred in awarding her only $1,800 per month in permanent periodic alimony. We disagree.

"An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." Allen v. Allen, 347 S.C. 177, 183-84, 554 S.E.2d 421, 424 (Ct. App. 2001). "Alimony is a

substitute for the support which is normally incident to the marital relationship." Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). "Generally, alimony should place the supported spouse, as nearly as practical, in the same position he or she enjoyed during the marriage." Allen, 347 S.C. at 184, 554 S.E.2d at 424. "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Id. (citing Woodward v. Woodward, 294 S.C. 210, 217, 363 S.E.2d 413, 417 (Ct. App. 1987). The trial court on remand states it reviewed all factors (as required by case and statutory law). We find the family court acted within its discretion in awarding Wife $1,800 per month permanent periodic alimony. Considering the factors for making an alimony award set out in S.C. Code Ann. § 20-3-130(C) (Supp. 2002), especially Wife's bleak earning potential due to her outdated bookkeeping skills, compared to Husband's stable employment, we find the alimony award was proper.

Husband argues in his brief this court should impute income to Wife. Although Husband disagrees with the finding that Wife is unemployable, he did not appeal the award of alimony. Therefore, we may not address Husband's argument.

IV. Post-Judgment Interest on the Alimony Award

Wife argues the family court erred by failing to award post-judgment interest on the alimony arrearage from the date of the original order. We agree.

We find Wife is entitled to post-judgment interest on the alimony award. Husband made seven payments totaling $32,400, which constitutes only eighteen alimony payments, although thirty-two months had elapsed. Therefore, Husband owes interest on thirteen past-due alimony payments. Interest is due on alimony at the time each support payment becomes due. See Thornton v. Thornton, 328 S.C. 96, 114, 492 S.E.2d 86, 96 (1997). Accordingly, Wife's post-judgment interest on the alimony arrearage should be calculated from the date each payment was due. As stated above, according to 2000 S.C. Act No. 344, § 4, the interest rate on all money decrees regarding causes of action arising before January 1, 2001 is 14% per

annum. We remand this issue to the family court for a determination of the amount of post-judgment interest Husband owes on the alimony arrearage.

V. Husband's Entitlement to a Portion of Wife's IRA

Wife contends the family court erred in not taking additional testimony regarding whether contributions to Wife's IRA were marital and in finding Husband is entitled to a portion of the IRA. We find additional testimony was not needed on this issue and it was not error to award Husband 50% of the marital funds in the IRA. Wife testified at the final hearing in 1999 that she contributed to her IRA during the marriage in the amount of $1,500 per year for three years. This court specifically referred to this testimony in its 2001 opinion. Clearly, because these funds were contributed during the marriage, they are marital property to which Husband is partially entitled. S.C. Code Ann. §§ 20-7-472 to -473 (Supp. 2002); Calhoun v. Calhoun, 331 S.C. 157, 175, 501 S.E.2d 735, 744-45 (Ct. App. 1998) (stating annuity in which wife invested during marriage was part of marital estate and was subject to equitable distribution in divorce action), aff'd in part, rev'd in part on other grounds, 339 S.C. 96, 529 S.E.2d 14 (2000). Based on the above, we agree with the family court judge's finding that Husband is entitled to $2,250, or half of the marital property in the IRA.

Wife argues that if Husband is entitled to any portion of Wife's IRA, he is entitled to only the value of the marital funds deposited, not the amount of funds deposited during the course of the marriage. On remand, the family court determined it had correctly calculated the amount of marital contributions made to the Wife's IRA. Husband refers us to exhibits in the record showing that the value of the marital contributions made to the IRA during the marriage was $9,308.89. That being the case, we fail to see how Wife is prejudiced by the court's finding that Husband is entitled to only one-half of the amount of the contributions of $4,500.00. Wife may not complain of a ruling that does not prejudice her. State v. Abney, 109 S.C. 102, 103, 95 S.E. 179, 180 (1918).

Husband argues he should receive more from the IRA due to an additional $875 he claims was marital property. Because Husband did not appeal, we do not address this argument.

VI. Reimbursement to Husband

Wife claims Husband is not entitled to the $4,222 reimbursement ordered by the family court. We find, while Husband is entitled to some reimbursement, he is only entitled to one-half of the amount ordered by the family court.

Husband paid $4,222.61 to redeem the marital home out of foreclosure and pay the mortgage payments through December 2001. Because the marital home is considered marital property, both Husband and Wife were jointly responsible for making the mortgage payments on the home. Therefore, we find Husband is entitled to $2,111 reimbursement from Wife. We find this amount, which represents half of the amount spent by Husband on the mortgage payments, is a fair reimbursement to Husband because the expenses of the marital home, as marital property, should be equally shared by Husband and Wife.

CONCLUSION

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CONNOR and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bynum Rayfield, Appellant.

Appeal From Chester County
Paul E. Short, Jr., Circuit Court Judge

AFFIRMED

Opinion No. 3728
Heard December 10, 2003 – Filed January 27, 2004

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney Charles H. Richardson and Senior Assistant Attorney General Harold W. Coombs, Jr., of Columbia; and Solicitor John R. Justice, of Chester, for Respondent.

KITTREDGE, J.: Bynum Rayfield was charged with three counts of first-degree criminal sexual conduct, three counts of committing a lewd act upon a child, and one count of contributing to the delinquency of a minor. The jury returned a verdict of guilty on all counts, and he was sentenced to an aggregate term of thirty years imprisonment. Rayfield appeals, arguing the circuit court erred in granting the State's Batson[1] motion and in charging the jury that the testimony of victims "need not be corroborated." We affirm.[2]

FACTS

Rayfield was accused of sexually abusing his two stepdaughters, his daughter, and two neighborhood girls who were friends with his stepdaughters and daughter. All of the girls were minors and testified as to Rayfield's sexual misconduct. Rayfield denied any misconduct. The jury found Rayfield guilty of all charges, and he was sentenced.

LAW/ANALYSIS

I. Batson Issue

Rayfield argues the trial court erred in granting the State's motion under Batson. We agree, but we are constrained to conclude that Rayfield ultimately was not legally prejudiced by the trial court's error.

During the initial jury selection, Rayfield, through counsel, employed peremptory strikes against five prospective jurors. Four of the five prospective jurors struck were female.[3] The State introduced its Batson objection by indicating that defense counsel should be required to put

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[1] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986).

[2] Rayfield's appellate counsel did not represent Rayfield at trial.

[3] Defense counsel struck an additional female prospective juror during selection of alternate jurors. In total, Rayfield's trial counsel struck six prospective jurors, five of whom are female.

forward a race and gender-neutral explanation for his strikes. The State noted, "that of the selected jurors there are nine males [and] three females …." [4] It further indicated that the motion "concerned . . . the strikes of the white females." The State specifically identified Juror #17, a white female, as "concern[ing] the State the most."

Defense counsel provided the trial court with the basis for striking each of the prospective female jurors. The trial court deemed these explanations "race and gender neutral." As discussed more fully below, the trial court found a Batson violation with respect to the only male, Juror #70, struck by defense counsel.[5] The first jury was quashed and "a redraw of the jury" followed.

The ensuing "redraw" resulted in no Batson challenge, and significantly, none of the jurors struck by defense counsel during the initial jury selection were seated on the second jury.[6]

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). The purpose of Batson is to "protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." State v. Haigler, 334 S.C. 623, 628-629, 515 S.E.2d 88, 90 (1999). Both the State and defendants

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[4] The first jury was comprised of eight blacks and four whites. The first alternate is a white male, and the second alternate is a black female.

[5] While Juror #70 was the only male struck by the defense, the State struck only males.

[6] Defense counsel struck two of the four females who were successfully challenged in the initial jury selection process. Juror #70 was not drawn for the second jury. The second jury was comprised of eight whites and four blacks, and the gender makeup was altered as well, as the second jury was comprised of seven males and five females.

are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. Georgia v. McCollum, 505 U.S. 42, 58 (1992). The trial court must conduct a Batson hearing "when members of a cognizable racial group or gender are struck and the opposing party requests a hearing." State v. Tucker, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999).

Our supreme court has set forth the following procedure for a Batson hearing:

> After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral [or gender-neutral] explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral [or gender-neutral], the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race [or the other gender] were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment.

State v. Ford, 334 S.C. 59, 64, 512 S.E.2d 500, 503 (1999).

Whether a Batson violation has occurred must be determined by examining the totality of the circumstances, and "the opponent of the strike carries the ultimate burden of persuading the trial court the challenged party exercised strikes in a discriminatory manner." Shuler, 344 S.C. at 615, 545 S.E.2d at 810. With regard to a Batson motion, "[a]ppellate courts give the trial court's finding great deference on appeal, and review the trial court's ruling with a clearly erroneous standard." Id. When the record, however, does not support the reason upon which the trial court has based his findings, "those findings will be overturned." Tucker, 334 S.C. at 9, 512 S.E.2d at 103.

Rayfield's counsel offered two reasons for striking Juror #70: (1) "he was retired [and] I didn't have information from what he was retired;" and (2) his "conservative" appearance.

Here, the trial court followed the State's lead and disregarded defense counsel's explanation that he struck juror #70 due to his conservative appearance. Our courts, as well as other jurisdictions, have consistently found a prospective juror's demeanor and appearance as nondiscriminatory reasons for exercising a peremptory challenge of the juror. See Tucker, 334 S.C. at 8, 512 S.E.2d at 102 (finding no violation of Batson where State struck juror because he was argumentative and his answers were "dogmatic"); State v. Wilder, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991) (holding that counsel may strike a juror based on demeanor and disposition); State v. Smalls, 336 S.C. 301, 309, 519 S.E.2d 793, 797 (Ct. App. 1999) (finding no discriminatory intent inherent in defense counsel's explanation for striking jurors who appeared to counsel as "looking in a 'mean,' 'stern' or 'accusatory' manner"); State v. Guess, 318 S.C. 269, 273, 457 S.E.2d 6, 8 (Ct. App. 1995) (noting that demeanor has been upheld in many jurisdictions as a legitimate reason to strike a juror (citing Lockett v. State, 517 So.2d 1346 (Miss. 1987)); see also Jones v. State, No. 05-02-00357, 2003 WL 21649964, at 3 (Tex. Crim. App. July 15, 2003) (upholding trial court's denial of defendant's Batson motion where State's explanation for striking juror was that the juror wore leather clothing and had a "very liberal outward appearance").

Although not argued by the State, we note South Carolina's rejection of the "dual motivation doctrine in the Batson context." See Payton v. Kearse, 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998) (noting that South Carolina follows the "tainted" approach whereby a discriminatory explanation for the exercise of a preemptory challenge will vitiate other nondiscriminatory explanations for the strike). Consequently, Rayfield's counsel's stated reliance on the appearance of Juror #70 will not cure a discriminatory purpose. The question then becomes whether, under our deferential standard of review, the record sustains the trial court's determination that Juror #70 was struck because of his gender. We find the record contains no evidence indicating Juror #70 was struck because he is a male.

The State's disjointed and moving-target approach to its Batson motion created confusion. The State began its motion with a reference to Juror #17, a white female, requesting a "race and gender-neutral explanation" for the strike. On the heels of informing the trial court that its focus was the striking of white females, the State mentioned Juror #70, the sole male struck by defense counsel. The colloquy returned to the gravamen of the State's Batson motion, the striking of females, especially Juror #17 which "concern[ed] the state the most." During the argument, the State repeatedly assigned discriminatory motives to defense counsel in striking females. When the trial court determined that defense counsel's reasons for striking the females were nondiscriminatory, the State resurrected its challenge to Juror #70. Defense counsel reiterated his position that "juror [#70] appeared to be a very conservative individual, to me . . . he just appeared from appearance that he would be the type likely to side with the State." The trial court ignored defense counsel's reliance on this juror's conservative appearance and granted the State's Batson motion, finding Juror #70 was struck because he was a male: "The only reason given for striking Juror #70 … is that he was retired … but you allowed Juror #36 [a female] to serve [who was also retired] … I'm going to find that [in regard to Juror #70] that was not a gender neutral reason."

As noted, the first jury was comprised of nine males and three females. Defense counsel used the allotted number of strikes, exercising all but one against females. Clearly, Rayfield's counsel was not discriminating against males. The totality of the facts and circumstances compels a finding that no gender based discrimination was associated with the striking of Juror #70. Defense counsel asserted to the trial court: "[T]hey're complaining I was striking all these females and seating all these men, and then there's one man I strike … [and] out of all these jurors, it's certainly not a pattern of discrimination against men." We agree and find absolutely no gender based discrimination in the exercise of a preemptory challenge against Juror #70. We therefore find that the reasons asserted for the strike of Juror #70 were gender neutral, and the State fell short of demonstrating purposeful gender based discrimination. It was error for the trial court to grant the State's Batson motion.

We nevertheless find no reversible error pursuant to the supreme court precedent of State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). In Adams, the trial court erred in granting the State's Batson motion and quashing the jury. Because the jury ultimately selected had none of the persons defense counsel struck from the first jury panel, the supreme court found "no prejudice resulted from the judge's error" and affirmed Adams' convictions. Id. at 126, 480 S.E.2d at 373. In so holding, the court in Adams recognized that no juror's equal protection rights are violated where the trial court improperly quashes a jury panel. In addition, the court in Adams referenced the settled principle that "[a] defendant has no right to trial by any particular jury." Id. But cf. Ford, 334 S.C. at 66, 512 S.E.2d at 504 (holding that reversal and granting of a new trial is a proper remedy where the trial court erred in finding defendant violated Batson in striking certain jurors *and* any challenged juror was seated on the second jury).[7]

II. Charge Pursuant to S.C. Code Ann. § 16-3-657

Rayfield argues the trial court erred in charging the jury that the testimony of the victims "need not be corroborated" pursuant to S.C. Code Ann. § 16-3-657 (Supp. 2002). We disagree.

The trial court is required to charge the correct law of South Carolina. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (1996). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Sims, 304 S.C. 409, 422, 405 S.E.2d 384 (1991). The substance of the law is what must be instructed to the jury, not any

[7] We acknowledge Rayfield's concern with the loss of a properly selected jury, and the concomitant desire of the State to avoid a particular jury for a variety of reasons connected to the State's perceptions of its chances of obtaining a guilty verdict. The application of the holding in Adams may, in some cases, allow the State to benefit from its pursuit of a meritless Batson motion by providing it with another opportunity to draw a jury more to its liking. We are, however, bound to apply the holding in Adams.

particular verbiage. State v. Rabon, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980).

The trial court instructed the jury that section 16-3-657 provides that "the testimony of a victim need not be corroborated." The challenged charge withstood appellate scrutiny in State v. Schumpert, 312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993). We consequently find no reversible error in the trial court's instruction to the jury regarding the corroboration of the victims' testimony. Consistent with Schumpert, we note the trial court: (1) properly instructed the jury that they were the sole finders of fact with the discretion to determine the credibility of the witnesses; (2) correctly charged our state's constitutional mandate prohibiting the court from commenting on the facts and stated: "The law does not permit me to have an opinion about the facts in this case;" and (3) correctly charged the State's burden of proof. While the section 16-3-657 charge is not mandatory, such charge does not constitute reversible error when the Schumpert safeguards are present.

CONCLUSION

Having determined that Rayfield's appeal is controlled by the supreme court precedent of State v. Adams and State v. Schumpert, respectively, the judgment of the circuit court is

AFFIRMED.

HEARN, C.J., and HOWARD, J., concur.