The Supreme Court of South Carolina

In the Matter of Nancy Ranson Cole, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 1, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 8, 2008, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Nancy Ranson Cole shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 16, 2008

The Supreme Court of South Carolina

In the Matter of Bruce Benton Davidson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1981, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated November 24, 2008, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Bruce Benton Davidson shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/John H. Waller, Jr. J.

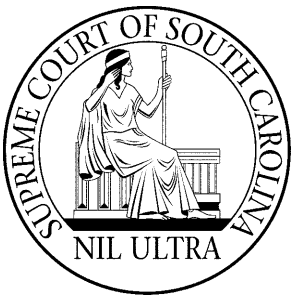
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 16, 2008



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 47
December 22, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Luke A. Williams III, Petitioner,

v.

Jon Ozmint, Commissioner,
South Carolina Department of
Corrections, Respondent.

ORIGINAL JURISDICTION

Opinion No. 26573
Heard October 22, 2008 – Filed December 22, 2008

WRIT DENIED

David I. Bruck, of Lexington, Virginia, Keir M. Weyble, of Columbia, for Petitioner.

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

CHIEF JUSTICE TOAL: Petitioner Luke A. Williams was convicted of murder and sentenced to death. Petitioner has exhausted his appeals and

now seeks a writ of habeas corpus from this Court based on our decision in *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007).

FACTUAL/PROCEDURAL BACKGROUND

In 1993, a jury found Petitioner guilty of the murders of his wife and son. During the sentencing phase, the solicitor stated three times that he "expected" the death penalty. Defense counsel did not object, and the jury sentenced Petitioner to death.

Petitioner's convictions and sentences were affirmed on direct appeal. *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Petitioner applied for post-conviction relief (PCR) raising three issues. The PCR court granted relief on the third ground.[1] However, this Court reversed, finding lack of prejudice. *Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005). The United States District Court for the District of South Carolina granted Petitioner a writ of habeas corpus, but the Fourth Circuit Court of Appeals reversed the district court's decision. *Williams v. Ozmint*, 494 F.3d 478 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 1445 (2008).

Petitioner now seeks issuance of a writ of habeas corpus based on this Court's decision in *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007), in which this Court reversed the defendant's death sentence based upon the solicitor's improper statements in the sentencing phase.

LAW/ANALYSIS

Petitioner argues that he is entitled to habeas relief because the solicitor improperly stated that he "expected" the death penalty during his sentencing argument. We disagree.

At common law, habeas relief was only available to a convicted defendant to attack the jurisdiction of the court imposing the sentence. *See*

[1] Petitioner raised the issue of the solicitor's improper closing argument in this PCR application, but the PCR court denied relief on this ground.

Ex parte Klugh, 132 S.C. 199, 128 S.E. 882 (1925) (recognizing that habeas corpus is a collateral remedy and calls in question only the jurisdiction of the court whose judgment is challenged). However, during the 1950s and 1960s, South Carolina courts greatly expanded the use of the writ in order to ensure that our state afforded prisoners a proceeding where they could assert claims regarding constitutional violations. *See Simpson v. State*, 329 S.C. 43, 44, 495 S.E.2d 429, 430 (1998) (recognizing that the appeals in habeas matters increased between 1950 and 1970 apparently in response to United States Supreme Court decisions relating to the exhaustion of state remedies requirement for federal habeas corpus relief). In 1969, South Carolina adopted our version of the Uniform Post-Conviction Relief Act (UPCA), which drastically limited the availability of habeas corpus. *See* James Blume, note, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina* 45 S.C.L.Rev. 235, 263 (recognizing that following the adoption of the UPCA, post-conviction relief largely replaced habeas corpus relief). The UPCA directed that post conviction relief (PCR) was to encompass the relief available under the common law writ of habeas corpus, the relief available under the expansion of the writ, and the relief available by collateral attack under any common law, statutory or other writ, motion, petition, proceeding, or remedy. *See Simpson*, 329 at 44, 495 S.E.2d at 430; S.C. Code Ann. § 17-27-12(b) (2007).

In a PCR proceeding, a defendant collaterally attacks his conviction and may raise any claims of constitutional violations relating to his conviction. *See* S.C. Code Ann. § 17-27-12(a) (2007). Every applicant has the right to appellate review of the denial of PCR, and every applicant is entitled to the assistance of counsel in seeking review of the denial of PCR. *Bray v. State*, 366 S.C. 137, 139-40, 620 S.E.2d 743 (2005). Counsel is required to advise a PCR applicant of the right to appellate review of the denial of PCR and to brief arguable issues to safeguard the right to appeal, despite counsel's belief that the appeal is frivolous. *Id.* Although successive PCR applications are disfavored, they are not prohibited.[2] *See Washington v.*

[2] In fact, Petitioner's PCR application mentioned above was successive. The PCR court allowed it to proceed on the merits finding that Petitioner did not receive adequate assistance of PCR counsel in his first application.

State, 324 S.C. 232, 478 S.E.2d 833 (1996) (allowing successive PCR application where the defendant was denied due process due to numerous procedural irregularities); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) (denying a successive PCR application where the defendant failed to show a sufficient reason to entertain the successive application).

Notwithstanding the exhaustion of appellate review, including all direct appeals and PCR, habeas corpus relief remains available to prisoners in South Carolina. *See* S.C. Const. art. I, § 18. Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights. For these reasons, a defendant bears a much higher burden in a habeas proceeding. A writ of habeas corpus is reserved for the very gravest of constitutional violations "which, in the setting, constitute[] 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. It is clear that "not every intervening decision, nor every constitutional error at trial will justify the writ." *McWee v. State*, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004) (quoting *Green v. Maynard*, 349 S.C. at 538, 564 S.E.2d at 84). A defendant who seeks a writ of habeas corpus based on an error recognized as a constitutional violation after his conviction must show that, in the setting, the violation denied him fundamental fairness. *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). It is against this backdrop that we must review Petitioner's case.

At the beginning of the sentencing phase, the solicitor stated that "we're seekin' [the death penalty] and we expect to get it." At the beginning of his closing argument, the solicitor stated again "we expect the death penalty" and finished his closing argument with ". . . you can give him what he deserves. What he gave them! And we ask for it! Be bold! Be strong! Do what this case screams out for! We ask for it! We seek it! We expect to get the death penalty."

Petitioner argues that this Court should issue a writ of habeas corpus based on *State v. Northcutt*, in which this Court reversed the defendant's death sentence based in part upon the solicitor's statements that he "expected" the death penalty in his closing argument of the sentencing phase. Petitioner contends that the solicitor injected his own authority into the jury's

deliberations and that the implication of the solicitor's argument was that his expectation was a proper consideration for the jury to weigh in deciding whether to impose the death penalty. We disagree.

In *Northcutt*, this Court held that the solicitor's interjection of "expecting" the death penalty required reversal because such comments imposed the solicitor's personal beliefs upon the jury. 372 S.C. at 223, 641 S.E.2d at 881. In our view, *Northcutt* is inapposite. The Court did not hold that the solicitor's comments regarding "expecting" the death penalty constituted a denial of fundamental fairness shocking to the universal sense of justice. Rather, we held that the solicitor's closing argument as a whole[3] infused the sentencing proceeding with "passion and prejudice" in violation of S.C. Code §16-3-25(C)(1) (2003). *Northcutt* at 222, 641 S.E.2d at 881. Furthermore, unlike *Northcutt* which was a direct appeal, this case reaches the Court in the posture of a claim for a writ of habeas corpus. Petitioner therefore bears a much higher burden in challenging his conviction.

In this case, although the solicitor stated that he "expected" the death penalty, the totality of his argument did not "minimize the juror's own sense of responsibility for [Petitioner's] fate." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981) (holding that solicitor's attempt to minimize jury's responsibility was improper). Notably, the solicitor referenced the jurors' promise to "base [their] verdict on the testimony and the exhibits and the law presented," and told the jury that after considering all of the evidence, they should give "the punishment that fits the crime." Moreover, the trial judge gave thorough instructions to the jury, including the statement that "you are never required to recommend the death penalty." Accordingly, we hold that Petitioner failed to show that, in the setting,[4] the solicitor's remarks

[3] The solicitor in *Northcutt*, an infant homicide case, not only stated that he "expected" the death penalty, but also declared that it would be "open season on babies" if the jury did not return the death penalty and staged a funeral procession with a black shroud draped over the victim's crib.

[4] We reject Petitioner's argument that "in the setting" refers to all cases containing similar facts. Rather, "in the setting" refers specifically to the

constituted a denial of fundamental fairness shocking to the universal sense of justice.[5]

Petitioner has been afforded more than sufficient judicial review. Specifically, Petitioner raised this issue on PCR, but was denied relief on this ground. This Court reviewed Petitioner's direct appeal as well as his PCR proceeding. The federal district court, the federal circuit court, and the United States Supreme Court have also reviewed Petitioner's case. Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *Id.* This is not such a case. We hold that Petitioner's conviction and sentence does not constitute denial of fundamental fairness shocking to the universal sense of justice.

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totality of the facts and circumstances in the defendant's case.

[5] We recognize that this Court has granted habeas relief in other cases. *See Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001) (finding the combination of the judge's withholding of pertinent information regarding the deadlocked jury, the failure to instruct the jury not to communicate the nature of its division in future deliberations, and the giving of a coercive *Allen* charge shocking to the universal sense of justice) *and Butler*, 302 S.C. 466, 397 S.E.2d 87 (holding that a mentally retarded defendant was entitled to habeas corpus relief where coercive comments made by the trial judge violated the defendant's fifth amendment right). In our view, however, the circumstances in *Tucker* and *Butler* were extreme and, unlike Petitioner, the defendants in *Tucker* and *Butler* were denied fundamental fairness shocking to the universal sense of justice.

CONCLUSION

For the foregoing reasons, we deny the writ of habeas corpus.

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

The Supreme Court of South Carolina

In the Matter of
T. Andrew Johnson, Petitioner.

ORDER

Petitioner was suspended from the practice of law for one (1) year, retroactive to the date of his interim suspension, October 4, 2006. In the Matter of Johnson, 375 S.C. 499, 654 S.E.2d 272 (2007). Petitioner filed a Petition for Reinstatement which was referred to the Committee on Character and Fitness (CCF) pursuant to Rule 33(d), RLDE, Rule 413, SCACR. After a hearing, the CCF filed a Report and Recommendation recommending the Court grant the Petition for Reinstatement. Neither petitioner nor the Office of Disciplinary Counsel (ODC) filed any exceptions to the CCF's Report and Recommendation.

The Court grants the Petition for Reinstatement. Petitioner is hereby reinstated to the practice of law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Pleicones, J., not participating

Columbia, South Carolina

December 18, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

02-CP-06-314

Southeastern Housing Foundation f/k/a Southeastern South Carolina Housing, Inc., Appellant-Respondent,

v.

John Michael Smith, Stephen Mark Nettles, Sally Smith and Dawn N. Nettles, Defendants, of whom John Michael Smith and Sally Smith are Respondents-Appellants.

02-CP-06-315

Southeastern Housing Foundation f/k/a Southeastern South Carolina Housing, Inc., Appellant-Respondent,

v.

Calhoun Insurance Agency, Inc. a/k/a Calhoun Insurance Company, Inc. and John Michael Smith, Respondents-Appellants.

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4468
Heard October 7, 2008 – Filed December 12, 2008

AFFIRMED

William Howell Morrison, Phyllis W. Ewing, of Charleston, for Appellant-Respondent.

Curtis W. Dowling, R. Jeffords Barham, J. Todd Kincannon, of Columbia, for Respondents-Appellants.

GEATHERS, J.: This consolidated appeal arises from two suits filed by the nonprofit corporation, Southeastern Housing Foundation (the Foundation). In the first action, the Foundation sued its former attorney, John Michael "Pat" Smith (Smith), Smith's wife, its former developer, Stephen Nettles (Nettles), and Nettles' wife for civil conspiracy, negligence, breach of fiduciary duty, legal malpractice, and misappropriation of assets in connection with several affordable housing financing transactions. In the second action, the Foundation sued Smith and the Calhoun Insurance Agency, of which Smith is the registered agent and a shareholder, for the recovery of real estate and improvements on property leased to the Foundation.

The Foundation appeals the trial court's grant of summary judgment in favor of the Smiths and the Calhoun Insurance Agency. The Foundation argues that the trial court erred in finding the Foundation's newly appointed board of directors (New Board) was not properly installed such that the New Board was unauthorized to file suit on behalf of the Foundation.[1] Smith also appeals on several grounds claiming the trial court improperly vacated its

[1] For ease of reference, the Court will refer to "Smith" throughout the opinion for any claims pertaining to Smith, Smith's wife, and the Calhoun Insurance Agency.

order of summary judgment when it granted the Foundation's motion for relief from judgment under Rule 60(b), SCRCP. Smith mainly contends the Foundation manufactured a post hoc resolution permitting court-appointed custodians to file suit on behalf of the Foundation only after summary judgment was granted, which precluded the resolution from being deemed "newly discovered evidence" as required to grant relief under Rule 60(b)(2), SCRCP. We agree that the trial court properly granted the Foundation's 60(b) motion, and as such, we decline to address the Foundation's arguments for reversing the grant of summary judgment, save the Foundation's argument regarding the legal malpractice claim.[2]

FACTS/PROCEDURAL HISTORY

A discussion of the underlying facts and relationships between the parties is necessary for an understanding of this appeal's extensive and complex history.

The Foundation was created in 1976 as a nonprofit corporation pursuant to state and federal law.[3] As stated in its articles of incorporation, its purpose is "to provide, on a nonprofit basis, housing for lower income families, where no adequate housing exists . . . ." Consistent with this purpose, the Foundation is "authorized to engage in or assist in the development or operation of low-income housing . . . ." 24 C.F.R. § 811.102 (2008).

The Foundation's housing operations are largely intertwined with the South Carolina Regional Housing Authority No. 3 (Housing Authority). The Housing Authority is a creature of state law with the "power to acquire

[2] Because the Foundation will have received its requested relief, its remaining issues on appeal will be moot. See Seabrook v. Knox, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) (recognizing that this Court will not decide questions on which a judgment rendered will have no practical legal effect).

[3] The Foundation was originally named "Southeastern South Carolina Housing, Inc." Its name was officially changed on June 5, 1997 to "Southeastern Housing Foundation" to reflect its status as a public benefit corporation.

property, to remove unsanitary or substandard conditions, to construct and operate housing accommodations and to borrow, expend, lend and repay moneys for [these] purposes . . . ." S.C. Code Ann. §§ 31-3-30, 31-3-910 (Supp. 2007). As a quasi-governmental/state entity, the Housing Authority essentially serves as a paid management company for the Foundation's affordable housing properties. See S.C. Code Ann. §§ 31-3-20(10), 31-3-450, 31-3-530 (Supp. 2007).

Federal regulations governing subsidized housing allow an applicant, such as the Foundation, to participate in programs under Section 11(b) of the United States Housing Act of 1937.[4] The United States Department of Housing and Urban Development (HUD) allows an applicant to qualify for participation in programs under Section 11(b) if the applicant identifies its "parent entity" public housing authority and proves that it is a nonprofit entity that serves as an authorized agency or instrumentality of the parent entity. See 24 C.F.R. § 811.105 (2008).

As stated in its bylaws, all of the Foundation's corporate powers were to be exercised by its board of directors, "except as otherwise provided by [HUD] and the Federal Housing Administration." Further, the Foundation was empowered to enter into "a Regulatory Agreement with the Secretary of [HUD] . . . to enable the [Foundation] to secure the benefits of financing with the assistance of mortgage insurance under the provisions of the National Housing Act." To comply with HUD's federal regulations, the Foundation amended its bylaws in 1978 to include a provision that one of its purposes was to "otherwise assist and be utilized as a 'public housing agency' approved by [HUD] . . . [and] by the South Carolina Regional Housing Authority No. 3." The Foundation also stated in this amendment that upon dissolution, its property would vest in the Housing Authority.

After these amendments to its bylaws, the Foundation did not actively operate for almost twenty years. In the mid-1990s, Smith, who served as the part-time Executive Director of the Housing Authority, and Nettles, who

[4] As amended and consolidated with other housing statutes to form the Housing and Community Development Act of 1974, 42 U.S.C.A. §§ 1437 to 1437z-8.

served as the Director of Management of the Housing Authority, learned of a program administered by HUD.[5] Under the program, the Secretary of HUD is empowered to enter into contracts with state and local public housing agencies and fund these agencies through annual contribution contracts. See 42 U.S.C.A. § 1437f(b) (2008). In turn, the program encourages public housing authorities to establish nonprofits. Once established, a nonprofit entity can own affordable housing, obtain grants for rehabilitation of properties, and enter into management agreements with housing authorities. The concept behind the program was that the Foundation would own the properties, but the Housing Authority would manage the properties for a fee.

Pursuant to this program, Nettles and Smith revitalized the Foundation and entered into an agreement with the Housing Authority on July 1, 1996 regarding both entities' roles in the program.[6] Under this agreement, the Foundation agreed to accept the Housing Authority as its "Parent Agency" in order to assist the Foundation with management and financial support until the Foundation became self-sufficient. Consistent with the Foundation's agreement to be managed by the Housing Authority, the General Certificate executed at the first meeting of the revitalized Foundation set forth the board of directors. It stated that three of the four directors were serving "At [the] Will of [the Housing] Authority" and that each was "duly qualified to act in the official [designated] capacity."

After entering into this agreement with the Housing Authority, the Foundation applied for tax-exempt status under 26 U.S.C.A. § 501(c)(3). In

[5] Smith, as an original incorporator of the Foundation, served as a member of the Foundation's board of directors from its inception in 1976 until he resigned in July 1997.

[6] When the Foundation entered into this agreement with the Housing Authority, Nettles was both the Executive Director of the Foundation and Director of Management of the Housing Authority and Smith was the part-time Executive Director of the Housing Authority. This coterminous representation is permissible pursuant to 24 C.F.R. § 811.105(e) (2008) ("Members, officers, or employees of the parent entity [public housing authority] may be directors or officers of the applicant unless this is contrary to state law.").

its application to the Internal Revenue Service (IRS), the Foundation stated it would buy, rent, and sell houses to low-income families "through and [with the] support [of the] South Carolina Regional Housing Authority No. 3." The Foundation also submitted an opinion letter written by attorney Lee Bowers, which stated that the Foundation was "an agency or instrumentality of the S.C. Regional Housing Authority, No. 3, i.e., parent entity." The Foundation further represented that it would be controlled by and financially accountable to the Housing Authority. Based on these statements and other submissions, the IRS granted the Foundation's application.

The Foundation then began to purchase and finance affordable housing properties, notably the "Marlboro Street Property," which is the subject of the Foundation's second action, in Barnwell, South Carolina. In almost all of these transactions, Smith, as the Foundation's attorney, and Nettles, as the Foundation's developer, received fees for either legal or development work.

In February 2002, Smith and Nettles had a falling out, which led to mutual accusations of improper conduct and ended with Nettles filing a grievance against Smith with the Housing Authority. Based on these allegations, the Housing Authority's board of commissioners (Board of Commissioners) requested that HUD conduct an audit of the Foundation and directed the Foundation to "[i]mmediately dismiss" its current board of directors. In March 2002, the Housing Authority appointed three of its own commissioners as new board members for the Foundation and assumed control of the Foundation's affairs.

On May 30, 2002, the Housing Authority's legal counsel sent letters to the remaining four former board members (Former Board) requesting their formal resignations and execution of a unanimous consent resolution granting authority to the Housing Authority to elect a new board. In the letter, counsel stated that if the Former Board did not consent, counsel would be required to advise the Board of Commissioners of its legal options. Two of the four members resigned, and when the remaining two members refused, the Housing Authority filed a derivative action against them. In response, the remaining two board members resigned, and the suit was dismissed with

prejudice.[7] The Housing Authority then filled the remaining vacancies on the Foundation's board in June 2002.

During the time that the Housing Authority was attempting to obtain the Former Board's resignation, the Inspector General of HUD was performing an audit of the Foundation.[8] The report concluded that Smith and Nettles "took advantage of their positions . . . to financially benefit themselves, their families, and friends at the expense of [the Housing Authority and the Foundation]."[9] The audit stated that any net earnings beyond those needed for "the retirement of project debt or to carry out low-income housing projects were not to inure to the benefit of any person or entity other than the parent entity, the Authority." As such, HUD concluded that Smith and Nettles' collection of over $958,738 in development and other fees on Foundation property purchases was inappropriate. The audit also opined that the Housing Authority's agreement with the Foundation to provide financial and administrative support was illegal because HUD funds can only be used for projects that have been explicitly approved by HUD.

Based on this audit, the Housing Authority filed suit against Smith regarding alleged incentive compensation he received while Executive

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[7] Smith alleges the New Board failed to follow statutory guidelines in filing its unanimous consent resolution to remove the Former Board and in obtaining the written resignations of the Former Board. Because we find the court-appointed custodians, acting as the Foundation, had the authority to file the lawsuits, we decline to address these arguments as the board's former or present constitution has no bearing on the ability of the Foundation to file suit.

[8] Because the Foundation was a recipient of annual contribution contracts for its low-income housing projects, 42 U.S.C.A. § 1437c(h)(1) required the Foundation to provide HUD with the right to audit.

[9] At the time of the audit in 1999, the respective board members included: (1) Nettles' wife, Dawn Nettles; (2) Smith's wife, Sally Smith; (3) Smith's employee, Melissa Still; (4) Dawn Nettles' mother, Kathleen Norton; (5) Sally Smith's brother-in-law, Bobby Kinard; (6) Sally Smith's niece and Bobby Kinard's daughter, Julie Welch; and (7) Dawn Nettles' sister, Valerie Kraun.

Director of the Housing Authority. In addition, the Foundation filed two suits in December 2002, which were later consolidated and are now before this Court. The first suit was against the Smiths and the Nettles to recover the above-mentioned fees and other damages,[10] and the second action was against Smith and the Calhoun Insurance Agency for alleged misdeeds over the purchase and subsequent lease of the Marlboro Street Property.[11]

In April 2005, the Smiths and the Nettles filed a summary judgment motion pursuant to Rule 56, SCRCP, as to all causes of action and alleged the New Board was without authority to file suit on behalf of the Foundation. After the trial court held a hearing on the motion, but before it issued its order, two members of the New Board filed an action for judicial dissolution of the Foundation and petitioned the trial court to appoint a custodian for the Foundation pending the outcome of the litigation. On June 22, 2005, the trial court signed an order appointing three custodians for the Foundation.[12] The trial court authorized the custodians to exercise all powers of the corporation through or in place of the New Board and to sue and defend on behalf of the

[10] The Foundation also sued Smith's wife, Sally Smith, and Nettles' wife, Dawn Nettles, due to their employment with the Foundation at the time of the alleged wrongdoings. The Foundation has since settled its case against the Nettles.

[11] The Foundation filed suit against Smith and the Calhoun Insurance Agency for breach of fiduciary duty, tortious interference with contract, and constructive trust. These claims stemmed from the purchase and subsequent leasing of the Marlboro Street Property, which was used by the Foundation and the Housing Authority for office space. The Foundation alleged that Smith, while legal counsel for the Foundation, improperly assigned the sales contract to himself, charged property taxes to the Foundation, which otherwise would not have accrued due to its 501(c)(3) status, and improperly assessed improvements and rental fees against the Foundation. See Southeastern Housing Foundation f/k/a Southeastern South Carolina Housing, Inc. v. Calhoun Insurance Agency, Inc., and John Michael Smith, C/A No. 02-CP-06-315.

[12] The trial court entered its initial order appointing the custodians on June 6, 2005. After receiving comments from the parties, the trial court amended its initial order on June 22, 2005 and filed the order on June 24, 2005.

Foundation. It also expressly charged the custodians with ensuring that the Foundation's financial obligations were met, with ratifying any actions taken by the New Board if in the best interests of the Foundation, and with informing the trial court about the custodians' positions on any pending lawsuits involving the Foundation.

On June 23, 2005, the trial court granted summary judgment in favor of the Smiths and the Nettles on the grounds that the New Board was created illegally and thus lacked the power to file suit on behalf of the Foundation. The trial court also held that the Foundation's claims against Smith for legal malpractice were fatally flawed due to its failure to present an expert witness to establish Smith's required duty of care. Following entry of summary judgment, the Foundation timely filed a Rule 59(e), SCRCP, motion.

On August 1, 2005, two days prior to the trial court's hearing on the 59(e) motion, the custodians filed a resolution with the trial court, ratifying the filing of the lawsuits, which the trial court had voided in its grant of summary judgment. The trial court formally denied the Foundation's 59(e) motion on December 9, 2005, reasoning that because the custodians' resolution was not before the trial court when it initially ruled on the summary judgment motion, it would be improper to consider the custodians' resolution in ruling on the 59(e) motion.

The Foundation then properly perfected an appeal to this Court on December 22, 2005. Almost six months later on June 20, 2006, the Foundation moved for relief from judgment under Rules 60(b)(2) and 60(b)(5), SCRCP, in tandem with a motion to this Court for leave to file the 60(b) motion with the trial court. On August 25, 2006, this Court granted the Foundation's motion for leave, thus conferring jurisdiction on the trial court to address the 60(b) motion.

On November 28, 2006, the trial court granted the Foundation's 60(b)(2), SCRCP, motion finding the custodians' resolution was "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ." In its order, the trial court found that the New Board's filing of the lawsuit on behalf of the Foundation was a voidable act. However, while the New Board may have been illegally

formed, because the Foundation had the authority to bring suit in its name as a distinct jural entity, the subsequent ratification by legally-appointed custodians cured that voidable act. As a result, the custodians' resolution ratifying the New Board's filing of the lawsuits was evidence of the Foundation's intent at the time of the initial filing. Thus, the trial court relieved the Foundation from its earlier summary judgment ruling on all causes of action except its grant of summary judgment in favor of Smith for legal malpractice. The Smiths and the Calhoun Insurance Agency timely filed a Rule 59(e), SCRCP, motion, which the trial court denied on March 26, 2007.[13] This appeal follows.

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[13] The Foundation contends that Smith's appeal is untimely because he failed to appeal the 60(b) motion within thirty days of its issuance. The Foundation argues that a Rule 59(e) motion is only appropriate to alter or amend a "judgment," and because the grant of the 60(b) motion neither dismisses the action nor finally determines the rights of any party, it is not a judgment within the meaning of the Rules. Thus, the 60(b) motion was untimely because the time to appeal was not stayed upon the filing of the 59(e) motion. We disagree. Under this analysis, if the trial court fails to address issues raised by a party at the 60(b) stage, the party would be forced to file a direct appeal without the benefit of first submitting a 59(e) motion to the trial court. Further, while a Rule 59(e) motion is a vehicle to alter or amend a judgment, it is also a means to reconsider previously raised issues and arguments. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). Without first submitting a 59(e) motion to the trial court, this Court could then dispose of the party's arguments on error preservation principles. See I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it is [sic] has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Because Rules 59 and 60(b) must be read together, Smith's 59(e) motion in response to the 60(b) ruling was proper. See Gray v. Bryant, 298 S.C. 285, 287, 379 S.E.2d 894, 895 (1989) ("It is our view that Rules 59 and 60(b) must be read together.").

ISSUES ON APPEAL

Smith appeals the trial court's grant of the Foundation's motion for relief from judgment under Rule 60(b)(2), SCRCP, on several grounds.[14] First, Smith argues the custodians' resolution ratifying the Foundation's lawsuit was not "newly discovered evidence" as is required for relief under Rule 60(b)(2), SCRCP. Second, Smith argues the 60(b)(2) motion was filed outside the one-year time limit and was not filed within a "reasonable time" after the resolution was discovered. Smith additionally contends that the custodians' ratification of the filing of the lawsuits was invalid because the custodians were never properly appointed. Smith next argues that S.C. Code Ann. § 33-31-1008 prohibits a corporation from affecting ongoing litigation through amendments to the articles, and because the custodians' resolution was actually an articles amendment, the trial court erred in relying on it to

[14] Even if the order granting the 60(b) motion is not immediately appealable, this Court may review an interlocutory order when the order is coupled with an appealable issue. See Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005); Briggs v. Richardson, 273 S.C. 376, 379 n.1, 256 S.E.2d 544, 546 n.1 (1979); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 338, 574 S.E.2d 502, 511-12 (Ct. App. 2002); Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). But cf. Pocisk v. Sea Coast Constr., Op. No. 4460 (S.C. Ct. App. filed November 20, 2008) (Shearouse Adv. Sh. No. 44 at 49) (finding parties' appeal from trial court's order granting 60(b) relief was not immediately appealable where the 60(b) order was the only issue before this Court and the order's appealability was specifically raised on appeal). Because the trial court's grant of summary judgment on the Foundation's legal malpractice claim is a final determination that is properly before this Court, we believe judicial economy argues for the resolution of Smith's arguments on the 60(b) motion at this time. See Edge, 366 S.C. at 517, 623 S.E.2d at 390 (finding resolution of partial denial of motion to dismiss was proper when it was coupled with appeal from partial grant of motion to dismiss because resolution of both was "in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)").

grant the Foundation relief. Last, Smith alleges the trial court erred when it addressed other issues in its 60(b) ruling, arguing this Court had granted the trial court leave to consider only the effect of the custodians' ratification on these lawsuits.

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Therefore, our standard of review is limited to determining whether there was an abuse of discretion. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

LAW/ANAYSIS

I. The Custodial Resolution as Newly Discovered Evidence

A. Existence of Resolution at Time of Summary Judgment

Smith contends the trial court erred in granting the 60(b) motion because the custodial resolution was "manufactured" after summary judgment and thus cannot be deemed "newly discovered evidence" under Rule 60(b)(2), SCRCP. We disagree.

A trial court may relieve a party from a final judgment, order, or proceeding if "newly discovered evidence which by due diligence could not have been discovered in time to move from a new trial under Rule 59(b)" is presented to the trial court. Rule 60(b)(2), SCRCP. Evidence is not "newly discovered" if it is known to the party at trial and in the party's possession. Lanier v. Lanier, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005).

The newly discovered evidence at issue is the custodians' resolution ratifying the Foundation's filing of the lawsuits. On June 22, 2005, one day

before the trial court granted summary judgment, the trial court signed an order appointing the custodians and charged them with reporting to the trial court within twenty days of the order's filing on whether it would be in the Foundation's best interests to file a lawsuit against the Smiths and the Calhoun Insurance Agency. The trial court then granted summary judgment on June 23, 2005. The Foundation then filed a 59(e) motion, and the custodians' resolution ratifying the lawsuits was filed less than a month later with the trial court on August 1, 2005. Because the resolution could not have been filed with the trial court before entry of summary judgment or in time to move for a new trial under Rule 59(b), SCRCP, the resolution is the proper subject of a 60(b)(2) motion.[15]

Furthermore, because the trial court found the New Board was illegally constituted in its summary judgment order, it was only with the judicial appointment of the custodians and their subsequent investigation that the Foundation's pre-existing intent to file suit could properly be considered by the trial court. See Peacock v. Bd. of Sch. Comm'rs, 721 F.2d 210, 214 (7th Cir. 1983) (generally finding that material not in existence until after trial falls within 60(b)(2) only if it pertains to facts in existence at time of trial). While the resolution may not have been in existence until after summary judgment was granted, the resolution was evidence of the Foundation's corporate will at the time of filing and thus was properly considered as "newly discovered evidence." See Gray, 298 S.C. at 287, 379 S.E.2d at 896 (finding juror's letter to newspaper praising doctors and criticizing parties who sue them, which was written on the same day the jury returned a verdict in favor of the defendant doctor and published two weeks after verdict, revealed a preexisting bias and was newly discovered evidence for purposes of Rule 60(b)); Amesco Exports, Inc. v. Assoc. Aircraft Mfg. & Sales, Inc., 87 F.Supp.2d 1013, 1015 (C.D. Cal. 1997) (finding plaintiff corporation's receipt of letter from tax commission advising it of conditional revival of its corporate status constituted newly discovered evidence for purposes of 60(b)(2) warranting relief from final judgment); Nat'l Anti-Hunger Coal. v.

[15] A motion for a new trial pursuant to Rule 59(b) "shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered." Rule 59, SCRCP.

Exec. Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1075 n.3 (D.C. Cir. 1983) (stating task reports that came into existence after lower court's decision pertained to facts in existence at time of decision which supported a finding that the reports were newly discovered evidence within the meaning of Rule 60(b), FRCP); 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2859 (2d ed. 2008) (stating "Rule 60(b)(2) has proved useful, especially when the newly discovered evidence calls into question the validity of the judgment by directly refuting the underpinnings of the theory which prevailed").

B. Establishment of Lanier Elements as Prerequisite for 60(b) Relief

Smith additionally argues the resolution was not the proper subject of a 60(b) motion because the Foundation failed to satisfy the first and fifth elements from Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005), thus forfeiting the Foundation's right to relief under Rule 60(b)(2), SCRCP.

In Lanier, we stated that to receive a new trial based on newly discovered evidence, the moving party must establish that the newly discovered evidence: "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." Id. at 217, 612 S.E.2d at 459. The five-part test recited in Lanier is yet another way of restating Rule 60(b)(2)'s requirements. See 12 Moore's Federal Practice § 60.42[2] (Matthew Bender 3d ed.) (discussing various element tests for Rule 60(b)(2)).

Smith's argument that the Foundation failed to establish or even discuss the first and fifth elements is unsubstantiated. The Foundation specifically stated in its 60(b) motion that the resolution was material and determinative of the Foundation's ability to file suit and was not cumulative or impeaching. Furthermore, the trial court specifically acknowledged and applied this test from Lanier in its 60(b) order. The trial court noted the resolution was outcome changing because the Foundation lacked the authority to bring suit prior to the resolution. With the resolution's filing,

facts supporting the Foundation's intent to file suit were in evidence. This resulted in the revival of all causes of actions, save the legal malpractice suit, against the Smiths, the Nettles, and the Calhoun Insurance Agency, and thus changed the outcome. In addition, the resolution was not merely cumulative or impeaching as it was the first evidence of the Foundation's corporate intent at the time of the filing of the lawsuits. The Foundation even elaborated on the fact that the resolution was not cumulative or impeaching at the 59(e) hearing to reconsider the 60(b) motion. Consequently, the trial court properly considered the custodial resolution as "newly discovered evidence" pursuant to Lanier and Rule 60(b)(2), SCRCP.

II. Filing of the Resolution within the Time Limitations of Rule 60(b)

Smith claims the Foundation failed to file its Rule 60(b) motion within a reasonable time and further alleges the motion was filed outside the absolute one-year time limit. Smith contends the Foundation's filing of its 60(b) motion with the trial court on September 12, 2006 was untimely as the date of the trial court's order granting summary judgment on June 23, 2005, rather than the date of its order denying the Foundation's 59(e) motion on December 9, 2005, controls. We disagree.

A Rule 60(b)(2) motion "shall be made within a reasonable time, and . . . not more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP. The one-year limit is non-discretionary, whereas the "reasonable time" limit is discretionary and should be determined under the facts and circumstance of each case. Coleman, 303 S.C. at 513, 402 S.E.2d at 183.

The precise question presented in this case is whether the time limit, which normally runs from the date of the judgment's entry, is stayed by the filing of a Rule 59(e) motion. Rule 203(b), SCACR, which discusses the motions that stay the time to file an appeal, is instructive on this question. The rule states:

> When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new

> trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

Rule 203(b)(1), SCACR.

Under this rule, if a party does not have to appeal to this Court while a 59(e) motion is pending because the finality of the challenged judgment has been removed, it follows that a party does not have to file a 60(b) motion with the trial court until the trial court issues its ruling on the 59(e) motion. See Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999) (basing the commencement of the time period for appeal on the finality of a judgment). For the same reason, a trial court plausibly could amend not only a judgment but also could reconsider its prior ruling on issues or arguments in response to a 59(e) motion. See Elam, 361 S.C. at 21, 602 S.E.2d at 779 (stating "it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court to 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments"). If a party were forced to file a 60(b) motion before it receives the trial court's 59(e) ruling, it would create unnecessary paperwork for the court system, increased costs and fees, and greater confusion for the parties. Unless the newly discovered evidence is revealed in time to move for a new trial under Rule 59(b), a party's only choice is to wait on the trial court's 59(e) ruling and then promptly file a 60(b) motion. As in the instant case, it is possible that the trial court could take several months to formally rule on a 59(e) motion. Under Smith's view of 60(b), the trial court's timeliness in granting or denying a Rule 59(e) motion could result in prejudice to the moving party, which we believe is inherently unfair.

The trial court granted summary judgment in Smith's favor on June 23, 2005, and formally denied the Foundation's Rule 59(e) motion on December 9, 2005. Based on the above-stated reasoning, the one-year deadline for

filing the Foundation's Rule 60(b) motion began to run at the entry of summary judgment and then was tolled with the Foundation's filing of the 59(e) motion. The time to file then began to run again when the trial court denied the Foundation's 59(e) motion on December 9, 2005. The Foundation properly filed its 60(b) motion on September 12, 2006, well within the one-year time frame. Moreover, the Foundation filed the motion within a "reasonable time" as it properly requested leave to file the 60(b) motion with this Court on June 20, 2006. See Rule 60, SCRCP (stating that "[d]uring the pendency of an appeal, leave to make [a 60(b)] motion must be obtained from the appellate court"). We ruled on the motion on August 25, 2006, and the Foundation promptly filed its 60(b) motion with the trial court less than a month after this Court's ruling. As such, the 60(b) motion was filed both within the one-year time limit and within a reasonable time.

III. Lawful Appointment of Custodians[16]

Smith argues the custodians' ratification of the lawsuits was null and void because the trial court was without authority to lawfully appoint the custodians. Smith contends Buccie Harley (Harley) and Doug Haley (Haley), the petitioners for custodial appointment, were not within the class of persons allowed to petition for judicial dissolution, so the trial court's appointment of the custodians during the pendency of the judicial dissolution was void. We disagree.

Harley and Haley, as members of the New Board, petitioned the trial court for judicial dissolution pursuant to S.C. Code Ann. § 33-31-1430 (Supp.

[16] The Foundation asserts in its brief that Smith cannot attack the validity of the custodians as Smith never appealed from the trial court's appointment order, and thus, Smith's attack on the validity of the custodial appointment is an improper collateral attack. Because the appointment of a custodian, as contrasted with the appointment of a receiver, is an interlocutory order and thus not immediately appealable based on this Court's decision in Shapemasters Golf Course Buiders, Inc., v. Shapemasters, Inc., 360 S.C. 473, 602 S.E.2d 83 (Ct. App. 2004), we will address Smith's argument. We express no opinion on whether Smith's failure to appear at the hearing on the custodians' appointment renders his attack on the appointment improper.

2007) and for custodial appointment pursuant to S.C. Code Ann. § 33-31-1432 (Supp. 2007).[17] Whether or not they were de jure directors on the New Board, they acted under color of authority to protect the interests of the Foundation. See Vestry of St. Luke's Church v. Matthews, 4 S.C. Eq. 578, 587-88 (1815) (finding an appointee may become a de jure officer when appointed by a de facto board or officer). When a "de facto" director or officer acts under color of right in assuming or performing a duty of that office, the action is sustainable. See id. at 587 (stating "trustees, even if not regularly elected, were at least trustees by colour [sic] of office, and their acts would be good"); see also 19 C.J.S. Corporations § 560 (2008) (stating a person may exercise the duties of an officer or director if the person possesses the office and exercises its duties under an appearance of right even if he or she is not an officer or director de jure by reason of ineligibility or lack of qualification or being unlawfully elected); 18B Am.Jur.2d Corporations § 1411 (2008) (noting that "[i]f the officers of a corporation exceed their authority and the act is one that could have been authorized in the first instance, the act may be expressly or impliedly ratified and, thus, be rendered just as binding as if it had been authorized when done"); cf. State v. Miller, 565 P.2d 228, 229 (Kan. 1977) (finding that a "de facto officer" is a person who assumes and performs a duty of office under color of authority and is recognized and accepted as a rightful holder of office, despite defects in the manner of appointment or his or her failure to conform to a condition precedent). Thus, because they acted under color of authority to carry out a lawful act, Harley and Haley's petition for judicial dissolution under § 33-31-1430(a)(2) is sustainable at law.

Furthermore, Smith's argument ignores the fact that the Housing Authority and the Foundation are in a statutorily-created relationship that renders the Foundation accountable to the Housing Authority. While Smith argues the New Board's failure to be elected by the Former Board, as required by S.C. Code Ann. § 33-31-804(b), prevented the New Board from

[17] Harley and Haley also served coextensively on the Housing Authority's Board of Commissioners when they petitioned for judicial dissolution and custodial appointment. See 24 C.F.R. § 811.105(e) (2008) ("Members, officers, or employees of the parent entity PHA may be directors of officers of the applicant unless this is contrary to state law.").

being valid, this argument ignores the interplay of the provisions of the National Housing Act. The Foundation is a South Carolina nonprofit corporation, and thus subject to the South Carolina Nonprofit Act, but it is also created pursuant to the National Housing Act and as a result is subject to those provisions as well.

Under the National Housing Act, the Foundation is "an agency or instrumentality" of the "parent entity" Housing Authority. 24 C.F.R. § 811.102. As reflected in the Foundation's bylaws, one of its purposes is to "otherwise assist and be utilized as a 'public housing agency' [as] approved by the Department of Housing and Urban Development . . . [and] by the South Carolina Regional Housing Authority No. 3." The Housing Authority has a vested interest in preserving and protecting the Foundation's assets, as the bylaws state, "In the event of the dissolution of the [Foundation] . . . the [Foundation's] property shall be given, conveyed and distributed to and shall vest in the South Carolina Regional Housing Authority No. 3 . . . ." This provision reflects the federal requirement "that upon dissolution of the applicant, title to or other interest in any real or personal property that is owned by such applicant at the time of dissolution shall be transferred to the parent entity [public housing authority]." 24 C.F.R. § 811.105(c)(6). Because of this relationship, the Housing Authority has a direct interest in the affairs of the Foundation. Without Harley and Haley's initiation of the dissolution and custodial appointment proceedings, the Housing Authority's ability to preserve and protect assets to which it is statutorily entitled could be threatened.

Furthermore, regardless of whether Harley and Haley petitioned the trial court as the Foundation's de jure or de facto directors, we note that neither Smith nor his counsel appeared at the hearing for custodial appointment, even after having received notice as an interested party. At the Rule 59(e) hearing to reconsider the 60(b) motion, Smith's counsel told the trial court that he did not attend the custodian hearing because the appointment would not affect Smith, but agreed at that time that "it was a very good idea that the custodian[s] be appointed." Despite Smith's role and interest in the Foundation and the Housing Authority, he never sought to intervene, which we fail to understand given Smith's current position on the custodians' appointment.

Based on all of the above, the trial court's appointment of the custodians was proper. Because their appointment was valid, the trial court was within its power to charge the custodians with exercising all the powers of the Foundation, including the power to sue and defend on behalf of the Foundation.

IV. Custodial Resolution's Effect on Ongoing Litigation

Smith contends the trial court's consideration of the custodial resolution at the 60(b) hearing was error as the Foundation is statutorily prohibited from affecting ongoing litigation through an articles amendment. We disagree.

S.C. Code Ann. § 33-31-1008 (Supp. 2007) states, "An amendment to [the] articles of incorporation does not affect a cause of action existing against or in favor of the corporation, [or] a proceeding to which the corporation is a party . . . ."

Smith argues the resolution filed with the Secretary of State is an articles amendment and thus was improperly before the trial court at the 60(b) hearing. However, the document at issue is entitled, "Resolution To Approve, Adopt & Ratify Previous Actions Of The Corporation And To Take Additional Actions With Respect Thereto." Within the body of the resolution, there is no mention of any amendments to the articles and the language specifically states, "This resolution is adopted by the Corporation with the unanimous written consent of the Custodians as evidenced by their individual signatures below." (emphasis added).

David Miller (Miller), one of the court-appointed custodians, filed the resolution with the Secretary of State and testified at the 60(b) hearing. Miller stated that he went to file the resolution "late in the day" on June 28, 2005, and when he handed it to a clerk at the Secretary of State, she returned it with a coversheet entitled, "Nonprofit Corporation Articles of Amendment." Miller testified he specifically told the clerk it was not an articles amendment. The clerk stated the coversheet was a formality and had to be completed for the resolution to be filed with the Secretary of State.

When Miller filled out the coversheet, most of his responses were "n/a [not applicable]" as the questions pertained to amending the articles of the corporation. Miller stated the coversheet was not attached to the resolution when he came to the Secretary of State's office, and were it not for the clerk's insistence that it be filled out as a prerequisite to filing the resolution, he would not have completed it.

Miller's testimony and the resolution itself prove it was not an articles amendment but was a properly-created custodial resolution. Further, while Smith argues the Foundation's failure to take corrective action renders the resolution an articles amendment that cannot be considered for purposes of this litigation, any alleged error was on the face of the coversheet, not within the body of the resolution. The coversheet was not created by the custodians or the Foundation, rather it was a "form revised by the South Carolina Secretary of State" and per the filing instructions on the coversheet, two copies of the form had to be completed for the resolution to be filed. As the coversheet was not contained within the body of the resolution and there are no facts within the resolution to indicate it is an articles amendment, the trial court properly considered the resolution at the 60(b) hearing.

V. Whether the Trial Court Considered Matters Outside the Scope of its Jurisdiction in its 60(b) Order

Smith lastly argues that all causes of action against him were essentially legal malpractice claims. Smith contends that the Foundation's failure to present an expert at summary judgment thus extinguished all of the Foundation's causes of action against him. Smith claims that because the issue of the necessity of a legal malpractice expert is still on appeal, the trial court did not have jurisdiction to reinstate all of the causes of action against Smith as the legal malpractice issue encompassed the remaining causes of action. We disagree.

The trial court's summary judgment order stated that all causes of action against Smith, including "legal malpractice, negligence, breach of fiduciary duty, conspiracy, misappropriation of assets, tortious interference with contract, and constructive trust . . . are based on some alleged breach of duty or loyalty to the Foundation or some conflict of interest in disregard of

the Foundation's rights." Smith argues this statement proves that Smith's legal representation of the Foundation is a common thread in all of the Foundation's claims.

However, before the trial court issued the summary judgment order, it notified the parties in writing that "an expert witness would be required to establish a standard of care and any deviations therefrom on the legal malpractice actions." (emphasis added). After receiving this letter, Smith's counsel drafted a proposed summary judgment order dismissing "these actions" against Smith for the Foundation's failure to name an expert. At the 59(e) hearing to reconsider the 60(b) motion, when the trial court realized Smith construed the summary judgment order as dismissing all causes of action against Smith, the trial court clarified any misconceptions regarding the scope of its prior order. The trial court stated,

> My intention was to send it back to let everything be heard except the legal malpractice claim . . . [The Foundation] didn't give me an expert and the legal malpractice case was gone and everything else against Mr. Smith was viable except for [the Foundation] didn't follow the corporate formalities . . . all other issues not dealing with legal malpractice, we're back to square one where we're going to try the case. . . . What I intended to do all along was to dismiss the legal malpractice case because there was no expert. I also dismissed the other part of the case because [] corporate formalities were not followed. I overrule or change my mind on that based on the corporate resolution. I am still of the opinion which leaves us with the legal malpractice case gone and the other actions, whatever they may be, if any, still pending.

While the trial court may have initially stated that the lack of a legal expert affected all of the claims against Smith, the court had the power to amend and clarify any misconceptions at the 59(e) stage. See Rule 59, SCRCP. Smith raised the issue of whether the trial court had jurisdiction in

his 59(e) motion, and the trial court was proper to address this issue at the 59(e) hearing. See Elam, 361 S.C. at 24, 602 S.E.2d at 780 ("A party may wish to file [] a [59(e)] motion when [the party] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.") (emphasis in original).

The trial court's 60(b) ruling demonstrates the intended scope of the order as well: "[The Foundation] is relieved from summary judgment in both actions on all causes of action except the aforementioned legal malpractice action against John Michael Smith." (emphasis added). The trial court clearly intended for the ratification to moot all issues regarding the exercise of corporate powers and to restore all the causes of action, except the legal malpractice claim.

Furthermore, the pleadings show the legal malpractice claim was distinct from the other claims as it was a separately pled cause of action against Smith in the Foundation's first complaint. As such, the Foundation's failure to proffer an expert for that claim in no way affects the Foundation's remaining claims for civil conspiracy, negligence, misappropriation of assets, tortious interference with contract, and constructive trust.[18] Those remaining causes of actions are still viable as to Smith, his wife, and the Calhoun Insurance Agency. A legal malpractice expert would not aid the jury in determining whether the Foundation should recover for those claims, as Smith's wife is not an attorney and the Calhoun Insurance Agency is not a law firm. Consequently, the trial court was within its power to find that the custodial resolution ratifying the filing of the lawsuits revived all causes of action, exclusive of the legal malpractice claim, against the Smiths and the Calhoun Insurance Agency.

[18] We recognize the dismissal of the legal malpractice claim would extinguish the breach of fiduciary duty cause of action against Smith in the first action. However, whether Smith can still be found to have breached a duty to the Foundation as the Executive Director of the Housing Authority, as the registered agent and shareholder of the Calhoun Insurance Agency, or as a board member of the Foundation in the second action is still a jury question regardless of his role as the Foundation's attorney.

VI. Foundation's Failure to Proffer an Expert Witness

The Foundation argues the trial court erred in finding that the lack of an expert witness was fatal to the Foundation's legal malpractice action against Smith, as Smith's actions were obvious violations of his legal duties. We disagree.

"In South Carolina, the plaintiff in a legal malpractice suit must prove several elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the plaintiff's damages by the breach." Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002). Typically, a plaintiff in a legal malpractice case must establish the standard of care through expert testimony, unless the subject matter is of common knowledge to laypersons. Sims v. Hall, 357 S.C. 288, 295-96, 592 S.E.2d 315, 319 (Ct. App. 2003). With the aid of expert testimony, "the jury is able to analyze the attorney's conduct and measure it against the action that a competent attorney would be expected to take under the same circumstances." Cianbro Corp. v. Jeffcoat & Martin, 804 F.Supp. 784, 793 (D.S.C. 1992).

The Foundation argues that Smith's malpractice falls within the common knowledge exception because his actions are statutorily prohibited by S.C. Code Ann. § 31-3-360 (Supp. 2007). Section 31-3-360 prohibits an employee or commissioner of a housing authority from "acquir[ing] any interest, direct or indirect, in any project or in any property included or planned to be included in any project, nor shall [an employee] have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any project."

Because Smith recouped attorney and development fees over the course of his employment with the Housing Authority, the Foundation argues he was plainly in contravention of the statute, and thus no expert was necessary. While Smith may be liable for any inappropriate commissions or fees recouped during his tenure as a director or a board member pursuant to this section, this statute is not conclusive on whether he breached a duty to the Foundation as its attorney. Further, given the extended duration of Smith's

involvement with the Foundation and the Housing Authority and the complex nature of many of the property and business transactions in which he represented the Foundation, the Foundation should have presented expert testimony, by affidavit or otherwise, at the summary judgment stage. As the standard of care for legal malpractice is outside the ambit of the common knowledge of laypersons, the Foundation's failure to present this evidence precludes the Foundation from bringing the legal malpractice claim against Smith at trial.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jon E. Hartfield, by and through his Conservator, Haskell L. Hartfield, and Haskell L. Hartfield, individually, Appellants,

v.

Glenn McDonald, d/b/a The Carolina Lounge, and The Getaway Lounge & Grill, Inc., and Shou-Mei Morris, Individually and as President of the Getaway Lounge & and Grill, Inc., Robert C. Cockrell, individually and d/b/a Williams Package and South Pointe Pub, Defendants,

Of whom, The Getaway Lounge & Grill, Inc., and Shou-Mei Morris, individually and as President of The Getaway Lounge & Grill, Inc., and Robert C. Cockrell, individually and d/b/a Williams Package and South Pointe Pub are, Respondents.

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

Opinion No. 4469
Heard October 21, 2008 – Filed December 17, 2008

AFFIRMED

Jon E. Newlon, of Greenwood, for Appellants.

C. Rauch Wise and Marvin R. Watson, both of Greenwood, for Respondents.

HEARN, C.J.: Jon Hartfield and Haskell L. Hartfield, individually and as Conservator to Jon Hartfield, (collectively referred to as Hartfield) appeal the circuit court's grant of a directed verdict in favor of Respondents Robert Cockrell, individually and d/b/a Williams Package and South Pointe Pub (collectively referred to as the Pub). Hartfield contends the circuit court erred in directing a verdict in favor of the Pub because there was sufficient evidence presented to the court to survive the Pub's motion for a directed verdict. Hartfield also contends the circuit court erroneously required direct evidence of service of alcohol and level of intoxication. We affirm.

FACTS

Hoyt Helton was a frequent drinker who many considered an alcoholic. Helton's wife testified that over the course of their eleven-year marriage, Helton drank Bud Light or Budweiser beer every day, and had gotten in trouble for drinking and driving "a number of times." She also described Helton's drinking style as a "sipper," and said that he weighed between one-

hundred thirty, and one-hundred fifty pounds. On July 11, 2003, after an evening out at several drinking establishments, Helton crossed the centerline of a highway in a car he was driving. Helton's vehicle struck a car driven by Laura Riddle, and in which Jon Hartfield was a passenger. Helton died at the scene. Testing conducted after the accident revealed Helton's blood alcohol content (BAC) was .212. Riddle and Hartfield were seriously injured, and Hartfield was in a coma for several months after the accident. As a result of his injuries, Hartfield requires assisted living arrangements for the remainder of his life.

On the day of the accident, Helton left his house sometime between 1:15 and 5:45 p.m., according to his wife. Cockrell, one of two owners and managers of the Pub, was tending bar at the Pub on that particular day and testified Helton arrived between 4 and 4:15 p.m. Helton exited the Pub at approximately 5:30 p.m. Cockrell did not see Helton again until he was closing for the night at 7 p.m., when he saw Helton sitting on a bench in front of the Pub. In addition, Cockrell testified he neither served Helton a beer, nor saw him drinking while he was inside the establishment, and testified Helton was not in possession of a beer on the bench when Cockrell left.

Brad Harrison, a drinking buddy of Helton's, testified he arrived at the Pub that day around 6 p.m. and Helton was sitting outside on a bench. Harrison recalled Helton was not drinking, and that from the time Harrison arrived, until 7:10 p.m. when he left, Helton did not drink a beverage of any kind. Thereafter, Helton made his way to the The Getaway Lounge & Grill, Inc. (The Getaway), where the bartender that evening, Diane Bice, testified Helton arrived between 7:15 and 7:30 p.m. According to her testimony, Helton left The Getaway around 8 p.m., and in the time he was there, Bice neither served nor observed Helton drinking. Harrison, however, testified he arrived at The Getaway at 8 p.m., and while he was there, Helton was sitting at the bar and consumed two to three beers. Both Harrison and Bice testified Helton did not appear intoxicated while at The Getaway.

Finally, Helton made his way to The Carolina Lounge (Carolina), where bartender Billy McDonald testified Helton arrived at approximately 10 p.m. and left shortly thereafter around 10:15 p.m. McDonald recalled Helton

sat at the bar and was not served a beer; however, Highway Patrolman Tony Keller testified he spoke with McDonald on the phone shortly after the accident, and McDonald admitted Helton had been served and had consumed one beer at Carolina. McDonald also told Keller that Helton was sober when he left Carolina at 10:15 p.m. The accident occurred at approximately 10:51 p.m.

Hartfield filed suit against Cockrell, individually, and the Pub; Shou-Mei Morris, individually, and The Getaway Lounge & Grill, Inc.; and Glenn McDonald, d/b/a The Carolina Lounge. Hartfield contended each of the defendants was negligent, grossly negligent, careless, reckless, willful and wanton, under a rubric of dram shop liability, and that the defendants' actions were the direct and proximate cause of the injuries and damages he received. At the close of Hartfield's case, the circuit court granted Cockrell's and the Pub's motions for directed verdict. A jury verdict was obtained against Morris and The Getaway, and the circuit court declared a mistrial as to McDonald and Carolina. Only the circuit court's grant of a directed verdict in favor of the Pub is before this court on appeal.

LAW/ANALYSIS

Hartfield contends the circuit court erred in directing a verdict in favor of the Pub because there was sufficient evidence presented to the court from which a reasonable juror could find Helton appeared visibly intoxicated and was served alcohol at the Pub. Hartfield also contends the circuit court erred by requiring direct evidence of service of alcohol and level of intoxication, rather than finding the circumstantial evidence provided at trial created a sufficient jury question. We disagree.

Section 61-4-580 of the South Carolina Code (Supp. 2007) prohibits the sale of beer or wine to an intoxicated person. That section specifically provides:

> Prohibited acts.
> No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee

> may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:
> . . .
> (2) sell beer or wine to an intoxicated person[.]

S.C. Code Ann. § 61-4-580(2). This Court has previously held that § 61-4-580's predecessor supplied a private cause of action for civil liability to a third party who is injured as a result of a violation of the statute. Daley v. Ward, 303 S.C. 81, 83-84, 399 S.E.2d 13, 14 (Ct. App. 1990) (interpreting S.C. Code Ann. § 61-9-410 (1976)).

As indicated above, testimony from all parties who witnessed Helton on the night of the accident was that he was neither visibly intoxicated, nor actually served alcohol while at the Pub. As a result, Hartfield called a series of experts to establish Helton's intoxication at the time he died, and by virtue of his height, weight, drinking style, and the night's general timeline, introduced circumstantial evidence to prove Helton would have been visibly intoxicated during the time he was at the Pub. Dr. William Brewer was qualified before the court as an expert in toxicology. Brewer testified as to the general effects of alcohol on people based on their physical characteristics, as well as the physical manifestations an intoxicated person would exhibit given the level of his or her intoxication. Brewer then explained to the jury how retrograde extrapolation[1] could be used to determine the level of intoxication of a person at any point during the night.

The circuit court ultimately prevented parts of Brewer's retrograde extrapolation analysis from introduction before the jury. Hartfield contends the proffered circumstantial evidence may be used to establish service of alcohol and the level of a person's intoxication at the time of service. In

[1] Retrograde extrapolation begins with the known variable of what a person's BAC is at the time of testing, and then extrapolates that figure back, taking certain assumptions and known variables into consideration, in order to create a drinking timeline as a rough estimate of what the person's BAC would have been at any point during the day of drinking.

support of this contention, Hartfield points to several other courts and jurisdictions that have allowed the introduction of circumstantial evidence in dram shop cases. See Alaniz v. Rebello Food & Beverage, L.L.C., 165 S.W.3d 7 (Tex. App. 2005); Romano v. Stanley, 684 N.E.2d 19 (N.Y. 1997); People v. Ladd, 675 N.E.2d 1211 (N.Y. 1996). In addition, Hartfield cites Daley v. Ward, which states a jury could determine from circumstantial evidence whether a person was visibly intoxicated such that a prudent man would have known of his condition. Daley, 303 S.C. at 87, 399 S.E.2d at 16. However, in each of the cases cited by Hartfield, the sale or consumption of alcohol at the establishments in question was either admitted to, or proven by other evidence. We find Hartfield's lack of evidence as to the Pub's sale of alcohol fatal to his argument.

Moreover, each of the cases cited by Hartfield is factually distinguishable from the case at hand. In Daley, this court held that the circuit court erred in its response to a jury question, because it removed from the province of the jury the issue of whether circumstantial evidence could establish visible intoxication. Daley, 303 S.C. at 87, 399 S.E.2d at 16. However, the intoxicated patron admitted that he drank nine beers in the five hours he was present in the establishment. Id. at 83, 399 S.E.2d at 14. In addition, the accident occurred only fifteen to twenty minutes after the patron left, and the establishment was the only one which the patron frequented that evening. Id. In Alaniz, the Texas Court of Appeals found that the temporal proximity between the patron's exit from the establishment, and a convenience store video captured after the accident occurred, some fifty to fifty-five minutes after the patron left, was too great. Alaniz, 165 S.W.3d at 15. The Alaniz court noted that "although evidence of [patron]'s obvious intoxication and the requisite proximate causation may be established by circumstantial evidence, the evidence must transcend mere suspicion and conjecture." Alaniz, 165 S.W.3d at 14-15.

In Romano, the Court of Appeals in New York also found that circumstantial evidence was admissible to prove intoxication; however, it expressly rejected as speculative and conclusory, evidence such as the retrograde analysis in the case at hand, because the academic conclusion of a person's level of toxicity, arrived at after-the-fact, was not based on any facts

or data contemporaneous to the sale of the alcohol. Romano, 684 N.E.2d at 22; see also Sorenson v. Denny Nash, Inc., 671 N.Y.S.2d 559, 560-61 (N.Y. App. Div. 1998) (applying the analysis in Romano). Finally in Ladd, retrograde analysis evidence was admitted as evidence of what the person's intoxication would have been when the accident occurred, where the BAC test was not administered until later; however, objections to this evidence were not properly preserved, so the Ladd court did not rule on its propriety. Ladd, 675 N.E.2d at 1213.

Section 61-4-580(2) clearly states that an actual sale of alcohol to an intoxicated person is prohibited. (emphasis added). Even taking the evidence at trial in the light most favorable to Hartfield, as we are required to do on review of a motion for a directed verdict, the record is simply devoid of any evidence that the Pub actually sold Helton alcohol while he was there, or that Helton was drinking while present. As a result, we need not decide whether retrograde analysis would be admissible in a proper case because, in the absence of evidence of a sale, the directed verdict was properly granted.

Accordingly, the decision of the circuit court is

AFFIRMED.

HUFF, J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Bruce E. Kirton, **Appellant.**

Appeal From Georgetown County
John M. Milling, Circuit Court Judge

Opinion No. 4470
Heard December 11, 2008 – Filed December 17, 2008

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

ANDERSON, J.: Bruce Kirton (Kirton) appeals his conviction for criminal sexual conduct with a minor in the second degree. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Bruce Kirton was convicted of criminal sexual conduct with a minor in the second degree and sentenced to twelve years in prison. The indictment alleged:

> That Bruce Edward Kirton did in Georgetown County on or between December 1, 2005 and February 21, 2006 engage in sexual battery with a victim at least eleven years of age but less than fourteen, [Victim,] to wit: the defendant did have sexual intercourse with the victim, [Victim,] whose date of birth is [1992]. This is in violation of Section 16-3-0655(2), S.C. Code of Laws, 1976, as amended.

The thirteen year old victim (Victim) answered the assistant solicitor's questions on direct examination:

> Q: When was the first time that you remember that [Kirton] touched your private parts?
>
> A: When we were living in the trailer, and me and him were laying on his bed watching tv.
>
> Q: Okay.
> And, um, where—how old were you?
>
> A: Six or seven.
>
> Q: Okay.
> Do you remember what grade you were in?
>
> A: Second or third.

Q: Okay.
And, um, where did he touch you?

A: He just, like, touched my boobs and made me touch his penis.

Q: Okay.
And do you remember if you had your clothes on or off?

A: I don't remember.

Q: Okay.
And what about him? Did he have his clothes—his pants on?

A: He had a pair of boxers on.

Q: And did you touch his penis on the outside or the inside of his boxers?

A: The inside.

Q: Okay.
And how did that happen? Did he pull his pants down or how did—do you remember?

A: He took my hand.

Q: He—

A: He took my hand.

Q: Okay.
And he did what with you hand?

A: He pulled it into his boxers.

Q: Inside his boxers?

And is that the only time anything like that ever happened to you?

A: No.

Q: Um, so when—so this was six or seven years ago. Is that right?

A: Yes, sir.

Q: And you were about six years old?

A: Yes, sir.

Q: Do you remember about how many times that type of thing happened?

A: No, sir.

Q: Okay.
How often did it happen?

A: A couple of times a month, I guess.

Q: And, um, for the next few years up until, um, the last year or so, was it the thing that happened a couple of times a month, was that all the same or was it different?

A: I don't know.

Q: Okay.
What kind of things did he do to you a couple of times a month?

A: Just making me touch his penis and he touched me.

Q: Okay.
Where did he touch you?

A: On my crotch and my boobs.

Q: Okay.
And, ah, do you know when the first time was when he touched you in your crotch?

A: No, sir.

Q: Alright.
Do you remember about how long it was?

A: No, sir.

Q: Was it more than a year ago or less than a year ago?

A: It was probably more than a year ago.

Q: And did he ever—what did he touch your—the first time he touched you in your crotch, what did—what did he touch you with? What body part of his?

A: His hand.

Q: Okay.
And—and you say that was probably more than a year ago?

A: Yes, sir.

Q: And then did he ever touch your crotch with any part of his body?
Let me ask you this. You said it happened a couple of times a month. Right?

A: Yes, sir.

Q: And was there ever a time when he either didn't do it or didn't do it as much?

A: When he first started dating Lisa.

. . .

Q: Okay.
Tell me—tell me what happened the last times.

A: I don't remember the first one that well but the last time was two or three days before Christmas, and I was laying on the couch because I had spent the night with him, and he came in the living room and took my pants off and—put his penis in my crotch.

Q: Who—where did that take place?

A: His house in the living room.

Q: And did you say you were on the couch?

A: Yes, sir.

. . .

Q: I said were you—you were laying on the couch before he came in, and I was about to ask the question.
Which is, um, when he inserted his penis into your crotch, were you—was he on—how were y'all positioned on the couch?

A: I was laying down, and he was on his knees.

. . .

Q: How does it—how did that make you feel?

A: Upset.

. . .

Q: And did you tell anybody right away after that? Did you tell anybody right away after that happened?

A: No, not right away.

Q: And why not?

A: I just didn't want anybody to know.

Q: Were you embarrassed?

A: Yes.

Q: Okay.
Were you afraid?

A: Yes.

. . .

Q: Did he say anything to you about what would happen if you told?

A: He just told me if I told I'd never get to see him again.

. . .

Q: Okay.
And you told your mom, and then after that, did you go to see a lady named Dr. Carol Rahter?

A: I think so.

Q: Okay.
And did you tell her basically what happened?

A: Yes, sir.

. . .

Q: When [Kirton] put his penis in your crotch, did he put it inside your vagina?

A: Yes, sir.

. . .

Dr. Carol Ann Rahter conducted a forensic interview with Victim on March 2, 2006. The forensic interview consisted of a one-on-one conversation lasting approximately thirty minutes followed by a medical examination. Dr. Rahter advised the purpose of a forensic interview of a child victim of sexual assault is to determine what happened to the child to ascertain (1) what kind of medical treatment is needed and (2) whether it is safe for the child to return to his or her environment. Dr. Rahter has conducted over a thousand forensic interviews with child victims of sexual assault since 1993. Dr. Rahter asserted on direct examination:

Q: In your opinion did [Victim] appear to be competent?

A: Yes, she was competent.

Q: And, um, what, if anything, did she relate to you about the time frame of the sexual assault?

A: She has difficulty with age because she told me that the first time it happened she was seven, that that was either second grade, third grade or fourth grade.
Now, we all know that when you're about seven, you're about—you're either in first grade depending on your birthday or second grade. You're not in fourth grade.

Um, so that was—she has a little difficulty with time.
That's when she said the first time happened.
She told me that the last time happened approximately or about—I think she used the word "about" four weekends before.
And—

Q: What is the concept of delayed reporting? What does that mean?

A: The majority of children do not report at the time of any kind of sexual abuse. There's many reasons for that. . . .

. . .

Q: Now, um, how does that impact the child—the delayed reporting, how does that impact the child's ability to be specific with respect to dates of the assault?

A: My experience with children reporting dates is unless it's something that happened on their birthday or Christmas or something that's very impactual [sic] in a child's life, they can't tell you the date.
I mean, I've got a teenager. She can't tell you the date of anything.
It's just they're not small adults. They're children, and their time frames are not the same as adults. They don't write checks. They don't know—write dates down all the time, and so frequently children will tell me, "It happened a lot of times."
And when I'll say to them, "Does that mean less than five or more than five?"
They'll say, "More than five."
But they can't tell me how many times.
But when you go on and interview them, they'll end up saying that it happened every weekend over a three year period of time.
Well, then, obviously, that's a lot more than five.
They have a lot of difficulty quantitating [sic] and telling specifics about dates.

They can tell nighttime and daytime. They can sometimes tell you it was before Christmas or after Christmas or, "It was before my birthday or after my birthday," or it was in the summertime and school was not going on but they have a lot of difficulty telling me a specific date, a specific month, specific quantities of the times—of how many times something occurs to them.
Also, when there is an extended period of time where children have been assaulted, a lot of that blends together. So sometimes they'll report something that was actually several different incidents as if it was all in one day, and so sometimes it doesn't—it just doesn't make logical sense the way they're reporting but that's just what we see. They blend things, and so it's not—sometimes it doesn't make logical sense with dating and reporting.

Q: And as in the case of [Victim,] somebody a child has assaulted at the time that you're seven—if they are seven until the time that they are twelve or thirteen, um, how would that impact their ability to be specific with respect to the nature of their assaults?

A: Well, the same thing. When it happens multiple times, they tend to blend—the way—the things that they can tell oftentimes, like, if it's a different location they'll be able to tell different things that occurred to them physically which is usually a grooming process, what starts out being something that's non-painful and ends up progressing to something that's more, um, ah, aggressive and oftentimes painful. Over a period of time that occurs.
So they can oftentimes tell you specific about when things transitioned, when different acts started occurring to them, and oftentimes, they can tell you more specific detail if it was something like it always happened in the house but one time it happened in their car on the way to Wal-Mart.
But when the assaults are occurring in the same setting, they're very blended together, especially if it happens over a number of years.

So, oftentimes, they might be saying something that happened when they were seven and also blending it with something that happened when they were nine and then something that happened when they were eleven because that's just the way their memories are of the sexual abuse.

Q: Did you, ah, conduct a physical examination of [Victim]?

A: I did.

. . .

Q: With the disclosure of children, ah, do they always fully disclose the first time you talk to them?

A: It is very rare to fully disclose the first time. Kids disclose in a piece-meal fashion, and the only time there's a big exception to that is when it's a one-time incident and they disclose right away. But even then some of the details don't come out right after that happens. They may a week later tell something else they remember, um, about what the guy was wearing or what something looked like or whatever.
So, it's very rare to get a full disclosure which is why we try to refer all these children to counseling so that they can build a rapport with a counselor and have ongoing counseling to not only work through these things but oftentimes they're able to—they're more comfortable in that setting when they've had multiple sessions with somebody to disclose more.
This is a forensic interview. You see them one time. You don't have a rapport that you've built up with them over a number of weeks or months.
So it would be very rare to get a full disclosure in the first interview.

Q: And would it surprise if different details were given at different times to different people?

A: No.

Q: Why is that?

A: Because that's what happens. That's the norm.

Q: Does that happen more often than not?

A: Correct.

Q: So, ah, getting back to the physical exam, when—did you say when you conducted the physical exam?

A: Yes, right after the interview.

. . .

Q: What were your findings?

A: . . .
In her case, her hymen was redundant and estrogenized meaning it was like the scrunchy. Estrogrenized means it was thickened, and there was a complete transection noted at seven o'clock.
We look at the hymen like a clock. Six o'clock is down here. Twelve o'clock is up here.
So at seven o'clock she had a complete transection of her hymen which was healed. You know, it wasn't bleeding or anything at the time but, obviously, there had been a penetrating injury there that had caused a transection to her hymen, and when it healed, it did not heal back together. So there's a permanent transection there at seven o'clock.

Q: What kind of object would cause that type of injury?

A: When you see a transection, you don't know what object. All you know is it's a penetrating injury to the hymen.

It could be a penis. It could be a foreign object. It could be digital penetration with a finger. You don't know by looking at the injury what caused the injury.

Q: Um, so that doesn't differ in every case. In every case it's not possible for you to say who the perpetrator is. Is that true?

A: Correct.

Q: You can just say whether there is physical evidence to indicate penetration. Is that right?

A: Correct.

Q: Would it be, ah, likely that the injury to the hymen was caused by the victim herself?

A: No.

Q: Why is that?

A: Because research and studies have shown that even in severely mentally retarded children, they don't injure their own hymen, and the reason is because the hymen is very sensitive in children, painful to touch.
So, and even if all children masturbate even in extremely mentally retarded children, they don't touch the hymen because when they touch it, it hurts, and they stop touching it. So they don't cause injury to their own hymen.
Um, the same thing with tampons don't cause injuries to hymens. Injuries to hymen occur by something that's forceful penetrating the hymen, and so you don't get those injuries from self, ah, stimulation.

Q: Were your findings, ah, you said—you say your findings were diagnostic of sexual assault?

A: Yeah, the penetrating injury to the vagina.

Q: Thank you.
And, ah, were—were your medical findings consistent with the forensic interview that you conducted with [Victim]?

A: Yes.

At trial, Kirton was asked whether it would be "sick" for an adult to have sex with a child, and Kirton agreed. The State then sought to introduce a statement Kirton made at his bond hearing in which he indicated he needed mental help. The court held a Jackson v. Denno hearing in camera to determine whether to suppress the statement.

Georgetown County magistrate Benjamin Dunn testified that at Kirton's bond hearing, he read him his Miranda rights. Judge Dunn confirmed he informed Kirton of his right to remain silent and anything he said could be used against him. Judge Dunn substantiated he told Kirton he had a right to an attorney and if he could not afford an attorney that one would be appointed for him.

After informing Kirton of his rights, Judge Dunn asked Kirton, "Would you like to address the court?" Kirton responded, "I need help." Judge Dunn inquired what kind of help, and Kirton professed, "I need mental help." Judge Dunn acknowledged Kirton was in custody but asserted the purpose of the questioning was solely as it related to setting bond and not seeking anything substantive related to the charges against Kirton.

The jury found Kirton guilty of criminal sexual conduct with a minor in the second degree, and the court sentenced him to twelve years imprisonment.

ISSUES

I. Did the trial court err in denying Kirton's motion to exclude evidence of prior bad acts?

II. Did the trial court err in denying Kirton's motion to suppress a statement made during his bond hearing?

III. Did the trial court err in admitting Dr. Rahter's testimony, which Kirton avers exceeded the parameters of time and place?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004)); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004); State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004). "This court is bound by the trial court's factual findings unless they are clearly erroneous." Preslar, 364 S.C. at 472, 613 S.E.2d at 384; accord State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)). The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001); accord State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (citing State v. Bailey, 276 S.C. 32, 37, 274 S.E.2d 913, 916 (1981)); Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006); State v. Broaddus, 361 S.C. 534, 539, 605 S.E.2d 579, 582 (Ct. App. 2004). "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the

defendant." State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); accord Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-219 (Ct. App. 2004); State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999); see State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) ("The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard."); State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) ("[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown."). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); accord State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-205 (2007); State v. Adkins, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003).

The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis, such as an emotional one. Saltz, 346 S.C. at 127, 551 S.E.2d at 247.

"To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." White, 372 S.C. at 374, 642 S.E.2d at 611 (citing Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)); accord Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). "Error is harmless when it 'could not reasonably have affected the result of the trial.' " State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)); accord State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991); Broaddus, 361 S.C. at 542, 605 S.E.2d at 583; State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003); see also Chapman v. California, 386 U.S. 18, 22 (1967) ("[S]ome constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."); State v. Rice, 375 S.C. 302, 316, 652 S.E.2d 409, 415 (Ct. App. 2007) ("The commission of legal error is harmless if it does not result in prejudice to the defendant."); Visual Graphics Leasing Corp., Inc. v. Lucia, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993) ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, [an appellate] court should not set aside a conviction because of errors not affecting the results." Broaddus, 361 S.C. at 542, 605 S.E.2d at 583 (citing Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002)).

Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. Baccus, 367 S.C. at 48, 625 S.E.2d at 220; State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996); State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Arrowood, 375 S.C. at 366, 652 S.E.2d at 442; State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), cert. granted, June 7, 2007; Preslar, 364 S.C. at 472, 613 S.E.2d at 384. Accordingly, the appellate courts are "bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence

and not clearly wrong or controlled by error of law." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Saltz, 346 S.C. at 136, 551 S.E.2d at 252.

LAW/ANALYSIS

I. PRIOR BAD ACTS

Kirton maintains the trial court erred in allowing evidence into the record that he began touching and committing other sexual acts with Victim when she was six or seven years old. Kirton asseverates the prior sexual acts are not similar to the charged crime, there is not clear and convincing evidence that the prior sexual acts occurred, and the prior sexual acts are unduly prejudicial. We disagree.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the perpetrator. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Martucci, Op. No. 4438 (S.C. Ct. App. filed Sept. 24, 2008) (Shearouse Adv. Sh. No. 37 at 48); State v. Sweat, 362 S.C. 117, 123, 606 S.E.2d 508, 511 (Ct. App. 2004). If not the subject of a conviction, proof of prior bad acts must be clear and convincing. State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). When considering whether there is clear and convincing evidence, this court is bound by the trial judge's findings unless they are clearly erroneous. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. Id. at 329, 580 S.E.2d at 192. Even though the evidence is clear and convincing and falls within a Lyle exception, it must be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice to the defendant. Id. at 324, 580 S.E.2d at 189. If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

a. Clear and Convincing Evidence

"When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous." State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) (citing State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)). The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. Tutton, 354 S.C. at 325-326, 580 S.E.2d at 190 (citing State v. Rosier, 312 S.C. 145, 149, 439 S.E.2d 307, 310 (Ct. App. 1993)).

Victim testified about the events that took place beginning at approximately age seven. While she could not remember details of the events from six years prior, she specifically testified Kirton touched her breasts and crotch and made her touch his penis. She professed the abuse occurred several times a month except when Kirton first started dating his girlfriend. Testimony in the record supports the finding made by the trial judge that there was clear and convincing evidence of the prior bad acts, and that finding was not erroneous.

b. Common Scheme or Plan

"A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect. State v. Raffaldt, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995). The degree of remoteness between the other crimes and the one charged is one factor to be considered in

determining the connection between them. Id. As the similarity becomes closer, the more likely the evidence will be admissible. State v. Aiken, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct. App. 1996). "The acid test of admissibility is the logical relevancy of the other crimes." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998); see also State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983) (finding common scheme or plan exception requires more than mere commission of two similar crimes by the same person). When a criminal defendant's prior bad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan. State v. Weaverling, 337 S.C. at 471, 523 S.E.2d at 792-793.

We reviewed the history of jurisprudence addressing prior bad act evidence in child sexual abuse cases in State v. Weaverling:

> In State v. Richey, 88 S.C. 239, 70 S.E. 729 (1911), our Supreme Court held admissible evidence that a man charged with carnal knowledge of a girl under fourteen continued his illicit relationship with the child past her fourteenth birthday. The court ruled " 'acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties.' " Id. at 242, 70 S.E. at 730.
>
> The common scheme or plan exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties." State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955). Such evidence is admissible when the " 'close similarity of the charged offense and the previous act[s] enhances the probative value of the evidence so as to overrule the prejudicial effect.' " State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). In McClellan, the Court addressed the admissibility of testimonial evidence of appellant's pattern of sexual attacks against each of his three daughters in his

trial for criminal sexual conduct against the youngest daughter. The Court allowed the youngest daughter to testify the appellant had attacked her on previous occasions, even though the appellant was not charged for the previous attacks. The Court held the "prosecutrix's testimony regarding prior attacks was admissible under [the common scheme] exception to show the continued illicit intercourse forced upon her by Appellant." Id. at 392, 323 S.E.2d at 774.

Additionally, the Court found the testimony of the other daughters concerning prior misconduct was admissible. The experiences of each of the three daughters paralleled that of her sisters: the initial attack occurred around the time each girl reached age twelve; appellant entered their bedroom late at night and chose one of them who he would then take to his bedroom where she would be forced to submit; he gave to each the same explanation for his actions—that he was "teaching them how to be with their husbands"; and he quoted to each a specific Bible verse during the attacks. Id. at 391, 323 S.E.2d at 773. The Court concluded the evidence fell squarely within the common scheme or plan exception.

Likewise, in State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), our Supreme Court held the trial court did not err in admitting evidence of appellant's sexual abuse of three of his former foster daughters in his criminal sexual conduct trial for abuse of a fourth foster daughter. The challenged evidence included the testimony of two sisters who were foster children in the Hallman home for five years. Shortly after they were placed in his care, appellant rubbed the girls' bodies outside their clothing. He then began digital penetration and forced each girl to rub his penis. Another young woman testified that when she lived with appellant at the age of four, he forced her to rub his penis on four occasions. The charges against the appellant included, but went beyond, the type of acts testified to by the other young women. Finding the evidence of the other acts admissible, the Court explained the abuse against the victim

"commenced . . . in exactly the same manner under similar circumstances" as the abuse of the other foster children. Id. at 175, 379 S.E.2d at 117. The Court determined "the evidence of prior bad acts bears such a close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect." Id. at 175, 379 S.E.2d at 117.

The appellant in State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), claimed the trial court erred in admitting the testimony of two females in his trial for criminal sexual conduct against his granddaughter. He argued the alleged prior bad acts were not closely similar to the charged offense. In their testimony, the females indicated they had been sexually molested by appellant at approximately the same age and in the same manner as appellant's granddaughter. The Court held: "In each instance, [appellant] took advantage of his relationship with the victim for his sexual gratification. The prior acts were sufficiently similar to the charged offense to be admissible." Id. at 33, 446 S.E.2d at 439.

More recently, in State v. Adams, 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998), the trial court's admission of appellant's stepdaughter's testimony, detailing eight years of extensive sexual abuse which mirrored the charged allegations made by another stepdaughter, was upheld under the common scheme or plan exception. The appellant used his relationship as stepfather to control both stepdaughters and engaged in similar conduct as to each. The Court announced the specifics were so similar "that proof of one tended to prove the other" and the close similarity of the other bad act evidence to the charged offense enhanced the probative value so that it outweighed the prejudicial effect. Id. at 143, 504 S.E.2d at 126.

Weaverling, 337 S.C. at 469-471, 523 S.E.2d at 791-792.

In Weaverling, we analyzed a situation where Weaverling was charged with performing fellatio on Doe on three occasions and providing Doe a

pornographic magazine to look at on one occasion. Evidence indicated: (1) Weaverling initiated the sexual contact by pulling down Doe's pants or shorts; (2) he obtained sexual gratification by having the child review pornography; (3) beginning when Doe was seven or eight years old, almost every time they saw one another, Weaverling would get Doe alone, pull down Doe's pants, and perform oral sex on Doe; and (4) Weaverling would have Doe look at a pornographic magazine or movie during the sexual assaults. We elucidated:

> The challenged testimonial evidence of Weaverling's prior bad acts shows the same illicit conduct with the same victim under similar circumstances over a period of several years. The probative value of the evidence regarding Weaverling's prior bad acts clearly outweighs the prejudicial effect of admitting the evidence. As the Court concluded in State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984), "[i]t would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence."

Id. at 471, 523 S.E.2d at 792-793.

In State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), we considered a case where Tutton was charged with sexual assault of two sisters, twelve-year old Jane and thirteen-year old Mary. Jane alleged Tutton touched her buttocks and private parts, and she testified, "[h]e stuck his fingers inside of me." Mary advanced that Tutton touched her buttocks and private parts outside of the covers before she was able to move outside of Tutton's reach. During direct examination, the State sought to elicit testimony that Tutton had sexually assaulted Jane on another occasion several years prior to the events in question. She asserted that four or five years prior to the trial, Tutton sexually assaulted her when she and Mary were staying with Tutton because their parents were on vacation. She declared that Tutton forced her to lay down on her back and take off her panties. Tutton performed oral sex on her and forced her to perform oral sex on him. She professed Tutton threatened to tell her parents she was misbehaving if she

spoke of the incident, and she didn't tell anyone about the incident prior to the investigation of Tutton's current charges.

The trial court ruled the evidence was admissible under the common scheme or plan exception to Lyle. We enunciated:

> Sex crimes may be unique in this respect because they commonly involve the same victims engaged in repeated incidents occurring under very similar circumstances. The reason for the general admissibility of such evidence under these circumstances is self evident—where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.
>
> However, Weaverling and McClellan do not lower the bar for admissibility under Lyle simply because sexual crimes are involved. Regardless of the nature of the charges facing the defendant, there must be evidence that the defendant employed a common scheme or plan in the commission of the crimes. Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the continuous nature of the assaults will generally suffice to prove the existence of the common scheme or plan as well. In Weaverling and McClellan, the sheer volume of repeated occurrences, together with the close similarities in the assaults, evidenced a pattern of continuous illicit conduct. Accordingly, these cases fall squarely within the plain meaning of common scheme or plan evidence. McClellan, 283 S.C. at 392, 323 S.E.2d at 774 (stating it would be difficult to conceive of evidence more within the common scheme or plan exception); Weaverling, 337 at 469, 523 S.E.2d at 791 (stating the pattern of sexual abuse represented "quintessential common scheme or plan evidence").

Tutton, 354 S.C. at 328-329, 580 S.E.2d at 191. We then examined the dissimilarities between the charges and the uncharged prior bad acts. We concluded:

> The balancing of the similarities in cases concerning the admission of common scheme or plan evidence is a difficult task. While inferential leaps are at the heart of such decisions, we are compelled to find that the similarities in this case are insufficient to support the inference that Tutton employed a common scheme or plan to commit the assaults alleged in this case. As stated in Lyle, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected." Lyle, 125 S.C. at 417, 118 S.E. at 807; see also State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993) (cert. dismissed as improvidently granted) (stating the defendant must be given the benefit of the doubt regarding the introduction of common scheme testimony where the admissibility was a close question). Because we do not clearly perceive the required connection, we hold the trial judge erred by admitting Jane's testimony about the uncharged assault under the common scheme or plan exception to Lyle.

Tutton, 354 S.C. at 333-334, 580 S.E.2d at 194 (footnote omitted).

In State v. Hubner, 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005), cert. granted, Nov. 15, 2006, Hubner was charged with six acts of committing a lewd act upon a child. The victim met Hubner at age twelve when she became involved in a church youth group where Hubner volunteered. Hubner's actions toward her progressed for three years. The victim became uncomfortable around him and successfully avoided him for certain periods during the three years. The victim eventually informed her youth pastor about Hubner's actions, and charges were brought.

At trial, the State proffered the testimony of Rachel, a thirty-two year old who voluntarily traveled from her home in Arizona to South Carolina.

She testified that she met Hubner when her family moved to Maine in 1981, just before her twelfth birthday. Hubner lived three to four houses away and became acquainted with Rachel's parents. Rachel began to watch television with Hubner and became his friend. She would help him shovel his driveway and baby-sat his children at his house.

> Rachel thought Hubner was nice to her. Hubner began to give Rachel short hugs. At some point, however, these hugs became a kind where Hubner would touch her body in the wrong way. He also began to kiss Rachel on the neck, and cheek, and would French kiss her. This contact occurred at his house while Rachel was baby-sitting. There came a time when Hubner began to fondle Rachel's breasts and bottom through her clothing and would tell Rachel she had a nice body. On one occasion, Hubner came up from behind Rachel, grabbed her chest, and "rub[bed] certain body parts." In another incident, Hubner removed Rachel's shirt, but not her bra, and just stared at her.
>
> Hubner also would put his hands in her front and back pockets and would massage her vagina and her buttocks through her clothes. This progressed until he would also touch her vaginal area under her clothes. Hubner would also come up behind her while he had an erection and rub himself against her. On other occasions, she touched his crotch both with and without his clothes on. This behavior progressed to him masturbating in front of Rachel and having sexual intercourse with her. Hubner also gave her alcohol. Rachel testified Hubner would tell her she was pretty, she had a beautiful body, and that he loved her. He threatened to kill her if she ever told anyone.
>
> . . .
>
> During the hearing, Hubner took the stand and admitted pleading guilty to one count of unlawful sexual contact against Rachel, but denied he committed any of the acts Rachel claimed he committed. After hearing the testimony and arguments, the trial judge noted that the progression of the seriousness of the

> acts over a period of time was different between the two cases and there were "a number of acts that were very dissimilar." Nonetheless, the judge found the similar acts were probative, and their probative value outweighed their prejudicial effect. He thus determined it was proper to admit the portions of Rachel's testimony regarding the similar acts, but the State was not allowed to go into dissimilar acts. The case proceeded to trial, and Rachel's testimony regarding the hugging, kissing and inappropriate touching was allowed into evidence over Hubner's objection. Thereafter, Hubner was found guilty on all charges and was sentenced to three consecutive twelve-year terms, two concurrent twelve-year terms, and one fifteen-year term, which was suspended with five years of probation.

Id., 362 S.C. at 580-581, 608 S.E.2d at 467. We reversed, instructing:

> In the case at hand, the acts were against two different victims and occurred some fourteen years apart. Thus, the testimony cannot be admitted on a generalized basis as a pattern of continuous illicit conduct under the common scheme or plan exception. Rather, the admissibility of Rachel's testimony rests solely on whether the requisite degree of similarity between the separate acts is present. As noted, this similarity must not merely be a similarity in the results. Rather, there must be such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations.
>
> The trial judge here recognized the numerous dissimilarities in the two cases. He nonetheless allowed into evidence prior bad acts against Rachel, attempting to limit the impact of these dissimilarities by restricting the examination of Rachel to testimony concerning only similar acts. The evidence was thus presented in a vacuum to the jury. However, this does not diminish the fact that an overwhelming number of significant dissimilarities were present between the prior bad act and the case at hand. While the similarities may "link the two crimes,"

> the question is whether they "paint the broader, more relevant picture" of a common scheme or plan of which they are the individual manifestations. Tutton, 354 S.C. at 331, 580 S.E.2d at 192-93. Thus, the trial judge failed to balance the similarities and dissimilarities in making a determination as to whether Rachel's testimony concerning the prior bad acts was admissible at all.

Id., 362 S.C. at 584-585, 608 S.E.2d at 469.

In State v. Wallace, 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005), cert. granted, Nov. 14, 2006, Wallace was convicted of second degree criminal sexual conduct with a minor. The victim accused Wallace of "push[ing] his hands up [her] privates." The trial court admitted testimony from victim's sister that on prior occasions, Wallace performed oral sex, digital penetration, and sexual intercourse on her. We reversed, determining:

> In this case, the trial court did not address any connection between the two crimes to establish if the allegations by the victim's sister were admissible. The court instead ruled, "it goes to a common scheme or plan because of the close degree of similarity between the conduct, with regards to the two victims." When the State was asked to explain why the testimony was essential to its case, the solicitor responded:
>
> > This is technically a credibility case, that's what it is. It's one witness's word against potentially another witness's word. The evidence would be relevant and would be essential to the State's case because it is a piece of evidence, just like any other piece of evidence, that goes to prove or disprove the case. And this is strictly a credibility case: Therefore, this testimony is necessary to, again, prove the victim's allegations.
>
> This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime. It falls far short of the threshold for the admission of a

> prior crime under the common scheme or plan exception to Lyle. Accordingly, the trial court erred in admitting the evidence on this basis.
>
> It was also error for the trial judge to attempt to limit the testimony of the sister so that there would be a close similarity between the prior bad act and the crime charged. The court noted that the testimony of the sister was more egregious than that of the victim and ordered the testimony redacted, stating, "I find it appropriate under State v. Tutton to limit the testimony of the Lyle witness only to the extent and only to the acts which occurred to the victim in this prosecution, and not to go beyond that, which will limit the prejudicial effect of this testimony coming in." This court in Tutton concluded the differences in the evidence proffered of the prior criminal sexual conduct was sufficiently different to render it inadmissible. Tutton, 354 S.C. at 333, 580 S.E.2d at 194. We did not, however, sanction the redaction of testimony in order to make similar that which is dissimilar.

Wallace, 364 S.C. at 141, 611 S.E.2d at 338.

The case at bar is formed out of the same mold as Weaverling and McClellan. All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity. Kirton began by rubbing the minor victim's breasts, proceeded to make her touch his penis, began touching her vagina as she got older, and finally culminated the sexual abuse by engaging in the intercourse for which he was charged. The prior sexual acts did not take place just once or twice, six or seven years ago. Victim indicated they happened several times a month for years. While the prior sexual acts are not the same as the exact crime for which Kirton was charged, Victim detailed a clear pattern of escalating sexual abuse and not a few isolated, unrelated incidents.

Kirton's prior abuse of the minor victim was clearly "part of an overall plan or scheme devised by him to perpetuate the type of misconduct that

occurred." Tutton, 354 S.C. at 330, 580 S.E.2d at 192. The probative value of the evidence was so great that it substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury. The trial court properly found the evidence was admissible to show a common scheme or plan, and Kirton's continuous illicit conduct toward Victim was extremely probative to prove the charged criminal sexual conduct occurred.

c. Harmless Error

Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003); Taylor, 333 S.C. at 172, 508 S.E.2d at 876; State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151.

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. at 63, 584 S.E.2d at 897; Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 610, 486 S.E.2d 762, 764 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991); State v. Adams, 354 S.C. 361, 380-381, 580 S.E.2d 785, 795 (2003). Thus, an insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978); State v. Weaverling, 337 S.C. 460, 471, 523 S.E.2d 787, 793 (Ct. App. 1999); see also State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which is properly admitted).

At trial, Victim, Dr. Rahter, and Victim's friend all testified regarding Kirton's touching Victim prior to the forcible intercourse for which he was

charged. While the objection to the testimony presented by Victim was preserved, Kirton did not timely object to the testimony by the Victim's friend or Dr. Rahter. Accordingly, the admission of Victim's testimony would have been harmless error because it was merely cumulative to her friend's testimony and Dr. Rahter's testimony that was entered into evidence without a contemporaneous objection. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding any error in admission of evidence cumulative to other unobjected-to evidence is harmless); State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (instructing admission of improper evidence is harmless where it is merely cumulative to other evidence); Broaddus, 361 S.C. at 542, 605 S.E.2d at 583-84 (concluding error in admission of drug evidence was harmless where it was cumulative to other unobjected-to testimony at trial regarding drug use and drug dealing); State v. Richardson, 358 S.C. 586, 596-97, 595 S.E.2d 858, 863 (Ct. App. 2004) (observing even if the challenged testimony constituted improper "character evidence," any error in its admission was harmless where the testimony was cumulative to other similar testimony that was admitted without objection); see also State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (Ct. App. 2001) (holding any error in admitting evidence of murder defendant's violent character was harmless as properly admitted evidence of the defendant's use of force during his argument with victim the previous day clearly demonstrated defendant's propensity to become violent).

Assuming, arguendo, that the trial judge did err in admitting Victim's testimony, such error was harmless.

II. BOND HEARING STATEMENT

Kirton posits the trial court erred in denying his motion to suppress a statement made during his bond hearing. We disagree

The trial court's determination of whether a defendant was deprived of his Miranda rights will be upheld unless unsupported by the record. See State v. Navy, 370 S.C. 398, 405, 635 S.E.2d 549, 553 (Ct. App. 2006) ("Appellate review of whether person is in custody for Miranda purposes is

limited to a determination of whether the trial judge's ruling is supported by the record.")

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held the Fifth Amendment privilege against self-incrimination prohibits admitting statements, whether exculpatory or inculpatory, given by a suspect during "custodial interrogation" without following prescribed procedural safeguards. Id. at 444. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody." Id. "The warning mandated by Miranda was meant to preserve the privilege during 'incommunicado interrogation of individuals in a police-dominated atmosphere.' " Illinois v. Perkins, 496 U.S. 292, 296 (1990) (quoting Miranda, 384 U.S. at 445).

a. Custodial Interrogation

In the case sub judice, Kirton was not subjected to custodial interrogation at his bond hearing, even though he was in custody at the time. There is no evidence that he was subjected to questioning by law enforcement or any other interrogation such that the requirement to provide Miranda warnings attached.

"Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998) (citing Rhode Island v. Innis, 446 U.S. 291 (1980); State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989)).

> The Miranda decision is meant to preserve the privilege against self-incrimination during interrogation of a suspect in a police dominated atmosphere. The police dominated atmosphere generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."

State v. Lynch, 375 S.C. 628, 635, 654 S.E.2d 292, 296 (Ct. App. 2007) (quoting Illinois v. Perkins, 496 U.S. at 296).

Not all encounters with law enforcement require Miranda warnings to be given. Requiring a suspect to perform field sobriety tests during a traffic stop does not constitute detainment sufficient to rise to the level of "custodial interrogation." State v. Peele, 298 S.C. 63, 66, 378 S.E.2d 254, 256 (1989).

In discussing the difference between Sixth Amendment right to counsel and the Fifth Amendment right as memorialized in Miranda, the United States Supreme Court has held a suspect's Miranda rights are only invoked by "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police. Requesting the assistance of an attorney at a bail hearing does not bear that construction." McNeil v. Wisconsin, 501 U.S. 171, 179 (1991) (emphasis removed). The Court in McNeil found a bail hearing is not a setting in which custodial interrogation takes place requiring Miranda warnings. The Illinois Supreme Court recognized:

> It is not surprising that virtually every Supreme Court opinion involving Miranda has used the phrase "custodial interrogation." It is custodial interrogation with which Miranda was concerned. . . . While in court on a bond hearing, a defendant is not subject to interrogation, and the need for Miranda is not yet present. . . . Absent the interplay of custody and interrogation, an individual's privilege against self-incrimination is not threatened.

People v. Villalobos, 737 N.E.2d 639, 645 (Ill. 2000).

The Maryland Court of Appeals dealt with a remarkably similar case in Fenner v. State, 846 A.2d 1020 (Md. 2004). At Fenner's bail hearing, he was asked, "Is there anything you'd like to tell me about yourself, sir?" Id. at 1023. During the colloquy that followed, statements were made which the State sought to admit at his trial. Fenner sought to suppress the statements because he was not given his Miranda warnings. The court held that Miranda warnings were not required because Fenner was not subject to custodial interrogation. Specifically, the court reasoned "any questions asked of an

arrestee at a bail hearing should normally be general and unrelated to evidence gathering or prosecution." Id. at 1028. The court announced:

> We hold that nothing in the setting of petitioner's January 10, 2001 bail review hearing can be said to have coerced him into making his inculpatory statement. The question posed, "Is there anything you'd like to tell me about yourself, sir?," was a routine question to ask in a setting such as a bail review hearing. Questions posed to an arrestee by a judge regarding matters relevant to bail, asked in the setting of a bail review hearing, do not normally amount to an "interrogation" requiring that the arrestee be again advised of his Miranda rights in order that his responses may be later admitted into evidence at his merits trial.

Id. at 1030 (footnote omitted).

Kirton was not questioned by law enforcement or anyone associated with law enforcement. He was asked a single question by a magistrate presiding over his bond hearing. The innocuous question related solely to the setting of the bond and in no way was intended to elicit an incriminating response. There was no requirement that Kirton be advised of his Miranda rights and no requirement that a waiver of those rights be obtained. The trial court did not err in admitting into evidence Kirton's voluntary statement made at his bond hearing.

b. Miranda Warnings and Voluntary Waiver

Kirton contends he was not properly advised of his Miranda rights and, even if he was advised, the State failed to demonstrate he voluntarily waived his rights. We disagree.

"The well-known Miranda rights are that the accused must be informed of: the right to remain silent; any statement made may be used as evidence against him or her; and the right to the presence of an attorney." State v. Lynch, 375 S.C. 628, 633 n.5, 654 S.E.2d 292, 295 n.5 (Ct. App. 2007) (citing State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998)).

During the in camera hearing, Judge Dunn testified, "When he came in, I advised him that this was his bond hearing; not his trial. And I read him his rights." Judge Dunn elaborated about the rights he explained to Kirton: "advised him that he has the right to remain silent; and anything that he says can be held against him [in] a court of law. . . . And I asked him—I said: Do you understand that?" According to Judge Dunn, Kirton answered that he did. The trial court asked Judge Dunn, "Do you as a common course . . . advise defendants of their right to have an attorney; and that if they cannot afford an attorney . . . to contact the Public Defender's Office?" Judge Dunn responded, "Yes sir."

The State introduced the Magistrate's Bond Hearing Checklist, which indicated a check mark beside "Defendant was advised of his right to counsel—to an appointed counsel if financial unable." It was only after advising Kirton of his rights and going through the checklist that Judge Dunn asked Kirton if there was anything he wanted to say to the court. At the in camera hearing, Kirton testified that Judge Dunn went down the checklist and "[h]e read me rights . . . and then set my bond." The evidence in the record amply supports a finding that Kirton was properly advised of his Miranda rights and given the opportunity to waive them.

There is no indication Kirton was under the influence of drugs or alcohol. There is no evidence Kirton was coerced into making a statement, was promised anything in exchange for his statement, or made his statement by anything other than his own volition. Judge Dunn's testimony supports the conclusion that Kirton voluntarily waived his rights and freely made his statement to the magistrate. The trial court's admission of Kirton's statement did not constitute error.

III. TIME AND PLACE EVIDENCE

Kirton avers the trial court erred in allowing testimony by the State's expert witness, Dr. Carol Rahter, that went beyond the corroborative testimony allowed by Rule 801(d)(1)(D), SCRE. Rule 801(d)(1)(D) states, "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the

statement is (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident."

a. Preservation

The issue Kirton raises is not properly preserved for review on appeal. Kirton relies on a motion made prior to trial to allege the issues are properly preserved for review on appeal. Prior to trial, Kirton's counsel stated, "I have one motion that the Court caution the State that any corroboration of [Victim's] allegation of sexual abuse be strictly limited to time and place, and I would impose that on each of the testifying witnesses and also to Dr. Rahter as she testified also." The court did not consider the motion to be a motion in limine, but as a motion "to simply be sure that the witnesses do not come in and without an understanding." The court explained:

> I would expect that if questions come up which defense counsel feels are proper questions and you feel are improper questions, you will interpose an appropriate objection, and likewise, if questions are asked that you feel are proper and defense counsel feels are improper, . . . he will impose proper objections.

The ruling by the court prior to trial was not a final ruling and the court expected counsel to offer a contemporaneous objection if allegedly improper testimony is offered. Significant testimony occurred between the pre-trial motion and Dr. Rahter's testimony that is challenged. The pre-trial motion, therefore, did not act to preserve the issue for review on appeal. See State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001) (finding only when no evidence is taken between the trial court's in limine ruling and the admission at trial of the evidence is the issue preserved without a contemporaneous objection).

Kirton alleges the objections were entered into the record by counsel. Kirton points to two instances where Dr. Rahter's testimony included allegedly improper hearsay testimony beyond that which is allowed by Rule 801(d)(1)(D). The first instance is when Dr. Rahter was testifying regarding

the beginning of the sexual abuse Victim suffered. Dr. Rahter stated she was told by Victim that the first time the abuse occurred was when Victim was seven and the last time was about four weekends before their interview. No contemporaneous objection was made when Dr. Rahter testified about the abuse. See State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. . . . If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.").

When Dr. Rahter testified regarding whether the medical findings—that Victim's hymen had been transected by a "penetrating injury"—and Victim's testimony were consistent, Kirton failed to object on any grounds. Kirton directs this Court to an exchange with the trial court after Dr. Rahter's testimony and counsel's objection after the presentation of Kirton's case before he rested. Neither of these objections was contemporaneous to Dr. Rahter's testimony. Kirton's counsel even admitted to the trial court: "I know I did not contemporaneously object when she answered that but the Court prior to that made its ruling, and I'm going to see if I can preserve it by putting the sidebar on."

b. Cumulative

Even if properly preserved, the allegedly improper testimony is cumulative to other un-objected to testimony. Several other witnesses testified regarding Victim's statements about abuse by Kirton. The other witnesses' testimony identifies Kirton as the perpetrator and provides some details of the abuse. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (stating that any error in admission of evidence cumulative to other unobjected-to evidence is harmless); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence.").

c. Not Improper Testimony

The testimony by Dr. Rahter was not improper hearsay testimony. The first instance alleged in Kirton's brief included only the date or time frame of

the alleged abuse. This testimony is properly allowed under Rule 801(d)(1)(D), SCRE.

The second instance involved testimony regarding the medical findings by Dr. Rahter. This testimony was properly admitted as evidence used by the expert witness in forming her opinion that the medical findings were consistent with the interview conducted with Victim. Dr. Rahter explained why the statements and medical findings were significant. The testimony was admitted as forming the base of her opinion and not for the truth of the matter asserted. See, e.g., Howle v. PYA/Monarch, Inc., 288 S.C. 586, 595-596, 344 S.E.2d 157, 162 (Ct. App. 1986).

The issue raised in Kirton's brief is not properly preserved for review on appeal, the testimony was cumulative to other unobjected-to testimony, and the testimony was not improper hearsay. The trial court did not err in admitting the testimony.

CONCLUSION

We hold the trial court properly denied Kirton's motion to exclude evidence of prior bad acts. Notwithstanding that Kirton's appearance before a magistrate at his bond hearing did not require Miranda warnings, Kirton was given the Miranda warnings and voluntarily waived his rights by stating he needed "mental help." The trial court's admission of this statement was not in error. Despite Kirton's failure to preserve any objection to Dr. Rahter's testimony, her testimony was proper and cumulative to other unobjected-to evidence. Therefore, the trial court did not err in admitting her testimony.

Accordingly, Kirton's conviction is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James W. Coker, Appellant,

v.

Catherine G. Cummings, Ida Dell Green, Jerome L. Green, Annette Green, Jeanette Green, Annie Harriot Green, Agnes Oree, Clayton L. Oree, Thomas Snype, and Fred Snype, Defendants,

Of Whom Catherine G. Cummings, Ida Dell Green, Jerome L. Green, Annette Green, Jeanette Green, and Annie Harriot Green are Respondents.

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 4471
Heard October 7, 2008 – Filed December 18, 2008

AFFIRMED

Michael R. Daniel, of Elloree, for Appellant.

G. Trenholm Walker and Daniel S. McQueeney, Jr., both of Charleston, for Respondent Catherine A. Cummings.

D. Peters Wilborn, Jr., of Charleston, for Respondents Ida Dell Green, Jerome L. Green, Annette Green, Jeanette Green, and Annie Harriot Green.

KONDUROS, J.: In this boundary dispute case, James Coker appeals the master-in-equity's grant of summary judgment in Respondents' favor finding Coker had acquiesced to the boundary lines. We affirm.

FACTS

In 1985, Mott Fogle conveyed Lot 24 in the Smithville subdivision near Mount Pleasant to Jessie and Evelyn Gregg. However, in 1987 the Greggs conveyed the lot back to Fogle. In 1999, Fogle filed a suit regarding the boundary issue, which he later withdrew. In 2002, Coker purchased Lot 24 from Fogle. At the time Coker entered the contract to purchase the lot, he was unaware of a discrepancy between the boundaries as described on certain plats of the property and where the boundaries were physically located. In actuality, the lot contained less land than the plats depicted. Coker learned of the discrepancy in 1999 when he had a survey of the property performed in contemplation of the closing.

In 2003, Coker brought suit against Catherine Cummings, who owns Lots 25 and 26, and Ida Dell, Jerome L., Annette, Jeanette, and Annie Harriot Green, who own Lots 21, 22, and 23, seeking a declaratory judgment on the boundary line dispute. In 2004, Coker added Agnes and Clayton L. Oree and Thomas and Fred Snype, as defendants. In 2006, the defendants filed

motions for summary judgment. The parties stipulated that the Orees and Snypes should be dismissed from the action.

The Greens purchased some of their property but the rest they obtained by an adverse possession action in 1986. Annie Green presented an affidavit stating she had cleared the property on lots 21, 22, and 23 in 1952 or 1953, began cultivating a garden, and no one had challenged or complained about the boundaries of her family's lots. However, the Greens' counsel did admit "the plants do not go up exactly to where they claim the" boundary is located. Green's affidavit also stated that "in 1986 or 1987, Mr. Gregg attempted to come on to my famil[y's] lots, however, I instructed him as to the boundaries and asked that he move off the property, which he did." Additionally, she provided, "No one since Mr. Gregg has questioned the boundaries of the lots until the current dispute with Mr. Coker arose."

Cummings submitted an affidavit stating Lot 25 had been in her family since 1913 and her husband purchased Lot 26 in 1975. Further, she stated her son installed a home on Lot 25 in 1975 and has lived there permanently and without interruption since the mid-1970s. Additionally, she asserted "[f]or over 20 years, no one has complained about the location of his home or the location of the eastern boundary (which is approximately 50 feet behind the home)." Cummings also provided, "We had the land surveyed many years ago. The existing eastern boundary of Lot 25 is clearly marked with iron property stakes. Those stakes . . . are approximately 50 feet behind [my son's] house."

Coker also submitted an affidavit from a title examiner giving the title history for the lots implicated in the action. The affidavit asserted the Huguenin plat, prepared in 1870, and the Weston plat, prepared in 1951, depicted all the lots involved in the dispute to be approximately the same size and dimensions. Ben Coker, Coker's brother, stated in his deposition that Ms. Green informed his crew they were on her property when they went to perform a survey prior to Coker's purchase. Ben Coker testified the distances depicted on the Weston plat do not agree with the field distance.

The master granted the defendants summary judgment in a form order filed October 27, 2006. On December 8, 2006, the master entered a longer order, which Coker asserts the master instructed the Greens' attorney to draft at the hearing. The order provided Coker had "not countered the considerable proof presented by the defendants and there is no genuine issue of material fact." The master determined "all defendants have occupied their respective properties up to the de facto boundary lines (as shown on the Seabrook survey) by acquiescence, which the plaintiff's grantor and predecessors have recognized without contest for a long period of time in excess of ten years." (citing Knox v. Bogan, 322 S.C. 64, 71-72, 472 S.E.2d 43, 48 (Ct. App. 1996) ("It is well settled that if adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time – usually the time prescribed by the statute of limitations – they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one.")). This appeal followed.[1]

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

In determining whether a triable issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if evidentiary facts are not

[1] Respondents filed a motion to dismiss the appeal asserting Coker's appeal was not timely. We denied the motion but allowed them to address the issue in their brief.

disputed, if only the conclusions to be drawn from them are, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

LAW/ANALYSIS

I. Timeliness of Appeal

Respondents argue this appeal should be dismissed for Coker's failure to file a timely appeal because the form order, issued October 27, did not mention a full order would follow; neither party filed a Rule 59(e), SCRCP, motion; the full order was issued December 8; and Coker appealed the full order and not the form order. We disagree.

"A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b), SCACR. "Rule 203(b) requires notice of entry of the order. . . . [T]he time to file a notice of appeal pursuant to Rule 203(b), SCACR, begins to run when written notice that the order has been entered into the record by the clerk of court has been received." Upchurch v. Upchurch, 367 S.C. 16, 24, 624 S.E.2d 643, 647 (2006).

> The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (citations omitted).

In Leviner v. Sonoco Products Co., 339 S.C. 492, 493, 530 S.E.2d 127, 127-28 (2000), the trial court filed a form order on January 10, 1997, and neither party filed a Rule 59(e), SCRCP, motion asking for a clarification within the ten day period following the order. The trial court filed a full written order on February 10, 1997, which the supreme court found untimely because under Rule 59(e), the trial court has only ten days from entry of judgment to alter or amend an earlier order on his own initiative absent a "reservation" of jurisdiction in the form order. Id. at 494, 530 S.E.2d at 128; see also Rule 203(b)(1), SCACR ("When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment."). However, the January form order contained no such reservation, and the supreme court found because no timely Rule 59 motion was made nor timely sua sponte order filed under Rule 59(e), the January form order "matured" into a final judgment. Leviner, 339 S.C. at 494, 530 S.E.2d at 128. Therefore, the order filed on February 10 was a nullity because the trial court no longer had jurisdiction over the matter. Id.

We find Leviner distinguishable from the present case. Because Coker did not receive notice of the form order until he received the full order, the time for him to file the appeal from the form order did not begin to run until he received the full order. Thus, his appeal was timely. Further, although the form order did not mention the full order would follow, the master instructed one of the defendants' attorneys to draft the longer order. Therefore, the master reserved jurisdiction and could enter the full order.

II. Doctrine of Acquiescence

Coker argues the master erred in finding the evidence failed to raise any judiciable issue of fact, and thus, concluding the defendants were entitled to summary judgment. We disagree.

"A boundary dispute is an action at law, and the location of a disputed boundary line is a question of fact." Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) (citations omitted). "A disputed boundary line can be established by acquiescence of the parties." Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548-49 (Ct. App. 1985), receded from on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988). "[A]cquiescence is a question of fact determined by the intent of the parties." Id. at 198, 332 S.E.2d at 549.

> [I]f a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interest[s] are affected. His silence is acquiescence and it estops him.

McClintic v. Davis, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955) (quoting S. Ry. v. Day, 140 S.C. 388, 138 S.E. 240 (1926)).

"If adjoining landowners occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in for a long period of time, they are precluded from claiming the boundary line thus recognized and acquiesced in is not the true one." Gardner v. Mozingo, 293 S.C. 23, 26, 358 S.E.2d 390, 392 (1987). "In other words, such recognition of, and acquiescence in, a line as the true boundary line, if continued for a sufficient length of time, will afford a conclusive presumption that the line thus acquiesced in is the true boundary line." Knox v. Bogan, 322 S.C. 64, 72, 472 S.E.2d 43, 48 (Ct. App. 1996). The length of time required is usually that prescribed by the statute of limitations. Id. However, acquiescence can be established even if the period of time is very short; acquiescence need not continue for the period necessary to establish adverse possession. McClintic, 228 S.C. at 384, 90 S.E.2d at 366. For a new boundary to be established by acquiescence, both parties must recognize a particular line constituted the true property line. See Croft v. Sanders, 283 S.C. 507, 510, 323 S.E.2d 791, 793 (Ct. App. 1984).

Additionally, when boundary lines have "been located and designated by monuments and there is a discrepancy between the calls for these monuments and courses and distances shown by a plan referred to in the conveyance, the normal rule as to the controlling effect of calls for monuments will be followed." Klapman v. Hook, 206 S.C. 51, __, 32 S.E.2d 882, 883 (1945). "[U]nder the rules for determining disputed boundaries 'the quantity of land named in the deed is ordinarily one of the lowest in the scale of importance.'" Id. at __, 32 S.E.2d at 883 (quoting Holden v. Cantrell, 100 S.C. 265, 84 S.E. 828 (1915)).

When a party makes a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial." S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 188-89, 322 S.E.2d 453, 457 (Ct. App. 1984). If the adverse party does not respond accordingly, the trial court shall enter summary judgment against him if appropriate. Id. at 189, 322 S.E.2d at 457. When a party makes no factual showing in opposition to a motion for summary judgment, the trial "court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law." Id.

Coker offered plats and an affidavit in support of his contention the boundaries on the ground are incorrect. However, the record contains nothing to dispute Respondents' evidence they have lived on their property with the boundaries as they claim for at least twenty years. The plats simply show that at some point, the boundaries may have been as Coker asserts they were intended. Further, the affidavit is purely speculative as to what happened, and thus, does not raise a material question of fact. Accordingly, the master did not err in granting summary judgment and the order is

AFFIRMED.

ANDERSON and WILLIAMS, JJ., concur.