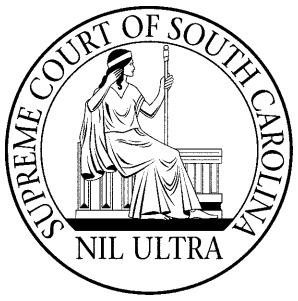

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 49
December 13, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

LeQuint Johnson, Appellant.

Appeal from Lee County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 26902
Heard October 5, 2010 – Filed December 13, 2010

REVERSED

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

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

JUSTICE PLEICONES: Appellant was convicted of two counts of murder, armed robbery, and unlawful possession of a weapon, and received consecutive life sentences for the murders, thirty years for armed robbery,

and five years for the weapons charge. Appellant was tried jointly with Sharod Frazier. On appeal, appellant contends the trial court erred in denying appellant's mistrial motion, made after a State's witness committed a Bruton-type[1] error. We agree and reverse.

FACTS

The State's primary witness was Sammy Baker a/k/a Supercat. Supercat testified about his activities on November 16-17, 2004. In relevant part, he testified that he took his friend Rashad Sharice Thomas a/k/a Rock to meet up with Rock's friend, co-defendant Frazier a/k/a Shy. Eventually they picked up Shy's cousin, appellant LeQuint Johnson a/k/a Q. Supercat did not know appellant. Rock testified that Supercat, Shy, and appellant were together when they dropped him off at his home around 9 pm on the 16th. He did not see or hear from them again.

Supercat testified that he, Shy, and appellant went to Nasty Cat's club, a/k/a The Barn, where Supercat saw his friend Tyrone Dinkins, a/k/a Good Buddy. Supercat followed Good Buddy, with Shy and appellant riding as passengers, to St. Charles Road where people raced their cars and bet on the races. The racing continued until 1 or 1:30 am November 17, when the racers decided to return to Nasty Cat's club. Shy and appellant stayed in Supercat's car while at St. Charles Road, and apparently no one saw them there just as no one had seen them earlier at Nasty Cat's club. Bud Reames, an older man riding as a passenger with Good Buddy, stayed in that car as well.

When the racers returned to Nasty Cat's, Supercat testified he and Good Buddy went in the bar but that Shy and appellant stayed in the car. The club was closing, so Supercat and Good Buddy drove to the Shell Station to buy gas. A videotape from the Shell Station shows Supercat and Good Buddy there around 2 am on the morning of the 17th, although there was testimony that the time might be off by an hour.

[1] Bruton v. United States, 391 U.S. 123 (1968).

After riding around in their cars for a while, Supercat testified he challenged Good Buddy to a race. Good Buddy said to follow him, but that he had to stop and do something under his hood before he could race. Supercat testified Good Buddy pulled over and Supercat pulled in behind him. Supercat testified he got out of his car to help Good Buddy, who was out of his car, when gunshots rang out. Supercat testified he saw Shy standing by Good Buddy. When the gunfire ended, Shy told Supercat to get in the car and drive, while appellant, also armed and outside the car, told Shy they needed to kill Supercat. As Supercat drove, Shy threatened Supercat's sister, and then proceeded to count money. Supercat testified that he met up with Shy later at the Piggly Wiggly where Shy, who told Supercat he was a Blood, threatened Supercat. A witness testified she observed this long conversation and that Supercat looked fearful.

At 6:40 am on November 17th, an officer was dispatched to check out a report of a black male (Good Buddy) lying on the ground on the driver's side of a parked car in which a second black male (Reames) was observed seated in the passenger's seat. A SLED crime scene investigator testified that the man on the ground's pants pocket was turned inside out, and change was scattered around the body and on top of it. Good Buddy was known to carry a good deal of cash. It was clear the two men had been shot to death.

The forensic pathologist testified Good Buddy had eight gunshot wounds from a 0.22. Reames, Good Buddy's passenger, had been shot twice with a 0.38 or a 0.357 magnum. Their time of death was estimated to have been 5 am.

Shy and appellant were tried jointly. Pre-trial, appellant sought a severance because Shy had made a statement to the police which implicated himself and another person ("Knock"). Alternatively, appellant sought suppression of Shy's statement. In this statement, Shy stated that he and 'Knock' were present when Supercat and another friend talked about getting Good Buddy. According to the statement, Shy and Knock were in Supercat's car when they went to a gas station, then followed Good Buddy and pulled him over. Supercat got out of the car and "let loose" (i.e. shot) both people in

Good Buddy's car, using a 0.22 on Good Buddy and a 0.38 on the old guy (i.e. Reames). Shy admitted he and Knock took money from Good Buddy's pockets after Supercat killed him. Shy did not identify Knock.

The trial judge denied both appellant's motion for a severance and his request that Shy's statement not be admitted at their joint trial. The State suggested that Shy's statement could be redacted to eliminate the references to 'Knock.' At some point the trial judge apparently ruled that Shy's statement, with the two references to 'Knock' redacted, would be admitted.[2]

Prior to the introduction of Shy's statement, the trial judge gave the jury this charge:

> Ladies and gentlemen, you're going to see the document in evidence that I have admitted. Certain portions of that document contain information that is not admissible in this case. Information that is not admissible, you should not consider in your deliberations. So don't – the fact that you see a certain part of it has been struck out, you should not consider that in any way. You will see those portions that are admissible in this case in your deliberations. So those that have been redacted have nothing to do and are not admissible to this evidence in this case.

Sheriff's Investigator J.D. Dellinger testified to this statement given to him by "Shy" Frazier:

> I met Supercat in Churchwood. I was on my way to work, but I stopped and began to talk to Supercat. I didn't go to work because I left with Supercat. We drove around for a while talking about who we going to rob for this day. We went to Nasty Cat's Barn, then Supercat met Seneca. They talked for a while on how they were going to get Good

[2] Whether this redaction was necessary or appropriate is not before the Court.

> Buddy. Supercat stopped talking, then got in the car and told me to drive off. I did.
>
> We went to this gas station, then we followed Good Buddy. We pulled him over. Supercat jump out, talk for a second, then let loose on both people. **Me** stayed in the car while Supercat let loose on both people. Then **me** jumped out the car and got the money out of Good Buddy's pockets. The gun Supercat had used on Good Buddy was a .22 revolver and he used a .38 revolver on old guy.
>
> (bold representing points at where the words "and Knock" were covered up with black magic marker).

Investigator Dellinger continued to testify to his observations at the scene, and towards the end of his testimony the following exchange occurred between Investigator Dellinger and the solicitor:

> Q. Now, was [appellant] arrested?
>
> A. Yes, sir, he was.
>
> Q. And the arrest of [appellant], how did that come about?
>
> A. Based on our investigation.
>
> Q. Based on your investigation. And what else?
>
> A. I'm not sure I understand.
>
> Q. The conversation with Sammy Baker [Supercat]?
>
> A. Mr. Baker [Supercat] and Mr. Frazier [Shy].
>
> Q. Okay.

Appellant immediately moved for a mistrial, arguing that the judge's "redaction" charge coupled with Investigator Dellinger's testimony that his conversation (i.e., the one leading to the statement) with Shy led to appellant's arrest effectively violated Bruton by allowing Shy, a non-testifying codefendant, to inculpate appellant. Since Shy did not testify, appellant was denied the ability to confront or cross-examine him in violation of the Confrontation Clause and the hearsay rules. The judge found the error did not rise to the level requiring a mistrial.

ISSUE

Did the trial judge err in denying appellant's mistrial motion?

ANALYSIS

The denial of a mistrial motion following improper testimony by a State's witness is a matter resting in the trial court's sound discretion, and will be overturned on appeal only where there is an abuse of discretion amounting to an error of law. State v. Crawley, 349 S.C. 459, 562 S.E.2d 683 (2002). We find such an error here.

This case presents an unusual Bruton-type issue. Under Bruton, a non-testifying co-defendant's confession that inculpates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor. However, such a confession may be admissible if the confession is redacted in a way that removes any reference to the non-testifying codefendant. Richardson v. Marsh, 481 U.S. 200 (1987); Gray v. Maryland, 523 U.S. 185 (1998).

Shy's confession was redacted to eliminate his references to "Knock;" there is, however, no evidence that appellant is known as "Knock." On the other hand, the redacted confession clearly has had a name eliminated from it, and the jury was charged about this omission. Investigator Dellinger's

statement that appellant's arrest was based in part on Dellinger's "conversation" with Shy, the same conversation in which Shy gave his confession, effectively told the jury that Shy's unredacted statement named appellant. This evidence violated the hearsay rules as well as appellant's Sixth Amendment Confrontation Clause rights.

The State argues this is not truly a Bruton error, citing United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999). In Akinkoye, the codefendants' confessions were retyped and the phrase "another person" substituted in each. The fourth circuit held the redacted statement did not facially implicate the other defendant. Akinkoye is inapposite: the issue here is not the redacted statement itself, but rather whether the statement when combined with Investigator Dellinger's reluctant identification of Shy as having implicated appellant in the crime was an error requiring that the court grant a mistrial. The State also argues harmless error based upon the trial judge's limiting instruction that the jury not consider anything removed from the redacted statement. This type of instruction cannot mitigate a Confrontation Clause violation. Bruton, *supra*.

There is no overwhelming evidence against appellant, as only Supercat's testimony places him at the scene and identifies him as a participant. Investigator Dellinger's "inadvertent slip" strongly implied that Shy's statement named appellant along with "**me**" as present and participating, when in fact appellant was not even named in that statement.

Appellant has demonstrated both constitutional error and prejudice. The trial court erred in denying his mistrial motion.

CONCLUSION

Appellant's convictions are

REVERSED.

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

CHIEF JUSTICE TOAL: I respectfully dissent. While I believe error was committed at the trial court level, I do not believe that error is preserved for our review. The majority's opinion holds that the specific redaction created a *Bruton* violation. In my opinion, Frazier's statement should not have been redacted to begin with. The effect of the majority's opinion is to bring *Bruton* in through the back door. The purpose of the United States Supreme Court's holding in *Bruton* was to prevent a defendant from being implicated by the statements or confession of a non-testifying co-defendant.

In my mind, there is nothing in Frazier's statement that implicates Johnson. To the contrary, Frazier stated that he and "Knock" were seated in Baker's car at the time of the shooting. Frazier's description of Knock at the *Jackson v. Denno* hearing did not fit the description of the defendant. Frazier stated that Knock had braids. At that same hearing, Officer Dellinger admitted that when he interviewed Johnson shortly after the murders, "[h]is hair was cut short." According to the trial testimony of Baker, Johnson and Frazier are cousins. However, Frazier's testimony regarding the identity of Knock does not reflect a familial relationship. Frazier stated that Knock "stay on the back street near the man who sell juice and other things . . . ." Referring to how he knew Knock, Frazier stated, "I just got out in June and he get out in August." When asked directly by defendant's counsel to whom he was referring when he used the name Knock, Frazier elusively stated that "[i]t's a person," and then denied that person was Johnson. Therefore, Frazier's statement, in its original form, did not implicate Johnson. Had the full statement been before the jury, Officer Dellinger's testimony would not have implicated Johnson. It was the redaction itself that implicated Johnson, and therefore I do not believe these facts square with *Bruton*.

During a pre-trial hearing, defense counsel motioned the judge to either sever the trial or to rule Frazier's statement wholly inadmissible. The trial judge denied both these motions and instead chose to redact any reference to Knock contained in Frazier's statement. Why defense counsel did not then object to the redaction of an exculpatory statement is a mystery; however, that mystery may be better solved in a post-conviction relief hearing. This issue is not preserved, nor does it properly raise a *Bruton* issue. Therefore, I would affirm the conviction.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Earthscapes Unlimited, Inc., Respondent,

v.

Richard F. Ulbrich, Anne Ulbrich, J.E. Black Construction Co., Inc., Bluffton Glass & Mirror, Inc., Livingoods Inc., and K&K Plumbing, Defendants

Of Whom Richard F. Ulbrich and Anne Ulbrich are Appellants.

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

Opinion No. 26903
Heard October 20, 2010 – Filed December 13, 2010

AFFIRMED

Karl D. Twenge, of Twenge & Twombley, of Beaufort, for Appellants.

John R. C. Bowen, of Laughlin & Bowen, of Hilton Head Island, for Respondent.

CHIEF JUSTICE TOAL: This action was commenced by Earthscapes Unlimited, Inc. (Respondent) in February 2006 by service of a summons, complaint, and lis pendens on Richard and Ann Ulbrich (Appellants) seeking foreclosure of a mechanic's lien, alleging breach of contract, and in the alternative, seeking judgment under quantum meruit. Appellants' answer included a third-party claim against J.E. Black Construction Company, Inc. (J.E. Black). Respondent filed an amended complaint and lis pendens adding all other mechanic's lien claimants as parties. On September 7, 2007, the circuit court entered an order in which it found J.E. Black to be in default as to all parties for failing to comply with discovery and failure to obtain counsel. On December 28, 2007, the circuit court consolidated several pending cases involving mechanic's liens seeking foreclosure on Appellants' property, but the circuit court did not include this case in that consolidation. On June 12, 2008, this case was tried without a jury resulting in an award for Respondent in the amount of $26,342.80 in principal damages, pre-judgment interest of $5,548.96, and costs and attorney's fees of $19,761.74. This appeal followed. This Court certified this case for review pursuant to Rule 204(b), SCACR.

FACTS

Respondent is a small landscape company doing business primarily in Berkeley Hall Plantation (Berkeley) in Bluffton. Respondent is not a licensed general contractor. On December 30, 2004, Appellants contracted with J.E. Black to build their home inside Berkeley for $1,100,000. Within the contract was a $30,000 allowance for landscaping and an irrigation system. Construction within Berkeley is regulated by an Architectural Review Board (ARB). In order to receive a permit to construct a home in Berkeley it is necessary to obtain approval of the ARB. The ARB requires

that all homes be landscaped, that a landscape plan be submitted, and a landscape fee be paid in order to receive a building permit.

During the summer of 2005, when the house was under construction, Richard Ulbrich (Ulbrich), Appellant homeowner, met Donnie Ward (Ward), Respondent's owner and operator. How the two first met is in dispute. Ulbrich testified he was introduced to Ward at Joseph Black's (Black) house, where Respondent provided landscaping services. Black is the owner of the general contractor J.E. Black. Ward testified he met Ulbrich one day as he was performing landscaping services on the house adjacent to Appellants' lot. Ward also testified that Ulbrich asked if he would landscape Appellants' yard and draw up a landscape design for the home.

Respondent submitted a proposal to Ulbrich for landscaping at the price of $32,677.89. After reviewing the proposal, Ulbrich asked Respondent if he could perform the work for $30,000. Respondent agreed to do the work for $30,000. Respondent next obtained the landscaping permit from the ARB and commenced work on Appellants' property. Respondent's work on the property included ordering and installing plant materials for the home, installing an irrigation system, and installing landscape lighting. The alleged contract for this work was never put in writing. Ward testified he failed to put the contract in writing because of the friendship he forged with Ulbrich, hence, he did the work "on a handshake instead of a signature."

During the course of landscaping, Ulbrich asked Respondent to provide some additional work not included in the original proposal. This extra work included the installation of drainage for water runoff, adding additional plant materials, and the installation of a well for yard irrigation.

On December 9, 2005, Respondent presented a bill to Appellants in the amount of $33,555. This bill included the agreed upon charge of $30,000 for the original work, $2,950 for the irrigation well, $320 for additional plants, and $285 for the extra drainage work. On December 23, 2005, Ulbrich

issued a check to Respondent in the amount of $3,270.[1] Ulbrich then telephoned Respondent and informed him that he had paid the remainder of the landscaping bill to the general contractor J.E. Black, that he would not pay Respondent's bill, and that Respondent should ask J.E. Black for the money. Respondent served its mechanic's lien dated January 18, 2006 on Appellants, and when no payment was forthcoming, filed this action on February 16, 2006.

The circuit court held Respondent had a valid and subsisting mechanic's lien on Appellants' property. The circuit court distinguished the facts of the present case from those in *Skiba v. Gessner*, 374 S.C. 208, 648 S.E.2d 605 (2007). The circuit court held Respondent actually performed labor and supplied materials that attached to and became part of the real estate adding to its value. However, in *Skiba* the party did not receive the protection of the mechanic's lien statutes where the worker merely prepared land for landscaping and did no work relating to a building or structure.[2] The circuit court also found there was a contract between Appellants and Respondent for the landscaping work performed on Appellants' property. The circuit court noted that absent its ruling on the mechanic's lien, it would have found against Appellants for the same amount of money under the quantum meruit claim.

ISSUES

I. Did the circuit court lack subject matter jurisdiction over the action?

II. Did the circuit court err in finding unjust enrichment to be an alternate form of recovery?

---

[1] While a payment of $3,270 would leave a balance of $30,285, Respondent's claim in the circuit court sought $30,000. The circuit court awarded $26,342.80 in principal damages to Respondent after subtracting for a credit due to Appellants and for costs Appellants incurred.

[2] Appellants did not raise the *Skiba* case until their Rule 59(e) motion. It appears from the record that the circuit court judge's order of June 20, 2008 is the first mention of issues pertaining to *Skiba*.

III. Did the circuit court err in finding that there was a contract between Appellants and Respondent?

IV. Did the circuit court err in finding the mechanic's lien statutes applied?

LAW/ANALYSIS

I. Subject Matter Jurisdiction

Appellants argue the circuit court lacked subject matter jurisdiction over the action. Appellants misconstrue this issue as an issue of subject matter jurisdiction. "[S]ubject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) (citation omitted). The circuit court clearly has subject matter jurisdiction to hear disputes related to the mechanic's lien statutes and construction contracts. The proper manner to couch this issue would be whether there is a statutory prohibition against the enforcement of the alleged contract and mechanic's lien at issue. However, because Appellants did not raise section 40-11-370 of the South Carolina Code as an affirmative defense at any stage in the proceedings below, we find this affirmative defense was not properly pled.

As noted above, the circuit court held Respondent had a valid and subsisting mechanic's lien on Appellants' property by distinguishing *Skiba* and finding Respondent actually performed labor and supplied materials that attached to and became part of the real estate adding to its value. Appellants then submitted a Rule 59(e) motion to reconsider, arguing that the circuit court should dismiss Respondent's claims because Respondent did not have a license required by sections 40-11-20, -30 and -370 of the South Carolina Code.[3] Hence, Respondent could not pursue a claim at law or in equity.

[3] Regarding license requirements necessary to contract work, section 40-11-30 of the South Carolina Code states:

Appellants never made a motion to amend their pleadings to incorporate the arguments presented in their Rule 59(e) motion.

A party in replying to a preceding pleading shall affirmatively set forth his or her defenses. Rule 8(c), SCRCP. "Every defense, in law or fact, to a cause of action in any pleading . . . shall be asserted in the responsive pleading thereto . . . ." Rule 12(b), SCRCP; *see also Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("[A]ffirmative

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> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

"General construction" is defined as "the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property." S.C. Code Ann. § 40-11-20(8) (2001). "General contractor" is defined as "an entity which performs or supervises or offers to perform or supervise general construction." *Id.* § 40-11-20(9). A contractor's failure to hold a license required by section 40-11-30 is governed by section 40-11-370 of the South Carolina Code, which provides in pertinent part:

> (A) It is unlawful to use the term "licensed contractor" or to perform or offer to perform general or mechanical construction without first obtaining a license as required by this chapter.
> . . . .
> (C) An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading."). "Statutory prohibition is in the nature of an affirmative defense precluding enforcement of a contract and should be pled." *Madren v. Bradford*, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct. App. 2008) (citing *Costa and Sons Constr. Co. v. Long*, 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct. App. 1991)); *see also Skiba*, 374 S.C. at 210, 648 S.E.2d at 606 (noting that section 40-11-370 is an affirmative defense). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). Rule 15(b), SCRCP provides an exception to the waiver rule by permitting a party to amend his or her pleadings to conform to the evidence. *Madren*, 378 S.C. at 193, 661 S.E.2d at 393.

In *Madren*, there was a motion to dismiss prior to trial and a post-trial Rule 59(e) motion, both arguing that sections 40-11-30 and -370 precluded a contract from being enforced because the opposing party did not have a contractor's license. *Id.* at 192, 661 S.E.2d at 393. However, the party making those motions never made a motion to amend its pleadings. *Id.* at 193, 661 S.E.2d at 393. The court of appeals affirmed the trial court's denial of those motions on the basis that the party making those motions "should not be able to argue for a potential benefit from an affirmative defense without his being required to affirmatively plead it." *Id.* (citation omitted).

In this case, there was a Rule 59(e) post-trial motion filed arguing that section 40-11-370 of the South Carolina Code precludes the enforcement of this action. However, Appellants never amended their pleadings to incorporate this affirmative defense. Appellants cannot benefit from an affirmative defense that was never pled. Hence, we affirm the circuit court's denial of Appellants' Rule 59(e) post-trial motion.

II. Quantum Meruit

Appellants argue the trial court erred in finding quantum meruit to be a basis upon which Respondent can recover. We disagree.

An action based on a theory of quantum meruit sounds in equity. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (citation omitted). When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). Absent an express contract, recovery under quantum meruit is based on quasi-contract. *Columbia Wholesale Co., Inc.*, 312 S.C. at 261, 440 S.E.2d at 130. The elements of a quantum meruit claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. *Id.*

In this case, the circuit court held absent the mechanic's lien claim, "I would still find in favor of the plaintiff and against the defendant for the same amount of money under the *quantum meruit*, or unjust enrichment claim." (italics in original). The benefit conferred by Respondent to Appellants was the work performed by Respondent on Appellants' property. Appellants have realized and enjoyed the benefit of the work performed by Respondent. Finally, allowing Appellants to retain the benefit of Respondent's work without paying its value under the circumstances of this case would be unjust. Hence, we find under the theory of quantum meruit Appellants owe Respondent the same amount of damages awarded at the circuit court.

III. Contract and Mechanic's Lien

Because an appellate court need not address remaining issues when disposition of a prior issue is dispositive, an analysis of the remaining issues in unnecessary. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Because we affirm the circuit court on the quantum meruit claim, it is not necessary to determine whether there was an express contract or whether the mechanic's lien statutes apply to this factual scenario.[4]

[4] While the circuit court did find there was a contract between the two parties in this action, it never awarded damages because of a breach of that contract.

CONCLUSION

Because Appellants never amended their pleadings to incorporate their affirmative defense, we affirm the circuit court's denial of Appellants' Rule 59(e) post-trial motion. Moreover, we find that Appellants owe Respondent the same amount of damages awarded at the circuit court under the theory of quantum meruit.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

Rather, the circuit court chose the theory of quantum meruit as an alternate remedy.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Andres Antonio Torres, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 26904
Heard September 22, 2010 – Filed December 13, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan J. McDonald, Office of the Attorney General, all of

Columbia; Harold W. Gowdy, III, Seventh Circuit Solicitor's Office, of Spartanburg, for Respondent.

JUSTICE HEARN: Anthony Andres Torres ("Torres") appeals the circuit court's admission into evidence of autopsy photographs and a videotape recording during the sentencing phase of his capital murder trial. Torres contends the photographs should have been excluded based on South Carolina Rule of Evidence 403, and the videotape recording should have been excluded based on either Rule 403 or Section 16-3-25(C)(1) of the South Carolina Code (2003). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In May of 2007, Union County Emergency Services received a call reporting a one-car accident involving a van. Subsequently, Torres was identified by witnesses in a police photo line-up as the driver of the van.

Officers arrived on the scene of the accident shortly after Torres fled the area and discovered that the van was registered in the name of Ann Emery. Officers found Ann and her husband Charles Ray Emery's (collectively "the Emerys") belongings in the van, and based on that discovery, requested a welfare check on their residence.

Upon arriving at the Emerys' residence and getting no response at the front door, officers walked around the house to check for signs of forced entry. Finding none, officers entered the residence through an unsecured door, immediately smelled the odor of gasoline, and noticed the house felt hot. Officers discovered the body of Charles Ray Emery lying face down on the mattress in the bedroom. The body of Ann Emery was discovered on the floor beside the bed after EMS arrived on scene. Due to the extent of their injuries, neither body could be identified at the scene, and identification was accomplished at the hospital during an autopsy. Due to the compromising

position of Ann Emery's body at the scene, a sexual assault kit was administered. Semen taken from Ann Emery's body by way of the kit matched DNA of Torres. Torres was indicted on: two counts of armed robbery; two counts of murder; one count of burglary of a dwelling, first degree; one count of attempt to burn; and one count of criminal sexual conduct, first degree. A jury trial was held, resulting in a verdict of guilty on all counts.

During the sentencing phase, the State sought to introduce a video recording showing prison guards using pepper-spray to force Torres to comply with a pat-down request. The events documented on the tape occurred the night that Torres was found guilty. Torres refused to allow prison guards to touch him when the guards requested that he place his hands on the wall for a pat-down. The guards explained that the pat-down was policy and indicated that if he continued to refuse, Torres would be pepper-sprayed. Torres continued to resist after several requests for compliance, so the guards used pepper-spray to restrain him. Torres objected, citing Section 16-3-25(C)(1) of the South Carolina Code (2003); Rule 403, SCRE; and a violation of *Miranda v. Arizona*. However, the trial judge overruled Torres' objections and admitted the video recording. Additionally, the State introduced sixteen autopsy photographs of the Emerys. Torres objected again, citing Rule 403. The trial judge excluded three of the photographs based on Rule 403 and admitted the remaining thirteen.

The defense called various witnesses who testified regarding Torres' mental issues throughout his childhood and adult life and his substance abuse problems. James Aiken, a prison consultant, testified nothing in Torres' records or in the video recording shown by the State gave him any concern about Torres' ability to adapt to life in prison because wardens would be able to manage his behavior.

At the end of the sentencing phase, the jury recommended Torres be sentenced to death. The trial judge sentenced Torres to death, finding the evidence warranted the imposition of the death penalty, and the imposition was not the result of prejudice, passion, or any other arbitrary factor.

ISSUES

Torres raises two issues on appeal:

1. Did the trial judge commit reversible error at sentencing by allowing the State to introduce autopsy photographs of the victims in violation of Rule 403, SCRE?

2. Did the trial judge commit reversible error at sentencing by allowing the State to introduce a video recording of Torres being pepper-sprayed and subdued in the detention center in violation of Section 16-3-25(C)(1) of the South Carolina Code (2003) and Rule 403, SCRE?

STANDARD OF REVIEW

Generally, "[i]n criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003).

LAW/ANALYSIS

I. Autopsy Photographs

Torres contends the trial judge should have excluded the autopsy photographs of the Emerys because the photographs were more prejudicial than probative in violation of Rule 403, SCRE, and only served to inflame the emotions of the jury. We disagree, as we do not believe the trial judge abused his discretion in admitting the photographs.

Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate

material facts or conditions. *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted). In the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase. *See State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986).

The State offered several autopsy photographs into evidence during the sentencing phase of the trial. The State argues that the photographs were properly admitted because they corroborated witness testimony and were introduced to illustrate the circumstances of the crime and the character of the defendant. It is well settled in this state that "[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *see also State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). In addition, this Court has held that autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant. *See State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhart*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007).

The doctor who performed the autopsy used the introduced photographs during his testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed. We do not suggest that these autopsy photographs are mild and easy to view; some of the photographs are close-ups of the victims' injuries and are graphic in nature. However, the purpose of the close-ups was to help identify the nature of each particular injury. The net effect of the photographs was to show what Torres did to the Emerys, which goes straight to circumstances of the crime.

Moreover, the trial judge did exercise his discretion by excluding three of the State's photographs, ruling that they were duplicative and prejudicial. While the admitted photographs graphically depict the injuries of the victim,

this was a particularly horrific crime, and the admission of the photographs did not unduly prejudice the jury. *See Brazell*, 325 S.C. at 78, 480 S.E.2d at 72. Accordingly, we affirm the trial judge's decision to admit them.

Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

II. Video Recording

As part of its case-in-chief during the sentencing phase, the State introduced a video recording of Torres in prison. Torres argues that the introduction of this video recording injected an arbitrary factor into the sentencing phase in violation of section 16-3-25(C)(1) and Rule 403, SCRE. We disagree.

As mentioned above, a trial judge has wide latitude concerning the admissibility of evidence. *See Rosemond*, 335 S.C. at 596, 518 S.E.2d at 589-90. Nonetheless, section 16-3-25(C)(1) establishes that a death sentence must be vacated if it was "imposed under the influence of passion, prejudice, or any other arbitrary factor. "

Evidence admitted during the sentencing phase of a capital murder trial must be relevant to the character of the defendant or the circumstances of the crime. *See Burkhart*, 371 S.C. at 487, 640 S.E.2d at 453; *State v. Copeland*, 278 S.C. 572, 587, 300 S.E.2d 63, 72 (1982). "[A]daptability to prison life . . . is clearly admissible [ ] and . . . evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the *defendant's personal behavior* in those conditions." *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453 (emphasis added); *see also State v. Tucker*, 324 S.C. 155, 174, 478 S.E.2d 260, 270 (1996) (determining that defendant's future

dangerousness and his adaptability to prison life are legitimate interests in the sentencing phase of a capital case).

The video recording in this case demonstrates exactly the type of evidence that *Burkhart* permits. The video shows Torres' behavior in a routine prison situation where he repeatedly refused to accede to prison guards' numerous requests to submit to a pat-down. Because the video recording is probative on the issue of Torres' adaptability to prison life, which is a legitimate concern in the sentencing phase of a capital case, the video does not introduce an arbitrary factor into the jury's determination.

Nonetheless, this evidence is still subject to Rule 403, SCRE. The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court. *See State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009). We believe the trial judge's ruling was correct because the probative value far outweighs any prejudice stemming from the video and any unfair prejudice is *de minimis*. The video recording presented the jury with competent evidence to showcase Torres' character and adaptability to prison life by illustrating Torres in an actual routine prison situation. While prior testimony had already established Torres' prior convictions and his problems with maintaining parole conditions, this video recording was unique in its application to a specific parameter held by this Court to not be arbitrary in the sentencing phase of a capital murder trial. *See Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453.

As his final argument, Torres claims that introducing the video recording gave undue emphasis to the evidence, relying on *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982). We find *Gulledge* is readily distinguishable from the present case. *Gulledge* held that allowing the jury to take a tape recording transcript into the jury room placed undue emphasis on that evidence. *Id.* at 371-72, 287 S.E.2d at 490. Torres is not arguing that the jury should not have been allowed to take the video into the jury room; rather he argues the video should not have been introduced in the first place. Nothing in *Gulledge* supports the idea that the tape recording was not appropriately introduced. Instead, *Gulledge* provides that the trial judge

should not have allowed the jury to take the tape transcripts into the jury room. Furthermore, the video recording here goes to Torres' adaptability to prison life and character, factors which are clearly relevant to the jury's sentencing decision. *See Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453. Therefore, the trial judge properly allowed the video into evidence.

PROPORTIONALITY REVIEW

Pursuant to Section 16-3-25(C) of the South Carolina Code (2003), we must conduct a proportionality review. We find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009) (involving double murder and arson); *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009) (imposing the death penalty for murder, first degree burglary, and criminal sexual conduct).

CONCLUSION

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

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth B. Jenkins, Respondent,

v.

Benjamin Scott Few and Few Farms, Inc., Appellants.

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 4763
Heard June 22, 2010 – Filed December 8, 2010

AFFIRMED IN PART AND REVERSED IN PART

J. Falkner Wilkes, Jr., and Robert Clyde Childs, III, of Greenville, for Appellants.

Fred W. Suggs, III, of Greenville, for Respondent.

LOCKEMY, J.: In this tort action, a jury found Benjamin Scott Few and Few Farms, Inc. (collectively "Few") liable to Kenneth B. Jenkins for

damage to his fertilizer truck and lost profits. On appeal, Few maintains the trial court erred by failing to grant his motions for a directed verdict and in qualifying an expert witness. Few also contends the trial court erred by declining to reduce actual and punitive damages. We affirm in part and reverse in part.

FACTS

Few and Jenkins are competitors in the fertilizer and lime spreading business. Jenkins had reason to believe Few hired two individuals to place sugar in the gas tank of his Ford F-700 fertilizer truck on two separate occasions for the purpose of interfering with his business. Consequently, Jenkins brought suit against Few alleging trespass, conversion, civil conspiracy, and violation of South Carolina's Unfair Trade Practices Act.[1]

At trial, two witnesses testified Few asked them to sabotage Jenkins's fertilizer truck. The first witness, Buford Stokes, a friend of Few's, testified Few called him and asked whether putting sugar or metal filings into a gas tank would cause more damage to a truck. After Stokes replied that he understood sugar would do the most damage, Few expressed his desire to destroy a competitor's fertilizer business.

The second witness, Johnny Lindsey, testified Few also telephoned him about putting sugar in a gas tank. According to Lindsey, during their conversation Few indicated he wanted to place sugar in the gas tank of Jenkins's fertilizer truck. Lindsey initially declined to help Few and handed the phone to a friend, Billy Guest, who made arrangements to sabotage Jenkins's truck for Few. The pair met with Few and acquired the sugar. Later, Guest put the sugar in the gas tank of Jenkins's truck while Lindsey waited in the get-a-way car.

Lindsey explained Few paid him $100 for his part in the sabotage of Jenkins's truck. After learning Jenkins's truck was still operable, Few called Lindsey again and asked him to sabotage the truck a second time. This time

[1] S.C. Code Ann. §§ 39-5-10, -560 (1985 & Supp. 2009).

Lindsey put five pounds of sugar into a gas can and poured it into Jenkins's truck for another $100. Eventually, Lindsey turned himself in to the police and pled guilty to malicious damage for his role in sabotaging Jenkins's fertilizer truck. Lindsey was ordered to pay Jenkins $220 in restitution.

After learning Jenkins's truck was sabotaged, Stokes explained he met with Jenkins and told him about his conversation with Few. According to Stokes, Few called him after he met with Jenkins and threatened him. Few denied contacting Stokes or Lindsey regarding sabotaging Jenkins's truck and denied any involvement in interfering with Jenkins's fertilizer business.

At the end of Jenkins's case, Few moved for a directed verdict on civil conspiracy and conversion. The trial court denied Few's motions and after the close of Few's case, charged the jury on unfair trade practices, conversion, civil conspiracy, and trespass. The jury found in favor of Jenkins on trespass, conversion, and civil conspiracy. The jury found in favor of Few on the unfair trade practices claim. On a general verdict form, the jury awarded Jenkins $28,000 in actual damages and $100,000 in punitive damages. After the verdict was published, Few moved for (1) a new trial absolute on trespass of personal property, conversion, and civil conspiracy and (2) a new trial nisi remittitur on actual damages. Few also sought a post verdict review of the punitive damages award. The trial court denied both motions and declined to set aside or modify the punitive damages award. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in denying Few's motion for a directed verdict on civil conspiracy?

2. Did the trial court err in denying Few's motion for a directed verdict on conversion?

3. Did the trial court err in declining to exclude Stokes as a witness and qualifying Stokes as an expert?

4. Did the trial court err in declining to reduce the jury's award of actual damages?

5. Did the trial court err in finding the jury's punitive damages award comported with due process?

LAW/ANALYSIS

I. Directed Verdict Issues

A. Standard of Review

In reviewing the denial of a directed verdict motion, this court employs the same standard as the trial court: we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418 (Ct. App. 2000). "This [c]ourt will reverse the trial court only when there is no evidence to support the ruling below." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

B. Civil Conspiracy

Few argues the trial court erred in denying his motion for a directed verdict on civil conspiracy because Jenkins failed to demonstrate damages beyond those alleged in other causes of action. We disagree.

"The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). "[T]he gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design." Id. "Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." Pye v. Estate of Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006).

In his complaint, Jenkins alleged special damages from the civil conspiracy as "including, but not limited to, the destruction of [his fertilizer truck], and the loss of revenue for the nine days which [he] could not operate his business." Jenkins did not allege lost profits in regard to any other cause of action. At trial, Jenkins testified, without objection, that he could not operate his spreading business for 8.16 days and lost $5,891 in profits. Additionally, Jenkins explained he incurred $2,035 in costs related to offering and paying a reward for information leading to the parties responsible for sabotaging his truck. We conclude evidence supports the trial court's ruling that Jenkins alleged and demonstrated special damages. Accordingly, the trial court properly denied Few's motion for a directed verdict on civil conspiracy.

C. Conversion

Few argues the trial court erred in denying his motion for a directed verdict on conversion because the record contains no evidence he wrongfully assumed and exercised the right of ownership over Jenkins's fertilizer truck. We agree.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights." Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel." Id.

Here, the record reveals no evidence Few wrongfully assumed and exercised the right of ownership over Jenkins's fertilizer truck. Jenkins argues the damage to his truck so altered its condition that Few wrongfully assumed and exercised the right of ownership.[2] However, Jenkins cites no

[2] The Restatement of Torts appears to support this contention: "One who intentionally destroys a chattel or so materially alters its physical condition as to change its identity or character is subject to liability for conversion." Restatement (Second) of Torts § 226 (1965). Absent a change in identity

South Carolina authority in support of this proposition. Instead, Jenkins points to his testimony Few "took control" of the truck by sabotaging it and that Few "took possession of [his] truck" because he could not use it after sugar was placed in the gas tank. These statements indicate Few interfered with the truck, not that he wrongfully assumed and exercised the right of ownership over the truck. Because Jenkins presented no evidence Few wrongfully assumed and exercised the right of ownership or illegally used or misused the truck, we find the trial court erred in denying Few's motion for a directed verdict on conversion.

II. Expert Witness

Few argues the trial court erred in allowing Stokes to testify as an expert witness because he lacked the necessary qualifications and Few was not provided with notice Jenkins intended to call Stokes as an expert. We disagree.

Generally, "[t]he admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). Also, "[w]here a party fails timely to disclose the identity of an expert witness, the question of whether the witness'[s] testimony may be received in evidence is left largely to the discretion of the trial judge." Tribble v. Hentz, 285 S.C. 616, 618, 330 S.E.2d 560, 562 (Ct. App. 1985).

Pursuant to Rule 33(b)(6), SCRCP, counsel has a duty to disclose "any expert witnesses whom the party proposes to use as a witness at the trial of the case." This rule imposes an ongoing duty to supplement interrogatory answers to reflect the addition of a witness or the intention to call a listed witness as an expert. Rule 33(b); Bensch v. Davidson, 354 S.C. 173, 182,

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there still may be conversion if "the change materially affects the value of the chattel to the plaintiff for the normal uses to which such chattels are put." Id. at § 226 cmt. d. However, no South Carolina case has adopted this view of conversion.

580 S.E.2d 128, 132 (2003) ("[T]here is a continuing duty on the part of the party from whom information is sought to answer a standard interrogatory, such as the one requesting the party list any expert witnesses whom the party proposes to use as a witness at the trial of the case."). The trial court has the discretion to determine whether a sanction is warranted for a violation of Rule 33(b)'s continuing duty to disclose information. Bensch, 354 S.C. at 182, 580 S.E.2d at 133. "The sanction of excluding a witness should never be lightly invoked." Id. Before excluding a witness as a sanction for violating the continuing duty to disclose information the trial court should ascertain (1) the type of witness involved, (2) the content of the evidence, (3) the explanation for the failure to name the witness in answer to the interrogatory, (4) the importance of the witness's testimony, and (5) the degree of surprise to the other party. Id.

We are cognizant of the similar factors outlined in Jumper v. Hawkins, and applied by a number of subsequent cases. 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001); see, e.g., Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005); Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 586 S.E.2d 572 (2003); Bryson v. Bryson, 378 S.C. 502, 662 S.E.2d 611 (Ct. App. 2008); Arthur v. Sexton Dental Clinic, 368 S.C. 326, 628 S.E.2d 894 (Ct. App. 2006). However, we conclude the Bensch factors are more appropriate because the record before us indicates Jenkins listed Stokes as a fact witness but failed to later supplement his interrogatory answer to indicate his intention to call Stokes as an expert witness. In sum, Jenkins violated Rule 33(b)'s continuing duty of disclosure. Because this was the precise issue in Bensch, we apply the Bensch factors.

We find the trial court made the appropriate considerations before declining to exclude Stokes as an expert witness. Here, the trial court determined Jenkins was calling Stokes as an expert witness and would testify that introducing sugar into a gas tank could damage an engine. Jenkins's counsel explained he first listed Stokes as a fact witness but reserved the right to make a later determination about calling him as an expert witness. However, after deciding to call Stokes as an expert witness, Jenkins's counsel inadvertently failed to supplement his interrogatory answer. The trial court

found this mistake was not the result of bad faith. The trial court also determined other experts would testify regarding the effect of sugar on an engine. Finally, the trial court found the degree of surprise and prejudice to Few was low because Stokes testified to the same thing during his deposition and Few's counsel had the opportunity to cross-examine him during an in camera proffer of his testimony. Accordingly, we conclude the trial court did not abuse its discretion in admitting Stokes as an expert witness.

We now turn to Few's contention the trial court erred in qualifying Stokes as an expert. During the in camera proffer, Stokes testified he was a certified automobile mechanic with two years' experience. Stokes also explained he worked on two cars about which he was told had sugar placed in their gas tanks. Based on Stokes's training and experience, the trial court qualified him as an expert in automobile mechanics. Few alleges the trial court erred in qualifying Stokes as an expert because he lacked personal knowledge of whether the automobiles he worked on actually had sugar placed in their gas tanks. Stokes's lack of personal knowledge goes to the weight of his testimony and not its admissibility. See Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 400, 618 S.E.2d 903, 908 (2005) (holding experts lack of firsthand knowledge "goes to the weight of the testimony, not its admissibility"). Accordingly, we find the trial court did not abuse its discretion in qualifying Stokes as an expert witness. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (noting a trial court's decision to qualify a witness as an expert will not be disturbed absent an abuse of discretion).

III. Actual Damages

Few argues the trial court erred in declining to reduce the jury's award of actual damages for trespass to personal property. According to Few, the actual damages award is excessive because it exceeds the diminution in value or damage to Jenkins's fertilizer truck and appears to be based on the value of a new truck Jenkins purchased. We disagree.

Few's argument hinges on a finding trespass to personal property is the only surviving cause of action and asks us to speculate as to the amount of actual damages attributable to trespass to personal property. Both civil conspiracy and trespass to personal property support the jury's actual damage award. Few contributed to drafting and agreed to use a general verdict form that did not include a separate damages award for each cause of action. Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages. See Armstrong v. Collins, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) (finding "[b]ecause the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages"). Accordingly, we will not disturb the trial court's ruling on this issue.

IV. Punitive Damages

Few argues the trial court erred in failing to reduce the punitive damages award. Specifically, Few maintains that based on the actual damage to Jenkins's fertilizer truck caused by his trespass to personal property, the award of punitive damages is excessive. We disagree.

In evaluating the constitutionality of a punitive damages award, we conduct a de novo review. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (holding "our appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award"). Accordingly, we apply the test articulated in Mitchell and consider (1) the degree of reprehensibility of Few's conduct, (2) the disparity between the actual harm suffered and the amount of punitive damages awarded by the jury, and (3) the difference between punitive damages awarded by the jury and those awarded in similar cases. See id. at 587-89, 686 S.E.2d at 185-86. (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996)).[3]

[3] We note the post-trial review factors outlined in Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) are still applicable, but only within the context of the test articulated in Mitchell, 385 S.C. at 587, 686 S.E.2d at 185.

A. Reprehensibility

In considering the degree of reprehensibility, a court should consider whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. at 587, 686 S.E.2d at 185 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003)). Here, Jenkins suffered economic harm. The damage to his fertilizer truck caused him to lose revenue for the eight days he could not operate his business. Further, the record contains no evidence Few evinced an indifference to or a reckless disregard towards Jenkins's health or safety. However, Few deliberately targeted Jenkins's truck and business during the fertilizer spreading season when he knew Jenkins would be the most busy, ensuring he would inflict the most economic harm to his competitor. Additionally, after learning his first attempt failed to render the truck nonoperational, Few sabotaged the truck a second time. Few acted with intentional malice expressing his desire to put Jenkins out of business to both Stokes and Lindsey. Few also perpetrated a clandestine conspiracy to accomplish his goal of sabotaging Jenkins's truck. Weighing the above factors, we find Few's conduct was highly reprehensible.

B. Ratio

Courts must ensure that punitive damages are "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." Campbell, 538 U.S. at 426. Although there is no

constitutional limit on the ratio between harm and damages recovered, single-digit multipliers are more likely to comport with due process. Id. at 424-25. In determining reasonableness, courts may consider "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." Mitchell, 385 S.C. at 588, 686 S.E.2d at 185.

Here, the jury awarded Jenkins $100,000 in punitive damages and $28,000 in actual damages. The ratio between punitive damages and actual damages is 3.6 to 1. Furthermore, this award of punitive damages will serve to deter Few from engaging in like conduct against Jenkins or other competitors in the fertilizer spreading business. Additionally, the record contains evidence Few has the ability to pay the punitive damages award. Based on the foregoing, we find the award of punitive damages is both reasonable and proportionate to the amount of harm caused.

C. Comparative Penalty Awards

In conducting a comparative penalty analysis the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Mitchell, 385 S.C. at 588, 686 S.E.2d at 186. To identify comparable cases "a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." Id. at 588-89, 686 S.E.2d at 186.

A review of case law uncovered no case factually on point with this one. However, research revealed several comparable cases on the lower end of the single-digit spectrum. In Mackela v. Bentley, a conversion case, this court affirmed a punitive to actual damage ratio of 3.7 to 1. 365 S.C. 44, 50, 614 S.E.2d 648, 651 (Ct. App. 2005). Also, in Austin v. Specialty Transportation Services, Inc., a negligence case, this court affirmed a punitive to actual damage ratio of 2.5 to 1. 358 S.C. 298, 318, 594 S.E.2d 867, 877 (Ct. App. 2004). This court has also affirmed ratios on the high end

of the single-digit spectrum. For instance, in Collins Entertainment Corp. v. Coats & Coats Rental Amusement, this court upheld a punitive to actual damage ratio of 9.9 to 1 on an intentional interference with contract claim. 355 S.C. 125, 143-44, 584 S.E.2d 120, 130 (Ct. App. 2003). Our review of these cases leads us to the conclusion the 3.6 to 1 ratio at issue here is within the range of comparable cases and those most often upheld by South Carolina courts. See Mitchell, 385 S.C. at 593, 686 S.E.2d at 188 ("South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum . . . .").

After applying the standard articulated in Mitchell, in our view—especially considering the reprehensibility of Few's conduct and the low single-digit ratio of actual to punitive damages—the jury's award of punitive damages comports with due process.

CONCLUSION

In sum, Jenkins's claim for civil conspiracy was properly submitted to the jury. However, we find the trial court erred in submitting Jenkins's conversion claim to the jury. Furthermore, the trial court properly declined to exclude Stokes as a witness and did not err in qualifying Stokes as an expert. Because the jury issued a general verdict, we will not speculate as to the amount of damages attributable to each remaining cause of action. Therefore, we affirm the trial court as to the actual damages award. Finally, we find the jury award of punitive damages comports with due process. Accordingly, the decision of the trial court is

AFFIRMED IN PART AND REVERSED IN PART.

KONDUROS and GEATHERS, JJ., concur.