The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF ROBERT A. GAMBLE, PETITIONER

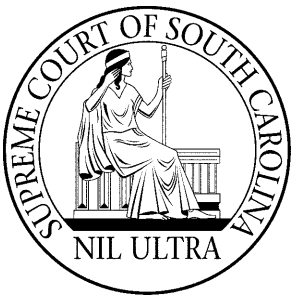
Petitioner was definitely suspended from the practice of law for eighteen (18) months, retroactive to August 24, 2011. In the Matter of Gamble, Op. No. 27310, (S.C. Sup. Ct. filed September 4, 2013)(Shearouse Adv. Sh. No. 39 at 19). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
December 11, 2013



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 52
December 11, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ashley N. Hepburn, Appellant.

Appellate Case No. 2011-190695

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 27336
Heard December 4, 2012 – Filed December 11, 2013

REVERSED

Andrew A. Mathias, of Nexsen Pruet, LLC, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

E. Charles Grose, Jr., of The Grose Law Firm, LLC, of Greenwood, and James W. Bannister, of Bannister & Wyatt, LLC, of Greenville, for Amicus Curiae, South Carolina Association of Criminal Defense Lawyers.

CHIEF JUSTICE TOAL: Ashley N. Hepburn (Appellant) appeals her conviction for homicide by child abuse. We reverse the circuit court's denial of Appellant's mid-trial motion for a directed verdict.

FACTS/PROCEDURAL BACKGROUND

On the evening of October 13, 2009, sixteen-month-old Audrina Hepburn (the victim) became unresponsive and was admitted to the hospital in Greenwood, South Carolina. She eventually died in a Greenville hospital on October 17, 2009. No one, including Appellant, disputes that the victim died from child abuse. There were only two people who could have killed the victim, either Appellant or her boyfriend of five months, co-defendant Brandon Lewis, as they were home with the victim on the night she sustained her fatal injuries.

Appellant and Lewis invoked their rights to a jury trial, and the State chose to prosecute them as co-defendants in a joint trial that took place from February 22 to March 3, 2011.[1]

A. The State's Evidence

At the time of her injuries, the victim resided with her two-year-old brother, Owen, Appellant, Appellant's mother, Doris Davis, and Davis's boyfriend, David Crumley.

On the evening of October 12 between 8:00–8:30 p.m., Appellant, the victim, Owen, Davis, and Crumley ate dinner together. After dinner, Appellant ran a bath for the children, and Davis and Crumley went to bed on the opposite side of the residence just as Lewis arrived.[2] Lewis helped Appellant get the children ready

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[1] On May 15, 2013, the court of appeals reversed Lewis's conviction for aiding and abetting homicide by child abuse. *See State v. Lewis*, Op. No. 5132 (S.C. Ct. App. filed May 15, 2013). The State's petition for a writ of certiorari from that decision is pending before this Court.

[2] Crumley and Davis went to sleep in their bedroom at approximately 9:00 p.m. on the opposite side of the house and did not come out of their bedroom again until they were awoken between 1:15–1:20 a.m. to Appellant's distraught crying, and

for bed. Appellant described the victim as "fussy" before bedtime, and stated she gave the victim a bottle at approximately 9:00 p.m. She also administered Orajel to the victim because she was teething. After putting the victim to bed, Appellant, Lewis, and Owen watched football in the living room. At approximately 10:00 p.m., Appellant got Owen ready for bed and "popped" him when he would not brush his teeth. She and Owen then got into bed in her bedroom, and she read books to Owen until they both fell asleep while Lewis continued watching television in the living room. Around 11:00 p.m., Lewis checked on the victim for the first time. When he opened the door to the victim's room, the victim "popped her head up."[3] Lewis then entered Appellant's bedroom, and tried to wake her up to ask her if she wanted to watch a movie or eat any of the food his grandmother made for him to bring over. She declined and fell back asleep. Therefore, Lewis made food for himself and sat down in the living room and resumed watching television. Between 1:00–1:30 a.m., Lewis checked on the victim again.[4] This time, the victim "didn't stick her head up so I thought she was asleep . . . . When I seen [sic] her she was laying [sic] on her stomach with her head on the rails of the crib. I woke [Appellant] up and I told her I couldn't get [the victim] awake." Appellant awoke to Lewis holding the unresponsive victim in his arms. Appellant and Lewis then woke Davis and Crumley, who called 911.

The victim was taken to Self Regional Hospital in Greenwood. When she arrived, no history of falls, injuries, traumas, or other illnesses was reported to physicians. However, treating physicians and paramedics noticed numerous

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found Appellant in the living room huddled over the limp victim. Lewis told Crumley he went to check on the victim, found her lying face down in her crib with her head up against the rails, shaking "as if she was [sic] cold or having a seizure." Davis testified Lewis "kept repeating" that he found the victim "face down horizontal in the crib."

[3] In one statement to police, Lewis stated he then "shut the door . . . . I didn't hold her then, but I did earlier in the night. I didn't shake her or anything."

[4] In one statement to police, Lewis said that he routinely checked on the victim when he stayed at Appellant's house, and that the walls of the house were so thin that he usually could hear if the victim was crying. On the night in question, he stated the victim was not crying.

bruises and petechiae[5] on the victim's body, retinal hemorrhaging, labored breathing, and overall lack of responsiveness. Upon closer inspection, physicians determined that the victim sustained a subdural hematoma. Dr. Michelle Curry, who treated the victim at Self Regional testified that the subdural hematoma extended from the front to back of the right side of the victim's brain and was "fairly extensive."[6] Dr. Curry opined that the victim's injuries were caused by an acceleration-deceleration movement, as in a car accident or shaken baby syndrome.[7] Likewise, Dr. Robert Seigler, the medical director of the pediatric intensive care unit at Greenville Memorial Hospital where the victim was transferred, opined that due to the nature of her injuries, the victim sustained abusive head trauma due to child abuse. Dr. Mary-Fran Croswell, who also examined the victim at Greenville Memorial Hospital, testified that she could not rule out a "direct impact force, "acceleration-deceleration forces," or some "combination of the two."[8]

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[5] At trial, it was explained that petechiae are caused by the rupture of microscopic blood vessels underneath the surface of the skin, similar to bruising.

[6] Dr. Curry explained:

> A subdural hematoma is not something that happens spontaneously. There are types of bleeding in the brain that can happen spontaneously. Subdural hematomas are the result of trauma because it involves a tearing of veins between layers. There is some amount of, we call it acceleration-deceleration of shaking or wiggling that happens. If you think of the brain as jello inside of a very hard mold and if you shake the mold hard enough the jello separates from the side. When that happens in the brain the little veins that are in between the mold and the jello tear and you get the bleeding around the brain or the jello which then eventually compresses it.

[7] Dr. Curry defined "shaken baby syndrome" as a "well described entity in the pediatric and emergency medicine literature," in which "a child is being disciplined or is so aggravating they are shaken . . . and it can result in both the retinal hemorrhages and the subdural hematoma."

[8] While Dr. Croswell testified that the victim's injuries were as severe as if she had fallen "from several stories, more than a story high," she concluded that "[w]ithout

All of the victim's treating physicians testified that the victim would not have appeared "normal" almost immediately after sustaining this type of injury. Dr. Seigler testified that the victim "would of [sic] had symptoms virtually immediately after an injury this severe and she would have at the least been in a coma and likely have had more severe symptoms than that." Dr. Croswell testified that the severity of the injuries would have brought about a drastic change in a toddler's demeanor that would have been instantly noticeable to her adult caregivers.

While the victim was receiving treatment at Self Regional Hospital, the hospital chaplain, Alexander Brown, met with Appellant and Lewis. At trial, Brown testified that Lewis explained that he was the only person awake at the residence and that he was watching television when he realized he had not checked on the victim in an hour and a half. He stated he would normally open the door or knock to "see if [the victim] would wake up or acknowledge his presence there at the door." However, this time, Lewis found the victim "sideways with her face careened against the side of the crib" instead of her normal posture of "head to foot." Upon closer inspection, he noticed the victim was unresponsive. Brown testified that Appellant was present while Lewis recounted his version of events and did not dispute his story:

> They both seemed concerned but they appeared united in their story and understanding of what was going on at the time. There wasn't any dispute about [Lewis's] description. And, let's see, let me find my words here. They didn't seem any more like outrageously concerned like something was very, very seriously wrong. They weren't over [sic] emotional, they seemed collected as it were, just really concerned.

Brown testified further that at one point Lewis

> said one statement in the middle of his explanation of how he found [the victim]. It concerned me and it seemed odd. In the middle of his

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a history of significant accidental injury such as . . . a motor vehicle crash or a fall from several stories, this constellation of findings [was] most consistent with abusive head trauma."

> statement he explained that [the victim], "didn't like him but he loved her."

Neither party accused the other of any wrongdoing at that time.

The State's evidence also hinted at the possibility of prior abuse. In the weeks leading up to the fatal injuries, Appellant brought the victim to her pediatrician three times to treat a petechial rash. In addition, the victim's father and Appellant's estranged husband, Daniel Hepburn (Daniel), and his mother, Rita Ebel, testified that they both noticed that the victim had a chipped tooth and a bruise on her forehead, which Appellant claimed was caused by the victim striking her head on her crib. Daniel testified that Appellant was concerned about the rash and took the victim to the doctor for treatment. However, when Daniel confronted Appellant about the petechial rash after accompanying the victim to one of her doctor's appointments, Daniel testified Appellant became "defensive right away" and stated that "no one had choked her."[9] In addition, Appellant told Daniel that she did not know how the victim chipped her tooth, but that it "must have happened with her being a little kid."

After a visit on October 8, Daniel did not see the victim again until she was in the hospital. He testified he saw Lewis at the hospital in Greenwood, and Lewis "stated, in his opinion she had had a seizure," as "he walked in to check on her and she was rigid at one point, seemed like she had had a seizure along those lines."

Daniel further testified about the breakdown of his marriage to Appellant, stating their marital problems began when the victim was born prematurely. Daniel testified that the couple decided to divorce in May 2009, and shortly thereafter he learned that Appellant and Lewis "were a couple." Finally, over Appellant's objection, Daniel testified that Appellant struck him during a fight they had while intoxicated when Appellant visited him in Washington in February 2009 to reconcile their marriage.

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[9] On redirect, Daniel testified that Appellant got defensive because she knew Daniel did not like Lewis to be around the children, and "[s]he got defensive right away as far as me questioning him being around the children, me questioning her right as a parent to allow him around the children."

Under cross-examination, Daniel testified that Appellant was a good mother, who nursed the victim when she was born prematurely and was never violent with the children. Furthermore, he testified that he had agreed to Appellant receiving primary custody of the children during a custody hearing. Under further cross-examination by Lewis's counsel, Daniel stated that he spoke with Appellant by telephone on October 12 and she seemed "frustrated" because the victim was teething, but "not more than normal." He testified he later learned that Appellant found out that she did not receive a job offer as hoped on the day before the victim sustained the injuries.

Likewise, both Crumley and Davis testified that Appellant was a good and loving mother, who was attentive to her children.[10] Both testified that they saw a bruise in the middle of the victim's forehead prior to her hospitalization. Davis testified that Appellant brought the bruise to her attention and they attempted to discover the cause of the bruise in the home, and that Appellant took the victim to the doctor because she was concerned about the petechial marks on the victim's neck. Davis testified she did not notice any other bruising on the victim's body when Appellant bathed her earlier in the night.

B. Directed Verdict Motion

At the close of the State's evidence, Appellant moved for a directed verdict pursuant to Rule 19, SCRCrP, claiming the State had failed to present substantial circumstantial evidence that Appellant committed the crimes charged.[11] Instead, Appellant's counsel argued, the State's evidence merely rose to a suspicion that

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[10] In contrast, Crumley testified that Lewis frequented the home sporadically, his contact with the victim was "[v]ery limited," and Lewis "[n]ever had anything to do" with the victim other than see her at the residence.

[11] Pursuant to Rule 19(a), "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." Rule 19, SCRCrP. Moreover, "[i]n ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight." *Id.*

Appellant committed the crime, and this mere suspicion was insufficient to survive a directed verdict motion, in that the State had only proven that Appellant was in the home when the victim sustained the fatal injuries. While Appellant's counsel conceded that the State had proven that the child died from homicide by child abuse, he argued that the State had not proven that the child abuse was inflicted by Appellant. Finding it could be logically deduced from the circumstantial evidence that one of the two defendants violently shook the victim causing her injuries, the court denied Appellant's motion for directed verdict. The trial judge stated that the jury would be given a "mere presence" charge, would have the opportunity to evaluate the witnesses' credibility, and could ultimately conclude that either defendant was not guilty.

C. Appellant's Defense

Appellant's testimony largely corroborated the State's evidence.

Appellant testified that October 12 was a normal day, and she, Crumley, Davis, and the children ate dinner between 8:00–8:30 p.m., after which Appellant bathed the children. Lewis arrived at the residence while Appellant was bathing the children, and helped Appellant dress them for bed. Meanwhile, Davis and Crumley went to bed. Appellant, Lewis, and the children watched television, and then Appellant put the victim in her bed. Appellant testified the victim was tired and irritable, so she gave her a bottle. Appellant and Lewis smoked a cigarette on the back porch, and heard the victim crying. Therefore, Appellant took the victim out of her crib and administered Orajel for teething, and then placed her back in her crib.

Once Appellant reentered the living room, Owen accidentally hit Lewis in the face with his elbow while they were playing, and Appellant and Lewis fought over Appellant's disciplinary tactics. Appellant told Owen to brush his teeth, and she spanked him when he would not follow her instructions.[12] Appellant subsequently entered the victim's bedroom to retrieve books to read to Owen, and the victim looked up at her and appeared normal. Appellant testified she and Owen both fell asleep reading books together in Appellant's bed. Appellant woke

[12] Appellant testified she never used corporal punishment on the victim, and the only time she ever used corporal punishment on either child was when she "popped [Owen] on the backside" when he would not brush his teeth on October 12.

up when Lewis offered her food his grandmother had prepared, and the next thing she remembered was waking up again to Lewis holding the unresponsive victim in his arms. Appellant testified Lewis was acting "odd" and "collected," but she panicked when she realized the victim was not responsive.

Appellant testified that she and Lewis had been dating for approximately six months. She stated that the victim would "cry and cling" to her when Lewis was around, but that she did not think that was unusual at the time, just that "she . . . didn't take to him." Appellant testified that Lewis was the only person awake in the house at the time the victim sustained her injuries and was the only person who could have harmed the victim.

She testified that the victim was born prematurely and was in the hospital for eight weeks. Appellant spent a portion of every day in the NICU with the victim during this time. Appellant testified she "needed help" with the children, as the preterm birth put stress on her relationship with Daniel and finances, so she moved back into her mother's home from Washington, where Daniel was stationed in the military. Appellant testified that she and Daniel had rekindled their relationship after the victim's death and were still in a relationship at the time of trial.

Appellant testified that, outside of visitation for Daniel, she was with her children "[t]wenty-four, seven." As to the victim's previous injuries, Appellant testified she was concerned about the petechial rash, and noticed the chipped tooth and bruising to the victim's forehead and assumed she hit her head on her crib. Appellant testified that she took the victim to her doctor three times to follow-up on the petechial rash. Moreover, she was in the process of finding a dentist to fix the victim's chipped tooth. She also testified she attempted to add padding to the crib bar so that the victim would not injure herself on it again.

D. Lewis's Defense

On the other hand, Lewis's defense painted a markedly different version of events. Lewis testified he stopped by Appellant's home on October 12 at approximately 3:30 p.m. While there, Lewis testified, Appellant slapped him in the face because he called her a "bitch" for throwing a pillow at him after he playfully threw the pillow at her. Lewis testified Appellant "was stressed" because she had not received a job offer as hoped. Lewis went home, and did not return until after dinner later that evening around 8:30 p.m. When he arrived, Lewis

helped Appellant dress the children for bed, and they all watched television together. Lewis testified that Owen accidentally hit him in the face with his elbow, and he and Appellant argued over disciplining Owen. At approximately 10:00 to 10:30 p.m., Appellant then told Owen repeatedly to brush his teeth, and when he would not comply with her instructions, Appellant "yanked" Owen by the arm, took him into the bathroom, and Lewis heard Appellant "pop" Owen at least four or five times. Lewis testified he had never known Appellant to strike her children before this night. To "avoid" Appellant, Lewis began watching television again. At this point, Appellant and Owen were in Appellant's bed, and the victim was in her bedroom in her crib. Around 11:00 p.m., Lewis asked Appellant if she wanted to watch a movie, and she declined. Lewis testified, "[w]hen I asked her to watch a movie I think [Appellant] was still awake."

At some point, Lewis checked on the victim by peering into the room from the doorway, and she seemed "fine." Lewis testified "she was really a light sleeper and she was just popped her head up and I let the door shut back and just went back and started watching TV." Next, he testified he heard the victim "faintly crying" and then "heard [Appellant] get up and stomp into the room, I actually felt her footsteps." Lewis testified, "I can remember hearing [Appellant] stomp into the room I heard her go into the room and I can remember [the victim] crying a little bit. And then she wasn't crying and [Appellant] went out of the room." Lewis testified that the victim's cries were different from her normal cries. He testified he heard "short pauses in between [the victim's] cry and it just, it sounded to me like she could have been shaken." Lewis testified that the crying then stopped and Appellant left the victim's bedroom. However, Lewis testified, at the time, he "didn't think anything had happened to [the victim]." Rather, he "just thought her mom went in there and checked on her." Lewis then heard Appellant walk back to her bedroom. Waiting until she was calm because he figured Appellant was agitated, Lewis returned to Appellant's room to ask her if she wanted something to eat and she declined. Therefore, Lewis fixed himself something to eat.

After he ate and because he was preparing for bed, he checked on the victim a final time. This time, Lewis testified he saw the victim lying horizontally, facedown, with her head against the bars of her crib, and when he went to straighten her, he noticed she was bleeding from the mouth, barely breathing, and limp. He picked her up and ran to Appellant's bedroom. Lewis testified Appellant went to the bathroom and then Lewis handed the victim to her in the hallway. Lewis testified he thought the victim had a seizure because he had experienced

seizures in the past and the victim's mouth was bleeding. Lewis testified he and Appellant then woke Davis and Crumley.[13]

Lewis testified he withheld this version of events in previous statements because he loved Appellant and wanted to protect her. Lewis testified he did not inflict harm on the victim or shake her. However, while at the police station on October 13, Lewis testified he did not believe Appellant had done anything to harm the victim. With respect to his first statement, Lewis testified that he "left out that we had gotten into an argument, . . . that she had slapped me in the face, . . . that I heard her going to [the victim's] room." However, upon speaking with his grandmother and because he felt the police did not believe his first statement, Lewis gave the second statement. Lewis testified that when the police came to his house later to interview him, he ran to a friend's house because he feared he would be arrested. The day after the victim's death, Lewis attempted suicide by taking an overdose of pills. However, Lewis testified that he did not harm the victim.

Lewis re-called an investigating officer to the witness stand, who testified that after Lewis's second statement was shown to Appellant later in the afternoon on October 13, she allegedly exclaimed "oh my god all of this is true but I don't remember hurting my baby."

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[13] This testimony corroborated Lewis's second statement to police, which was introduced by Lewis at trial. In this second statement, Lewis stated:

> [Appellant] got Owen to brush his teeth and then put [the victim] in her crib. [Appellant] then went to bed with Owen and I went to the living room to watch TV. I watched the football game and then around 11:00 in the p.m. I went to check on [the victim]. When I went to check on her at that point [the victim] was fine laying [sic] in the crib. I started watching TV again and then around 12:45 in the a.m. I heard [the victim] crying in her room. I then heard some loud footsteps coming from the back of the house where [Appellant] and Owen were located at. [The victim] started crying even louder as if she was being shaken.

E. Renewal of Directed Verdict Motion

The jury found Appellant guilty of homicide by child abuse and Lewis guilty of aiding and abetting homicide by child abuse. The trial court sentenced Appellant to 45 years' imprisonment and Lewis to ten years' imprisonment suspended upon the service of seven years.

At the close of the case, Appellant renewed her motion for directed verdict, which the trial court denied.

Appellant filed a timely appeal in the court of appeals. On October 3, 2012, this Court certified this case for review pursuant to Rule 204(b), SCACR.

ANALYSIS

Appellant argues the trial court erred in denying Appellant's motion for directed verdict. We agree.[14]

A. Standard of Review

In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). During trial, "[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Id.* at 593, 606 S.E.2d at 477–78 (citing *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002)); *see also* Rule 19(a), SCRCrP. The trial court should "grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as '[s]uspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478 (citations

[14] We need not reach the remaining evidentiary and constitutional issues, as this issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when determination of prior issue is dispositive).

omitted). On the other hand, "a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* (emphasis removed).

On appeal, "[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state." *Id.* (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)); *see also State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding that when ruling on cases in which the state has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the state has presented "any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," this Court must affirm the trial court's decision to submit the case to the jury. *Cherry*, 361 S.C. at 593–94, 606 S.E.2d at 478; *cf. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 ("The trial judge is required to submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'") (emphasis removed) (citation omitted).

B. The "Waiver" Rule

Today, our decision depends on *what* evidence we deem appropriate for consideration at the appellate stage of review to assess whether the State presented "any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused" sufficient to overcome Appellant's mid-trial motion for directed verdict. *See Cherry*, 361 S.C. at 593–94, 606 S.E.2d at 478. In turn, this issue hinges on whether or not we accept the so-called "waiver" rule.[15]

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[15] Under the "waiver" rule:

> [A] defendant's decision to present evidence in his behalf following denial of his motion for a judgment of acquittal made at the conclusion of the Government's evidence operates as a waiver of his objection to the denial of his motion. If a defendant fails to renew his motion for judgment of acquittal at the end of all the evidence, the "waiver doctrine" operates to foreclose the issue of sufficiency of the evidence on appeal absent a "manifest miscarriage of justice." If a defendant renews his motion for judgment of acquittal at the end of all

Appellant contends that, when reviewing the propriety of a mid-trial motion for directed verdict, this Court may only rely on evidence presented during the State's case-in-chief, noting that in its brief, the State relies predominately on Lewis's testimony to rebut her argument that the State lacked substantial circumstantial evidence to convict her. To this end, Appellant argues this Court should overrule the court of appeals' recognition of the waiver rule articulated in *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996), or in the alternative, exclude consideration of Appellant's and Lewis's presentation of evidence in assessing the propriety of the trial court's denial of Appellant's motion.[16]

In *Harry*, the appellant was indicted for two separate counts of arson on the same property. 321 S.C at 276, 468 S.E.2d at 78. During its case-in-chief, the state presented the following evidence that the appellant committed arson: (1) the appellant purchased a $25,000 homeowners insurance policy covering the contents of the home approximately two weeks prior to the fire; (2) several stacks of empty, but totally sealed, boxes were found during an inventory of the home; (3) and the appellant provided his insurer with false information about his losses after the fire. *Id.* The appellant made a motion for directed verdict, which the trial court denied. *Id.* at 276–77, 321 S.E.2d at 78. The appellant subsequently put forward a defense during which the following evidence came to light: (1) a person restored power to

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> the evidence, the "waiver doctrine" requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the Government's case-in-chief.

United States v. White, 611 F.2d 531, 536 (5th Cir. 1980) (internal citations omitted).

[16] The South Carolina Association of Criminal Defense Lawyers also argued these positions in its amicus brief. The State did not file a brief in response to the amicus filing, but made a return by letter dated November 8, 2012, in which it noted that the amicus brief was filed after the close of the briefing cycle and that "Appellant renewed her motion for directed verdict at the conclusion of all the evidence but made no assertion that the trial court should not consider the co-defendant's testimony at that time." In addition, the State questioned the relevance of the amicus brief. This was the extent of the State's response to the waiver arguments.

the home at some point after firefighters extinguished the first fire but before the second fire commenced; (2) the appellant was knowledgeable about transformers and electrical equipment because he worked for an electric company for many years; and (3) the appellant and his mother sustained financial losses after the failure of their pizza business. *Id.*

On appeal, the appellant argued that, in reviewing the propriety of the trial court's denial of his mid-trial motion for directed verdict, the court should only review the evidence presented by the state in its case-in-chief, as that was the only evidence available to the trial court when denying the appellant's motion. *Id.* at 277, 468 S.E.2d at 79. Citing *United States v. Byfield*, 928 F.2d 1163 (D.C. Cir. 1991),[17] the court of appeals rejected this argument, finding that "when the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone." *Harry*, 321 S.C. at 277, 468 S.E.2d at 79. In *Harry*, the court of appeals found instructive the rationale of the Kentucky Supreme Court, holding that the denial of a defendant's motion for directed verdict could not be reviewed on appeal after the defendant did not renew the motion at the close of all evidence:

> A motion for a directed verdict made at the close of the [state's] case is not sufficient to preserve error unless renewed at the close of all the evidence, because once the defense has come forward with its proof, the propriety of a directed verdict can only be tested in terms of all the evidence. If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever

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[17] In *Byfield*, the United States Court of Appeals for the District of Columbia Circuit stated, "Although a motion for judgment of acquittal made at the close of the government's case-in-chief is decided on the basis of only that evidence so far introduced at trial . . . [the court] must look at the entire record when ruling on the same motion made after trial." *Byfield*, 928 F.2d at 1165–66; *see also United States v. Foster*, 783 F.2d 1082, 1085 (1986) (holding "a criminal defendant who, after denial of a motion for judgment of acquittal at the close of the government's case-in-chief, proceeds with the presentation of his own case, waives his objection to the denial," and noting that "[t]he motion can of course be renewed later in the trial, but *appellate review* of [the] denial of the later motion would take into account all evidence introduced to that point.") (emphasis added).

> been given an opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury. In effect, therefore, a motion for directed verdict made only at the close of one party's evidence loses any significance once it is denied and the other party, by producing further evidence, chooses not to stand on it.

Harry, 321 S.C. at 277–78, 468 S.E.2d at 79 (citing *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977)) (alterations in original). Thus, the court of appeals held that sufficient evidence existed to support the trial court's denial of the appellant's motion for directed verdict. *Id.* at 278, 468 S.E.2d at 79.

We decline Appellant's invitation to overrule *Harry* and instead adopt its rationale today. *Cf. State v. Thomkins*, 220 S.C. 523, 68 S.E.2d 465 (1951) ("[I]n determining the sufficiency of the evidence to support the verdicts, we must consider the entire testimony, including that offered by appellants . . . . 'We know of no reason why the defendant in a criminal court, who is not content to leave the [government's] case where he finds it, should escape a just conviction simply because he has, unfortunately for himself, completed the proof of his own guilt.'") (quoting *Commonwealth v. George*, 42 Pa. C. C. 643 (1914)).[18]

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[18] In so holding, we recognize that state courts have not uniformly accepted the waiver rule. Appellant and amicus argue this Court should follow other state courts from Alabama, California, Delaware, Florida, Massachusetts, Michigan, and New Jersey, in rejecting the waiver doctrine.

Interestingly, most of the cases espoused by Appellant do not discuss the waiver rule at all, but reject the notion of considering any evidence outside the state's presentation based solely on state law precedents stating that the *trial court* may only consider the state's case-in-chief at time the mid-trial motion is made. *See, e.g.*, *State v. C.H.*, 624 A.2d 53, 61 (N.J. Super. Ct. App. Div. 1993) ("[W]hen the motion is made at the conclusion of the State's case, the court is not to review the evidence presented by defendant.") (citation omitted); *Cline v. State*, 720 A.2d 891 (Del. 1998) ("The motion for acquittal must be tested solely on the State's case. The defendant's testimony in his case cannot be considered."); *In re Hardley*, 766 So. 2d 154, 157–58 (Ala. 1999) ("We must review the denial of [the defendant's] motion at the close of the State's case-in-chief by considering the state of the evidence as it existed at that stage of the trial."). Certainly, our precedents concerning trial court review of a mid-trial directed verdict motion are

C. "Exceptions" to the Waiver Rule

Citing *Cephus v. United States*, 324 F.2d 893 (D.C. Cir. 1963), Appellant and amicus alternatively argue that the waiver rule excludes consideration of a co-defendant's testimony in assessing whether sufficient evidence existed to deny a mid-trial directed verdict motion and urge this Court to find that Appellant's defense did not operate as a waiver here because she presented evidence in her defense which did not supplement the State's evidence against her in any way. We agree with Appellant that the waiver rule does not apply in these situations.

In *Cephus*, the United States Court of Appeals for the District of Columbia Circuit dealt with the situation in which a co-defendant incriminated the appellant after he testified in his own defense subsequent to the district court's denial of the appellant's motion for acquittal. 324 F.2d at 884. In finding the government's presentation of evidence insufficient to sustain the guilty verdict, the court stated:

> It is clear that if the defendant himself rests on the Government's evidence, the co-defendant's testimony does not waive the defendant's motion. It is also clear that the defendant's own evidence, introduced in response to the codefendant's testimony, does not waive the motion if it adds nothing to the Government's case. The waiver question arises only where, as here, the defendant himself, in seeking to explain, impeach, or rebut the co-defendant's testimony, introduces evidence which overshoots that mark and tends to cure a deficiency in the Government's case. We think the waiver doctrine cannot fairly be applied in this situation.

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indistinguishable. *See, e.g.*, *Cherry*, 361 S.C. at 593, 606 S.E.2d at 478. However, the waiver rule does not affect the trial court's scope of review once a party has moved for a mid-trial directed verdict, in that the trial court must only consider the state's evidence. In our view, these other state court opinions conflate the standards applicable to trial court review of mid-trial denials of directed verdicts with appellate review of the propriety of the trial court's denial of the directed verdict motion. In our view, these are two separate standards, and the waiver rule recognizes the distinction.

> A defendant's attempt to explain, impeach, or rebut a co-defendant's testimony does not at all imply that after the defendant made his motion to dismiss, he then re-evaluated the Government's case-in-chief and now thinks it sufficient. It may be both necessary and possible for the defendant to meet the co-defendant's testimony. He should be free to do so without risk that he may be held to have waived his motion.
>
> If the appellant is now deemed to have waived his right to test the sufficiency of the Government's case, the Government will in effect have been able to use the coercive power of the co-defendant's testimony as part of its case-in-chief, even though the Government was prohibited from calling the co-defendant to testify for the prosecution. Although this prohibition arises from the co-defendant's privilege against self-incrimination, its effect excludes from the Government's case-in-chief the testimony of one who has an incentive to exculpate himself by inculpating his fellow defendant.

Id. at 897–98 (footnotes omitted); *see Foster*, 783 F.2d at 1085–86 (declining to abrogate the ultimate precise holding of *Cephus*, which refused to broaden the waiver rule to cases in which a defendant has moved for a motion for acquittal, decided not to put up a case, and a co-defendant subsequently introduces evidence incriminating him); *United States v. Johnson*, 952 F.2d 1407, 1411 (D.C. Cir. 1992) (disregarding co-defendant testimony in considering the propriety of the trial court's denial of the motion for acquittal).

Most courts that recognize the waiver rule also acknowledge its inapplicability to co-defendant testimony. *See State v. Pennington*, 534 So. 2d 393, 396 (Fla. 1988) (noting that, where "a codefendant presented the missing-link evidence" during the defendant's presentation, "a majority of the jurisdictions utilizing the waiver rule would not apply it under these facts because the respondent in this case did not choose to introduce the unproven elements of the offense in his defense"). The rationale behind the co-defendant exception pertains to control. In *United States v. Belt*, the United States Court of Appeal for the Fifth Circuit explained:

> The waiver doctrine is not mere formalism but is an expression of our adversary justice system which requires a defendant to accept the risks

> of adverse testimony that he introduces. The doctrine's operative principle is not so much that the defendant offering testimony "waives" his earlier motion but that, if he presents the testimony of himself or of others and asks the jury to evaluate his credibility (and that of his witnesses) against the government's case, he cannot insulate himself from the risk that the evidence will be favorable to the government. Requiring the defendant to accept the consequences of his decision to challenge directly the government's case affirms the adversary process. But the decision of a codefendant to testify and produce witnesses is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial.

574 F.2d 1234, 1236–37 (5th Cir. 1978) (footnote omitted). In *Belt*, the appellant "engaged in cross-examination and produced testimony solely because of his codefendant's testimony and directed his efforts to refuting that testimony." *Id.* at 1237. Furthermore, the appellant "did not attempt to refute any element of the proof adduced in the government's case." *Id.* The *Belt* court limited its holding to testimony elicited to rebut a co-defendant's evidence:

> The result we reach is a limited one, applying only to a joint trial and to cross-examination and third-party testimony elicited by the appealing defendant and directed solely to the codefendant's credibility and character. So long as the defendant contents himself with cross-examination of the codefendant and testimony aimed at vitiating the inculpatory testimony given by the codefendant rather than brought forward by the government, the adversarial purpose of the waiver doctrine is left untouched.

Id.

We find this rationale persuasive. Here, Appellant did not dispute the State's contention that the victim died from homicide by child abuse inflicted by one of the two defendants. Instead, her testimony rebutted Lewis's contention that she killed the victim. Thus, we recognize an exception to the waiver rule where a co-defendant testifies, implicating the defendant, and will not consider Lewis's testimony, or testimony elicited by Appellant that is responsive to Lewis's

testimony, for purposes of determining whether the State presented substantial circumstantial evidence sufficient to survive Appellant's mid-trial motion for directed verdict.

In addition, Appellant contends that we should not consider her defense in assessing the trial court's denial of her directed verdict motion. Appellant contends that *Cephus* stands for the proposition that "if the defendant's case does not provide a missing link in the Government's evidence or rectify any deficiency in the State's case, the presentation of a defense does not operate as a waiver of the right to have an appellate court review the mid-trial denial of a motion for directed verdict on the State's evidence alone."

In *Cephus*, the court stated that regardless of whether the waiver rule applies, "if the defendant then rests or if he introduces evidence which adds nothing to the Government's evidence, the sufficiency of the Government's case-in-chief may be reviewed on the appeal from a conviction." *Cephus*, 324 F.2d at 895 (footnote omitted). Moreover, when referring to co-defendant testimony, the court stated further, "It is also clear that the defendant's own evidence, introduced in response to the codefendant's testimony, does not waive the motion if it adds nothing to the Government's case." *Id.* at 897. Thus, the *Cephus* court took it as a given that when the defendant testifies and does not provide any gap-filling evidence for the government's case, then a reviewing court need not consider that testimony. Likewise, we hold that where a defendant's evidence does not serve to fill gaps in the state's evidence, her testimony does not operate to waive consideration of the evidence as it stood at the close of the state's case.[19]

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[19] The fact that Appellant testified, necessarily placing her credibility in issue, further does not operate to waive consideration of her testimony where the testimony does not present patent inconsistencies with the State's evidence. Here, the jury obviously did not believe Appellant's version of events, and that presents a dilemma for any court assessing whether the defendant has provided evidence that fills gaps in the State's case. *United States v. Zeigler*, 994 F.2d 845, 850 (D.C. Cir. 1993) (noting "[t]here is no principled way of deciding when the government's proof, less than enough to sustain the conviction, is nevertheless enough to allow adding negative inferences from the defendant's testimony to fill the gaps," the court held that because mere speculation supported the defendant's conviction, it could not "determine whether [the defendant], by her demeanor on the stand, supplied the evidence needed to support her conviction."); *see also United States v.*

In sum, we hold that the waiver rule is operative. However, because Appellant's co-defendant testified and implicated her and because Appellant's

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Bailey, 553 F.3d 940, 946–47 (6th Cir. 2009) ("The district court is correct that assessment of the credibility of the witness lies within the province of the jury. In reviewing the sufficiency of the evidence, however, the court of appeals must not 'allow the jury's discrediting of the defendant's testimony to make up for a shortfall in the sufficiency of the government's evidence.' Although the sufficiency-of-the-evidence standard is highly deferential to the jury, we cannot let this deference blind us on review to the government's burden to prove guilt beyond a reasonable doubt. Regardless of whether the jury believed [the witnesses'] oral testimony that [the defendant] did not have control over the firearm found by the police underneath [the defendant's] seat, the prosecution had the burden of producing sufficient evidence to convict." (alterations added) (quoting *United States v. Toms*, 136 F.3d 176, 182 (D.C. Cir. 1998); *United States v. Sliker*, 751 F.2d 477, 495 n.11 (2nd Cir. 1984) ("Although [demeanor] is a legitimate factor for the jury to consider, this could not remedy a deficiency in the Government's proof if one existed."); *Dyer v. MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952) ("He, who has seen and heard the 'demeanor' evidence, may have been right or wrong in thinking that it gave rational support to a verdict; yet, since that evidence has disappeared, it will be impossible for an appellate court to say which he was."). The State avers that the victim died as a result of child abuse at the hands of either Appellant or Lewis, but every State witness attested that Appellant was asleep until Lewis woke her up with the unresponsive victim in his arms. Moreover, Appellant's testimony as to the main issue of whether she harmed the victim corroborated that she was asleep during the time period the victim was injured. Appellant's testimony did not highlight any patent inconsistencies and was not contradictory to the State's evidence, and therefore, did not fill any gaps in the Government's case. *See United States v. Dingle*, 114 F.3d 307, 312 (D.C. Cir. 1997) (finding *Zeigler*'s general rule is inapplicable where '"the defendant's testimony, on its face, [is] utterly inconsistent, incoherent, contradictory, or implausible,'" and therefore, "[w]hile [the defendant's] testimony was not internally inconsistent, the government's rebuttal evidence made it extremely implausible" and "[a] jury viewing the government's evidence could reasonably find that [the defendant's] account was false, regardless of his demeanor, and that he was in the apartment for illicit purposes.") (quoting *Zeigler*, 994 F.2d at 849).

testimony merely rebutted this testimony, we will not consider either testimony in assessing the propriety of the trial court's denial of Appellant's mid-trial directed verdict motion.

C. Sufficiency of Evidence

Absent Lewis's and Appellant's testimony, the State has not presented substantial circumstantial evidence on which the trial court could have based the denial of Appellant's motion for directed verdict with respect to the homicide by child abuse charge.[20]

The homicide by child abuse statute provides:

> (A) A person is guilty of homicide by child abuse if the person:
>
> > (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
> >
> > (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.
>
> (B) For purposes of this section, the following definitions apply:
>
> > (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
> >
> > (2) "harm" to a child's health or welfare occurs when a person:

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[20] Appellant was acquitted of aiding and abetting child abuse, so the propriety of the trial court's ruling in that respect is not before this Court on appeal.

> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment . . .

S.C. Code Ann. § 16-3-85 (2003).

Relying on *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011), Appellant contends that the trial court erred in finding that the State presented *substantial* circumstantial evidence sufficient to deny Appellant's motion for directed verdict.

As in this case, in *Bostick*, the State presented entirely circumstantial evidence that the defendant committed murder. 392 S.C. at 140, 708 S.E.2d at 777. The trial court denied the defendant's directed verdict motion, based on the State's presentation of the following evidence: (1) the victim's personal items were found in a burn pile in a neighboring home owned by the defendant's mother; (2) a heavy petroleum product was used as an accelerant in the burn pile and the defendant's mother testified she was afraid to use such accelerants and did not use them; (3) a pattern of gasoline was found on the defendant's shoes and was used as an accelerant to start a fire in the victim's home after her assailant struck her; and (4) blood was found on the defendant's jeans and the DNA expert testified she could not conclusively state that blood found on the defendant's jeans was the victim's, even though she could exclude 99 percent of the population. *Id.* at 141–42, 708 S.E.2d at 778. On this evidence, the Court reversed the trial court, finding the state had not presented substantial circumstantial evidence sufficient to submit the case to the jury. *Id.* at 142, 708 S.E.2d at 778.

Likewise, in *Odems*, the defendant was convicted of first degree burglary, grand larceny, criminal conspiracy, and malicious injury to an electrical utility system, and this Court reversed the trial court after it denied the defendant's directed verdict motion. 395 S.C. at 582, 720 S.E.2d at 48. In that case, the state presented the following circumstantial evidence: (1) less than 90 minutes after the burglary, police found the petitioner in the getaway car with the burglars and the stolen goods; (2) the petitioner fled from law enforcement; and (3) the petitioner asked an uniformed person to lie for him. *Id.* at 588, 720 S.E.2d at 51. To the contrary, other evidence presented tended to obviate the petitioner's guilt, in that the sole eyewitness saw only two people at the crime scene; a forensic investigator

collected twelve sets of fingerprints from the crime scene, none of which matched the petitioner's fingerprints; and a co-defendant testified during the State's case-in-chief that the petitioner did not participate in the crime but was present in the car after he offered him a ride. *Id.* This Court reversed, finding that there was not substantial circumstantial evidence on which to base a conviction, and therefore, the trial court erred in refusing to direct a verdict in favor of the petitioner. *Id.* at 592, 720 S.E.2d at 53.

Appellant contends that the State's evidence "falls woefully short" of the standard set by this Court's precedents concerning the modicum of evidence constituting substantial circumstantial evidence sufficient to withstand a directed verdict. On the other hand, the State contends it presented substantial circumstantial evidence warranting the trial court's denial of the Appellant's directed verdict motion, focusing on Appellant's circumstances at the time of the victim's death, namely scant evidence that she was frustrated by her failure to secure employment, living situation, and parental responsibilities; the medical testimony concerning the severity of the victim's injuries; but most predominantly *Lewis's testimony* that he heard Appellant shake the victim prior to finding her unresponsive in her crib.

Barring Lewis's testimony, as outlined *supra*, we find the State did not present substantial evidence that Appellant killed the victim. Every State witness placed Appellant asleep at the time the victim sustained the fatal injuries. While undoubtedly present at the scene, the only inference that can be drawn from the State's case is that one of the two co-defendants inflicted the victim's injuries, but not that *Appellant* harmed the victim. Thus, we reverse the trial court's refusal to direct a verdict of acquittal because the State did not put forward sufficient direct or substantial circumstantial evidence of Appellant's guilt.

Although not raised by the State, due the similar nature of the charges and facts, the court of appeals' case, *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), bears mentioning. In that case, the court of appeals held that the State had presented substantial circumstantial evidence sufficient to overcome the motion for directed verdict based, in part, on the fact that the two co-defendants were the only responsible adults that could have inflicted or been aware of the victim's fatal injuries. The facts of *Smith* are very similar to those here, in that the 20-month-old child died while in the custody of her mother and her mother's boyfriend (Smith) while on a vacation to the beach. *Id.* at 483, 597 S.E.2d at 889.

The State's case, as here, was entirely circumstantial and the two suspects were tried together as co-defendants. In that case, the court of appeals found that Smith was not entitled to a directed verdict, in part because all of the evidence adduced by the State at trial indicated that during the time period in question, Smith and the victim's mother "were the only two persons with [the victim] who could have possibly caused her injury." *Id.* at 491, 597 S.E.2d at 894. In their respective statements to investigators, the victim's mother told investigators she was with the victim the entire time, and Smith "referred to all of their actions that day as 'we,' never indicating a time when he and [and the victim's mother] were not together during that weekend." *Id.* Moreover, the court noted that the medical testimony indicated that the victim experienced more than one blow to the head and shaken baby syndrome, of which symptoms would have been severe and immediate, and importantly, obvious to both Smith and the victim's mother very soon after the injuries were inflicted. *Id.* at 491–92, 597 S.E.2d at 894.

Noting that the child abuse statute "makes clear that child abuse may be committed by either **an act or an omission** which causes harm to a child's physical health," S.C. Code Ann. § 16-3-85(B)(1), and "harm to a child's health occurs when a person either **inflicts, or allows to be inflicted** physical injury upon a child," S.C. Code Ann. § 16-3-85(B)(2)(a), the court concluded:

> Given the evidence on the severity and number of injuries to [the victim], the fact that both Smith and [the victim's mother] were the only adults with [the victim] during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have been obvious to these two adults, along with the evidence of possible cover-up, we find there was sufficient evidence of an act or omission by Smith wherein he inflicted or allowed to be inflicted physical harm to [the victim] resulting in [the victim's] death. Accordingly, there was substantial circumstantial evidence reasonably tending to prove the guilt of Smith such that the charges were properly submitted to the jury.

Smith, 359 S.C. at 492, 597 S.E.2d at 894.

Homicide by child abuse cases are difficult to prove because often the only witnesses are the perpetrators of the crime. What separates this case from a case

like *Smith* is that every piece of the State's evidence establishes (1) Appellant was asleep at the time the victim sustained her injuries, (2) Appellant was only awoken after Lewis retrieved the unresponsive victim from her crib, and (3) the victim appeared to be acting normally until after Appellant put the victim to sleep and went to sleep herself. As in *Smith*, medical testimony adduced at trial indicated that the victim would not have appeared "normal" within a short period of time after her injuries were inflicted due to the nature and extent of her neurological injuries. However, there is no evidence that Appellant herself was aware of the victim's injuries, let alone caused them. Thus, we find this case distinguishable from *Smith*.

We hold that, absent Lewis's interested testimony and the ability to assess Appellant's credibility on the witness stand, the State did not present substantial circumstantial evidence sufficient to warrant the denial of Appellant's mid-trial directed verdict motion.

While we are mindful that the net result of our decision is to overturn a jury verdict reached with all due deliberation and diligence, we are called by our standard of review to consider the evidence as it stood after the State presented its case, and we are not satisfied that the evidence was sufficient to sustain the State's ultimate burden of proof in this case.

CONCLUSION

Based on the foregoing, we find the trial court erred in refusing to grant Appellant's mid-trial motion for directed verdict, and now direct a verdict of acquittal.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard G. Jordan, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-166367

ON WRIT OF CERTIORARI

Appeal from Richland County
G. Thomas Cooper, Jr., Trial Judge
L. Casey Manning, Post-Conviction Relief Judge

Opinion No. 27337
Submitted October 15, 2013 – Filed December 11, 2013

REVERSED AND REMANDED

Appellate Defender Robert M. Pachak of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General Megan E. Harrigan, both of Columbia, for Respondent.

JUSTICE KITTREDGE: In this post-conviction relief (PCR) case, the Court issued a writ of certiorari to review the denial of Petitioner Richard G. Jordan's

application for relief. The PCR court dismissed Petitioner's PCR application, finding Petitioner failed to establish trial counsel had an actual conflict of interest. We reverse and remand to the court of general sessions for a new trial.

I.

In September 2003, a confidential informant notified law enforcement that Cynthia Summers, Petitioner's then-girlfriend, was manufacturing methamphetamine in a camper in Richland County. The informant did not give an address for the camper but provided directions to it, and police officers promptly began an investigation.

Richland County Investigator Robert Crane was familiar with Summers after previously executing a search warrant for methamphetamine at her home. Investigator Crane followed the informant's directions and was able to locate the camper. Upon arriving at the camper, Investigator Crane realized that a Richland County evidence technician ("neighbor") lived next door to the suspect camper.

The next morning, officers returned to the location and observed Summers at the camper for approximately forty-five minutes. When Summers departed, the officers conducted a traffic stop. No drugs were found during the traffic stop; however, officers did note that the passenger, Willie Hutchinson, had sores on his arms consistent with chemical burns from the manufacture of methamphetamine.

Law enforcement then interviewed the neighbor. The neighbor informed officers that the camper had an exhaust fan that ran at all times, several propane tanks on the premises, and a great deal of suspicious vehicle traffic. With the neighbor's consent, the officers placed video equipment in the neighbor's home to watch the suspect camper over a period of ten days. Petitioner frequented the camper, and he was the only person seen coming to the camper.

Based on the evidence they had gathered, police officers obtained a search warrant for the camper. During the search, officers found methamphetamine, drug paraphernalia, several firearms, and other items indicative of the manufacture of methamphetamine. Officers secured a second search warrant for a storage room on the premises and discovered an additional 417.3 grams of methamphetamine.

Petitioner was arrested and indicted for possession with intent to distribute methamphetamine and trafficking in methamphetamine. At the suggestion of

Summers, Petitioner retained Harry Clayton DePew[1] to represent him on the methamphetamine charges. DePew was then representing Summers on an unrelated Lexington County charge. DePew did not inform the trial court at any time that he represented both Petitioner and Summers.

At trial, evidence was introduced pointing to Summers' involvement with the methamphetamine lab operation. So strong was the evidence of Summers' involvement that the trial court invited Petitioner to present evidence as to Summers' third-party guilt.[2] DePew, however, did not present any evidence to incriminate Summers, though Petitioner testified at the PCR hearing that he had several witnesses that were prepared to testify as to Summers' guilt. Petitioner was convicted on both charges and sentenced to twenty-five years in prison.

Thereafter, Petitioner sought PCR alleging ineffective assistance of counsel because DePew's dual representation of Petitioner and Summers constituted an actual conflict of interest. During the PCR hearing, Petitioner testified that he was not informed of the conflict of interest, did not waive the conflict of interest, and wanted to present a third-party guilt defense as to Summers. Upon examination by PCR counsel, DePew testified as follows:

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[1] In 2002, the Court publicly reprimanded DePew for failing to act diligently on his clients' behalf. *In re DePew*, 350 S.C. 265, 267, 565 S.E.2d 305, 306 (2002). In 2008, DePew was suspended from the practice of law for nine months after pleading *nolo contendere* to unlawfully using his deceased father's name and information in an application for a driver's license. *In re DePew*, 376 S.C. 543, 544, 658 S.E.2d 79, 80 (2008). DePew remains suspended from the practice of law.

[2] We have imposed limitations on the admissibility of evidence of third-party guilt, "limit[ing] [admissible evidence] to facts which are inconsistent with the defendant's guilt . . . [and that] raise a reasonable inference as to the accused's innocence." *Miller v. State*, 379 S.C. 108, 114 n.2, 665 S.E.2d 596, 599 n.2 (2008) (quoting *State v. Mansfield*, 343 S.C. 66, 81, 538 S.E.2d 257, 265 (Ct. App. 2000)). The trial court found that the evidence of Summers' guilt was inconsistent with Petitioner's guilt, and permitted DePew to pursue a third-party guilt defense.

Q: And if you could explain to me, did you not feel that there was a conflict in presenting a third-party guilt claim that was based on a current client of yours?

A: I had discussed that with [Petitioner] and [Summers]. They were living together at the time and, as I said, he expressed the opinion that he was aware of everything she was doing. And he even spoke with her about what she was doing in Lexington County.

Q: But, you as his attorney, you took the opportunity to explain to him that their interests were adverse and that a conflict would be there if you were representing her on drug charges and then trying to make her out to be his third-party guilt defense. Did you explain that to him?

A: I don't think it was explained in so many words. I mentioned items with him regarding her regarding him [sic], but I do believe he was blinded by love.

Q: Did you put the Court on notice that you had active representation of Ms. Summers at the time you were going to use the third-party guilt claim?

A: No, I did not.

Following the hearing, the PCR judge dismissed Petitioner's PCR application, holding there was no actual conflict of interest and concluding Petitioner failed to show deficient performance and resulting prejudice. Alternatively, the PCR judge found that Petitioner was made aware of all potential conflicts of interest and had waived any such conflicts, though not in writing as required by Rule 1.7(b)(4), RPC, Rule 407, SCACR. In so finding, the PCR judge specifically noted that noncompliance with the Rules of Professional Conduct does not establish constitutionally deficient representation. We granted certiorari to review the PCR court's order.

II.

This Court gives deference to the PCR judge's findings of fact, and "will uphold the findings of the PCR court when there is any evidence of probative value to

support them." *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) (citing *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007)). However, we review questions of law *de novo*, and "'will reverse the decision of the PCR court when it is controlled by an error of law.'" *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (quoting *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 167–68 (2008)).

III.

Petitioner argues that the PCR judge committed an error of law in failing to find that an actual conflict of interest existed when trial counsel simultaneously represented both Petitioner and Summers. We agree.

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Lomax*, 379 S.C. at 100, 665 S.E.2d at 167 (citing *Strickland v. Washington*, 466 U.S. 668, 684 (1984)).

In a PCR proceeding, the applicant bears the burden of demonstrating that he is entitled to relief. *Miller*, 379 S.C. at 115, 665 S.E.2d at 599. "'The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.'" *Lomax*, 379 S.C. at 101, 665 S.E.2d at 168 (quoting *State v. Gregory*, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005)). Indeed, "'until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.'" *Id*. at 102, 665 S.E.2d at 168 (quoting *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)).

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance." *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added) (citing *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). However, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." *Staggs v. State*, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007).

This Court has noted that an actual conflict of interest occurs:

> when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (internal marks omitted) (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979)); *see also Thomas*, 346 S.C. at 143–44, 551 S.E.2d at 256 ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.") (citing *Jackson*, 329 S.C. at 354, 495 S.E.2d at 773)).

We find that the PCR judge erred in denying Petitioner's PCR application. At the PCR hearing, DePew testified that he was introduced to, and came to represent, Petitioner by way of Summers. DePew was actively representing Summers. While Summers was not charged in relation to this methamphetamine seizure, she was the initial focus of law enforcement's investigation. In fact, the investigation was initiated only upon officers' receipt of a tip naming Summers as the individual manufacturing methamphetamine. Moreover, at trial, the evidence of Summers' guilt was such that the trial judge permitted DePew to proceed on a theory of Summers' third-party guilt, but DePew never pursued this theory. DePew testified at the PCR hearing that he "was trying to throw mud any place [he] could that it would stick." That testimony is fundamentally at odds with DePew's failure to pursue a third-party guilt defense as to Summers.

We find as a matter of law that DePew's concurrent representation of Petitioner and Summers constituted an actual conflict of interest. The effect of this actual conflict of interest is best illustrated by DePew's refusal to pursue a third-party guilt defense as to Summers, especially after being invited by the trial judge to do so. Because of the actual conflict of interest, Petitioner was not required to demonstrate resulting prejudice.

Further, we find there is no probative evidence in the record to support the PCR judge's finding that Petitioner waived any potential conflict of interest. The PCR judge cited a correct proposition of law in that the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993). Here, however, there is simply no evidence that DePew informed Petitioner or the trial court of his dual representation of Petitioner and Summers, or that Petitioner knowingly, voluntarily, and intelligently waived any potential conflict of interest. *See Thomas*, 346 S.C. at 144, 551 S.E.2d at 256 ("To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.") (citing *United States v. Swartz*, 975 F.2d 1042, 1048–49 (4th Cir. 1992); *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990)). The only evidence at the PCR hearing on this issue was the testimony of both Petitioner and DePew that Petitioner was not informed of the precise nature of the conflict of interest. *See Swartz*, 975 F.2d at 1049–50 (holding that a waiver is not knowing, intelligent, and voluntary unless the defendant knows the precise form of the conflict of interest that eventually results); *Hoffman*, 903 F.2d at 289 ("A defendant cannot knowingly and intelligently waive what he does not know."). We conclude that the PCR court erred in finding that Petitioner waived any conflict of interest. *Cherry v. State*, 300 S.C. 115, 118–19, 386 S.E.2d 624, 625–26 (1989) (holding that a PCR judge's findings will be reversed if there is no probative evidence to support them).

IV.

We reverse the PCR judge's dismissal of Petitioner's PCR application, and we remand the matter to the court of general sessions for a new trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter Michael Anthony Walker, Respondent

Appellate Case No. 2013-002237

Opinion No. 27338
Submitted November 12, 2013 – Filed December 11, 2013

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Michael Anthony Walker, of Charleston, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions as specified hereafter. We accept the Agreement and disbar respondent from the practice of law in this state and impose the conditions as stated hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

In 2010, a medical provider treated Client A for injuries she suffered in an incident that give rise to a personal injury claim. Respondent, Client A's attorney, was provided with the medical provider's lien against settlement proceeds.

For approximately one (1) year, the medical provider routinely checked the status of Client A's case and respondent's office advised the case was pending. When the medical provider against inquired in November 2011, respondent's office advised it had "dropped" the case and was no longer representing Client A.

The medical provider then sent Client A's outstanding bill to a collection agency. Thereafter, Client A called the medical provider and said her case had settled and respondent had told her he had paid the medical provider. Later, the collection agency provided the medical provider with a letter from respondent stating the bill had been paid along with respondent's proof of payment, a photocopy of the front and back of his cancelled trust account check. Convinced the check had not been deposited into its account, the medical provider filed a complaint against respondent.

Respondent admits he did not pay the medical provider from Client A's proceeds although he told her he had done so. He also admits he misappropriated the $1,880 the medical provider was to receive and that the check image he provided to the collection agency was fabricated. During the disciplinary investigation, respondent paid the medical provider $1,880.

Matter II

Matter I was not the first time respondent misappropriated funds belong to the above medical provider. For several years, respondent failed to pay the medical provider whenever he concluded a case on which the medical provider had a lien against proceeds. Instead, respondent presented his clients with settlement statements indicating he was paying the medical provider, but he took the funds due the medical provider and used them for his own purposes.

The medical provider, which has numerous health care professionals and several offices, discovered this situation in 2009 while attempting to collect on outstanding patient bills. When confronted, respondent admitted the misappropriation and gave the medical provider's owner an affidavit admitting he owed the medical provider $353,000, the amount he misappropriated, and a Confession of Judgment for the same amount. The medical provider chose not to report respondent at that time and, although he promised to repay the medical provider over time, he made no payments.

Matter III

Respondent failed to comply with the terms of a finally accepted agreement for discipline and provided misleading records to the Commission on Lawyer Conduct (the Commission). In September 2011, respondent received a confidential admonition citing Rule 1.5 and Rule 1.15 of the Rules of Professional Conduct, Rule 407, SCACR, and Rule 417, SCACR, pursuant to an agreement for discipline by consent.[1]

As a condition of the discipline, respondent was required to submit monthly trust account reconciliation reports, bank statements, and other specific financial records for a period of one (1) year. Respondent's submissions were incomplete as they failed to include records of deposits as required by the agreement and failed to demonstrate the three-part reconciliation required by Rule 417, SCACR. Further, the submitted reconciliation reports routinely showed fictitious outstanding deposits solely to make it appear respondent's trust account had a positive balance when adjusted for outstanding items when, in fact, the sum of outstanding checks exceeded the account balance. In addition, outstanding checks were sometimes simply removed from the list of outstanding items from one month to the next even though they had neither been voided nor cleared the account.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall promptly notify third person of receipt of funds in which the person has an interest and promptly deliver the third person any funds the person is due); Rule 4.1 (lawyer shall not make false statement of fact to third person); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for

[1] The confidential agreement issued in 2011 resulted from respondent's failure to pay a different medical provider and his failure to comply with the recordkeeping and reconciliation requirements of Rule 417, SCACR.

lawyer to engage in conduct prejudicial to administration of justice). Respondent further admits he has violated Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or bring the professional into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(9) (it shall be ground for discipline for lawyer to willfully fail to comply with terms of finally accepted agreement for discipline).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state.[2] Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Respondent shall not seek readmission until he can demonstrate that he has made full restitution to the medical provider in Matters I and II of this opinion. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

[2] On September 11, 2013, the Court placed respondent on interim suspension. In the Matter of Walker, 405 S.C. 468, 748 S.E.2d 236 (2013).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert Lawrence Papa, Respondent

Appellate Case No. 2013-002230

Opinion No. 27339
Submitted October 25, 2013 – Filed December 11, 2013

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey MacLure Watson, III of Ballard Watson Weissenstein, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed three (3) years with conditions stated hereafter. We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years and impose certain conditions as specified hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Background

Respondent represented Mrs. Doe's late husband, Mr. Doe, in various domestic matters involving prior marriages. In addition, respondent was hired by Mr. Doe to represent his trucking company in a bankruptcy matter in the early 1990s. Mrs. Doe was employed by the trucking company, including, at one point, serving as its president.

Mrs. Doe established other businesses separate from the trucking company. Respondent represented Mrs. Doe in the late 1990s in her own personal bankruptcy matter. Respondent subsequently represented Mrs. Doe in filing a partition action involving property she jointly owned with her sister.

Respondent represented Mrs. Doe, Mr. Doe, and their companies over the years by giving them general legal and business advice and by handling various bankruptcy and civil matters for them.

In 2002, Mr. Doe died. As a result, Mrs. Doe received proceeds from two life insurance policies. The first was paid to Mrs. Doe without dispute. Respondent placed these funds in his trust account in 2002 as directed by Mrs. Doe.

The proceeds of the second life insurance policy were subject to a claim by Mrs. Doe's adult stepson. Respondent represented Mrs. Doe in the civil action that arose as a result of that claim. The matter was settled in December 2003 and the civil action was dismissed in February 2004. Mrs. Doe received a portion of the proceeds and another portion was paid to the stepson.

Throughout 2003, 2004, and 2005, respondent collected legal fees from funds held in trust on behalf of Mrs. Doe a variety of legal matters.

Matter I

Upon receipt of the life insurance proceeds, Mrs. Doe asked respondent to manage her money to protect her from her own inability to handle money. Respondent

agreed, based on his long-standing relationship with Mr. Doe and his belief that Mr. Doe would have wanted him to assist Mrs. Doe after his death.

Respondent took possession of more than one million dollars ($1,000,000.00) from or on behalf of Mrs. Doe for this purpose between 2002 and 2004. Respondent did not put the terms of his agreement with Mrs. Doe regarding management of her money in writing.

In 2002 and 2003, respondent managed Mrs. Doe's funds using his law firm trust account. He used Mrs. Doe's funds held in trust to pay some of Mrs. Doe's living expenses and provide her with spending money as she requested it. There was no written agreement between respondent and Mrs. Doe with regard to the management and investment of Mrs. Doe's funds.

On January 14, 2004, respondent formed Kilauea Properties, LLC, a single member LLC, naming himself as the sole member. Respondent created this business entity so that Mrs. Doe would be prevented from having the right to participate in decisions and activities of the business. Mrs. Doe had no ownership interest of record in Kilauea Properties, LLC.

In February 2004, respondent opened a bank account in the name of Kilauea Properties, LLC. He moved some of Mrs. Doe's money from his trust account to the Kilauea Properties, LLC, account. Respondent had sole signatory authority on that account and Mrs. Doe had no access to it other than to request checks from respondent. From that account, respondent purchased various real estate properties as investments which generated income rental and resale. The properties were titled in the name Kilauea Properties, LLC.

Respondent contends he met regularly with Mrs. Doe, a licensed real estate agent, to discuss the status of the properties, including how they were titled, and future acquisitions. However, respondent has no records of these meetings.

In connection with several of the property transactions involving Kilauea Properties, LLC, respondent performed legal work on behalf of the company. On at least two occasions, respondent collected fees for those legal services from Mrs. Doe's funds in the Kilauea Properties, LLC, bank account.

Respondent received no compensation for his management of Mrs. Doe's funds. However, Kilauea Properties, LLC, was included in respondent's tax returns since it was titled in his name. Kilauea Properties, LLC, showed losses from which respondent personally benefitted from a tax standpoint.

Mrs. Doe began to question respondent's management of the funds and investment decisions. On January 1, 2005, respondent prepared and signed an "irrevocable option" which purported to allow Mrs. Doe to exercise the option to acquire a 49% interest in Kilauea Properties, LLC, at any time. Respondent contends he believed the decision to retain a controlling interest was necessary to allow him to ensure that the LLC was properly wound down in the event respondent elected to do so. On August 1, 2007, respondent prepared and signed an "Agreement to Execute Instruments of Conveyance" which set forth in writing, for the first time, terms of the trust arrangement, respondent's duties to provide income, documents, and information to Mrs. Doe, and his duty to convey all properties held by Kilauea Properties, LLC, to Mrs. Doe at her request.

Mrs. Doe filed a lawsuit against respondent. The civil action was settled in mediation in which respondent agreed to deed the properties held by Kilauea Properties, LLC, to Mrs. Doe. The lawsuit has been concluded.

Matter II

Respondent and a realtor formed Camp Center, LLC, for the purpose of real estate investment. In February 2004, Mrs. Doe agreed to participate in the Camp Center investment. With her consent, respondent wrote a check payable to himself for $94,500.00 and a check payable to the realtor for $55,500.00 from Mrs. Doe's funds held in his trust account. These checks were written to allow Mrs. Doe to acquire an interest in Camp Center, LLC.

Respondent used the funds to purchase various properties as part of a shopping center. Mrs. Doe was aware of the transactions undertaken by Camp Center, LLC, and personally viewed the property that was acquired. Respondent believes that Mrs. Doe received approximately $200,000.00 within a year as a return on her investment, but he does not have documentation supporting this assertion.

Respondent believes that there was written documentation of the terms of these transactions provided to Mrs. Doe, but he does not have a copy. He does not know

if he disclosed the conflict of interest related to these transactions to Mrs. Doe or if he obtained her informed consent.

Matter III

Respondent deeded a parcel of real estate he personally owned to Kilauea Properties, LLC. In exchange, he paid himself an initial payment of $25,000 and several subsequent payments of various amounts from the Kilauea Properties, LLC, bank account. No written documentation of the terms of this transaction was provided to Mrs. Doe. Respondent cannot locate records documenting the dates or amounts of the subsequent payments. Respondent neither disclosed the conflict of interest related to this transaction to Mrs. Doe nor did he obtain her informed consent in writing. This property was commercial in nature and was subsequently leased for $800.00 per month, yielding $9,600.00 per year in income that was deposited into the Kilauea Properties, LLC, account.

Matter IV

From July 2003 until November 2003, respondent represented Mrs. Doe in connection with a parcel of real estate she jointly owned with her sister-in-law. Respondent represented Mrs. Doe in the partition of that property. After the conclusion of the partition action, respondent used funds from the Kilauea Properties, LLC, bank account to pay off Mrs. Doe's mortgage obligation on that property. The property was then deeded from Mrs. Doe to Kilauea Properties, LLC, a company solely owned by respondent. No written documentation of the terms of this transaction was provided to Mrs. Doe. Respondent neither disclosed the conflict of interest related to this transaction to Mrs. Doe nor did he obtain her informed consent.

Matter V

Respondent and another business partner owned Caribbean Properties, LLC, a real estate renovation company. Respondent loaned funds from the Kilauea Properties, LLC, account to Caribbean Properties, LLC. Respondent contends the purpose of these loans was to make use of Mrs. Doe's funds to generate revenue on her behalf, even if available funds were insufficient to purchase the property outright. These funds were used for renovations on several properties owned by Caribbean Properties, LLC. No written documentation of the terms of these transactions was

provided to Mrs. Doe. Respondent neither disclosed the conflict of interest related to this transaction to Mrs. Doe nor did he obtain her informed consent.

Matter VI

Respondent and an acquaintance formed Wadmalaw Properties, LLC, in which each owned a fifty percent interest. Wadmalaw Properties, LLC, was formed to purchase a parcel of commercial real estate for development using approximately $31,000.00 from the Kilauea Properties, LLC, account. Respondent also used funds from the Kilauea Properties, LLC, account to pay taxes and related fees as well as repairs and renovations for the property purchased by Wadmalaw Properties, LLC. No written documentation of the terms of these transactions was provided to Mrs. Doe. Respondent neither disclosed the conflict of interest related to these transactions to Mrs. Doe nor obtained her informed consent.

VII

Respondent did not maintain accurate records of transactions involving Mrs. Doe's funds. Further, he failed to comply with the recordkeeping and reconciliation requirements of Rule 417, SCACR. As a result, respondent was unable to produce an accounting to Mrs. Doe or her counsel, in spite of repeated demands. Respondent has subsequently attempted to create an accurate accounting of transactions involving Mrs. Doe's funds, but lack of adequate recordkeeping has rendered this reconstructed accounting incomplete.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.7 (where concurrent conflict of interest, lawyer may represent client if lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to client and client gives informed consent, confirmed in writing); Rule 1.8 (lawyer shall not enter into business transaction with client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless: (1) transaction and terms on which lawyer acquires the interest are fair and reasonable to client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by client; (2) client is advised in writing of the desirability of seeking and is given reasonable opportunity to seek advice of independent legal

counsel on the transaction; and (3) client gives informed consent, in a writing signed by client, to the essential terms of the transaction and lawyer's role in transaction, including whether lawyer is representing client in the transaction); Rule 1.15(a) (lawyer shall hold property of clients or third persons in lawyer's possession in connection with representation separate from lawyer's own property). Respondent further admits he has violated Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for three (3) years and impose the following conditions: 1) within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) and 2) within nine (9) months of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School and provide proof of completion to the Commission. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas M. Carter, Debra Carter, and Christopher Michael Carter, Respondents,

v.

The Standard Fire Insurance Company and Frank L. Siau Agency, Inc., Defendants,

of whom The Standard Fire Insurance Company is the, Petitioner.

Appellate Case No. 2011-193846

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
Clifton Newman, Circuit Court Judge

Opinion No. 27340
Heard May 2, 2013 – Filed December 11, 2013

AFFIRMED

William Pearce Davis, of Baker Ravenel & Bender, LLP, of Columbia, for Petitioner.

William P. Hatfield, of Hyman Law Firm, of Florence, and Robert Norris Hill, of Law Offices of Robert Hill, of Newberry, for Respondents.

CHIEF JUSTICE TOAL: The Standard Fire Insurance Company (Standard Fire) seeks review of the court of appeals' decision reversing the trial court's grant of summary judgment in favor of Standard Fire, and finding Thomas M. Carter, Debra Carter, and Christopher Michael Carter (collectively Respondents) were entitled to stack underinsured motorist (UIM) coverage despite an exclusion in Standard Fire's policy purporting to limit a Class I insured's ability to stack such coverage when the vehicles insured under the subject policy were not involved in the accident. We affirm the court of appeals.

FACTS/PROCEDURAL BACKGROUND

On November 11, 2006, Michael Carter (Michael) was a passenger in his 2006 Dodge Charger, titled in both his and his mother's names and driven by his friend Bernie Collins, when the vehicle was involved in a collision resulting in Michael's paralysis and Collins's death. Respondents brought suit against Collins's estate, alleging that he was driving in a negligent and reckless fashion at the time of the collision, causing the collision and Michael's injuries.

The Dodge Charger was insured by Allstate. Allstate settled with Michael on behalf of Collins's estate, and agreed to pay the available limits of liability coverage, or $250,000, plus another $100,000 in liability coverage under a policy that Allstate issued to Collins, in exchange for a covenant not to execute. In addition, as the insurer of Michael's Dodge Charger, Allstate paid him $500,000 in UIM coverage, comprising $250,000 of coverage on the Dodge Charger, plus $250,000 on another vehicle owned by Michael and insured under his Allstate policy.

Additionally, Michael sought UIM coverage from a Standard Fire insurance policy issued to his parents Thomas and Debra Carter (Thomas and Debra), which was in effect from February 11, 2006, to February 11, 2007, and covered three Chevrolet vehicles owned by them (the Policy). The Policy provided UIM coverage for each vehicle for bodily injury of $250,000 per person and $500,000 per accident. Thus, Respondents sought $750,000 in UIM coverage from Standard Fire.

However, the Policy contains the following exclusion:

EXCLUSIONS

A. We do not provide [UIM] for "bodily injury" or "property damage" sustained by any person:

> 1. While "occupying" . . . any motor vehicle owned by you or any "family member" which is not insured for this coverage under this policy . . . .

The Policy defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household." The Policy also provides that "you" and "your" refer to: "1. [t]he 'named insured' shown in the Declarations; and 2. [t]he spouse if a resident of the same household."

Debra removed Michael as a named insured from the Policy prior to the accident. However, it is undisputed that Michael resided with Thomas and Debra throughout the policy period in question, and therefore, as a resident relative, is a Class I insured under the Policy. It is further undisputed that the Policy did not specifically cover Michael's Dodge Charger.

On October 26, 2007, Respondents brought this action against Standard Fire, alleging, *inter alia*, that Standard Fire breached the terms of the Policy by failing to provide UIM coverage to Michael "for serious injuries sustained as a result of an automobile accident."[1] Respondents alleged that Michael should be permitted to stack UIM coverage under the Policy. In its Answer, Standard Fire denied that UIM coverage was available under the Policy, citing the above policy exclusion.

Each of the parties filed separate motions for summary judgment. In their motion, Respondents argued that the exclusion was void because it conflicts with section 38-77-160 of the South Carolina Code[2] and, as a result, Michael was entitled to stack UIM coverage. In its motion, Standard Fire maintained, *inter alia*,

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[1] Respondents also brought various claims, including the negligent failure to procure insurance, against the Frank L. Siau Agency, Incorporated (the Siau Agency).

[2] S.C. Code Ann. 38-77-160 (2002).

that (1) its policy specifically excluded UIM coverage for any person injured while occupying a motor vehicle owned by that person or a family member not insured under the Policy; and (2) such an exclusion had been sanctioned by this Court in *Burgess v. Nationwide Mutual Insurance Company*, 373 S.C. 37, 644 S.E.2d 40 (2007).

The circuit court heard the motions on December 18, 2008. On February 18, 2009, the circuit court granted Standard Fire's motion for summary judgment on the grounds that (1) UIM coverage was not available to Respondents by virtue of a valid exclusion of coverage of a vehicle not insured under the Policy; (2) Respondents were not entitled to stack coverages under the Policy because coverage was not available under the exclusion; (3) Respondents were bound by the plain language of the exclusion; and (4) the "Other Insurance" clause in the Policy did not provide for UIM coverage.[3]

Respondents filed a timely Notice of Appeal in the court of appeals on February 27, 2009. In an unpublished opinion, the court of appeals reversed and remanded the trial court's order granting Standard Fire's summary judgment motion. *See Carter v. Standard Fire Ins. Co.*, Op. No. 2011-UP-175 (S.C. Ct. App. filed April 18, 2011). Relying on *Nakatsu v. Encompass Insurance Company*, 390 S.C. 172, 178, 700 S.E.2d 283, 287 (Ct. App. 2010), the court of appeals held that the case must be reversed because the exclusion was inconsistent with statutory provisions allowing Class I insureds to stack UIM. *Id.* The court of appeals refused to reach the remaining issues on appeal because the stacking issue was dispositive. *Id.*

Standard Fire sought review, and this Court granted the petition for writ of certiorari.

ISSUE

Whether section 38-77-160 of the South Carolina Code permits an insurance company to exclude UIM coverage to a Class I insured when he is occupying a vehicle he owns but does not insure under the subject policy?

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[3] Likewise, the court granted summary judgment in favor of the Siau Agency; however, that ruling is not before this Court on appeal.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) ("An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP.") (citation omitted).

ANALYSIS

This case presents the question of whether an insurer may limit a Class I insured's ability to stack UIM coverage through an exclusion purporting to limit stacking only to those vehicles owned by the insured, and insured under the subject policy. Standard Fire argues the court of appeals erred in reversing summary judgment because the policy exclusion at issue is permitted under section 38-77-160 of the South Carolina Code. Under Standard Fire's formulation of that provision, the insurer is required *to offer* UIM coverage to an insured, but is not required to provide coverage unless the insured purchases such coverage, and because the Policy contained a valid exclusion, that coverage was not purchased by Respondents. On the other hand, Respondents argue that the plain language of section 38-77-160, the purpose behind the provision, and the traditional construction of the provision suggest that insurers may not eliminate a resident relative's ability to stack UIM coverage under his parents' policy.

Section 38-77-160 governs stacking,[4] and provides, in relevant part:

> Automobile insurance carriers ***shall offer***, ... at the option of the insured, [UIM] motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation

[4] Stacking is defined "as the insured's recovery of damages under more than one policy until all of his damages are satisfied or the limits of all available policies are met." *Giles v. Whitaker*, 297 S.C. 267, 268, 376 S.E.2d 278, 279 (1989); *State Farm Mut. Auto. Ins. Co. v. Moorer*, 330 S.C. 46, 60, 496 S.E.2d 875, 883 (Ct. App. 1998).

> imposed by statute. ***If, however, an insured or named insured is protected by . . . [UIM] coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident***. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or [UIM] coverage.

S.C. Code Ann. § 38-77-160 (Supp. 2012) (emphasis added).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). "The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist," and therefore, "[t]he UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons" and "should be construed liberally to effect the purpose intended by the Legislature." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) (citations omitted).

In the context of interpreting an insurance contract, "[s]tatutory provisions relating to an insurance contract are part of the contract as a matter of law." *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App. 2000) (citation omitted). To this end, "[UIM] coverage is controlled by and subject to our [UIM] act, and any insurance policy provisions inconsistent therewith are void, and the relevant statutory provisions prevail as if embodied in the policy." *Kay v. State Farm Mut. Auto. Ins. Co.*, 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App. 2002). A policy of automobile insurance must provide at least the minimum amount of coverage outlined in the statute, and "a policy issued pursuant to the law which gives less protection will be interpreted by the court as supplying the protection which the legislature intended." *Id.* at 450, 562 S.E.2d at 678 (quoting *Hamrick v. State Farm Mut. Auto. Ins. Co.*, 270 S.C. 176, 179, 241 S.E.2d 548, 549 (1978)).

While we disagree with Respondents' broad assertion that an insurer may never limit an insured's ability to stack, it is well-settled that an insurer cannot contractually limit coverage in contravention of section 38-77-160. *See Ruppe v.*

Auto–Owners Ins. Co., 329 S.C. 402, 405–06, 496 S.E.2d 631, 632–33 (1998) (noting the rule that stacking of statutorily required coverage cannot be contractually prohibited is an oversimplification of our stacking law and declining to apply it to the stacking of *liability* coverage, and stating "stacking may be prohibited by contract if such a prohibition is consistent with statutory insurance requirements."). However, we find that Standard Fire's interpretation of section 38-77-160 fails to account for the portion of the statute that unequivocally states that once the insured "**is protected by . . . UIM coverage in excess of the basic limits**," the insurer "**shall provide**" UIM coverage up to the amount held on the vehicle involved in the accident. Because the exclusion in question conflicts with this clear language, we hold the exclusion is void. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (stating "the rules of statutory interpretation are not needed and the court has no right to impose another meaning" when the statute's language is plain and unambiguous); *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used.") (citation omitted).

Generally, "[s]tatutorily required coverage is that which is required to be offered or provided." *Ruppe*, 329 S.C. at 404–05, 496 S.E.2d at 632. "[A]n insurer must offer UIM coverage pursuant to [section] 38–77–160 when the insurer extends statutorily required liability coverage." *Howell v. U.S. Fid. & Guar. Ins. Co.*, 370 S.C. 505, 510, 636 S.E.2d 626, 629 (2006). "South Carolina courts have interpreted [section 38–77–160] to allow Class I insureds[5] to stack UIM coverage from multiple automobile insurance policies." *Kay*, 349 S.C. at 449, 562 S.E.2d at

[5] There are two categories of insureds: (1) Class I insureds, which includes a person named in the policy, the named insured's spouse, or any resident relatives of the named insured, and (2) others known as Class II insureds, *i.e.* permissive users and guests. *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998); *see also Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 211, 473 S.E.2d 843, 845 (Ct. App. 1996); *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 443 n.1, 405 S.E.2d 396, 397 n.1 (1991). Importantly, a person is entitled to pursue stacking *only if* he or she is a Class I insured under the at-home policy. *See Hill*, 323 S.C. at 211, 473 S.E.2d at 845 ("The critical question in determining whether an insured has the right to stack is whether he is a Class I or Class II insured.").

678.[6] This is so because UIM coverage is considered to be both "personal and portable." *See Burgess*, 373 S.C. at 41, 644 S.E.2d at 42 ("[A]s a general proposition, UIM coverage follows the individual insured rather than the vehicle insured, that is, UIM coverage, like UM, is 'personal and portable.'"). Thus, a Class I insured typically may pursue stacking whether or not he was injured in his vehicle. *See* S.C. Code Ann. § 38-77-30(7) (Class I insureds are insured "while in a motor vehicle or otherwise"); *Howard*, 315 S.C. at 53, 55, 431 S.E.2d at 608, 609–10 (Ct. App. 1993) (invalidating an "owned vehicle" exclusion because UIM "is nowhere limited to the use of the insured vehicle, and cannot be so limited by the policy provisions," and allowing a husband, as a Class I insured under his wife's policy covering the involved vehicle, to stack policies of multiple at-home vehicles).

However, the amount an insured is permitted to stack from at-home policies is limited to the amount of UIM carried on the vehicle involved in the accident. *See Mooneyham*, 304 S.C. at 446, 405 S.E.2d at 398 ("[T]he amount of coverage which may be stacked from policies on vehicles not involved in an accident is limited to an amount no greater than the coverage on the vehicle involved in the accident."); *but see Brown v. Continental Ins. Co.*, 315 S.C. 393, 396, 434 S.E,2d 270, 272 (1993) (noting that "UM and UIM qualify as 'statorily required coverage'" because "required coverage includes coverage that is required to be provided or *required to be offered*," but holding that section 38-77-160 prohibits the stacking of UM and UIM when an insured vehicle is not involved in the wreck and because the exclusion tracked the statutory language, it was valid) (citations omitted).

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[6] The fact that the involved vehicle was insured by a separate insurance company than the insurance company insuring the at-home vehicles is insignificant under the typical stacking analysis. *See, e.g., Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 7, 339 S.E.2d 501, 502 (1985) (allowing stacking of UM coverages where insured owned eight vehicles, two of which were covered under a fleet policy issued by one company, three of which were covered under one fleet policy issued by Nationwide, and three of which were covered by separate, individual Nationwide policies); *Am. Sec. Ins. Co. v. Howard*, 315 S.C. 47, 49, 431 S.E.2d 604, 606 (Ct. App. 1993) (allowing stacking of UIM coverage where policy covering involved motorcycle was insured by American Security Insurance Company and insured's wife insured three at-home vehicles under a policy issued by South Carolina Insurance Company).

Standard Fire concedes that, but for the Policy exclusion, Michael would be entitled to stack the coverage on each of the three cars insured by the Policy under the normal framework. However, Standard Fire argues that the Court's decision in *Burgess* marked a turning point in stacking jurisprudence by implicitly overruling those cases that stand for the proposition that UIM coverage is "statutorily required" because it is "required to be offered." In particular, Standard Fire relies on *Burgess*'s statement that "public policy is not offended by an automobile insurance policy provision which limits the portability of basic 'at home' UIM coverage when the insured has a vehicle involved in the accident." *See Burgess*, 373 S.C. at 43, 644 S.E.2d at 42. Standard Fire argues that under *Burgess*'s rationale, "insurers may restrict or even exclude UIM coverage if their insureds incur damages as a result of an accident involving a vehicle owned by the insured or a resident relative but not insured under the subject policy." Standard Fire notes that because UIM is entirely voluntary, a policy provision limiting basic UIM portability when the insured is involved in an accident while in a vehicle that he owns but does not insure under the subject policy does not violate the statute.[7]

In *Burgess*, this Court considered the validity of a policy provision purporting to limit the portability of UIM coverage where the insured sought coverage from one of his at-home vehicles, even though he did not carry UIM coverage on the vehicle involved in the accident. *Burgess*, 373 S.C. at 39, 644 S.E.2d at 41. The insured suffered injuries from a motor vehicle accident while riding his motorcycle, insured by Alpha Property and Casualty Insurance Company (Alpha). *Id.* The insured's damages were in excess of the at-fault driver's coverage, and the insured had no UIM coverage on his motorcycle. *Id.* However, he owned three other vehicles insured by Nationwide Mutual Insurance Company (Nationwide), each of which carried $25,000 in UIM coverage. *Id.* Thus, the insured sought to "port" UIM coverage from one of the at-home vehicles, and not to stack coverage. *Id.* at 41 n.1, 644 S.E.2d at 43 n.1. Nationwide refused to pay the insured's UIM claim based on the following "other insurance" policy exclusion:

> If a vehicle **owned by you or a relative** is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall:

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[7] This is essentially the same position taken by the dissent. As explained, *infra*, this position is not supported by our precedents or the wording of section 38-77-160.

a) be primary if the involved vehicle is your auto described on this policy; or

b) be **excess** if the involved vehicle **is not your auto described on this policy**. The amount of coverage applicable under this policy **shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.**

Id. at 39–40, 644 S.E.2d at 41–42.

Under the circumstances, the Court found that public policy was not offended by an insurance policy that purported to limit the portability of UIM when an insured is injured in a vehicle he owns but does not insure under the insurance policy. *Id.* at 41–42, 644 S.E.2d at 43. The Court did not rely on the specific language of section 38-77-160 or any prior decisions. *Id.* Rather, the Court stated the following:

> UIM coverage is entirely voluntary, and permits insureds, at their option, to purchase insurance coverage for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages. Essentially, the insured is buying insurance coverage for situations, as where he is a passenger in another's vehicle or is a pedestrian, where he cannot otherwise insure himself. When, however, the insured is driving his own vehicle, he has the ability to decide whether to purchase voluntary UIM coverage. Burgess chose not to do so when insuring his motorcycle.
>
> . . . .
>
> We hold that public policy is not offended by an automobile insurance policy provision which limits the portability of basic "at-home" UIM coverage when the insured has a vehicle involved in the accident. *Compare State Farm Mut. Auto. Ins. Co. v. Calcutt,* 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) (endorsement providing for set-off of workers' compensation benefits for UIM valid where UM set-off is not, because UIM coverage is voluntary). Upholding this limit

> on portability encourages persons to purchase UIM insurance on all their vehicles. To hold, as did the Court of Appeals, that basic UIM is portable even in this situation permits an individual who owns multiple vehicles to purchase UIM insurance on only one vehicle, yet have basic UIM coverage on all. We find this result undesirable.

Id. at 42, 644 S.E.2d at 43.

In the wake of the *Burgess* opinion, the court of appeals considered a nearly identical factual scenario to the instant case in *Nakatsu*. 390 S.C. at 172, 700 S.E.2d at 283. In that case, the insured (Nakatsu) was injured in an automobile accident while she resided with her sister and brother-in-law (the Buckners). *Id.* at 174, 700 S.E.2d at 285. Nakatsu received the limits of liability insurance from the at-fault driver's insurer. *Id.* at 175, 700 S.E.2d at 285. Likewise, she collected $25,000 in UIM coverage from a policy she maintained on her own vehicle, which was involved in the accident. *Id.* She also sought UIM coverage from a policy issued by Encompass Indemnity Company (Encompass), which insured three vehicles owned by the Buckners, which held UIM limits of $50,000 per vehicle and $100,000 per accident. *Id.* However, the Buckners' policy contained a similar "owned vehicle" exclusion, which denied coverage when the involved vehicle was owned by the insured but not covered under the policy. *See id.* at 175–76, 700 S.E.2d at 285–86.

Despite stipulating that the policy provisions did not allow her to stack UIM coverages on the three vehicles because she was not driving a vehicle insured under the policy, Nakatsu argued that the provision was invalid because she was a Class I insured, and therefore, she was entitled to stack UIM coverage under section 38-77-160. *Id.* at 177, 700 S.E.2d at 286. Relying on *Burgess*, the trial court granted summary judgment to Encompass. *Id.*

On appeal, the court of appeals reversed the trial court, agreeing with Nakatsu's arguments that the exclusion was void because it was inconsistent with section 38-77-160 and *Burgess* was inapplicable to the facts. *Id.* at 178, 700 S.E.2d at 286. Noting "[s]tatutorily required coverage is that which is required to be offered or provided," the court found the exclusion violated section 38-77-160. *Id.* at 179–80, 700 S.E.2d at 287 (citation omitted). Moreover, the court of appeals distinguished *Burgess* because it was not a stacking case, opining that Nakatsu, because she was a resident relative of the Buckners, was a Class I insured under

their policy, and therefore, unlike in *Burgess*, the issue was whether Nakatsu could stack the Buckners' UIM coverage. *Id.* at 181, 700 S.E.2d at 288. With respect to the policy concerns raised by the *Burgess* court, the court of appeals found they did not apply to Nakatsu's case because the insured in *Burgess* declined UIM coverage, whereas Nakatsu sought to stack UIM coverage she purchased on the vehicle involved in the accident. *Id.*

Standard Fire argues we should overrule *Nakatsu* because it "is largely premised on the proposition that UIM coverage is 'statutorily required' since it is 'required to be offered.'" We agree with the *Nakatsu* court's reasoning, and therefore, decline Standard Fire's invitation to overrule it.

First, *Burgess* is factually distinguishable from the present case and *Nakatsu* in that *Burgess* did not involve stacking. *Burgess*, 373 S.C. at 41 n.1, 644 S.E.2d at 43 n.1. For this reason, *Burgess* did not involve section 38-77-160, and this Court did not interpret that section or touch on any of our precedents interpreting that section.

Standard Fire argues that the *Burgess* court's statement that "UIM coverage is entirely voluntary, and permits insureds, at their option, to purchase insurance coverage for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages," *see Burgess*, 373 S.C. at 42, 644 S.E.2d at 43, directly contradicts language in pre-*Burgess* opinions stating that UIM is "statutorily required" because "it is required to be offered," *see, e.g.*, *Ruppe*, 329 S.C. at 404–05. *Burgess* did not implicitly overrule those cases. Instead, we find that *Burgess* may be reconciled with them. While true, as Standard Fire suggests, we have stated that UIM is not mandatory coverage in the sense that an insured chooses to purchase excess UIM coverage on a vehicle and a specified amount is not required by statute,[8] we have held it is a statutorily

[8] *Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 644 S.E.2d 62 (2007) (noting that unlike UM coverage, UIM is not mandatory in all automobile insurance policies); *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 154, 311 S.E.2d 723, 726 (1984) ("We hold underinsured motorist coverage is optional coverage provided by an insurance carrier in the event damages are sustained by the insured in excess of the at fault driver's liability coverage, recovery therefrom being additional to any recovery from the at fault motorist, total recovery not to exceed the amount received from the damages sustained."); *cf. State Farm Mut. Auto. Ins. Co. v.*

required coverage in the sense it is required to be offered. Our precedents, read in the context of section 38-77-160, unequivocally require the insurer to provide coverage in an amount equal to the excess UIM coverage purchased on the vehicle involved in the accident. Thus, because Michael, a Class I insured under the Policy, *purchased* UIM coverage on the vehicle involved in the accident, the statute requires he be permitted to stack UIM coverages on the at-home vehicles.[9]

Richardson, 313 S.C. 58, 61, 437 S.E.2d 43, 45 (1993) ("Insurance companies may prohibit the stacking of non-mandatory coverage."); *Giles v. Whitaker*, 297 S.C. 267, 269, 376 S.E.2d 278, 280 (1989) ("Because there is no statutory requirement that State Farm provide liability coverage for vehicles other than the one described in the policy, the policy provisions limiting stacking of liability insurance were valid.").

[9] We note that *Burgess* further does nothing to alter the well-settled principle that UIM coverage is both personal and portable. *Cf. Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012) (a nonstacking case in which this Court determined the public policy that UIM is personal and portable entitles insureds, who were involved in an accident while riding in a car owned and operated by a resident relative without UIM coverage, to recover UIM benefits from their at-home policies despite the valid portability limitation in the insured's policy that provided the amount of coverage applicable was lesser of the coverage limits under the at-home policy or the coverage limits on the car involved in the accident); *Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973) (considering an exclusion barring UM coverage, and noting that "[UM] coverage is not to provide coverage for the uninsured vehicle but to afford additional protection to an insured. Unlike the provisions relative to liability coverage, the statute plainly affords [UM] coverage to the named insured and resident relatives of his or her household at all times and without regard to the activity in which they were engaged at the time. Such coverage is nowhere limited in the statute to the use of the insured vehicle, and cannot be so limited by the policy provisions.") (citation omitted); *Howard*, 315 S.C. at 52–53, 431 S.E.2d at 608, *overruled on other grounds by Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 498 S.E.2d 865 (1998) (holding policy containing an exclusion stating the insurer would not provide UIM coverage to a person occupying a motor vehicle owned by the named insured or any family member that was not insured under the policy invalid because UIM coverage "is nowhere limited to the use of the insured vehicle, and cannot be so limited by the policy provisions") (citation omitted).

In addition, the policy concerns raised by the *Burgess* opinion are not present here because Michael purchased UIM coverage on the vehicle involved in the accident. *See Burgess*, 373 S.C. at 42, 644 S.E.2d at 43 ("Upholding this limit on portability encourages persons to purchase UIM insurance on all their vehicles. To hold, as did the Court of Appeals, that basic UIM is portable even in this situation permits an individual who owns multiple vehicles to purchase UIM insurance on only one vehicle, yet have basic UIM coverage on all. We find this result undesirable.") Rather, to allow the exclusion here would be to permit the insurance company, in the better position to assess risk because it can account for a resident relative in setting premiums, to hinder competition and increase insurance premiums by limiting coverage for a Class I insured to a single policy, meaning the Class I insured could only purchase excess UIM coverage on all of his vehicles on the insurer's terms. We find *this* result undesirable, and more importantly, one not intended by the legislature under the clear language of 38-77-160.

Therefore, we hold the court of appeals correctly determined that section 38-77-160 invalidates the exclusion barring coverage to Respondents.

CONCLUSION

Based on the foregoing, we affirm the court of appeals' reversal of summary judgment in favor of Standard Fire, and remand this case to the circuit court for further proceedings consistent with this opinion.

AFFIRMED.

BEATTY, J., and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE PLEICONES: Michael was injured while a passenger in a Dodge Charger he and his mother owned and insured with Allstate. By virtue of his status as a resident relative of his parents, he is an "insured" under the Standard Fire insurance policy purchased by his parents insuring three other vehicles they owned. The trial court upheld the validity of an exclusion in the Standard Fire policy denying underinsured (UIM) coverage where an insured is damaged while occupying a vehicle he owned but did not insure under that policy. The Court of Appeals reversed, and the majority affirms. I would reverse the Court of Appeals because I agree with the trial court that the policy exclusion is valid.

While S.C. Code Ann. § 38-77-160 requires an insurance company to offer UIM coverage, the decision to purchase such coverage is voluntary. *E.g. Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007). Here, Standard Fire offered such coverage and the parents purchased it, albeit subject to certain exclusions. This UIM exclusion, therefore, does not involve "statutorily mandated coverage" as the majority maintains, since it is only the **offer** of such coverage that is required by § 38-77-160.

In *Burgess, supra*, we acknowledged the 'personal and portable' nature of UIM coverage. Since, however, such coverage is not mandatory, and since limitations on portability are permissible under the "If, however" clause of § 38-77-160, *Burgess* held a policy could lawfully eliminate the portability of UIM coverage when the named insured is involved in an accident while in a vehicle he owns but does not insure under the policy. Therefore, under *Burgess*, had Michael's mother been involved in an accident while occupying the Charger, we would uphold the validity of this Standard Fire exclusion as applied to her. The present case differs from *Burgess* in that the Standard Fire policy's portability exclusion is sought to be applied to an insured, rather than the named insured, injured while driving a vehicle he and a named insured owned but did not insure under the parents' Standard Fire policy.

As I explained in my dissent in *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012), when a named insured purchases a policy that limits UIM, that portability exclusion applies to all the insureds, whether named or resident relatives. Under my view, an insured who is not the owner of the policy is bound by the UIM portability decisions made by the policy owner, a result that the General Assembly mandated in § 38-77-160. *Rhoden*, 398 S.C. at 405, 728 S.E.2d at 483.

Section 38-77-160 provides in the "If, however" clause that where an insured "is protected by [UIM coverage],[10] the policy shall provide he is protected only to the extent of the coverage he has on the vehicle involved in the accident."[11] In my view, the Standard Fire exclusion is consistent with this clause: while Michael was entitled to the 'personal and portable' UIM coverage in his parents' policy because he was an insured, that policy, consistent with the "If, however" clause of § 38-77-160, limited Michael's UIM coverage to the amount bought "on the vehicle involved in the accident." Here, the Standard Fire policy provided no UIM coverage on the involved vehicle since the car was not insured under that policy. I see nothing in Standard Fire's exclusion that violates either public policy or the language of § 38-77-160.

I would reverse the decision of the Court of Appeals.

KITTREDGE, J., concurs.

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[10] I read the "If, however" clause to cover two types of voluntary insurance: all UIM coverage and "excess" uninsured motorist (UM) coverage, that is, UM coverage exceeding the statutorily mandated minimum.

[11] Michael cannot rely on the portion of the "If, however" clause that restricts recovery where the insured is occupying a non-owned vehicle, as he owned the vehicle he was occupying at the time of this accident.

The Supreme Court of South Carolina

In the Matter of Richard G. Wern, Respondent.

Appellate Case No. 2013-002314
Appellate Case No. 2013-002316

ORDER

By order dated November 6, 2013, the Court placed respondent on interim suspension and appointed the Receiver, Gretchen B. Gleason, to protect the interests of his clients. In the Matter of Wern, S.C. Sup. Ct. Order dated November 6, 2013 (Shearouse Adv. Sh. No. 48 at 30). The Commission on Lawyer Conduct (the Commission) has now filed a Motion to Terminate Order of Receivership and requests reimbursement of costs and expenses.

Catherine F. Juhas, Esquire, a lawyer who practiced with respondent prior to his suspension, is willing to assume the responsibility for the representation of respondent's clients. The Court finds Ms. Juhas is capable of and shall be responsible for the representation of respondent's clients. Accordingly, the appointment of the Receiver is unnecessary and the Motion to Terminate Order of Receivership is granted. See Rule 31(b), RLDE, Rule 413, SCACR (it is unnecessary to appoint Receiver where partner or other responsible party capable of conducting suspended lawyer's affairs exists). The request for reimbursement of costs and expenses is denied.

The Receiver shall transfer possession and control of respondent's client files and trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent maintained to Ms. Juhas and, if necessary, shall notify the United States Postmaster to redirect respondent's mail to Ms. Juhas' address. Ms. Juhas shall ensure respondent's clients are notified that she is now representing them.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 6, 2013

The Supreme Court of South Carolina

RE: Amendment to Rule 404 of the South Carolina Appellate Court Rules

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ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 404(b) of the South Carolina Appellate Court Rules is amended to read:

> **(b) Prohibitions on Admission Pro Hac Vice.** An attorney may not appear pro hac vice if the attorney is regularly employed in South Carolina, or is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina, unless the attorney has filed an application for admission under Rule 402, SCACR. Notwithstanding any other provision herein, an attorney who files more than six applications for admission pro hac vice in a calendar year, including applications for purposes of Rule 404(h), is considered regularly engaged in the practice of law in South Carolina.

This amendment is effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 9, 2013