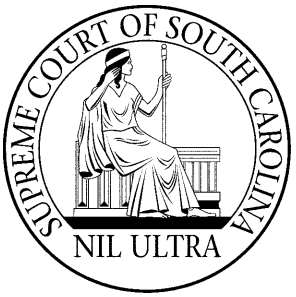

OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 1, 2002

ADVANCE SHEET NO. 22

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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The Supreme Court of South Carolina

Dexter L. Faile and Lesa L. Faile, individually and as parents and natural guardians of Brandon Chase Faile, Respondents,

v.

South Carolina Department of Juvenile Justice, Petitioner.

ORDER WITHDRAWING ORIGINAL OPINION, SUBSTITUTING SUBSEQUENT OPINION, AND DENYING PETITION FOR REHEARING

PER CURIAM: Opinion No. 25434, filed April 1, 2002, is hereby withdrawn and the following opinion is substituted. After careful consideration, the Petition for Rehearing is denied.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

July 1, 2002

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dexter L. Faile and Lesa L. Faile, individually and as parents and natural guardians of Brandon Chase Faile, Respondents,

v.

South Carolina Department of Juvenile Justice, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

Opinion No. 25434
Heard October 18, 2000 - Refiled July 1, 2002

AFFIRMED
AND REMANDED

William H. Davidson, II, and Andrew F. Lindemann, both of Davidson, Morrison & Lindemann, of Columbia, for petitioner.

Lex A. Rogerson, Jr., of Lexington; and Steven Randall Hood, of Law Offices of James C. Anders, of Rock Hill, for respondents.

JUSTICE BURNETT: We granted certiorari to review the decision of the Court of Appeals overturning the trial court's grant of summary judgment to the South Carolina Department of Juvenile Justice ("DJJ") on the ground DJJ was entitled to quasi-judicial immunity under the South Carolina Tort Claims Act.[1] Faile v. S.C. Dep't of Juvenile Justice, Op. No. 99-UP-1811 (S.C. Ct. App. filed June 9, 1999). We affirm in result and remand.

FACTUAL/ PROCEDURAL BACKGROUND

On April 15, 1993, Fredrico R. ("Fredrico"), age 12, violently assaulted Brandon Chase Faile, the nine-year old son of Dexter and Lesa Faile ("Respondents"). Fredrico was a juvenile delinquent on probation at the time of the attack, with nine prior referrals to DJJ on his record.

In February 1992, Fredrico was charged in the Family Court of Chester County with grand larceny of a bicycle. After pleading guilty, Fredrico was committed by Judge Barrineau to the DJJ Reception and Evaluation Center ("R&E") for the purpose of evaluation and

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[1]When a plaintiff claims an employee of a state agency acted negligently in the performance of his job, the South Carolina Tort Claims Act requires a plaintiff to sue the agency for which an employee works, rather than suing the employee directly. S.C. Code Ann. § 15-78-70(c) (Supp. 2001). Whether the DJJ was the proper defendant-agency is discussed in part III of this opinion.

recommendation for disposition.

R&E expressed concern over Fredrico's aggressive behavior, recognizing he was impulsive and explosive at times. After receiving the R&E's recommendation, Judge Barrineau, in April 1992, ordered continued probation for one year, a suspended commitment to DJJ, 25 community service hours, placement in a therapeutic foster home, and counseling sessions for Fredrico's parents.

Fredrico was placed in a new foster home in January 1993. However, on April 7, 1993, he was expelled from that home for stealing a knife and gun from a school police officer. He used the gun to threaten his foster mother. Max Dorsey ("Dorsey"), Fredrico's DJJ probation counselor, removed him from the foster home and placed him in the Greenville Group Home for the night of April 7, 1993. Dorsey placed Fredrico with his biological mother on April 8, 1993, claiming that no alternative placement was available for Fredrico.

Five days **after** placing Fredrico with his biological mother, Dorsey filed a Rule to Show Cause with the Family Court to have Fredrico brought before the judge to show why his probation should not be revoked. Judge Barrineau signed the Rule and scheduled a hearing for April 21, 1993. Dorsey told the judge Fredrico had been expelled from his foster home where he was temporarily staying with his family, and Dorsey intended to recommend Fredrico be committed to DJJ. Dorsey failed to inform the judge the placement violated the earlier court order. Judge Barrineau did not indicate he knew the placement violated his earlier order. Dorsey did not request a modification of the earlier order. On April 15, 1993, **before** the hearing was held, Fredrico assaulted Brandon Faile.

Respondents instituted this action against DJJ, alleging DJJ was grossly negligent in placing Fredrico in his family home, and claiming damages of $64,000.00. DJJ moved for summary judgment. The trial court granted DJJ's motion on the ground that DJJ was entitled to quasi-judicial immunity pursuant to S.C. Code Ann. § 15-78-60(1) (Supp. 2001).

Respondents appealed.

The Court of Appeals reversed the trial court, holding a question of fact remained whether the trial judge ratified Dorsey's administrative act (placing Fredrico at home), thereby converting it into a judicial act entitling DJJ to quasi-judicial immunity.

DJJ petitioned for certiorari, asserting the Court of Appeals erred in reversing the trial court's grant of summary judgment. The following issues are before us on certiorari:

I. Did the Court of Appeals err in failing to recognize that DJJ was entitled to quasi-judicial immunity under the South Carolina Tort Claims Act because Dorsey's placement of Fredrico in his family home was a judicial act?

II. Did the Court of Appeals err in refusing to consider DJJ's additional sustaining grounds?

III. Is the trial court's decision to grant summary judgment supported by the following additional sustaining grounds:

A. DJJ is not the proper party to the lawsuit;

B. DJJ is entitled to discretionary immunity under the Tort Claims Act;

C. DJJ is entitled to immunity under the juvenile release exception to the Tort Claims Act; or

D. DJJ did not owe a duty of care to Respondents' child.

LAW/ ANALYSIS

I. Quasi-Judicial Immunity

A. Judicial Act Requirement

DJJ argues Dorsey's placement of Fredrico in his family home was a judicial act for which he was entitled to quasi-judicial immunity, and therefore the Court of Appeals erred in reversing the trial court's grant of summary judgment to DJJ. We disagree.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Id. The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability. Strange v. S. C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). Provisions establishing limitations on liability must be liberally construed in the State's favor. S.C. Code Ann. § 15-78-20(f) (Supp. 2001).

The issue of whether juvenile probation officers are entitled to quasi-judicial immunity under the Tort Claims Act is one of first impression in South Carolina. Section 15-78-60(1) provides: "the governmental entity is not liable for a loss resulting from: legislative, judicial, or quasi-judicial action or inaction." In addition to the judicial immunity under the Tort Claims Act, common law judicial immunity was expressly preserved in South Carolina under the Tort Claims Act. O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998), cert. denied 1999 Shearouse Adv. Sh. No. 10 at p. iv.

South Carolina recognizes three exceptions to judicial or quasi-judicial immunity. Judges and other officials are not entitled to judicial immunity if: (1) they did not have jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only. Id. at 385, 498 S.E.2d at 692. The second exception, which emphasizes the importance of the act, as opposed to the actor, is relevant here. Under the second exception, even judges are not insulated by judicial immunity when they act in an administrative capacity. Id. (citing Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). In determining whether an act is judicial, the Court looks to the nature and function of the act. Id.; Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).[2] Therefore, we must determine whether probation officer Dorsey's placement of Fredrico had the nature and function of a judicial act, thereby entitling him, and thus DJJ, to quasi-judicial immunity.

Much of the analysis of judicial immunity has been made in the federal arena. Several federal circuits have granted probation officers quasi-judicial immunity, but only when carrying out certain functions the courts have deemed to be judicial. The Tenth Circuit has held that federal probation officers are absolutely immune when the action challenged is "intimately associated with the judicial phase of the criminal process." Tripati v. United States Immigration & Naturalization Serv., 784 F.2d 345 (10th Cir. 1986)

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[2]The United States Supreme Court extends absolute immunity to protect some quasi-judicial actors, such as prosecutors and witnesses, who perform judicial functions. Briscoe v. LaHue, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983); Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). However, determining whether an individual is entitled to absolute immunity requires the court to consider the function performed by the individual, rather than the individual's position. Forrester, supra (denying absolute immunity for parole officer's detainment of parolee, but recognizing functions, such as testifying at a parole hearing, for which a parole officer is entitled to absolute immunity).

(finding probation officer immune for damages resulting from reporting plaintiff's conviction to immigration authorities). The Tenth Circuit has made clear the immunity arises from protected functions, not from protected individuals. Mee v. Ortega, 967 F.2d 423 (10th Cir. 1992); Forrester, supra. The key element is whether the officer was engaged in adjudicatory duties when the challenged act occurred. Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986).

Other federal circuit courts have granted probation officers absolute immunity in preparing pre-sentencing reports, and in other situations when they act "as an arm of the court." Gant v. United States Probation Office, 994 F. Supp. 729, 733 (S.D. W. Va. 1998) (citations omitted). Many of these courts, however, find no absolute immunity for the same type of officer when the officer is acting in his executive capacity. Gant, supra; Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984); Ortega, supra; see also Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986) (denying absolute immunity of probation officer for charging appellant and presenting evidence against him at a parole hearing, because those were his duties as a parole officer).

If the individual is acting pursuant to a direct court order, courts are more likely to grant quasi-judicial immunity for that action. In Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), a father sued the state for the actions of two social workers who placed his daughters in a home where they were sexually abused. The social workers placed the girls temporarily in the abusive home in April 1982. Id. at 449. The juvenile court confirmed the placement by order in May 1982. The sexual abuse did not occur until sometime after May. Id. Plaintiffs argued the social workers were not entitled to immunity for the temporary placement of the girls before the court order was issued. The court discounted this argument as irrelevant, however, on the grounds the abuse did not occur until **after** the court had confirmed the placement. Id.

Respondents argue the court's confirmation of the placement was essential to the court's finding of judicial immunity in Babcock. Conversely, DJJ cites Babcock as holding that placement is a judicial act even if not made

pursuant to a direct court order. DJJ's argument, however, overlooks that the judge formally confirmed the placement **before** the injury took place. In the present case, Judge Barrineau's mere knowledge that Fredrico was placed in his family's home, in the absence of any further act by him, does not amount to confirmation or ratification of Dorsey's act.

Viewing the facts and all inferences that can be drawn in the light most favorable to Respondents, as the non-moving party, the trial court erred in granting summary judgment to DJJ on this ground. We agree with our Court of Appeals' conclusion that the placement of juveniles by a probation counselor is an administrative function. We find persuasive the precedent discussed above from other jurisdictions which supports this analysis. Just as police officers are not granted absolute immunity when they apply for arrest warrants, probation officers generally are not immune in performing their enforcement duties. See Gant, supra; Acevedo v. Pima County Adult Prob. Dep't, 690 P.2d 38 (Ariz. 1984)(holding that supervision of probationers is an administrative task, unconnected with the performance of a judicial function). Dorsey's placement of Fredrico was administrative. The Family Court's mere knowledge that Dorsey placed Fredrico with his family, without more, is insufficient to convert that placement into a judicial act.

For the forgoing reasons, we conclude DJJ is not entitled to quasi-judicial immunity.

B. Agent of the Court

DJJ argues a juvenile probation officer acts as an agent and representative of the Family Court, and, therefore, Dorsey's placement of Fredrico was a quasi-judicial act entitling him to immunity under the Tort Claims Act, S.C. Code Ann. § 15-78-60(1). We disagree.

DJJ cites Fleming v. Asbill, 326 S.C. 49, 483 S.E.2d 751 (1997), for the proposition that "non-judicial officers are entitled to quasi-judicial immunity for carrying out a function assigned by the court." In Fleming, we granted absolute judicial immunity to a court-appointed guardian ad litem

based on common law theories. Id. This Court did not apply the Tort Claims Act in Fleming because we found the guardian ad litem was not an employee of the state as defined by section 15-78-30(c) of the Act. We held, however, that common law judicial immunity protected the guardian from liability in the performance of her official duties, despite a line of cases holding guardians ad litem liable for negligence. Id.; see McIver v. Thompson, 117 S.C. 175, 108 S.E. 411 (1921). We distinguished those cases based on the dramatically different role of court-appointed guardians ad litem in child custody suits today. Fleming, supra.

In Fleming, this Court based the grant of immunity for court-appointed guardians on the necessity for guardians to be able to act without fear of lawsuits as well as the inequity of holding guardians liable for negligence. DJJ argues that the guardians were awarded immunity merely for being representatives of the court. Although we indicated the guardians were representatives of the court, it was not the decisive factor in our decision to grant guardians immunity. A primary role of the guardian is to be an advocate within the courtroom. However, guardians are not "acting on 'behalf' of the court; [they] do not affect legal relationships between the court and third parties." Fleming, 326 S.C. at 53. Their job is to represent their ward's interest before the court, unlike probation officers whose duties extend far beyond the courtroom.

Additionally, the role of a court-appointed guardian is distinguishable from the role of a DJJ probation officer because the guardian's participation ends when the court renders its decision. The DJJ officer's role does not. Instead, the officer is essentially charged with executing the court's orders. While the officer may be entitled to judicial immunity when executing those orders, the present case involves an officer who, at least for summary judgment purposes, deviated from the explicit terms of the order.

For these reasons, we decline to hold that DJJ is entitled to summary judgment for judicial immunity as an agent of the Family Court.

II. Additional Grounds

Additional grounds are raised to support the trial court's granting of summary judgment. Though we are not required to do so we address each in the interest of judicial economy. Our conclusions are based upon the facts before us and the parties are not precluded from further development of the issues we address.

A. Proper Party

DJJ contends the Family Court, not DJJ, is the proper party to this litigation. DJJ argues Dorsey was not acting on its behalf, but on behalf of the family court since the court retained authority over Fredrico. We disagree.

The Tort Claims Act requires a plaintiff to sue "only the agency . . . for which the employee was acting." S.C. Code Ann. §15-78-70(c) (Supp. 2001). An agency is defined as the state entity "which employs the employee whose act or omission gives rise to a claim." S.C. Code Ann. § 15-78-30(a) (Supp. 2001). There is no disagreement Dorsey's actions gave rise to this claim. The question is whether Dorsey was acting on behalf of the family court or DJJ.

As discussed above, this Court in Fleming, supra, determined whether a guardian ad litem was an employee under the Tort Claims Act. The Court held that while the guardian is appointed as a court representative to assist the court, it is "not acting on 'behalf' of the court." Id. at 53, 483 S.E.2d at 753. "The relationship between the Court and a guardian ad litem is not an agency relationship" nor an "employee-employer relationship." Id. Like a guardian ad litem, the juvenile probation officer is characterized as an "agent of the court."[3] Like the guardian, the probation officer is not acting on

[3] See S.C. Code Ann. § 20-7-2155 (1976), repealed by 1996 Act 383. The principle of the probation officer as being an agent of the court is now codified

behalf of the family court, but is there to assist the court. The probation officer is responsible for conducting investigations, providing relevant information to the court, and taking charge of a child if ordered by the court. See id.

A probation officer is an employee of DJJ, not the family court. This Court in Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971), there are four factors used to determine whether a person is an employee of a particular entity. The factors are: (1) who has the right to control the person; (2) who pays the person; (3) who furnishes the person with equipment; and (4) who has the right to fire the person. While a court may direct a probation officer to assist in aiding the court in its adjudication of a case, DJJ also has the right to control the actions of probation officers who are its employees.[4] DJJ does not deny it pays Dorsey, furnishes him with the equipment needed to perform his job, and has the ability to discharge him. DJJ argues, however, that since probation officers are agents of the court, they are controlled by it. While the family court has a right to direct a probation officer to perform certain tasks, this fact alone is not dispositive of whether Dorsey is an employee of the court. See Simmons v. Robinson, 305 S.C. 428, 409 S.E.2d 381 (1991). More important is the Fleming rule that the court "agent" is assisting the court, but is not acting as a true agent on its behalf.

It is also important to look at the plain meaning of sections 15-78-70(c) and 15-78-30(a). In attempting to harmonize the two sections, we determine a plain reading to be that "only the entity employing the employee whose act gives rise to the claim may be sued." DJJ's argument would lead

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at S.C. Code Ann. § 20-7-8335 (C) (Supp. 2001).

[4] See S.C. Code Ann. § 20-7-2155 (1976), repealed by 1996 Act 383. After the events giving rise to this suit, the General Assembly passed legislation explicitly giving the director of DJJ the power to direct a juvenile probation officer in the performance of duties. See S.C. Code Ann. § 20-7-6840 (Supp. 2001).

to a cramped interpretation of the statute. If followed by this Court, DJJ's interpretation would immunize all officials whose duties bring them under some direction of a court.

We conclude, based on the facts before us, DJJ is the properly named defendant.

B. Discretionary Immunity

DJJ argues its motion for summary judgment can be sustained on the ground it is entitled to discretionary immunity under the Tort Claims Act. We disagree.

A governmental entity is not liable for losses resulting from an exercise of discretion by its employees. Section 15-78-60 (5) of the South Carolina Tort Claims Act exempts governmental entities from liability for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." Discretionary immunity is an affirmative defense requiring DJJ to prove Dorsey evaluated competing alternatives and made a "judgment" call based on applicable professional standards. Foster v. South Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 413 S.E.2d 31 (1992).

In determining whether Dorsey's action was discretionary, it is helpful to compare the two classifications for the duties of public officials. The duties of public officials are generally classified as either ministerial or discretionary. Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 403 S.E.2d 615 (1991) "The duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts." Id. at 203, 403 S.E.2d at 619. The duty is discretionary if the governmental entity proves it actually weighed competing considerations, faced with alternatives, and made a conscious decision based upon those considerations. Id. (citing Niver v. Dep't Highways & Pub.

Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990)).

In Jensen, this Court affirmed the Court of Appeals' finding that insufficient evidence was submitted to determine whether the Department of Social Services ("DSS") made a discretionary decision. Id. In the case, a teacher reported a potential child abuse case to DSS. A DSS social worker interviewed the child, and noted the presence of bruises and the child's fear of the mother's boyfriend. However, the social worker failed to follow up on the interview and eventually closed the file. One month later, the child's brother was beaten to death in the home. The Court held that DSS had a duty to conduct a thorough investigation before deciding to close the file. The Court concluded that conducting the investigation was ministerial but closing the file was discretionary because it required applying facts discovered through investigation to reach a decision. Id. Despite the fact that closing the file is discretionary, the Court held that there was insufficient evidence to grant discretionary immunity, because the decision was due to failure to complete the investigation, an administrative function, rather than a weighing of competing considerations. Id.

In the present case, DJJ claims Dorsey's decision to place Fredrico in his home after he was expelled from his foster home was a discretionary decision. Respondents claim Dorsey placed Fredrico in his family home because he thought no one else would take him. However, Respondents argue there was alternative placement available in the Greenville Group Home, which had agreed earlier to take Fredrico in an emergency. Therefore, Respondents claim if Dorsey had weighed competing alternatives, he would have placed Fredrico in the Greenville Group home. Based on our holding in Jensen and the evidence before us, DJJ is not entitled to discretionary immunity.

In addition, even if we held Dorsey exercised discretion, the performance of discretionary duties does not give rise to immunity if the public official acted in a grossly negligent manner. See Jackson v. South Carolina Dep't of Corr., 301 S.C.125, 390 S.E.2d 467 (Ct. App. 1989) aff'd, 302 S.C. 519, 397 S.E.2d 377 (1990). "Gross negligence is the intentional,

conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). It is the failure to exercise even the slightest care. Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993). This Court has also defined it as a relative term that "means the absence of care that is necessary under the circumstances." Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952).

Gross negligence is ordinarily a mixed question of law and fact. See Clyburn v. Sumter County School District # 17, 317 S.C. 50, 451 S.E.2d 885 (1994). When the evidence supports but one reasonable inference, it is solely a question of law for the court, otherwise it is an issue best resolved by the jury. Id. In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury.

In Jackson, supra, a jury found the Department of Corrections grossly negligent for placing a prisoner with strong violent tendencies into a minimum security prison, where he killed a fellow inmate. The Court of Appeals found the Department of Corrections transferred the inmate even though they knew he had multiple disciplinary violations, including the killing of a fellow inmate. The Court of Appeals held the jury could view the transfer as gross negligence since it demonstrated a "conscious indifference to the threat posed to the safety of other inmates." Jackson, 301 S.C. at 125, 390 S.E.2d at 468.

In the instant case, Dorsey placed Fredrico into a home where DJJ workers noted there was no proper supervision. Furthermore, Dorsey knew of Fredrico's violent tendencies. He even wrote before the incident that he "wouldn't give (Fredrico) two weeks with his mother before he would get into big trouble."

Based on the facts before us, DJJ is not entitled to discretionary immunity as a matter of law. At a minimum, Faile has presented enough evidence to overcome DJJ's summary judgment motion on the matter.

C. Juvenile Release Exception

DJJ argues it is entitled to summary judgment because it is granted immunity under the juvenile release exception to the Tort Claims Act. We disagree.

Under Section 15-78-60(21), a governmental entity is not liable for "the decision to or implementation of release, discharge, parole, or furlough of any person in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client, or the escape of these persons." DJJ argues that the present case falls squarely within this exception based on Respondents' allegations that Fredrico was in the DJJ's custody and was negligently released from that custody.

Despite the Respondents' factual allegations, however, it does not appear Fredrico was released from his relationship with the DJJ, whether it was a custodial relationship or not. Neither Respondents nor DJJ present any case law on this exemption. However, on its face, the exemption appears to apply to a narrower set of circumstances than those presented in this case. The language of the exemption indicates the custodial entity must make a conscious, if not formal, decision to terminate the relationship before this immunity is triggered. DJJ did not do so in this case. Dorsey placed Fredrico in his home temporarily and appears to have had the authority to remove him at any time. Without further evidence, we conclude the juvenile release exemption does not protect the DJJ from liability.

Furthermore, although § 15-78-60(21) does not contain a gross negligence exception, this Court has recognized that "when a governmental entity asserts various exceptions to the waiver of immunity . . . [the court] must read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard." Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999). Therefore, even if Dorsey's actions fell within the release exception, a jury could find his actions were grossly negligent.

D. Duty of Care

DJJ argues the trial court's grant of summary judgment is supported because DJJ owed no legal duty of care to the Respondents' son when he was assaulted by Fredrico. We disagree.

In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff. Steinke, supra. "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." Steinke, 336 S.C. at 387, 520 S.E.2d at 148.

Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Rogers v. South Carolina Dep't of Parole & Cmty Corr., 320 S.C. 253, 464 S.E.2d 330 (1995); Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1998), cert. denied, 298 S.C. 204, 379 S.E.2d 133 (1998); Restatement (Second) of Torts § 314 (1965) . We recognize five exceptions to this rule: 1) where the defendant has a special relationship to the victim;[5] 2) where the defendant has a special relationship to the injurer;[6]

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[5] See, e.g., Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986) (duty of Fraternity to protect an intoxicated person based on its relationship with the victim); Restatement (Second) of Torts § 315 (b) (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless ... a special relation exists between the actor and the other which gives to the other a right to protection.").

[6] See Rogers, supra. When a party is in a position to monitor, supervise, and control a person's conduct, a special relationship between the defendant and the dangerous person may trigger a common law duty to warn potential victims of the danger posed by the individual. This special duty is limited to situations where the person under the defendant's control has made a "specific threat directed at a specific individual." Id. at 256, 464 S.E.2d at 332.

3) where the defendant voluntarily undertakes a duty;[7] 4) where the defendant negligently or intentionally creates the risk;[8] and 5) where a statute imposes a duty on the defendant.[9] See generally, Hubbard & Felix, The South Carolina Law of Torts 57-72 (1990).

The present case, based upon the facts before us, falls within the second category. The Restatement provides no duty exists "to control the conduct of a third person as to prevent him from causing physical harm to another unless ... a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." Restatement (Second) of Torts § 315 (a) (1965). Section 319 provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319 (1965).

Our courts have customarily applied § 315 and § 319 in conjunction with duty to warn cases. See Bishop, supra; Rogers, supra; Rayfield, supra. We have held a defendant has a duty to exercise reasonable care by issuing warnings after the third party has made specific threats to a specific individual. The rationale behind this line of cases is an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control. However, where the custodian knows of a specific, credible threat from a person in their care the injury is no longer speculative in nature.

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[7] See, e.g., Caldwell v. Jim Walter Homes, Inc., 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987); Restatement (Second) of Torts §§ 323-24A (1965).

[8] See, e.g., Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 195 S.E. 247 (1938); Restatement (Second) of Torts §§ 321-22 (1965).

[9] See, e.g., Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation, supra.

The application of § 319 is not limited to duty to warn cases. The use of the § 319 custodial duty of care in such cases is a slight misnomer. Duty to warn cases normally involve a defendant who has legally released a third party from direct custodial control or who releases the third party after medical evaluation. See Bishop, supra (defendant discharged third party mental patient from its care); Rogers, supra (defendant released third party to furlough program); Rayfield, supra (defendant released third party on parole). More importantly, those cases deal with claims of a defendant's duty to **warn**. Plaintiffs in none of these cases asserted a breach by the defendant of a common law duty to **control** a dangerous person in their custody. See Bishop, supra (plaintiff claimed defendant failed to warn victim of third party's release from a mental hospital); Rogers, supra (plaintiff argued defendant failed to warn victim of a dangerous third party's furlough); Rayfield, supra (plaintiff asserted defendant was liable for breaching its statutory duties in paroling third party).

In the present case, Respondents do not assert DJJ had a duty to warn potential victims. Instead, Respondents assert a breach of the duty to supervise and control a dangerous juvenile by the custodial entity. Therefore, Respondents argue DJJ had a specific § 319 duty to control a dangerous person legally placed in its direct custodial care. While this Court has never explicitly recognized such a duty, at least two appellate decisions mention a similar duty in dicta. See Jackson, supra; Rayfield, supra.

In Jackson we addressed the issue of discretionary immunity and the standard for gross negligence. The Court of Appeal's decision, which we affirmed, seems to presume, without argument, that the Department of Corrections had a duty to control a knowingly violent inmate in its custody from harming another inmate. See, Jackson, 301 S.C. at 126, 390 S.E.2d at 468 ("if the Department was grossly negligent in its duty to control... [the attacker] and this negligence proximately caused [victim's] death, its immunity from liability under the Act is waived.").

Rayfield addressed many issues including plaintiff's assertion that the Department of Corrections had a special relationship with the third

party which gave rise to a duty to prevent the third party from injuring the plaintiff. The Court of Appeals quotes § 319 to support the assertion. See Rayfield, 297 S.C. at 109, 374 S.E.2d at 918. However, in denying a duty existed, the court wrote:

> We do not question this rule of law [§319]. When applied to the facts of this case, however, it affords no basis for the Rayfields' cause of action. The mere knowledge that Lucas was drug addicted and potentially violent did not create a special relationship. A special relationship arose, if at all, from the custody the Department of Corrections exercised over Lucas. While the Department had charge of Lucas, it arguably owed a duty of care to others to prevent foreseeable harm Lucas might do them. But once the Department's custody of Lucas ended, it no longer had charge of him, and the special relationship based on custody ended.

Id., 297 S.C. at 109-10, 374 S.E.2d at 918.

Though not controlling, the Court of Appeals clearly presumed a § 319 duty is a recognizable duty where a defendant has custodial care of a dangerous third party.

The Fourth Circuit, in a case factually similar to the case *sub judice*, found an independent duty to control a dangerous individual under § 319. Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976), cert. denied sub nom., Folliard v. Semler, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976) . Semler involved Steven Gilreath ("Gilreath"), a mental patient found guilty of murder. A state court judge suspended Gilreath's sentence on the condition he be confined to receive treatment at the Psychiatric Institute of Washington ("Institute").

Gilreath's probation officer requested weekend passes over the next few months, based on a doctor's recommendation. The judge granted the weekend passes. Eventually, the judge modified the order to give the

probation officer discretion to issue Gilreath weekend passes. As Gilreath proceeded with treatment, his doctor and probation officer agreed to transfer him from twenty-four hour supervision to day care status at the Institute. The judge approved the transfer.

Based on a doctor's recommendation, the probation officer gave Gilreath a three-day pass to investigate the possibility of moving to Ohio. Later, the probation officer gave Gilreath a fourteen-day pass to return to Ohio to prepare his transfer. The probation officer did not submit either pass for judicial approval.

Anticipating Gilreath's transfer to Ohio, the Institute, contrary to the court order, discharged him. Although the Institute notified the probation officer, the court remained uninformed. When Ohio rejected Gilreath's parole transfer, the probation officer ordered his return to Virginia. The Institute re-admitted Gilreath to its program, but only on an out-patient basis, requiring him to meet in a group setting two nights a week. The change in status was contrary to the latest court order.

Additionally, Gilreath no longer lived with his parents as he had when he was in day care status, but instead lived alone, unsupervised. The probation officer never informed the judge of the new arrangement. Two months after returning to Virginia, Gilreath murdered another individual.

The Fourth Circuit, in upholding a civil verdict against the Institute and the probation officer, held each owed a duty to the victim. The court noted the judge ordered Gilreath "to receive treatment at and remain confined in the Psychiatric Institute until released by the Court." Id., 538 F.2d at 124. The Institute and probation officer argued the order's purpose was to rehabilitate Gilreath, therefore it created a duty only to him and not to any third party victims. The court held the order's purpose was twofold: to provide care for Gilreath and to protect the public from Gilreath. The Fourth Circuit noted the trial court was particularly concerned that Gilreath, who had a known history of attacking young girls, presented a foreseeable risk to the public.

Releasing Gilreath from the day care program violated the judgment of the court which determined confinement was in the best interest of the community. "The special relationship created by the probation order, therefore, imposed a duty on [the Institute and probation officer] to protect the public from the reasonably foreseeable risk of harm at Gilreath's hands [which] the state judge had already recognized." Id., 538 F.2d at 125.

The Fourth Circuit, construing § 319 of Restatement (Second) of Torts (1965), ruled the order itself provided the boundaries of the custodian's duty. Id. The Institute and the probation officer were obligated by the court order to retain custody over Gilreath until the court released him. "No lesser measure of care would suffice...they could not substitute their judgment for the court's with respect to the propriety of releasing him from confinement." Id.

In the present case, Judge Barrineau's April 1992 order placed Fredrico on probation for one year. The order suspended commitment to DJJ if Fredrico was placed in a therapeutic foster home. Fredrico's parents were ordered to undergo counseling. After his expulsion from the foster home, the probation counselor placed him in a group home for a night, then with his biological mother.

Dorsey placed Fredrico into a home without proper supervision. Dorsey was aware of Fredrico's violent tendencies. More importantly, Dorsey returned Fredrico to his mother's home in direct contradiction to the court order.

While Semler does not equate the § 319 duty with the "custodial entity's duty to obey court orders," we find § 319 to be, as decided by the Fourth Circuit, "close to the point." Id. This Court is reluctant to impose the duty to control unless there is an established authority relationship and a substantial risk of serious harm. See Hubbard & Felix, supra, at 64-65. Here, DJJ had custody of a known dangerous individual. It had an independent duty to control and supervise Fredrico to prevent him from harming others as long as it retained custody of him by court order.

CONCLUSION

For the foregoing reasons, we **AFFIRM IN RESULT** and **REMAND** this case to the Circuit Court for proceedings consistent with this opinion.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shawn Pauling, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Lexington County
Frank Eppes, Trial Judge
Marc H. Westbrook, Post-Conviction Judge

Opinion No. 25488
Submitted May 30, 2002 - Filed June 24, 2002

REVERSED

Assistant Appellate Defender Tara S. Taggart of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, and Assistant Attorney General Elizabeth R. McMahon,

all of Columbia, for respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the decision of the post-conviction relief (PCR) judge denying petitioner relief. We reverse.

ISSUE

Is there any evidence of probative value which supports the PCR judge's conclusion trial counsel were not ineffective for failing to object to the trial judge's incorrect response to the jury's question concerning the effect of its inability to render a verdict on the murder charges?[1]

DISCUSSION

Petitioner was indicted on two counts of murder, two counts of assault and battery with intent to kill (ABIK), two counts of armed robbery, criminal conspiracy, and possession of a firearm during the commission of a violent crime. At trial, he only contested the murder charges.[2] An

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[1]Petitioner was represented by two attorneys.

[2]During opening argument, trial counsel stated:

> . . . [P]etitioner, in fact, did shoot a young man through the foot. He did, in fact, shoot a young man in the knee.
>
> Those charges are assault and battery with intent to kill. I tell you now when you go in that jury room, [petitioner] admits that he did that. He admits everything in these indictments except that he did not kill anybody. He did not fire a shot from his gun that killed anyone. It was never his intention to kill anyone.

investigator with the Sheriff's Department testified petitioner was not the triggerman in either murder. The State based the murder charges against petitioner on a "hand of one, hand of all" theory.

The evidence established petitioner and three other men planned to rob a drug dealer in West Columbia. According to co-defendant Fletcher Archie, petitioner also stated he intended to find someone who had shot him on a previous occasion.

Trial testimony established petitioner provided the transportation to West Columbia, distributed the four guns to the assailants, and gave orders to both the victims and other assailants. While there was no evidence the robbery of the intended victim was accomplished, the four men participated in two shootings at two different apartment complexes. It was undisputed petitioner shot one surviving victim in the foot and the other in the knee. According to co-defendant Archie, petitioner stated the victim he shot in the knee looked like the man who had previously shot him.

After deliberating for 1½ hours, the jury asked to be recharged on ABIK. The trial judge reinstructed the jury accordingly and the jury returned to its deliberations.

An hour later, the trial judge returned the jury to the courtroom and inquired if it were close to reaching a verdict. The foreperson replied, "we have reached a verdict on six of the eight charges." The trial judge asked if the jury would like to continue deliberating or return in the morning to deliberate. The foreperson answered, "we are at an impasse on the two counts and I think we need to sit on it." When asked if he thought the jury would be able to reach a verdict on the two counts, the foreperson stated, "not immediately."

After a bench conference, the trial judge asked the jury to

continue its deliberations. Before sending the jury back to the jury room, he gave an Allen charge.[3]

An hour later, the trial judge again asked the foreman if the jury was "any closer to a verdict on those two counts than you were before." The foreperson replied the jury was still in the same position. The trial judge then asked, if he released the jury for the evening, was it possible to reach a verdict on the two unresolved counts. The foreperson replied he did not believe the opinions would change. Another juror indicated she was hopeful a verdict could be reached. A third juror asked if the jury could pose some questions prior to renewed deliberations and the trial judge responded affirmatively.

The following morning, the jury submitted a written question asking the judge whether the guilty verdicts would stand on the other six charges should a unanimous decision not be reached on the two counts of murder or would the whole case be retried. After discussion between the judge, solicitor, and trial counsel and, before the jury returned to the courtroom, the following occurred:

> COUNSEL: The question the jury posed was not any confusion about the law or anything. The question was if they cannot reach a unanimous verdict on two counts of murder - -
>
> THE COURT: It's a mistrial.
>
> COUNSEL: - - will he have to be retried on the other charges as well? That's all they asked. They didn't ask to be recharged on the law.
>
> THE COURT: Would he have to be retried on the other charges too?

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

COUNSEL: Right . . .

THE COURT: "If we cannot reach a unanimous decision on the two counts of murder, will the other charges be retried as well?["] You wouldn't have to retry the other charges, would you?

COUNSEL: I don't know about that. . . .

After the jury returned to the courtroom, the trial judge instructed:

. . . you gave me a question. If you do not reach a verdict on the two counts, it would be a mistrial. The whole case would have to be tried over.

It's not expected that we can get a more intelligent jury than you 12, and some jury will have to try this. The State and the defense will have to go through the expense, the County and the State. It's not expected that we can get a more intelligent jury.

So, I will ask you to continue deliberating. If I can enlighten you on the law, you can ask me what you want me to explain to you. If not, I will ask you to continue your deliberations.

(Emphasis added).

After deliberating shortly over an hour, the jury returned its verdict acquitting petitioner of one murder charge (Edmond murder) and convicting him on the remaining seven charges, including one murder (Joyner murder).

In order to establish ineffective assistance of counsel, a PCR applicant must establish trial counsel's performance fell below an objective standard of reasonableness and, "the deficient performance prejudiced the

[applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989), quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Id. The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

The PCR judge held the trial judge's incorrect response to the jury's question did not coerce the jury's verdict on the murder charges. Specifically, the PCR judge found:

> . . . despite the jury's written question, it is pure speculation to claim the jury reached its unanimous verdicts on the remaining murder counts to avoid a retrial. Neither this Court nor any court can look into the minds of the jury members. Finally, because [petitioner] was acquitted of one murder count, it is clear the jury was not compelled to convict [petitioner] of the murder charges to maintain the remaining convictions.

We find counsels' failure to object to the trial judge's response to the jury's question concerning the result if it failed to reach a verdict on the murder charges was deficient. As noted in petitioner's direct appeal, the jury's failure to reach a verdict on any count in the indictment would necessitate a new trial on the particular count, not a new trial of the entire case. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996), citing State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), cert. denied 480 U.S. 940 (1987). Without objection from counsel, the trial judge instructed the jury to the contrary - that failure to reach a verdict on the murder charges would require a new trial of the entire case. Because the trial judge's response was

clearly erroneous, counsel were deficient for failing to object.[4]

Moreover, petitioner was prejudiced by counsels' failure to object and have the jury properly instructed that, if it was unable to render a verdict on the murder charges, only the murder charges would be retried. Contrary to the PCR judge's conclusion, it is *not* speculative that the jury reached its verdict (convicting petitioner of one murder while acquitting him of the other) in order to avoid a retrial of the non-murder charges as the trial judge had instructed. The record indicates the jury was unable to reach a verdict on the murder charges. After being informed its failure to reach a verdict on those charges would require a retrial of the entire case, the jury reached its verdict. Since there is nothing in the record which distinguishes petitioner's involvement (particularly his intent) in the murder for which he was convicted from the murder for which he was acquitted, the trial judge's incorrect answer to the jury's question clearly affected the jury's verdict. While it would have been speculative to assume the trial judge's answer would have coerced the jury if the jury had convicted petitioner of both murders, it is not speculative to conclude the trial judge's answer did coerce the jury which convicted petitioner of one murder and acquitted him of the other. We conclude there is a reasonable probability that, but for counsels' failures to object to the trial judge's improper instruction, the outcome of petitioner's trial would have been different. See Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (where trial judge gave erroneous instruction on critical issue of intent, PCR applicant was prejudiced by counsel's failure to

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[4]Trial counsel offered no explanation why they failed to object. Accordingly, this is not a case of "trial strategy." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel). Moreover, citation to a 1986 opinion indicates the appellate ruling was not a new holding which counsel could not have anticipated. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grds. Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (Court does not require attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial).

object); High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989) (same); see also Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991) (where jury asked for written instructions on self-defense, PCR applicant was prejudiced by inadequate instructions). Because petitioner established both that counsels' performances were deficient and that he was prejudiced by the deficient performances, we reverse the order of the PCR judge and remand for a new trial on the Joyner murder. Holland v. State, supra (appellate court will not uphold findings of PCR court if no probative evidence supports them).[5]

The order of the PCR judge is **REVERSED**.

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

[5]Petitioner's remaining convictions are not affected by the outcome of this PCR action.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Samuel Pardue Greer, **Respondent.**

Opinion No. 25489
Submitted June 4, 2002 - Filed July 1, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Susan M. Johnston, both of Columbia, for the Office of Disciplinary Counsel.

Lucy London McDow, of Rock Hill, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an agreement pursuant to Rule 21, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of twelve months, retroactive to October 5, 2001. Respondent also consents to the imposition of certain conditions, which are detailed below. We accept the agreement. The following facts are set forth in the agreement.

Facts

In twelve civil matters, respondent failed to timely file suit, resulting in his clients' suits being forever barred by the statute of limitations or otherwise prejudiced.

In another civil matter, respondent failed to comply with orders of the court regarding discovery. As a result of respondent's failure to comply, his client's case was dismissed with prejudice and respondent was sanctioned with payment of significant monetary damages, which he personally paid.

In a domestic matter, respondent's delay in preparing a Qualified Domestic Relations Order prejudiced his client's rights. Additionally, respondent failed to adequately communicate with his client in this matter.

Law

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (failing to act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information); Rule 1.16 (failing to decline or terminate representation where the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client); Rule 3.2 (failing to make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to bring the courts or legal profession into disrepute); Rule 7(a)(6) (violating the oath of office taken upon admission to practice law); and Rule 7(a)(7) (willfully violating a valid court order issued by a court of this state).

Conclusion

Respondent fully acknowledges that his actions in the aforementioned matters were in violation of the Rules of Professional Conduct and the Rules for Lawyer Disciplinary Enforcement. We hereby suspend respondent from the practice of law for twelve months, retroactive to October 5, 2001. Within fifteen 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, Rule 413, SCACR.

Prior to reinstatement, respondent will certify to the ODC that he will maintain errors and omissions coverage sufficient to cover any future acts of malpractice, that his current aggregate deductible has been paid so that all reported claims are fully covered, and that he has made full restitution to any and all clients whose valid, reported claims have not been covered through his insurance carrier. Respondent will also complete an approved law office management course or hire an approved private consultant to set up an office management system and procedures for his practice. Certification that this course has been completed must be submitted to the ODC within thirty (30) days of the date of reinstatement.

Respondent also consents to participation in the following programs and treatments and to the following restrictions on his practice as a condition of his reinstatement. Respondent will continue psychiatric care until such time as the Commission on Lawyer Conduct is satisfied by a written report from respondent's psychiatrist that

treatment can be discontinued or changed to routine maintenance. In the interim, respondent will submit quarterly reports from his psychiatrist and submit to any evaluations or testing required by the Commission. Respondent will find an older, more experienced attorney to act as a mentor. Respondent will meet regularly with his mentor to review the size and manageability of his case load. Respondent will submit quarterly reports to ODC from his mentor for two (2) years. Respondent will restrict his practice to the representation of clients in criminal and family court matters, until the Commission consents to the removal of this condition.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Maurice Anthony Odom, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Barnwell County
Rodney A. Peeples, Judge

Opinion No. 25490
Submitted May 30, 2002 - Filed July 1, 2002

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Kenneth P.

Woodington, all of Columbia, for respondent.

JUSTICE MOORE: We granted a writ of certiorari in this post-conviction relief (PCR) case[1] to consider whether an oral waiver of presentment is sufficient to bestow subject matter jurisdiction on the trial court. We find it is not and reverse the denial of PCR.

FACTS

Petitioner Odom pled guilty to second degree criminal sexual conduct with a minor. At the plea hearing, the Solicitor alerted the trial judge that the indictment had not been true billed. The trial judge then questioned petitioner as follows:

> THE COURT: This case involving criminal sexual conduct has not been before the grand jury. It takes twelve of eighteen people to get it into court. You've indicated you want to give up that right and go ahead and plead guilty. Is that what you'd like to do?
>
> THE DEFENDANT: Yes, sir.

Petitioner subsequently sought PCR on the ground the trial court was without subject matter jurisdiction because there was no written waiver of presentment. The PCR judge denied relief. He found petitioner had orally waived presentment and this oral waiver was adequate.

DISCUSSION

In the absence of an indictment, there must be a valid waiver of

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[1]Counsel filed a no-merit brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). We denied counsel's request to be relieved and ordered briefing.

presentment for the trial court to have subject matter jurisdiction of the offense. State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992).

South Carolina Code Ann. § 17-23-130 (1985) provides that "the clerk shall have the defendant sign a waiver of the presentment by the grand jury and his plea of guilty." Similarly, S.C. Code Ann. § 17-23-140 (1985) provides that "upon signing the waiver of presentment" the defendant may plead guilty. We have held compliance with these sections is mandatory and, further, that they require a written waiver. Phillips v. State, 281 S.C. 41, 314 S.E.2d 313 (1984); State v. Martin, 278 S.C. 256, 294 S.E.2d 345 (1982); Summerall v. State, 278 S.C. 255, 294 S.E.2d 344 (1982); *see also* State v. Clarkson, 337 S.C. 518, 523 S.E.2d 817 (Ct. App. 1999), *rev'd on other grounds,* 347 S.C. 115, 553 S.E.2d 450 (2001).

In light of the statutory language requiring the defendant to sign a waiver of presentment, we find an oral waiver is not sufficient. The trial court had no subject matter jurisdiction to accept petitioner's plea. Accordingly, the denial of PCR is reversed and petitioner's plea is hereby vacated.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Harvey, Appellant,

v.

Dr. Glen Strickland and
Surgical Associates of
South Carolina, Respondents.

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

Opinion No. 25491
Heard April 2, 2002 - Filed July 1, 2002

REVERSED AND REMANDED

Calvin A. Rouse, of Augusta, Georgia, for appellant.

Charles E. Carpenter, Jr., George C. Beighley, and S. Elizabeth Brosnan, all of Richardson, Plowden, Carpenter, and Robinson, of Columbia, for respondents.

JUSTICE WALLER: Appellant, Charles Harvey, instituted this action against respondents, Dr. Glen Strickland and Surgical Associates (hereinafter Dr. Strickland), alleging breach of contract, lack of informed consent, medical malpractice, and medical battery. Harvey is a Jehovah's Witness; his claims stem from Harvey's receipt of unwanted blood transfusions two days after elective carotid artery surgery. The trial court granted directed verdicts for respondents on all four causes of action. We reverse.

FACTS

In November 1996, diagnostic testing revealed a blockage in Harvey's carotid artery. Dr. Strickland recommended a carotid endarterectomy. On November 4, 1996, in anticipation of surgery, Harvey signed written forms entitled "Refusal of Treatment/Release from Liability" and "Consent to Operation." The documents indicate that he refused to have blood or blood products given to him, and that he fully understood the attendant risks. They state that "in all probability, my refusal for such treatment, medical intervention, and/or procedure (may)(will) seriously imperil my health or life." The release relieves the attending physician, Lexington Medical Center, and its agents and employees from any and all claims of whatsoever kind or nature. Hospital forms list Harvey's mother, Julia, as his emergency contact. On January 14, 1997, the day before his surgery, Harvey signed another consent to operation form indicating that he did "not give permission to the doctor to use blood or blood products if necessary." However, Dr. Strickland testified that although he knew Harvey was a Jehovah's Witness, Harvey had told him he would consider a blood transfusion

Harvey's surgery was performed January 15, 1997. Although the surgery initially appeared to have gone well, Harvey developed a blood clot and had a stroke while in the recovery room. Because Harvey was unconscious, hospital personnel located his mother in the waiting room and obtained her permission to perform a CT scan and an arteriogram. A second surgery was performed and more blood clots were removed along the side of the carotid artery. Harvey was moved to the intensive care unit (ICU). He was intubated that evening by the on-call emergency room physician after the ICU nurse discovered Harvey was

having trouble breathing, and his blood pressure was 200/110. The next day, Harvey began bleeding from the surgical site at his neck; he had lost approximately 30% of his blood volume, and his heart rate was extremely high. Dr. Strickland was concerned that if they could not get the heart rate down, Harvey would have a heart attack and die. When his hemoglobin level reached 8, Dr. Strickland recommended a blood transfusion to Harvey's mother, Julia, who initially declined due to her son's faith as a Jehovah's Witness. Ultimately, Julia consented to giving Harvey two units of packed red blood cells. Harvey recovered fully from the procedures.

Harvey instituted this suit in July 1998 alleging medical malpractice, medical battery, breach of express contract, and lack of informed consent.[1] The trial court directed a verdict for Dr. Strickland on the breach of contract claim at the close of Harvey's case; the court directed a verdict for Dr. Strickland on the lack of informed consent claim at the close of the defense's presentation of evidence.

The medical malpractice and medical battery claims were submitted to the jury. After four hours of deliberations, the jury sent out a note indicating it could not agree. The jury was excused for the day, but brought back the next morning for further deliberations after an Allen charge. After the jury was sent out in the morning, counsel for Harvey requested if there was some way, in the event of a mistrial, for the court to get "all these thorny issues" before an appellate court without re-trying the case. During this discussion, the jury again returned, indicating it could not agree. The court then granted Dr. Strickland a directed verdict on the malpractice and battery claims and dismissed the jury.[2] Harvey appeals.

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[1] Lexington Medical Center was initially named as a defendant but was voluntarily dismissed in March 1999.

[2] We agree with Harvey's contention that rather than granting a directed verdict, the proper procedure in cases of jury deadlock is to grant a mistrial. However, as Harvey's request to the trial court contributed to the error, we do not reverse on this basis.

ISSUES

1. Did the trial court err in granting a directed verdict on Harvey's claims?

2. Did the trial court err in denying Harvey's motion to amend his complaint?

3. Did the trial court improperly exclude testimony of a hospital liaison worker?

1. DIRECTED VERDICT

Harvey contends the trial court erred in granting a directed verdict on his claims. We agree.

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one inference or its inference is in doubt. Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). "In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." Bultman v. Barber, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998).

a. Implied Consent

Citing Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct. App.), *cert*

denied 283 S.C. 64, 320 S.E.2d 35 (1984), Dr. Strickland contends the subsequent unplanned emergency required he seek the consent of Harvey's mother for further treatments. Accordingly, as he sought and obtained Harvey's mother's consent to the blood transfusion, he contends he cannot be held liable as a matter of law. We disagree.

In Hook, the Court of Appeals first recognized that the doctrine of implied consent applies to physicians in South Carolina. Under that doctrine, a physician has a duty to disclose to a patient the diagnosis, risks, benefits, alternatives, etc., of any procedures the doctor proposes to perform. Hook, however, indicates such information is to be given to "a patient of sound mind, in the absence of an emergency which warrants immediate medical treatment." 281 S.C. at 547-48, 316 S.E.2d at 694-95. Accordingly, as Harvey was unconscious, and an emergency situation presented, Dr. Strickland asserts he was obligated to seek his mother's consent to the blood transfusion. We disagree.

The right to be free of unwanted medical treatment has long been recognized in this country. More than one-hundred years ago, in Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891), the United States Supreme Court perceived that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." In Schloendorff v. New York Hosp., 105 N.E. 92, 93 (N.Y. 1914), Justice Cardozo stated, "every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." More recently, it has been noted that "the individual's right to make decisions vitally affecting his private life according to his own conscience . . . is difficult to overstate . . . because it is, without exaggeration, the very bedrock on which this country was founded." Wons v. Public Health Trust, 500 So. 2d 679, 687 (Fla. Dist. Ct. App. 1987), *aff'd* 541 So. 2d 96 (Fla. 1989). The right to control the integrity of one's own body spawned the doctrine of informed consent. In re Duran, 769 A.2d 497 (Pa. 2001). Accordingly, the United States Supreme Court has held that a competent adult patient has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment. Cruzan v. Director, Missouri Dep't of Mental Health, 497 U.S. 261 (1990).

Our General Assembly has recognized this right to be free of unwanted medical intrusion in the South Carolina Adult Health Care Consent Act (Consent Act), S.C. Code Ann. § 44-66-10 et seq. (Supp. 2001). Section 44-66-60 of the Consent Act states, in pertinent part:

> (A) Unless the patient, while able to consent, has stated a contrary intent to the attending physician or other health care professional responsible for the care of the patient, this chapter does not authorize the provision of health care to a patient who is unable to consent if the attending physician or other health care professional responsible for the care of the patient has **actual knowledge that the health care is contrary to the religious beliefs of the patient**.
>
> (B) This chapter does not authorize the provision of health care to a patient who is unable to consent if the attending physician or other health care professional responsible for the care of the patient has **actual knowledge that the health care is contrary to the patient's unambiguous and uncontradicted instructions expressed at a time when the patient was able to consent**.

(Emphasis supplied). Clearly, these sections reveal a legislative intent that a patient's wishes against medical treatment or intervention, when made known to a physician prior to surgery, must be followed by the attending physician.

Here, Harvey signed numerous forms indicating he was a Jehovah's Witness and did not wish to receive blood. In particular, on the date of his initial appointment with Dr. Strickland, Harvey signed a "Refusal of Treatment/Release from Liability" form which specifically which states:

> I, Charles Harvey, refuse to have blood or any blood products given to me _____.
>
> The risks attendant to my refusal have been fully explained to me and I fully understand that my chances for gaining normal health are seriously reduced, and that in all probability, my refusal for such treatment, medical intervention, and/or procedure (may) (will)

> seriously imperil my health or life.
> With the understanding, I hereby release the attending physician, the Lexington Medical Center and its employees and their respective agents, heirs, executors, administrators and assigns from any and all claims of whatsoever kind of any nature.

Given this evidence demonstrating Harvey's desire not to receive blood, we find Dr. Strickland's argument that he was under an obligation to seek Julia Harvey's consent unavailing.

However, in light of Dr. Strickland's testimony to the effect that he knew Harvey was a Jehovah's Witness, and that although Harvey never said "yes" to a blood transfusion, Harvey had told him he would consider a blood transfusion, we find the implied consent issue was a matter for the jury. Accordingly, we hold the trial court erred in granting a directed verdict on Harvey's implied consent cause of action.

B. Breach of Contract

Harvey next asserts the trial court erred in granting a directed verdict to Dr. Strickland on his breach of contract claim. We agree.

Here, the documents Harvey relies upon to create an express contract are 1) a "Doctor's Survey Reply" signed by Dr. Strickland which indicates he is willing in principle to offer medical treatment without the use of blood or blood products, 2) a Refusal of Treatment form, signed by Harvey on 11/04/96, indicating he did not wish to receive blood, 3) a Consent to Operation form for an "arch and four vessel arteriogram" signed by Harvey on 11/04/96, indicating he did not give permission to the doctor to use blood or blood products, 4) a Consent to Operation form for a Carotid Endarterectomy signed by Harvey on 1/14/97, indicating he did not give permission to the doctor to use blood products, and 5) a Refusal of Transfusion, indicating Harvey is a Jehovah's Witness and refuses blood transfusion and absolves the hospital of liability. Harvey also testified that it was his understanding that "he [Dr. Strickland] could do the operation without– bloodless transfusions, so when I asked him

about it, he said that that wouldn't be necessary. It wouldn't be necessary for the blood transfusion, so there was no more said."

We have previously recognized that an action may be maintained for breach of an express pre-treatment warranty to effect a particular result. Banks v. Medical University of South Carolina, 314 S.C. 376, 444 S.E.2d 519 (1994); Burns v. Wannamaker, 281 S.C. 352, 315 S.E.2d 179 (Ct. App. 1984), aff'd as modified 288 S.C. 398, 343 S.E.2d 27 (1985).

Viewing the above evidence, as we must, in the light most favorable to Harvey, we find it was for the jury to determine whether an express contract was created. Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (1998) (when Court reviews grant of directed verdict, evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-prevailing party. If the evidence is susceptible of more than one reasonable inference, case should be submitted to the jury). Accordingly, the trial court's grant of a directed verdict is reversed.

c. Medical Malpractice/Medical Battery

South Carolina recognizes a medical malpractice cause of action stemming from a lack of informed consent. Hook v. Rothstein, supra. Similarly, we have recognized that there may be a viable cause of action for medical battery as the result of failing to obtain proper consent. Banks v. Medical Univ. of South Carolina, supra.

We find the trial court erred in granting Dr. Strickland a directed verdict as to these causes of action. Harvey presented expert testimony that his hemoglobin level was not critical at the time of the transfusion, and that there was not really an emergency situation. The expert also opined that Harvey did not really need a transfusion, and that alternative bloodless procedures were available. Given this testimony, we find the issues of medical battery and medical malpractice were for the jury.

2. MOTION TO AMEND

Harvey asserts the trial judge committed reversible error in refusing to allow him to amend his complaint to conform to the evidence while the jury was deliberating. We disagree.

Harvey's complaint alleged only that Dr. Strickland was negligent and/or breached obligations to him in giving him blood products without his consent and contrary to his wishes. The trial centered around these allegations.[3] During the jury's deliberations, Harvey moved to amend his complaint to include allegations of medical negligence stemming from the "closed off airway" incident; he wanted to allege that it was a breach of the standard of care to let his airway be closed off requiring him to be intubated. Harvey asserted that Dr. Strickland had testified that the intubation was not a breach of the standard of care, such that the issue had been tried by consent.

The circuit court is to freely grant leave to amend when justice requires and there is no prejudice to any other party. Rule 15, SCRCP; Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993). A motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. Id. Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result. Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987). This decision is within the trial court's discretion. Id.

Given that the jury was in the process of deliberating at the time counsel moved to amend, we find no abuse of discretion in the trial court's refusal of the amendment. Accord Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000)(court will not find implied consent to try an issue if all of the parties did

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[3] In fact, at one point, the trial court specifically stated, "There are no allegations of any kind of negligence or anything else or any other treatment, right?" to which counsel for Harvey responded affirmatively.

not recognize it as an issue during trial, even though there is evidence in the record--introduced as relevant to some other issue--which would support the amendment).

3. EXCLUSION OF LIAISON'S TESTIMONY

Harvey also asserts reversible error in the trial court's exclusion of portions of the testimony of Richard Culler, a hospital liaison committee worker. The liaison committee worked with patients and doctors to attempt to prevent Jehovah's Witness patients from receiving unwanted blood transfusions. The trial court sustained Dr. Strickland's objection to any testimony by Culler as to what specific resources were available at the Lexington Medical Center to someone who did not want to receive blood. However, Culler was able to testify that there were resources available at the hospital to assist in the treatment of patients without use of blood products.

Given that Culler was able to testify as to resources generally available, we find no reversible error in the limitation of his testimony. Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996)(admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal).

Moreover, we find any evidence as to the availability and appropriateness of "cell saver" technology, about which Culler proposed to testify, would have required expert testimony. Accordingly, the trial court did not err in refusing the proffered testimony as Culler was not qualified as an expert. Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998)(qualification of witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party).

CONCLUSION

The trial court's grant of a directed verdict is reversed. We affirm the trial court's rulings limiting the testimony of the liaison, and denying Harvey's

motion to amend his complaint. The matter is reversed and remanded for a new trial.[4]

REVERSED AND REMANDED.

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

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[4] Dr. Strickland asserts, as an additional sustaining ground, directed verdicts were appropriate as Harvey suffered no legally cognizable injury. We disagree. We find the matter of damages was for the jury's determination. See Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000) (recognizing that every violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained). See also Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001) (analyzing damages for "loss of enjoyment of life" and "pain and suffering"); Gathers v. Harris Teeter, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984)(physical injury is not an element of a battery); Tisdale v. Pruitt, 302 S.C. 238, 394 S.E.2d 857 (Ct. App. 1990)(evidence that patient was denied right to make an informed consent to procedure, suffered pain from the procedure and suffered emotional injury were sufficient to present jury issue on whether damages were sustained and proximately caused by doctor's wrongful conduct).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Henry Richardson,	Respondent,
v.	
Town of Mount Pleasant and Charles M. Condon, Attorney General of South Carolina,	Defendants,
of which the Town of Mount Pleasant is and Charles M. Condon, Attorney General of South Carolina is	Respondent, Appellant.

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

Opinion No. 25492
Heard September 26, 2001 - Filed July 1, 2002

REVERSED

Attorney General Charles M. Condon, Deputy

Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for appellant.

Coming B. Gibbs, Jr., of Charleston, for respondent Henry Richardson; R. Allen Young, of Mount Pleasant, and John B. Williams, of Moncks Corner, for respondent Town of Mt. Pleasant.

JUSTICE PLEICONES: The circuit court judge found that a municipal police officer is a constable within the meaning of the South Carolina Constitution's dual office holding provisions.[1] Therefore, he held that Respondent Henry Richardson (Respondent) is entitled to continue serving as a police officer for the Town of Mt. Pleasant despite his subsequent election to the Berkeley County Council. Further, the circuit court concluded that to hold otherwise would violate Respondent's federal equal protection rights.[2] The Attorney General appealed. We reverse.

The South Carolina Constitution generally prohibits an individual from holding two offices of honor or profit at the same time. There are several exceptions to this general prohibition. Respondent has stipulated that county councilman and police officer are both positions of honor or profit and that, unless one office falls within a dual office holding exemption, he cannot hold both offices simultaneously.

I. Dual Office Holding

The dual office holding provisions are in derogation of the common

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[1]See S.C. Const. art. VI, §3 and art. XVII, §1A (Supp. 2001); see also art. III, §24 (restrictions on members of the General Assembly) and art. V, §16 (restrictions on certain judicial officers) (Supp. 2001).

[2]U.S. Const. amend. XIV.

law which prohibited a person from holding two offices only if they were "incompatible." State v. Buttz, 9 S.C. 156 (1887). Incompatibility meant either that the offices involved "such a multiplicity of business" that one person could not adequately perform both, or that they were "subordinate and interfering with each other, [inducing] a presumption that they cannot be executed with impartiality and honesty." Id.; Ex parte Ware Furniture, 49 S.C. 20, 27 S.E. 9 (1897) (McIver, J., dissenting). In some situations, public policy prevented a person from holding more than one office at a time. Id.

The 1895 Constitution extended the dual office holding proscription to all persons holding positions of "honor or profit," exempting from the prohibition only notaries public and militia officers. Art. II, §2. An exemption for delegates to constitutional conventions was added, but the provisions remained otherwise unchanged until 1988, when the Constitution was amended to exempt from the prohibition the offices of "constable" and "member of a lawfully and regularly organized fire department." The record does not suggest any persuasive reason why these two offices were added in 1988.

In this case, we are asked to determine the meaning of the term "constable" as used in the state constitution's dual office holding provisions. When this Court is called upon to interpret our Constitution, we are guided by the "ordinary and popular meaning of the words used . . . ." Abbeville County School Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999)(internal citation omitted). A word used in the Constitution should be given its "plain and ordinary" meaning. Johnson v. Collins Entertainment, 333 S.C. 96, 508 S.E.2d 575 (1998). In Johnson, this Court noted that the term "lottery" as used in our statutes and Constitution had no "technical, legal meaning," and should therefore be construed in the "popular sense."

The precise question posed here is whether the office of constable as used in the dual office holding provisions of the constitution encompasses the office of municipal police officer. While the word "lottery" has a popular, but not a technical or legal meaning, in this case we are construing a term of art, that is, the meaning of the term constable as it relates to "an office of

honor or profit." We therefore look not just at the popular definition of the word, but also at the legal definition of the office.

'Constable' is defined as "a peace officer with less authority and smaller jurisdiction than a sheriff, empowered to serve writs and warrants and to make arrests; in medieval monarchies, an officer of high rank, usually serving as a military commander in the ruler's absence; the governor of a royal castle," *The American Heritage Dictionary* p.314 (2d ed. 1991); or as "a high officer of a medieval royal or noble household; the warden or governor of a royal household or a fortified town; a public officer usually of a town or township responsible for keeping the peace and for minor judicial duties." *Webster's New Collegiate Dictionary* p.243 (1974). The use of the term 'constable' as a synonym for 'police officer' is primarily a British usage. Id.; *The American Heritage Dictionary*, *supra*.

In legal usage, a constable was originally defined as "an officer who regulated matters of chivalry, tournaments, and feats of arms." Anderson, *A Dictionary of Law* (1891) p. 236. Blackstone defined a constable as "an officer appointed to preserve the peace, and to execute the processes of a justice of the peace." Id. Black's Law Dictionary defines constable as:

> [a]n officer of a municipal corporation (usually elected) whose duties are similar to those of the sheriff, though his powers are less and his jurisdiction smaller. He is to preserve the public peace, execute the process of magistrate's courts, and of some other tribunals, serve writs, attend the sessions of the criminal courts, have the custody of juries, and discharge other functions sometimes assigned to him by the local law or by statute. Powers and duties of constables have generally been replaced by sheriffs.

Black's Law Dictionary p. 281 (5th Ed. 1979).

Under current South Carolina law,[3] the office which most nearly meets Black's and Blackstone's definitions of constable is that of "magistrate's constable." See generally South Carolina Code Annotated, Title 22, Chapter 9. Magistrate's constables have county-wide authority,[4] are authorized to serve[5] and execute process and make returns,[6] and to levy executions and serve attachments.[7] Constables must attend circuit court when required by the sheriff,[8] and while there are deemed "officers of the court" bound to "perform the appropriate duties and services assigned them by the sheriff and the presiding judge."[9]

South Carolina statutes create additional constable's offices, which are generally filled by the governor's appointment or commission.[10] Under S.C. Code Ann. §23-1-60 (1976), the governor "may . . . appoint such additional deputies, constables, security guards, and detectives as he may deem

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[3]The office of constable has long existed in South Carolina; there are references to the office in Locke's "The Fundamental Constitutions of Carolina" adopted in 1670.

[4]S.C. Code Ann. §22-9-50 (1976).

[5]S.C. Code Ann. §22-9-90 (1976).

[6]S.C. Code Ann. §22-9-80 (1976).

[7]S.C. Code Ann. §22-9-100 and -110 (1976).

[8]S.C. Code Ann. §22-9-70 (1976).

[9]Id.

[10]But see S.C. Code Ann. §59-119-340 (1976)(authorizing the board of trustees of Clemson University, acting as the governing body of the municipal corporation of "Clemson University," to "appoint one or more special constables who shall exercise all the power of a State constable or of a municipal policeman to enforce obedience to the ordinances of the board and to the laws of the State") .

necessary to assist in the detection of crime and the enforcement of any criminal laws . . . ." See also S.C. Code Ann. §1-3-220 (Supp. 2001) (providing for the governor's appointment of a "chief constable"). State constables appointed by the governor have state-wide jurisdiction. See Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970).

Some law enforcement officers are required or authorized to obtain state constable commissions. Generally, the jurisdiction of these law enforcement officers is circumscribed by statute. See, e.g., S. C. Code Ann. §59-116-20 (1990) (college and university police officers must obtain state constable commissions but their jurisdiction pursuant to such appointment "is limited to the campus grounds and streets and roads through and contiguous to them"); compare, e.g., S.C. Code Ann. §§50-3-310 and - 340 (Supp. 2001) (commissioned Dep't of Natural Resources (DNR) officers "when acting in their official capacity, have statewide authority for the enforcement of all laws relating to wildlife, marine, and natural resources"); see also S.C. Code Ann. §51-3-147 (1976) (commissioned Parks, Recreation and Tourism (PRT) officials have enforcement powers of any state constable).

The governor is also empowered to appoint special state constables whose jurisdiction is "limited to the lands and premises acquired by the United States government . . . in Aiken, Allendale, and Barnwell counties." S.C. Code Ann. §23-7-40 (Supp. 2001). These "Savannah River" constables possess "all of the rights and powers prescribed by law for magistrates' constables and deputy sheriffs and powers usually exercised by marshals and policemen of towns and cities." S.C. Code Ann. §23-7-50 (Supp. 2001); see also S.C. Code Ann. §58-13-910 (Supp. 2001) (governor authorized to "certify" special officers or constables for the protection of common carriers).

As explained above, the General Assembly has created and defined several different types of constable's offices. The legislature has also enacted a statute providing for the employment by municipalities of police officers. South Carolina Code Ann. §5-7-110 (Supp. 2001) provides:

> Any municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties.
>
> **Police officers shall be vested with all the powers and duties conferred by law upon constables, in addition to the special duties imposed upon them by the municipality. . . .**

(emphasis supplied).

Thus, unlike campus police officers, DNR officers, and PRT officials, municipal police officers need not obtain commissions from the governor to exercise the power and duties of a state constable.[11] Similarly, the General Assembly, in order to benefit municipal courts, has delegated to municipal police officers many of the responsibilities, and "the same powers and duties as are provided for magistrates' constables." S.C. Code Ann. §14-25-55 (Supp. 2001). No such express delegation of the powers of state constables and magistrate's constables to municipal police officers would be necessary, however, if those officers were already possessed of this authority by virtue of their employment. The General Assembly has distinguished between the office of constable and that of municipal police officer.

In addition to the statutory provisions separately providing for the creation of the offices of 'constable' and 'municipal police officer,' this Court has long recognized that the offices are distinct. In 1881, the Court held:

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[11]Despite this delegation of state constable authority, municipal police officers generally have no jurisdiction beyond the municipality's territorial limits. See State v. Harris, 299 S.C. 157, 382 S.E.2d 925 (1989).

> Municipal corporations as now established by law are of comparatively modern origin. They are agencies to assist in the conduct of local civil government, and what the state constitutionally empowers them to do may be considered as done by the state . . . . Mr. Dillon, in his excellent work on Municipal Corporations, observes that **'the office of a police officer is not known to the common law; it is created by statute, and the officer has and can exercise only such powers as he is authorized to do by the legislature . . . . When police officers are by statute invested with all the powers of constables, or conservators of the peace [they possess the same arrest powers]** . . . .

State v. Bowen, 17 S.C. 58, 61 (emphasis supplied); see also City Council v. Payne, 11 S.C.L. (2 Nott & McC.) 475 (1820) (Charleston ordinance gave its city guard the arrest powers of constables). We find nothing in our past or current law which has equated the offices, nor do we find that the offices share a "popular" meaning.

At the time the General Assembly enacted the legislation providing for the referendum to add the constable exception to the dual office holding provisions, the office of 'constable' had fixed meanings under South Carolina law. A constable is a person who holds a state commission, is employed in such capacity by a magistrate, or otherwise meets one of the statutory definitions. A municipal police officer is a person employed by a municipality pursuant to §5-7-110. The office of 'constable' does not subsume the office of 'municipal police officer.'

Respondent, in his capacity as a municipal police officer, is not a constable exempt from the constitutional provisions forbidding dual office holding.

We reverse the circuit court's holding permitting Respondent to hold both offices.

II. Equal Protection

The circuit court held there was no rational basis for exempting constables, but not municipal police officers, from the dual office holding proscription because the duties of each are substantially identical and the statutes do not distinguish between the positions. The court therefore concluded that to prohibit Respondent from holding both his office in Mt. Pleasant and his office in Berkeley County would violate his federal equal protection rights. We disagree.

As explained above, the factual predicate upon which the circuit court's decision rests is incorrect: the duties and jurisdiction of constables vary widely from those of municipal police officers, and the statutes distinguish between the offices. Further, the circuit court fundamentally misidentified the 'class' affected by the dual office holding proscriptions. That class consists of all persons holding an "office of honor or profit." All members of the class, including Respondent, are subject to the same limitation, that is, they may hold only one such office at any time, subject to the same exemptions. There is no "irrational classification" and the dual office holding provisions of the state constitution do not run afoul of the federal equal protection clause.[12]

Conclusion

Respondent has stipulated that county councilman and municipal police officer are positions of honor or profit. Since neither office is exempt from the state constitution's dual office holding prohibitions, the circuit court order permitting Respondent to retain both offices is

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[12]We point out that were there, in fact, an equal protection violation in the constable exception, the remedy would not be to expand the exempted class to include Respondent as was suggested by the circuit court, but rather to strike the exemption in its entirety.

REVERSED.

MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, the exemption to the prohibition against dual office holding for constables and firefighters encompasses municipal police officers. As the majority points out, the legislature enacted a statute providing for the employment of police officers by municipalities. South Carolina Code Ann. § 5-7-110 (Supp. 2001) provides, in part, "police officers **shall be vested with all the powers and duties conferred upon constables**, in addition to the special duties imposed upon them by the municipality . . . ." (Emphasis added). In my view, by vesting municipal police officers with all of the powers and duties of constables, the legislature exempted municipal police officers from the prohibition against dual office holding.

The Supreme Court of South Carolina

Respondent

In the Matter of Gene C. Wilkes, Jr.,

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the relief sought by Disciplinary Counsel.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from

making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Stephan Charles Ouverson, Esquire, has been duly appointed by this Court.

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

James E. Moore J.
FOR THE COURT

Columbia, South Carolina

July 27, 2002

The Supreme Court of South Carolina

In re: Adoption of Rule 422, SCACR, Commission on Alternative Dispute Resolution.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the attached Rule, creating a Commission on Alternative Dispute Resolution, is adopted. This Rule shall be effective September 1, 2002.

IT IS SO ORDERED.

s/Jean H. Toal

C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

July 1, 2002

RULE 422
COMMISSION ON ALTERNATIVE DISPUTE RESOLUTION

(a) Purpose. The Commission on Alternative Dispute Resolution is created to assist the courts, practitioners and the public with issues related to arbitration and mediation in the judicial system.

(b) Membership of Commission. The Commission's Chair will be the Chief Justice or the Chief Justice's designee. The Supreme Court will appoint the Commission's other members as follows:

(1) State Judges: One Circuit Court judge, one Family Court judge; one judge from the state appellate bench; one summary court judge; two judges from any state court.

(2) Practicing Lawyers: Six practicing lawyers, at least four of whom are certified arbitrators and/or mediators, with due regard for diversity of practices among the members.

(3) Two public members who may be certified arbitrators or mediators.

(4) A clerk of court from a county subject to mandated alternative dispute resolution rules.

(5) The Director of Court Administration or the Director's designee.

(6) The Chair of the House of Representatives Judiciary Committee or the Chair's designee.

(7) The Chair of the Senate Judiciary Committee or the Chair's designee.

(8) The Chair of the South Carolina Bar's Alternative Dispute Resolution Section.

(**c) Duties**. The Commission shall be responsible for the efficient administration of court-connected arbitration and mediation in South Carolina. Its responsibilities include:

(1) To serve as the principal resource for and coordinate efforts in the use of alternative dispute resolution in the resolution of civil and family litigation in the judicial system of South Carolina;

(2) To collect and analyze data on the effectiveness of those alternative dispute resolution programs;

(3) To approve training programs for the certification of arbitrators and mediators (hereinafter referred to as neutrals);

(4) To nominate five persons from its membership to serve as the Board of Arbitrator and Mediator Certification as established by the Circuit Court Alternative Dispute Resolution (ADR) Rules and the Family Court Mediation Rules (hereinafter referred to as the ADR Rules);

(5) To set certification and recertification fees subject to approval by the Supreme Court;

(6) To recommend funds needed at the state level to support the court-connected programs and administrative costs, and to allocate and expend funds received for any of the purposes within the scope of the Commission;

(7) To promote educational opportunities for all users;

(8) To monitor alternative dispute resolution efforts in other jurisdictions;

(9) To make recommendations to the Supreme Court, the South Carolina Bar, voluntary bar associations and the law school concerning

additional means by which the use and practice of alternative dispute resolution can be improved and expanded; and

(10) To recommend to the Supreme Court amendments or additions to the ADR rules.

(d) Promulgation of Regulations. Regulations may be promulgated by the Commission. Regulations will be effective only upon approval of the Supreme Court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Darlene Shaw,

Plaintiff,

v.

The City of Charleston,

Appellant,

and

Marianna Hanckel f/k/a Marianna D. Glass,

Respondent.

Appeal From Charleston County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 3522
Heard May 7, 2002 - Filed June 24, 2002

REVERSED AND REMANDED

Henry D. McMaster and Bryan P. Stirling, both of Tompkins and McMaster, of Columbia, for appellant.

James D. Myrick and Jonathan D. Crumly, both of Charleston, for respondent.

STILWELL, J.: Darlene Shaw was injured when she tripped on the sidewalk in front of Marianna Hanckel's house on Tradd Street in Charleston. Shaw sued Hanckel and the City of Charleston alleging they were both negligent and jointly and severally liable for her injuries. The trial court granted Hanckel's motion for summary judgment over City's objection. We reverse and remand.

FACTS

Shaw alleges she tripped and injured herself when she accidentally inserted her foot into a hole where the sidewalk abuts an old coal grate appurtenant to Hanckel's house. The grate is a textured piece of sheet metal covering an opening in the sidewalk which historically was a chute for coal to be delivered into the basement of the house. The opening is reinforced with brick, and the sidewalk is concrete.

In support of her motion for summary judgment, Hanckel argued the evidence showed only that the sidewalk, not the coal grate, caused Shaw's fall. She noted as a matter of law that City is responsible for maintaining the public sidewalk, and in fact, "[t]he City of Charleston has admitted this responsibility. . . ." In opposition, City asserted it does not own the steel grate or the brick shaft and is not the responsible party. City summarizes its position:

> Hanckel has moved for summary judgment on the ground that "it is the duty of the City of Charleston, not hers, to maintain city sidewalks. . . (quoting from page one of the text of Hanckel's motion)." There is no dispute regarding this assertion. However, Hanckel's reliance on this assertion as the basis for her motion for summary judgment is wholly misplaced. The issue here is not whether each defendant has a duty to maintain its own property. Rather, the central issue regarding Hanckel's motion is a question

> of location. Specifically: was the defect involved in the plaintiff's fall located on property owned and maintained by Hanckel or, rather, by the City? We submit that a genuine issue of fact exists regarding whether the defect is located on Hanckel's property or on the City's.

The trial court granted Hanckel summary judgment and clearly found that the hole in which Shaw tripped was part of the sidewalk. It found: "No evidence was presented that the hole in the sidewalk was caused by the grate. . . . In dispute here was whether homeowner Hanckel also owed a duty to inspect and maintain the sidewalk." In its conclusions of law, the trial court continued:

> There is no evidence in the record which would create a material question of fact that Hanckel owed a duty to inspect and maintain public sidewalks outside her house. The evidence in the record, taken in the light most favorable to the Plaintiff, establishes that even if Hanckel had some ownership rights in the air shaft cover and its surrounding stone, such structures were squarely upon the public sidewalk and subject to the City of Charleston's control. (Emphasis added.)

ISSUES

Originally, the City's argument was limited to whether the trial judge erred in her finding that "the defect that caused this accident was a part of the sidewalk and not a part of the shaft owned by. . . Hanckel" where an issue of material fact exists regarding whether the defect was located on Hanckel's property or the sidewalk maintained by the City. Thereafter, this court directed the parties to brief "the issue of whether a co-defendant in an action based on negligence is an 'aggrieved party' within the contemplation of Rule 201(b), SCACR, thereby vesting it with the right to appeal a grant of summary judgment to its co-defendant when the plaintiff in the action, against whom the summary judgment is awarded, does not file an appeal." Understandably, City argues it is an aggrieved party and Hanckel argues it is not. Therefore, the two issues before us are:

1. Is City an "aggrieved party" with standing to challenge the grant of summary judgment to its co-defendant?

2. If so, was summary judgment properly granted?

LAW/ANALYSIS

I. Standing to Appeal

City argues it is an "aggrieved party" within the contemplation of the rule, and may therefore appeal the grant of summary judgment to its co-defendant. We agree.

Rule 201(b), SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." We recently reiterated that "[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." Id.; see Parker v. Brown, 195 S.C. 35, 44-45, 10 S.E.2d 625, 629 (1940) ("An aggrieved party or person is one who is injured in a legal sense; one who has suffered an injury to person or property."). "A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests." Beaufort Realty, 346 S.C. at 301, 551 S.E.2d at 589-590; First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998).

Under the peculiar facts of this case, we find City is an aggrieved party with standing to challenge its co-defendant's dismissal from the underlying cause of action. Shaw filed her complaint against City and Hanckel alleging negligence and joint and several liability between these co-defendants. "The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against the government." Washington v. Lexington County Jail, 337 S.C. 400, 404, 523 S.E.2d 204, 206

(Ct. App. 1999). City, being a "governmental entity" as defined in section 15-78-30(d), is liable for its torts "in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations . . . contained herein." S.C. Code Ann. § 15-78-40 (Supp. 2001). However, City's liability in damages to Shaw are capped for each occurrence and claim. S.C. Code Ann. § 15-78-120 (Supp. 2001). Moreover,

> [i]n all actions brought pursuant to [the Tort Claims Act] when an alleged joint tortfeasor is named as [a] party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

S.C. Code Ann. § 15-78-100(c) (Supp. 2001) (emphasis added).

Hanckel argues City can never be an aggrieved party under the present facts because the Uniform Contribution Among Tortfeasors Act (UCATA) states it "shall not apply to governmental entities." S.C. Code Ann. § 15-38-65 (Supp. 2001). She argues this section essentially places City in the position of a joint tortfeasor under the common law. The intention behind UCATA is to provide some relief to "a tortfeasor who has paid more than his pro rata share of the common liability." S.C. Code Ann. § 15-38-20(B) (Supp. 2001) (emphasis added). Because the Tort Claims Act applies and clearly provides that liability among or between tortfeasors shall be apportioned by the jury, this argument lacks merit.

Clearly the inclusion or exclusion of Hanckel, who may be deemed partially liable to Shaw, drastically affects City's potential exposure in this tort action. If Hanckel remains a party, the verdict may apportion the damages between Hanckel and City. Without Hanckel, however, City could only be apportioned 100% of any potential liability. Such a result under the Tort Claims Act clearly bears directly on its pecuniary interests.

Our sister state, Georgia, has drawn a similar distinction regarding appealability and standing turning on whether the co-defendant's rights are

affected. In the case of Hussey, Gay & Bell v. Ga. Ports Auth., the Georgia Court of Appeals held:

> (A) co-defendant does not have any standing to appeal an order granting summary judgment in favor of another defendant when (his) right has not been adversely affected thereby. Only if the co-defendants are sued as joint tort-feasors does the grant of summary judgment as to one potentially affect the other's right of contribution. Therefore, it is only in this situation that the co-defendant is deemed a losing party and therefore has standing to appeal the grant of summary judgment to another co-defendant.

Hussey, 420 S.E.2d 50, 53 (Ga. Ct. App. 1992) (quotations and citations omitted). See generally 5 Am. Jur. 2d Appellate Review § 275 (1995 & Supp. 2002). In the seminal case, Georgia held a co-defendant had standing to appeal the grant of summary judgment to another co-defendant against whom a contribution claim was asserted. R.E. Thomas Erectors, Inc. v. Brunswick Pulp & Paper Co., 321 S.E.2d 412 (Ga. Ct. App. 1984). Later, the court clarified that relaxation of standing requirements for co-defendants was limited to those sued as joint tortfeasors. C.W. Matthews Contracting Co. v. Studard, 412 S.E.2d 539, 540 (Ga. Ct. App. 1991); see also Johnson & Harber Constr. Co., 469 S.E.2d 697, 699 (Ga. Ct. App. 1996); Shackelford v. Green, 349 S.E.2d 781 (Ga. Ct. App. 1986). Under similar circumstances, the Illinois Court of Appeals held that a co-defendant had standing to appeal the grant of summary judgment to another who would otherwise share liability where their interests were adverse because dismissal was premised on determination of contractual assumption of co-defendant's liability to plaintiff, though no cross-claim for contribution had been filed. Hammond v. N. Am. Asbestos Corp., 565 N.E.2d 1343 (Ill. Ct. App. 1991).

We agree that the circumstances where a co-defendant will be an aggrieved party permitted to appeal a grant of summary judgment to another defendant are very narrowly circumscribed. This holding should not be read to confer such a right in all cases. Much will depend on the scope of summary judgment and the practical and preclusive effects on the relative rights of the

parties which, of necessity, must be a fact-specific determination. As the Florida court has explained:

> Inherent in the right to oppose a grant of summary judgment to a co-defendant is the right of the non-moving co-defendant to demonstrate the existence of a genuine issue of material fact with regard to the plaintiff's claims against the moving co-defendant.

U-Haul Co. of E. Bay v. Meyer, 586 So.2d 1327, 1331 (Fla. Dist. Ct. App. 1991), cited with approval in Benton Inv. Co. v. Wal-Mart Stores, Inc., 704 So.2d 130, 132 (Fla. Dist. Ct. App. 1997).

However, where the grant of summary judgment is not determinative of the co-defendant's rights or does not impact potential liability, a co-defendant has been held not to have standing to appeal. See, e.g. Aguirre v. Phillips Properties, Inc., 2001 WL 961337, ___ S.W.3d ___ (Tex. Ct. App. 2001) (Because co-defendant could not show prejudice by grant of summary judgment and had not filed cross-claim, it had no standing since relative liability was not affected.); Tinker v. Kent Gypsum Supply, Inc., 977 P.2d 627 (Wash. Ct. App. 1999) (where no cross-claim was filed, co-defendant could not appeal grant of summary judgment); Clay v. Pepper Constr. Co., 563 N.E.2d 937 (Ill. Ct. App. 1990) (co-defendants who did not cross-claim for contribution lacked standing to appeal summary judgment).

Thus, in this case, City is an aggrieved party within the contemplation of the rule and may appeal the grant of summary judgment to its co-defendant.

II. Summary Judgment

City argues genuine issues of material fact preclude granting summary judgment in favor of its co-defendant, Hanckel. We agree.

Summary judgment is a drastic remedy that should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543

(1991). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Toomer v. Norfolk S. Ry. Co., 344 S.C. 486, 489, 544 S.E.2d 634, 635 (Ct. App. 2001); Rule 56(c), SCRCP. "It is not appropriate[, however,] where further inquiry into the facts of the case is desirable to clarify the application of the law." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing and Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn [therefrom] must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App. 1999). "If triable issues exist, those issues must go to the jury." Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991); Young v. S.C. Dep't of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999).

To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach. Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The trial court found "no evidence in the record which would create a material question of fact that Hanckel owed a duty to inspect and maintain public sidewalks outside her house." (Emphasis added.) We agree with this statement. We find nothing in the record to support a finding that Hanckel has accepted the duty to maintain the public sidewalks. See Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (Generally, "[o]ne who controls the use of property has a duty of care not to harm others by its use."). However, this finding does not resolve the issue.

The record reflects that Shaw's fall was caused by a hole located somewhere adjacent to the coal grate next to Hanckel's house. Shaw avers that

she tripped when her "foot became trapped in a hole between the concrete of the sidewalk and a metal grate/cover which extended from Defendant Hanckel's property into and upon the sidewalk. The hole in which Plaintiff's foot became caught was located on the sidewalk owned and maintained by the Defendants." (Emphasis added.) This hole was located "adjacent to and extended beneath an old coal grate/cover which extended out into the sidewalk, beside 6 Tradd Street." (Emphasis added.) Shaw described the hole as approximately four to six inches deep and six to seven inches wide and partially covered by the grate itself. She restated that her "fall was caused by a hole which was on property owned by, or appurtenant property owned by Marianna Hanckel. . . ." Shaw testified that she was unsure who actually owns the coal grate.

City's Superintendent of Streets and Sidewalks opined that the boundary between the private property owned by Hanckel and the sidewalk maintained by City would be the brick area. "Based on my experience, the boundary line, if I had gained access to that area, would be on this outside brick wall. Because one would have to build that brick wall to put whatever had existed at that point in time, and not at the opening." He later reiterated: "the edge of the metal would not be the boundary line, it would be at the end of the bricks, because they would build some form, some uniform form to support what that access roofing might have been." Similarly, the City Engineer and Director of the Department of Public Service stated the hole that caused Shaw's fall was located entirely within the area owned and controlled by the adjacent homeowner, Hanckel.

> [T]he area which encompasses this air shaft includes the block apron or foundation which extend beyond the metal grate/cover of the shaft. . . . The metal grate covers only a portion of the entire area of the air shaft attached to the house; the grate does not cover the entire area of the air shaft. That is, the outer edges of this shaft on the eastern and western sides of the metal cover, which are made of block or stone material, are part of the shaft itself and are not part of the City's sidewalk.

City has not filed a cross-claim against Hanckel. City answered Hanckel's interrogatory that it believed she, not City, was responsible for maintaining the grate. However, City admitted responsibility for maintaining the sidewalk.

> The City is generally responsible for the maintenance, repairs and upkeep of its sidewalks, but landowners owning property or residences appurtenant to the sidewalks are responsible for their grates, or air shafts, which encroach upon the sidewalks and are also responsible for the physical parts of same and any and all damages the structures cause to the sidewalks.

The Superintendent corroborated the general duty City has accepted regarding sidewalks in its corporate limits. "[I]f one [of the grates] is broken and open, I'll put a barricade over it. . . ." Assuming the pictures accurately depicted the condition of the area, he stated he would have placed a barricade over it. Nevertheless, City argues an issue of fact over the actual ownership of this hole is still in dispute. We agree.

A dispute over ownership is ordinarily a mixed question of law and fact. Cannon v. Motors Ins. Corp., 224 S.C. 368, 372, 79 S.E.2d 369, 371 (1953). We find the trial court erred in finding as a matter of law, "that even if Hanckel had some ownership rights in the air shaft cover and its surrounding stone, such structures were squarely upon the public sidewalk and subject to the City of Charleston's control." Ordinarily, the law imposes no duty on City to maintain private property. We disagree with the trial court's conclusion that the grate being located on the sidewalk renders it subject to City's control and legal duty to maintain the sidewalk.

Whether City accepted the duty to maintain the offending area merely goes to the issue of apportionment of fault. As such, it is an issue for the jury. See Bryant v. City of N. Charleston, 304 S.C. 123, 127, 403 S.E.2d 159, 161 (Ct. App. 1991) (The fact that the Department of Highways and Public Transportation owns and maintains the subject sidewalk in the city of North Charleston does not prevent the City from undertaking its maintenance.). City's admitted duty to maintain public sidewalks is not dispositive of the location of

the dangerous portion where the incident occurred, nor is it dispositive of ownership. The jury might find Hanckel has a similar duty of care if it found that she owned the portion with the hole. See Miller, 329 S.C. at 314, 494 S.E.2d at 815-16; Epps v. United States, 862 F.Supp. 1460, 1464 (D.S.C. 1994) (Legal duty of municipality to maintain sidewalk does not absolve landowner with abutting property from similar duty to traveling public. "The general rule appears to be that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk unless such a duty is imposed by legislation, the abutter created an unsafe condition on the sidewalk, or the abutter has a special property interest in the sidewalk.") (emphasis added).

CONCLUSION

The trial court's dismissal of Hanckel at the summary judgment stage prejudices City. Genuine issues of fact exist regarding whether City or Hanckel owns the coal grate and its adjoining foundation and where precisely the hole is located that caused Shaw to trip. The record at this stage of the proceeding does not resolve precisely how the accident occurred. The hole itself clearly contributed, but it is unclear whether the grate likewise contributed to Shaw's fall. Whether either or both of the co-defendants has accepted the duty to maintain this portion of the sidewalk is not before this court. Rather, this appeal is concerned only with whether a genuine issue of fact exists regarding the ownership of the subject portion of the sidewalk and the duty of care appurtenant thereto. Without factual proof that Hanckel does not own the hole and did not undertake a duty to maintain it, the trial court's order dismissing Hanckel as a co-defendant was premature.

REVERSED AND REMANDED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Eddie Lee Arnold,

Appellant.

Appeal From Colleton County
Luke N. Brown, Jr., Circuit Court Judge
Donald B. Beatty, Circuit Court Judge

Opinion No. 3523
Heard April 10, 2002 - Filed June 27, 2002

REVERSED

J. Brent Kiker and Scott M. Merrifield, both of Kiker & Douds, of Beaufort; and Samuel C. Bauer, of Hilton Head Island, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick McFarland, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

HOWARD, J.: Eddie Lee Arnold was convicted of murder and sentenced to life imprisonment. Arnold raises several issues on appeal, including the assertion that the circuit court erred in denying his motion for a directed verdict. We agree that the evidence is insufficient to support the conviction and, therefore, we reverse.

FACTS/PROCEDURAL HISTORY

On the morning of June 18, 1997, Dr. Jennings Cox ("the victim") left his office for a dental appointment. Because the victim's car was being repaired, he borrowed a co-worker's car. The victim did not return from his dental appointment or answer his pager that afternoon, and his wife subsequently filed a missing person's report with the Savannah, Georgia, Police Department. Three days later, his body was located on the side of an access road in a wooded area in Colleton County, South Carolina.

Two days after the victim disappeared, the borrowed car was located in a parking lot in Johnson City, Tennessee. In a search of the vehicle, Tennessee police discovered a plastic tab from a coffee cup lid in the center console. In the meantime, Colleton County detectives learned that the victim had recently been involved in a sexual relationship with Arnold. Arnold's fingerprints were compared with the fingerprint on the coffee cup lid, and they matched. Arnold was then charged with murdering the victim. Arnold was later tried and convicted of murder. He appeals from the jury verdict.

DISCUSSION

Arnold argues the trial judge erred in failing to grant a directed verdict. We agree.

The State's case is entirely circumstantial. When the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. 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 fairly and logically be deduced.'" Id. (quoting State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989)). In reviewing a denial of a directed verdict motion, this Court must view the evidence in a light most favorable to the State. State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989).

Considering the evidence in a light most favorable to the State, the following facts were established. Bobby Ray Ware, a long-distance truck driver, had an ongoing, sexual relationship with the victim. Ware also knew Arnold, and on June 13, 1997, Arnold asked Ware to drive him from Jacksonville, Florida, to Savannah, Georgia. Upon arriving in Savannah, Arnold stayed at Ware's apartment where he later met the victim. During this encounter, Arnold and the victim engaged in sexual acts. According to Ware, Arnold also displayed a handgun during his stay at Ware's apartment.

On the morning of June 18, the victim's wife drove him to his office where he borrowed a co-worker's new automobile. The victim left his office between 10:30 and 11:00 a.m. for a dental appointment. At 1:20 p.m., the victim called his secretary, and as a result of this call, she cancelled his afternoon appointments. During the afternoon, both the victim's wife and his secretary unsuccessfully tried to contact him by calling his pager. On the evening of June 18, the victim's wife filed a missing persons report with the police.

On June 21, the victim's body was discovered in a wooded area approximately one-quarter mile down a dirt road in Colleton County, South Carolina. The victim had been shot, once in the heart and once in the head. No tissue, blood, shell casings, bullets, fragments or other evidence was found at the scene. No blood spatters were found on any plants or groundcovering, and there was no evidence of a struggle. In short, no evidence indicated whether the victim had been murdered in the woods where he was found or at a different location. An autopsy performed on June 22, 1997, indicated that the time of death was approximately three and one-half days before the examination.

The borrowed automobile was found in Johnson City, Tennessee, on June 20.[1] The only fingerprint capable of analysis inside the car was on the tab of a plastic coffee cup lid and was later identified as belonging to Arnold.[2] No evidence of the homicide, such as blood or bullet holes, was discovered in the vehicle.

On June 17, the day before the homicide, Ware left Savannah to pick up a shipment, heading for Chicago, Illinois. He was supposed to deliver the shipment the following afternoon. However, according to Ware, when he arrived in Chicago, the dispatcher made him wait until the morning of June 19 to unload. Ware testified that while he was in Chicago he received a message from his dispatcher to call a number in Tennessee. Ware stated he called the number and spoke with Arnold by telephone on June 19. During this call, Arnold stated he was back in Tennessee.[3]

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[1] The dissent repeatedly contends that Johnson City, Tennessee, is near the home of Arnold's father in Gray, Tennessee, but there is no evidence in the record to support this contention.

[2] Latent fingerprints not matching Arnold's were also recovered from the exterior of the vehicle. Although they were forwarded for analysis, they were not compared to other known suspects.

[3] The State also introduced evidence that additional phone calls were placed on the day the victim disappeared. These calls were made from Arnold's

Other than the bullet wounds, there is no evidence of the circumstances under which the victim met his death. The State did not establish the scene of the murder, although in a light most favorable to the State, the lack of blood or other evidence in the woods did not exclude the possibility that Cox was shot where he was found. Arnold's gun was not connected to the crime, and no evidence placed Arnold at any crime scene, in the woods or otherwise. Nor is there any evidence of the circumstances by which Arnold obtained possession of the borrowed vehicle, if at all,[4] or that the vehicle was involved in the murder.

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father's phone in Tennessee to Ware's apartment.

[4] The dissent provides citations standing for the proposition that possession, soon after a murder, of property belonging to the victim may be the foundation of an inference of guilt. See 40A Am. Jur. 2d Homicide § 252 (1999); 41 C.J.S. Homicide § 245 (1991). However, cases cited under these sections involved defendants with no prior relationship to the victim or, at best, a casual relationship with the victim. See Wilson v. United States, 162 U.S. 613 (1896) (noting defendant, who was recently introduced to the deceased by a third party, was in possession of the victim's belongings); Gibson v. State, 174 S.E. 354 (Ga. 1934) (indicating accused was in possession of the deceased's watch, but not indicating any prior relationship between the accused and the deceased); State v. Grissom, 298 P. 666 (N.M. 1930) (noting dentist, convicted of second degree murder for producing an abortion after which the mother died, had the deceased woman's recently missing ring); People v. Mitchell, 176 A.D.2d 897 (N.Y. App. Div. 1991) (noting defendant, who had assisted performing renovation work for the deceased, was found in possession of the victim's credit card); McKay v. State, 707 S.W.2d 23 (Tex. Crim. App. 1985) (affirming capital murder conviction and noting at the time of arrest defendant was found driving a car belonging to the victim's father when he had no previous relationship with either person). Unlike those cases, Arnold and the victim had an intimate relationship.

At most, the State's testimony established that the borrowed car was capable of traversing the dirt road leading to the victim's body.[5]

The above evidence supports the conclusion that Arnold knew the victim, had access to him, and was in the area on the day of the homicide. The State's evidence also reasonably tends to prove that Arnold did have some contact with the victim on June 18, in view of the fact that his fingerprint was found in the borrowed car.[6] Furthermore, the evidence provides a reasonable basis for concluding that Arnold drove the car to Tennessee. Indeed, in a light most favorable to the State, Arnold had a gun which could possibly have been used to kill the victim. However, even viewing the evidence in a light most favorable to the State, the State has failed to meet the "any substantial evidence" standard.

In State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), the defendant was convicted of two murders. At trial, the State attempted to link Schrock to the murders by presenting evidence Schrock was in the area of the murders and that a footprint at the scene was similar to footprints found in an area in which the defendant admitted he had been walking. However, our supreme court reversed the convictions, ruling Schrock was entitled to a directed verdict because the evidence was exclusively circumstantial and nothing placed Schrock at the scene of the crime. The court concluded the circumstances were suspicious, but were insufficient to establish a basis for the conviction.

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[5] The dissent notes an "examination of the [car] revealed scratches on its exterior that suggested, according to the lead investigator, it had been driven down 'something rough.'" However, read as a whole, the investigator's testimony makes it clear that this conclusion is purely speculative.

[6] The dissent points out the proposition that fingerprint evidence may be sufficient to support a conviction if the prints are "found at the scene of the crime under such circumstances that they could only have been made at the time of commission of the crime." 29A Am. Jur. 2d Evidence § 1482 (1994). However, Arnold's prints were not found at any place established as the scene of the crime. Arnold's fingerprint was located only on a coffee cup lid in the car. The car was never connected to the crime in any way.

In the more recent case of State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), our supreme court again reversed a murder conviction when the State's case was purely circumstantial and the evidence was insufficient to establish the defendant's presence at the scene of the crime at the time of the murder. Although the State presented evidence that a car resembling the one in the possession of the defendant was at the victim's apartment complex the night of the murder, there was no evidence that this car was actually the car in the defendant's possession. In reversing the conviction, our supreme court stated, "[l]ike the footprints in Schrock, the possibility that it was the same car, without any other evidence placing the defendants at the scene, is not enough evidence to place [the defendant] inside the Victim's apartment." Id. at 603, 533 S.E.2d at 575.

Except in cases where the crime is alleged to be procured or caused indirectly, our supreme court has clearly stated that "[b]y bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act." Schrock, 283 S.C. at 133, 322 S.E.2d at 452. The evidence in this case, as in Shrock and Martin, established only that the circumstances were strongly suspicious, but falls short of providing a basis upon which the jury could have reasonably and logically determined Arnold's guilt.[7]

CONCLUSION

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[7] The dissent argues that in Schrock and Martin the evidence was only similar or resembled the defendants' shoes or car, whereas in this case there is no question but that the fingerprint on the coffee cup lid belonged to Arnold. However, this overlooks the fact that the evidence in Schrock and Martin was discovered or viewed *at the scene of the crime*. Arnold's fingerprint was not found at any place established as the scene of the crime, but was only found on a coffee cup lid in a vehicle which had been in the possession of the victim at some time before he was killed.

We find that the evidence presented by the State does not rise to the level of substantial evidence which reasonably tended to prove Arnold's guilt or from which his guilt may fairly and logically be deduced. Therefore, Arnold's murder conviction is

REVERSED.[8]

HEARN, C.J., concurs.
GOOLSBY, J., dissents in a separate opinion.

GOOLSBY, J. (dissenting): I respectfully dissent and would hold the evidence, albeit entirely circumstantial, is sufficient to withstand a motion for directed verdict.[9]

The defendant and the victim had engaged in sexual relations. The victim, a child psychologist, lived and worked in Savannah, Georgia. On June 18, 1997, he *borrowed* an almost new BMW Z-3 from another doctor to keep a dental appointment; however, he never arrived at the dentist's office. The last time his office heard from him was at 1:20 that afternoon. Two days later, on June 20, 1997, the BMW was found abandoned in a parking lot in Johnson City, Tennessee. The next day, June 21, 1997, the victim's body was discovered by the side of a dirt road in a wooded area near State Highway 61 and Interstate 95 in Colleton County, South Carolina. He had been shot twice, having apparently died sometime on June 18, 1997. His wallet was missing. Just a few hours before, the victim had withdrawn $300.00 from an ATM.

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[8] In light of our decision to reverse Arnold's murder conviction, we need not address the other issues on appeal.

[9] Because the majority did not address the other issues that the defendant raises on appeal, I will not do so either.

Subsequently, an examination of the BMW uncovered a coffee cup lid that bore the defendant's fingerprints. There was neither any evidence that the defendant ever had access to the automobile before the victim borrowed it nor any explanation regarding how an article with the defendant's fingerprint on it wound up inside the car. Further examination of the BMW revealed scratches on its exterior that suggested, according to the lead investigator, it had been driven down "something rough."

Investigators also learned that the defendant's father lived in Gray, Tennessee, not far from Johnson City where the BMW was found. On June 19, 1997, Bobby Ray Ware spoke to the defendant from Chicago and learned the defendant "was back in Tennessee." Ware, a long-distance truck driver, had days before the victim's murder introduced the victim to the defendant. Ware knew the defendant to carry a gun and had last seen him in Savannah on June 17, 1997.

From this evidence, the jury could have found, as it obviously did, that the victim and the defendant had a sexual relationship, that they met in Savannah sometime after 1:20 p.m. on June 18, 1997, that they drove to Colleton County, where the defendant killed the victim, stole his wallet, the money, and the BMW, and that the defendant then drove the BMW to Tennessee, where he abandoned the vehicle, went to his father's house, and spoke by telephone to Ware the following day. Because no other plausible explanation was offered for how the car could have ended up some distance from where the victim's body was found, the jury could have reasonably concluded that the defendant had absconded with the car, which in turn would have led to the inference that he killed the victim in order to take possession of it.[10]

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[10] See 40A Am. Jur. 2d Homicide § 252, at 91 (1999) ("Possession, soon after a murder, of articles apparently taken from the murder at the time of death, if not satisfactorily accounted for, may be the foundation of . . . [an] inference of guilt."); 41 C.J.S. Homicide § 245, at 96 (1991) ("It is competent to introduce in evidence the fact that, after the killing, accused had possession of property belonging to deceased . . . ."); cf. 29A Am. Jur. 2d Evidence § 1482, at 864

I view it as more than a mere coincidence that the defendant's fingerprints were found on a coffee cup lid inside an automobile that the victim had borrowed on the day he was murdered and that the automobile was found abandoned not far from where the defendant's father lived. Indeed, the defendant concedes in his brief that these facts could lead to the reasonable inference that he had "had contact with" the BMW at some point prior to its discovery.

The majority relies on State v. Schrock[11] and State v. Martin[12] to support its decision to reverse the defendant's conviction.

But this is not a case, as was Schrock, where the only evidence linking the defendant to the crime was footprints at the scene of a murder that were *similar* to known footprints of the defendant. There, the experts could not definitely testify that the footprints at the scene were made by the defendant's shoes.

Neither is this a case, as was Martin, where the defendant's car was not definitely identified as the car seen at the victim's apartment complex the night she was murdered. There, the State could show only that the latter car *resembled* the defendant's car.

Here, there is no question but that the fingerprint on the coffee cup lid belonged to the defendant.[13] Moreover, in addition to the unexplained presence

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(1994) ("Evidence of fingerprint . . . identification may be sufficient to support a conviction in a criminal prosecution [and] is sufficient to establish identity if the prints are found at the scene of the crime under such circumstances that they could only have been made at the time of commission of the crime.").

[11] 283 S.C. 129, 322 S.E.2d 450 (1984).

[12] 340 S.C. 597, 533 S.E.2d 572 (2000).

[13] The majority misapprehends the point made in this dissent, i.e., that the failure in Schrock and Martin was in connecting the evidence at the scene of the

of the defendant's fingerprint in the BMW, there was, as was mentioned above, evidence of a prior sexual relationship between the defendant and the victim, evidence that the defendant possessed a gun, and evidence from which the jury could infer that the defendant drove from Georgia or South Carolina to Tennessee in an automobile that he had no right to possess.

I do not overlook the cases cited by the defendant, State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000), and State v. Jones, 241 S.C. 271, 128 S.E.2d 114 (1962). They, too, may be distinguished from the one here.

In Mitchell, the supreme court held the State's proof that the defendant entered the house was insufficient where the only evidence the State offered was a fingerprint of the defendant lifted from a screen propped up against the house, a house that he had been in and around on at least three occasions prior to the burglary. Here, there is no evidence that the defendant was ever in or around the BMW before the victim disappeared.

In Jones, which the supreme court has cited only once—and that in a concurring and dissenting opinion—the supreme court held the State failed to prove that the defendants broke and entered an office building where the State did not connect the defendants to the evidence found at or near the scene, evidence that included a monogrammed towel from the hotel where the defendants were staying.[14] Here, fingerprint evidence together with the evidence

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crime to the particular defendant on trial. In the current appeal, that connection was made—no one disputed the accuracy of the fingerprint evidence.

[14] This is the way the supreme court characterized the evidence in Jones:

> The presence of the hand towel of the St. John Hotel at the scene of the crime is strongly relied upon by the State. The defendants, with Joe Roughton, had registered at the St. John Hotel on the day before the commission of the crime. An employee of the hotel testified that it was customary to place in rooms, such as rented by the defendants, two hand towels but could not testify as

to whether two had been placed in the room of the defendants. The officers testified that there was only one hand towel in their room when they were arrested. There was testimony that quite a number of hand towels are taken from the rooms of the hotel by guests without the knowledge of the management. The record shows that the hand towel came from the St. John Hotel, but fails to sufficiently connect its appearance at the scene of the crime with these defendants to form the basis of a conviction. The State did not show that the towel had ever been in the possession of the defendants, but only that it was a towel belonging to the hotel where the defendants were staying.

The tools found some distance from the Moody Oil Company were not connected with the defendants, nor does the testimony show their connection with the alleged crime. The tracks found in the vicinity of the scene of the crime were not compared with those of the defendants and the officers testified that they could not identify the tracks as having been made by any particular person. The fact that the defendants were seen, approximately six miles from the scene of the crime, walking along the railroad toward Charleston, and the conflicting statements as to their whereabouts on the night of the crime affords basis for disbelief of their statements as to where they were at the time and their activities during the night, but does not prove their presence at the scene in the absence of some substantial testimony connecting them with the crime. Likewise, the presence of the automobile of Roughton near the scene of the crime and the admissions by these defendants to the officers that they were with Roughton earlier in the night afford[ ] no sufficient basis for the presumption that they continued together until the crime was committed, in the absence of other connecting circumstances.

Jones, 241 S.C. at 277-78, 128 S.E.2d at 117-18.

that the defendant and the victim intimately knew each other and that the BMW was found near the home of the defendant's father before the discovery of the victim's body is sufficient in my mind to connect the defendant to the murder.

I would affirm the trial court's denial of the defendant's motion for a directed verdict of acquittal.