OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 25, 2001

ADVANCE SHEET NO. 23

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jay Walter Tate, Jr., Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
J. Derham Cole, Post-Conviction Judge

Opinion No. 25308
Heard May 22, 2001 - Filed June 25, 2001

AFFIRMED

Chief Attorney Daniel T. Stacey, of the 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, Jr., all of Columbia, and Assistant Attorney General Kathleen J. Hodges, of Greenville, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of post-conviction relief (PCR) to petitioner on an issue related to his indictments. We affirm.

FACTS

Petitioner was indicted for murder and assault and battery with intent to kill (ABIK). On both indictments, the caption reads, in pertinent part, as follows:

> At a Court of General Sessions, convened on _____ , the Grand Jurors of Cherokee County present upon their oath. . . .

Thus, the County information is filled in, but the date information for when the grand jury convened is not. Likewise, on the back of both indictments, the County information is supplied, but the Term information is blank. Under the section entitled "ACTION OF GRAND JURY," the indictments are both stamped "TRUE BILL" and signed by the Grand Jury Foreman.

> The body of the ABIK indictment reads:
>
> COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL
>
> That Jay Walter Tate Jr. did in Cherokee County on or about June 1, 1994, with malice aforethought commit an assault and battery upon one Joe Stanley Murray, Jr. with intent to kill the said victim.

The body of the murder indictment reads:

> COUNT ONE — MURDER

> That Jay Walter Tate Jr. did in Cherokee County on or about June 1, 1994, feloniously, wilfully and with malice aforethought kill one Brenda Tate by means of stabbing her and that the said victim died as a proximate result thereof.

Petitioner was tried for stabbing his wife, who died, and his stepson. The crimes were committed on June 1, 1994. The trial occurred on January 17 and 18, 1995. At the outset of the trial, the solicitor called the indictments by number[1] and indicated that each had been true billed. No objection was made to the indictments. A jury convicted petitioner of murder and assault and battery of a high and aggravated nature (ABHAN). The trial court sentenced him to life for murder and nine years concurrent for ABHAN. This Court dismissed his direct appeal for failure to file the Record on Appeal.

Petitioner filed for PCR. With the exception of the claim regarding his direct appeal, the PCR court denied petitioner relief. On petition for certiorari, this Court granted petitioner a belated appeal and affirmed his convictions based on the direct appeal issue raised. However, we also granted certiorari on the following issue:

> Are the indictments invalid because neither show the date on which the grand jury convened?

DISCUSSION

Petitioner argues that counsel was ineffective in failing to object to the indictments because the space for the date in the caption showing when the grand jury met is blank. Alternatively, petitioner contends that this omission deprived the trial court of subject matter jurisdiction because without the date on which the grand jury met, the indictments fail to establish that the grand jury timely acted on the charges.

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[1]The murder indictment was Docket No. 94-GS-11-928 and the ABIK indictment was Docket No. 94-GS-11-929.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). This Court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. E.g., Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Petitioner's counsel should have raised an objection to these indictments because the date information was blank. Nonetheless, we find there is no prejudice from counsel's conduct since the omissions in the indictments do not invalidate them. In other words, the defect in the caption did not affect the trial court's subject matter jurisdiction over this case.

The regularity of the proceedings of a court of general jurisdiction will be assumed in the absence of evidence to the contrary. Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). This Court has stated that "the caption of an indictment should show the place and date at which the court was held and the indictment found." State v. Griffin, 277 S.C. 193, 196, 285 S.E.2d 631, 633 (1981). However, any "omissions may be corrected by other parts of the indictment." Id.

Furthermore, the caption of an indictment is no part of the finding of the grand jury. State v. Lark, 64 S.C. 350, 42 S.E. 175 (1902). Instead, "[i]t is the body of the indictment rather than its caption that is important. If the body specifically states the essential elements of the crime and is otherwise free from defect, defect in the caption will not cause it to be invalid." State v. Marshall and Brown-Sidorowicz, P.A., 577 P.2d 803, 811 (Kan. Ct. App. 1978); see also 42 C.J.S. *Indictments and Information* § 28 (1991) ("Defects in a caption will not invalidate an indictment which is otherwise good and sufficient.").

In Griffin, the murder indictment did not have the blanks filled in for the date and county of the grand jury's convention. On the back of the indictment, however, the county and date were specified, and the grand jury

foreman's signature appeared below the words "True Bill." Thus, we ruled that the trial court correctly refused to quash the indictment. Griffin, supra.

In the instant case, the back of the indictment does not specify the date the grand jury met. Nevertheless, we find the record amply supports the conclusion that there was no irregularity in the proceedings. First, we note the 94- prefix on the docket numbers indicates that the grand jury met in 1994. See footnote 1, supra. In addition, we find the grand jury necessarily convened after the crime had been committed. See Lark, supra (noting absurdity of argument that an indictment was found before crime was committed). Moreover, the record clearly reflects that the indictments had been true billed by the time the case was called to trial in January 1995. Given that the regularity of the proceedings of a court of general jurisdiction will be assumed absent evidence to the contrary, Pringle, supra, we hold that the record in this case establishes the grand jury met and acted in a timely fashion.

Furthermore, we note there is no challenge to the sufficiency of the body of the indictments, and our own review confirms that the indictments properly state the counts of murder and ABIK. Therefore, the defects in the captions do not vitiate these indictments. See State v. Marshall and Brown-Sidorowicz, P.A., supra (a defect in the caption will not cause indictment to be invalid if the body specifically states the essential elements of the crime).

Despite the lack of information regarding the date on which the grand jury met, the indictments were substantively sufficient to confer subject matter jurisdiction. Accordingly, petitioner cannot show any prejudice from counsel's failure to object to the indictments.[2]

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[2]Although the parties in their briefs cite State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000), Anderson v. State, 338 S.C. 629, 527 S.E.2d 398 (Ct. App. 2000), and State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995), we find them inapposite to the issue at bar. These three cases all involved indictments which had not been stamped "True Bill." In Anderson and Grim, the matter was remanded to determine whether the indictments had, in fact, been

CONCLUSION

On petitioner's claim challenging the indictments, we affirm the PCR court's order denying relief.

AFFIRMED.

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

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true billed; in Bultron, the Court of Appeals held that the evidence from a hearing to quash the indictment showed that the indictment had been true billed. The failure on an indictment to reflect the action taken by the grand jury is completely distinguishable from the omission in the caption of the date on which the grand jury convened. We therefore reject petitioner's suggestion that this matter necessitates a remand.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Brannon, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Donald W. Beatty, Post-Conviction Judge

Opinion No. 25309
Submitted May 24, 2001 - Filed June 25, 2001

REMANDED

Joseph L. Savitz, III, 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 Allen Bullard, all of Columbia, and Assistant Attorney General Kathleen Hodges, of Greenville, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of Post-Conviction Relief (PCR) to Petitioner, John Brannon. We remand for an evidentiary hearing to ascertain whether Brannon knowingly and voluntarily withdrew his PCR application.

FACTS

Brannon pled guilty to armed robbery in 1994 and was sentenced to 21 years. He filed for PCR claiming, *inter alia*, he should have received a more lenient sentence. When Brannon advised the PCR court he wanted his sentenced reduced, the court advised it did not have authority to do so; counsel then indicated Brannon wished to withdraw his PCR application. The motion was granted without further discussion.

A written order was subsequently filed which, rather than simply permitting withdrawal of Brannon's application, dismissed the application with prejudice. Although the order of dismissal indicates Brannon was questioned to ensure the withdrawal of his application was free and voluntary, no such questioning took place on the record.

ISSUE

Did the PCR court err in dismissing Brannon's PCR application with prejudice without an inquiry to determine whether the withdrawal was knowing and voluntary?

DISCUSSION

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Holland v.

State, 322 S.C. 111, 470 S.E.2d 378 (1996).

Here, there is no evidence supporting the PCR court's ruling that the withdrawal of Brannon's PCR application was knowing and voluntary. Contrary to the language in the PCR court's order, there was no inquiry conducted to ascertain the voluntariness of the withdrawal, nor was Brannon advised his withdrawal would result in a dismissal with prejudice.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000); State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992)(PCR judge must, if a hearing is held, either appoint counsel for indigent defendants or obtain a knowing, voluntary waiver thereof); Carter v. State, 293 S.C. 528, 326 S.E.2d 20 (1987)(where PCR applicant is represented by his trial counsel at PCR, court must obtain a waiver of claims of ineffective assistance on the record).

We find the PCR court erred in failing to ascertain the voluntariness of Brannon's withdrawal prior to dismissing his application with prejudice. Roddy, supra. Accordingly, as there is no evidence supporting the PCR court's ruling, we remand for an evidentiary hearing on the matter. If his withdrawal was not knowing and voluntary, then Brannon may proceed with his PCR application.[1]

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

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[1] We have consistently held a PCR applicant is entiled to one full bite at the apple. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999); Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989); Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987); Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Alston, Petitioner,

v.

Black River Electric Cooperative, Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Sumter County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 25310
Heard March 6, 2001 - Filed June 25, 2001

REVERSED

Robert P. Wood, of Rogers Townsend & Thomas, PC, of Columbia, for petitioner.

Hoover C. Blanton and Pope D. Johnson, III, of McCutchen, Blanton, Rhodes & Johnson, of Columbia,

for respondent.

Wilburn Brewer, Jr., and Ashley C. Biggers, of Nexsen Pruet Jacobs & Pollard, LLC, of Columbia, and Robert E. Tyson, Jr., of Cayce, for Amicus Curiae, The Electric Cooperatives of South Carolina, Inc.

JUSTICE WALLER: This case presents the novel issue of whether members of an electric cooperative should be per se disqualified from serving on a jury when the cooperative is a party. Affirming the trial court, the Court of Appeals rejected a rule of per se disqualification. Alston v. Black River Elec. Coop., 338 S.C. 543, 527 S.E.2d 119 (Ct. App. 2000). We granted a writ of certiorari and now reverse.

FACTS

Petitioner Michael Alston sued respondent Black River Electric Cooperative ("Black River") for negligence in connection with a fire on his property. According to the complaint, Alston was building a house on his property which was served by Black River. Alston asked Black River to move a power line because it crossed over the house, but the power line was not moved. Alston alleged that during a storm on November 17, 1994, the splice in the power line failed, sending sparks to the roof of Alston's house and causing a fire which destroyed the house.

The case proceeded to trial. During jury voir dire, seven jurors on the twenty-juror strike list identified themselves as customers, i.e., members, of Black River. Two of the three jurors on the alternate strike list were Black River members. Alston requested that the trial court excuse these jurors for cause; however, the trial court denied the motion. Four of the twelve seated jurors were Black River members, as was the alternate juror.[1] The jury returned a

[1]The alternate juror did not participate in the deliberations.

verdict in favor of Black River.

Alston appealed. His sole argument on appeal was that he was denied a fair and impartial jury because of the trial court's refusal to excuse Black River members from the jury panel. A divided panel of the Court of Appeals affirmed. Alston, supra (Anderson, J., dissenting). Rejecting a rule of per se disqualification, the Court of Appeals instead decided that "the party attempting to disqualify the potential juror must demonstrate actual bias" and the determination of whether a potential juror is competent to serve should be made by the trial court "on a case-by-case basis." Id. at 549, 527 S.E.2d at 122.

ISSUE

To preserve the right to an impartial jury, should members of an electrical cooperative be per se disqualified from serving on a jury when the cooperative is a party to the lawsuit?

DISCUSSION

Under South Carolina law, litigants are guaranteed the right to an impartial jury. See S.C. Code Ann. § 14-7-1050 (Supp. 2000) ("in all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury."). If a potential juror has an interest in the lawsuit such that she is "not indifferent in the cause," the juror shall be deemed incompetent to serve on the jury. See S.C. Code Ann. § 14-7-1020 (Supp. 2000).

Under South Carolina's Rural Electric Cooperative Act, an electric cooperative is a non-profit membership corporation, and the excess revenues of the cooperative shall, unless otherwise determined by a vote of the members, "be distributed by the cooperative to its members as patronage refunds. . . ."

S.C. Code Ann. § 33-49-460 (1990).[2] Tort liability of the cooperative affects whether it has excess revenues to distribute. See Bush v. Aiken Elec. Coop., 226 S.C. 442, 447-48, 85 S.E.2d 716, 718 (1955) ("regardless of the nature of the surplus revenue, there is no surplus to refund until all liabilities, including those for tort, have been discharged"). Furthermore, we have explained that members of a cooperative "at once take the place of the **stockholders and customers** of privately owned utilities; **they are both owners and customers** . . . ." Bookhart v. Central Elec. Power Coop., 219 S.C. 414, 423, 65 S.E.2d 781, 784 (1951) (emphasis added).

In the instant case, the majority of the Court of Appeals stated that "the members of Black River are first and foremost customers of a utility. Their main concern is utility service, not profit." Alston, 338 S.C. at 548-49, 527 S.E.2d at 121. While this may be true, we reiterate that members are both customers **and** stockholders of an electric cooperative. Bookhart, 219 S.C. at 423, 65 S.E.2d at 784. As "owners," members of a cooperative clearly are entitled to excess revenues. See S.C. Code Ann. § 33-49-460. Since tort liability has a direct effect on whether the cooperative has any excess revenues to distribute to members, see Bush, supra, we find as a threshold matter that members of a cooperative have a pecuniary interest in a lawsuit involving that cooperative. The question then becomes whether, because of their pecuniary interest, we should presume that cooperative members are "not indifferent in the cause" thereby requiring their automatic disqualification from jury service. S.C. Code Ann. § 14-7-1020.

It is well-settled under South Carolina law that a stockholder in a corporation is incompetent to serve as a juror in a case in which the corporation is a party or has any pecuniary interest. Southern Bell Tel. & Tel. Co. v. Shepard, 262 S.C. 217, 222, 204 S.E.2d 11, 12 (1974) ("'That a stockholder in

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[2]Under Black River's bylaws, excess revenues are paid in the form of credits to a member's account. Black River Bylaws, art. VII, § 2 ("The Cooperative is obligated to pay by credits to a capital account for each patron all such amounts in excess of operating costs and expenses.").

a company which is a party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law.'") (quoting Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971)). Alston argues that members of an electric cooperative are similar to corporate shareholders and therefore should be per se disqualified from serving on a jury when the cooperative is a party. We agree.

It is beyond dispute that members of a cooperative are stockholders and more. Bookhart, 219 S.C. at 423, 65 S.E.2d at 784 (members are both stockholders and customers). Arguably then, the interest of a cooperative member in a lawsuit involving the cooperative is even stronger than that of a stockholder when the stockholder's corporation is a party to a lawsuit. We therefore hold that a member of a cooperative "is incompetent to serve as a juror in a case in which the [cooperative] is a party." Southern Bell, 262 S.C. at 221, 204 S.E.2d at 12.

To hold otherwise, in our opinion, would compromise the right to an impartial jury which is guaranteed to all litigants. See S.C. Code Ann. § 14-7-1050. Indeed, the Court of Appeals in the instant case, as well as in a previous case involving an electric cooperative, has acknowledged the dangers which inhere when the jury includes members of the cooperative. In Wall v. Keels, 331 S.C. 310, 321, 501 S.E.2d 754, 759 (Ct. App. 1998), the Court of Appeals held that the cooperative's closing argument "unfairly appealed to the economic self-interests of the cooperative members sitting on the jury." Additionally, the Court of Appeals noted in Wall "the inherent difficulty [the plaintiff] faced in selecting a neutral jury," as well as the "real potential for bias in cases involving local cooperatives." Id. at 322, 501 S.E.2d at 760. In the case at bar, the Court of Appeals again cautioned the trial court "to be aware of the potential for bias in cases involving cooperatives." Alston, 338 S.C. at 549-50, 527 S.E.2d at 122

The comments by the Court of Appeals in both this case and Wall are tantamount to an acknowledgment that cooperative members serving on a jury have an economic interest in the outcome of the trial and almost certainly will be biased in favor of the cooperative. Given this inherent risk of impartiality, we are persuaded that cooperative members should be per se

disqualified from jury service in such cases.

We are not unmindful of the potential burden on rural counties as a result of the adoption of a per se rule. There is the concern that in a rural county, many prospective jurors will be members of a cooperative. Although this is an important, and very real, concern, it should not prevent adoption of a per se disqualification rule. For example, in this case, only seven jurors on the twenty-juror strike list, two of the three jurors on the alternate strike list, and four of the twelve seated jurors were Black River members. These numbers indicate it would not be impossible to get a jury pool without members of the cooperative.

More importantly, however, it is fundamental that each party is entitled to a trial by an impartial jury. See S.C. Code Ann. § 14-7-1050; see also S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."). Our adoption of a per se rule is based on principles of fairness and jury impartiality, and these goals simply trump the goal of having a trial in the particular county served by the cooperative. If a lawsuit arises where it is truly impossible to strike a jury without cooperative members, then a change of venue would be justified based on fairness concerns. See S.C. Code Ann. § 15-7-100(2) (1976) (the court may change the place of trial when there is reason to believe that a fair and impartial trial cannot be had therein); see also Lancaster v. Fielder, 305 S.C. 418, 409 S.E.2d 375 (1991) (where the Court affirmed trial court's grant of motion for a change of venue based on the assertion that an impartial jury could not be obtained in Union County; the Court reasoned that change of venue may have been justified by jurors' relationships with defendant doctor and hospital).

Finally, the law of other jurisdictions supports the adoption of a per se rule. Among the seven states that have addressed this issue, the majority rule is per se disqualification. See generally Annotation, *Competency of Juror as Affected by his Membership in Co-operative Association Interested in the Case*,

69 A.L.R.3d 1296 (1976 & Supp. 2000).[3] Only North Dakota and Mississippi have rejected a per se rule.[4]

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[3]Five states have adopted a per se rule of disqualification for members of a cooperative. See Salt River Valley Water Users' Ass'n v. Berry, 250 P. 356 (Ariz. 1926) (treating members of association as ordinary corporate stockholders and upholding their disqualification from service on jury); Thompson v. Sawnee Elec. Membership Corp., 278 S.E.2d 143, 145 (Ga. Ct. App. 1981) ("It is clear that the members of an electric membership corporation are in the same position as the stockholders of a corporation . . . as regards their right to share in the net earnings of the business. Accordingly, we conclude that the members of an electric membership corporation are disqualified from service as jurors in the trial of a case in which damages are sought from the corporation.") (citation omitted); Ozark Border Elec. Coop. v. Stacy, 348 S.W.2d 586, 589 (Mo. Ct. App. 1961) (because members of a rural electric co-operative "'are both owners and customers' and 'at once take the place of the stockholders and customers of privately owned utilities,' it would seem to be logical and proper that . . . the same rule should be . . . applied as in cases involving stockholders of other corporations and thus their disqualification for such service should be declared.") (quoting Bookhart v. Central Elec. Power Coop., 219 S.C. at 423, 65 S.E.2d at 784); Peanut Growers' Exch. v. Bobbitt, 124 S.E. 625, 625 (N.C. 1924) (holding trial court erred in refusing to strike for cause a juror who was a member of the plaintiff association, notwithstanding juror's assertion that he could be fair and impartial, because as a member, juror was "necessarily interested in the litigation"); South Dakota v. Thomlinson, 100 N.W.2d 121 (S.D. 1960) (holding that a member of cooperative association had a "disqualifying interest" and should not have been allowed to sit on jury in prosecution for burglary of association's property).

[4]Garcia v. Coast Elec. Power Ass'n, 493 So.2d 380, 383-84 (Miss. 1986) (rejecting per se rule and stating that "[a]ny pecuniary gain the customer or member receives [from the cooperative] is practically nil"), modified on other grounds by Whittley v. City of Meridian, 530 So.2d 1341 (Miss. 1988); Cassady v. Souris River Tel. Coop., 520 N.W.2d 803, 806 (N.D. 1994) (noting its history of "not adopting blanket disqualifications for jury service," the court held that

Of the states that have adopted the per se rule, most of the courts have based the decision on the parallel between a corporate stockholder and a cooperative member. See Salt River Valley Water Users' Ass'n v. Berry, 250 P. 356 (Ariz. 1926); Thompson v. Sawnee Elec. Membership Corp., 278 S.E.2d 143 (Ga. Ct. App. 1981); Ozark Border Elec. Coop. v. Stacy, 348 S.W.2d 586 (Mo. Ct. App. 1961); Peanut Growers' Exch. v. Bobbitt, 124 S.E. 625 (N.C. 1924). For instance, the Missouri Court of Appeals specifically relied on this Court's statement in Bookhart that members of a cooperative "'at once take the place of the stockholders and customers of privately owned utilities; they are both owners and customers. . . .'" Ozark Border Elec. Coop. v. Stacy, 348 S.W.2d at 588 (quoting Bookhart, 219 S.C. at 423, 65 S.E.2d at 784). The Missouri court reasoned that it was "logical and proper" to apply the same rule of disqualification as is applied in cases involving corporate stockholders. Id. at 589. We, too, find it is both logical and proper to apply our own rule of Southern Bell to cases involving cooperative members. By doing so, jurors in cases where a cooperative is a litigant shall be selected "with no suspicion that their verdict would be colored by their personal interests." Salt River Valley Water Users' Ass'n v. Berry, 250 P. at 357.

CONCLUSION

In sum, we hold that when a cooperative is a party to a lawsuit, a cooperative member has an inherent pecuniary interest in the case. Thus, the bias of a cooperative member shall be presumed – just as a corporate stockholder's is when the corporation is a party. See Southern Bell, supra. Accordingly, to preserve a litigant's "right to demand a panel of twenty competent and impartial jurors from which to strike a jury," S.C. Code Ann. § 14-7-1050, we adopt a per se rule disqualifying cooperative members from serving on a jury when the cooperative is a party to the lawsuit. The Court of Appeals' opinion is therefore

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actual bias on the part of a prospective juror must be established).

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

G. Robert George and G. Robert George & Associates, Inc., Appellants,

v.

Margaret D. Fabri, Respondent.

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

Opinion No. 25311
Heard May 8, 2001 - Filed June 25, 2001

AFFIRMED

Charles J. Baker, III, of Buist, Moore, Smythe & McGee, P.A., of Charleston, for appellants.

Armand Derfner and D. Peters Wilborn, Jr., of Derfner & Wilborn, LLC, of Charleston, for respondent.

JUSTICE WALLER: Appellants G. Robert George (George) and G. Robert George and Associates, Inc. (GRGA) appeal from the grant of

summary judgment to respondent Margaret D. Fabri (Fabri). We affirm.

FACTS

This is a defamation case. In November 1997, Fabri and George opposed each other as candidates for the James Island District 12 seat on the Charleston City Council. In the first election, Fabri won by one vote. This election was set aside due to a poll worker's error. George won the second election. The allegations of defamation relate to statements Fabri made in between the two elections.

The statements were published on Fabri's website and in campaign materials. There are three categories of statements at issue: (1) those related to Dr. Henry Jordan and the South Carolina Citizens for Life's endorsement of George; (2) those related to a potential conflict of interest George would have as a council member due to his position as district engineer of the James Island Public Service District (JIPSD); and (3) those related to engineering contracts George and GRGA received from the JIPSD.

Dr. Henry Jordan Statements

South Carolina Citizens for Life is a pro-life organization, and LIFEPAC is its political action committee. In between the two November elections, LIFEPAC endorsed George in a letter addressed "Dear Pro-Life Voter."[1] Included in the printed letterhead were the names of those on the Advisory Board of South Carolina Citizens for Life. Henry Jordan, a surgeon from Anderson, was listed on the letterhead. Dr. Jordan, a member of the state Board of Education, had made state-wide news a few months before when, during a Board meeting, he advocated posting the Ten Commandments in all

[1]In addition to endorsing George as the "pro-life candidate" for city council, the endorsement includes statements about Fabri, for example characterizing her as "one of the most hardened pro-abortionists ever to run for public office."

public schools and said "Screw the Buddhists and kill the Muslims."

On the day before the election, in response to the endorsement, Fabri posted an item on her website which stated as follows in pertinent part:

> Anderson physician Dr. Henry Jordan, whose racist remarks including "Screw the Buddhists and kill the Muslims" made news around the nation earlier this year – and a group of right-wing radicals of which he is a member, this weekend endorsed GOP candidate G. Robert "Bobby" George in a mass mailing.
>
> The mailing . . . is the first hard evidence of George's connections to Jordan and the radical right throughout South Carolina. . . .
>
> It appears that in his desperation not to lose again, Mr. George has shown his true nature by asking for help from Jordan and his radical organization. We think this settles once and for all the character issues that we had raised at the beginning of the campaign, and proves that Mr. George does in fact espouse dangerously radical ideas about society and supports governmental regulation of our citizen's [sic] most intimate personal lives. Can it be that Mr. George also supports Dr. Jordan's supremacist views and his support for government restrictions on religious freedoms? We believe it is now clear that George would be a danger to the community, and all the residents of the City of Charleston, if he were ever elected to city council.
>
> We believe that Mr. George and his handlers have raised these issues about "reproductive rights" and Christian superiority as a diversion from the real legitimate issues of the campaign. . . .

George alleged in his complaint that these statements implied that he is racist and holds supremacist views.

Fabri testified in her deposition that after reading the endorsement letter and seeing Dr. Jordan's name on the letterhead, it was clear to her that Dr. Jordan was endorsing George. According to Fabri, Dr. Jordan's remarks about Buddhists and Muslims could be perceived as being supremacist and racist. She stated, however, that she did not know what George thought of Dr. Jordan's comments, and did not know if George is a racist. Nonetheless, in her opinion, it is reasonable to assume that a candidate who is endorsed by an organization with Dr. Jordan as a member could be considered as sharing similar beliefs as Dr. Jordan. Furthermore, Fabri testified that George must have had some input into getting and accepting the endorsement.

Steve Abrams, Fabri's public relations consultant,[2] testified that he viewed Dr. Jordan's name on the letterhead as indicative of his active involvement in the organization. Abrams stated that since Dr. Jordan's remarks were about Buddhists and Muslims "who probably aren't Caucasians," a racial issue could be implied. In addition, Abrams testified that candidates are never "spontaneously endorsed" but instead have to "do something" to get endorsed.[3] He further stated that the intention of the statement was to show that George essentially accepted an endorsement from Dr. Jordan and that this was representative of George's "true nature."

Conflict of Interest Statements

Fabri made statements related to George's position as district engineer of the JIPSD and the fact that a seat on city council would result in a

[2]Abrams created the website material, but Fabri reviewed and approved all material put on her website.

[3]Indeed, George filled out a survey for South Carolina Citizens for Life indicating his views on abortion. The fax cover sheet to this "voter information questionnaire" contained the letterhead with Dr. Jordan's name on it.

conflict of interest for him:

> Candidate G. Robert George is a paid engineering consultant to the James Island PSD. Since the City of Charleston CPW and the James Island PSD have overlapping jurisdictions that have resulted in nasty legal battles, and since the CPW is answerable to the city council, Mr. George will have a conflict of interest should he be elected to city council and retain his PSD contracts. We think Mr. George owes the voters an explanation of what actions he will take to avoid a conflict, such as stepping down as a consultant to the PSD. . . .

In addition, Fabri published the following statement on her website:

> In an attempt to disclose the details of Mr. George's involvement with the PSD, we submitted a freedom of information request to the PSD . . . . We asked to see all contracts and a list of payments made to Mr. George and his company. . . .
>
> Mr. George (and his company) were paid $538,715.06 over the past 5 years
>
> Although Mr. George now says that he will not do any further consulting with the PSD if elected, he entered into a new contract with the PSD just months ago, after he announced that he was running for council, that requires him to serve as "District Engineer" through the year 2000!
>
> We feel this is proof positive that he has an unresolvable ethical conflict. . . .
>
> As a city councilman, he would have a fiduciary responsibility to the citizens and taxpayers of the city which

> would be best served by annexing the rest of James Island and consolidating the cost of the CPW and PSD.
>
> Anything that would dismantle the PSD would cause Mr. George to lose his $100,000 per year salary from the PSD projects (based on the last 5 years actual payments), so he's got a direct financial interest that would run contrary to his fiduciary responsibility as a councilman.
>
> Hence, the reason he's so defensive about this matter.

Fabri testified it was her belief that since George had an economic interest in the "viability" of the JIPSD and "the stated objective of the City of Charleston was to annex [the JISPD] out of existence," then his election to the city council could constitute a conflict of interest.

After the election, George resigned as the JIPSD's district engineer. According to George, he resigned to fulfill a campaign promise, and not because there was any ethical conflict. George and GRGA continue to perform other engineering services for the JIPSD; however, pursuant to a State Ethics Commission opinion, George does not vote on any matters that directly affect GRGA's economic interests.

Engineering Contracts Statements

Fabri published the following statement regarding engineering contracts George received from the JIPSD:

> The Truth about Bob George. . . .
>
> Bob George says he's a Conservative, and he wants to protect your tax dollars. . .
> But in the past 5 years he has received over HALF A MILLION of YOUR TAX DOLLARS doing consulting work for the James Island Public Service District, an agency that he

> himself used to chair – and his father in law used to be on as well.
>
> These contracts required no competitive bidding, so there was no one looking out for the James Island Taxpayers. They look like "sweetheart" insider contracts to us – nepotism at its worst. Not exactly the type of behavior you would have expected from a "Conservative" Republican.
>
> Now he wants to be on the Charleston City Council so he can do to the City Taxpayers what he's already doing to the rest of the taxpayers on James Island . . . use his inside contacts to land huge consulting contracts at taxpayer expense.
> . . .

George alleged that these statements were defamatory because the consulting contracts were awarded after a "public competitive selection process and were not the result of insider dealing or nepotism."

George was an elected JIPSD commissioner from 1977 to 1980, and he had served as the chair of the JIPSD. His father-in-law, George Witham, served as a commissioner in the 1980's. He was not related to any of the commissioners who served on the JIPSD from 1992 through 1997.

Fabri testified that she had been told that George "appeared to be getting all the contracts" with the JIPSD. She stated that a JIPSD commissioner told her that in the 1980's George's father-in-law wanted the JIPSD to hire George as district engineer, and that George was upset when he was not selected. Moreover, Fabri stated that loyalty to George's father-in-law by those who had served with him on JIPSD extended to support for George. In her opinion, this was nepotism.

Regarding the statement that the contracts did not require "competitive bidding," Fabri testified she based that on conversations with two commissioners and on Abrams' conversation with Robert Behre, a newspaper

reporter. Abrams testified that Behre described the position of district engineer as being a personal-service contract, and so the engineering contracts related to George's position as district engineer did not require bidding. Behre testified that in his discussion with Abrams he said engineering contracts would go through a "competitive process," but that there would not be a "bid *per se*." Abrams also stated that he did not know if, in fact, George had received the engineering contracts based on nepotism or insider dealing.

The trial court granted summary judgment on all claims[4] based on the lack of evidence of Fabri's "actual malice" in making the statements. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Appellants raise four issues on appeal.

ISSUES

1. What is the appropriate standard for summary judgment on the issue of actual malice?

2. Did the trial court err in affording broad protection to Fabri's speech because it was in the context of a political election?

3. Did the trial court err in finding insufficient evidence of actual malice and granting summary judgment to Fabri?

4. Did the trial court err in applying the actual malice standard to GRGA's claims?

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[4]The claims in the complaint were defamation, trade disparagement, and intentional infliction of emotional distress. Regarding the intentional infliction of emotional distress claim, the trial court relied on Hustler Magazine v. Falwell, 485 U.S. 46 (1988), which held that a public figure making a claim for emotional distress due to a defamatory publication must meet the New York Times actual malice standard in order to recover.

1. SUMMARY JUDGMENT STANDARD FOR ACTUAL MALICE

Appellants argue that the trial court erroneously applied a clear and convincing standard for summary judgment. According to appellants, it was error for the trial court to employ this "heightened" standard. We disagree.[5]

The constitutional guarantee of free speech requires that a public official or public figure must prove a defamatory statement was made "with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 279-80; see also Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending New York Times standard of actual malice to public figures); Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899 (2000). At trial, the plaintiff must prove actual malice by clear and convincing evidence. E.g., New York Times, supra; Elder, supra.

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP (emphasis added). On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party. E.g., Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994);

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[5]Respondent argues that this issue is unpreserved because the trial court's order does not expressly state which standard it applied on summary judgment. Alternatively, respondent asserts that the trial court found no evidence of actual malice, and thus, the standard is immaterial. We disagree. First, the trial court found no evidence of actual malice to withstand summary judgment. Second, since an appellate court reviews the granting of summary judgment under the same standard applied by the trial court, it is necessary for this Court to establish the appropriate standard. See Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 114, 410 S.E.2d 537, 545 (1991).

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose as a matter of law." Main v. Corley, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (emphasis added); see also Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (standard for summary judgment "mirrors" standard for directed verdict).

In McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980), a defamation case, this Court affirmed summary judgment finding no evidence of actual malice. We stated in McClain:

> The presence or absence of actual malice is a constitutional issue and "where a publication is protected by the New York Times immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case." . . . Unless the trial court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant.

Id. at 284, 270 S.E.2d at 125 (citations omitted). Our opinion in McClain did not, however, expressly state the standard by which actual malice should be assessed on summary judgment.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the United States Supreme Court addressed this precise issue under Rule 56(c) of the federal rules of civil procedure[6] and held that the clear and convincing evidence

[6]South Carolina's Rule 56(c) is identical to its federal counterpart.

standard must be considered by the trial court when ruling on a summary judgment motion involving the issue of actual malice. The Supreme Court stated that the inquiry under Rule 56(c) "is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. Therefore, the Liberty Lobby Court reasoned that "the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." Id. at 252. Specifically, the Supreme Court ruled that where the dispute concerns New York Times actual malice, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Id. at 255-56.

Appellants argue that Liberty Lobby does not apply to South Carolina because it was ruling on federal procedure, rather than a constitutional ruling. See Moffatt v. Brown, 751 P.2d 939 (Alaska 1988). While Liberty Lobby may not be binding, we find the logic of the case persuasive. Like the federal rule, South Carolina's Rule 56(c) requires that summary judgment be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In our opinion, the trial court would only be able to make this evaluation if it considered the substantive evidentiary standard applicable at a trial on the merits. See Liberty Lobby, 477 U.S. at 252 (the inquiry on a motion for summary judgment "necessarily implicates" the substantive evidentiary standard required at trial). As aptly stated in Liberty Lobby: "It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." Id. at 254-55.

Furthermore, it is implicit in McClain that the appropriate inquiry at summary judgment on the issue of actual malice relates to what the plaintiff must prove at trial. See McClain, 275 S.C. at 284, 270 S.E.2d at 125 ("Unless

the trial court finds . . . that the plaintiff can prove actual malice, it should grant summary judgment for the defendant") (emphasis added). Thus, we hold that the appropriate standard at the summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard.

2. FIRST AMENDMENT PROTECTION OF SPEECH IN A POLITICAL ELECTION

Appellants argue that the trial court erred in stating that Fabri's statements were entitled to the broadest protection because the parties were in a political contest. Essentially, appellants contend that the trial court improperly gave the speech at issue "special protection." We disagree.

The considerations which led to the formulation of the New York Times rule "apply with special force to the case of the candidate." Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971). Additionally, the Supreme Court has explained that the New York Times rule "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant." Garrison v. Louisiana, 379 U.S. 64, 77 (1964). Indeed, "[t]here is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the New York Times rule.'" Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989) (quoting Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971)).

In Harte-Hanks, the Supreme Court further discussed the basis for the rule as follows:

> As Madison observed in 1800, just nine years after ratification of the First Amendment:
>
> > "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free

> and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 J. Elliot, Debates on the Federal Constitution 575 (1861).
>
> This value must be protected with special vigilance. When a candidate enters the political arena, he or she "must expect that the debate will sometimes be rough and personal," . . . and cannot "'cry Foul!' when an opponent or an industrious reporter attempts to demonstrate" that he or she lacks the "sterling integrity" trumpeted in campaign literature and speeches. . . . Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.

Id. at 687 (emphasis added; citations and footnote omitted). Nonetheless, despite the special value of political speech, the Supreme Court has stressed that defamatory political speech is not afforded absolute immunity, and instead is measured by the actual malice standard. Id. at 688.

In the instant case, the trial court properly noted the context in which Fabri's statements were made – a political election. Essentially, the trial court stated that, in this context, free speech is particularly important. We find the trial court's statements are amply supported by Supreme Court precedent. See id.; Monitor Patriot, supra; Garrison, supra. However, the basis of the trial court's decision clearly – and correctly – rested on an application of the New York Times actual malice rule. Accordingly, appellants' argument that the trial court improperly gave special protection to Fabri's statements is meritless.

3. INSUFFICIENT EVIDENCE OF ACTUAL MALICE

Appellants argue there is ample evidence in the record of Fabri's actual malice and therefore the trial court erred in granting summary judgment. We disagree.[7]

As stated above, a public figure must show, by clear and convincing evidence, that defamatory statements were made with knowledge that they were false or with reckless disregard of whether they were false or not. New York Times, supra; Curtis Publishing, supra; Elder, supra. Initially, we note that "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." Harte-Hanks, 491 U.S. at 666. Moreover, the reckless conduct contemplated by the New York Times standard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant v. Thompson, 390 U.S. 727, 731 (1968); see also Elder, 341 S.C. at 114, 533 S.E.2d at 902 ('reckless disregard' requires more than a departure from reasonably prudent conduct).

Instead, actual malice is governed by a subjective standard which tests the defendant's good faith belief in the truth of her statements. Id. There must be sufficient evidence to conclude either that the defendant made the statements with a "high degree of awareness of . . . probable falsity," Garrison, 379 U.S. at 74, or that the defendant "in fact entertained serious doubts as to the truth of his publication." St. Amant, 390 U.S. at 731.

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[7]Because summary judgment was granted solely on the issue of actual malice, we assume *arguendo* that the statements were false and defamatory. Although Fabri raises as an additional sustaining ground that her statements are not defamatory, we decline to address this argument. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (an appellate court need not discuss respondent's additional sustaining grounds when its affirmance is grounded on an issue addressed by the lower court.)

The actual malice standard is premised on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times, 376 U.S. at 270. Indeed, "[a] statement made in the heat of an election contest supplies the paradigm for that commitment to free debate." Lynch v. New Jersey Educ. Ass'n, 735 A.2d 1129 (N.J. 1999).[8]

Dr. Jordan Statements

Appellants argue that because Fabri testified she did not know whether George was a racist, there is proof that she entertained serious doubts about the truth of her statements. However, the mere fact that Fabri stated she did not know how George felt about Dr. Jordan's controversial comments or whether George was a racist is not evidence that she entertained "serious doubts" about the truth of the statements she made. St. Amant, 390 U.S. at 731.

On the contrary, even viewing the evidence in the light most favorable to appellants, we find Fabri's testimony established the following regarding her subjective beliefs about the endorsement from South Carolina Citizens for Life/LIFEPAC: (1) that George had in some way requested, and subsequently, accepted the endorsement; (2) that Dr. Jordan, as a member of the advisory board of South Carolina Citizens for Life, was endorsing George; (3) that Dr. Jordan's controversial comments could be viewed as supremacist and racist; and (4) that it was reasonable to link George, as someone who was endorsed by an organization with Dr. Jordan as a member, to the remarks made by Dr. Jordan. Moreover, Fabri and Abrams both testified that they intended to link George to Dr. Jordan because his name appeared on the letterhead of the LIFEPAC endorsement letter.

We hold appellants could not show, by clear and convincing evidence, that Fabri in fact entertained serious doubts as to the truth of the

[8]See also the authorities discussed in Issue 2, supra.

statements she made regarding Dr. Jordan. St. Amant, supra. Indeed, the evidence leads only to one reasonable conclusion, i.e., that Fabri subjectively believed in the truth of her statements, and their implications, when she published them on her website. Cf. Elder, 341 S.C. at 118, 533 S.E.2d at 904 (where editor testified that he believed information in statement from anonymous source could be true, the Court could not conclude he "purposefully avoided the truth" in printing statement).

Moreover, we agree with the trial court that Fabri simply utilized a common campaign practice – "linking a candidate to his supporters." Cf. Lynch, 735 A.2d at 1141 (where the New Jersey Supreme Court held no actual malice in the publication of a political advertisement linking incumbent state senator candidate to "mobsters" and stating "You can tell a lot about a person by the company he keeps."). In Lynch, the defendants relied on previously published information that the state senator candidate had mobsters for clients and business partners. The New Jersey Supreme Court affirmed summary judgment, stating as follows: "Eager, thoughtless, and negligent defendants may have been, but the record does not reflect that they published with serious doubts about the truth of the statements concerning Senator Lynch." Id.

Similarly, in the instant case, Fabri relied on the endorsement letter itself and on Dr. Jordan's controversial comments in making her statement about George. On the day before the second election, Fabri was doubtless "eager" to win, and possibly was thoughtless and negligent in making the statement; but, the evidence does not create a genuine issue of fact that she published the statement with serious doubts as to its truth. While we certainly do not condone candidates making accusations in a negligent manner, mere negligence is insufficient as a matter of law to prove actual malice. See St. Amant, 390 U.S. at 731 (actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing"); Elder, 341 S.C. at 114, 533 S.E.2d at 902 ('reckless disregard' requires more than a departure from reasonably prudent conduct).

Accordingly, we hold the trial court correctly granted summary judgment as to these statements.

Conflict of Interest Statements

Appellants argue that Fabri's motive, her lack of investigation of state ethics laws, and her failure to obtain information from the State Ethics Commission are all evidence of her actual malice in accusing George of having an unresolvable conflict of interest if he was elected to the city council. We disagree.

The failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. Elder, 341 S.C. at 114, 533 S.E.2d at 902 (citing St. Amant, supra). However, actual malice may be present where the defendant fails to investigate and there are obvious reasons to doubt the veracity of the statement or informant. Id. Furthermore, "[a]lthough it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry, courts should be careful not to place too much reliance on such factors." Elder, 341 S.C. at 117, 533 S.E.2d at 904 (citing Harte-Hanks, supra).

In this case, Fabri's deposition testimony clearly indicates that she subjectively believed that George would have a conflict of interest if he was elected to city council. According to Fabri, because George was district engineer for the JIPSD, he had an economic interest in the viability of the JIPSD. Fabri further believed that the City of Charleston wanted to annex JIPSD "out of existence," and therefore George's interest in the JIPSD would be in conflict with the city's interest. Based on this testimony, appellants could not show, by clear and convincing evidence, that Fabri in fact entertained serious doubts as to the truth of the statement, or that she made the statement with a high degree of awareness of its probable falsity. Garrison, supra; St. Amant, supra.[9]

[9]Moreover, appellants' claims regarding Fabri's lack of investigation into state ethics laws are unavailing. See Elder, supra (failure to investigate before publishing is generally insufficient to establish reckless disregard). Indeed, based on the State Ethics Commission opinion that George later received, if

We hold the trial court properly decided that, as to these statements, there was insufficient evidence of actual malice to withstand summary judgment.

Engineering Contracts Statements

Appellants maintain that, because Fabri admits she did not know of any JIPSD commissioner who showed George favoritism, Fabri acted in reckless disregard when she made statements that George received "no-bid" contracts through nepotism and insider dealing. We disagree.

Once again, simply because Fabri admits that she does not know that George received engineering contracts based on improper influence does not create a genuine issue of material fact that she subjectively had serious doubts about her statements. Furthermore, her testimony belies that conclusion. Fabri believed that lingering loyalty to George's father-in-law who had previously served on the JIPSD influenced the JIPSD commissioners to support George. Additionally, Fabri recounted her sources for her statement that George was not required to "competitively bid" for the engineering contracts. Given this testimony, there is insufficient evidence that Fabri subjectively made these statements with a high degree of awareness of their probable falsity, or that she entertained serious doubts as to the truth of the publication. Garrison, supra; St. Amant, supra.

Appellants point out Fabri's lack of investigation into the JIPSD's method of selection of engineers, and the fact that this selection is competitive, although not in the form of competitive bidding. They contend that Fabri had "no knowledge whatsoever" about how the JIPSD made its selection, and

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Fabri had investigated, she would have discovered that George would not have been able to vote on any matters that directly affected GRGA's economic interests. While this may have negated her claim that George's alleged conflict of interest was "unresolvable," it certainly supports that there were no obvious reasons for her to doubt the truth of her statements.

therefore, she made her statements with actual malice.

Given that appellants' argument simply amounts to an allegation that Fabri failed to investigate, we find it unpersuasive. St. Amant, supra (reckless disregard is not measured by whether a reasonably prudent man would have investigated before publishing). Moreover, while appellants attempt to characterize Fabri's lack of investigation as tantamount to an avoidance of the truth, we disagree that Fabri did no investigation, or that Fabri purposely avoided the truth. Elder, supra (lack of investigation is probative on actual malice only if there are also obvious reasons to doubt truth of the informant). Finally, Fabri's testimony indicates she subjectively believed in her statements; therefore, she could not be said to have purposely avoided the truth. Cf. id. (where editor testified that he believed information in statement from anonymous source could be true, the Court could not conclude he "purposefully avoided the truth" in printing statement).

Accordingly, summary judgment was properly granted as to these statements.

4. APPLICATION OF ACTUAL MALICE STANDARD TO GRGA's CLAIMS

Appellants argue that the trial court erred in granting summary judgment as to the claims made by GRGA, George's engineering consulting firm. Appellants contend that GRGA is not a public figure and therefore, the actual malice standard was improperly applied by the trial court. We disagree.

According to George's affidavit, GRGA is a consulting engineering, planning, and surveying firm he founded in 1977. George is vice-president of the company and has always been its chief executive officer and principal engineer. Furthermore, George stated in his affidavit the following: "From the beginning of the firm until now, the reputation of GRGA for experience, ability, quality, ethics, and professionalism has been associated with my own reputation."

In addition, George's campaign materials included the following under the heading "WHO IS BOB GEORGE?":

> Bob is founder and principle [sic] engineer of G. Robert George & Associates, Inc., a local consulting engineering firm celebrating its 20th year serving the low country and the southeast. He is a Registered Professional Engineer in South Carolina, North Carolina, Georgia and Florida and a member of several national, state and local engineering societies.

If an individual "voluntarily injects himself or is drawn into a particular public controversy," he "becomes a public figure for a limited range of issues . . . and assume[s] special prominence in the resolution of public questions." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). In determining whether a plaintiff is a limited-purpose public figure, the court should look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Id. at 352.[10]

Under the circumstances of this case, GRGA was properly considered a public figure. In his campaign materials, George identified himself as the founder and principal engineer of GRGA. He stated that his own reputation is basically intertwined with GRGA's reputation for experience,

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[10]We recognize that courts have employed various particularized tests to determine whether a corporate plaintiff in a defamation action is a public figure. See, e.g., Blue Ridge Bank v. Vericbanc, Inc., 866 F.2d 681 (4th Cir. 1989); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980); Jadwin v. Minneapolis Star and Tribune Co., 367 N.W.2d 476 (Minn. 1985). However, given the purely political nature of the speech in this case, as opposed to the commercial nature of the speech involved in most cases with corporate defamation plaintiffs, we feel it is appropriate to look no further than the general test for public figure status as set forth by the Supreme Court in Gertz.

ability, quality, ethics, and professionalism. We find that GRGA voluntarily injected itself into this campaign – or at the very least was fairly drawn into it – and thereby assumed the special prominence of a public figure. See id.

Therefore, GRGA achieved limited-purpose public figure status and its claims are subject to the New York Times actual malice standard. Accordingly, the trial court appropriately granted summary judgment as to GRGA's independent claims of defamation.

CONCLUSION

In a political campaign, the guarantee of free speech must be protected with special vigilance to ensure the optimal functioning of the democratic process. Harte-Hanks, 491 U.S. at 687. Therefore, speech about a public figure is properly measured against the actual malice rule which offers substantial protection to the critic of a public figure. Nonetheless, this qualified privilege ought not encourage political candidates to act irresponsibly while campaigning – even in a hotly contested race. We stress that our decision should not be taken as a signal that "All is fair" in politics.

This was, however, a proper case for summary judgment, and the trial court correctly granted summary judgment to Fabri on all claims. Thus, the decision below is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eastern J. Ezell, Respondent,

v.

The State, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Dorchester County
David F. McInnis, Trial Judge
Costa M. Pleicones, Post-Conviction Judge

Opinion No. 25312
Heard May 8, 2001 - Filed June 25, 2001

AFFIRMED AS MODIFIED

Senior Assistant Appellate Defender Wanda H. Haile, of the South Carolina Office of Appellate Defense, of Columbia, for respondent.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, Assistant Attorney General Howard L. Steinberg, and Assistant

Attorney General William Bryan Dukes; all of Columbia, for petitioner.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine the appropriate remedy for the ineffective assistance of appellate counsel. We find, under the circumstances of this case, the appropriate remedy is a new trial.

FACTS

Respondent was convicted of distribution of crack and distribution of crack within proximity of a school. He was sentenced to imprisonment for twelve years and ten years, respectively, the sentences to run concurrently. His convictions and sentences were affirmed on direct appeal. State v. Ezell, Op. No. 97-UP-429 (S.C. Ct. App. filed July 17, 1997).

After a hearing on his application for post-conviction relief (PCR), respondent was granted a new direct appeal on the ground of ineffective assistance of appellate counsel.[1]

ISSUES

I. Was appellate counsel ineffective?

II. What is the appropriate remedy for ineffective assistance of appellate counsel?

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[1] Respondent's trial counsel served as his appellate counsel.

DISCUSSION

Ineffectiveness of Appellate Counsel

This case involved an undercover drug transaction in which petitioner was arrested more than three months after the transaction. A confidential informant (CI), accompanied by Officer Blake, an undercover officer, was wearing a wire when he allegedly purchased crack cocaine from respondent. On the audio tape, the CI identified respondent by name prior to, during, and after the transaction. The CI could not be located and did not testify at trial. The entire tape of the transaction was admitted into evidence and played for the jury at trial over counsel's objection.

The only other evidence presented at trial identifying respondent as the person who sold the crack was through the testimony of two police officers. Officer Blake testified respondent was at the car making the deal for less than two minutes and that he did not have "constant facial contact" with respondent the entire time. Although he identified respondent as the individual from whom the crack was purchased, Blake admitted he did not know what the individual was wearing at the time of the buy, nor did he recall his distinctive hairstyle. According to Blake's testimony, the voice on the tape of the transaction was that of respondent.

Deputy Sherrod, who was in a nearby car listening to the tape of the transaction, testified he knew respondent and recognized his voice on the tape. Sherrod stated he could not see what occurred from his vantage point.

On appeal, respondent argued the trial judge erroneously admitted the tape of the drug transaction into evidence since it contained the CI's hearsay testimony identifying respondent as the individual who sold him the crack and denied respondent his right to confront the CI. The Court of Appeals found respondent failed to provide a sufficient record for review since the

audio tape was not included in the Record on Appeal. State v. Ezell, supra.[2]

The PCR court found appellate counsel to be ineffective because the omission of the tape from the Record denied respondent a direct appeal. As a result, the PCR court found respondent was entitled to the remedy of filing a new direct appeal addressing this issue.

After listening to the audio tape, we believe the result of respondent's appeal would have been different had appellate counsel provided the Court of Appeals with the audio tape of the drug transaction. See Southerland v. State, 337 S.C. 610, 617, 524 S.E.2d 833, 836 (1999) (Southerland "met his burden of demonstrating both that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different").

Since the tape contained out-of-court testimony identifying respondent as the person who sold the drugs to the CI and the CI was not available for respondent to cross-examine, the portions of the tape in which the CI identified respondent were inadmissible hearsay. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999); Rules 801(c) and 802, SCRE (hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is inadmissible unless an exception to the rule against hearsay applies).

Because we do not find evidence of respondent's guilt overwhelming, the admission of the evidence is not harmless. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) (refusing to find error harmless where the evidence of

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[2] Two transcripts of the tape, which differ in that one does not indicate the CI identified respondent by name, were presented at a suppression hearing and were not submitted to the jury. Both transcripts, but not the actual tape, were presented to the Court of Appeals. The court, in its opinion, stated, "As for the tape itself, because [respondent] has failed to provide the recording in the record on appeal, we are unable to determine whether the informant did in fact make references to [respondent]."

guilt was not overwhelming). Absent the CI's statements, the only other information that was presented to the jury was the belief of Deputy Sherrod, who could not see the person selling the drugs, that the voice on the tape was that of respondent, and Officer Blake's weak testimony identifying respondent as the seller. Therefore, we believe respondent would have been granted a new trial had the tape been presented to the Court of Appeals.

Appropriate Remedy

The determination of the appropriate remedy is controlled by Southerland v. State, supra. This Court, in Southerland, stated the following:

> A defendant is constitutionally entitled to the effective assistance of appellate counsel. . . . First, the burden of proof is on petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the **proceeding** would have been different.

Southerland, 337 S.C. at 615-616, 524 S.E.2d at 836 (citations omitted) (emphasis in original). Here, we conclude the result of respondent's appeal would have been different had counsel submitted the audio tape to the Court of Appeals. Therefore, based on Southerland, the appropriate remedy for the ineffective assistance of appellate counsel on the particular facts of this case is to grant respondent a new trial.[3]

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[3] See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

CONCLUSION

Since respondent has met his burden of demonstrating both that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different, he is entitled to a new trial.

AFFIRMED AS MODIFIED.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice James E. Lockemy, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Individually, and as Guardian for his minor child, James Doe and Jason Doe, Individually and on behalf of all others similarly situated, Respondents,

v.

Merle Batson, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25313
Heard April 4, 2001 - Filed June 25, 2001

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Edward R. Cole and Robert E. Davis, of The Ward Law Firm, of Spartanburg, for petitioner.

J. David Flowers and William A. Jordan, of Greenville, for respondents.

JUSTICE BURNETT: Petitioner Merle Batson (Batson) appeals from an opinion of the Court of Appeals reversing the trial court's order granting summary judgment in her favor. Doe v. Batson, 338 S.C. 291, 525 S.E.2d 909 (Ct. App. 1999). We affirm in part, vacate in part, and remand to the trial court for further proceedings.

FACTS

Respondent John Doe brought this putative class action on behalf of his minor sons and other unidentified boys (collectively "Doe") who were sexually abused by Donald Batson (Donald), a youth minister at Brushy Creek Baptist Church. Donald pled guilty to seventeen felony counts of criminal sexual conduct and was incarcerated at the time the summary judgment motion was heard.

Doe's complaint against Batson alleged that Donald lived in Batson's home from 1991 to 1995, during which time he brought boys between the ages of ten and eighteen to Batson's home for the purpose of molesting them. Doe alleged that Batson was home on numerous of these occasions and that she knew, or should have known, that her son had young boys in his bed and had deviant sexual propensities. Doe alleged that Batson's failure to warn the boys' parents was negligent, willful, and wanton, demonstrated a reckless disregard for the rights, safety, and well-being of the young boys who were abused by her son, and that but for Batson's failure to warn the boys and their parents, the boys would not have been molested. The trial court granted Batson's motion for summary judgment under Rule 56, SCRCP, and the Court of Appeals reversed. Doe v. Batson, 338 S.C. 291, 525 S.E.2d 909 (Ct. App. 1999). Batson's petition raises two issues for this

Court:

> I. Did the Court of Appeals err in holding the trial court's grant of summary judgment was premature?
>
> II. Did the Court of Appeals err in holding a parent of an adult child living in the parent's home may have a duty to warn third parties of the dangerous propensities of the adult child?

DISCUSSION

I. Summary Judgment

Batson argues the Court of Appeals erred when it held the trial court abused its discretion in prematurely granting summary judgment. See Black v. Lexington School Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997) (applying abuse of discretion standard to trial court's rulings pursuant to Rule 56, SCRCP). We disagree.

A. Rule 56 Affidavits

Batson moved for summary judgment under Rule 56, SCRCP, on February 23, 1998. She attached to her motion an affidavit stating that Donald was born on August 6, 1964 and was therefore an adult of at least 27 years of age at the time the complained of acts allegedly began in 1991, that Donald resided in her home from and after November of 1993, and that she did not know, nor did she have reason to believe or know, any such acts were being committed, including any acts allegedly committed in her home.

The trial court conducted the Rule 56 motion hearing via telephone conference call on May 7, 1998. The court initially stated the hearing was on Batson's motion to dismiss. Batson's counsel immediately corrected the judge and reminded him the court had heard and denied Batson's Rule 12(b)(6) motion several months earlier. Doe's attorney did not

object to proceeding with the Rule 56 motion. The basis for Batson's summary judgment motion was that Donald was an adult at the time the abuse took place and his mother had "no ability or duty to control his actions."

Doe opposed the motion, arguing first that it was premature, because he had several depositions scheduled the following week, including Donald's, and he had not yet had the opportunity to depose Batson. Second, Doe argued that Donald's age was irrelevant because Batson's duty was rooted in premises liability.

The trial judge asked whether Doe had filed any affidavits in opposition to the summary judgment motion. Doe's counsel answered negatively and stated he, like the court, assumed Batson had refiled her motion to dismiss because that is what the notice from the court stated.[1] He acknowledged he received the summary judgment motion with the affidavit attached, and asked, if the court was inclined to grant the motion on that basis, that he be permitted to file a Rule 56(f) affidavit on his own behalf indicating to the court the outstanding discovery that had already been requested.

The trial judge indicated his inclination to grant the summary judgment motion for two reasons. First, although the docket did show a motion to dismiss, Doe's counsel was served with Batson's motion for summary judgment and affidavit on February 24, 1998 and did not file any opposing affidavits as required by Rule 56(e), SCRCP. Second, even viewing the allegations in the light most favorable to Doe, there existed no genuine issue of material fact that would render Batson liable under the law of South Carolina. The court's subsequent written order granting summary judgment to Batson relied on Doe's failure to respond by affidavit or other

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[1]Moreover, Batson filed "basically the same" memorandum in support of her motion for summary judgment as filed in support of her earlier motion to dismiss and did not retitle it.

evidence demonstrating a genuine material issue of fact and Doe's failure to bring to the court's attention any rule of law in South Carolina which would create liability on Batson's part for the acts of her adult son. The court ruled that since Batson had "no legal duty to supervise or control her adult son," she therefore had "no duty to third parties to warn them of his propensities, which in any event she has denied any knowledge of."

Rule 56(e), SCRCP, relied upon by the trial court, requires a party opposing summary judgment to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial.[2] However, this requirement does not apply to motions to dismiss under Rule 12(b)(6). We conclude the trial court acted hastily in granting summary judgment based on a technical deficiency on the part of Doe's counsel, when there clearly existed some confusion regarding whether the hearing was

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[2]The full text of the rule is as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

Rule 56(e), SCRCP (emphasis added).

pursuant to Rule 12(b)(6) or Rule 56.

We disagree, however, with the Court of Appeals' conclusion that the trial court abused its discretion in refusing to permit Doe's attorney to file Rule 56(f), SCRCP affidavits after the hearing. Rule 56(f) applies when it appears "*from the affidavits* of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." Rule 56(f), SCRCP (emphasis added). In such a case, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." Id. Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery. The rule does not apply in the situation presented where no affidavits were filed whatsoever.

B. Full and Fair Opportunity to Complete Discovery

The Court of Appeals held the trial court abused its discretion in granting summary judgment before Doe had a full and fair opportunity to complete discovery. We agree.

Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Id.

In Baughman, we ruled summary judgment premature because (1) plaintiffs demonstrated a likelihood that further discovery would uncover additional relevant evidence, and (2) plaintiffs were not dilatory in seeking discovery. Although three years had elapsed between filing the action and summary judgment, the delay could not fairly be attributed solely to plaintiffs' inaction, and the delay was tempered by the complexity of the case. Id. at 112-114, 410 S.E.2d at 544.

The record here does not support a finding that Doe was dilatory in pursuing discovery. Depositions, including Donald's, were scheduled for the week following the hearing. Doe had noticed Batson's deposition on January 31, 1998, but postponed it at the request of defense counsel in two related cases,[3] in order to consolidate the discovery process. Although the delay was in no way attributable to Batson, it was not solely attributable to Doe either. Doe should have been permitted to complete discovery. See J.S. v. R.T.H., 714 A.2d 924, 936 (N.J. 1998) (summary judgment entered five months after defendant's answer was filed was premature; "plaintiffs should have been given the opportunity to depose [molester] and others to try to discover further evidence bearing on [defendant's] knowledge of [molester's] conduct or sexual proclivities").

II. Batson's Duty

Batson argues that even if the trial court erred in granting summary judgment on procedural grounds, South Carolina does not impose upon her a duty to act affirmatively under the facts alleged. The record before us is insufficient to determine whether Batson owed any duty to Doe.

To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach. Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (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. South Carolina Dept. of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). Without a duty, there is no actionable negligence. Id. "Proof of negligence in the air, so to speak, will not do." Palsgraf v. Long Island Railroad Co., 162 N.E. 99, 99 (N.Y. 1928) (quoting Sir Frederick Pollock). The existence of a duty owed is a question of law for the courts. Washington v. Lexington County Jail, 337

[3]Doe also sued Donald and Brushy Creek Baptist Church.

S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

The Court of Appeals discussed two possible sources of liability for the parent of an adult child residing in the home: (1) a duty to warn arising from a special relationship or circumstance, and (2) a duty to warn based on premises liability. We vacate those portions of the Court of Appeals' opinion suggesting potential sources of liability in this case. The paucity of the record makes it impossible for us to determine the merits of Doe's argument. Whether Batson had a cognizable duty will be determined after the record has been more fully developed.

CONCLUSION

We affirm the Court of Appeals' reversal of summary judgment, vacate those portions of the Court of Appeals' opinion discussing liability, and remand to the trial court for discovery and development of Doe's theories of recovery.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Alexander S. Macaulay, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leland Humbert, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Florence County
Ralph King Anderson, Jr., Trial Judge
James E. Brogdon, Jr., Post-Conviction Judge

Opinion No. 25314
Heard April 25, 2001 - Filed June 25, 2001

AFFIRMED

James D. Dotson, Jr., of Lake City, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General G. Robert DeLoach, and Assistant Attorney General William Bryan Dukes, all of Columbia, for respondent.

JUSTICE BURNETT: Petitioner was convicted of common law robbery and sentenced to fifteen years imprisonment, suspended upon service of ten years.[1] The Court granted his petition for a writ of certiorari to review the decision of the post-conviction relief (PCR) judge denying his PCR application. We affirm.

FACTS

Petitioner claims he received ineffective assistance of counsel because defense counsel allowed the case to proceed to trial while petitioner was wearing a jail uniform, shackles, and an identification bracelet bearing his mug shot. We disagree.

Petitioner was charged with robbing a Sav-Way convenience store at approximately 2:30 a.m. on March 19, 1994. At trial, the store clerk on duty at the time of the robbery identified petitioner as the perpetrator. She testified when petitioner asked her the price of a beer, she left the register, walked to the cooler, opened the door, and stated the price. At that point, petitioner grabbed her arm and she felt something in her back. Petitioner released the clerk, then proceeded to the cash register. He kept one hand in his jacket and used the other hand to remove food stamps, postage stamps, cash, and coins from the register.

The clerk testified although he told her not to look at him, she watched petitioner and, when he was at the register, she had a good opportunity to observe him. She testified the robber was a black male with sideburns and a beard. He wore a baseball cap with an "A" on it and work clothes, specifically navy blue pants, a light blue shirt, and a navy blue jacket with "Mercury-Lincoln" inscribed on it. The clerk estimated petitioner was in the store for fifteen minutes. The clerk observed him drive away. She saw the back of his vehicle which she described as a two-door white truck with

[1]Petitioner voluntarily withdrew his direct appeal.

"Chevrolet" on the tailgate.

After the robbery, a deputy arrived at the Sav-Way. The clerk described the perpetrator and the getaway truck. At 4:00 a.m., while on another call, the deputy noticed a truck matching the description given by the store clerk. The deputy drove beside the truck and determined the driver matched the description of the robber. He followed the truck. When the driver exited the vehicle, the deputy told him he matched the description of a robbery suspect. The driver consented to the deputy searching the truck. A blue work jacket with "Lincoln-Mercury" was on the front seat. A navy baseball cap with an "A" on it was located behind the seat. The deputy identified petitioner as the driver.

The deputy arrested petitioner for public intoxication and placed him in the back seat of his patrol car. Thereafter, he took petitioner to the Sav-Way where the clerk identified him as the robber. After taking petitioner to jail, the deputy found postage and food stamps on the back seat of his patrol car.

The lead investigator testified he joined the deputy after petitioner was arrested. Petitioner was wearing blue work pants and a light blue shirt.

Photographs of petitioner's truck were admitted into evidence. The rear of the truck is white; "Chevrolet" appears in black lettering on the tailgate.

At the sentencing proceeding, petitioner personally stated:

> And also I would - -I would like to - - to move for a dismissal or mistrial for the fact that - - on the grounds of that I was - - the Solicitor advised me to turn my prison clothes wrong side out and with a prison band on choose a selection of jury of my peers and stand before them and get a fair and impartial trial. . . .

Solicitor: Your honor, could I just add one thing for the record?

Court: Yes.

Solicitor: I would just like to note that the Solicitor's Office never told him anything about his jail clothes. We were advised by the Sheriff's Department jailers that the Defendant, on the day of trial, refused at the jail to put on his non-jail clothes. But when he came up here, the people with the Sheriff's Department decided that the best thing to do was to be - - to put his clothes on by turning them wrong side out in such a way that it could not be told that the Florence County Sheriff's Department emblem was on them, that he would - - or, rather, the jail emblem was on them.

Court: Counsel, make sure that an appeal is filed in - - -

At the PCR hearing, petitioner testified, before he left the detention center for trial, he made arrangements for a Public Defender's Office investigator to obtain civilian clothes for him to wear during trial. Petitioner explained, at the detention center, he only had his prison jumpsuit and the clothes he was wearing when the store clerk identified him as the robber.

Petitioner testified, before trial, however, the solicitor told him to wear his prison jumpsuit inside out. He denied refusing to wear the clothing he had on when he was identified by the clerk. Petitioner testified he also wore shackles and a Florence County Detention Center wrist band which held his mug shot.[2] Defense counsel did not request the trial judge continue the trial until the investigator delivered petitioner's civilian clothes.

[2]In his brief, petitioner described the wrist band as "bright orange." This description does not appear in the record.

Defense counsel died two years before the PCR hearing.

In the Order of Dismissal, the PCR judge ruled "[a]lthough it may have been deficient for trial counsel to permit the trial to proceed with [Petitioner] in clothing provided by the Florence County Detention Center, this Court finds that [Petitioner] has failed to satisfy his burden of showing prejudice."

ISSUE

Is there any evidence to support the PCR judge's conclusion petitioner was not prejudiced by defense counsel allowing the trial to proceed with petitioner wearing jail clothing, shackles, and a detention center identification bracelet?

DISCUSSION

In PCR proceedings, the applicant must meet the standard established in Strickland v. Washington, 466 U.S. 668 (1984). "To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, supra). Thus, a PCR applicant must show both error and prejudice to win relief in a PCR proceeding. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The PCR judge did not rule on whether defense counsel was ineffective for proceeding to trial while petitioner was shackled and wearing an identification bracelet. Petitioner did not file a Rule 59(e), SCRCP, motion requesting a ruling on these issues. Accordingly, petitioner's claims

regarding counsel's ineffectiveness for allowing the trial to proceed while he was shackled and wearing an identification bracelet are not preserved for review. Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

As to petitioner's clothing, the record supports the PCR judge's finding counsel was deficient by allowing the trial to proceed while petitioner was dressed in prison clothing.[3] We find it generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing.[4] Nevertheless, as conceded by petitioner, in order to prevail in this PCR action, the Strickland analysis applies and petitioner must establish prejudice.[5]

We find the evidence of record supports the PCR judge's conclusion petitioner was not prejudiced by counsel's deficient performance. The store clerk identified petitioner as the robber shortly after the crime and, then again, at trial. The clerk's description of the perpetrator's clothing matched the clothing petitioner was wearing approximately 1½ hours after the robbery. A blue "Lincoln-Mercury" jacket and baseball cap with the letter "A" on it - items which the clerk stated the robber was wearing - were found in petitioner's vehicle. Petitioner was driving a truck which matched the description of the getaway vehicle. Food and postage stamps were found in the backseat of the patrol car after petitioner was removed from the

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[3]Even though petitioner was wearing the jumpsuit inside out, we assume that petitioner's clothing was still readily identifiable as jail issue.

[4]The defendant's appearance at trial dressed in jail clothing is not automatically reversible error. There may be situations where, as a matter of trial strategy, counsel decides jail attire benefits the defense. Accordingly, in order to obtain a new trial on direct appeal, an objection must be raised at trial. See Estelle v. Williams, 425 U.S. 501 (1976). Here, the record is devoid of evidence of any such strategy.

[5]Petitioner conceded Strickland applies both in his brief and at oral argument.

vehicle. The clerk testified food and postage stamps had been taken from the cash register. Due to the overwhelming evidence against petitioner, there is not a reasonable probability the outcome of his trial would have been different had petitioner not been dressed in his prison jumpsuit.

At oral argument, petitioner suggested for the first time in this action that the State compelled him to wear prison clothing in violation of his right to due process. This argument was not raised to and ruled on by the PCR judge and, therefore, is not preserved for review. Id. Further, petitioner's claim cannot be asserted in a PCR action. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (when asserting violation of a constitutional right, the applicant generally must frame the issue as one of ineffective assistance of counsel). PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

While we find it troublesome petitioner appeared before a jury dressed in a prison jumpsuit, because there is probative evidence to support the PCR judge's conclusion petitioner was not prejudiced by the clothing, the Court must affirm. Cherry v. State, supra.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Terry Lee Nesbitt,

Appellant.

Appeal From Spartanburg County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3359
Heard February 5, 2001 - Filed June 25, 2001

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and Senior Assistant Attorney General Charles H. Richardson, all of

Columbia; and Solicitor Holman C. Gossett, of Spartanburg, for respondent.

SHULER, J.: Terry Lee Nesbitt appeals from his conviction for attempted armed robbery, asserting the trial court erred in denying his motion for a directed verdict. We affirm.

FACTS

In the early morning hours of June 10, 1998, Lawrence Brockman, an employee of the Fast Stop convenience store, was taking gas pump readings when he was approached by a man inquiring what time the store would close. After Brockman explained that he was in the process of closing the store, the man turned and walked away. Brockman later described him as a black male approximately five feet, nine inches tall.

Brockman then re-entered the store and went back behind the counter to the register. As Brockman looked up, he saw a man at the front door wearing a mask or goggles and waving a gun. The man did not enter the store, nor did he point the gun at anyone inside the store. Rather, Brockman testified he stopped at the door for approximately two seconds, then turned and fled. In his description to the police, Brockman stated only that the perpetrator was a black male.

Annie Sarratt, Brockman's common law wife, also witnessed the incident. She testified that before Brockman left the store to check on the gas pumps, she was suspicious of someone in dark clothing loitering in front of the store. When Brockman returned, she asked what had taken so long. Brockman responded that he was attempting to determine who was ducking around the corner of the building. Sarratt then testified:

> I saw Mr. Brockman duck down and I didn't know what was going on. But I looked around. Somebody was in the door, two, two men. One man with dark clothing and I forgot what the other man

> had on. But [he] was waving something. So I ran to the poker machine and I ducked down and then they left. . . . They didn't come on in the store. But they had the door open and one guy [was] doing something like this [and] saying something. And the guy in the black ran. The other guy was still standing there and I said what was he saying. . . . [H]e wouldn't answer. He left.

Sarratt testified both perpetrators were black males, one of whom wore a hooded piece of clothing and waved something. She also identified one of the perpetrators as the man who had spoken to Brockman outside the store. On cross-examination, Brockman testified the man he spoke to was not the defendant, Terry Nesbitt, whom he knew.

Officer James Powell was the first officer to respond to the reported armed robbery. En route to the scene, Powell observed a black male fitting the description of the suspect and a white male walking side-by-side down railroad tracks near the store. The black male was the defendant, Terry Nesbitt. Powell testified that although he could not identify the object, Nesbitt had something black in his right hand. As Powell swung his patrol car around, Nesbitt fled down the tracks and into the woods. Shortly thereafter, a K-9 officer and his dog tracked Nesbitt and discovered him lying in the woods. Upon discovery, Nesbitt stated, "I threw it down."

The officers handcuffed Nesbitt and placed him in a patrol car. A search of the area along the route Nesbitt had been chased produced a black nylon stocking cap and a pair of goggles. While sitting in the patrol car, Nesbitt waived his Miranda rights and gave the following statement:

> Me and Michael and two other guys, black males, were sitting beside the store. . . . Michael said we would do the store. We smoked two rocks and I stayed at the back of the store. Michael had the gun. It looked like a .32 auto. I was going down Druid Street when they went in the store. Michael is a white male about six foot, twenty-six to twenty-seven years old, dark colored clothes, lives on Oak Dale Court. Michael changed clothes at the end of Druid Street

> and gave me the gun. The other two black males, I, I don't know their names. One lives at the boarding house on Druid Street. The other one I don't know anything about him. They are in their thirties. They always hanging around the store bumming for quarters. Me and Michael were walking down Henry Street. He was going home and I was too. Michael gave me the gun as he took a piss in the street. Then the police came up and I ran.

Nesbitt was subsequently charged with attempted armed robbery. At trial, he moved for a directed verdict based on the insufficiency of the evidence. The trial court denied the motion. Nesbitt was convicted and sentenced to ten years imprisonment. This appeal followed.

STANDARD OF REVIEW

When reviewing the denial of a motion for directed verdict in a criminal case, the evidence must be viewed in the light most favorable to the State. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997). "[I]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); Huggins, 325 S.C. at 110, 481 S.E.2d at 118. This Court is concerned with the existence or non-existence of evidence, not its weight. Id.; Green, 327 S.C. at 586, 491 S.E.2d at 265. Accordingly, the trial judge should grant the motion for directed verdict in those cases where the evidence merely raises a suspicion that the defendant is guilty. Green, 327 S.C. at 587, 491 S.E.2d 265.

LAW/ANALYSIS

Nesbitt argues the trial court erred in failing to grant a directed verdict because the State failed to offer sufficient evidence to prove that an attempted armed robbery occurred or that Nesbitt took part in it. We disagree.

Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose." Id. at 397, 532 S.E.2d at 285 (citing United States v. Calloway, 116 F.3d 1129 (6th Cir. 1997)). Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime. State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942). "The preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made." Quick, 199 S.C. at 260, 19 S.E.2d at 103.

In Quick, our supreme court stated the following in determining whether a particular defendant's conduct constitutes an overt act:

> It is well settled that the "act" is to be liberally construed, and in numerous cases it is said to be sufficient that the act go far enough toward accomplishment of the crime to amount to the commencement of its consummation. While the efficiency of a particular act depends on the facts of the particular case, the act must always amount to more than mere preparation, and move directly toward the commission of the crime. In any event, it would seem, the act need not be the last proximate step leading to the consummation of the offense.

Id. at 259, 19 S.E.2d at 102.

Nesbitt's statement referring to the perpetrators' agreement to "do the store" constitutes direct evidence that the specific intent to rob the store existed. Therefore, the determinative issue before this Court is whether the perpetrators'

conduct as presented by the State was a sufficient overt act to sustain a conviction for attempted armed robbery.

Although we are unaware of any South Carolina cases factually analogous to the situation presented here, other jurisdictions have addressed similar scenarios. In State v. Ward, three men drove to a motel with the intention of robbing it and its owner. 601 S.W.2d 629 (Mo. Ct. App. 1980). One of the men waited in the getaway car as the other two approached the motel entrance, armed and masked. The hotel manager testified he was inside the motel lobby when he heard a rattling at the outside door and saw the defendant, Ward, pointing a gun at him. As the manager ran from the lobby, he shouted "don't" and "take the money." Id. at 630. When he returned with a shotgun, the getaway car was leaving the scene. Although the defendant never entered the store, he admitted he was at the scene but left because he "changed [his] mind." Id. Ward was later convicted of attempted armed robbery.

On appeal, Ward argued his actions constituted mere preparation to rob the store. The Missouri Court of Appeals disagreed and affirmed Ward's conviction, stating:

> An overt criminal act is one going beyond mere preparation and done after and in furtherance of a prior plan to commit a crime. We agree with the trial court's conclusion that overt acts were shown by "defendant's act of going up to the door of the motel office, masked, with shotgun in hand, and a getaway car waiting."

Id. (citation omitted).

In Young v. State, police set up a surveillance of local banks in an area that had experienced a number of recent robberies. 493 A.2d 352 (Md. 1985). Early one afternoon, the police observed Young driving an automobile in a manner that led them to believe that he was casing the banks. Later that afternoon, Young left his vehicle and proceeded toward the front door of one of the banks. He added a stocking cap, white gloves, and an eyepatch to his attire. A bank manager observed Young approaching the door. Young's jacket collar

was turned up, his right hand was in his jacket pocket, and his left hand was in front of his face. Unaware that the bank had closed for the day, Young was surprised to discover that the door was locked. He then fled, running past the windows while covering his face.

Police stopped Young as he attempted to drive away and ordered him to exit the vehicle. As he stepped out, the butt of a .22 caliber pistol was sticking out of his right jacket pocket. A pair of white surgical gloves, a black eyepatch, a blue knit stocking cap, and a pair of sunglasses were located on the front seat.

In affirming Young's conviction for attempted armed robbery, the court noted that "the determination of the overt act which is beyond mere preparation in furtherance of the commission of the intended crime is a most significant aspect of criminal attempts." Id. at 357. The court went on to hold that Young's conduct leading to his apprehension established the necessary overt act toward the commission of armed robbery. The court stated: "Even if we assume that all of Young's conduct before he approached the door . . . was mere preparation, . . . when Young tried to open the bank door . . . that act constituted a 'substantial step' toward the commission of the intended crime." Id. at 360.[1]

In State v. Parker, the defendant, Parker, armed with a gun, was lying beside a hedge across the street from a market store. 311 S.E.2d 327 (N.C. Ct. App. 1984). He then crossed the street and got on a bicycle, which he rode a short distance before returning to the area near the hedge. Shortly thereafter, a police officer responding to a complaint from a suspicious employee arrived at the scene. Parker quickly walked away and was arrested while attempting to reach his bicycle.

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[1] In determining the existence of an overt act which is beyond mere preparation, the Maryland Court of Appeals adopted the "substantial step" approach, which posits that a person is guilty of an attempt to commit a crime where he purposely does or omits to do anything which constitutes a substantial step in a course of conduct planned to culminate in his commission of the crime. See Young, 493 A.2d at 358.

In reversing Parker's conviction for attempted armed robbery, the court found that Parker's actions amounted to no more than mere preparation. The court stated: "Although lurking outside a place of business with a loaded pistol may be unlawful conduct, it does not constitute the sort of overt act which would clearly show that defendant attempted to rob that business." Id. at 329.

We believe the facts presented in the instant case more closely resemble those addressed in Ward and Young than in Parker. In Parker, the defendant never made any advance toward his intended target. In this case, as in Ward and Young, the perpetrators approached the entrances of the buildings while armed and disguised and committed an overt act in attempting to gain entrance.

According to Brockman, a black male masking his appearance approached the entrance of the store brandishing a weapon. Sarratt testified that one of two perpetrators opened the door and said something before fleeing the scene. We find that these actions move directly toward the commission of an armed robbery. While the conduct may not have been the last proximate step toward the commission of the offense, the acts committed went beyond mere preparation. In our view, these acts are sufficient to meet the overt act requirement espoused in Quick. It should not be necessary to subject victims to a face-to-face confrontation with a lethal weapon in order to find the essential element of an overt act. From the sum of all evidence presented, the jury could infer that an armed robbery was immediately forthcoming, or that the attempt had begun.

Nesbitt also argues, however, that even if the State presented sufficient evidence to establish that an attempted armed robbery occurred, it failed to establish that he took part in it. We disagree.

Although the State relied exclusively on circumstantial evidence to establish Nesbitt's participation, a trial judge is nevertheless required to submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." See State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256

(2001) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)) (emphasis added); see also State v. Stokes, 299 S.C. 483, 386 S.E.2d 241 (1989); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989); State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955).

Clearly, the trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the defendant is guilty. State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) (citing State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978)). It is equally clear, however, that this Court must view the evidence in a light most favorable to the State. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

Sarratt testified the two perpetrators that approached the store were black males, one of whom was wearing a hooded piece of clothing. Brockman testified one of the men was wearing a mask or goggles and was armed with a gun. Nesbitt admitted he was present when the discussion to "do the store" occurred and at one point had possession of the gun. Officer Powell arrived at the scene shortly after the attempted robbery and observed Nesbitt in the vicinity of the store carrying a black object. When Powell approached Nesbitt, he fled into the woods. After his apprehension, Nesbitt stated, "I threw it down." The police later found a stocking cap and goggles along the route Nesbitt had been chased.

Viewing this evidence as we must, in a light most favorable to the State, we find there is substantial circumstantial evidence from which Nesbitt's participation in the attempted armed robbery could fairly and logically be deduced. The trial judge was, therefore, required to submit the case to the jury.

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

AFFIRMED.

HEARN, C.J. and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beaufort Realty Company, Inc.,

Respondent,

v.

Beaufort County, a political subdivision of the State of South Carolina, and the Beaufort County Board of Appeals, an appointed agency of Beaufort County,

Respondents,

and

The South Carolina Coastal Conservation League,

Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Special Circuit Court Judge

Opinion No. 3360
Heard May 8, 2001 - Filed June 25, 2001

AFFIRMED

William B. Regan, and Frances I. Cantwell, both of Regan, Cantwell & Stent, of Charleston, for appellant.

David L. Tedder, of Daugs, Tedder, Newman & McDougall, of Port Royal; Curtis L. Coltrane, of Coltrane & Alford, of Hilton Head; and Ellison D. Smith, IV, of Smith, Bundy, Bybee & Barnett, of Charleston, for respondents.

HEARN, C.J.: The South Carolina Coastal Conservation League (League) appeals the circuit court's order reversing four consolidated appeals from the Beaufort Zoning Board of Appeals (Board) on the ground that the League lacked standing to appeal the decisions of the Beaufort County Zoning Administrator (Administrator) to the Board, and, therefore, the Board was without legal authority to overturn the Administrator. We affirm.

FACTS

In November 1998, Beaufort Realty Company, Inc. (Beaufort Realty) submitted a plat subdividing Bay Point Island to the Administrator, who exempted the plat from approval under the Beaufort County Development Standards Ordinance (Ordinance) because all the lots shown were five acres or more in size and no new access was required. In December 1998, a similar plat for Rose Island was presented to the Administrator, who likewise stamped that plat exempt. The League, a non-profit conservation advocacy group, challenged these decisions and requested the matters be consolidated for hearing.

The Board held a hearing on both of these matters and issued an order overturning the Administrator's determinations that the plats were exempt

from the Ordinance. Beaufort Realty appealed the decision of the Board to the circuit court.

In March 1999, Beaufort Realty altered and resubmitted the plats. Again, after consulting with the county's development review team, the Administrator exempted the plats for each island.[1] The League challenged the exemptions to the Board. Following a hearing, the Board again overturned the Administrator's decision. Beaufort Realty appealed this decision to the circuit court.

These matters were consolidated for hearing. The circuit court reversed the Board on all four appeals, finding the League lacked standing to appeal the Administrator's decisions to the Board, and therefore, the Board was without legal authority to overturn the Administrator. This appeal follows.

DISCUSSION

The League argues the circuit court erred in finding the League lacked standing to appeal the Administrator's decisions to the Board. We disagree.

"An organization has standing only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 487, 523 S.E.2d 795, 800 (Ct. App. 1999) (citing Sierra Club v. Morton, 405 U.S. 727 (1972)). The United States Supreme Court has established the following requirements to show standing: (1) the plaintiff must suffer an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as

[1] This was done pursuant to a recently enacted county ordinance mirroring the exemption from subdivision review authorized by S.C. Code Ann. § 6-29-1110(2)(b) (Supp. 2000).

opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The Lujan Court also held that it is "substantially more difficult" to establish standing where a challenge to the government action is brought by one who is not the object of the action, but rather seeks to challenge government action or inaction because of alleged illegality. Id. An organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

Additionally, Rule 201, SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." 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. Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970); Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). 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. 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.

The League has not alleged that it or its members have suffered or will suffer an individualized injury as the result of the filing of the subdivision plats. Although the League alleges its members will suffer injury if the islands are developed, the injury is purely conjectural and hypothetical. There is no evidence in the record that either the League or its members have suffered any actual injury by the filing of the subdivision plats.

The League relies on Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000). In Laidlaw, the United States Supreme Court held certain environmental groups had standing to bring suit pursuant to the Clean Water Act against Laidlaw, a wastewater treatment facility. When Laidlaw discharged excessive pollutants into a river, Friends of the Earth

(Friends) and other environmental groups filed an action seeking declaratory and injunctive relief, civil penalties, costs, and attorney fees. The Court found Friends demonstrated sufficient injury to establish standing, citing the testimonial evidence of various members of the groups who had already been adversely affected by the pollutants. Id. at 181-83. For instance, some members who lived along the river near the plant had to refrain from recreational activities such as fishing, hiking, camping, swimming, boating, and picnicking. One member also attested to decreased property values.

However, Laidlaw is distinguishable from the instant case for two reasons. First, the League did not call any of its members as a witness, whereas Friends called many of its members to testify. See Laidlaw, 528 U.S. at 181-82; see also Carolina Alliance, 337 S.C. at 487, 523 S.E.2d at 800 (holding that an organization has standing only if it shows its members will suffer injury). Although the League's attorney argued that there was an injury in fact, arguments of counsel are not evidence. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986).

Secondly, the League has shown only the potential for future harm, whereas Friends clearly demonstrated in Laidlaw that many of its members had already suffered harm. See Laidlaw, 528 U.S. at 181-82. Even the League's own attorney stated before the Board that its members had not suffered any harm, but merely feared the prospect of future harm: "We have many members in Beaufort County who have--the *prospect* of exempting these islands from development would view it with severe concern [sic], so we have stepped in to appeal the decision" (emphasis added). Prospective concern falls far short of the standard of "concrete and particularized and . . . actual or imminent" harm set forth in Lujan. 504 U.S. at 560. Consequently, the League did not present evidence of injury in fact.

Moreover, the League does not allege injuries traceable to the challenged action of Beaufort Realty. Mere filing of plats in itself does not work any injury on the League's members or the public at large. Therefore, the filing of the plats and the alleged harm to League members are not causally connected.

Therefore, we hold the League does not have standing under the three-pronged Lujan test or under Rule 201, SCACR, since neither it nor its members are aggrieved parties who have suffered injury in fact. Accordingly, we affirm.

AFFIRMED.

ANDERSON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Tommy Lee James,

Appellant.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3361
Heard June 5, 2001 - Filed June 25, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and

Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

ANDERSON, J.: Tommy Lee James appeals his conviction and life sentence for first degree burglary arguing the trial court erred in (1) permitting the State to introduce evidence of his seven prior burglary convictions and (2) submitting the prior burglary indictments to the jury. We affirm.

FACTS/PROCEDURAL BACKGROUND

On the afternoon of April 5, 1997, Ramona and Richard Granger were performing lawn care at the home of Edyth Richards and Frances Gilbert when they noticed a bicycle leaning against the outside of the fence. They observed James on the front porch of the residence, walking away from the front door. His pockets were bulging. When Mrs. Granger asked James if he needed help, he replied that he was looking for "the rent man." Mrs. Granger told James no such person lived there. James got on the bicycle and pedaled quickly away.

Mr. Granger asked his wife to check the front door. When she said the door was open, he decided to follow James. Mr. Granger called 911 on his cellular phone as he drove behind James. James was apprehended after he abandoned his bicycle and hid behind a tree. He had a screwdriver sticking out of his pocket.

Upon investigation, police determined someone forcibly gained entry to the home of Richards and Gilbert through the front door. Further, someone had rummaged through both bedrooms. Several items were missing, including thirteen rolls of quarters. Police later returned the missing property.[1] After his

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[1]The jury heard no testimony concerning where the police recovered the stolen quarters because of a search and seizure violation.

arrest, James gave an oral statement in which he denied burglarizing the residence.

ISSUES

I. In a prosecution for first degree burglary where the aggravating circumstance is the defendant's prior convictions for burglary, housebreaking, or both, should the State be limited to introducing two prior convictions?

II. Does the trial court improperly allow the introduction of hearsay evidence by submitting the actual indictments of a defendant's prior burglary convictions to the jury?

LAW/ANALYSIS

I. Introduction of Prior Convictions

James contends the trial court erred in allowing the State to introduce seven of his prior convictions for burglary where the State could have established the aggravating circumstance necessary to elevate the instant charge to first degree burglary with the introduction of only two prior convictions. We disagree.

Rulings on the admissibility of evidence are left to the sound discretion of the trial court. State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). The trial court's evidentiary rulings will therefore be reversed only upon a showing of an abuse of discretion which results in prejudice. State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App. 1998).

James was indicted for first degree burglary in violation of South Carolina Code section 16-11-311(A)(2), which reads:

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . .
>
> > (2) the burglary is committed by a person with a prior record of *two or more* convictions for burglary or housebreaking or a combination of both ….

S.C. Code Ann. § 16-11-311(A)(2) (Supp. 2000) (emphasis added). The trial court permitted the State to introduce seven of James' prior convictions for burglary over defense objections to the introduction of more than two prior offenses. James maintains introduction of more than two of his prior convictions was not necessary and was unduly prejudicial.

In State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997), this Court held that under section 16-11-311(A)(2), "prior burglary or housebreaking convictions are clearly an element of burglary in the first degree." Id. at 446, 486 S.E.2d at 515. As such, the prosecution in Hamilton was entitled to present evidence relevant and material to that element of the offense, despite our "well-established rule that evidence that an accused has committed other crimes is not admissible in the prosecution for the crime charged." Id. at 447, 486 S.E.2d at 515. The Court reasoned that the prosecution could not be forced to stipulate generally to the prior offenses or to the fact that the defendant had the legal status to be charged with first degree burglary because such stipulation might cause a substantial gap in the evidence needed for the jury to find the defendant guilty of the offense. Id. at 446, 486 S.E.2d at 515.

The Hamilton Court analyzed the prejudicial impact of the evidence:

> [H]ad the South Carolina General Assembly wished to use the prior convictions as merely a sentence enhancer rather than as an element of the crime, it could have done so …. Certainly, a cogent argument can be made that the statute contravenes the well-established rule that evidence that an accused has committed other crimes is not admissible in the prosecution for the crime charged. Rule 404(b),

> SCRE; State v. Gregory, 191 S.C. 212, 220, 4 S.E.2d 1, 4 (1939); State v. Williams, 31 S.C.L. (2 Rich.) 418, 421-22 (1845). It is not this court's province, however, to question the wisdom of a legislative enactment.
>
> Finally, Appellant asserts it was error to allow proof of the prior burglary offenses because the evidence was not admissible under any of the exceptions recognized in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Appellant's argument is misplaced, however, since the State did not offer proof of his prior burglary convictions to establish motive, intent, identity, or common scheme or plan. Here, Appellant's prior burglary convictions were presented solely to prove an element of the crime for which he was charged. Evidence which is logically relevant to a material element of the offense charged should not be excluded merely because it may also show guilt of another crime. See State v. Tillman, 304 S.C. 512, 518, 405 S.E.2d 607, 611 (Ct. App.), cert. denied, (Sept. 5, 1991).

Hamilton, 327 S.C. at 447, 486 S.E.2d at 515-16 (footnote omitted).

Our Supreme Court recently discussed this issue in State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). The Court rejected a claim that section 16-11-311(A)(2), "'as interpreted in State v. Hamilton,'" unconstitutionally deprives defendants of due process of law "'because evidence required to prove the status element of prior convictions dilutes the State's burden of proof with respect to the remaining elements of the offense.'" Id. at 154-55, 526 S.E.2d at 229. In concluding the statute did not facially violate due process, the Court explained:

> To deter repeat offenders, the General Assembly chose to include *two or more* prior burglary and/or housebreaking convictions as an element of first degree burglary. The United States Supreme Court has held this is a valid state purpose which does not violate due process. We agree.

Benton, 338 S.C. at 154, 526 S.E.2d at 230 (emphasis added)(internal citation omitted). The Court noted "evidence of other crimes is admissible to establish a material fact or element of the crime charged." Id. at 155, 526 S.E.2d at 230 (citing State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987)).

James contends that a Rule 403 analysis negates the admissibility of the additional convictions. Benton states:

> [W]e note evidence of other crimes is admissible to establish a material fact or element of the crime charged. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). . . . For purposes of an element of first degree burglary under § 16-11-311(A)(2), we conclude the probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect. Rule 403, SCRE.
>
> Further, while generally inadmissible, propensity evidence is not prohibited. Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions. Rule 404, SCRE (evidence of other crimes is not admissible to prove character to show action in conformity but to show motive, absence of mistake or accident, intent, identity, the existence of common scheme or plan). Here, appellant's two prior burglary convictions were offered to prove a statutory element of the current first degree burglary charge, not to suggest appellant was a bad person or committed the present burglary because he had committed prior burglaries.

Benton, 338 S.C. at 155-56, 526 S.E.2d at 230 (footnote omitted).

Section 16-13-311(A)(2) provides a person is guilty of first degree burglary if he commits a burglary and has *two or more* convictions for burglary, housebreaking, or a combination thereof. Nothing in the statute limits the number of convictions the State may use to prove this element of the offense.

Certainly had the General Assembly intended to limit the use of prior convictions to two in order to prevent the possibility of undue prejudice to the defendant, it could have easily done so. Because the element is *two or more* qualifying prior offenses, we find no error in the court's admission of James' seven prior burglary convictions.

We are mindful of the potential for prejudicial effect in the admission of such evidence. However, as is required, the trial court instructed the jury to limit its consideration of James' prior convictions to the particular purpose for which the convictions were offered. See Benton, 338 S.C. at 156, 526 S.E.2d at 231; Hamilton, 327 S.C. at 447, 486 S.E.2d at 516. See also Rule 105, SCRE (when evidence is admissible for one purpose but not for another, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly). The Court issued this instruction immediately after the admission of the evidence and again during its general jury charge. These instructions required the jury to consider James' prior convictions only to the extent necessary to determine whether he was guilty of the aggravating circumstance charged, and not to consider the offenses as evidence of bad character or as evidence of whether he committed the burglary in question. We find no abuse of discretion.

II. Admission of Prior Indictments

James maintains the trial court erred in admitting the prior indictments and submitting them to the jury for consideration. He argues the indictments contain inadmissible, prejudicial hearsay. This issue is not preserved.

James first objected to the introduction of the indictments on this ground after the close of all evidence and the charge of the jury. This objection was untimely. The State introduced the indictments during the presentation of its case. Because James failed to contemporaneously object on the ground he now asserts, this issue is not preserved. See State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(contemporaneous objection required at trial to properly preserve error for appellate review); State v. Benton, 338 S.C. 151, 526 S.E.2d

228 (2000)(issue not preserved if party argues one ground for objection at trial and a different ground on appeal).

CONCLUSION

We hold the trial court did not err in admitting seven of James' prior convictions for burglary. Further, we find James' contention that the indictments should have been excluded because they contain inadmissible, prejudicial hearsay is not preserved for our review. Accordingly, James' first degree burglary conviction is

AFFIRMED.

HUFF, J., concurs.

SHULER, J., concurs in a separate opinion.

SHULER, J., concurring: I agree with the decision to affirm this case but write separately because I believe the element of first degree burglary found in § 16-11-311(A)(2) simply requires the State to prove *at least two* earlier convictions for burglary and/or housebreaking. Thus, in my view, the statutory language referencing "two or more" prior convictions does not mandate the admission of James' entire prior record for burglary; rather, the admissibility of his prior convictions is governed by traditional rules of evidence.

Hamilton and Benton do not dispense with the requirement that all evidence be more probative than prejudicial. Instead, these cases merely hold that two prior convictions for burglary, where necessary to prove an essential element of the crime charged, are inherently more probative than prejudicial. See Benton, 338 S.C. at 155-56, 526 S.E.2d at 230 ("For purposes of an element of first degree burglary under § 16-11-311(A)(2), we conclude the probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect."); see also Hamilton, 327 S.C. at 446,

486 S.E.2d at 515 (implicitly finding two prior convictions more probative than prejudicial because they were an element of the crime that the State was required to prove; the court noted that had the convictions been ruled inadmissible, "there would have been a substantial gap in the evidence necessary for the jury to convict Hamilton of burglary in the first degree").

While I feel constrained by Benton and Hamilton to find the trial court did not err in admitting all seven burglary convictions, see, e.g., Hamilton, 327 S.C. at 445, 486 S.E.2d at 514 (citing the "fundamental principle" that the State "is entitled to prove its case with evidence of its own choosing"), I am mindful that neither case involved the admission of more than two prior convictions into evidence. To me, it is readily apparent that the problem arising from this case, the seemingly unnecessary introduction of extremely prejudicial evidence of numerous prior burglary convictions, stems directly from what appears to be a general prosecutorial policy of refusing to accept a defendant's offer to admit the validity of the predicate prior convictions. In my view, just because the State is entitled to reject a defendant's "stipulation" in this regard does not mean that in the interest of fairness it should.