The Supreme Court of South Carolina

JEAN HOEFER TOAL
CHIEF JUSTICE

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MEMORANDUM

TO: Circuit Court Judges
Family Court Judges
Masters-In-Equity
Clerks of Court
Members of the Bar

FROM: The Honorable Jean H. Toal

RE: Motion Fee

DATE: August 16, 2002

Effective July 1, 2002, Act No. 329 of 2002 amended the Code of Laws by adding § 8-21-320, which requires a fee of $25.00 to be collected for every motion made in the Court of Common Pleas and Family Court. The fee does not apply to family court juvenile delinquency proceedings, nor to family court matters involving rules to show cause in child and spousal support matters. The legislation also exempts matters involving indigents. The revenues from the motion fee must be separately transmitted to the state treasurer to be used exclusively by the Judicial Department.

Rule 7(b)(1), SCRCP provides that "[a]n application to the Court for an Order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or Order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." Generally, all written, filed motions that fall into this definition and do not fall under the exceptions

stated in the paragraph above require the $25.00 fee. All matters traditionally exempt from a filing fee do not carry the $25.00 fee on motions subsequently made in those cases. In those instances where it is not clear whether the motion fee applies, the applicable statute or rule should serve as a guide. If the word application, petition, motion, or affidavit appears in the statute or rule and no exemption applies, the motion fee should be assessed.

To promote uniformity in the application of the $25.00 motion fee, the following listing is provided as a guide. We will continue to monitor the situation, and inform you of any additions or changes to this list. If you have any questions or suggestions, please contact Court Administration at (803) 734-1800.

A. Motions Requiring the $25.00 Fee

1. Motion for Order of Publication: § 15-9-710: $25.00.

2. Rule 12, SCRCP Motions: $25.00.

3. Motion for Court Approved Settlement: $25.00.

4. Motion for Release of Counsel: $25.00.

5. Motion for Substitution of Counsel: $25.00.

6. Consent Orders: $25.00. (See Rule 43(k), SCRCP).

7. Supplemental Pleadings: Rule 15(d), SCRCP: $25.00.

8. Motion for Default Judgment: Rule 55, SCRCP: $25.00, regardless of whether damages are liquidated or unliquidated.

    a. Motion to Set Aside Default: Rule 55(c), SCRCP: $25.00.

9. Motion for New Trial: Rule 59, SCRCP: $25.00.

10. Motion to Alter or Amend Judgment: Rule 59(e): $25.00.

11. Motions Made in Court, Reduced to Writing: $25.00.

12. Motion to Amend a Motion: $25.00.

13. Motion for Order of Continuance: $25.00.

14. Motion for Substitution of Parties: Rule 25, SCRCP: $25.00.

15. Motion of Intervention: Rule 24, SCRCP: $25.00.

16. Motion Requesting Physical and/or Mental Examination: Rule 35, SCRCP: $25.00.

17. Rule 50, SCRCP.

    a. Motion for Directed Verdict: $25.00.
    b. Motion for Judgment Notwithstanding the Verdict: $25.00.
    c. Motion for New Trial: $25.00.

18. Motion for Request for Jury Instruction: Rule 51, SCRCP: $25.00.

19. Motion for Amendment of Judgment: Rule 52(b), SCRCP: $25.00.

20. Motion for Summary Judgment: Rule 56, SCRCP: $25.00.

21. Motion for Relief from Judgment or Order: Rule 60, SCRCP: $25.00.

22. Motion for Seizure of Person or Property: Rule 64, SCRCP: $25.00

23. Motion for Execution or Assistance: Rule 70, SCRCP: $25.00.

24. Motion for Appointment of Receiver: Rule 66, SCRCP: $25.00.

25. Single Motion Applied to Multiple Cases: $25.00 Per Case.

26. Subsequent Motions to Master: $25.00.

B. Motions Requiring Fee With Special Conditions

1. Motion for Referral to Master: Rule 53, SCRCP: If referred to Master by Motion or Consent of Parties: $25.00. If referred to Master by Motion of Court: No Fee.

    a. § 14-11-310 requires various fees to be collected in Master's Court and retained by County. These fees will be collected in addition to the motion fee.

2. Supplemental Proceedings: If conducted in the Court of Common Pleas: $25.00. If conducted by Master, refer to #1 above.

3. Orders Mailed Directly to Court: No charge if proposed order is submitted pursuant to judge's instruction. Otherwise: $25.00.

4. Amendment of Pleadings: Rule 15(a), SCRCP: Matter of Right within thirty days of Filing: No Fee. After thirty days: $25.00.

5. Third Party Practice: Rule 14, SCRCP: Defendant as Third Party Plaintiff bringing in Non-Party, if done within ten days after service of original answer: No Charge. After ten days with leave of Court: $25.00.

6. Joinder, Permissive Joinder, Misjoinder, and Non-Joinder of Parties: Rules 19, 20, and 21, SCRCP: If by Motion of Party: $25.00. If by Motion of the Court: No Fee.

7. Depositions before Action or Pending Appeal: Rule 27, SCRCP: If by Petition of Party: $25.00.

8. Depositions Upon Oral Examination: Rule 30, SCRCP: If leave of Court required: $25.00.

9. Motion for Dismissal: Rule 41, SCRCP.

    a. (a)(1): By Plaintiff by Stipulation, without leave of Court: No Fee.
    b. (a)(2): By Order of Court: $25.00.
    c. (b): Involuntary Dismissal, Non-Suit: $25.00.

10. Motion to Consolidate or Sever: Rule 42, SCRCP: If requested by Party: $25.00. Upon Court's own Motion: No Fee.

11. Rule 43, SCRCP

    a. Rule 43(j): Motion for Right to Open and Close: $25.00.
    b. Rule 43(k): Agreement of Counsel
        1. If reduced to the form of a Consent Order or Written Stipulation signed by Counsel and entered in the record: $25.00.
        2. If made in open Court and entered in the record: No Fee.

12. Rule 65, SCRCP: All actions contained in the Rule require separate filing fees; subsequent Motions in same action: $25.00.

13. Post-Conviction Relief: If exempt from filing fee due to Indigency, No Further Fee for Subsequent Motions by Defendant Required. Attorney General's Motion to Dismiss: $25.00.

14. Motion to Enforce Settlement: $25.00, but may be shifted to other Party by judge.

15. Motion to Compel: Rule 26, SCRCP: $25.00, but may be shifted to other Party by judge.

16. Rule 40, SCRCP

    a. (a): Request for Jury or Non-Jury in Pleadings: No Charge.
    b. (c): Transfer to Jury Trial Roster by Agreement: $25.00.
    c. (d): Objection to Transfer: $25.00.
    d. (e): Request Transfer to Jury Roster Nine Months to Twelve Months after Filing: $25.00.
    e. (g): Motion to Strike from Jury Trial Roster: $25.00.
    f. (i): Continuance: $25.00.
    g. (j): Requires New Filing Fee and New Case Number: No Motion Fee.
    h. (k): Alternate Method of Transfer to Jury Roster: $25.00.

17. Motion for Order of Protection from Discovery; Motion to Quash: Rules 24, 37, and 45, SCRCP: $25.00, but may be shifted to other Party by judge.

18. Motion for Temporary Relief in Family Court: Rule 21, SCRFC: $25.00. This Motion may include numerous standard forms of relief, such as temporary custody, visitation, support, etc. However, only one fee charged.

19. Matters Involving Rule to Show Cause in Court Ordered Custody and Visitation Cases: $25.00.

20. Subpoena Duces Tecum for DSS Child Support Cases: $25.00, but may be shifted to other party by judge.

C. Motions With No Fee

1. Sexually Violent Predator Cases: Regulation exempts filing fee. No subsequent Motion Fees.

2. General request for Subpoena: No Fee.

3. Matters Involving Rules to Show Cause for Spousal Support: No Fee. No Subsequent Motion Fees.

4. Matters Involving Rules to Show Cause for Child Support: No Fee. No Subsequent Motion Fees.

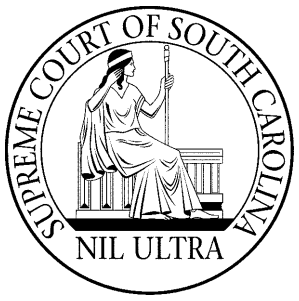
5. Juvenile Delinquency Matters in Family Court: No Fee. No Subsequent Motion Fees.

6. Matters Involving Indigency in Common Pleas or Family Court: No Fee. No Subsequent Motion Fees.

7. Matters Involving Orders of Protection from Domestic Abuse: No Fee. No Subsequent Motion Fees.

8. Matters Involving Abuse and Neglect: No Fee. No Subsequent Motion Fees.

JHT/amh



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 26, 2002

ADVANCE SHEET NO. 30

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Edward Rothschild III, Appellant.

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 25518
Heard June 25, 2002 - Filed August 26, 2002

AFFIRMED

H. Louis Sirkin and Jennifer M. Kinsley, both of Sirkin, Pinales, Mezibov & Schwartz, LLP, of Cincinnati, Ohio; and Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, PA, of Charleston, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Melody J. Brown; and Solicitor Warren B. Giese, all of Columbia, for respondent.

JUSTICE MOORE: Appellant was convicted of violating S.C. Code Ann. § 16-13-470(A)(4) (Supp. 2001) which prohibits the possession of adulterants intended to defraud a urine drug screening test. We affirm.

FACTS

Appellant owns two stores in Richland County: Nicki's Novelty Store and Michael's Lingerie and Leather Shop. An ad for Nicki's appeared in an issue of the Free Times Magazine which read: "Taking a drug test? Want to cleanse your system? We carry Readi-Clean, Carbo-Clean Plus, Quick Tabs, One Hour, Zydot, One Hour Klear, Body Flush." On October 18, 1999, in response to the ad, undercover SLED agent Joseph West was dispatched to Nicki's to purchase one of these products. Agent West purchased a product called Zydot from Nicki's[1] after the store clerk assured him this product would allow him to successfully pass a drug test for marijuana. Zydot, which contains no illegal ingredients, is an adulterant used to defeat drug testing of a urine sample.

SLED subsequently seized this product and others like it from Nicki's. Invoices for these products billed to appellant were seized from appellant's other shop.

After a bench trial, appellant was found guilty of violating § 16-13-470(A)(4) which provides:

> (A) **It is unlawful** for a person to:
>
> > (1) sell, give away, distribute, or market urine in this State or transport urine into this State with the intent of using the urine to defraud a drug or alcohol screening test;

[1]The Zydot cost $48.29.

> (2) attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample or the advertisement of a sample substitution or other spiking device or measure;
>
> **(3) adulterate a urine or other bodily fluid sample with the intent to defraud a drug or alcohol screening test;**
>
> **(4) possess adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test**; or
>
> (5) sell adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.[2]

(emphasis added). The trial judge found appellant knowingly possessed the prohibited adulterants and found him guilty under subsection (4).

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[2]This statute further provides:

> Intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale, giving, distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test accompany the sale, giving, distribution, or marketing of urine.

We found this provision unconstitutional and severed it in Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001).

ISSUES

1. Does § 16-13-470(A)(4) violate the First Amendment protection of free speech?

2. Does § 16-13-470(A)(4) lack a mens rea element?

3. Was appellant prejudiced by the admission of irrelevant evidence?

4. Should appellant have been granted a directed verdict?

DISCUSSION

First Amendment

Appellant contends because the product he was convicted of possessing is not otherwise unlawful, its possession becomes illegal under § 16-13-470 only when one speaks of its use as an adulterant in a commercial setting.[3] He argues § 16-13-470(A)(4) is therefore an "indirect ban" on commercial speech that violates the First Amendment. We disagree.

First, the conduct punishable under subsection (4) is possession of an illegal adulterant; commercial speech is not an integral part of the prohibited activity. Commercial speech may be implicated, however, when, as here, it is used as evidence to prove an element of the offense, *i.e.* that the adulterant was intended to defeat a drug test.

"[T]he First Amendment does not protect commercial speech about unlawful activities." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 n.7 (1996) (*citing* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)). Adulterating a urine sample to defeat a drug or alcohol

[3]Appellant complains that Zydot is simply a "sophisticated Gatorade" and drinking large amounts of water could also defeat a urine drug test.

test is an illegal activity under subsection **(3)** of § 16-13-470(A). Commercial speech promoting this illegal activity is therefore not protected. Evidence of such speech may be used to prove intent under § 16-13-470(A)(4) without violating the First Amendment.

Mens rea element

Appellant contends § 16-3-470(A)(4) is impermissibly vague because it contains no mens rea element.[4] We construe § 16-13-470(A)(4) to require that the person possessing the product intended it be used as an adulterant. The statute thus contains a mens rea element. *See* State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990) (knowledge and intent as examples of mental state). Appellant's complaint is without merit.

Irrelevant evidence

Appellant contends the trial judge erroneously allowed evidence of the ad, the search warrant, and the other adulterants seized from his store. He claims this evidence is irrelevant because it goes to show mental culpability which is not an element of § 16-13-470(A)(4). Under our reading of the statute, the evidence evincing appellant's mental culpability is relevant and was properly admitted.

Directed verdict

Appellant contends the trial judge should have granted his motion for directed verdict. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce any direct or substantial circumstantial evidence of the offense charged. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). Here, there was evidence

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[4]*But see* State v. Ferguson, *infra* (stating that the legislature, if it so chooses, may make an act or omission a crime regardless of fault).

appellant owned the store where the adulterants were for sale and there were invoices indicating he had paid for them. Further, it can be inferred from the ad advertising the adulterants for sale at appellant's store that he possessed them with the intent they be used to defeat drug or alcohol tests. Accordingly, the motion for directed verdict was properly denied.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shawn Paul Humphries, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Henry F. Floyd, Trial Judge
H. Dean Hall, Post-Conviction Judge

Opinion No. 25519
Submitted June 26, 2002 - Filed August 26, 2002

AFFIRMED

Deputy Chief Attorney 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 Donald J. Zelenka, all of Columbia, for respondent.

CHIEF JUSTICE TOAL: Shawn Paul Humphries ("Petitioner") appeals from the denial of his application for post-conviction relief ("PCR").

FACTUAL/PROCEDURAL BACKGROUND

Petitioner was tried for the murder of Dickie Smith ("Smith"), the owner of a Max-Saver convenience store. Petitioner was convicted of murder, attempted armed robbery, and criminal conspiracy. He was sentenced to death for murder and to concurrent sentences of twenty years for attempted armed robbery and five years for criminal conspiracy. His convictions and sentences were affirmed on direct appeal. *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268, 117 S. Ct. 2441, 138 L. Ed. 2d 201 (1997).

The evidence at trial, including the video from the store's surveillance camera, established that Petitioner and an accomplice entered the convenience store with the intention of robbing the store. Smith, who was working in the store, asked Petitioner whether he wanted anything. Petitioner flashed the gun he had stolen the night before and replied he wanted money. There was some evidence to suggest Smith then reached under the counter to get a gun. When Smith reached under the counter, Petitioner fired a shot in Smith's direction and fled from the store.[1] The bullet fired by Petitioner struck Smith in the head, killing him. Petitioner was apprehended and immediately confessed his crime.[2]

The jury convicted Petitioner of murder, and after hearing all the evidence

[1] When the shot was fired, Petitioner's accomplice, Eddie Blackwell, fainted and later regained consciousness prior to the arrival of the police. Blackwell was convicted of murder, criminal conspiracy, and attempted armed robbery, and received a life sentence for murder.

[2] When the arresting officer asked Petitioner where the gun was, Petitioner immediately told him it was in his belt. Petitioner remained cooperative throughout the arrest.

in the sentencing phase, recommended a death sentence. The statutory aggravating factor relied on by the State, and found by the jury, was that the murder was carried out while in the commission of an armed robbery.[3]

During the sentencing phase, the State introduced testimony from the victim's family (his brother and his wife) about Smith's childhood, work ethic, generosity, and close relationship with his young daughter. Smith's brother testified he and his brother grew up in a poor family and that they did not have hot water. When Smith was nine years old, his father died. After his father's death, Smith and other family members began working to support the family. Smith's brother testified when Smith was in the ninth grade, he took a job as a meat cutter at Bi-Lo after school, working until 10:00 or 11:00 at night. In the tenth grade, Smith acquired a full-time job working second shift in a textile mill while continuing to attend school. Smith's brother testified further that everyone in the community liked Smith and that he was a good person.

Smith's wife also testified during the sentencing phase. She described Smith as ambitious, hardworking, and generous. For instance, after receiving one technical degree and becoming a supervisor, Smith went back to school to get his residential home builder's license and began building houses in 1986. According to Smith's wife, she and Smith had a daughter, Ashley, in 1988. Smith's wife described Smith and Ashley's relationship as very close, and testified Ashley was having a hard time since her father was killed and was receiving counseling.

Petitioner presented evidence in mitigation during the sentencing phase through the testimony of thirteen witnesses. Apparently, Petitioner's strategy was to mitigate the circumstances of his offense by making the jury aware of the brutal circumstances in which he was raised.

Petitioner's paternal grandfather testified Petitioner and Petitioner's brother lived with him and Petitioner's grandmother from the time Petitioner

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[3] The facts are as stated in this Court's opinion in *State v. Humphries.*

was three years old until Petitioner was twelve years old. Petitioner's grandfather testified that he and his wife were heavy drinkers, and that his wife grew marijuana in their back yard. Petitioner's grandfather described his son, Petitioner's father, as unpredictably violent, noting he had been to prison several times. Petitioner's grandfather testified that his son, Petitioner's father, had cut him on the arm with a knife and had kicked Petitioner's grandmother in the face, knocking her false teeth out.

Next, Petitioner's aunt testified Petitioner's father had said on numerous occasions that he never loved his children and that the children should have been aborted.

Petitioner's mother testified that, after she left Petitioner's father, she became pregnant with Petitioner as a result of his father raping her at knife point. She stated she eventually left the children with their paternal grandparents and married several more men. She reunited with the children only after she married someone who would allow the children to live with her.

Petitioner's mother also discussed Petitioner's criminal record. According to his own mother's testimony, Petitioner was arrested in 1984 for two counts of breaking and entering, and was placed on probation. Thereafter, he was given more probation after he was suspended from school for fighting several times. After Petitioner's second probation revocation when he was fifteen years old, he was sent to Reception & Evaluation in Columbia for thirty days and was placed on probation again. Petitioner was arrested in January 1989 for breaking into a church, apparently looking for food because he had been living on the street for a week. Petitioner pled guilty to that charge and was placed on probation. In 1990, Petitioner was charged with stealing an automobile after he was released from substance abuse treatment in Texas.[4] As a result of that charge, Petitioner was sentenced to two years imprisonment with four years of

[4] Petitioner's mother enrolled him in substance abuse treatment because she had observed him huffing paint, and, upon visiting his residence, had discovered empty paint cans and rags littering the floor.

probation.

Petitioner's step-mother testified that Petitioner's father used a combination of alcohol, drugs, and paint fumes every day, and had shared those substances with Petitioner from 1983 to 1992.

Petitioner's brother testified regarding the circumstances in which he and Petitioner grew up, including: their father's violence toward his own parents, the lack of hot water and sometimes running water, the lack of food, and the trips taken to the dumpsters to find school clothes.

Mary Shults, an expert witness with a degree in sociology and a master's degree in social work, testified regarding Petitioner's social history. She related that Petitioner had been reminded throughout his life that he was a product of rape. Shults stated that Petitioner's father was incredibly violent, would kick people in the face, cut people, and would refer to himself as Satan. In addition, Shults testified that Petitioner's father introduced Petitioner to drugs and alcohol sometime between the ages of six and ten.

At the close of the sentencing phase evidence, Petitioner's counsel moved to prohibit the solicitor from making any reference to victim impact in his closing argument. The trial judge denied that motion.[5]

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[5] In denying the motion, the trial judge stated:

> I realize that this is an issue that's in this case that if the death penalty is returned, that the appellate courts will have to address. How the Supreme Court wants to deal with my ruling as to whether it is or is not evidence of aggravation or is it just merely pointing out the characteristics of the victim in this case, or is it adequately covered in the notice, I'll let them worry about it. I've ruled, and the water's over the bridge, so I will not prohibit from arguing to the jury those facts,

In his sentencing phase closing remarks, the solicitor argued, in part:[6]

> It's easy in this stage of the game – in this stage of the trial to start looking at [Petitioner] as a victim in this case. And the Defense wants to paint a picture sort of a window for you to look through. Let's remember the good [Petitioner], and lets forget what he did and let's forget all the back record and all that stuff. Let's just look at what he did.
>
> And they presented a bajillion [sic] pictures of [Petitioner] as a little boy to you. Folks, the State of South Carolina is not attempting to send to death row that little boy in that picture. Every defendant in this country who has gone to death row has had pictures like that. Everyone that comes after this will have pictures like that.
>
> We're not talking about a three year old boy or a six year old boy or a twelve year old boy. We're talking about a 22 year old man who went to a store and executed [Smith]. That's what we're talking about. But it's easy at this stage when you go through day after day of testimony about [Petitioner] to start looking at him as some sort of victim.
>
> I would submit to you that the last thing you need to look at in this case is [Smith] and his uniqueness as an individual. When I talk about [Smith], I'm not trying to get tears of sympathy for him. A jury's duty is to look objectively at the case. So look at the cold hard facts.

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since that is now in the record.

[6] We have italicized the portions of the solicitor's closing argument that Petitioner underlined in his brief, however, we have included more of the solicitor's comments than Petitioner included in his brief.

. . .

[Smith] was born in 1950, fourth son, fifth child of a fellow named Alton Smith and a sweet lady named Lottie Mae Darnell Smith. They grew up poor. They didn't have hot water. They had a spigot coming in and a tub next to the stove, and they had a few acres of cotton.

[Smith] is as much about this case as [Petitioner]. When [Smith's father] died when [Smith] was nine, he pulled himself up by his boot straps and he started contributing to the family. He got all kinds of odd jobs picking cotton at a penny a pound, hunting rabbits, skinning them, dressing them out, selling them for 50 cents.

When he's 14 years old, he gets a job in Greenville at the Bi-Lo in the Meat Department working after school. He's gone to school all day. From after school till about 10:00 or 10:30 at night working at Bi-Lo, saving his money, buying a car for the family.

When he's in tenth grade, he goes down to Boenett's and he gets a full-time job, second shift. He's going to school all day, and he's working until midnight, contributing. Lottie Mae Darnell Smith with eight kids, got them all out of high school, all at least a tech degree, some of them through college.

When [Smith] finished high school, he went to work for Union Carbide, then Kemet, but he didn't stop there. He kept improving himself. He went to Tech, he got an engineering degree, and he became a supervisor, and then he went back to Tech because he decided he wanted to build houses, and he got his – another degree at Tech, and he got his builder's license.

And in 1984 he met Pat and they fell in love, and they got married. That's the same year [Petitioner] committed two house

break-ins at age 13. 1986, [Smith] makes a pretty drastic move. He decides he's going to quit Kemet and go build houses full-time, and he goes out, and he starts building houses in the community he had grown up in. That's the same year [Petitioner] is up for his second probation violation and sent down to Columbia.

Then in 1988, July the 4th, they have a little baby girl named Ashley. You know, the Defense brought in a 12 year old . . . stepsister, said, "Please don't put Shawn Paul Humphries in the electric chair." I'm sorry I did not feel it was appropriate to bring in a six year old [sic] girl Ashley and parade her in front of you.

In 1988 Ashley is born. That's the same year [Petitioner] went to jail for two years. And in the spring of 1992, I believe, [Smith] opens the doors to the Max-Saver, building a business down in that community.

You have the right to look at the uniqueness of the individual. I would submit to you that [Smith], by everybody's description to you was a unique individual. He grew up in that southern part of Greenville County below Simpsonville that was mainly farming, cotton, agriculture area.

And he grew up watching it change to industrial. And he first went to work at Union Carbide, and then decides he was going to be part of that change, and he started building houses down there.

Who is the victim? Is it [Petitioner] or is this lady right here, his momma, or his wife, or Ashley, who the only way she can see her daddy is to go visit his grave on Sunday after church?

There are a lot of reasons for punishment. Rehabilitation is one reason, and rehabilitation is a proper goal in some circumstances, but you've got to decide about whether [Petitioner], who at 13 is breaking the law, at 14 is breaking the law, at 17 is

going – is breaking the law, at 18 is breaking the law and going to jail, who's been given every chance that the system offers. You decide if you're going to rehabilitate him.

What are some reasons for punishment? Retribution is one reason for punishment. That may not sound good, may not sound right, but, in fact, it is part of punishment, because retribution is our community saying you have done something wrong and we're going to punish you.

We don't allow individual retribution. If something happened to your momma, your sister, we don't allow you to go out and individually take retribution against the perpetrator, but it's the community saying you have broken a law in the community, and we're going to punish you.

And the question is when somebody commits the ultimate act, can they be subject to the ultimate punishment? And the answer is yes. And what we do is impanel a jury, and they decide when we're going to invoke the ultimate punishment.

I would submit to you folks that every time a jury sits in a situation like this, something important happens. I'm not talking about duty. I'm not talking about service. I'm talking about values. Every time a jury sits in a case like this, it is a statement of our values as a community, as a society. It's like a banner.

I'm not talking about dollars and cents. The Defense will say, "Well, sending [Petitioner] to the electric chair is not going to bring [Smith] back." I'm not talking about that, and you don't have to answer to anyone for the verdict you bring back, but *I'm talking about value.*

When you look at a case like this, when you look at the aggravation, when you look at the total lack of mitigation, I would

> submit, *when you look at the character of [Petitioner], and when you look at Smith*, how profane when you look at all the circumstances of this crime and of this [Petitioner], how profane to give this man a gift of life under these circumstances.
>
> Each of you said, "If the case was aggravating enough, if the case was senseless enough, yes, I could sign that form." What punishment will you recommend here? What punishment do you recommend for a crime as senseless as this?
>
> *. . .What punishment do you recommend when somebody like [Smith] is taken from us? . . .*
>
> . . .
>
> If not in a case as aggravating as this, if not in a case with absolutely no mitigation like this, *if not in a case with a character like this, if not in a case when somebody like [Smith] is taken, then when are you going to do it?*

The jury deliberated and recommended death. Afterwards, the trial judge stated,

> The only thing that remotely would cause me concern is that issue of the error – the alleged error as to that [victim impact] testimony, but whether or not it's wrong to admit it or not, the jury having heard it, I don't think made a decision on the basis of prejudice, passion or any other arbitrary factor.

At the post-trial motions hearing, Petitioner's counsel objected to the solicitor's use of comparisons between Smith and Petitioner during his argument. The trial judge noted the facts solicitor referenced during the argument were clearly in the record. The trial judge disagreed with counsel's

reading of *Payne v. Tennessee*,[7] and commented further that the solicitor's argument was one of the best arguments he had ever heard, particularly in terms of the technique, delivery, and effectiveness.

On direct appeal, Petitioner argued the prosecution's use of the victim impact evidence during closing argument was inappropriate and prejudicial. However, this Court held the argument was not preserved. *State v. Humphries*, 325 S.C. at 35, 479 S.E.2d at 56.

At the PCR hearing on Petitioner's PCR application, S.J. Henry, one of Petitioner's trial counsel, testified the objection made to the comparison argument was not timely. He testified he was aware an objection should have been made at the time of the closing argument and the failure to do so would render the issue not preserved for appeal. Henry testified the failure to object during the solicitor's argument was not done as a matter of trial strategy. Henry believed the critical factors resulting in Petitioner's sentence of death were the video tape of the crime and the victim impact testimony of Smith's wife.

Petitioner's other trial attorney, John Mauldin, testified in a deposition which was presented to the PCR court. Mauldin stated the solicitor's closing argument compared Smith's life and Petitioner's life, and that this argument had a devastating effect on Petitioner's ability to receive a life sentence. Mauldin testified, in his "modest and limited understanding of *Payne* . . . that a comparative analysis between the life of the deceased and the life of the defendant is not authorized." He stated he should have made an objection at the time the solicitor made the comparison and used *Payne* as authority for that objection. However, he stated, at the time, he was unsure whether he knew the solicitor's comparison argument was wrong.

The PCR court found Petitioner's contention - that the solicitor had suggested Petitioner should die because his life was worth less than Smith's life - was not supported. The court found that there was no reference to the

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[7] 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

comparative worth of Smith and Petitioner. The court further noted the fact Petitioner and Smith had similar backgrounds, which defeated the probative worth of much of the defense's presentation in mitigation, did not cause the argument to be in error. The court concluded, since there was no showing the argument was improper, Petitioner's counsel could not be deemed ineffective for failing to object to the argument. The court further noted that *Payne* actually encourages the prosecution to comment on evidence on record about the life of the victim and about the life of the defendant. Therefore, the PCR court found Petitioner failed to show his attorneys were ineffective.

The Court granted certiorari on the following issue:

> Were Petitioner's attorneys ineffective for failing to object to the solicitor's comparison of Smith and Petitioner in his closing argument?

LAW/ANALYSIS

Petitioner argues his attorneys were ineffective for failing to timely object to the solicitor's closing argument, which Petitioner alleges suggested he deserved to die because his life was worth less than his victim's.

In order to prove counsel was ineffective, the applicant must show counsel's performance was deficient and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. CT. 2052, 80 L.Ed.2d 674 (1984); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). This Court will sustain the PCR judge's findings regarding ineffective assistance of counsel if there is any probative evidence to support those findings. *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997).

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. *State v.*

Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999) (citation omitted). A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. *Id.* Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998) (citations omitted). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Id.* (citations omitted).

In *Payne v. Tennessee*, the United States Supreme Court reversed its prior precedent regarding the admission of victim impact evidence. In *Payne*, the Supreme Court held,

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

501 U.S. at 827, 111 S. Ct. at 2609,115 L. Ed. 2d at 736.

Victim impact evidence is admissible in South Carolina, and the State is permitted to make arguments regarding that evidence during the sentencing phase of a death penalty trial.[8] While the admissibility of victim impact

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[8]*State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998), *overruled in part on other grounds by State v. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000), *overruled by Shafer v. South Carolina*, 121 S. Ct. 1263, 149 L. Ed. 2d 178 (2001); *State v. Rocheville*, 310 S.C. 20, 425 S.E.2d 32 (1993); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), *cert. denied*, 503 U.S. 993, 112 S. Ct.

evidence (in the form of testimony or by solicitor's argument in closing) in the sentencing phase of a death penalty trial is well-settled in post-*Payne* case law, the specific issue of whether it is permissible for the State to make a closing argument regarding the comparative worth of a defendant's life and the victim's life has not been addressed by this Court.

We agree with the PCR court's finding that the solicitor's argument does not suggest that the Smith's life is *worth more* than the Petitioner's life. We do recognize, however, that the solicitor compared the lives of Smith and the Petitioner based on the evidence presented. We now consider whether or not such a comparison is proper. Petitioner asserts this Court has answered this question already in *State v. Southerland,* 316 S.C. 377, 447 S.E.2d 862 (1994). We disagree, and believe Petitioner has misconstrued our decision in *Southerland.* In *Southerland,* the State did not offer any victim impact evidence, but the defendant wanted to introduce evidence of the *victim's bad character*. This Court held that "*Payne* prohibits this use of comparative character analysis." *Id.* at 385, 447 S.E.2d at 867. The Court recognized, "[w]hile evidence of harm caused by the defendant may include evidence of the victim's character, it is not offered to encourage comparative character analysis." *Id.* Upon examination of *Payne*, and other post-*Payne* precedent, we are convinced the Court was referring to comparative character analysis between the victim and other members of the community, not comparisons between the defendant and the victim.[9]

1691, 118 L. Ed. 2d 404 (1992); *Lucas v. Evatt,* 308 S.C. 31, 416 S.E.2d 646 (1992) (finding solicitor's closing argument concerning victims and impact of their murders upon their families did not render trial fundamentally unfair because argument was responsive to defendant's mother's testimony that she loved her son and that his arrest and trial had been very hard on her, and because argument described to jury consequences of defendant's criminal act, impact of murders upon family, and personal characteristics of victims).

[9]*See Alvarado v. State*, 912 S.W.2d 199 (Tex. Crim. App. 1995) (citing *Southerland* and *Payne* in support of trial court's refusal to admit evidence of a victim's prior bad act because it was not relevant to defendant's "moral

The following passage from *Payne* clarifies this distinction:

> Payne echoes the concern voiced in *Booth's* case that the admission of victim impact evidence permits a jury to find that defendants whose victims are assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. (citation omitted). As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind – for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss resulting to the community might be.

*Payne***,** 501 U.S. at 823-824, 111 S. Ct. 2607, 115 L. Ed. 2d at 734. According to this passage, the comparison prohibited by *Payne* is one between the victim and other members of society; *Payne* does not indicate any concern about comparisons between the victim and the defendant.

Although there is no *per se* bar against victim impact evidence after *Payne*, defendants are not left unprotected. As always, defendants are protected from overly prejudicial evidence by due process. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825, 111 S. Ct. at 2608, 115 L. Ed. 2d at 735; *Rocheville*; *Evatt.* In this case then, we must consider whether any of the solicitor's comments in his closing argument were so unduly prejudicial as to render his sentencing fundamentally unfair. Instead of arguing prejudice, however, Petitioner staked his argument on the impropriety of the solicitor's closing in which Petitioner alleged he improperly compared the lives of Petitioner and Smith in order to convey that Smith's life was worth more than Petitioner's life. As discussed, we do not believe this comparison was

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blameworthiness" in murdering the victim, the purpose for allowing victim impact evidence espoused in *Payne*).

prohibited by *Payne* or by this Court in *Southerland*. Therefore, the solicitor's comments were not improper and do not warrant reversal unless they were so prejudicial that they rendered the sentencing fundamentally unfair.

In our opinion, the solicitor's closing argument did not render sentencing fundamentally unfair as they did not prejudice Petitioner. The solicitor's comments were based on evidence already in the record. Smith's wife and brother testified during the penalty phase regarding each of the facts about Smith's life upon which the solicitor commented. Petitioner presented the testimony of thirteen witnesses in mitigation during the sentencing phase who attested to Petitioner's at-risk childhood and subsequent criminal acts as a juvenile and young adult, providing all the evidence of Petitioner's character discussed by the solicitor in his closing.

Through the testimony of Petitioner and Smith's family members, both the similarities (the childhood poverty and adversity) and the differences (the manner in which Petitioner and Smith dealt with their circumstances) were readily apparent to the jurors, before the solicitor's closing argument. As permitted by *Payne*, the State offered evidence of Smith's "uniqueness" as an individual by describing the successful ways in which Smith dealt with adversity in his life. Likewise, Petitioner introduced evidence of his own "uniqueness" through the testimony of thirteen witnesses (compared to Smith's two witnesses) regarding his own difficult childhood and background, thereby inviting a comparison between Petitioner and Smith's respective characters even before the solicitor gave his closing remarks. As such, we do not believe the solicitor's comments were so prejudicial (if prejudicial at all) that they rendered Petitioner's death sentence fundamentally unfair under the Due Process Clause. *Payne.*

To reverse the PCR court's denial of relief, this Court must find, first, that counsel was ineffective, and, second, that counsel's ineffectiveness resulted in prejudice. *Payne* does not prohibit character comparisons between defendants and victims; it prohibits comparisons that suggest that there are worthy and unworthy victims. Therefore, Petitioner cannot establish either the ineffectiveness prong or the prejudice prong of the test as required to overturn

the PCR court's denial of relief.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the PCR court's denial of relief.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dan Anthony Dearybury, Petitioner

v.

Wanda Kim Greene Dearybury, Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Spartanburg County
Maxey G. Watson, Family Court Judge

Opinion No. 25520
Heard June 25, 2002- Filed August 26, 2002

REVERSED

Gloria Y. Leevy, of Columbia, for Petitioner.

Michael L. Rudasill and Richard H. Rhodes, both of Burts, Turner, Rhodes & Thompson, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: We granted certiorari to review the decision of the Court of Appeals in *Dearybury v. Dearybury*, Op. No. 2000-UP-516 (S.C. Ct. App. filed July 6, 2000) to increase the amount of lump sum alimony awarded to respondent (Wife) from $125,000 to $150,000. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

The family court ordered petitioner (Husband) to pay Wife $125,000 in lump sum alimony. The section of the order awarding alimony states that "[i]n addition to other findings [in the] order," the award of alimony was based on the following findings: (1) Wife's monthly expenses for herself and the parties' children, including private school tuition for the children, were more than Husband's and, considering the property distribution aspects of the order and Husband's non-marital assets, Husband's future monthly expenses should be even less; (2) Husband was being awarded $214,985.19 in non-marital assets and $310,930.39 in marital assets of which $85,087.34 was either in cash or could be converted to cash; and (3) the unknown nature of Husband's future income and the possibility that he may not be able to make regular alimony payments due to the fact that he was self-employed in a start-up company. The family court also found that alimony awarded to Wife should not be taxable to her or tax deductible for Husband.

Earlier in the order, in a section entitled "Background and Findings Relevant to Most Issues," the family court found the following: (1) Husband was 37 years old and Wife was 36 years old at the time of the hearing; (2) while the mental health of both parties was "less than excellent," incident to the break-up of the marriage, both parties were in good physical health; (3) Husband has an undergraduate degree and was employed in the family's oil business until he was terminated as a result of poor performance; (4) Husband's total direct contributions to the marriage were approximately $627,763.40; (5) although at the time of the hearing Husband reported $1,000 per month gross income, he was capable of earning $38,454 per year based on his history of earnings; (6) Husband has the ability to earn an additional $1,130 per month from the sale of his interest in the family business and

reinvestment of the value of his interest; (7) Husband does not need additional education to achieve his income potential; (8) Wife has a two year degree from a junior college and credits toward a marketing degree from the University of South Carolina; (9) early in the marriage wife worked at an accounting firm and for Congresswoman Liz Patterson, and at the time of the hearing was earning $260 per week working on a part-time basis at the children's school; (10) Wife is capable of earning at least $6.00 per hour and can work forty hours per week; (11) Wife's income potential should increase upon completing one full academic year of college credit and receiving her graduate degree; (12) Wife brought $1,400 and a vehicle into the marriage and contributed $18,241.89 in wages to the marriage; (13) Wife was the primary caretaker of the parties' children and was responsible for household chores, but Husband cooked some meals and indirectly contributed to the household; (14) both parties committed marital misconduct and separated several times during the course of the marriage; and (15) the parties enjoyed a comfortable standard of living due in large part to contributions from Husband and his parents.

Wife argued on appeal that lump sum alimony of $125,000 was insufficient given the wide discrepancy in earning potential and resources between the two parties. The Court of Appeals held the following regarding this issue:

> As to the wife's appeal of this issue . . . we hold that a full review of the record and close consideration of all the relevant facts and circumstances warrants a finding that she should receive $150,000.00 in lump sum alimony. In so holding, we elect to exercise our jurisdiction to find the facts according to our own view of the evidence. Of particular concern to us here is the family court's apparent misapprehension that the husband is considerably older than the wife and has less time left to engage in remunerative employment. The evidence is clear that there is, in fact, only a few months difference between the parties' ages.

Husband argues the increase in alimony was error. We agree.

LAW/ANALYSIS

The decision to grant or deny alimony rests within the discretion of the family court judge. *Clardy v. Clardy*, 266 S.C. 270, 222 S.E.2d 771 (1976). The judge's discretion, when exercised in light of the facts of each particular case, will not be disturbed on appeal absent abuse thereof. *Long v. Long*, 247 S.C. 250, 146 S.E.2d 873 (1966). An abuse of discretion occurs when the judge is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support. *Stewart v. Floyd*, 274 S.C. 437, 265 S.E.2d 254 (1980).

In making an award of alimony, the following factors must be considered and weighed: (1) the duration of the marriage and ages of the parties at the time of marriage and at the time of the divorce; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse, together with the need of each spouse for additional training or education in order to achieve that spouse's income potential; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action; (9) custody of the children; (10) marital misconduct or fault of either or both parties if the misconduct has affected the economic circumstances of the parties, or contributed to the breakup of the marriage; (11) tax consequences; (12) existence of any support obligations from a prior marriage; and (13) such other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C)(Supp. 2001).

In appeals from all equity actions, including those from the family court, the appellate court has authority to find facts in accordance with its own view of the preponderance of the evidence. *Rutherford v. Rutherford*,

307 S.C. 199, 414 S.E.2d 157 (1992). However, this broad scope of review does not require the appellate court to disregard the findings of the lower court. *Stevenson v. Stevenson*, 276 S.C. 475, 279 S.E.2d 616 (1981).

In the case at hand, the Court of Appeals elected to exercise its jurisdiction to find facts according to its own view of the evidence and, based on those findings, to increase the amount of lump sum alimony to $150,000. However, other than expressing concern over the family court's misapprehension regarding the parties' ages, the Court of Appeals failed to specify the findings of fact it relied upon in increasing the award of alimony.

Rule 220(b)(1), SCACR, states that in every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. Accordingly, when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision.

Here, the lone finding set forth by the Court of Appeals in support of the increase in alimony, that a misapprehension regarding the ages of the parties was a factor in awarding alimony, is not supported by the record. The family court made findings, either in the "Background and Findings Relevant to Most Issues" section or the "Alimony" section of the order, regarding each of the factors set forth in section 20-3-130(C). Those findings are supported by the record. The statement the Court of Appeals apparently relied upon in increasing the amount of alimony is found in the section of the family court order addressing the role retirement assets played in the decision regarding equitable distribution. The family court stated the following:

> This distribution also considers the retirement assets of the parties are almost wholly being divided to Husband. *Husband is older than Wife and has less*

> *time left in his work life*.[1] In addition, the majority of the retirement assets are derived from Dearybury Oil and Gas, his family's company. Some of these are marital and some are non-marital. Wife is receiving liquidity whereas Husband will not have the benefit of liquidity (without incurring substantial tax considerations) with these retirement assets.

(Emphasis added).

The family court did not find, as the Court of Appeals states, that Husband is "considerably older" than Wife. Moreover, while the family court considered other findings contained in the order when determining the amount of alimony to be awarded, there is no indication the family court relied on the age difference noted in its discussion of retirement benefits. Instead, the findings regarding each of the factors set forth in section 20-3-130(C) are found in the "Background and Findings Relevant to Most Issues," wherein the family court properly noted the age difference between the parties.

Accordingly, because the only finding upon which the Court of Appeals based its increase in the award of lump sum alimony is not supported by the record, we reverse its decision to increase that sum from $125,000 to $150,000. Moreover, we decline to exercise our ability to make independent findings of fact in this case because the decision of the family court is fair and reasonable based on the facts set forth in the record.

CONCLUSION

For the foregoing reasons, we reverse the Court of Appeals' decision to increase the amount of lump sum alimony awarded to Wife.

[1] Husband is less than one year older than Wife. In the "Background and Findings Relevant to Most Issues" section, the family court correctly lists the ages of both Husband and Wife at the time of marriage and at the time of the divorce hearing.

REVERSED.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daryl Dean Sanchez, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appeal From Charleston County
John Hamilton Smith, Trial Judge
Daniel F. Pieper, Post-Conviction Relief Judge

Opinion No. 25521
Submitted October 23, 2001 – Filed August 26, 2002

AFFIRMED IN PART; REVERSED IN PART

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, for petitioner/respondent.

Assistant Appellate Defender Robert M. Pachak, of South Carolina Office of Appellate Defense, of Columbia, for respondent/petitioner.

JUSTICE MOORE: We granted both respondent/petitioner Sanchez's and petitioner/respondent State's cross-petitions for certiorari. The post-conviction relief (PCR) judge had granted in part and denied in part Sanchez's PCR application. We affirm in part and reverse in part.

FACTS

Respondent/petitioner Sanchez was convicted of first-degree criminal sexual conduct with a minor and sentenced to sixteen years imprisonment.

At trial, the State's first witness was the six-year-old victim. Victim testified she was visiting her grandmother on the evening of July 15, 1989, when Sanchez, a family friend, "touched her on her bottom with his dingle." Direct examination continued:

> Q. All right. Did he touch you with anything else on your bottom?
> A. This time I have been thinking but nope, his fingers, not dingle.
> Q. Now, [victim], did you touch [Sanchez] anywhere?
> A. Yes.
> Q. Where did you touch him?
> A. On his hiney.
> Q. Why did you do that?
> A. Huh?
> Q. Did he tell you to touch him there?
> A. Yes, that's most likely [sic] he told me.
> Q. All right. What happened when you touched him there?
> A. He peed in my mouth.
> . . .
> Q. All right. Do you know how his hiney felt?
> A. Hard, hard, hard.

Thereafter, victim testified Sanchez made her touch him "on his penis

again." She touched him with her hands.

Victim testified, the following morning, she told her mother Sanchez "stuck his hiney -- he took his dingle over my hiney."

On direct examination, victim's mother testified victim told her "[Sanchez] stuck his finger in my hiney." Mother testified, later the same morning, victim stated "[Sanchez] peed in my mouth." Trial counsel did not object to these statements.

On direct examination, victim's father testified mother told him that victim told her "[Sanchez] had stuck his finger in her hiney." He testified, later the same morning, victim stated Sanchez had "peed" in her mouth. Trial counsel did not object. Thereafter, father stated, in the afternoon, mother told him "[Sanchez] did the whole thing; he raped [victim.]." At this point, the trial judge interjected, "[w]e are getting into a lot of hearsay now."

On direct examination, Officer Georgia Malloy testified she showed victim four anatomically correct dolls. Malloy testified she asked victim to demonstrate what happened with Sanchez using the dolls. Victim selected the adult male doll and the child female doll. Malloy testified victim inserted the fingers of the adult male doll into the vagina of the child female doll then put the penis of the adult male doll against the vagina of the child female doll. Victim also placed the male doll's penis into the child doll's mouth. Counsel did not offer any objections to this testimony.

At the PCR hearing, trial counsel testified he did not object to mother's and father's hearsay testimony because it did not bolster the victim's testimony. Trial counsel stated he did not object to the testimony regarding the victim's demonstration with the anatomically correct dolls because the victim's statements with the dolls were vague.

The PCR judge found counsel had a valid strategic reason for not objecting to mother's and father's hearsay testimony. The PCR judge also found counsel had a valid strategic reason for not objecting to hearsay

testimony concerning the victim's demonstration with the anatomically correct dolls. The judge concluded, for tactical reasons, counsel wanted the jury to hear the testimony regarding the victim's use of the dolls because it illustrated her vague statements and descriptions regarding the alleged assault.

ISSUE

Was counsel ineffective for failing to object to hearsay testimony?

DISCUSSION

To prove ineffective assistance of counsel, a PCR applicant must establish that (1) counsel failed to render reasonably effective assistance under prevailing professional norms and (2) he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). To establish prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). Where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). If there is any probative evidence to support the findings of the PCR judge, those findings must be upheld. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony. *Id.* When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot

include details or particulars or the identity of the perpetrator. *Id.*

Since mother's and father's testimony was inadmissible hearsay, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness. *See* Strickland v. Washington, *supra*; Brown v. State, *supra*.

As to the prejudice prong of Strickland v. Washington, *supra*, Sanchez was prejudiced by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. As stated in Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 569, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Mother's and father's testimony impermissibly bolstered the victim's testimony. Mother and father both testified as to the identity of the perpetrator and the details and particulars of the assault. Their testimony corroborated the victim's accusation. Consequently, the PCR judge erred by not granting Sanchez relief on this ground.

Furthermore, counsel was ineffective for failing to object to the police officer's hearsay testimony concerning the victim's demonstration of the assault through the use of anatomically correct dolls. Counsel's reason for not objecting was that he wanted the jury to hear the testimony because it illustrated the victim's vague statements regarding the alleged assault. Because the officer's testimony regarding the dolls corroborated the victim's testimony at trial, counsel's strategy was not reasonable given the prejudicial effect this testimony had on Sanchez.

CONCLUSION

Because Sanchez was prejudiced by counsel's deficient performance, we find he is entitled to a new trial. The State's issue is affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997); California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588

(1995); Plyler v. Moore, 129 F.3d 728 (4th Cir. 1997), *cert. denied*, Moore v. Cummings, 524 U.S. 945, 118 S.Ct. 2359, 141 L.Ed.2d 727 (1998); Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000); Plyler v. Evatt, 313 S.C. 405, 438 S.E.2d 244 (1993).

AFFIRMED IN PART; REVERSED IN PART.

WALLER and PLEICONES, JJ., concur. BURNETT, J., dissenting in a separate in which TOAL, C.J., concurs.

JUSTICE BURNETT (dissenting): I respectfully dissent. As noted by the majority, if there is any probative evidence which supports the findings of the PCR judge, those findings must be upheld. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000). Because there is probative evidence which supports the PCR judge's findings in this matter, the Court is required to affirm.

First, I agree mother and father offered inadmissible hearsay testimony regarding the victim's identity of the perpetrator and the specific details of the assault. Nonetheless, counsel articulated a valid, strategic reason for not objecting to the hearsay. Counsel's decision not to object to mother's and father's testimony because it did *not* bolster the victim's testimony was a reasonable, strategic decision. Mother and father testified the victim stated Sanchez "stuck his finger in her hiney." The victim, however, testified to various accounts of the incident, none of which specifically stated Sanchez "stuck his finger in her hiney." In my opinion, counsel offered a valid trial strategy by not objecting to mother's and father's testimony as their testimony contradicted the victim's already vague description of the assault. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) (where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective).

Furthermore, even if it was deficient for counsel not to object to the hearsay testimony, Sanchez failed to establish prejudice as mother's and father's testimony arguably undermined the victim's testimony. Cf. Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (improper hearsay testimony which *corroborates* victim's testimony cannot be harmless). Accordingly, the Court must affirm the PCR court. Anderson v. State, supra.

Second, counsel articulated a valid trial strategy by not objecting to the police officer's hearsay testimony concerning the victim's demonstration of the assault through the use of anatomically correct dolls. The police officer who was present during the victim's demonstration testified the victim placed the fingers of the adult male doll into the vagina of the child female doll. However, the victim's testimony was less than clear. Initially, the victim

state Sanchez "touched her on her bottom with his dingle." She later appeared to retract this statement, instead testifying Sanchez touched her with his fingers. To compound the difficulty of understanding her description of the assault, the victim used the terms "hiney," "dingle," and "penis" interchangeably. In my opinion, counsel articulated a valid trial strategy by not objecting to the officer's testimony as the hearsay testimony contradicted the victim's trial testimony. Caprood v. State, supra (where trial counsel articulates valid reason for employing certain trial strategy, the conduct will not be deemed ineffective).

Even if counsel should have objected to the officer's testimony, Sanchez failed to establish prejudice. The victim's demonstration of the assault through the use of anatomically correct dolls impeached, rather than corroborated, her trial testimony. Cf. Dawkins v. State, supra (improper hearsay testimony which *corroborates* victim's testimony cannot be harmless). Because the findings of the PCR judge are supported by the record, the Court must affirm. Anderson v. State, supra.

In essence, the majority holds it is never a reasonable trial strategy for trial counsel to decline to object to inadmissible hearsay testimony in a case involving criminal sexual conduct. I disagree with this conclusion. First, the majority ignores the fundamental presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and that the PCR applicant has the burden of proving the allegations in his complaint. Rule 71.1(e), SCRCP. Second, there are circumstances where inadmissible hearsay testimony benefits a defense. This is one of those cases. Trial counsel proffered a valid reason not to object to the hearsay testimony. The Court should not second guess trial counsel's legitimate reason for not objecting to the testimony.

I would affirm.[1]

TOAL, C.J., concurs.

[1]I agree with the majority's decision affirming the State's issue pursuant to Rule 220(b)(1), SCACR, and the cited authorities.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Koatesworth Swope, Respondent.

Opinion No. 25522
Submitted July 30, 2002 - Filed August 26, 2002

PUBLIC REPRIMAND

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

William Koatesworth Swope, of Charleston, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the agreement and publicly reprimand respondent.

Facts

I. Failure to Timely Comply with Deferred Disciplinary Agreement

On August 17, 2001, respondent admitted minor misconduct in a probate matter and entered into a Deferred Disciplinary Agreement with the Commission on Lawyer Conduct. The agreement required respondent to meet certain obligations to the client and submit an affidavit of compliance to the Office of Disciplinary Counsel. Respondent failed to timely comply with the obligations and failed to timely submit the required affidavit. Respondent has since complied with the agreement.

II. Failure to Cooperate with Office of Disciplinary Counsel

The Office of Disciplinary Counsel notified respondent of complaints filed in two separate matters. Respondent provided a response in one matter only after a second request from the Office of Disciplinary Counsel. Thereafter, respondent failed to respond to a request for documentation. Respondent cooperated with the Office of Disciplinary Counsel after receiving a Notice of Full Investigation.

In the second matter, the Office of Disciplinary Counsel never received a response from respondent even after sending him a Treacy[1] letter and a Notice of Full Investigation. Respondent filed a timely answer to Formal Charges filed in the matter and has cooperated with the Office of Disciplinary Counsel and the Commission on Lawyer Conduct since that time.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407,

[1] In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

SCACR: Rule 8.1 (knowingly failing to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice). Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct) and Rule 7(a)(3) (knowingly failing to respond to a lawful demand from a disciplinary authority).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lynn W. Bazzle and Burt A. Bazzle, in a representative capacity on behalf of a class and for all others similarly situated, Respondents,

v.

Green Tree Financial Corp. a/k/a Green Tree Acceptance Corporation a/k/a Green Tree Financial Services Corporation n/k/a Conseco Finance, Inc., Appellant.

Daniel B. Lackey, George Buggs, and Florine Buggs, in a representative capacity on behalf of a class and for all others similarly situated, Respondents,

v.

Green Tree Financial Corp., a/k/a Green Tree Financial Services Corp., a/k/a Green Tree Acceptance Corp., n/k/a

Conseco Finance, Inc., Appellant.

Appeal From Dorchester County
Patrick R. Watts, Special Circuit Court Judge
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25523
Heard March 21, 2002 - Filed August 26, 2002

AFFIRMED

Wilburn Brewer, Jr. and Robert C. Byrd, of Nexsen Pruet Jacobs Pollard & Robinson, LLP, of Charleston; and Alan S. Kaplinsky and Mark J. Levin, of Ballard Spahr Andrews & Ingersoll, LLP, of Philadelphia, PA, all for appellant.

Steven W. Hamm, of Richardson Plowden Carpenter & Robinson, P.A., of Columbia; D. Michael Kelly, Bradford P. Simpson and B. Randall Dong, all of Suggs & Kelly Lawyers, P.A., of Columbia; Mary Leigh Arnold, of Mary Leigh Arnold, P.A., of Mt. Pleasant; Charles L. A. Terreni, of Terreni Law Firm, of Columbia; and T. Alexander Beard, of Beard Law Offices of Mt. Pleasant, all for respondents.

Herbert W. Hamilton, of Kennedy Covington Lobdell & Hickman, L.L.P., of Rock Hill; Christopher R. Lipsett, Eric J. Mogilnicki, Christopher J. Mead, all of Wilmer, Cutler & Pickering, of New York, NY; and John T. Moore, B. Rush Smith, III and Thad H.

Westbrook, all of Nelson, Mullins, Riley & Scarborough, L.L.P., of Columbia, all for Amicus Curiae American Bankers Association, American Financial Services Association, Consumer Bankers Association, South Carolina Bankers Association, and South Carolina Merchants Association, in support of appellant.

John F. Hardaway, of Columbia; and Michael D. Donovan, of Donovan Searles, LLC, of Philadelphia, PA, both for Amicus Curiae National Association of Consumer Advocates, in support of respondents.

CHIEF JUSTICE TOAL: Two classes of plaintiffs, represented by Lynn and Burt Bazzle, et. al. ("Bazzles") and by Daniel Lackey, et. al. ("Lackey"), were awarded damages pursuant to their respective class action arbitrations against Green Tree Financial Corporation ("Green Tree") for violations of the South Carolina Consumer Protection Code.[1] Green Tree appeals the arbitrator's[2] awards in both cases, on grounds that class-wide arbitration of the plaintiffs' claims was not authorized by the arbitration agreement.

FACTUAL/PROCEDURAL BACKGROUND

On February 22, 2001, this Court entered an Order withdrawing Green Tree's appeal from the Court of Appeals. By that order, this Court assumed jurisdiction and consolidated the *Bazzle* and *Lackey* cases for appeal. Although each case proceeded through arbitration independently, resolution of each appeal involves the same novel issue: whether class-wide arbitration is permissible when the arbitration agreement between the parties is silent

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[1]S.C. Code Ann. §§ 37-10-102; 37-10-105 (Supp. 1997).

[2]The same arbitrator heard both cases separately.

regarding class actions.

Bazzle

The Bazzles (like their fellow class members) were approached by Patton General Contracting ("Patton"), a non-exclusive Green Tree dealer, in 1995, to perform home improvements. Patton provided the Bazzles with a Green Tree application for financing. The Green Tree application contained no attorney or insurance agent preference notice. On May 20, 1995, the Bazzles executed a Retail Installment Contract and Security Agreement for $15,000 which contained the arbitration clause at issue.[3] The same day the Bazzles executed a number of other documents identifying Green Tree as the lender, including a mortgage stamped with directions to return it to Green Tree once executed. The Bazzles were never given an attorney or insurance preference form and no attorney was involved in the transaction or closing on their behalf.

On March 25, 1997, Lynn and Burt Bazzle commenced an action against Green Tree in the Dorchester County Court of Common Pleas based on Green Tree's alleged violations of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code[4] arising out of their home improvement financing agreement with Green Tree.

On April 21, 1997, the Bazzles filed an amended complaint incorporating class allegations and a Motion for Class Certification. A month later, Green Tree filed a Motion for Stay and to Compel Arbitration. On December 5, 1997,

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[3]The arbitration clause does not mention class actions in arbitration or otherwise, but Green Tree argues the singular language of the clause stating claims relating to "*this* contract . . . will be resolved by binding arbitration by an arbitrator selected by us with the consent of *you*" precludes class-wide arbitration. (emphasis added). Green Tree does not concede that the agreement is "silent."

[4]S.C. Code Ann. §§ 37-10-102; 37-10-105 (Supp. 1997).

the trial court heard both motions. It granted the Motion for Class Certification. After the court granted class certification, Green Tree pursued its Motion to Compel Arbitration, and the trial court granted it.

The trial court issued two separate orders memorializing its rulings on December 5, 1997: (1) an order granting class certification; and (2) an order compelling arbitration. In its order compelling arbitration, the trial court stated that the order applied to the Bazzles and all members of their class who elected to be part of the action. In a supplemental order issued January 7, 1998, the trial court ordered that the class action in arbitration proceed on an opt-out basis.

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the trial court's order granting class certification. After a hearing, the trial court denied Green Tree's Motion for Reconsideration, and Green Tree filed an appeal. On April 28, 1998, the Court of Appeals dismissed Green Tree's appeal on grounds that granting or denying class certification is interlocutory and non-appealable. Green Tree filed a Petition for Rehearing. The Court of Appeals denied rehearing and Green Tree filed a petition for certiorari with this Court. This Court denied Green Tree's petition and remitted the case to the trial court.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of an Arbitrator. On May 6, 1999, Green Tree filed a Motion to Dismiss on grounds that the Bazzles were not the proper parties to pursue the claims asserted, as their interests were contrary to the interests of the class members. On May 20, 1999, the trial court heard both motions. The trial court appointed the Honorable Thomas Ervin as arbitrator and declined to hear the Motion to Dismiss for lack of jurisdiction.

All class action proceedings were thereafter administered by the arbitrator, without further involvement of the trial court. The arbitrator handled several motions by the parties before holding the final hearing on May 31, 2000. On July 24, 2000, the arbitrator issued a Final Order and Award, finding Green Tree liable for violating the attorney and insurance preference statute, S.C. Code Ann. § 37-10-102(a). The arbitrator found the remedies for such a violation to be in S.C. Code Ann. § 37-10-105 (Supp. 1996 & 1997) and awarded relief to the

class of 1,899 individuals in the amount of $10,935,000, and an additional $3,645,500 in attorney's fees and $18,242 in costs.

On July 25, 2000, the Bazzles filed a Motion to Confirm the Award in the trial court. On August 24, 2000, Green Tree filed a Motion to Remand the Award for Amendment and Clarification, an objection to the Motion to Confirm, and a Motion to Vacate the Award. On September 15, 2000, the trial court confirmed the award and denied Green Tree's motions to remand and vacate. Green Tree appealed and this Court assumed jurisdiction to hear the consolidated appeals.

Lackey

Daniel Lackey (and his fellow class members) entered into preprinted consumer installment contracts and security agreements with Green Tree for the purchase of mobile homes. These transactions were secured by real property and were subject to the South Carolina Consumer Protection Code. In each of these transactions, the consumer completed a Green Tree application for financing through a Green Tree dealer. The applications contained no attorney or insurance preference notice and no preference form was provided at any other time during the transaction.

Green Tree, not its dealers, notified the consumer whether credit had been granted or denied. If granted, Green Tree set the terms, including the interest rate, and prepared a mortgage and note. The mortgages were delivered to the consumer through the dealer, but were returned directly to Green Tree. The notes and mortgages were assigned to Green Tree. Green Tree funded the transaction after the consumer reported satisfaction with the set up of the mobile home and then issued checks to the dealer.

On May 28, 1996, Daniel Lackey and George and Florine Buggs commenced a *class* action against Green Tree in the Barnwell County Court of Common Pleas. The Lackey plaintiffs, like the Bazzles, alleged violations of the attorney and insurance preference provisions of the South Carolina Consumer Protection Code.

Green Tree filed its answer and the Lackey plaintiffs proceeded to file a Motion for Class Certification. Green Tree moved to Stay the Matter and to Compel Arbitration. The trial court denied Green Tree's Motion to Compel Arbitration, finding Green Tree's contract was an adhesion contract with an unconscionable and unenforceable arbitration clause. Green Tree appealed and the Court of Appeals reversed. Although the Court of Appeals agreed that the contracts were ones of adhesion, it found that the arbitration clause within them was not unconscionable. *Lackey, et. al. v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).

Following remand, the parties entered into a Consent Order appointing the Honorable Thomas Ervin as arbitrator. Apparently, the arbitrator raised the issue of class action arbitration and held a hearing to determine whether a class action could proceed under Green Tree's arbitration clause.[5] The Lackey Plaintiffs claim Green Tree sought a decision by the arbitrator at the hearing that the class action could not proceed in arbitration. Green Tree, however, claims its involvement was limited to vigorous objection that the arbitrator did not have authority to order class arbitration under the Federal Arbitration Act[6] ("FAA") and the arbitration agreement. After a hearing on the matter, the arbitrator issued an order permitting class action arbitration and scheduled a class certification hearing.

On September 22, 1998, Green Tree initiated a declaratory judgment action in federal district court, seeking to enjoin the arbitrator from certifying a class. After a hearing, the district court denied the injunction and dismissed

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[5]Although the Lackey plaintiffs moved for class certification in the trial court before Green Tree moved to compel arbitration, the trial court never addressed the motion because it refused to compel arbitration. As discussed, its decision was reversed and the matter was remanded for arbitration before the motion to certify the class was ever considered.

[6]9 U.S.C. §§ 1-208 (1994).

the declaratory judgment action for lack of subject matter jurisdiction.[7]

On November 28, 1998, the arbitrator held the hearing on class certification. Green Tree's counsel was present but refused to participate in the argument of the motion. The arbitrator found the requirements for class certification were met. In December 1998, Green Tree filed an action for Declaratory Judgment and Preliminary Injunction in state court and a Motion to Stay the arbitration proceedings. After a hearing, the trial court denied the stay on the ground it lacked jurisdiction to interfere with the arbitration.[8]

After a hearing in May of 1999, the arbitrator approved a class notice that was sent to the class members on May 12, 1999. On January 28, 2000, the arbitrator held a pre-trial conference. At the conference, the parties entered into a Consent Agreement redefining the Lackey class to include all mobile home transactions and placing all home improvement class members in the Bazzle class.

The arbitrator heard the Lackey claims on March 6-8, 2000. Green Tree participated, offering witnesses and evidence. At the conclusion, the arbitrator ruled orally that Green Tree had violated the attorney and insurance agent preference requirements of the Consumer Protection Code. The arbitrator awarded $9,200,000 for violation of the attorney and insurance preference statute, and an additional $3,066,666 in attorney's fees and $18,252 in costs. On May 31, 2000, the same arbitrator heard the Bazzle home improvement claims and again held Green Tree violated the attorney and insurance preference provisions. At this hearing, the arbitrator established the procedures for Green Tree to address its offset claims in both *Bazzle* and *Lackey*.

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[7]Significantly, the district court noted that even if it had jurisdiction, it would decline to intervene in the proceeding before the arbitrator as section 4 of the FAA only authorizes a party to petition a federal court when it has been aggrieved by the refusal of another to arbitrate.

[8]The trial court noted in its order that it found class actions and arbitration to be compatible.

On July 24, 2001, the Lackey Plaintiffs filed a motion to confirm the award in trial court. In response, Green Tree filed a Motion to Remand and a Motion to Vacate the award. In December 2001, the trial court confirmed the award. Green Tree appealed and this Court withdrew the appeal from the Court of Appeals and assumed jurisdiction to hear the consolidated *Bazzle* and *Lackey* appeals.

Although the *Bazzle* and *Lackey* cases involve financing for different purposes, Green Tree structured and conducted the transactions in the same manner. The consumers in both classes were bound to arbitration by the same clause which appeared in their Retail Sales Agreements. Procedurally, however, the two cases differ in how class certification was granted. As discussed, in *Bazzle*, the trial court certified the class and then granted Green Tree's Motion to Compel Arbitration. The Lackey suit was filed as a class action in trial court, but arbitration was compelled before the motion to certify the class was considered although the Lackey plaintiffs did make a Motion to Certify the Class. Thus, the arbitrator authorized class certification within the arbitration. The cases have been consolidated and Green Tree appeals the following issues:

I. Did Green Tree waive its ability to object to class-wide arbitration in *Bazzle* and *Lackey* by manifesting consent to the class-wide arbitration?

II. Did the trial court in *Bazzle* and the arbitrator in *Lackey* have contractual or legal authority to authorize the respective arbitrations to proceed on a class action basis?

III. If so, were the due process rights of the absent class members sufficiently protected?

LAW/ANALYSIS

I. Waiver

The Bazzle and Lackey plaintiffs argue this Court can avoid addressing

the broad issue of whether class-wide arbitrations were permissible by affirming on the alternate ground that Green Tree manifested consent to class-wide arbitration and may not now object to it. We are not convinced by this waiver argument.

The courts of this state have recognized that a party cannot complain when it receives the relief for which it has asked. *See McKissick v. J.F. Cleckley & Company*, 325 S.C. 327, 479 S.E.2d (Ct. App. 1996); *Estes v. Gray*, 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995). Specifically, a party that by its conduct consents to arbitration of a dispute waives any subsequent judicial challenge to its arbitrability. *See Rock-Tenn Co. v. United Paperworkers Int'l Union*, 184 F.3d 330 (4th Cir. 1999). Although this is an accurate statement of the law, Green Tree did not consent to class-wide arbitration by defending itself in the arbitration. As discussed, Green Tree protested class-wide arbitration vigorously in both cases, receiving adverse rulings every time, before defending itself on the merits.

In *Bazzle*, Green Tree requested arbitration and received it after the motion to certify the class was granted by the trial court. Even after the trial court certified the *Bazzle* class, Green Tree continued to push for arbitration, and the trial court granted Green Tree's Motion to Compel arbitration. The Bazzles therefore contend that Green Tree got what it asked for and cannot now complain that the court abused its discretion by granting the relief it requested. Although Green Tree did object to the class-wide arbitration before the arbitrator, the Bazzles contend it waived its ability to object by manifesting consent to proceed through some of its subsequent actions. For example, the Bazzles point to Green Tree's Motion to Decertify the class before the arbitrator on substantive grounds as evidence that Green Tree manifested consent to the arbitrator's authority to certify or decertify the class. The Bazzles claim that by placing the decertification issue squarely before the arbitrator, Green Tree manifested acceptance of the arbitral forum as sufficient to resolve the issue.

In *Lackey*, the plaintiffs argue similarly that Green Tree waived its right to object to class-wide arbitration by moving to compel arbitration when it knew of the class allegations being asserted. They argue that moving to compel

arbitration without insisting that the trial court address the class certification motion manifested consent for the arbitrator to decide the certification issue. The Lackey plaintiffs assert that Green Tree did not object with motions and stays until after the arbitrator ruled against Green Tree on the general issue of whether this action could possibly proceed as a class-wide arbitration. The Lackey plaintiffs claim Green Tree was obligated to force the trial court to decide the Lackey plaintiffs' motion before it granted Green Tree's Motion to Compel because Green Tree was aware of the class allegations and knew the arbitrator would decide the issue if the trial court did not.

We are not persuaded by the plaintiffs arguments for waiver in *Bazzle* or *Lackey*. In *Bazzle*, Green Tree argued against the Motion to Certify before the trial court, lost, and then filed a Motion for Reconsideration of the issue. The Motion for Reconsideration was denied and Green Tree appealed the denial all the way to this Court. In *Lackey*, although Green Tree did not insist the trial court decide the issue before arbitration was compelled, it objected vigorously to the possibility of class certification at the first hearing on the matter before the arbitrator and filed actions to enjoin class certification in federal and state court. Green Tree's motions in both cases were entirely unsuccessful, but, nonetheless, manifested Green Tree's objection to class-wide arbitration sufficiently to counter the plaintiffs' waiver argument.

II. Class Action Arbitration

In these consolidated cases, Green Tree argues the trial court and the arbitrator failed to enforce Green Tree's arbitration clause in accordance with its terms, in violation of the FAA, when they imposed class-wide arbitration.

The parties do not dispute that the FAA applies to the arbitration agreements in both cases.[9] The arbitration agreements expressly state that they

[9]In a separate action against Green Tree, this Court previously held Green Tree's arbitration clause was governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). The same arbitration clause is at

are made pursuant to transactions in interstate commerce and are governed by the FAA. Although they agree the FAA applies, the parties dispute how the FAA impacts the class-wide arbitration question.

The United States Supreme Court has not addressed the FAA's impact on class-wide arbitration, although it was presented with an opportunity to do so in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).[10] Thus, there is no binding precedent that this Court is obligated follow. Courts in other jurisdictions have addressed the issue, and have taken two different approaches. Several federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their interpretation of section 4 of the FAA.[11] Representing the opposing view, the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent.[12]

A. Seventh Circuit Approach

Green Tree urges the Court to adopt the reasoning employed by the Seventh Circuit, holding courts lack authority to order class-wide arbitration under section 4 of the FAA. 9 U.S.C. § 4. Section 4 requires arbitration in "accordance with the terms" of the agreement. If the arbitration agreement in

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issue here.

[10]This was an appeal from an opinion of the California Supreme Court in which, among other things, the California Court held class-wide arbitration permissible under state law when the arbitration agreement was silent regarding class action arbitration. *Keating v. Superior Court*, 31 Cal.3d 584, 645 P.2d 1192 (Cal. 1982).

[11]This federal approach was first enunciated by the Seventh Circuit in *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995).

[12]The California approach was first enunciated in *Keating v. Superior Court*.

question is silent on the issue, these courts reason that authorizing class-wide arbitration would not be in "accordance with the terms" of the agreement. *See Champ v. Siegel Trading Co., Inc. ; McCarthy v. Providential Corp., et. al.*,1994 WL 387852 (N. D. Cal.); *Gammaro v. Thorp Consumer Discount Co.*, 828 F.Supp. 673 (D. Minn. 1993). These courts support their decisions by drawing an analogy between ordering *class-wide* arbitration and ordering *consolidation* in arbitration.[13] *Id.*; *Med Ctr. Cars, Inc. v. Smith*, 727 So.2d 6 (Ala. 1998) (finding the federal authority persuasive and applying the consolidation analogy to class-wide arbitration in Alabama state courts).

In *Champ*, a class action alleging violations of the Commodity Exchange Act, RICO, and other state laws, the Seventh Circuit found "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275. Based on this comparison, the *Champ* court adopted "the rationale of several other circuits and [held] that section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.*; *Boeing; National Cas.; Baesler.* In reaching their decision in the consolidation cases, the various courts placed strict enforcement of the terms of the agreement above the policy favoring expeditious resolution of claims. *Champ*.

Citing a decision by the Second Circuit, the *Champ* court noted that the FAA's overriding goal was to place private arbitrations on the same footing as other contracts negotiated between private parties. *Champ* (citing *United Kingdom v. Boeing,* 998 F.2d 68 (2d Cir. 1993)). In furtherance of this goal, the Second Circuit held the duty to enforce the agreement as the parties wrote it to be tantamount, regardless of "possible inefficiencies created by such enforcement." *Champ,* 55 F.3d at 275 (citing *Boeing,* 998 F.2d at 72). The

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[13]Several federal circuits have refused to order consolidation of arbitration when the agreement is silent regarding consolidation. *See Government of United Kingdom v. Boeing, Co.,* 998 F. 2d 68 (2d Cir. 1993); *American Centennial Ins. v. National Cas. Co.,* 951 F.2d 107 (6th Cir. 1991); *Baesler v. Continental Grain Co.,* 900 F.2d 1193 (8th Cir. 1990).

Champ court, however, failed to discuss whether the arbitration agreement was one of adhesion or was truly *negotiated* by the parties, and failed to discuss the differences between consolidation and class-action on a practical level.

B. California Approach

The California Supreme Court, on the other hand, did consider whether a trial court could order class-wide arbitration under adhesive but enforceable franchise contracts in *Keating*, 31 Cal.3d 584, 645 P.2d 1192, *rev'd in part on other grounds* in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).[14] The California court concentrated on the negative implications of refusing to allow class-wide arbitration when arbitration has been made mandatory through an adhesion contract:

> If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial. Arbitration proceedings may well provide certain offsetting advantages through savings of time and expense; but, depending upon the nature of the issues and the evidence to be presented, it is at least doubtful that such advantages could compensate for the unfairness inherent in forcing hundreds or perhaps thousands, [sic] of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources.

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[14]The United States Supreme Court declined to reach this issue, finding that the California Supreme Court's decision was based entirely on state law and raised no federal question for them to review (e.g., whether or not the FAA prohibited class-wide arbitration in these circumstances). *Southland*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1.

Keating, 31 Cal.3d at 609.

The California Supreme Court, like the Seventh Circuit, drew an analogy between ordering consolidation and class-wide arbitration to support its decision. In 1982, when *Keating* was decided, the Second Circuit permitted consolidation where the agreement was silent. *Compania Espanola de Pet., S.A. v. Nereus Ship*, 527 F.2d 966 (2d Cir. 1975), *cert. denied* 426 U.S. 936, 96 S. Ct. 2650, 49 L. Ed. 2d 387 (1976). The Second Circuit has reversed itself on this issue since *Keating*, however, and now holds that ordering consolidation when the arbitration agreement is silent violates section 4 of the FAA. *United Kingdom v. Boeing*. Nonetheless, the California court's analysis remains viable; although it drew an analogy between permitting consolidation and class-wide arbitration when the contract is silent, it also distinguished the two, making its case for class-wide arbitration even stronger.

The California court pointed out that consolidated arbitration often involves a "tripartite relationship in which the parties in dispute each have a contract with a third party, but not with each other," as opposed to class-wide arbitrations in which all plaintiffs had a contract directly with the defendant. *Keating*, 31 Cal.3d at 612. Highlighting the greater burden likely to result from ordering consolidation, the California court explained:

> Thus, a party may be forced into a coordinated arbitration proceeding in a dispute with a party with whom he has no agreement, before an arbitrator he had no voice in selecting and by a procedure he had not agreed to.
>
> In these respects, an order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship.

Id. Unlike parties subjected to consolidation, "the members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claim is asserted." *Id.* Balancing the potential inequities and inefficiencies against resulting prejudice to the drafting party, the California

court held that it was not beyond the court's authority to order class-wide arbitration in the appropriate case. The court thus left the question for the trial court to answer on a case by case basis, in its discretion, upon consideration of certain factors.[15]

More recently, the California Court of Appeal for the second district reaffirmed the California Supreme Court's holding in *Keating. Blue Cross v. Superior Court*, 67 Cal. App. 4th 42 (Cal. App. 1998), *cert. denied* 527 U.S. 1003, 119 S. Ct. 2338, 144 L. Ed. 2d 235 (1999). The Court of Appeal discussed the rationale employed by the California Supreme Court in *Keating* extensively, and upheld the court's ruling in *Keating* on state *and* federal law grounds. *Blue Cross.* Going further than the California Supreme Court, the Court of Appeal addressed the impact of the FAA on this issue, concluding that it does not preclude application of California's class-wide arbitration rule. *Id.*

First, the Court of Appeal held that section 4 of the FAA does not apply to state courts at all. For support, the court cited the legislative history of the FAA and several decisions of the United States Supreme Court. *Id.* (citing *Volt Info. Sciences v. Leland Stanford Jr. U.*,489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (stating that the Court has never held that sections 3 and 4 of the FAA apply to state courts). The Court of Appeal reasoned that the language of section 4 contemplated a petition before a district court and application of the federal rules of civil procedure. *Id.* at 60 (citing *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal.4th 394 (Cal. 1996)). The court recognized the FAA would prevail over a state procedural rule if in direct conflict, but found that a state procedure that furthers "the effectuation of the federal law's objectives" would not conflict and should be followed. *Id.* at 61 (quoting *Rosenthal*, 14 Cal.4th at 410). The court concluded that following state precedent allowing class-wide arbitration can further rather than defeat the FAA's goal of enforcing agreements to arbitrate and is, therefore, not preempted

[15]The factors that should be considered include efficiency, equity, and prejudice to the drafting party likely to result from class-wide arbitration. *Keating*.

by section 4 of the FAA. *Blue Cross*.[16]

C. Relevant South Carolina Law

This Court has not considered whether or not class-wide arbitration may be ordered when the arbitration agreement is silent. Generally, however, this Court favors arbitration of disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995). Further, our courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *See Towles v. United Health Care Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). This Court examined the arbitration clause at issue last year in *Munoz v. Green Tree Financial Corp,* 343 S.C. 531, 542 S.E.2d 360, (2001). In *Munoz*, this Court held "general principles of state law apply to arbitration clauses governed by the FAA." 343 S.C. at 539, 542 S.E.2d at 364 (2001) (citing *Doctor's Assoc., Inc. v. Casarotto,* 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)).

Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). After all, the drafting party has

[16]The court also addressed the consolidation argument and drew an analogy to consolidation despite the Second Circuit's reversal of its decision relied upon by the California Supreme Court in *Keating.* The Court of Appeal cited a decision by the First Circuit permitting consolidation where the agreement was silent, finding its reasoning to be more persuasive than those circuits (Second, Fifth, Sixth, and Eleventh) that prohibit consolidation where the agreement is silent. *Blue Cross (*citing *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) *cert. denied* 489 U.S. 1077, 109 S. Ct. 1527, 103 L. Ed. 2d 832 (1989)). The Third Circuit has adopted *Champ* since *Blue Cross* was decided. *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings. *Id.*

The United States Supreme Court has applied this common-law rule of contract construction, construing ambiguous language against the drafting party in a case involving arbitration issues. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, a suit brought by customers of a securities brokerage firm, the Court permitted an arbitration panel to award punitive damages although the arbitration agreement was silent regarding punitive damages, but contained a choice of law provision which the brokerage firm claimed prohibited the arbitrator from awarding punitive damages. 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). The Court framed the question presented in broad terms, asking whether the award of punitive damages was consistent with the FAA's purpose of ensuring arbitration agreements are "enforced according to their terms." *Mastrobuono*, 514 U.S. at 54, 115 S. Ct. at 1214, 131 L. Ed. 2d at 82. The Court found the choice of law provision introduced an ambiguity into an agreement that would otherwise permit punitive damage awards. The Court then resolved the ambiguity against the brokerage firm as the drafting party, based on the federal policy favoring arbitration[17] and the common law rule of contract interpretation construing ambiguous language against the drafting party. *Mastronbuono.*

Although this Court has not addressed whether class-wide arbitrations are permissible when the agreement is silent, this Court has considered whether consolidation of arbitration is permissible. In *Episcopal Housing Corp. v. Federal Ins. Co.*,this Court authorized consolidation of the claims of plaintiff (owner of an apartment complex) against an architect and builder absent contractual or statutory authority. 273 S.C. 181, 255 S.E.2d 451 (1979). In sum, this Court held, "[w]hile we recognize that arbitration is a creature of

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[17]The *Mastrobuono* Court cited its opinion in *Volt Info. Sciences v. Leland Stanford Jr. U.* for the proposition that ambiguities as to the scope of the arbitration clause should be resolved in favor of arbitration. *Volt*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)

contract, appellant would not be denied its contracted-for right to arbitration; rather the consolidation would provide a logical, expeditious method by which to enforce that right." *Episcopal Housing*, 273 S.C. at 183-84, 255 S.E.2d at 452. Significantly, the Court considered whether the objecting parties had demonstrated any prejudice which would result from consolidated proceedings and found that they had not. *Id.* The Court of Appeals applied *Episcopal Housing's* prejudice analysis in a more recent decision, and this Court has not revisited the issue. *Plaza Development Services v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988).

D. Application to *Bazzle* and *Lackey*

As a preliminary matter, we find Green Tree's arbitration clause was *silent* regarding class-wide arbitration. Certainly, the clause does not mention class-wide arbitration, but Green Tree argues that the language limits arbitration to claims by individuals. Green Tree relies on the portion of the clause providing for arbitration of "disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*."[18] In our opinion, this language does not limit the arbitration to non-class arbitration. At best, it creates an ambiguity, and should, therefore, be construed against the drafting party, Green Tree.

Still, Green Tree contends this Court must follow the federal precedent established by the Seventh Circuit in *Champ*. Green Tree argues that this Court is obligated to follow *Champ*, as a matter of federal substantive law, mandated by section 4 of the FAA. We disagree. The United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court. Although Green Tree asserts that the Fourth Circuit *recognizes* that the FAA *requires* non-class arbitration, we believe Green Tree

[18]The arbitration agreements contained in the Retail Sales Agreements in *Bazzle* and *Lackey* are identical except for one word. The *Bazzle* clause says the arbitrator will be selected by Green Tree "with the consent of *you*" and the *Lackey* clause says "with the consent of *Buyer[s]*." (Emphasis added).

is incorrect. The Fourth Circuit has not addressed the issue directly; the Fourth Circuit has cited *Champ*, but only in dicta, and the question of class-wide arbitration resolved in *Champ* has not been before the Fourth Circuit. *See Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999).[19]

Moreover, whether section 4 of the FAA applies in state court is debatable. Section 4 provides, "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition a *United States district court* . . . ." 9 U.S.C. § 4. As noted by the California Court of Appeal in *Blue Cross*, this language contemplates enforcement in the federal district court, not state court, and the United States Supreme Court has not held that section 4 applies in state courts to counter the plain meaning of the statute. *See Volt*,489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (stating that the Court has never held that sections 3 and 4 of the FAA applied to state courts).

In any case, this Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. "As a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than

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[19]In *Deiulemar Compagnia,* the Fourth Circuit cited *Champ* in its discussion of the application of Rule 81 of the Federal Rules of Civil Procedure ("FCRP") in determining arbitrability. Specifically, the court held, "[t]he lesson of *Champ* . . . is that Rule 81(a)(3) does not affirmatively authorize application of the federal rules to matters that are incident to an arbitrable dispute." *Deiulemar Compagnia,* 198 F.3d at 483. Class-wide arbitration was not an issue in *Deiulemar Compagnia*, and this Court is still free to adopt the position that the FAA does not prohibit a state court from ordering class-wide arbitration where the agreement is silent.

to permit arbitral class actions."[20] No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so. *Episcopal Housing Corp. v. Federal Insurance Co.; Plaza Development Services v. Joe Harden Builders* (holding that a court has authority to order consolidation when it would serve to expedite the parties contracted-for right of arbitration and the parties have not demonstrated prejudice would result).

The rationale employed by *Champ* that Green Tree urges this Court to adopt is based on an analogy between ordering consolidation and class-wide arbitration where the agreement is silent. *Champ* grounds its decision to prohibit class-wide arbitration almost entirely on the precedent of other courts prohibiting consolidation of arbitration absent an explicit right to consolidate within the written agreement. Applying this precedent in South Carolina results in the opposite outcome. Since this Court permits consolidation of appropriate claims where the arbitration agreement is silent, it follows that this Court would permit class-wide arbitration, as ordering class-wide arbitration calls for "considerably less intrusion upon the contractual aspects of the relationship." 42 Wm & Mary L. Rev. 1, 86-87. As the California Court noted in *Keating*, the members of a class would be parties to an agreement with the defendant, as opposed to consolidated parties, who each have a contract with a third party but not with each other. *Id.; Keating.*

Today, we adopt the approach taken by the California courts in *Keating* and *Blue Cross,* and hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would

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[20]Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm & Mary L. Rev. 1, 83 (Oct. 2000).

not result in prejudice.[21] If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement. Following the federal approach risks such a result where arbitration is mandated through an un-negotiated adhesion contract. Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law.[22] Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy.

In South Carolina, a trial court's ruling on whether an action is properly maintainable as a class action is within the court's discretion. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998). Therefore, a court's decision whether or not to certify a class is reviewed under an abuse of discretion standard. *Id.* Neither the trial court nor the reviewing court may look to the merits when determining whether to certify a class. *Id.* (citing *Curley v. Cumberland Farms Dairy*, 728 F. Supp. 1123 (D.N.J. 1990).

The permissible scope of review of arbitral decisions is far more limited. Section 10 of the FAA provides extremely limited grounds for vacating an arbitrator's award. Only where (1) the award was procured by corruption, fraud,

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[21]Although this present case does not raise this question, we note that preclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract.

[22]Apparently, even the courts which prohibit class-wide arbitration when the agreement is silent acknowledge that class-wide arbitration *can* be accomplished as a practical matter. *See Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (stating that it appears impossible for a class action to be pursued in an arbitral forum "unless the arbitration agreement contemplates such a procedure").

or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing, or in refusing to hear pertinent evidence, or any other misconduct by which parties' rights have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10. If an arbitrator acted even *arguably* within the scope of his authority, even a *serious* error on his part does not warrant overturning his decision. *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 1015, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001).

South Carolina courts have interpreted this standard narrowly. "Factual and legal errors by arbitrators do not constitute an abuse of their powers . . . . A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power." *Pittman Mortgage Co. v. Edwards,* 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (1997) (citations omitted). The Fourth Circuit has interpreted the fourth justification in section 10 of the FAA (that the arbitrator exceeded his power) to mean that an arbitrator must act in *manifest disregard of the law* for his decision to be overturned. *See Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231 (4th Cir. 1998)**.**

In light of the narrow standards of review in both cases, we uphold the arbitrator's awards in *Bazzle* and *Lackey*. Green Tree did not allege any fraud, corruption, or other misconduct by the arbitrator that would warrant vacating his decision to certify the class or his award under the first three justifications listed in section 10 of the FAA. 9 U.S.C. § 10. That leaves manifest disregard of the law as the only possible justification for overturning the arbitrator's awards. In our opinion, the arbitrator did not act in manifest disregard of the law. As Green Tree noted in its brief, manifest disregard of the law occurs when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case. (App. Br. p. 12) (citing *Trident Technical College v. Lucas Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985), *cert. denied* 474 U.S. 1060 (1986)).

As discussed, the issue of whether class-wide arbitration is permissible

when the agreement is silent was not settled in this state at the time of the *Bazzle* and *Lackey* arbitrations. Therefore, the arbitrator did not act in manifest disregard of the law by permitting it to proceed.[23] Accordingly, we uphold the arbitrator's awards.

III. Due Process Rights of Absent Class Members

Green Tree and the Amici argue that the absent class members' due process rights were violated by the class-wide arbitration of their claims. The *Bazzle* and the *Lackey* plaintiffs, on the other hand, claim the rights of the absent class members were adequately protected through proper notice. Regardless, both classes of plaintiffs argue that this issue is not preserved for review because Green Tree failed to raise it in a timely fashion. We agree that the issue was not preserved for review, and, further, find no evidence that the rights of the class members were not protected in this case.

It is well-settled that an issue may not be raised for the first time on

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[23]In addition, Green Tree argues that the arbitrator exceeded his powers when he awarded statutory penalties under S.C. Code Ann. § 37-10-102(a). The Bazzle and Lackey plaintiffs argue that the attorney preference statute upon which their allegations are based authorizes class actions filed before May 2, 1997 to proceed. South Carolina Code Ann. § 37-10-102 requires creditors of loans secured by real estate to ascertain the buyer's preference as to legal counsel prior to closing. The creditor complies with this requirement as long as it gives notice to the buyer of the preference information in a manner specified in the statute. Section 37-10-102 does not provide the penalties for violation of this requirement; penalties are provided in section 37-10-105. This section was amended in 1997 and now prohibits class actions. In its amendment, however, the legislature provided specifically that "any actions filed as class actions, without regard to certification, prior to May 2, 1997, may proceed, but with remedies pursuant to section 37-10-105 as amended." 1997 Act No. 99, § 1. As such, the arbitrator did not act in manifest disregard of the law by awarding penalties provided for in the amended section 37-10-105.

appeal. In order to preserve an issue for appellate review, the issue must be (1) raised to and ruled upon by the lower court, (2) by the appellant, (3) in a timely manner, and (4) with sufficient specificity. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)*; Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); Toal, Vafai, & Muckenfuss, *Appellate Practice in South Carolina* at 66 (S.C. Bar 1999).

In *Bazzle*, Green Tree first raised the issue of the absent class members' due process rights in its motion to vacate the arbitrator's final award. Green Tree argued vaguely that "the Arbitrator violated certain due process protections afforded by the Fourteenth Amendment and the South Carolina Constitution." To be preserved, the issue must have been raised and ruled upon by the trial court at the time the class was certified. *I'On, L.L.C. v. Town of Mt. Pleasant*. As Green Tree gave the trial court no opportunity to address this issue, it is procedurally barred. *Id.*

Similarly, in *Lackey*, Green Tree did not raise the due process rights of the absent class members when it moved to decertify the class before the arbitrator. Green Tree raised this issue for the first time when it argued that the arbitrator's final award should be vacated. Because it did not give the arbitrator an opportunity to rule upon this issue, Green Tree failed to preserve it for review before this Court. *I'On; Wilder.*

Green Tree has not articulated precisely how it believes the class members' due process rights have been violated. In any case, the class members' rights appear to have been properly protected by the notice given to all of them.[24] Green Tree was given the opportunity to review and comment on the notice sent and did not voice an objection to it at that time. Although protection of the due process rights of absent class members is an essential component in all class actions, and one which may necessitate particular

[24]*See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (holding procedure followed whereby descriptive notice sent to by first-class mail to each class member with explanation of right to opt-out fully satisfied due process).

attention in class-wide arbitrations, Green Tree has not presented the Court with the means to address it properly.[25]

CONCLUSION

For the foregoing reasons, we **AFFIRM** the arbitrator's awards in both cases.

MOORE, WALLER, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

[25]For a discussion on protection of due process rights, *see Phillips Petroleum v. Shutts*; 42 Wm & Mary L. Rev. 1.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angel Ann Brown Gilliland,

Respondent,

v.

John Doe, an unknown motorist,

Appellant.

Appeal From Greenville County
Alison R. Lee, Circuit Court Judge

Opinion No. 3544
Heard June 5, 2002 - Filed August 26, 2002

REVERSED

Samuel C. Weldon, of Greenville, for appellant.

John M. Croft, Samuel D. Harms, John R. Peace and Joel D. Bieber, all of Easley, for respondent.

PER CURIAM: Angel Ann Brown Gilliland brought this automobile negligence action against unknown driver John Doe pursuant to

S.C. Code Ann. ' 38-77-170. Following a jury trial, Gilliland was awarded actual and punitive damages. Doe appeals. We reverse.

FACTS/PROCEDURAL HISTORY

On March 26, 1996, Gilliland was injured in an automobile accident as she was returning from the store. According to Gilliland, several young men tried to get her attention in the parking lot as she was leaving the store. When she exited the parking lot in her vehicle, she testified she was followed closely by these same young men and that, Athey were right on my bumper and I was trying to get away . . . I was scared.@ With the unknown vehicle behind her, Gilliland lost control of her car and ran off the road. The unknown vehicle never came in contact with Gilliland=s vehicle.

Gilliland filed this action against Doe, the unknown driver of the unidentified vehicle, pursuant to section 38-77-170. She alleged Doe=s pursuit of her caused her to run off the road and strike a tree. Gilliland suffered severe injuries as a result of the accident.

At trial, Gilliland presented the testimony of Gayle Norris who was traveling in the opposite direction at the time of the accident. Norris had stopped around the curve where Gilliland ran off the road to yield the right of way before turning left. Norris testified that Gilliland=s car Acame around the curve and come [sic] almost completely around the curve and then it just kind of went straight into a tree and a ditch.@ Norris also testified she saw the headlights of another vehicle shining on Gilliland=s bumper just before Gilliland ran off the road.

A jury awarded actual damages to Gilliland in the amount of $110,880.00, and punitive damages in the amount of $96,250.00. This appeal follows.

LAW/ANALYSIS

Doe argues the trial court erred in denying his motion for judgment notwithstanding the verdict, or, in the alternative, his motion for a new trial,

as Gilliland=s evidence was insufficient to satisfy the requirements of S.C. Code Ann. ' 38-77-170. We agree.

AIn ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions.@ Steinke v. S.C. Dep=t of Labor, Licensing and Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). AThe trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt.@ Id. AThis Court will reverse the trial court only when there is no evidence to support the ruling below.@ Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000) (citing Steinke, 336 S.C. 373, 520 S.E.2d 142 (1999); Creech v. S.C. Wildlife & Marine Res. Dep=t, 328 S.C. 24, 491 S.E.2d 571 (1997)).

Section 38-77-170 provides the following:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

S.C. Code Ann. ' 38-77-170 (2002)(emphasis added).

In 1987, S.C. Code Ann. ' 56-9-850 was amended and recodified as S.C. Code Ann. ' 38-77-170. The language of the new statute is essentially

identical to the old statute. However, one difference is that the second condition for recovery under the statute was changed in order to provide an alternate method of satisfying that condition. This condition can now be met by either evidence of physical contact with the unknown vehicle or evidence provided by an independent witness to the accident. AThe purpose of the second condition [of 38-77-170] [was] to assure adequate proof the accident involved a second unknown vehicle.@ Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 275, 422 S.E.2d 106, 109 (1992) (citing Coker v. Nationwide Ins. Co., 251 S.C. 175, 161 S.E.2d 175 (1968)). AThe legislature, by the 1987 amendment, has determined an independent witness is sufficient to reduce the possibility of false claims.@ Id.

Doe contends Gilliland did not satisfy subsection (2) of S.C. Code ' 38-77-170, in that there was no physical contact between the two vehicles, and the testimony offered by Norris was insufficient to satisfy the requirement that the accident be witnessed by someone other than the owner or operator of the vehicle. Doe argues that subsection (2) requires that the witness to the accident provide some evidence, independent of the operator of the vehicle, that an unknown driver=s conduct caused or contributed to the accident. Gilliland, on the other hand, avers that the statute does not require the witness to observe the cause of the accident, but instead requires only that the witness observe the actual collision. Accordingly, Gilliland argues Norris=s testimony was sufficient to satisfy the requirements of the statute, inasmuch as Norris testified that she witnessed Gilliland=s car run off the road and into a tree.

When interpreting a statute, our primary concern is to determine the legislature=s intent, if it can be reasonably discovered in the language of the statute when construed in the light of the statute=s intended purpose. AThe uninsured motorist legislation is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished.@ Franklin v. Devore, 327 S.C. 418, 421, 489 S.E.2d 651, 653 (Ct. App. 1997) (citing Gunnels v. Am. Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d 822 (1968)). AHowever plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been

intended by the Legislature or would defeat the plain legislative intention.@ Collins v. Doe, 343 S.C. 119, 123-24, 539 S.E.2d 62, 64 (Ct. App. 2000).

We find the intent behind the language in the uninsured motorist legislation -- that the Aaccident must be witness[ed] by someone other than the owner . . . of the insured vehicle@ and the witness must attest Ato the facts of the accident@ -- is that the witness must testify to more than the actual collision itself. The witness must also be able to attest to the circumstances surrounding the accident, i.e. what actions of the unknown driver contributed to the accident. To hold otherwise would circumvent the legislative intent of preventing fraudulent claims under the unknown motorist statute. See Collins, 349 S.C. at 125, 539 S.E.2d at 65 (finding eyewitness testimony sufficient where witness testified to the existence of an unknown vehicle who failed to yield the right of way and ran driver off the road). See also Georgia Uninsured Motorist Statute, Ga. Code Ann. ' 33-7-11(b)(2) (2001) (A[I]n order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured. Such physical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant.@); Rogers v. Schuman-Mann Supply Co., 397 S.E.2d 463, 465 (Ga. Ct. App. 1990) (interpreting Georgia Uninsured Motorist statute and finding that statutory language required eyewitness corroboration of the description of the accident); Fisher v. Clarendon Nat. Ins. Co., 437 S.E.2d 344, 346 (Ga. Ct. App. 1993) (finding testimony did not satisfy the Aeyewitness@ requirements on the Uninsured Motorist Statute when witness did not observe the accident, but only circumstantial evidence of the occurrence).

Norris testified that she pulled up to an intersection and saw the curve from which Gilliland appeared. She testified that Atwo cars started around the curve.@ She only saw the headlights of the second car, though she stated she was Aconvinced it was a car.@ She added she saw lights shining on Gilliland=s bumper but was unable to testify how close the alleged other vehicle was to Gilliland=s automobile. Norris=s testimony fails to verify the

existence of an unknown vehicle, driven by an unknown driver, that caused Gilliland to run off the road into the tree. We find that Norris=s testimony was insufficient to meet the requirements of S.C. Code Ann. section 38-77-170.[1]

CONCLUSION

Accordingly, for the foregoing reasons, the denial of Doe=s motion for judgment notwithstanding the verdict is

REVERSED.

CURETON, STILWELL and SHULER, JJ., concur.

[1] In light of our disposition of the above question, we decline to address the remaining issues on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John T. Black, Jr. and Jeanne Jones, as Personal Representatives of the Estate of Dorothy Carter, and also as Trustees of the Trust of Melissa Lynne Carter and Cynthia Anne Carter, Sylvia Carter, Otis Calvin Carter, III, Suzanne Carter Riley, Lacy Rebecca Rhode and John Duncan Carter,

Plaintiffs,

v.

Jagdish M. Patel and Usha M. Patel,
Defendants/Third-Party Plaintiffs,

Appellants,

v.

Dr. Abraham Karrottukunnel,

Third-Party Defendant,

Respondent.

Appeal From Colleton County
Roger M. Young, Special Referee

Opinion No. 3545
Heard June 4, 2002 - Filed August 26, 2002

AFFIRMED

G. Dana Sinkler, of Charleston; Stephen A. Spitz, of Columbia, for appellants.

Michael S. Church, of Columbia, for respondent.

STILWELL, J.: Neighboring landowners brought an action against Jagdish and Usha Patel claiming superior title to a portion of property Dr. Abraham Karrottukunnel conveyed to the Patels by general warranty deed. The Patels commenced a third-party action against Dr. Karrottukunnel. Although Dr. Karrottukunnel participated in the defense, he refused to defend the action in its entirety. The master-in-equity ruled in favor of the Patels, concluding the plaintiffs failed to establish superior title. In a separate order, the master ruled the Patels could recover their costs from Dr. Karrottukunnel, but not their attorney's fees. The Patels appeal. We affirm.

BACKGROUND

Several years after purchasing the property, the Patels completed construction of a separate one-story hotel building on the property. The portion of the property on which this building was located is the subject of the action against the Patels. Neighboring landowners sent a letter to the Patels offering to sell them the disputed property for $400,000. The Patels refused the offer and the neighbors filed suit for trespass and nuisance, alleging the one-story building was situated on their property. They sought a decree allowing them to demolish

the building as well as granting them a portion of the hotel's rental proceeds during the period of encroachment.

The Patels did not immediately answer the complaint, but asked their title insurance company to defend. It refused. Thereafter, they requested in writing that Dr. Karrottukunnel defend the action pursuant to the terms of his general warranty deed. Dr. Karrottukunnel did not respond. The Patels then filed their answer which included a third-party complaint against Dr. Karrottukunnel for breach of warranty.

The case was referred to the master-in-equity. Dr. Karrottukunnel did not defend the trespass and nuisance case on the Patels' behalf, but, with his attorney, participated in the defense including offering expert testimony from a surveyor. The master's ruling that the neighboring landowners had failed to establish their title to the disputed land appears to have been based in no small part on the expert testimony offered by Dr. Karrottukunnel. In a separate order, the master held the Patels could recover the cost of their defense of the title action from Dr. Karrottukunnel, but could not recover their attorney's fees from him because of our supreme court's decision in Jeter v. Glenn, 43 S.C.L. (9 Rich.) 374 (1856).[1]

DISCUSSION

The Patels contend Dr. Karrottukunnel breached his covenant of quiet enjoyment and the master erred in refusing to allow them to recoup from Dr. Karrottukunnel the attorney's fees they incurred in defending their title. We note Dr. Karrottukunnel participated in the underlying action and defended the Patels' title by presenting evidence of its validity which ultimately proved successful. However, because we agree with the master that Jeter v. Glenn precludes the Patels' recovery of attorney's fees, we need not decide whether

[1] We granted the Patels' motion to argue against the precedent of Jeter solely for the purpose of allowing them to preserve the issue for further appellate review.

Dr. Karrottukunnel breached any covenant of his general warranty deed by failing to take over the defense entirely.

> A South Carolina general warranty deed embraces all of the following five covenants usually inserted in fee simple conveyances by English conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances. The first and second covenants have the same effect as the third and fourth covenants.

Martin v. Floyd, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984).

In Jeter, Glenn conveyed by general warranty deed property he purchased at a sheriff's sale to a person who later conveyed the property by general warranty deed to Jeter. The widow of a prior owner of the property sued Jeter to recover her dower. Jeter "vouched in" Glenn to defend.[2] Jeter, 43 S.C.L. at 374-75. It is difficult if not impossible to ascertain the extent to which Glenn participated in the defense of the suit, if at all. After a verdict in the widow's favor, Jeter brought a breach of warranty action against Glenn to recover the amount of the dower plus costs of litigation. A jury awarded Jeter the amount assessed for the dower but no costs. Id. at 375. On appeal, Jeter sought costs and attorney's fees incurred defending against the widow's action. The Court of Appeals of South Carolina, predecessor to our current supreme court, held Jeter was entitled to recover costs plus interest from Glenn. Id. at 380. However, the court ruled Jeter could not recover attorney's fees as "there is no authority for including counsel fees in the damages recoverable upon contracts." Id. at 380-81.

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[2] Vouching-in is a common law "procedural device by which a defendant may give notice of suit to a third party who is liable over to the defendant on the subject-matter of the suit, so that the third party will be bound by the court's decision." Black's Law Dictionary 1572 (7th ed. 1999). The device has been largely replaced by third-party practice. Id.

The Patels argue the claim in Jeter was based on the covenant against encumbrances and is therefore distinguishable from the instant action, which is based on the covenants of general warranty and quiet enjoyment. We do not read Jeter so narrowly. The court in Jeter noted that of the covenants included in a general warranty deed, the covenant of quiet enjoyment and the covenant against all encumbrances "may be united in one." Jeter, 43 S.C.L. at 379. Moreover, the court explained that although the general warranty "may well be understood to embrace all the usual covenants for title," it was enough for resolution of the claim that the deed be shown to include the covenant of quiet enjoyment and the covenant against encumbrances. Id. The court then analyzed the duties a grantor owes under the language of the general warranty itself. Id. at 130. Because the Jeter court addressed both the covenant against encumbrances and the covenant of quiet enjoyment, we find no rational basis for distinguishing the decision.

Next, the Patels assert we should not apply Jeter as precedent because, unlike this case, Jeter was awarded substantial damages against Glenn following the unsuccessful defense of his title. The Patels reason "the Court in Jeter was concerned that an innocent buyer not be overcompensated. The question in this case is far different; whether an innocent buyer is entitled to any compensation at all." We are unpersuaded by this argument as the Jeter court gave no indication that attorney's fees were denied because Jeter was awarded damages against Glenn. We do not construe the opinion in Jeter as barring attorney's fees only when the underlying claim is successful.

Finally, the Patels challenge the legal authority cited in Jeter on the issue of attorney's fees. They submit the authority cited by Jeter (Sedgwick on Damages) is no longer sound or, alternatively, that this court should turn its attention to another passage from that text, rather than the one relied upon in the decision. We cannot offer the Patels relief from Jeter on this basis as we are bound, not by the underpinnings of Jeter, but by Jeter itself. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); Duval v. Heritage Life Ins. Co., 339 S.C. 616, 620, 529 S.E.2d 566, 569 (Ct. App. 2000) (same).

AFFIRMED.

CURETON and SHULER, JJ., concur.