The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS AND NOTICE OF PUBLIC HEARING

The Supreme Court is considering the adoption of the attached Proposed Rule 38, SCRCP, Sealing Documents and Settlement Agreements. Individuals or organizations desiring to submit written comments regarding the proposal may do so by filing an original and seven copies of their comments with the Supreme Court addressed to the Honorable Daniel E. Shearouse, Clerk of Court, P.O. Box 11330, Columbia, South Carolina 29211. All written comments must be received by the Supreme Court by Wednesday, January 8, 2003.

A public hearing on the proposal will be held in the Supreme Court Courtroom at 2:00 p.m. on January 21, 2003. Those desiring to be heard shall notify the Clerk of the Supreme Court no later than January 17, 2003. Remarks will be limited to five minutes.

Columbia, South Carolina
November 25, 2003

Proposed Rule 38, SCRCP,
Sealing Documents and Settlement Agreements

(a) Purpose. Because South Carolina has a long history of maintaining open court proceedings and records, this Rule is intended to establish guidelines for governing the filing under seal of settlements and other documents. The Court recognizes, that as technology advances, court records will be more readily available and this Rule seeks to balance the right of public access to court records with the need for parties to protect private information from public view. Further, the Court recognizes that, especially in the case of settlement agreements, the parties may, by contract, agree to settle any matter confidentially, and have the matter voluntarily dismissed under Rule 41(a)(1), SCRCP, without court involvement.

(b) Filing Documents under seal. Should Rule 26(b)(5), SCRCP, be inapplicable, and absent another governing rule, statute, or order, any party seeking to file documents under seal shall file and serve a "Motion to Seal." The motion shall identify, with specificity, the documents or portions of documents for which sealing is considered necessary, shall contain a non-confidential description of the documents, and shall be accompanied by a separately sealed attachment labeled "Confidential Information to be submitted to Court in Connection with the Motion to Seal." The attachment shall contain the documents for the court to review *in camera* and shall not be filed. The motion shall state the reasons why sealing is necessary, explain why less drastic alternatives to sealing will not afford adequate protection, and address the following factors:

(1) the need to ensure a fair trial;

(2) the need for witness cooperation;

(3) the reliance of the parties upon expectations of confidentiality;

(4) the public or professional significance of the lawsuit;

(5) the perceived harm to the parties from disclosure;

(6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and

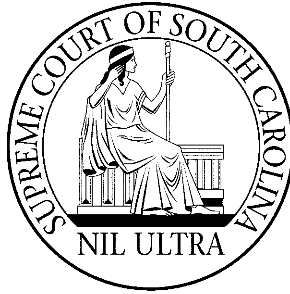
(7) why the public interest is best served by sealing the documents.

The burden is on the party seeking to seal documents to satisfy the court that the balance of public and private interests favors sealing the documents.

Unless otherwise ordered by the court, the clerk of court shall treat the motion to seal in a manner similar to all other motions filed with the court.

(c) Sealing Settlements. No settlement agreement filed with the court shall be sealed pursuant to this Rule.

(d) Orders Sealing Documents. All orders sealing documents shall set forth with specificity the reasons that require sealing the documents.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

November 25, 2002

ADVANCE SHEET NO. 39

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

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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Christine Elledge and
Ginger A. Sierra by her
Guardian ad Litem,
Christine Elledge, Respondents,

v.

Richland/Lexington
School District Five, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

Opinion No. 25559
Heard May 29, 2002 - Filed November 25, 2002

AFFIRMED

M. Jane Turner, Andrea E. White, and James D. Pike, of Duff, Turner, White & Boykin, L.L.C., of Columbia,

for petitioner.

James C. Anders, Thad L. Myers, Cheryl F. Perkins, and Tressa T. Haynes, of James C. Anders, P.A. & Associates, of Columbia, for respondents.

JUSTICE WALLER: We granted a petition for a writ of certiorari to review the Court of Appeals' decision in Elledge v. Richland/Lexington Sch. Dist. Five, 341 S.C. 473, 534 S.E.2d 289 (Ct. App. 2000). We affirm.

FACTS

On December 9, 1994, nine-year-old Ginger Sierra (Ginger) slipped and fell on a piece of playground equipment at Irmo Elementary School where she attended fourth grade. The playground equipment was a metal monkey bar device which the children walked upon; it extended above the ground approximately two feet. As a result of the fall, Ginger broke her right leg. The growth plate in that leg was significantly damaged, and Ginger eventually underwent surgery in both legs to remove the growth plates.[1]

Ginger and her mother, Christine Elledge (collectively respondents), sued petitioner Richland/Lexington School District Five (the District) for negligence. A jury returned a verdict for the District. On appeal, the Court of Appeals reversed and remanded for a new trial. Elledge, supra.

At trial, James Shirley, the principal at Irmo Elementary since 1990, testified that shortly after he arrived at the school, he had concerns about the school's playground. He was especially concerned by the lack of a fall surface and by the height of some of the playground equipment. As to the monkey bar which Ginger fell on, Shirley stated that children had been walking on it and this

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[1]Removing the growth plates in both legs prevents uneven growth, but also retards growth in the legs. Ginger's doctor testified that this procedure would have the effect of making Ginger shorter than she would have been.

was also a concern. In 1991, Shirley contacted Jim Mosteller who redesigned the playground. As part of the playground renovations, the monkey bar which Ginger fell on was modified by Mosteller. Originally, the monkey bar was higher and had a bench underneath it. As part of the modifications performed in 1991, the height was lowered from about four feet to two feet, and the bench was removed. On the modified monkey bar, students would walk or crawl across it, although there were no hand-held supports on the side. Shirley testified that he knew the children were walking across the apparatus after the modification.

Both of respondents' playground safety experts testified that the monkey bar was, in its original form, designed to develop children's upper body strength. Archibald Hardy stated that this piece of equipment was known as a "pull and slide" and the children were supposed to lie back on the bench underneath the bars and pull themselves along the apparatus. According to Hardy, the original design "definitely wasn't for walking" because the metal rungs were small enough for children's hands and were "fairly slick." The modification to the equipment encouraged children to "run up and jump on top of it;" however, Hardy stated that children "shouldn't have been playing on top of it at all." Hardy, who sold to and installed playground equipment for Irmo Elementary, had visited the playground on several occasions since 1992, and had recommended to Shirley that all the older equipment on the playground be "bulldozed."

Steven Bernheim, respondents' other expert, similarly testified about the equipment and stated that it "was not meant as a climber." According to Bernheim, the equipment was safe as originally designed, but in its modified form, it was unsafe because the narrow bars were originally designed for hands, not feet, and no grit had been placed on the metal bars to prevent slipping.

Bernheim stated generally that the playground at Irmo Elementary did not meet the proper safety standards in the industry. Respondents sought, however, to introduce specific evidence regarding the Consumer Product Safety Commission (CPSC) guidelines for playground safety and the American Society for Testing and Materials (ASTM) standards for playground equipment. The

trial court granted the District's motion in limine to exclude this evidence. At trial, respondents argued that this evidence was relevant to establishing the District's common law duty of care. The trial court found the evidence inadmissible because the guidelines were not "binding" on the District and the District had not "adopted" them in any way.

Respondents proffered the following evidence. Bernheim would have testified that in 1994, when Ginger fell, the CPSC guidelines and ASTM standards were in effect and would have applied to "any group . . . utilizing the playground equipment for public use," including a school district. He stated that these guidelines are industry standards and are distributed to schools via superintendents' or principals' meetings. Significantly, Bernheim opined that the District should have had policies and procedures in place for retrofitting existing equipment so that it complied with the guidelines. Furthermore, Bernheim believed the modified monkey bar did not comply with the national guidelines because there were no handrails and no grit on the walking surface. According to Bernheim, because Ginger's injury involved getting caught in an entrapment between the ladder areas, it was the type of injury the guidelines are designed to prevent. While Bernheim acknowledged that the industry standards were guidelines only, he stated they are what the playground equipment industry "stands by."

Respondents also proffered testimony from the District's purchasing coordinator, Joe Tommie. According to Tommie, the District would specify in its bids for purchasing new playground equipment that the equipment must meet the CPSC guidelines and ASTM standards. He stated: "That's normally the standard we use to ensure that we purchase safe equipment."[2]

On appeal, respondents argued the exclusion of this evidence was prejudicial error. The Court of Appeals agreed. Stating that "[e]vidence of industry standards, customs, and practices is 'often highly probative when

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[2]We note that while this portion of Tommie's testimony was part of the proffer, and therefore excluded by the trial court's ruling, it nevertheless was brought out before the jury.

defining a standard of care,'" the Court of Appeals held the trial court erred by excluding evidence of the CPSC guidelines and ASTM standards. Elledge, 341 S.C. at 477, 534 S.E.2d at 290-91 (citation omitted). The Court of Appeals found the trial court was under "the mistaken belief that the District must have adopted these national protocols before such evidence was admissible. . . . [W]hile such proof might be necessary in attempting to establish negligence *per se*, it is not required when the evidence is offered to demonstrate an applicable standard of care." Id. at 478, 534 S.E.2d at 291. As to the District's argument there was no prejudice from any error, the Court of Appeals stated that the "exclusion of this testimony was clearly prejudicial since such evidence would tend to show the District's compliance with industry standards, which directly conflicts with the District's assertion that such standards were never recognized." Id. at 480, 534 S.E.2d at 292.

ISSUE

Did the Court of Appeals correctly decide that the trial court's exclusion of the CPSC guidelines and ASTM standards evidence was reversible error?

DISCUSSION

The District argues that the trial court correctly excluded the CPSC guidelines and ASTM standards evidence. Specifically, the District maintains respondents failed to establish that these guidelines were accepted and used by school districts in South Carolina to determine the safety of existing playground equipment. In addition, the District contends that even if the trial court erred, the error was not prejudicial. We disagree.

To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. E.g., Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. It is well settled that the admission and rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. E.g., Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000).

In our opinion, respondents' proffered evidence was relevant to, and admissible on, the first required element of negligence – the District's duty of care to respondents. See Bloom v. Ravoira, supra; Rules 401, 402, SCRE. We agree with Chief Judge Hearn's observation that the trial court was under "the mistaken belief that the District must have adopted these national protocols before such evidence was admissible." Elledge, 341 S.C. at 478, 534 S.E.2d at 291.

As recognized by the Court of Appeals, the general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case. See, e.g., McComish v. DeSoi, 200 A.2d 116, 120-21 (N.J. 1964) (holding that construction safety manuals and codes were properly admitted as objective standards of safe construction); Walheim v. Kirkpatrick, 451 A.2d 1033, 1034-35 (Pa. Super. 1982) (holding that safety standards regarding the safe design and use of trampolines, including ASTM standards, were admissible on the issue of the defendants' negligence, even though the defendants were unaware of the standards); Stone v. United Eng'g, 475 S.E.2d 439, 453-55 (W.Va. 1996) (no error to admit evidence of safety standards for the design and guarding of conveyors even though the standards had not been imposed by statute and did not have "the force of law"); see generally Daniel E. Feld, Annotation, *Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association*, 58 A.L.R.3d 148, 154 (1974) (modern trend is to admit safety codes on the issue of negligence). This kind of evidence is admitted not because it has "the force of law," but rather as "illustrative evidence of safety practices or rules generally prevailing in the industry." McComish v. DeSoi, 200 A.2d at 121.

Indeed, the District even acknowledges this is the general rule. Respondents' expert, Bernheim, laid an adequate foundation for the admission of these safety standards when he stated they: (1) were in effect at the time of Ginger's accident,[3] and (2) would have applied to any group using playground equipment for public use, including a school district. Thus, the Court of Appeals correctly held that the trial court erred by excluding evidence of the CPSC guidelines and ASTM standards.

The District, however, argues this evidence was inadmissible because respondents did not show that school districts generally accepted or followed the guidelines with regard to existing playground equipment.[4] We find

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[3]Bernheim would have testified that the CPSC guidelines were first published in 1981 and that ASTM standards applied to schools since at least 1993.

[4]The District contends that Bernheim "refused to discuss" the application of the CPSC guidelines and ASTM standards to existing equipment. This is an inaccurate portrayal of the record. As stated above, Bernheim would have testified that with regard to existing equipment, the District should have had policies in place to ensure compliance with the industry standards. Specifically, we note that the excluded testimony included the following exchange:

> Q. And again regarding the compliance for the standards for existing playground equipment, should [the District] have had in place policies and procedures?
>
> A. I think so, in my humble and professional opinion, yes.

Nonetheless, the District makes much of a comment Bernheim made at a later point in his proffered testimony. Bernheim stated that, in his experience, all requests for new playground equipment purchases required that the equipment conform with the CPSC guidelines and ASTM standards. In this context, when the District asked whether this was for new equipment, Bernheim replied: "For the purchase of new equipment. I don't want to discuss retrofitting." Despite

this argument completely unavailing. Since the evidence showed the District followed the CPSC guidelines when purchasing new playground equipment, and the guidelines are intended for general playground safety which logically includes the maintenance of existing playground equipment, the District's contention that the safety standards somehow did not apply to it on existing equipment is simply untenable. It is clear to us that a public school is exactly the type of entity to which the public playground safety guidelines should, and do, apply. Simply because the District did not utilize the guidelines in 1994 with regard to existing equipment does not mean that it should not have.[5]

We find this evidence is highly probative on the issue of defining the District's duty of care. Rules 401, 402, SCRE (evidence is relevant and admissible if it has any tendency to make the existence of any fact of consequence to the action more or less probable than it would be without the evidence); see also Elledge, 341 S.C. at 477, 534 S.E.2d at 290 ("Evidence of industry standards, customs, and practices is 'often highly probative when defining a standard of care.'") (quoting 57A Am.Jur.2d Negligence § 185 (1999)). Consequently, we hold the trial court abused its discretion by excluding this evidence.[6]

Bernheim's response that he did not want to discuss retrofitting, Bernheim had already testified as to his opinion regarding the District's duty to maintain existing equipment and the application of the standards to existing equipment. The District cannot isolate this portion of Bernheim's testimony and, by so doing, erase the other pertinent testimony on this issue which was offered by respondents.

[5]Indeed, since July 1997, the District has utilized the CPSC guidelines in conjunction with the inspection and maintenance of its playgrounds.

[6]The dissent, adopting the District's argument, states respondents did not show that the guidelines applied to existing playground equipment. However, because Bernheim specifically testified that the playground equipment guidelines applied to any group using playground equipment for public use, we find it irrelevant that he did not specifically testify "the guidelines applied to

The District further argues that any error made by the trial court did not result in prejudice to respondents. The District contends that the evidence was cumulative to the admitted testimony of respondents' experts and the expert testimony was limited only by excluding specific references to the safety standards. We disagree.

Evidence of objective safety standards is generally offered "in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, <u>and as such it provides support for the opinion of the expert concerning the proper standard of care</u>." <u>McComish v. DeSoi</u>, 200 A.2d at 121 (emphasis added); <u>see</u> <u>also</u> <u>Brown v. Clark Equip. Co.</u>, 618 P.2d 267, 276 (Haw. 1980) (evidence of safety codes is "admissible as an alternative to <u>or</u> utilized <u>to buttress</u> expert testimony") (emphasis added).

Respondents sought to introduce evidence of industry standards to identify and establish the duty of care owed by the District to respondents. According to respondents' expert, the modified monkey bar did not comply with the guidelines. According to the District's purchasing coordinator, the District utilized the guidelines to ensure the safety of new equipment purchases. The import of the expert's evidence is clear. Respondents sought to show that the same standards that were used to purchase safe new equipment, <u>should have been</u> used to safely modify and/or maintain the existing equipment.

Furthermore, this type of evidence constitutes an objective standard and as such would have greatly enhanced the opinions offered by respondents'

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existing equipment." It is beyond dispute that Bernheim's testimony established that the guidelines were in effect at the time of Ginger's accident, they applied to public playground equipment, schools would have had notice of the guidelines, and the District should have had procedures in place to guarantee compliance with the guidelines. Moreover, testimony was admitted that the District <u>required</u> that new equipment comply with the guidelines. We therefore believe this evidence, when taken together, establishes the guidelines applied to existing equipment.

experts. We therefore disagree with the District's argument that the evidence would have been cumulative to the experts' testimony. One of the main purposes of industry standard evidence is to provide support for an expert's opinion on what the applicable standard of care is, and thus, the evidence is not merely cumulative to the expert's testimony. See id.

In addition, we note that the bulk of the experts' testimony went to the element of breach of duty whereas the specific evidence of industry standards was intended to establish the applicable duty of care. In other words, while respondents' experts were allowed to offer their opinions that the equipment did not conform with the industry's guidelines and was not meant to be walked upon, this testimony primarily relates to breach of a duty, not to demonstrating precisely what the objective duty of care was. Since the evidence at issue went to a different element on the negligence cause of action – duty versus breach – clearly the evidence cannot be considered cumulative.

Accordingly, we hold the trial court's error in excluding this evidence prejudiced respondents' case.

CONCLUSION

The general rule is that evidence of industry safety standards is admissible to establish the standard of care in a negligence case. The evidence of CPSC guidelines and ASTM standards which respondents sought to have admitted in the instant case is exactly the type of evidence contemplated by this general rule. The Court of Appeals correctly held the trial court committed reversible error in excluding the evidence. Therefore, the Court of Appeals' opinion is

AFFIRMED.

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

JUSTICE MOORE (dissenting): I respectfully dissent because I disagree that the Court of Appeals correctly found the trial court had committed reversible error by excluding evidence of the CPSC guidelines and ASTM standards (hereinafter collectively referred to as "the guidelines"). While the majority opinion and the decision of the Court of Appeals focus on whether the guidelines were adopted by Richland/Lexington School District Five (the District), I believe this is an improper predicate upon which to base the ruling. The more appropriate question is whether the guidelines are applicable to the District's *existing* playground equipment.

Given that respondents did not present evidence the guidelines were applicable to the *existing* playground equipment on the District's property, the trial court properly disallowed evidence regarding those guidelines. While respondents' expert, Steven Bernheim, testified the District should have had policies and procedures regarding the existing equipment's compliance to the guidelines, Bernheim never testified, nor was it shown as the majority opinion contends, that the guidelines in fact applied to existing playground equipment. Bernheim merely testified the District should have had procedures in place for retrofitting existing equipment in accordance with the guidelines. However, he did not opine that the guidelines *applied* to existing playground equipment. Accordingly, the trial court did not abuse its discretion when it rejected the proffered testimony. *See* Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000) (admission and rejection of testimony is largely within trial court's sound discretion, the exercise of which will not be disturbed on appeal absent abuse of that discretion).

Further, even if the trial court had committed error by not admitting the evidence, respondents were not prejudiced by the alleged error. The proffered evidence was cumulative to the admitted testimony of respondents' experts. At trial, Bernheim testified that, "according to the standards and practices of the industry, [the playground equipment] did not meet the proper safety standards." Further, the District's equipment purchaser, Joe Tommie, testified, in bids for purchasing *new* playground equipment, the District specified the new equipment must meet the guidelines. Therefore, while specific evidence regarding the guidelines was not admitted, respondents were still able to show that the equipment did not meet the standards set by

the playground equipment industry. Additionally, both Bernheim and respondents' other expert, Archibald Hardy, testified the monkey bar was not meant to be walked upon. Hardy also testified that he had recommended to the Irmo Elementary School principal that all of the older equipment on the playground be "bulldozed." Given the above testimony, additional information regarding the guidelines would not have bolstered respondents' case any further.

While the majority opinion contends respondents were prejudiced by the trial court's decision because the bulk of the experts' testimony went to the element of breach of duty and that evidence of the guidelines would have established the applicable duty of care, respondents were able to present evidence of the applicable duty of care through the testimony of Bernheim and Tommie as noted above. Consequently, I do not find this contention persuasive as to why respondents were prejudiced by the alleged trial court error.

For the above stated reasons, I would reverse the Court of Appeals' decision because the trial court did not abuse its discretion by rejecting respondents' proffered testimony.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Miriam Pee, Respondent,

v.

AVM, Inc., and Arvin Industries, Inc., Petitioners.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Marion County
James R. Barber, Circuit Court Judge

Opinion No. 25560
Heard October 10, 2002 - Filed November 25, 2002

AFFIRMED

Stanford E. Lacy and Peter H. Dworjanyn, of Collins & Lacy, of Columbia, for petitioners.

Rodney C. Jernigan, Jr. and Karl A. Folkens, of Folkens & Jernigan, of Florence, for respondent.

Kathryn Williams, of Greenville, for *amicus curiae* S.C. Trial Lawyers Association.

JUSTICE MOORE: Respondent (Claimant) was awarded workers' compensation benefits for disability from carpal tunnel syndrome resulting from repetitive trauma to both wrists.[1] Petitioners (Employer) appealed. The circuit court and the Court of Appeals affirmed.[2] The only issue is whether a repetitive trauma injury is compensable under the South Carolina Workers' Compensation Act. We find it is and affirm.

FACTS

Claimant worked for Employer in various capacities beginning in 1987. Each of her jobs involved the repetitive use of her hands. In the spring of 1995 she began experiencing tingling and numbness in both hands. On April 25, 1995, she was diagnosed with moderately severe carpal tunnel syndrome caused by compression of the median nerve as it passes through the carpal tunnel in the wrist. The evidence is uncontradicted that claimant's injury is work-related.

After surgery in June 1995, Claimant's left wrist improved temporarily but her symptoms returned within six months. Claimant's treating doctor removed her from work beginning April 20, 1996. By May 1996, she had severe carpal tunnel syndrome in her right wrist. Surgery was recommended for her right wrist in October 1996 with no guarantee of relief from her symptoms.

Meanwhile, on July 21, 1996, Claimant filed this action claiming benefits for an on-the-job injury. Claimant was awarded temporary total benefits continuing until she reaches maximum medical improvement.

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[1] Carpal tunnel syndrome may also result from one traumatic event or as a secondary effect of another condition such as diabetes or pregnancy, which is not at issue here. *See* The Merck Manual of Medical Information (1997).

[2] Pee v. AVM, Inc., 344 S.C. 162, 543 S.E.2d 232 (Ct. App. 2001).

The circuit court and the Court of Appeals held a repetitive trauma injury is compensable as an "injury by accident" as provided in S.C. Code Ann. § 42-1-160 (Supp. 2001).

ISSUE

> Is a repetitive trauma injury compensable as an injury by accident?

DISCUSSION

Employer contends a repetitive trauma injury does not qualify as an "injury by accident" because the cause of the injury is not unexpected and the injury lacks definiteness of time. In the alternative, Employer contends injury from repetitive trauma should be compensable as an occupational disease if compensable at all.

1. Unexpectedness

Employer contends the repetitive event which causes a repetitive trauma injury is not unexpected but is part of the worker's normal work activity. Because the event causing the injury is not unexpected, Employer argues repetitive trauma injury cannot be compensable as an injury by accident.

Under § 42-1-160, a claimant is entitled to benefits for an "injury by accident arising out of and in the course of employment." In Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939), we interpreted for the first time the meaning of "injury by accident" under the newly enacted Workman's Compensation Act. We noted that two lines of cases had evolved in other jurisdictions: some jurisdictions, including North Carolina upon which our Act is modeled, held there must be some unusual or unlooked-for mishap resulting in injury to constitute an accident; other jurisdictions held no mishap was required for an accident so long as there was an unexpected injury occurring while the employee was performing his usual duties in his customary manner. We chose the latter definition, focusing on the

unexpected nature of the injury rather than requiring that the event causing the injury be unexpected. This definition of accident as an unexpected injury has been reiterated in a long line of cases. *See, e.g.,* Colvin v. E.I. DuPont de Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955) (injury by accident is an injury occurring unexpectedly without the prior occurrence of any external event of an accidental nature); Hiers v. Brunson Const. Co., 221 S.C. 212, 70 S.E.2d 211 (1952) (injury by accident is an injury that is accidental in that it is unforeseen and unexpected).[3]

As we more recently stated, "in determining whether something constitutes an injury by accident the focus is not on some specific event, but rather on the injury itself." Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991). Further, an injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing. Colvin, 227 S.C. at 468-69, 88 S.E.2d at 582 (emphasis added). Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident. Here, there is no evidence Claimant intended or expected to be injured as a result of her repetitive work activity.

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[3]In Hiers, we noted the policy reason for adopting such a definition:

> If [the injury] results from the conditions under which the work is carried on, there is no reason why it should not be held compensable. In such case, it is one of the casualties of business; and it is the purpose of the compensation statutes to place the burden of casualties upon the business and not upon the unfortunate employee.

70 S.E.2d at 221.

Employer's contention that the cause of the injury must be unexpected is incorrect. Under South Carolina law, if the injury itself is unexpected, it is compensable as an injury by accident.

2. Definiteness of time

Employer contends the injury resulting from repetitive trauma has no definite time of occurrence and therefore it is not compensable as an injury by accident.

Definiteness of time, while relevant to proving causation, is not required to prove an injury qualifies as an injury by accident. For instance, in Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977), we found the claimant's emphysema, which developed gradually, was caused by repeated exposure to high humidity and dust on the job and was therefore compensable as an injury by accident. Similarly, in Stokes, *supra*, we found a psychological disorder which developed over a period of months compensable as an injury by accident.

Further, under S.C. Code Ann. § 42-1-160 (Supp. 2001), a disease, which typically has a gradual onset, is compensable as an injury by accident "when it results naturally and unavoidably from the accident." This provision indicates the legislature intended an accident to be compensable under the Act, even where the effects of the accident develop gradually. The fact that a repetitive trauma injury is disease-like in its gradual onset does not preclude it from coverage as an injury by accident.

Here, it is uncontested that Claimant's carpal tunnel syndrome was caused by her work activities.[4] The lack of a definite time of injury is therefore not dispositive.

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[4] Employer's claim that our holding makes compensable all the effects of aging is without merit since causation must always be established. Whether there is any causal connection between

3. Repetitive trauma injury as occupational disease

Employer contends that if a repetitive trauma injury is compensable under the Workers' Compensation Act, it should be compensable only as an occupational disease and not as an injury by accident. The Court of Appeals rejected this argument and followed the rationale of other courts that have focused on the commonly understood meaning of the word "disease" to conclude repetitive trauma is not an occupational disease. *See* Lutrell v. Ind. Comm'n, 507 N.E.2d 533 (Ill. App. 1987) (injury results from a specific identifiable trauma or physical event whereas disease originates from a source that is neither traumatic nor physical); Duvall v. ICI Americas, Inc., 621 N.E.2d 1122 (Ind. App. 1993) (occupational disease results from exposure to conditions in the workplace; exposure is a passive relationship rather than an event or occurrence); Noble v. Lamoni Prods., 512 N.W.2d 290 (Iowa 1994) (none of the common definitions trace the cause of disease to trauma).

Whether a repetitive trauma injury is compensable either as an injury by accident or an occupational disease has not been squarely addressed by this Court.[5] As other courts have recognized, the difficulty in deciding this issue arises from the fact that a repetitive trauma injury has some of the characteristics of both accidental injury and occupational disease -- it is the cumulative effect of repeated and distinct events that ultimately produces the disability. *See* Berry v. Boeing Military Airplanes, 885 P.2d 1261 (Kan. 1994); Crosby v.

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employment and an injury is a question of fact for the Commission. Sharpe v. Case Produce Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

[5] In Minor v. Philips Prods., 329 S.C. 321, 494 S.E.2d 819 (1997), the appellant/employer raised the issue whether a repetitive motion injury should be considered an occupational disease rather than an injury by accident. We did not expressly answer this question but simply found substantial evidence supported the award of benefits as an injury by accident.

American Stores, 298 N.W.2d 157 (Neb. 1980). There is a split of authority on this issue with no real majority view.[6]

Further, it is not obvious that either approach is more favorable to finding coverage. *See* Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (Court will liberally construe Act in favor of coverage). Presumably, Employer is advocating the occupational disease approach based on case law from other jurisdictions where repetitive trauma is treated as an occupational disease and courts have found no coverage because the claimant failed to show a required element. For instance, in Fuller v. Motel 6, 526 S.E.2d 480 (N.C. App. 2000), the North Carolina Court of Appeals found no coverage for carpal tunnel syndrome where the claimant failed to show it was caused by conditions peculiar to her employment that excluded all ordinary diseases to which the general public is equally exposed.

In South Carolina, our statute defines an occupational disease as "a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged." S.C. Code Ann. § 42-11-10 (1985). Unlike the North Carolina courts, however, we have not construed the definition of occupational disease so rigidly. The statute is satisfied where the claimant is able to show simply that the employment increased the risk of the disease. *See* Mohasco Corp. v. Rising, 292 S.C. 489, 357 S.E.2d 456 (1987). Under

[6] *Compare* Kinney v. Tupperware Co., 792 P.2d 330 (Idaho 1990); Crosby v. American Stores, 298 N.W.2d 157 (Neb. 1980) (occupational disease) *with* TRW/REDA Pump v. Brewington, 829 P.2d 15 (Okla. 1992); Brown Shoe Co. v. Reed, 350 S.W.2d 65 (Tenn. 1961) (injury by accident). Other courts are restricted by statutory language. *See*, *e.g.,* Ala. Code § 25-5-1(9) (1975) ("Injury shall include physical injury caused either by carpal tunnel syndrome disorder or by other cumulative trauma disorder…."); Or. Rev. Stat. 656.802(1)(c) (1987) (occupational disease includes "any series of traumatic events or occurrences which requires medical services or results in physical disability or death").

our more liberal approach, it is not clear that proof of a repetitive trauma injury as an occupational disease would be a more onerous burden than proving it as an injury by accident.

In any event, the commission found Claimant's repetitive trauma injury was compensable as an injury by accident. We find a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma. We therefore conclude the commission's finding is supported by substantial evidence. *See* Anderson v. Baptist Med. Center, 343 S.C. 487, 541 S.E.2d 526 (2001) (findings of commission are presumed correct and will be set aside only if unsupported by substantial evidence).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ralph Schurlknight, Petitioner,

v.

City of North Charleston and State Accident Fund, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25561
Heard October 10, 2002 - Filed November 25, 2002

REVERSED AND REMANDED

Thomas M. White and J. Kevin Holmes, of The Steinberg Law Firm, L.L.P., of Goose Creek, for petitioner.

Andrew F. Haseldon, of Howser, Newman & Besley, L.L.C.; and Robert G. McCulloch, Jr., of State Accident Fund, both of Columbia, for respondents.

JUSTICE MOORE: This is a workers' compensation case involving a repetitive trauma injury.[1] Petitioner Schurlknight (Claimant) sought benefits for noise-induced hearing loss. The single commissioner, the full commission, and the Court of Appeals[2] found his claim was barred by the two-year statute of limitations found in S.C. Code Ann. § 42-15-40 (Supp. 2001).[3] We reverse and remand.

FACTS

The facts relevant to this issue are undisputed. Claimant worked as a fireman for more than twenty-four years. For most of this time he held the position of captain, requiring him to ride in the passenger seat of the fire truck only a few feet from the siren and air horn which sounded continuously on each call. In addition, the volume on the fire truck radio was turned up in order to be audible over the noise of the siren and horn.

On April 14, 1995, Claimant was given a hearing test by the fire department physician as part of a routine annual physical. The doctor found some noise-induced hearing loss but concluded Claimant was capable of performing his job. Claimant was referred to the Charleston Speech and Hearing Center where he was examined on May 3. He was diagnosed with a moderate bilateral loss of hearing and recommended for a binaural hearing aid evaluation.

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[1] In Pee v. AVM, Inc., Op. No. 25560 (S.C. Sup. Ct. filed November 25, 2002), we found a repetitive trauma injury is compensable as an injury by accident.

[2] Schurlknight v. City of North Charleston, 345 S.C. 45, 545 S.E.2d 833 (Ct. App. 2001).

[3] This section provides that the right to workers' compensation benefits is barred "unless a claim is filed with the commission within two years after an accident."

On May 10, Claimant was evaluated by his private physician, Dr. Fenwick, who diagnosed Claimant with bilateral hearing loss from noise exposure. Dr. Fenwick recommended a yearly audiogram and predicted Claimant would ultimately need hearing aids, although probably not for another ten years.

The following year, on February 29, 1996, Claimant had his yearly audiogram which detected hearing loss in both ears. The report noted "extended exposure to loud noises may make this loss worse."

Claimant left the fire department for unrelated medical reasons in August 1997. On December 1, 1997, Claimant again had his hearing checked by his private physician, Dr. Fenwick, who noted Claimant's hearing had decreased since the May 1995 examination. Claimant was diagnosed with a hearing impairment of 22.5% to his right ear and 37.5% to his left, resulting in a hearing impairment for both ears of 12.5%.

On May 6, 1998, Claimant filed this workers' compensation claim for noise-induced bilateral hearing loss. The commissioner found Claimant knew he had a workers' compensation claim for hearing loss at least by May 1995 and concluded the May 1998 filing was outside the two-year limitation. The full commission affirmed.

On appeal, the Court of Appeals affirmed with a separate concurring opinion by Judge Howard.

ISSUE

When does the two-year statute of limitations begin to run in a repetitive trauma case?

DISCUSSION

The Court of Appeals found Claimant failed to timely file a claim within two years. In so holding, it applied the discovery rule of Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639

(1992), and concluded Claimant knew or should have known of his compensable injury at the latest by February 1996 when he had his last work-related audiogram. Judge Howard reluctantly concurred, noting the harsh result but feeling constrained by this Court's precedent in Mauldin.

Mauldin involved a claimant who was originally misdiagnosed with a sprain. It was not until more than two years after the accident that she was finally diagnosed with a torn medial meniscus, a compensable injury. We applied the discovery rule and held the two-year time period began to run when the claimant knew or should have known she had a compensable injury.

Repetitive trauma injuries, unlike the injury in Mauldin which occurred on a specific date but simply was misdiagnosed, have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini-accidents." As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury. *See* Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997); Berry v. Boeing Military Airplanes, 885 P.2d 1261 (Kan. App. 1994). Applying the discovery rule to such an injury often works to the prejudice of an employee who discovers symptoms of a repetitive trauma injury but continues to work. King v. D.C. Dept. of Employment Servs., 742 A.2d 460 (D.C. 1999); Oscar Meyer & Co. v. Ind. Comm'n, 531 N.E.2d 174 (Ill. App. 1988).

Although there is no overwhelming consensus, courts seeking to liberally provide for workers' compensation coverage have adopted the "last day of exposure" or the "last day worked" rule premised on the recognition that the injury is caused by trauma that occurs repeatedly until the particular employment ends. *See* Lawson, *supra*; Berry, *supra*; Brooks Drug, Inc. v. Workmen's Comp. Appeal Bd., 636 A.2d 246 (Pa. Commw. Ct. 1993).

This approach is consistent with our policy to liberally construe the Workers' Compensation Act in favor of coverage. Mauldin, *supra.* Further, it has the added advantage of fixing an outside date for filing

that avoids the need to litigate the date of injury. We also note the separate requirement that a worker give the employer notice of an injury. S.C. Code Ann. § 42-15-20 (1985).[4] This notice requirement ensures the employer will not be unfairly prejudiced by a two-year period for filing that begins from the last date of exposure.

We hold the last day of exposure is the date from which the statute of limitations begins to run in a repetitive trauma case. Applying this rule to the case at hand, we reverse the ruling that Claimant's action is time-barred since he filed his claim within two years of his last date of exposure. The case is remanded to the commissioner to address the merits of the claim.

REVERSED AND REMANDED.

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

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[4]This section provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Title prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person. No compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Wesley Aaron Shafer, Jr., Appellant.

ON REMAND

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25562
Heard October 8, 2002 - Filed November 25, 2002

REVERSED AND REMANDED

David I. Bruck, Robert E. Lominack, and William Norman Nettles, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Thomas E. Pope, of York, for respondent.

JUSTICE MOORE: This case is before us upon remand from the United States Supreme Court. Previously, in State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000), we held appellant, a capital defendant, was not entitled to a jury instruction that he was parole ineligible because Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994)[1] was inapplicable under the state's new sentencing scheme.[2]

The United States Supreme Court reversed, finding Simmons was applicable to the state's new sentencing scheme. Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263 (2001). The Court held that whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole. Shafer, 532 U.S. at 51, 121 S.Ct. at 1273. However, the Court remanded the case for us to determine whether the prosecutor's evidentiary submissions or closing argument in fact placed appellant's future dangerousness at issue. *Id.* at 54-55, 121 S.Ct. at 1274-1275.

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[1]In Simmons, *supra*, the United States Supreme Court held that due process is violated where a trial judge refuses to instruct a sentencing jury that, under South Carolina law, life imprisonment meant no possibility of parole, where a death sentence is secured, at least in part, due to the defendant's future dangerousness.

[2]South Carolina's sentencing scheme, which became effective on January 1, 1996, states that a capital jury must first decide whether the prosecution has proved beyond a reasonable doubt the existence of any statutory aggravating circumstance. If the jury fails to agree unanimously on the presence of a statutory aggravator, it does not make a sentencing recommendation, and the trial judge, in that event, sentences the defendant to either life imprisonment or a mandatory minimum term of thirty years imprisonment. S.C. Code Ann. § 16-3-20(B). If, on the other hand, the jury unanimously finds a statutory aggravator, the jury then recommends one of two potential sentences -- death or life imprisonment without the possibility of parole. S.C. Code Ann. §§ 16-3-20(A), (B). No sentencing option other than death or life without parole is available to the jury.

FACTS

Appellant was charged with murder, attempted armed robbery, and conspiracy for his involvement in the shooting of a convenience store clerk. After the jury found appellant guilty as charged, his trial entered the penalty phase.

During the penalty phase, the State introduced evidence of appellant's criminal record, probation violations, and misbehavior in prison. The State introduced the following evidence:

> (1) appellant was convicted of burglary and criminal sexual conduct (CSC) at age seventeen, after he and others confessed to taking two twelve-year-old girls to an empty house and having sexual intercourse and fellatio with them;
>
> (2) after receiving a probationary sentence for his burglary and CSC convictions, appellant violated probation by being rearrested for burglary and driving under suspension, by twice testing positive for marijuana, and by failing to report both to his probation officer and to court-ordered sex offender counseling;
>
> (3) on the night of his arrest for murder, appellant asked a jailer whether his father would get his pistol back after it had been seized as the murder weapon;
>
> (4) while awaiting trial on the murder charge, appellant was charged with assaulting a female staff member at the Detention Center after he became enraged and verbally abusive because she turned off the telephones;
>
> (5) while in jail, appellant was charged with possession of contraband for illegally possessing and smoking cigarettes; and

> (6) when discussing the murder with a fellow jail inmate shortly after his arrest, appellant acted as if the murder "didn't even bother him."

During an *in camera* hearing on jury instructions, the State argued that it had not made future dangerousness an issue in the case nor would it be arguing future dangerousness in closing argument and therefore appellant was not entitled to a charge on parole ineligibility. Defense counsel protested on the ground the State should not be allowed to introduce evidence of future dangerousness, and then say they were not going to argue it and thereby avoid a charge on the law. The State countered that the evidence was introduced to show appellant's character and to show his adaptability to prison, not future dangerousness.

The trial judge ruled that parole ineligibility would not be charged unless the State argued future dangerousness.

Defense counsel then sought permission to read in his closing argument to the jury lines from the controlling statute, S.C. Code Ann. § 16-3-20(A), stating plainly that a life sentence in South Carolina carries no possibility of parole. Section 16-3-20(A) provides:

> If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

The trial judge denied the request.

In closing argument, the State discussed a video that portrayed the aftermath of the victim's murder, where some girls discovered the victim's body. The State argued the following:

> . . . do you remember the girls that came in and when Jamie Palmer was saying, "Oh God; oh, God; Ray, Ray" and the girls were running in and out, we've got to go, we've got to go, . . . but what is really etched in my mind is Monica Inman. Remember Jamie picks up the phone and she's calling 911, and Monica Inman says "come on, Jamie, *they might come back, they might come back*."
>
> . . . So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, *and they might come back, they might come back*, they will remember this day, and they will remember this jury, and they will remember this verdict.

(Emphasis added).

At the conclusion of the argument, defense counsel renewed the request for a life without parole charge on the grounds that the State again raised future dangerousness by discussing Jamie's fear that "they might come back, they might come back." The trial court ruled, "Well, I listened very carefully because I have to admit I had some concern when that argument was entered into as to whether we had crossed the line. . . . I find that it comes close, but did not; so, I deny [appellant's] motion."

Instructing the jury, the judge explained:

> If you do not unanimously find the existence of the aggravating circumstance as set forth on the form [murder during

> the commission of an attempted armed robbery], you do not need to go any further.
>
> If you find unanimously the existence of a statutory aggravating circumstance . . . you will go further and continue your deliberations.
>
> Once you have unanimously found and signed as to the presence of an aggravated circumstance, you then further deliberate, and determine whether or not Wesley Aaron Shafer should be sentence[d] to life imprisonment or death.

The judge told the jury twice that "life imprisonment means until the death of the defendant." After the judge instructed the jury, the defense again renewed its objection that the statutory language on parole ineligibility was not charged. The objection was overruled.

After about three and a half hours into sentencing deliberations, the jury sent a note to the trial judge containing two questions: (1) Is there any remote chance for someone convicted of murder to become eligible for parole?; and (2) Under what conditions would someone convicted for murder be eligible?[3]

Defense counsel again urged the court to read to the jury the previously requested portion of § 16-3-20(A). Counsel argued the judge's charge, which partially quoted from § 16-3-20 ("life imprisonment means until death of the offender"), omitted the portion of the statute that explained what "until death of the offender" means.

The trial judge decided not to charge the jury about parole ineligibility, and instructed the jury:

> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this

[3]The parties agreed the second question could not be answered.

section life imprisonment means until the death of the offender. Parole eligibility or ineligibility is not for your consideration.

The jury returned one hour and twenty minutes later. The jury unanimously found beyond a reasonable doubt the aggravating factor of murder while attempting armed robbery, and recommended the death penalty. After the jury was polled as to their assent to the aggravating circumstance finding and to the death penalty recommendation, defense counsel requested the jury be polled on "the specific question as to whether parole eligibility, their belief therein, gave rise to the verdict." The judge denied the request and imposed the death sentence.

ISSUES

I. Whether future dangerousness was an issue in appellant's case such that he was entitled to a parole ineligibility instruction?

II. Whether the Court should follow the rule of Yarbrough v. Commonwealth, 519 S.E.2d 602 (Va. 1999), to require that sentencing juries be instructed on parole eligibility in all cases?

III. Whether the sentencing jury should be informed that a life without parole sentence does not necessarily mean the defendant will never be released from prison?

I

Following appellant's trial and his appeal, the United States Supreme Court expanded the law governing whether the evidence submitted by or the argument of the prosecution raises future dangerousness. Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726 (2002). In Kelly, the Court found that evidence of violent behavior in prison can raise a strong implication of

generalized future dangerousness.[4] The Kelly Court stated "[a] jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee." 534 U.S. at __, 122 S.Ct. at 731.

The Court stated "that evidence of dangerous 'character' may show 'characteristic' future dangerousness." 534 U.S. at __, 122 S.Ct. at 732. Further, the Court stated that "[e]vidence of future dangerousness under Simmons is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." 534 U.S. at __, 122 S.Ct. at 732.

As for the prosecution argument in Kelly, the Court found "[t]he prosecutor accentuated the clear implication of future dangerousness raised by the evidence and placed the case within the four corners of Simmons." 534 U.S. at __, 122 S.Ct. at 732. The Court found the following portions of the prosecution argument important: (1) the prosecution expressed its hope the jurors would "never in [their] lives again have to experience . . . [b]eing some thirty feet away from such a person;" (2) the prosecution characterized Kelly as a dangerous bloody butcher, and while those statements went to retribution, they also implied Kelly would be dangerous in the future; (3) the prosecution stated Kelly was "more frightening than a serial killer" and that "murderers will be murderers." With these facts, the Court found that "Kelly's jury, like its predecessor in Simmons, [was] invited to infer 'that petitioner is a vicious predator who would pose a continuing threat to the community.'" 534 U.S. at __, 122 S.Ct. at 732-33.

Applying the Kelly analysis to the evidence introduced by the State in appellant's case, we conclude the State made future dangerousness an issue. The evidence presented addressed appellant's character and adaptability to

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[4]The Kelly prosecutor introduced evidence that Kelly took part in escape attempts, carried a shank, and had been caught carrying a weapon and planning or participating in escape attempts.

prison, as the State argued at trial; however, the evidence also tended to show that appellant could be dangerous in the future. The relevance of the evidence to future dangerousness did not disappear merely because the evidence supported other inferences. As Kelly noted, evidence of violent behavior in prison can raise a strong implication of generalized future dangerousness. Here, the State presented evidence that appellant became enraged and verbally abusive to a staff member of the Detention Center when she turned off the telephones.

The State also introduced evidence that appellant was incapable of following rules by showing he had violated his probation in the past and had been charged for possession of contraband in the jail. Further, the State showed that appellant was a repeat criminal offender. While this evidence implied that appellant had a bad character, the evidence also raised the implication of future dangerousness such that appellant was entitled to an instruction on parole ineligibility.

The State's penalty phase closing argument also raised future dangerousness. The language, "they might come back, they might come back," in the State's argument implied that appellant might come back and commit future crimes if he is not executed. This language is similar to language in Kelly where the prosecutor informed the jurors that he hoped they would never in their lives have to experience being thirty feet away from such a person as Kelly. The Kelly Court found that language accentuated the clear implication of future dangerousness raised by the evidence in Kelly.

The State admits that some of the evidence it introduced was the "sort of *evidence* Kelly found to have the tendency to raise future dangerousness." However, the State argues that because it did not *argue* that evidence during appellant's penalty phase, a claim with which we disagree, this case falls outside of Kelly. The State alleges that footnote 4 of Kelly[5] requires that

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[5]Footnote 4 states:

As THE CHIEF JUSTICE says . . . it may well be that the evidence in a substantial proportion, if not all, capital cases will show a defendant likely to

both evidence of future dangerousness *and* argument on future dangerousness must exist for the defense to be entitled to the parole ineligibility instruction.

Contrary to the State's argument, this footnote does not make such an assertion. Initially, we note the United States Supreme Court's clear instructions to this Court were to determine whether the prosecutor's evidentiary submissions *or* closing argument in fact placed appellant's future dangerousness at issue. Also, the majority language in Kelly belies such an assertion. For instance, the Kelly Court noted that this Court posed the legal issue accurately in Kelly, "for in considering the applicability of *Simmons* [this Court] asked whether Kelly's future dangerousness was 'a logical inference from the evidence,' *or* was 'injected into the case through the State's closing argument.'" 534 U.S. at __, 122 S.Ct. at 731 (emphasis added).

Further, the State's argument is illogical because if the State succeeded in this argument, then the State would have the ability to introduce evidence raising a defendant's future dangerousness, but avoid a parole ineligibility instruction simply by being careful not to argue future dangerousness. This tactic would undermine the Simmons line of cases.

II

Appellant argues the Court should follow the rule of Yarbrough v. Commonwealth, 519 S.E.2d 602 (Va. 1999), to require that sentencing juries be instructed on parole eligibility in all capital cases.

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be dangerous in the future. . . . But this is not an issue here, nor is there an issue about a defendant's entitlement to instruction on a parole ineligibility law when the State's evidence shows future dangerousness but the prosecutor does not argue it. The only questions in this case are whether the evidence presented and the argument made at Kelly's trial placed future dangerousness at issue. The answer to each question is yes; and we need go no further than *Simmons* in our discussion.

534 U.S. at __, 122 S.Ct. at 732, n.4.

In Yarbrough v. Commonwealth, *supra*, the Virginia Supreme Court held:

> in response to a proffer of a proper instruction from the defendant prior to submitting the issue of penalty-determination to the jury or where the defendant asks for such an instruction following an inquiry from the jury during deliberations, the trial court shall instruct the jury that the words 'imprisonment for life' mean 'imprisonment for life without possibility of parole.'

Yarbrough, 519 S.E.2d at 616. The Yarbrough court emphasized that the defendant must request the instruction and the trial court is not required to give the instruction *sua sponte*. Id. at 616, n.11.

We do not find any reason for adopting the Yarbrough rule because the Legislature has already adopted such a rule. The Legislature amended S.C. Code Ann. § 16-3-20 (Supp. 2001), effective May 28, 2002, to revise the definition of "life imprisonment" and provide that, when requested by the state or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole, and in cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. Accordingly, by legislative amendment, appellant has received the relief he requests.

III

The State argues a capital sentencing jury should be informed that a life without parole sentence does not necessarily mean the defendant will never be released from prison.

In South Carolina, the Department of Probation, Parole, and Pardon Services (Parole Board) has the sole authority, upon request by the Department of Corrections, to alter a life without parole sentence via a pardon or parole. *See* S.C. Code Ann. § 17-25-45 (Supp. 2001); S.C. Code

Ann. § 24-21-970 (1989). A person sentenced to life without parole may be paroled if the following occurs:

> (1) the Department of Corrections requests the Department of Probation, Parole, and Pardon Services to consider the person for parole; and
> (2) the Department of Probation, Parole, and Pardon Services determines that due to the person's health or age he is no longer a threat to society; and
> (a) the person has served at least thirty years of the sentence imposed pursuant to this section and has reached at least sixty-five years of age; or
> (b) the person has served at least twenty years of the sentence imposed pursuant to this section and has reached at least seventy years of age; or
> (c) the person is afflicted with a terminal illness where life expectancy is one year or less; or
> (d) the person can produce evidence comprising the most extraordinary circumstances.

S.C. Code Ann. § 17-25-45 (E) (Supp. 2001). Further, a life without parole inmate can be considered for pardon if the inmate is "afflicted with a terminal illness where life expectancy is one year or less." S.C. Code Ann. § 24-21-970 (1989).

Given that a life without parole sentence is generally immutable under South Carolina law, a charge regarding the possibility of pardon or parole is too speculative. We find the State is not entitled to such a charge.

CONCLUSION

We find a parole ineligibility instruction was warranted in the sentencing phase of appellant's trial because the prosecution made future dangerousness an issue in his trial. Accordingly, we remand for resentencing. We further note that, given the United States Supreme Court's

decision in Kelly, the better practice is for trial judges to give the capital sentencing jury a parole ineligibility charge whether it is requested or not.

REMANDED.

TOAL, C.J., WALLER, BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I agree that we should remand this case for a new sentencing proceeding. Consistent with my dissent in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), I would grant this relief solely because appellant requested a parole ineligibility charge at his first trial. Further, I agree with the majority that the decision whether to give such a charge in future capital sentencing proceedings is governed by the amended version of S.C. Code Ann. § 16-3-20 (Supp. 2001), effective May 28, 2002.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

Michael Meek and Angela Meek, Defendants,

Of Whom Angela Meek is the Appellant.

In the Interest of:

Cynthia Meek (DOB: 01-27-97) and
Kaitlyn Meek(12-08-99)
Minors under the age of 18.

Appeal From Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 3570
Submitted October 8, 2002 – Filed November 25, 2002

REVERSED AND REMANDED

Warren A. Kohn, of Columbia; for Appellant

Montford Shuler Caughman, of Lexington; for Respondent.

Ann Sharry Keisler, of Lexington; for Guardian Ad Litem

CONNOR, J.: Angela Meek (Mother) appeals the family court's decision to grant temporary custody of her two minor daughters to the South Carolina Department of Social Services (DSS). We reverse and remand.

FACTS

On April 20, 2000, the Lexington County Department of Social Services sought an ex parte order granting it temporary emergency physical custody of the two daughters of Mother and Michael Meek (Father). The family court found that Father, while holding a firearm, threatened to kill one of the children. He then shot the firearm in the home while fighting with Mother. The family court also found Mother was not willing to leave the home to protect herself or the two girls. Accordingly, the family court granted temporary emergency custody of the girls to DSS, finding probable cause existed to believe there was imminent and substantial danger to the life, health, or physical safety of the children.

The probable cause hearing was held on April 24, 2000, and the family court made a finding that probable cause existed to take the children into emergency protective custody. The family court awarded custody of the girls to DSS and ordered both Mother and Father to undergo psychological testing. The family court scheduled the merits hearing for May 24, 2000. However, the hearing was continued because no guardian ad litem had been

appointed. The order granting the continuance noted a waiver of the thirty-five-day statutory period for the hearing.

The court conducted a merits hearing on August 2, 2000. Mother appeared at the hearing with her attorney, and the parties announced they had reached an agreement. DSS indicated that no agreement had been reached with Father, and a hearing would be held regarding him sometime in the future.

DSS announced to the family court the agreement reached with Mother. The parties agreed, among other things, to a finding of physical neglect against Mother, the return of custody of the two girls to Mother, and to continued monitoring by DSS. After DSS stated the substance of the agreement on the record, the following exchange took place:

> [DSS]: Additionally, Your Honor, I will add that [Father], who is accompanied by his attorney, has no objections to custody being returned to Mrs. Meek.
>
> [Court]: What about a restraint as to his contact?
>
> [DSS]: He is in agreement with that, as well, Your Honor.
>
> . . .
>
> [Court]: So he's not to have any contact with these children?
>
> [Father's attorney]: No, sir.
>
> . . .

[Court]:	She understands she cannot have [Father] around these children?
[Mother's attorney]:	Yes, she understands that.

The family court approved the agreement. However, the August 29, 2000, written order (Mother's Order) failed to include the directive that Mother keep the girls away from Father.

Subsequently, Mother informed the DSS case worker that she was pregnant with Father's child. As a result of contact between Father and the children, Mother signed a Voluntary Placement Agreement, agreeing to give custody of the two girls to DSS for a temporary period. The agreement provided that DSS "may petition the Family Court for custody of my child(ren) at any time it deems such action necessary or should continued placement be necessary beyond three (3) months." The agreement also provided that Mother could request the return of her children by informing DSS of her request fifteen days before the date she wished them returned, but DSS could petition the family court for an order preventing the return of the children if DSS believed it was in the best interest of the children.

The court finally held the merits hearing regarding Father on March 5, 2001. Neither Mother nor her attorney appeared at the hearing. In addressing Father's failure to stay away from the children, one witness testified that Mother told DSS she was pregnant by Father. At the end of the hearing, the family court found that Father placed the children in threat of harm of physical abuse and mental injury. The court further ordered that Father be entered in the child abuse registry. Finally, the family court granted DSS's request that the children remain in its custody.

On March 27, 2001, without a hearing, the family court issued an order amending Mother's Order. The amended order added two provisions. One stated that Mother understood that Father was not to have contact with the children, and another forbade Father from contacting them. It is not clear

from the record when Mother was served with a copy of this order. The family court also issued an intervention order regarding Father (Father's Order) on April 11, 2001, finding that Father placed the children in threat of harm and that he should have no contact with the children. Father's Order did not address Mother's conduct or custody of the children.

On August 1, 2001, Mother sent a written request for the return of her children pursuant to the agreement she had signed with DSS. On August 8, 2001, without a hearing, the family court issued an amended Father's Order. The amended Father's Order provided that DSS should have continued temporary custody of the children because Mother failed to comply with a previous court order. Mother appeals from this order, arguing: (1) the family court lacked subject matter jurisdiction because DSS's complaint did not include the required statutory notices; (2) the family court lacked subject matter jurisdiction because the merits hearing was not held within the statutory time constraints; and (3) Mother was unlawfully deprived of her children and denied her constitutional due process rights because DSS failed to give her notice or a hearing regarding the amended orders.

STANDARD OF REVIEW

In appeals from family court, the appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. McElveen v. McElveen, 332 S.C. 583, 591, 506 S.E.2d 1, 5 (Ct. App. 1998).

LAW/ANALYSIS

I. SUBJECT MATTER JURISDICTION

Mother argues the family court lacked subject matter jurisdiction over the underlying proceedings because: (1) the initial emergency removal

complaint lacked adequate statutory notices; and (2) her merits hearing was not held within the statutory time constraints.

A. COMPLAINT

Mother first claims the family court was divested of subject matter jurisdiction because the complaint for removal served on her did not contain the statutorily-required notices.

The family court has exclusive jurisdiction to hear matters concerning the abuse and neglect of children. S.C. Code Ann. § 20-7-736(A) (Supp. 2001).[1]

DSS served Mother with a copy of the Complaint for the Ex Parte Order. The complaint identified the children, identified Mother and Father, and alleged there was probable cause to believe there existed a substantial threat to the children's life, health, or safety at the hands of Mother and Father. The complaint sought the emergency removal of the children from the parents' custody.

The General Assembly has required that certain notices be placed in petitions for removal:

> (D) Whether or not the petition for removal includes a petition for termination of parental rights, the petition shall contain a notice informing the parents of the potential effect of the hearing on their parental rights and a notice to all interested parties that objections to the sufficiency of a placement plan, if ordered, or of any recommendations for provisions in the plan or court order must be raised at the hearing. The notice

[1] Although we recognize this case arose in April 2000, we cite to the most current version of the Code throughout this opinion given no substantive amendments have been made to the pertinent statutes since this litigation began.

> must be printed in boldface print or in all upper case letters and set off in a box.
>
> . . .
>
> If the petition does not include a petition for termination of parental rights, the notice shall state: "At this hearing the court may order a treatment plan. If you fail to comply with the plan, you could lose your rights as a parent."

S.C. Code Ann. § 20-7-736(D) (Supp. 2001). The complaint served on Mother did not contain any of the notices outlined in the statute. However, Mother did not complain about this failure before the family court.

Mother argues that although the family court has exclusive subject matter jurisdiction to hear cases involving child abuse and neglect, the court was divested of this jurisdiction when DSS failed to include the necessary notices in the complaint. It is clear that DSS failed to include the necessary notices. However, nothing in the statute purports to divest the family court of subject matter jurisdiction where the notice requirements are not met by DSS.

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000). DSS's failure to include the appropriate notices in the complaint for removal may have violated certain due process rights of Mother, but the failure did not deprive the family court of subject matter jurisdiction over the emergency protective removal proceedings concerning Mother's children. See South Carolina Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 134-35, 538 S.E.2d 285, 288 (Ct. App. 2000) ("The law provides the family court has exclusive jurisdiction over all proceedings involving the termination of parental rights. We are aware of no provision divesting the court of that jurisdiction based on alleged improper removal of a child.") (internal citation omitted).

Moreover, since the failure of DSS to include the necessary notices in the complaint for removal does not involve a question of subject matter jurisdiction, this issue should have been raised to the family court. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (stating an issue cannot be raised for the first time on appeal).

B. TIME LIMITS

Mother next argues the family court was divested of subject matter jurisdiction to hear this matter because the family court failed to hold the merits hearing within the statutorily required time limits.

DSS brought the emergency action to remove the girls from Mother's custody on April 20, 2000. The family court held a probable cause hearing on April 24, 2000, and scheduled the merits hearing for May 24, 2000. On this date, DSS notified the family court that a guardian ad litem had not been appointed. The family court issued an order continuing the matter for this reason. The order specified that the thirty-five-day time limit had been waived. Nothing in the record indicates whether Mother appeared before the family court on May 24, 2000, or whether she agreed to waive the thirty-five-day time limit. Mother's merits hearing was held on August 2, 2000. Mother entered into an agreement with DSS at the hearing and did not object to the timing of the hearing.

The General Assembly has provided strict timelines for hearings on the removal of children. "The family court shall schedule a probable cause hearing to be held within seventy-two hours of the time the child was taken into emergency protective custody." S.C. Code Ann. § 20-7-610(M) (Supp. 2001). Further, the merits hearing "to determine whether removal of custody is needed, pursuant to Section 20-7-736, must be held within thirty-five days of the date of receipt of the removal petition." Id. A continuance may be granted for exceptional circumstances, however, "the hearing on the merits must be completed within sixty-five days following receipt of the removal petition" if a continuance is granted. Id. Section 20-7-736 also

provides that the family court shall "schedule a hearing to be held within thirty-five days" of the date of receipt of the removal petition. S.C. Code Ann. § 20-7-736(E) (Supp. 2001).

In reviewing the time limits outlined by statute, our Supreme Court has stated that the family court "must strictly comply with this schedule of hearings. The family court should order custody be returned to the child's parent or legal guardian if the hearings are not held within ten days after the statutory time limits." Hooper v. Rockwell, 334 S.C. 281, 289, 513 S.E.2d 358, 363 (1999).

More recently, in South Carolina Dep't of Soc. Servs. v. Gamble, 337 S.C. 428, 523 S.E.2d 477 (Ct. App. 1999), this Court reviewed the time limits described in the removal statutes. Gamble's minor child was removed from her home and placed into emergency protective custody after a report of suspected abuse. The family court scheduled the merits hearing for September 15, thirty-two days after the petition for removal was filed. However, on the day of the scheduled merits hearing, the family court determined the matter could not be concluded during the allotted time and ordered that the matter be rescheduled. Thereafter, Gamble requested and received an order allowing discovery. The merits hearing was held on November 5, but was not concluded. Gamble then moved to vacate the order granting custody to DSS because the merits hearing was not held within thirty-five days of the receipt of the removal petition. The family court granted Gamble's motion to dismiss for failure to prosecute, and DSS appealed. This Court compared the requirement from section 20-7-610(M) that the merits hearing "must be held" within thirty-five days of receipt of the removal petition with the requirement found in section 20-7-736(E) that the family court "shall schedule a hearing to be held within thirty-five days" of receipt of the petition for removal. Reading the two statutes together, this Court held:

> [T]he plain language of the statute indicates that a merits hearing must be *scheduled* to be held within thirty-five days of receipt of the removal petition.

> The statute does not indicate that the hearing must be *completed* within the thirty-five day period. Therefore the requirement that a hearing on the merits actually come to a conclusion within thirty-five days of the removal petition should not be read into the statute.

Gamble, 337 S.C. at 432, 523 S.E.2d at 479.

Mother argues the family court lost subject matter jurisdiction as a result of the failure to abide by the time limits mandated by statute. As previously discussed, the family court is given exclusive jurisdiction over matters concerning the abuse and neglect of children. Although the statutes outlining the time limits for the merits hearing indicate that a hearing should at least have been scheduled within thirty-five days, and completed within sixty-five days, of the receipt of the removal petition, nothing purports to remove jurisdiction over the abuse and neglect case if the hearing is not held within these time limits. The failure to complete the merits hearing within sixty-five days of receipt of the petition for removal did not deprive the family court of subject matter jurisdiction. As in Gamble, it is clear the family court complied with the statutes considering it originally scheduled the merits hearing to be held within thirty-five days of the receipt of the removal petition.[2] Moreover, the remedy for the failure to complete the hearing within the specified time limits was for Mother to petition for the return of her children or move to vacate the order granting custody to DSS.

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[2] However, as noted, the merits hearing was not completed within sixty-five days. Thus, it is not clear that the family court complied with the statute in this regard. We make no ruling on whether the failure to complete the hearing within this time limit violated the statute in this case. Our ruling is limited to whether the time-limit discrepancies deprived the family court of subject matter jurisdiction.

Mother did not pursue either action and did not raise this issue to the family court.[3]

II. DUE PROCESS VIOLATIONS

Mother argues her due process rights were violated and she was unlawfully deprived of custody of her children when the family court entered an amended order without giving her notice or opportunity to be heard.

"Due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur." South Carolina Dep't of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Id. Litigants should be placed on notice of the issues that the court is to consider in order to comply with due process. Murdock v. Murdock, 338 S.C. 322, 333, 526 S.E.2d 241, 248 (Ct. App. 1999) (finding family court erred in addressing issue of debt allocation where the husband did not receive notice that the issue would be addressed at the hearing on a rule to show cause for failure to pay child support).

The family court determined the merits of the abuse allegations against Mother at the August 2, 2000, hearing. The parties clearly indicated that the agreement reached at the hearing dealt only with Mother and that the merits of the abuse allegations against Father would be dealt with at a later hearing. The Voluntary Placement Agreement (VPA), dated January 31, 2001, between DSS and Mother indicated that DSS would petition the family court if it believed it necessary to seek further determinations regarding custody of the children. This indicates a formal process, with notice to

[3] Because the family court's compliance with the statutory time limits is not an issue of subject matter jurisdiction, Mother should have objected to the continuance to preserve the issue for appellate review. Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000).

interested parties, would be undertaken before a determination would be made on the custody of the children.

However, DSS did not apprise Mother that it would request a finding against her or request the family court for continued custody of the children at Father's merits hearing on March 5, 2001. The family court issued Father's Order on April 11, 2001. This order included no findings concerning Mother or custody of the children. After Mother followed the procedure outlined in the VPA to request custody of her children, Father's Order was amended to continue custody with DSS based on Mother's violation of a previous court order.[4] DSS argues the family court was merely correcting "clerical errors" by adding information discussed at Father's hearing but not included in the order. There is no merit to this argument where the "correction" goes to the very heart of the violation of Mother's fundamental right to due process.

Mother's interest in the custody of her children is extraordinarily significant. Mother's fundamental right to due process entitled her to notice that DSS intended to petition the family court for custody of the children at Father's hearing. Murdock, 338 S.C. at 333, 526 S.E.2d at 248. Moreover, DSS failed to follow its own procedures outlined in the VPA. Pursuant to the VPA, DSS should have petitioned the family court to prevent the return of the children upon Mother's request. Because DSS failed to follow the procedures outlined in the VPA, and failed to give Mother notice and an opportunity to be heard at Father's merits hearing, we reverse that portion of the amended Father's Order which grants custody of the children to DSS based upon Mother's conduct. We remand this matter to the family court for a full hearing to determine whether DSS is entitled to custody of the children beyond the time limits agreed upon by the parties in the VPA.

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[4] Presumably, Mother violated the amended Mother's Order prohibiting contact between Father and the children. DSS was aware of this violation at the time the parties executed the VPA. Thus, it is questionable why DSS sought an amended Father's Order continuing custody of the children with DSS based on this violation.

CONCLUSION

Based on the foregoing, the portion of the amended Father's Order addressing custody of the children and Mother's conduct is **REVERSED** and **REMANDED** for proceedings consistent with this opinion. A hearing on these issues shall be held immediately.

REVERSED AND REMANDED.

ANDERSON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Wade Pitts,

Appellant,

v.

Jackson National Life Insurance Company,

Respondent.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 3571
Heard September 11, 2002 – Filed November 25, 2002

AFFIRMED

Paul J. Doolittle, of Mt. Pleasant; and Ronald R. Parry, of Covington, KY, for appellant.

David L. Freeman and J. Theodore Gentry, of Greenville; and Joel S. Feldman, of Chicago, IL, for respondent.

CONNOR, J.: This appeal arises out of Jackson National Life Insurance Company's sale of preferred and non-preferred whole life insurance polices. Southland Container Corporation originally brought this class action suit against Jackson National, alleging several causes of action including breach of fiduciary duty/constructive fraud; fraudulent concealment and non-disclosure; and unjust enrichment and imposition of a constructive trust. William Wade Pitts was later substituted as named plaintiff. The circuit court granted Jackson National's motion to dismiss the breach of fiduciary duty and constructive fraud causes of action; granted Jackson National's summary judgment motion as to the fraudulent concealment claim; and denied Pitts's motion for summary judgment as to his claim for unjust enrichment. Pitts appeals. We affirm.

FACTS/PROCEDURAL HISTORY

In 1990, Southland Container Corporation (Southland) purchased "key-man" life insurance on David Katt, its president, from Jackson National. Southland purchased an Ultimate II policy on Katt. Katt allegedly would have qualified for a less expensive Preferred Ultimate II policy, but Southland was not aware of this policy and was not informed of it by Jackson National's agent. In a suit filed December 1, 1995, Southland Container alleged Jackson National sold it the Ultimate II policy when it actually qualified for the Preferred Ultimate II policy. The complaint alleged five causes of action: violation of unfair trade practices act; breach of fiduciary duty/constructive fraud; negligence; fraudulent concealment and non-disclosure; and unjust enrichment and imposition of a constructive trust.

Southland moved for class certification, and a class of South Carolina Jackson National policyholders who purchased non-preferred Ultimate policies, but would have been qualified to purchase preferred policies, was conditionally certified. William Wade Pitts was substituted as named plaintiff and class representative in place of Southland Container when it became apparent that Katt could not devote the necessary time to the litigation.

From 1985 to 1995, Jackson National offered two versions of its whole life insurance policy, the Ultimate I and Ultimate II. Jackson National also offered separate, but corresponding preferred policies, the Preferred Ultimate I and Preferred Ultimate II. The preferred policies had stricter underwriting standards, charged lower premiums, and paid the broker a lower commission than the standard policies of equal face amounts. Non-preferred policies were available to all insurance applicants, while preferred polices were available to "a more restrictive pool of insureds who [had] above average health, good life expectancy, no recent history of smoking and qualif[ied] under factors such as age and amount of insurance." Jackson National's underwriting department assessed the insurability of an applicant based on the policy requested. Thus, if the applicant qualified for the policy in the application, Jackson National would issue that policy without further investigation into whether the applicant qualified for a different policy. If the applicant did not qualify for the applied-for policy, Jackson National would advise if the applicant qualified for a different policy.

Pitts purchased his insurance through an independent insurance agent, Bruce Loring, with whom he had no previous relationship. Pitts purchased an Ultimate II policy for his daughter and a Preferred Ultimate II policy for himself. Although Pitts's daughter may have qualified for a preferred policy, Loring testified he chose to seek a non-preferred policy for her because he believed she would not qualify for the preferred policy because of her weight. Jackson National issued both policies as applied for, and the policies were accepted and paid for by Pitts. The amended complaint alleged Pitts's daughter qualified for the Preferred Ultimate II policy but was issued an Ultimate II policy instead, resulting in damages to Pitts.

Jackson National filed a motion to dismiss all five causes of action. The circuit court dismissed the causes of action for unfair trade practices, breach of fiduciary duty, and negligence. Both parties moved for reconsideration, and the circuit court also dismissed the constructive fraud claim.

Following discovery, Jackson National moved for summary judgment on the fraudulent concealment claim. Pitts moved for summary judgment on the equitable claim of unjust enrichment. The circuit court granted Jackson National's motion and denied Pitts's motion.

Pitts appeals, arguing the circuit court erred in dismissing the claims for breach of fiduciary duty and constructive fraud, in granting Jackson National's motion for summary judgment on the fraudulent concealment claim, and in denying his motion for summary judgment on the unjust enrichment claim.

DISCUSSION

Pitts argues the circuit court erred in granting Jackson National's motions to dismiss the claims for breach of fiduciary duty and constructive fraud. Jackson National's motions to dismiss were made pursuant to Rule 12(b)(6), SCRCP. "Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." Id. "A Rule 12(b)(6) motion to dismiss for failure to state a cause of action must be resolved by the trial judge based solely on the allegations established in the complaint." Berry v. McLeod, 328 S.C. 435, 441, 492 S.E.2d 794, 797 (Ct. App. 1997).

In deciding upon Jackson National's motions to dismiss, the circuit court considered matters outside the pleadings. Numerous exhibits were submitted in the memorandum in opposition to the motion to dismiss, including a copy of the life insurance policy and several tables of policy values. "If on a motion under 12(b)(6) matters outside the pleadings are presented and not excluded, the motion shall be treated as one for summary judgment." McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 489 n.2, 445 S.E.2d 638, 639 n.2 (1994); see Berry, 328 S.C. at 441, 492 S.E.2d at

798 (finding where trial court decided Rule 12(b)(6) motion based on matters outside the pleadings, the court converted the motion to dismiss into a summary judgment motion pursuant to Rule 56, SCRCP).

"[Rule 12(b)(6)] specifically provides for conversion, provided the parties, upon compliance with the notice provisions of Rule 56, are afforded a reasonable opportunity to introduce evidentiary matters." Johnson v. Dailey, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (1995). The pertinent portion of Rule 12(b) allowing conversion provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56.

The memorandum containing the outside materials was dated and filed on May 28, 1996. The order was dated November 25, 1996 and filed November 26, 1996. Because the judge issued the order six months after the memorandum was filed, there was ample opportunity for the parties to introduce additional evidentiary matters if they desired. Thus, the circuit court implicitly converted the motions to dismiss into summary judgment motions under the provisions of Rule 12(b), SCRCP. As such, the procedural posture from which we review these claims is that of summary judgment.

Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. West v. Gladney, 341 S.C. 127, 132, 533 S.E.2d 334, 336 (Ct. App. 2000). "Summary judgment can be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992).

"In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Id. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

I. Breach of Fiduciary Duty

Pitts[1] argues the circuit court erred in dismissing the claim for breach of fiduciary duty. Pitts specifically asserts "Jackson National had a fiduciary duty to provide complete and truthful information to Appellant and Class members when selling insurance policies to them, and it breached that duty when it failed to make full disclosure with respect to the type of policies available, the charges, commissions, mortality costs and other expenses associated with those policies . . . ."

Pitts, however, conceded at oral argument the relationship in this case cannot be considered a "pure" fiduciary relationship. Instead, he contends the relationship is based on the unique circumstances of the sale of insurance, which creates a heightened duty, particularly the duty of good faith and fair dealing.

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[1] At the time of the motions to dismiss, Southland Container was the named plaintiff. Pitts was substituted on October 1, 1999, after the motions to dismiss were heard and ruled upon. For continuity, Pitts will be discussed as if he were the named plaintiff throughout all of the proceedings in the circuit court, including the motions to dismiss.

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). A relationship must be more than casual to equal a fiduciary relationship. Steele v. Victory Sav. Bank, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988). "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring." Island Car Wash, Inc., 292 S.C. at 599, 358 S.E.2d at 152; see Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) ("As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a [fiduciary] relationship. The facts and circumstances must indicate that one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party."). Therefore, to determine whether a fiduciary relationship existed between Jackson National and Pitts, we must look at the particulars of their relationship.

Although the relationship between an insurer and an insured has at times been characterized as "special," this has occurred only after the parties have entered into a mutually binding contract for insurance, specifically in the posture of an insured's claim of bad faith refusal to pay benefits due under an insurance contract. The conduct at issue in these cases arose based on the insurer's established contractual obligations. See Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 503 n.5, 473 S.E.2d 52, 55 n.5 (1996) ("The duty of good faith and fair dealing is such a duty that arises by operation of law due to the special relationship of the parties in an insurance contract . . . ."); see also Lira v. Shelter Ins. Co., 913 P.2d 514 (Colo. 1996) (holding tort liability for breach of implied duty of good faith and fair dealing is based on quasi-fiduciary nature of insurance relationship and is predicated on parties' contractual responsibilities).

This case, however, requires us to review the context of an insurer/insured relationship from its inception, specifically, at the point of the application for insurance. Our research reveals no South Carolina case, and the parties have cited none, which establishes a fiduciary relationship at the application stage. In fact, our Supreme Court has found an applicant for an insurance policy does not stand in a fiduciary relationship with the insurer. Gordon v. Fidelity & Cas. Co. of N.Y., 238 S.C. 438, 120 S.E.2d 509 (1961) (finding no relationship of trust and confidence existed between the insurance applicant and the insurance agent); O'Connor v. Bhd. of R.R. Trainmen, 217 S.C. 442, 60 S.E.2d 884 (1950) (holding no relation of trust and confidence existed between the insurance applicant and the soliciting agent where they had not known each other prior to the transaction and the agent did nothing in preventing the applicant from reading the application).

Pitts attempts to distinguish Gordon and O'Connor, arguing they are "failure to read" cases, in which the information allegedly withheld from the policy applicants was disclosed in the written materials supplied to them. Although the cases involved a failure on the part of the insured to read the policy, they provide guidance in the present case in that the cases clearly establish the sale of insurance is an arm's length commercial transaction, which does not give rise to a fiduciary relationship. Because an applicant is still operating in the marketplace at the point of purchase, the insurer is in a decidedly different position than after the contract has been entered into; thus, no heightened duty has attached.

We find additional support for this conclusion in the holding of Moses v. Mfrs. Life Ins. Co., 298 F. Supp. 321 (D.S.C. 1968). In Moses, the insured purchased an annuity contract from the insurer. The insured selected the option of monthly payments during her life without the guarantee of payment beyond her own life. After receiving seven monthly payments, the insured died. Subsequently, the executors of her estate sought to have the election voided in an effort to recover under a more favorable settlement option, which was not chosen by the insured. The executors primarily argued the insurer stood in a fiduciary relationship with the insured. Based on this relationship, the executors claimed the insurer was required to determine

which policy was more favorable to the insured. The United States District Court for South Carolina rejected this contention. The Court found the executors' claim of a fiduciary relationship could not "rest upon the mere relationship of insurer and insured." Moses, 298 F. Supp. at 323.

Our decision is also consistent with other jurisdictions. See, e.g., Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 518 (Ind. 1993) (finding relationship at the initial purchase of an insurance policy is that of "a traditional arms-length dealing between two parties"); Stockett v. Penn Mut. Life Ins. Co., 106 A.2d 741, 744 (R.I. 1954) ("Ordinarily an insurance company stands in no fiduciary relationship to a legally competent applicant for an annuity or other insurance contract."); Legal Sec. Life Ins. Co. v. Ward, 373 S.W.2d 693, 697 (Tex. App. 1963) ("The legal relations between an applicant and an insurance company are fundamentally the same as those between parties negotiating any other contract.").

Applying the foregoing analysis to the instant case, we note Pitts first contacted Loring through an insurance brochure Loring circulated. With Loring's assistance, Pitts applied for a Preferred Ultimate II policy for himself. Pitts also completed an application for an Ultimate II policy for his daughter. Loring testified he chose to seek the non-preferred policy for Pitts's daughter because he believed she would not qualify for the preferred policy because of her weight. When Jackson National received Pitts's application, it determined that Pitts was qualified for the Preferred Ultimate II for which he applied, and his daughter was qualified for the Ultimate II policy for which she applied. Having determined that both individuals qualified for the policies they had applied for, Jackson National issued the policies. Pitts alleges his daughter would have received the preferred policy if she had applied for it, and Jackson National breached a fiduciary duty by not informing him she might qualify for a better policy. This assertion fails given no fiduciary relationship was created merely by the application for insurance. Furthermore, there is no evidence of a course of dealing or circumstances between Jackson National and Pitts that would give rise to a fiduciary duty. See 14 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 198:7, at 198-16 (3d ed. 1999) ("[A] fiduciary relationship, if one

is found to exist, flows not from the mere fact of an insurance relationship between the parties; something more than the mere fact of an insurance relationship is required to establish a fiduciary relationship."). Without a fiduciary relationship, Jackson National owed no duty to Pitts either to disclose the existence of a preferred policy or to perform full underwriting to determine eligibility for a policy other than that which was requested.

Despite the absence of a fiduciary relationship, Pitts contends insurance agents should be required to disclose product differences in situations where these differences are "unknown and unknowable to the average consumer." Initially, we note there is no evidence Loring undertook the obligation to obtain the best policy for Pitts, and absent this undertaking, he is not required to do so. See Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993) (affirming the finding of the trial judge that no obligation exists on the part of an agent or broker to secure insurance at the most favorable prices absent a promise to do so). Moreover, in light of the vast array of available insurance policies, including competitor's policies, it would be impractical to require an agent to disclose all of the differences between these policies.

II. Constructive Fraud

Pitts argues the circuit court erred in dismissing the claim for constructive fraud. Pitts contends "Jackson National should have either done full underwriting on all policy applicants . . . or disclosed to the Ultimate policy applicants that they were not going to receive full underwriting and the effect thereof."

"To establish constructive fraud, all elements of actual fraud except the element of intent must be established." Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Our appellate courts have stated:

> In order to prove [actual] fraud, the following

> elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Id. at 515, 431 S.E.2d at 269.

"Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud while intent to deceive is an essential element of actual fraud." Ardis, 314 S.C. at 516, 431 S.E.2d at 269-70. "The presence or absence of such an intent distinguishes actual fraud from constructive fraud." Id. at 516, 431 S.E.2d at 270. "However, in a constructive fraud case, where there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely." Id. at 516, 431 S.E.2d at 270.

"A complaint is fatally defective if it fails to allege all nine elements of fraud." Ardis, 314 S.C. at 515, 431 S.E.2d at 269. "Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim." Id.

In Pitts's complaint, there is no allegation of the first element of constructive fraud, a representation. Citing Ardis, Pitts argues there is no requirement for an affirmative statement because constructive fraud can be based on omissions or silence where there is a duty to speak. Although Ardis recognizes "[n]ondisclosure is fraudulent when there is a duty to speak," this discussion relates to a claim for fraudulent concealment, not constructive fraud. Ardis, 314 S.C. at 517, 431 S.E.2d at 270. We find the first element requiring an affirmative representation has not been met. Because all elements must be met and pled, the constructive fraud cause of action was properly dismissed.

To the extent the matter was heard as a summary judgment motion, there was no evidence outside the complaint of Pitts's reliance or his right to rely. Therefore, granting the motion was proper on this ground. As previously discussed, there was no fiduciary relationship created by the application for insurance. Thus, Pitts had no right to rely. Moreover, the record provides no evidence of an affirmative representation by Loring in connection with the Pittses' policies. Pitts knew of the existence of two different policies because he obtained a preferred policy for himself at the same time he obtained the non-preferred policy for his daughter. Therefore, he cannot claim Loring acted fraudulently by not informing him of these policies. He already had knowledge of both policies.

III. Fraudulent Concealment

Pitts asserts the circuit court erred in granting Jackson National's motion for summary judgment as to his fraudulent concealment cause of action. Pitts contends Jackson National was guilty of fraudulent concealment because it failed to disclose information related to the insurance policies.

"Nondisclosure is fraudulent when there is a duty to speak." Ardis, 314 S.C. at 517, 431 S.E.2d at 270. "Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972). Thus, the issue is whether Jackson National had a duty to disclose facts which it did not disclose. In Ardis, this Court stated:

> The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the

> particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Ardis, 314 S.C. at 517, 431 S.E.2d at 270 (quoting Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)).

Pitts acknowledged during the motion hearing that the first class of Ardis, requiring a pre-existing, definite fiduciary relationship to create a duty to disclose, does not exist in this case. The second class requires one party to expressly or impliedly repose a trust and confidence in the other party. Pitts did not expressly tell Loring he was imposing a trust or confidence in him. There is no evidence that this trust and confidence impliedly existed between Pitts and Loring. The parties had no previous dealings. We have already found they did not have a fiduciary relationship. Further, the relationship involved an arm's length commercial transaction between an applicant and his insurance agent. As previously discussed, our Supreme Court has held there is no relationship of trust and confidence between an applicant and an insurance agent. See Gordon v. Fidelity & Cas. Co. of N.Y., 238 S.C. 438, 451, 120 S.E.2d 509, 515 (1961) (finding there was no "relation of trust and confidence between the [insured] and the agent of the [insurance company]"); see also O'Connor v. Bhd. of R.R. Trainmen, 217 S.C. 442, 448, 60 S.E.2d 884, 886 (1950) (holding "[t]here was no relation of trust and confidence between [the insured] and the soliciting agent"). Furthermore, Jackson National owed no duty to advise Pitts concerning the policies. Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988) ("Generally, an insurer and its agents owe no duty to advise an insured."). Therefore, the second class of Ardis was not met.

The third class of Ardis requires the contract or transaction be "intrinsically fiduciary." We have already recognized that a claim of a fiduciary relationship "cannot rest upon the mere relationship of insurer and insured." Moses, 298 F. Supp. at 323. Moreover, at the application stage, the insurer is only required to fulfill a limited role as the Court explained in Moses:

> When requested, the [insurer] was obligated to be accurate and fair in its advice and in the information it gave the [insured]. But this did not mean the [insurer] was required to go beyond the request of the [insured] for information, to inject matters not raised by the [insured], or to make independent inquiries into such extraneous matters, especially when these matters were well within the knowledge of the [insured] herself.

Moses, 298 F. Supp. at 324.

In his brief, Pitts contends he "clearly presented evidence which demonstrated the existence of genuine issues of material fact as to whether the circumstances of the case, the nature of the dealings between [Pitts and Jackson National], or their position towards one another implied a trust and confidence which would require a duty to disclose." Despite this statement, Pitts never specifically listed the evidence but instead referenced other arguments. In our view, there is no evidence that would imply a trust and confidence requiring a duty on the part of Jackson National to disclose the existence of preferred policies or to perform "full underwriting" in order to inform every standard policy applicant of any eligibility for a preferred policy.

Additionally, Pitts received a preferred policy for himself and a non-preferred policy for his daughter. These policies disclosed the information he claims Jackson National concealed. "[O]ne cannot complain

of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument . . . ." Giles v. Lanford & Gibson, Inc., 285 S.C. 285, 289, 328 S.E.2d 916, 918 (Ct. App. 1985) (quoting Guy v. Nat'l Old Line Ins. Co., 252 S.C. 47, 51, 164 S.E.2d 905, 906 (1968)). Giles recognizes the circumstances of each case must be considered. We find the circumstances of this case indicate the nature of the transaction itself did not create any duty to disclose. The third and final class of Ardis has not been met. Because we find no disclosure requirement for Jackson National, we affirm the trial judge's grant of summary judgment for the claim of fraudulent concealment.

IV. Unjust Enrichment

A.

Pitts contends the circuit court erred in denying his motion for summary judgment on the unjust enrichment claim. He asserts Jackson National "will be unjustly enriched if it is allowed to retain [funds it received from Ultimate policy-holders who qualified for the Preferred Ultimate policy] and, therefore, a constructive trust should be imposed on all monies wrongfully obtained by Jackson National through concealment and non-disclosure." In support of his claim for unjust enrichment, Pitts relies on the duty of good faith and fair dealing and the anti-discrimination provision of the South Carolina Code. S.C. Code Ann. § 38-55-50 (2002).

Generally, the denial of a motion for summary judgment is not immediately appealable. Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001), cert. granted (Oct. 10, 2001). However, we have recently recognized an exception to this rule. Id. "Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." Id.; see Morris v. Anderson County, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (stating an appellate court "may, as a matter of discretion, consider an unappealable

order along with an appealable issue where such a ruling will avoid unnecessary litigation").

Although Pitts correctly characterizes this issue as the denial of his motion for summary judgment, we believe the circuit court's decision to grant summary judgment to Jackson National encompassed the claim of unjust enrichment. In its order, the court recognized Jackson National's argument that "the absence of [a] legal duty would be equally fatal to Plaintiffs' fraudulent concealment claim and to the unjust enrichment claim . . . which was also premised on the existence of such a duty." Moreover, the court specifically held "the duty of an insurer to inform an applicant of the availability of an allegedly superior product, or to evaluate the applicant's eligibility for that product, regardless of what product the applicant asked for does not exist in South Carolina. For this reason, Plaintiffs' unjust enrichment/constructive trust claim fails also."

Because the denial of the motion for summary judgment on the unjust enrichment claim is so closely connected to these other issues and constitutes a basis for the grant of summary judgment to Jackson National, we may properly review it at this time. Furthermore, the parties have briefed the merits of the denial of the motion for summary judgment, which further supports our decision to review the unjust enrichment claim. See Olson, 344 S.C. at 218, 544 S.E.2d at 51 (holding that "[i]n essence, the parties have consented to have the [denial of the summary judgment motion] adjudicated by this tribunal" because the parties briefed and argued the issue).

Turning to the merits of this issue, we note our Supreme Court "has recognized quantum meruit as an equitable doctrine to allow recovery for unjust enrichment." Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." Id. Our Supreme Court recently emphasized and adopted

this Scudder May test as the "sole test for a quantum meruit/quasi-contract/implied by law claim." Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 9, 532 S.E.2d 868, 872 (2000).

"In a law action, the measure of damages is determined by the parties' agreement, while in equity, 'the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff.'" Myrtle Beach Hosp., Inc., 341 S.C. at 8, 532 S.E.2d at 872 (quoting United States Rubber Prods., Inc. v. Town of Batesburg, 183 S.C. 49, 55, 190 S.E. 120, 126 (1937)). "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Id. at 8, 532 S.E.2d at 872.

Pitts failed to establish any duty to disclose or other cause of action that would allow recovery for unjust enrichment. There was no benefit conferred upon Jackson National that would be unjust for Jackson National to retain. There was no breach of fiduciary duty or fraud involved. Pitts paid for his policy as part of a commercial transaction and there is no reason to place a constructive trust over these funds. See SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990) ("A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty."); Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) ("A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy.").

B.

Pitts argues the duty of good faith and fair dealing imposes a duty to disclose on Jackson National. He contends "an action for breach of duty of good faith and fair dealing is not dependent upon the existence of a contract or a finding of breach of that contract."

Our appellate courts have held the elements of an action for breach of the covenant of good faith and fair dealing in an insurance contract are as follows:

> (1) the existence of a mutually binding contract of insurance between plaintiff and defendant; (2) a refusal by an insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing in the contract; (4) that causes damage to the insured.

Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (emphasis added); Gaskins v. S. Farm Bureau Cas. Ins. Co., 343 S.C. 666, 672, 541 S.E.2d 269, 272 (Ct. App. 2000), cert. granted (June 13, 2002); see Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983) (recognizing existence of a cause of action against an insurance company for bad faith refusal to pay first-party benefits due under an insurance contract); Peterson v. West Am. Ins. Co., 336 S.C. 89, 102, 518 S.E.2d 608, 614 (Ct. App. 1999) ("[E]very contract carries with it a covenant of good faith and fair dealing in the processing of a claim under a mutually binding insurance contract.").

The trial judge found "[b]ecause the covenant of good faith and fair dealing does not even come into existence until a contract is entered, it would not apply to the sales transaction that Plaintiffs complain of here." Pitts was not a party to a contract at the time of the challenged conduct of Jackson National's agent. Thus, there can be no duty to disclose based on the

implied covenant of good faith and fair dealing. See 14 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 198:16, at 198-29 (3d ed. 1999) ("[T]he duty of good faith and fair dealing is considered to be mutual duty of the insured and the insurer and generally applies to the conduct of the parties in the context of the insurance contract.").

C.

Pitts also argues section 38-55-50 of the South Carolina Code "demonstrates that Jackson National's conduct is wrongful and implies a duty to disclose." He contends the statute is relevant in determining whether Jackson National's conduct was wrongful in that it provides a "guidepost or standard in making that determination."

Section 38-55-50 provides in pertinent part:

> An insurer, its agent, or an insurance broker doing business in this State may not make or permit any discrimination in favor of individuals between insureds of the same class and risk involving the same hazards in the amount of the payment of premiums or rates charged for policies of insurance . . . or in any other of the terms and conditions of the contracts it makes.

S.C. Code Ann. § 38-55-50 (2002). This statute, a legislative prohibition against insurance discrimination, cannot be read as creating an implied duty to inform the applicant of all available policies. Furthermore, we find this statutory provision does not create a duty to disclose which would allow a claim for unjust enrichment. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (stating a court must apply the plain meaning of a statute where its language is unambiguous and conveys a clear meaning); Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."). Additionally, Pitts presented no

evidence of discrimination in contracting for insurance that would constitute a violation of this statute. All individuals were treated the same and received the policy they applied for if they qualified. See Smith v. Liberty Mut. Ins. Co., 313 S.C. 236, 437 S.E.2d 142 (Ct. App. 1993) (recognizing section 38-55-50 relates to discrimination in contracting for insurance).

CONCLUSION

Based on the foregoing reasons, the decision of the circuit court is

AFFIRMED.

ANDERSON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

John H. Simmons,

Appellant.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3572
Heard November 7, 2002 – Filed November 25, 2002

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia;

and Solicitor Warren B. Giese, of Columbia, for Respondent.

ANDERSON, J.: John H. Simmons was convicted of first degree burglary and petit larceny. He was sentenced to life without the possibility of parole. We affirm.

FACTS/PROCEDURAL BACKGROUND

On October 4, 1999, at approximately 2:15 a.m., Shirley Ann Thompson was in bed when she heard her door beep. Thompson had a burglar alarm system in her home on Liberty Street, but she did not have the alarm activated that evening. Even without the alarm activated, the system would beep whenever a door in Thompson's home was opened. Initially, Thompson assumed it was her son, but she soon discovered the man she saw carrying a light in her hallway was not her son. Thompson watched the figure walk down the hallway and grab her purse from the doorknob of her bedroom door, pulling the bedroom door closed in the process. Thompson grabbed her gun, chased the man out of her house, and shot toward him as he was fleeing down Liberty Street in the direction of the car wash. Thompson then called the police to report the burglary (Thompson burglary). She described the man as a dark-skinned black male wearing a black shirt with white writing on the back.

On that same morning, Douglas Brooks was watching television at his home near the intersection of Liberty and Magrath Streets, which was a block and a half away from Thompson's home. Sometime after 2:00 a.m., Brooks heard a loud noise coming from his back door which sounded like someone was trying to kick the door in. Brooks investigated the noise and saw someone jump off of his back porch. Brooks chased the man until he ran across Colonial Drive. Brooks stopped pursuing the suspect, and turned around to see a patrol car responding to the call at Thompson's house. Brooks flagged the officer down, informed him of the incident at his home, and described the suspect as wearing dark clothing.

As Officer Robert Lee Gibson was driving to Thompson's house in response to her call to 911, he saw a man in dark clothing run across Colonial Drive as he approached Liberty Street. Gibson informed another officer that he saw the suspect running down Colonial Drive. Police circled the area to find the suspect. Minutes later, the police located Simmons, who was hiding in some nearby bushes. He was wearing a black t-shirt with white writing on it. In the bushes, police found some clothing and other items Brooks had stored in his outside shed. Simmons had abrasions on his head. An ambulance was called to examine Simmons' wounds.

Thompson was taken to the scene, where she identified Simmons as the figure she had seen in her home. Although Thompson's purse was not immediately located, it was discovered the next morning across the street from the car wash near a daycare center. Because Brooks only viewed the suspect from the rear, he was unable to identify Simmons as the man who ran from his back porch.

Edward Anderson, a co-worker of Simmons, testified at trial. He stated that he and Simmons were working at the Cotton Club the evening of October 3, 1999. That night, Simmons was wearing the club's uniform, a black t-shirt with "Cotton Club" written on the back in white writing, along with black pants and suspenders. Anderson declared that he and Simmons left the club when it closed at midnight on October 4, 1999. The two men went to Dave's Lounge, where they drank several alcoholic beverages. On previous occasions, Anderson had driven Simmons home after work. Their route took them down Beltline Boulevard. After the two left Dave's around 2:00 a.m., an intoxicated Simmons directed Anderson to vary from their usual route by letting him out of the car near Beltline Boulevard and Colonial Drive, without explanation. Anderson let Simmons out of the car on Colonial Drive. Anderson then continued home.

Peter Banco, an officer with the Columbia police department, responded to Thompson's house on the morning of the burglary. He took a statement from Thompson at 4:05 a.m. He later returned to his office where he was able to speak with Simmons, who was already in custody. Banco gave Simmons his Miranda warnings. Simmons indicated he understood his rights. Simmons smelled of alcohol but he did not appear drunk to Banco.

When Banco asked Simmons whether he could have attempted to break into Thompson's and Brooks' homes, Simmons replied that he did not "know what's going on." The interview ended.

Simmons testified in his own defense at trial. He stated that the evening of the incident, he was wearing his black Cotton Club shirt with black tuxedo pants. He started drinking alcoholic beverages at about 4:00 p.m. while he was preparing dinner at home. Simmons had a few more drinks at the Cotton Club. He and Anderson left the Cotton Club at midnight and went to Dave's Lounge, where he imbibed three or four alcoholic drinks. According to Simmons, when he and Anderson left Dave's Lounge sometime between 1:00 and 2:00 a.m., Simmons was not intoxicated. Simmons claimed he asked Anderson to stop the car because he began to feel nauseous from all the alcohol he drank that day and he wanted to get out and walk. Simmons declared that he put on his earphones to his radio and began to walk along the edge of the road, when he thought he heard someone come up behind him. Simmons stated that, when he turned around to see a police patrol car behind him, he was struck by the patrol car. Simmons said he blacked out at that point, and his next memory was of waking up when medical personnel were working on him. Simmons denied breaking into Thompson's residence or attempting to break into Brooks' home. He further denied being in the bushes that morning. Simmons maintained the abrasion on his face that morning was the result of being hit by the patrol car.

ISSUES

I. Did the Circuit Court err in denying Simmons' motion to sever?

II. Did the Circuit Court err in denying Simmons' motion for a mistrial after directed verdicts of acquittal were issued on the burglary and petit larceny charges from the Brooks burglary?

III. Did the Circuit Court err in allowing the use of Simmons' prior burglary and housebreaking convictions to prove an element of first degree burglary?

LAW/ANALYSIS

I. SEVERANCE/JOINDER

Simmons argues the trial judge erred in failing to sever the two burglary charges against him for trial. We disagree.

Prior to trial, Simmons moved to sever the charges against him. Simmons contended the victims in the Thompson and Brooks burglaries were different, the witnesses were different, and the acts alleged were different. Simmons asserted he would be prejudiced if the jury heard about both the Thompson and the Brooks burglaries because the evidence was stronger in the Thompson matter and would influence the jury on the Brooks matter. The trial judge noted that the matter was within his discretion, and the trial proceeded on both sets of charges.

A motion for severance is addressed to the sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1967); State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996); State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). The court's ruling will not be disturbed on appeal absent an abuse of that discretion. Tucker, 324 S.C. at 164, 478 S.E.2d at 265; State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); State v. Deal, 319 S.C. 49, 459 S.E.2d 93 (Ct. App. 1995); see also State v. Harris, Op. No. 25535 (S.C. Sup. Ct. filed Oct. 14, 2002) (Shearouse Adv. Sh. No. 34 at 32) (stating a motion for severance is addressed to trial court and should not be disturbed unless abuse of discretion is shown).

Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be

prejudiced. State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place and character, trial judge has authority, in his discretion, to order indictments tried together over objection of defendant absent showing that defendant's substantive rights were violated); McCrary v. State, 249 S.C. 14, 36, 152 S.E.2d 235, 246 (1967) (stating "[t]he two offenses were of the same general nature, involving connected transactions closely related in time, place and character; and the trial judge had power, in his discretion, to order them tried together over objection by the defendant in the absence of a showing that the latter's substantive rights would have been thereby prejudiced."). Offenses are considered to be of the same general nature where they are interconnected. Jones, 325 S.C. at 315, 479 S.E.2d at 519.

Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. See, e.g., State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial judge erred in consolidating the charges for one trial where the crimes did not arise out of a single chain of circumstances and they required different evidence); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (finding that joint trial on identical but unrelated forgeries violated defendant's right to a fair trial). Cf. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (proper to try together all crimes arising from a single uninterrupted crime spree).

Further, joinder of offenses in one trial is "proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof." State v. Carter, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996) (citing City of Greenville v. Chapman, 210 S.C. 157, 41 S.E.2d 865 (1947)); see also State v. Harris, Op. No. 25535 (S.C. Sup. Ct. filed Oct. 14, 2002) (Shearouse Adv. Sh. No. 34 at 32) ("Charges can be joined in the same indictment and tried together where they (1) arise out of a

single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced.”).

In the instant case, the joinder of the separate burglary offenses was proper. The break-in at Thompson’s house was very close in time and proximity to the attempted break-in at Brooks’ home. Although Brooks could not identify the physical characteristics of the man who attempted to break into his home, both Brooks and Thompson similarly described the suspect as wearing dark clothing. Simmons was found after Brooks chased him and directed police to Simmons’ location. Despite the fact that Simmons was granted a directed verdict in the Brooks matter, both the indictments in the Brooks matter and the Thompson matter arose out of a single chain of events, were of the same nature, and were proved by the same evidence and witnesses. We find the trial court did not abuse its discretion in refusing to sever the indictments.

II. RES GESTAE

Furthermore, the evidence of the Brooks burglary was necessary for a full presentation of the case without fragmentation. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), our Supreme Court explained:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .’ [and is thus] part of the res gestae of the crime charged.” And where evidence is admissible to provide this “full presentation” of the offense, “[t]here is no

reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Id. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)).

Simmons' act of burglarizing Thompson's home was "inextricably intertwined" with his attempt to evade Brooks, and his subsequent capture by the police. Adams, 322 S.C. at 122, 470 S.E.2d at 371. The information regarding the Brooks burglary was relevant to show the complete, whole, unfragmented story regarding Simmons' crimes and capture.

III. MISTRIAL/CURATIVE INSTRUCTION

Simmons maintains the trial court erred in denying his motion for a mistrial. He claims he was prejudiced by the presentation of evidence regarding the Brooks burglary, especially in light of the fact that the trial court granted his motion for a directed verdict on the Brooks matter. We disagree.

At the end of the State's case, Simmons moved for a directed verdict of acquittal on the charges concerning the Brooks burglary. Simmons argued there was no evidence Brooks' home was entered, and the indictment failed to allege that the shed outside Brooks' home was a building appurtenant in order to qualify for burglary. The trial court granted the directed verdict as to the Brooks burglary and petit larceny charges, finding there was a lack of evidence to support the charges. Simmons then requested a mistrial, contending the jury had heard the evidence regarding the Brooks burglary, the evidence should not have been admitted under State v. Lyle[1] because there was not clear and convincing proof of the Brooks burglary, and it had tainted the jury. The trial court denied the motion for a mistrial, finding the Brooks burglary constituted a "continuous event" and the State was entitled to present the Brooks evidence in order to show how Simmons was apprehended.

[1] 125 S.C. 406, 118 S.E. 803 (1923).

Simmons requested "a curative instruction or some other instruction to the jury as far as what they can consider or not consider as far as the second burglary." The trial court instructed the jury as follows:

> I need to advise you at this time that the court has granted a motion for the defendant for a directed verdict and I have dismissed indictments 2000-GS-40-45786 and 787 which were the charges of burglary at [Brooks' address] and the petty larceny that accompanied that charge. So, I have granted a directed verdict in favor of the defendant on those charges. They are not to be considered by the jury for any purpose for the remainder of this trial. We'll continue with the trial at this time.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (Ct. App. 2001), cert. granted (Aug. 7, 2002); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Arnold, 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) (the general rule of this State is that "the ordering of, or refusal of a motion for mistrial is within the discretion of the trial judge and such discretion will not be overturned in the absence of abuse thereof amounting to an error of law.").

"The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977); see also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (granting of motion for mistrial is extreme measure which should be taken only where incident is so grievous that prejudicial effect can be removed in no other way); Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons). A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Harris, 340

S.C. at 63, 530 S.E.2d at 628; see also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

The trial judge did not abuse his discretion in denying Simmons' motion for a mistrial. The evidence presented regarding the Brooks burglary showed that Brooks heard a noise, chased a suspect, and directed police to the location where Simmons was apprehended. This evidence was relevant to Simmons' capture and would have been admissible at trial regardless of whether Simmons faced charges for the Brooks incident. Thus, Simmons suffered no error or resulting prejudice from the admission of this evidence.

Moreover, the trial judge instructed the jury to disregard the evidence regarding the Brooks burglary. Generally, a trial judge's curative instruction is deemed to cure any error. See Kelsey, 331 S.C. at 75, 502 S.E.2d at 76; Patterson, 337 S.C. at 226, 522 S.E.2d at 850; State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996). The trial judge in the present action thoroughly instructed the jury that Simmons no longer faced burglary or petit larceny charges in connection with the Brooks burglary and they were not to consider that evidence in any way. Concomitantly, we find any alleged error in failing to declare a mistrial was cured.

IV. PRIOR BURGLARY/HOUSEBREAKING CONVICTIONS

Simmons argues the trial court erred in allowing the State to present evidence of his prior burglary/housebreaking convictions as an element to support first degree burglary. Because Simmons agreed to stipulate that the burglary occurred at night, he contends it was unnecessary for the State to additionally prove his prior convictions. We disagree.

Prior to trial, Simmons moved to exclude evidence of his prior burglary/housebreaking convictions because the charged burglaries in the case sub judice occurred at night. Therefore, the State could prove the

"nighttime" element of first degree burglary instead of proving the "two or more prior convictions" element. Simmons asserted the prior housebreaking convictions were more than ten years old, thus outside the ten year time limit, and were prejudicial. The State informed the trial court that Simmons' prior record included a 1981 guilty plea to three counts of housebreaking; a 1983 conviction for common law burglary, on which he later received post-conviction relief; and a 1998 guilty plea to first degree burglary.

Simmons offered to stipulate to the "nighttime" element. After reviewing State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000), the trial court denied Simmons' motion. The trial court limited the State to proving the prior record and ordered it not to go into the details.

At the end of the State's case, Simmons and the State agreed to stipulate that the jury could be told Simmons had "two or more prior convictions for either burglary or housebreaking." The stipulation was subject to Simmons' objections. The trial court read the stipulation to the jury:

> The State and the defense have entered into a stipulation that the defendant in this case has two or more prior convictions for either burglary or housebreaking. These convictions are as follows: 1981, three counts of housebreaking and in 1998 one count of burglary. Now, I will further instruct you that you are not to consider the prior convictions about which I have just mentioned through the stipulation, you are not to consider these prior convictions as evidence that the defendant committed the crimes for which he is currently on trial nor should you consider the convictions as character evidence; that is, you should not conclude that because the defendant has been convicted of burglary and housebreaking previously that he is likely to have committed these offenses for which he is currently charged. You are to consider these prior convictions simply as part of the elements that the State must prove in order to make out a charge of first degree burglary. And I'll tell you the law on first degree burglary at the conclusion of the case when I am instructing you in the law.

After the jury instruction, Simmons renewed his motions.

> First degree burglary is defined, in part, as follows:
>
> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
>
> > . . . .
> >
> > (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
> >
> > (3) the entering . . . occurs in the nighttime.

S.C. Code Ann. § 16-11-311 (Supp. 2001).

The State is required to prove all the elements of first degree burglary beyond a reasonable doubt. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). "[B]ecause two prior burglary and/or housebreaking convictions are an element of first degree burglary under § 16-11-311(A)(2), the defendant cannot require the State to stipulate to the prior convictions in lieu of informing the jury about the prior convictions." Id. at 155, 526 S.E.2d at 230; see also State v. James, 346 S.C. 303, 307, 551 S.E.2d 591, 592 (Ct. App. 2001), cert. granted (Nov. 15, 2001) (the State cannot be forced to "stipulate generally to the prior offenses or to the fact that the defendant had the legal status to be charged with first degree burglary because such a stipulation might cause a substantial gap in the evidence needed for the jury to find the defendant guilty of the offense."); State v. Hamilton, 327 S.C. 440, 443, 486 S.E.2d 512, 513 (Ct. App. 1997) (finding "the two prior convictions were an element of the crime for which Appellant was charged. As such, the State was required to prove the two prior convictions and could not be forced to accept Appellant's offered stipulation.").

However, to ensure that the defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit the evidence to the prior burglary and/or housebreaking convictions. Benton, 338 S.C. at 156, 526 S.E.2d at 230-31. Detailed, particular information about the prior burglaries and/or housebreaking convictions should not be admitted. Id. In addition, the trial court should, on request, instruct the jury that the information should only be considered for the limited purpose of proving one of the elements of first degree burglary. Id.

This Court recently considered an identical argument in State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). In Cheatham, the defense offered to stipulate that the burglary occurred in the nighttime and moved in limine to prohibit the State from introducing the defendant's three prior burglary convictions. The trial court denied Cheatham's motion and allowed the State to introduce evidence of both the "nighttime" and the "prior record of two or more convictions for burglary" elements of first degree burglary. The Court articulated:

> It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice. Thus, the admission of Cheatham's prior burglary and housebreaking convictions as an element of first degree burglary does not constitute unfair prejudice in this case. Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first degree burglary was proven. We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice.
>
> Moreover, we find no merit to Cheatham's assertion that because he was willing to stipulate to the "nighttime" element of first degree burglary, the State should have been limited to proving only the "nighttime" element and it was unnecessary for

> the State to present any evidence of the "two or more convictions of burglary or housebreaking" element. As previously discussed, the State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt. Despite Cheatham's attempt to stipulate that he met the legal status to be charged with first degree burglary, we believe the trial court did not err in denying his request to limit the State to proof of only the "nighttime" element.

Cheatham, 349 S.C. at 109-110, 561 S.E.2d at 623 (internal citation omitted).

As in Cheatham, Simmons maintains the State should have been prohibited from submitting evidence of his prior burglary/housebreaking convictions because evidence existed that the present burglary occurred at night. The trial court did not err in allowing the State to introduce evidence of Simmons' prior burglary/housebreaking convictions because proof of such prior convictions constitutes an element of first degree burglary. Because the State bears the burden of proof, it was not required to prove only the "nighttime" element of first degree burglary. Further, Simmons agreed to stipulate to the convictions and their admission.

Simmons claims his prior housebreaking convictions should not have been admitted because they were more than ten years old. Whether a conviction should be admitted at trial due to its age is a question most often seen in evaluations of impeachment evidence under Rule 609, SCRE. In this instance, a record of a prior conviction is an element of the statutory crime. There is no requirement in the statute that the prior conviction be of a certain age in order to allow admission. There is no merit to Simmons' argument.

The trial court properly limited the introduction of Simmons' prior burglary/housebreaking convictions to listing the conviction. The jury was not informed of the specific details of the crimes or convictions. Finally, the jury was instructed that they should consider the convictions only as proof of an element of first degree burglary and that they were not to consider the convictions as proof that Simmons was guilty of the current crime. We find no error.

CONCLUSION

We hold that where the offenses charged in separate indictments are of the same general nature, involving connected transactions, closely related in kind, place and character, the trial judge has discretion to order the indictments tried together, over the objection of a defendant, absent a showing that the defendant's substantive rights were violated.

The joinder of offenses in one trial is proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions; (2) are committed by the same offender; and (3) require the same or similar proof.

The trial court did not abuse its discretion in refusing to sever the two burglary charges against Simmons. Both indictments arose out of a single chain of events, were of the same nature, and were proved by the same evidence and witnesses. Furthermore, evidence of the Brooks burglary was necessary for full presentation of the case without fragmentation. The trial judge did not err in denying Simmons' motion for a mistrial. Moreover, the judge's curative instruction to disregard the evidence as to the Brooks burglary cured any alleged error in failing to declare a mistrial. Finally, the trial court properly allowed the State to present evidence of Simmons' prior burglary/housebreaking convictions as an element to support first degree burglary. Accordingly, Simmons' convictions are

AFFIRMED.

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