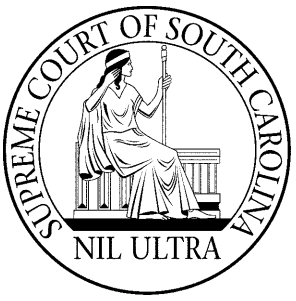

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 16, 2003

ADVANCE SHEET NO. 14

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alfred Lee Wigfall, Employee,
Claimant, Appellant,

v.

Tideland Utilities, Inc.,
Employer, and Northern
Insurance Company of New
York, Respondents.

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

Opinion No. 25628
Heard December 5, 2002 - Filed April 14, 2003

AFFIRMED

David T. Pearlman and James K. Holmes, both of The Steinberg Law Firm, LLP, of Charleston; for Appellant

C. Jo Anne Wessinger and Steven W. Hamm, both of Richardson, Plowden, Carpenter & Robinson, PA, of Columbia; for Respondents.

JUSTICE BURNETT: Alfred Lee Wigfall ("Wigfall") appeals the decision of the Workers' Compensation Commission ("Commission") limiting his disability to a scheduled member in lieu of awarding him

permanent, total disability. The Court of Appeals transferred Wigfall's direct appeal to this Court because he seeks to overturn Singleton v. Young Lumber Company, 236 S.C. 454, 114 S.E.2d 837 (1960). We decline to overturn Singleton and affirm the Commission's order.

FACTS

Wigfall sustained a broken left femur in a work related accident. Commission concluded Wigfall suffered a 90% permanent partial disability to his leg. Wigfall's sole physical injury is to that leg. The single commissioner concluded Wigfall's injury, employment history, age and educational attainment rendered him totally disabled. However, the single commissioner denied Wigfall benefits of total disability, relying on Singleton, supra. The single commissioner ordered Wigfall be compensated for a single, scheduled injury pursuant to S.C. Code Ann. § 42-9-30(15) (1976). The full Commission and circuit court affirmed the Order.

ISSUES

I. Does the exclusive remedy rule violate the Equal Protection Clause of the Constitution?

II. Does the term "impairment," as used in Singleton, include both wage loss and medical considerations?

II. Should Singleton's exclusive remedy rule be overruled?

I

Equal Protection Clause

Initially, Wigfall argues the exclusive remedy rule violates the Equal Protection Clause.[1] Wigfall raised the issue for the first time before the circuit court. The circuit court did not rule on the issue and Wigfall failed to seek consideration of the issue pursuant to Rule 59, SCRCP. Therefore the

[1] U.S. Const. Amend. XIV, § 1.

issue is not preserved for appellate review. Talley v. South Carolina Higher Educ. Tuition Grants Comm., 289 S.C. 483, 347 S.E.2d 99 (1986); see also Schurlknight v. City of North Charleston, 345 S.C. 45, 545 S.E.2d 833 (Ct. App. 2001) (workers' compensation case).

II

"Impairment"

Wigfall asserts we should interpret the term "impairment" as used in Singleton to include both medical and wage loss considerations. Therefore, Wigfall asserts he would be totally disabled under the Singleton standard if he demonstrates his scheduled loss was accompanied by a loss in earning capacity. We disagree.

The Singleton Court held:

> Where the injury is confined to the scheduled member, and there is no **impairment of any other part of the body because of such injury**, the employee is limited to the scheduled compensation, **even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity.** To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected.

Singleton, 236 S.C. at 471, 114 S.E.2d at 845 (emphasis added).

The Singleton Court did not intend for the additional "impairment" to be a loss of earning capacity, age, lack of training or any other economic factor. The Singleton Court intended "impairment" to encompass a physical deficiency. Wigfall's argument is without merit.

III

Singleton

Two competing models of workers' compensation are of concern in resolving this matter. The first, the economic model, defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury. The second, the medical model, provides awards for disability based upon degrees of medical impairment to specified body parts. Stevenson v. Rice Serv.'s, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996); Dunmore v. Brooks Veneer Co., 248 S.C. 326, 149 S.E.2d 766 (1966) (in cases of scheduled losses the compensation depends on the character of the injury (the medical model), and not the loss of earning capacity (the economic model)); Jewell v. R.B. Pond Co., 198 S.C. 86, 15 S.E.2d 684 (1941) (Act has two purposes: 1) to compensate for loss of injured employee's earning capacity; 2) to indemnify for physical ailments in a class of cases legislatively specified).[2] The two models are distinct in parts of the S.C. Workers' Compensation Act and intertwined in other parts.

South Carolina provides three methods to obtain disability compensation: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C. Code Ann. § 42-9-20;[3] and 3) scheduled disability under

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[2] Under the medical model loss of earning capacity is not irrelevant. Instead, the Legislature has statutorily presumed lost earning capacity for certain scheduled injuries even where the employee is still capable of working. See G. E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958); 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 86.02 at 86-5 (1999) (in scheduled benefits diminishment of earning capacity is conclusively presumed).

[3] A claimant may obtain partial permanent disability under S.C. Code Ann. § 42-9-20 (1976). To do so a claimant must show an injury and a loss of earning capacity. Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957). Because Wigfall claims he is totally disabled, this statute is not applicable.

S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity.

A. S.C. Code Ann. § 42-9-10.

A claimant may obtain total disability in one of three ways under § 42-9-10.

First, a claimant may be presumptively totally disabled. As such, a claimant must show a physical injury enumerated in § 42-9-10.[4] However, because the Legislature has categorized certain types of injuries as *per se* totally disabling, the claimant need not show a loss of earning capacity. The loss of earning capacity is, like a scheduled loss in § 42-9-30, conclusively presumed. Therefore, even in a category in which the earning capacity serves as a benchmark for disability, the Legislature has determined that certain injuries equal a permanent disability without the need to consider earning capacity. See Larson's Workers' Compensation Law, § 83.08 at 83-20.

Second, a claimant may establish total disability under § 42-9-10 by showing an injury, which is not a § 42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled. An example of such a claim occurred in Coleman v. Quality Concrete Prod.'s, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965), where a claimant experienced a double hernia after being injured while at work. The claimant established the double hernia, coupled with a lack of education or adequate job training, made him unable to find comparable, stable employment. The injury, combined with those other factors, diminished his earning capacity to such an extent as to entitle him to total disability.

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[4] The list of injuries included in the presumptive total disability category include: "[t]he loss of both hands, arms, feet, legs, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section" or that claimant "is a paraplegic, a quadriplegic, or who has suffered physical brain damage. . . ." S.C. Code Ann. § 42-9-10.

Third, a claimant may establish total disability through multiple physical injuries. Under this scenario a claimant who has a § 42-9-30 scheduled injury must show an additional injury. Singleton, supra; see also McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989) (Court found claimant totally disabled due to combined partial impairments to the back, stomach and leg).

In Singleton, claimant's recovery was premised on the theory that an injury to a scheduled body part combined with a loss of earning capacity equaled total disability. Neither party disputed that Singleton's lone physical injury was to his leg. However, a physician testified Singleton's injury prevented him from working in the job for which he was trained. This Court disagreed with Singleton's theory finding a claimant with a scheduled loss unaccompanied by any other physical injury was entitled only to the benefits of the scheduled loss in § 42-9-30 and not total disability under § 42-9-10.[5]

Singleton stands for the exclusive rule that a claimant with one scheduled injury is limited to the recovery under § 42-9-30 alone. The case also stands for the rule that an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional injuries beyond a lone scheduled injury. This principle recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Larson's Workers' Compensation

[5] The Singleton court did not address whether a person who has multiple physical impairments must also show lost earning capacity to qualify as totally disabled. Dicta in the case seems to suggest that lost earning capacity is irrelevant. The Court of Appeals in McCollum v. Singer Co., supra, found claimant totally disabled due to combined partial impairments to the back, stomach and leg because it found that such injuries combined carried a presumption of lost earning capacity. The question whether a claimant with multiple injuries in the Singleton context must prove a sufficient lost earning capacity to be deemed totally disabled is an issue raised in this appeal.

Law, 87.05 at 87-8; see, e.g., Cunnyngham v. Donovan, 271 F. Supp. 508 (E.D. La. 1967); Williams v. Industrial Comm'n, 237 P.2d 471 (Ariz. 1951).

B. S.C. Code Ann. § 42-9-30

A claimant may obtain disability for a scheduled physical injury included in S.C. Code Ann. § 42-9-30 (1976). The claimant is not required to show lost earning capacity because the compensation is based on the character of the injury and lost earning capacity is conclusively presumed. Fields v. Owens Corning Fiberglas, 301 S.C. 554, 393 S.E.2d 172 (1990); Larson's Workers' Compensation Law, § 86.02 at 86-5 (1999). As discussed previously, under Singleton a claimant with a single scheduled injury may only obtain a scheduled recovery.

Wigfall seeks to limit Singleton by establishing a fourth way to obtain total disability by allowing a claimant to be totally disabled if he can prove a scheduled injury caused sufficient lost earning capacity. Under this theory Wigfall must show a physical injury within the scheduled injuries of § 42-9-30. He must also show the physical injury has caused him to lose his earning capacity, thereby rendering him totally disabled.

Wigfall asserts developments since Singleton buttress his argument. For example, Wigfall points to the Singleton court's citation to 2 Schneider's Workmen's Compensation, § 2322 at 567 for the proposition that:

> [A] workman sustaining one of the minor injuries for which specific compensation is provided under the statute might, because of such injury, be unable to resume his employment and, because of his lack of education or experience or physical strength or ability, might be unable to obtain other employment, does not entitle him to be classed as totally and permanently disabled.

Singleton, 236 S.C. at 470, 114 S.E.2d at 845.

Wigfall asserts the modern trend is contrary to such language. He contends the modern view is "[t]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." Larson's Workers' Compensation Law, § 83.01 at 83-3.

Wigfall's assertion confuses the majority trend in statutes premised upon the economic model with the majority view in interpreting statutes based on the medical model. That is, according to Larson, a majority of states hold that a claimant may be found totally disabled when an unscheduled injury or multiple injuries prevent him from obtaining employment regularly in the labor market. Larson also informs us, however, a majority of states continue to follow the rule that an individual with a single scheduled injury is limited to compensation under the scheduled injury statute, even if the person is unable to obtain regular employment as a result of the injury. [6]

[6] For those states adhering to the exclusive rule see: Ratliff v. Alaska Workers' Comp. Bd., 721 P.2d 1138 (Alaska 1986); Hawkeye-Sec. Ins. Co. v. Tupper, 380 P.2d 31 (Colo. 1963); Wills v. St. Paul Fire & Marine Ins. Co., 239 S.E.2d 219 (Ga. Ct. App. 1977); Iowa Graves v. Eagle Iron Workers, 331 N.W.2d 116 (Iowa 1983); Duncan v. City of Osage City, 770 P.2d 843 (Kan. Ct. App. 1989); Lappinen v. Union Ore Co., 29 N.W.2d 8 (Minn. 1947); Nowlin v. Mississippi Chem. Co., 70 So.2d 49 (Miss. 1954); Fenster v. Clark Bros. Sanitation, 455 N.W.2d 169 (Neb. 1990); Padilla v. Concord Plastics, Inc., 534 A.2d 428 (N.J. Ct. App. 1987); Hise Constr. v. Candelaria, 652 P.2d 1210 (N.M. 1982); Raffual v. Oneida Bleachery, Inc., 116 N.Y.S.2d 760 (N.Y. Ct. App. 1952); Baldwin v. North Carolina Meml. Hosp., 233 S.E.2d 600 (N.C. 1977); Clark v. Keller Williams Furniture Mfg., 456 P.2d 541 (Okla. 1969); Bethlehem Mines Corp. v. Workmen's Comp. App. Bd., 529 A.2d 610 (Pa. 1987); Coker v. Armco Drainage & Metal Prods. Co., 236 S.W.2d 980 (Tenn. 1951); Travelers Ins. Co. v. Boydstun, 417 S.W.2d 601 (Tex. Ct. App. 1967); Oliver v. State Workman's Comp. Comm'r, 164 S.E.2d 582 (W. Va. 1968); Mednicoff v. Department of Indus., Labor & Human Relations, 194 N.W.2d 670 (Wisc. 1972). For states

South Carolina recognizes that a claimant may be totally disabled even though he is not altogether incapacitated if such an injury prevents him from obtaining regular employment in the labor market. See Coleman v. Quality Concrete Prods., Inc., supra; Colvin v. E.I. Du Pont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989). In the context of scheduled injuries, South Carolina recognizes a claimant's entitlement to be deemed disabled and to receive compensation for an injury even though the claimant is able to work. See Stephenson v. Rice, 323 S.C. 113, 473 S.E.2d 699 (1996). South Carolina has never recognized that a claimant can suffer a single scheduled injury and as a result become totally, permanently disabled. See Singleton, supra. Our decisions are therefore in line with a majority of states.

Wigfall cites to several cases for the proposition that states are turning from the Singleton exclusive view. However, the cases are distinguishable from Singleton in that they involve claimants with multiple injuries. See, e.g., Whitley v. Columbia Lumber Manuf. Co., 318 N.C. 89, 348 S.E.2d 336 (N.C. 1986) (claimant suffered injury to multiple scheduled members including a right arm and left hand); Van Dorpel v. Haven-Busch Co., 85 N.W.2d 97 (Mich. 1957) (claimant suffered loss of four fingers and the partial amputation of a right leg). In such cases Singleton would allow an individual to prove total disability.

Admittedly, Wigfall's most alluring argument is the complaint of inequity which results from allowing a claimant to establish total disability

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rejecting the exclusive view see: Smith v. Capps, 414 So.2d 102 (Ala. Ct. App. 1982); Langbell v. Industrial Comm'n, 529 P.2d 227 (Ariz. 1974); Cooper Indus. Prod., Inc. v. Worth, 508 S.W.2d 59 (Ark. 1974); Henderson v. Sol Walker & Co., 138 So.2d 323 (Fla. 1962); General Elec. Co. v. Industr. Comm'n, 433 N.E.2d 671 (Ill. 1982); C.E. Pennington Co., Inc. v. Winburn, 537 S.W.2d 167 (Ky. 1976); Jacks v. Banister Pipelines Am., 418 So.2d 524 (La. 1982); Hafer v. Anaconda Aluminum Co., 643 P.2d 1192 (Mont. 1982); Gonzales v. Gackle Drilling Co., 371 P.2d 605 (N.M. 1962); Hill v. State Accident Ins. Fund, 588 P.2d 1287 (Ore. Ct. App. 1979).

through a single non-scheduled injury plus a loss of earning capacity but not allowing a claimant to establish total disability through a single scheduled injury plus a significant loss of earning capacity. The result is an individual with a hernia may obtain total disability by showing lost earning capacity, while an individual with a scheduled injury may not attain total disability even if he could show the scheduled injury caused the claimant to lose his earning capacity.

Wigfall's argument is in line with several jurisdictions which have rejected the exclusive approach in favor of one which allows a claimant who has a scheduled injury to elect total disability if he can prove the injury caused the loss of earning capacity. See, e.g., Langbell v. Industrial Comm'n, 529 P.2d 227 (Ariz. 1974); Cooper Indus. Prod., Inc. v. Worth, 508 S.W.2d 59 (Ark. 1974). Such jurisdictions base their decisions on the inequities resulting from the exclusive approach and the liberal construction afforded to workers' compensation statutes.

While we may be inclined to accept Wigfall's equity argument, we decline to do so in the face of the Legislature's mandates concerning our workers' compensation system. Our ruling is based less on concepts of *stare decisis* and more on the acknowledgement that legislative intent is the paramount concern when interpreting a statute.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 81 (2000).

We are further bound by precedent to strictly construe statutes in derogation of the common law. Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (2001). Workers' compensation statutes provide an exclusive

compensatory system in derogation of common law rights. See Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948). As such, when reading a workers' compensation statute we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities.

Section 42-9-30 provides:

> In cases included in the following schedule, the disability in each case **shall be deemed** to continue for the period specified and **the compensation so paid for such injury shall be as specified** therein, to wit:
> . . .
> (15) For the loss of a leg, sixty-six and two-thirds percent of the average weekly wages during one hundred ninety-five weeks;

S.C. Code Ann. § 42-9-30 (1976).

The term "shall" in a statute means that the action is mandatory. Montgomery v. Keziah, 277 S.C. 84, 282 S.E.2d 853 (1981). A plain reading of the statute is that in cases in which a claimant loses the use of a leg, the disability must continue for one hundred ninety-five weeks and the compensation must equal sixty-six and two-thirds percent of the claimant's average weekly wages. Under such a reading, Wigfall is entitled only to the scheduled benefits because he suffers solely from a scheduled disability.

Buttressing a plain reading of the statute is the Legislature's inactivity on the issue over the last forty years since Singleton. The Legislature is presumed to be aware of this Court's interpretation of its statutes. See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation.

Wigfall asserts decisions by both the Michigan Supreme Court and the North Carolina Supreme Court counsel against Singleton. Wigfall

cites Van Dorpel v. Haven-Busch Company, 85 N.W.2d 97 (Mich. 1949), for the proposition that we should not be bound by the forty-year inaction of the Legislature in upholding Singleton. He cites to the North Carolina Supreme Court's decision in Whitley v. Columbia Lumber Manuf. Co., 348 S.E.2d 336 (N.C. 1986), as evidence that Courts should read workers' compensation claims liberally to allow for "full compensation" of injured workers in spite of "specific exclusive remedy statutory language." See Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 434, 424 S.E.2d 489, 490 (1992)("Because South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases."). Wigfall's reliance is misplaced.

Wigfall, in brief and at oral argument, asserted we should not consider legislative inaction to determine legislative intent. To do so, Wigfall argues, would allow a court to fall prey to "a Rip Van Winkle doctrine of judicial stagnation and inertia." See Van Dorpel, supra.

The Michigan Supreme Court in Van Dorpel admitted the disability statute it interpreted was "silent on the precise issue involved." Id. at 147. Therefore, the Michigan Supreme Court stated that it "37 years ago decided what it thought the correct interpretation should be. . . . [but now] happen[s] to disagree with that old interpretation and wish[es] to make a new interpretation." Id.

The Michigan Supreme Court faced a situation in which it had almost a half-century before interpreted into a statute something which was neither required nor forbidden. Later, with its prior interpretation challenged, the court concluded the passage of time counseled that its previous interpretation was unjust. Because the statute itself did not require such a finding, the court was not compelled to comply with an unworkable precedent. Wigfall's assessment of the case overlooks this critical point: The Michigan Supreme Court was not compelled to rely on legislative inaction as its guide because the precedent to be overturned was not based on legislative action in the first instance.

The Michigan Supreme Court need not be swayed by acquiescence where the Legislature has been silent all along, but this Court must acquiesce where the Legislature has stood silent only after its command was heeded in Singleton. Here statutory language commands that where Wigfall sustains a lone scheduled injury he may only recover for that scheduled injury.

In Whitley, the North Carolina Supreme Court concerned itself with interpreting the apparently exclusive phrase "in lieu of all other compensation" found in its version of the scheduled injury provision of workers' compensation. See N.C. Gen. Stat. § 97-31 (1985) ("In cases included by the following schedule the compensation in each case . . . **shall be in lieu of all other compensation, including disfigurement** . . .") (emphasis added).

Ultimately, the court concluded the phrase meant that a claimant may either elect to recover under the state's total incapacity statute, N.C. Gen. Stat. § 97-29 (1985), or under its scheduled loss section. The benefit was the claimant, who could not prove total disability due to lost earning capacity, could receive compensation under § 97-31, where lost earning capacity was presumed. However, if the claimant could prove lost earning capacity was total and permanent, they could elect to receive compensation under § 97-29.

The North Carolina court reached its decision after examining the legislative history of the act relying mainly on the Legislature's actions following Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942). In Stanley the North Carolina Supreme Court ruled a claimant who had multiple scheduled losses may recover under the total disability statute instead of the scheduled loss statute. The Stanley court also allowed the claimant double recovery under the statute for disfigurement and loss of a scheduled member. See id.

In response, the North Carolina General Assembly amended the scheduled member statute to include the "in lieu" language. See generally, J. Cameron Furr, Jr., Note, Whitley v. Columbia Lumber Manufacturing Co.:

Abolishing the Exclusive Remedy Requirement for the Scheduled Injuries Section of the North Carolina Workers' Compensation Act, 66 N.C. L. Rev. 1365 (1988) (provides case analysis and critique of Whitley decision). Instead of making the scheduled loss statute operate as an exclusive remedy to those who had scheduled injuries, the Whitley court construed the legislative action as only precluding double recovery. See Whitley, 318 N.C. at 97, 348 S.E.2d at 340. The court also found additional legislative acts to strike the time limitations in the total disability statute indicated its intent "to address the plight of a worker who suffers an injury permanently abrogating his earning ability." Id. The court thus read those legislative amendments to reveal legislative intent for the claimant to choose the more favorable remedy. See id.

With the intent of the legislature to allow greater recovery for claimants whose scheduled injuries caused total disability, the Whitley court argued other policy considerations required a finding that the "in lieu" language did not make the scheduled loss statute operate as an exclusive remedy. Chief among those policy considerations was the goal of workers' compensation to compensate claimants for their loss of wage earning capacity. See id. Making the scheduled loss statute an exclusive remedy would not truly compensate claimants for their full loss of earning capacity. However, allowing a claimant with a scheduled injury to receive total and permanent disability status would compensate for such a loss if the individual proved a significant diminishment of earning capacity. See id.

Finally, the Whitley court relied on principles of statutory construction to hold the "in lieu" language did not provide a claimant with an exclusive remedy under § 97-31. The court, in recognizing the Legislature's intent to compensate claimants whose scheduled injury causes total disability and the policy considerations underlying workers' compensation, professed that to narrowly construe the statute to limit recovery would not be equitable. Further, the court concluded any ambiguity must be resolved in favor of the claimant whom the Legislature intended to be compensated if they could prove their scheduled loss caused total disability through a complete loss of earning capacity. See id. at 97, 348 S.E.2d at 340.

"The [North Carolina] supreme court therefore concluded that the intent of the general assembly, the policy considerations, and the inequity of restricting the employee's recovery required that [§] 97-31 not function as an exclusive remedy when the employee is totally and permanently disabled." Furr, supra at 1368.

Although North Carolina workers' compensation case law retains a special significance in this state, our own Legislature's pronouncements of the law must necessarily prevail. The scheduled benefits section of § 42-9-60 is not similar to the language of § 97-31. The intent of the South Carolina Legislature is clear by its use of mandatory language. Further, the inaction to legislatively amend § 42-9-60 demonstrates the Legislature's intent to allow Singleton to remain effective. Contrasted with our Legislature's acquiescence to Singleton is the North Carolina Supreme Court's interpretation of its own Legislature's actions demonstrating an intent to move away from the exclusive remedy rule.

Our view of the South Carolina Workers' Compensation Act, in terms of public policy considerations and equity principles, is materially different from the North Carolina Supreme Court's view of its own statute. Workers' compensation statutes abrogate traditional common law approaches to compensate workers injured on the job. With rare exceptions, workers' compensation displaces tort law with a no-fault system for on-the-job injuries. But see S.C. Code Ann. § 42-9-60 (Supp. 2001) (barring an intoxicated employee from receiving workers' compensation).

By displacing traditional tort law the Legislature intended to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation. See Furr, supra at 1373; Taylor v. J.P. Stevens and Co., 59 N.C. 643, 645, 292 S.E.2d 277, 279 (N.C. Ct. App. 1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983) (citing Barnhardt v. Yellow Cab Co., 266 N.C. 419, 423, 146 S.E.2d 479, 484 (1966)). In exchange for these benefits, the parties and society as a whole bear some costs.

One such cost is workers' compensation claims may not be equitable in all situations. See Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept of Labor, 449 U.S. 268, 281 (1980) ("Respondents . . . argue that the Act should be interpreted in a manner which provides a complete and adequate remedy, to an injured employee. Implicit in this argument, however, is the assumption that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries. The inaccuracy of this implicit assumption undercuts the validity of respondents' argument."). "The schedule brings a windfall to the worker in some cases and gross hardship to the worker in others." Graves v. Eagle Iron Works, 331 N.W.2d 116, 120 (Iowa 1983).[7]

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[7] See Emily A. Spieler, Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation, 98 W. Va. L. Rev. 23, 132-33 (1995) (discussing the adequacy of benefits under workers' compensation statutes); Megan Manning Antenucci, Note, Permanent Partial Disability Under Worker's Compensation: Schedule Exclusivity Versus Impaired Earning Capacity, 33 Drake L. Rev. 885, 888 (1984). While workers' compensation statutes may have once adequately compensated claimants, the Occupational Safety and Health Act of 1970 noted economic, medical and technological changes raised "serious questions about the fairness and adequacy of present workmen's compensation laws." See 29 U.S.C. §§ 651-678 (1994); Richard A. Epstein, The Historical Origins and Economic Structure of Workers' Compensation Law, 16 Ga. L. Rev. 775, 797-800 (1982); Report of the National Commission on State Workmen's Compensation Laws 13 (1972) (The Commission also found that "[e]xcept in a few states, workman's compensation benefits are not adequate[]" and "[t]he inescapable conclusion is that State workmen's compensation laws in general are inadequate and inequitable." Id. at 53, 119). National Conference of State Legislatures, The State of Workers' Compensation 7-9 (1994) (noting that "[p]erhaps the most serious reservation about an impairment system is that it can result in a grave injustice in those limited instances where there is . . . catastrophic economic loss suffered by a person which is far out of proportion to the degree of impairment (and, therefore, the compensation)." Id. at 7.) Typically injured workers recover a lower percentage of their accident costs

It is essential to remember that the Legislature created a system, for good or ill, which "serve[s] a social function by providing the injured employee with sufficient income and medical care to keep him from destitution. . . . [they] are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." Gary A. Scarzafava and Frank Herrera, Jr., Workplace Safety – The Prophylactic and Compensatory Rights of the Employee, 13 St. Mary's L.J. 911, 944 (1982) (quoting Arthur Larson, The Nature and Origins of Workmen's Compensation, 37 Cornell L.Q. 206, 209-10, 213 (1952)). However, such sources of inequities are the province of the Legislature to correct by balancing the interests, risks and rewards of such a large, comprehensive program. This Court may only take such equitable arguments into account where legislative intent and statutory language are not clear.

Our decision does not dispute that the result Wigfall desires may be, in the abstract, the most just result of those in his condition. Nor does it dispute the idea that equity may continue to play a part in this Court's decision-making process. Our decision does maintain the rule that equity cannot prevail over a positive legislative enactment. Town of Zebulon v. Dawson, 216 N.C. 520, 5 S.E.2d 535 (1939). As the South Carolina Court of Appeals explained:

> There is a sound reason for this principle. An important function of legislation is to consider and to balance the competing interests and equities arising from the conduct of human affairs. Worker's compensation laws are a classic example of this legislative balancing of the equities. When the legislature has struck a balance by enacting a statutory rule, the courts have no

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than victims of off-the-job accidents. Deborah R. Hensler et al., Compensation for Accidental Injuries in the United States 107 fig. 4.8 (1991). Generally, workers' compensation claimants receive only 30% of costs related to their disability. Id. at 106 fig. 4.7.

> prerogative to annul the legislative choice by applying "chancellor's foot" notions of equity in its place. Stated differently, "[I]t is not the province of this Court to perform legislative functions." The function of equity is to supplement the law, not to displace it.

Spoon v. Newsome Chevrolet Buick, 306 S.C. 438, 440 412 S.E.2d 434, 434-35 (Ct. App. 1991), affirmed 309 S.C. 432, 424 S.E.2d 489 (1992) (citations omitted).

We "are not at liberty to extend by construction the meaning implicit in the language found in the Workmen's [sic] Compensation Act in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt." Singleton, 236 S.C. at 473, 114 S.E.2d at 846 (citing Rudd v. Fairforest Finishing Co., 189 S.C. 188, 200 S.E. 727 (1939)).[8] Therefore, when Wigfall urges us to adhere to other precedent liberally construing the Workers' Compensation Act in order to expand coverage not to limit it, we must refrain. See Peay v. United States Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993). We may apply such rules of statutory construction when the meaning of the act is ambiguous. We may not, however, read a statute liberally when the legislative enactment is susceptible of only one inference. We cannot read "shall" in § 42-9-30 to mean anything other than an exclusive "must", just as we cannot read 195

[8] Furthermore, neither Van Dorpel nor Whitley support Wigfall's central contention that a claimant should be allowed to claim total, permanent disability when they have received a single scheduled injury. The claimant in both cases sustained multiple injuries which, under Singleton, would permit him to receive total disability. Compare Whitley, supra (claimant suffered injury to multiple scheduled members including a right arm and left hand); and Van Dorpel, supra (claimant suffered loss of four fingers and the partial amputation of a right leg); with Singleton, supra (claimant had single injury to right leg). Under Singleton, a claimant in South Carolina with injuries similar to the ones sustained in Van Dorpel and Whitley could obtain total, permanent disability.

weeks in 42-9-30(15) to mean anything other than 195 weeks, no more and no less.

Because the Legislature's intent is clear from the statute's language and the decision by the Legislature not to statutorily overturn Singleton, we affirm the rule that where a claimant has only one scheduled injury his recovery is pursuant § 42-9-30.

CONCLUSION

For the above reasons we AFFIRM the Commission.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Claude and Phil Humphries, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 25629
Heard March 4, 2003 - Filed April 14, 2003

REVERSED

C. Rauch Wise, of Greenwood, for petitioners.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor C. Kelly Jackson, of Sumter, for respondent.

JUSTICE BURNETT: Petitioners Claude and Phil Humphries were convicted of trafficking in marijuana. They were each sentenced to twenty-five years imprisonment and fined $25,000. The Court of Appeals affirmed the convictions. State v. Humphries, 346 S.C. 435, 551 S.E.2d 286 (Ct. App. 2001). We granted a writ of certiorari to review the Court of Appeals' decision and now reverse.

ISSUES

I. Did the Court of Appeals err by affirming the trial judge's refusal to order the State to disclose the identity of the confidential informant?

II. Did the Court of Appeals err by holding improperly admitted "bad act evidence" was harmless error?

I.

Petitioners argue the Court of Appeals erred by affirming the trial judge's refusal to require the State to disclose the identity of the confidential informant. They assert the confidential informant was a material witness, not a tipster. We disagree.

At the beginning of trial, petitioners requested the court order the State to disclose the name of the confidential informant. The assistant solicitor stated the confidential informant was not a material witness, but simply notified law enforcement that a package containing drugs was going to be delivered by United Parcel Service (UPS) to petitioners' automotive garage.[1] The assistant solicitor further stated, as a result of the confidential informant's tip, a UPS package addressed to petitioners' garage was seized by law enforcement, a drug detection dog identified the package as

[1] Petitioner Claude Humphries owned C&J Automotive. At times, his brother, Petitioner Phil Humphries, worked at C&J.

containing drugs, and the package was later delivered to the garage by an undercover officer disguised as a UPS employee. The confidential informant was not present when the package was seized, the dog identified the package as containing drugs, or when the package was delivered to the garage by the undercover officer.

The trial judge ruled he was "not convinced at this point that the confidential informant was more than a mere tipster." He advised petitioners that, should it develop during trial that the informant was a material witness, he would entertain a new motion for disclosure.

Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974). For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987); State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984); State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973). On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere "tipster" who supplies a lead to law enforcement. State v. Burney, supra; State v. Wright, 322 S.C. 484, 472 S.E.2d 642 (Ct. App. 1987). The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure. State v. Shupper, supra.

The Court of Appeals correctly held the trial judge did not abuse his discretion by failing to require the prosecution to disclose the name of the confidential informant. *At the time he made his ruling*, the only information before the trial judge was that the confidential informant notified law enforcement that a package containing illegal narcotics would be delivered by UPS to petitioners' garage. Petitioners failed to meet their burden establishing the informant was anything more than a mere tipster.

II.

The majority of the Court of Appeals' panel held the trial judge erred by admitting certain "bad act evidence" under the common scheme or plan exception in Rule 404(b), SCRE; it nonetheless concluded the erroneous admission was harmless. State v. Humphries, supra.[2] The controversial evidence is testimony by Jeffrey Seruya, a prior employee, which suggests Petitioner Claude Humphries had marijuana delivered to Seruya's residence after Claude's arrest on the underlying criminal charge.[3]

The Court of Appeals erred by concluding Seruya's testimony concerning Claude's delivery of marijuana to his residence and his redelivery of the marijuana to Claude was harmless error. The evidence against petitioners consisted of 1) acceptance of a package delivered from UPS with a return address from an automotive parts business in California (at the time of petitioners' arrest, the package had not been opened, or, apparently, even moved from where Phil placed it upon its receipt); 2) $4500 in cash (wrapped in a rag and stored in a desk drawer at an automotive garage) with the scent of narcotics; and 3) Seruya's testimony stating he was suspicious illegal activity was taking place at C&J Automotive, was told not to open packages from California during his employment, and claimed the package seized by law enforcement from C&J Automotive was similar in appearance (i.e., brown box with gummed label) to those boxes he was told not to open.

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[2] The State argues the Court of Appeals erred by holding the trial judge improperly ruled the "bad act evidence" was admissible as a common scheme or plan under Rule 404(b), SCRE. In essence, the State asks the Court to affirm the judgment for any ground appearing in the Record on Appeal. Rule 220(c), SCACR. We decline to do so. I'On, L.L.C., v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (it is within appellate court's discretion whether to address any additional sustaining grounds).

[3] A full recitation of the evidence appears in the Court of Appeals' opinion. State v. Humphries, supra.

While these factors constitute some evidence of guilt, Seruya's testimony suggesting Claude had marijuana sent to Seruya's residence and later retrieved it from Seruya was highly significant as it was the only direct evidence of Claude's intent to deal in marijuana. Since we conclude Seruya's testimony concerning Claude's delivery of marijuana to his residence and his redelivery to Claude was not harmless, we reverse petitioners' convictions.

REVERSED.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John McPherson Scott, Appellant/Respondent,

v.

Deirdre Erwin Scott, Respondent/Appellant,

And Gregory T. Martin, Defendant.

Appeal From Greenville County
Amy C. Sutherland, Family Court Judge

Opinion No. 25630
Heard March 6, 2003 - Filed April 14, 2003

AFFIRMED IN PART; REVERSED IN PART

C. Dixon Lee, of McLaren & Lee, of Columbia; and James Fletcher Thompson, of Spartanburg, for Appellant-Respondent.

Robert M. Rosenfeld, of Porter & Rosenfeld; and David A. Wilson, of Horton, Drawdy, Ward & Jenkins, both of Greenville, for Respondent-Appellant.

Andrew G. Goodson, of Younts Alford Brown & Goodson, of Fountain Inn, Guardian Ad Litem.

JUSTICE WALLER: This is a cross-appeal from a divorce decree awarding joint custody of the couple's daughter, Caitlyn. We affirm in part, and reverse in part.

FACTS

Appellant/respondent John McPherson Scott (Father) and respondent/appellant Deirdre Erwin Scott (Mother) married on May 18, 1991. It was the second marriage for both. Mother had custody of Kristen Martin, her daughter from her previous marriage,[1] but Father had no children from his previous marriage. On June 30, 1993, Caitlyn was born.

Father filed for divorce in September 1998 on the ground of Mother's adultery. He sought custody of both his daughter Caitlyn and his step-daughter Kristen.[2] After a hearing in October 1998, the family court issued a temporary order on November 9, 1998, granting Father temporary custody of Caitlyn and awarding visitation to Mother every other weekend and every other Wednesday evening. The temporary order granted Mother custody of Kristen and stated that Father could have visitation with her, but this visitation would be subject to Kristen's wishes. The temporary order further designated Mother's visitation for Thanksgiving and Christmas of that year. The order did not, however, make any provisions for summer 1999 visitation. A Guardian Ad Litem (GAL) was appointed to represent the interests of Kristen and Caitlyn.

The final divorce hearing took place January 29 through February 2, 2001. At that time, Caitlyn was 7 years old and Kristen was 16 years old. During the over two years that the marital litigation was pending, Father

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[1] Kristen was born on January 22, 1985.

[2] Because Father sought custody of Kristen, Kristen's biological father Greg Martin was named as a defendant. Martin, however, did not participate in the divorce hearing and did not contest Father's claim for custody of Kristen.

refused to agree to any visitation not specified in the temporary order, and Mother went back to the family court no less than three times for modifications of her visitation.[3]

The primary issue at the lengthy divorce hearing was custody of Caitlyn.[4] Evidence regarding both Mother's and Father's capacity to alienate the other from Caitlyn was presented. For example, Kristen's relationship with Martin, her biological father, and the litigation regarding Martin's and Martin's parents' visitation with Kristen, was discussed extensively. In sum, the evidence revealed that Mother and Father worked together in an attempt to prevent both Martin and his parents from maintaining a relationship with Kristen.

Father also evidenced a capacity to alienate Caitlyn from Mother. Generally, he was inflexible regarding Mother's visitation. As discussed above, Father fought Mother's efforts regarding summer visitation and clearly would not allow Mother anything other than what was specified in the temporary order. In addition, there was the so-called "Brownie incident." Mother attended a Brownie event with Caitlyn. Father also showed up at the event and apparently was incensed by Mother's presence since it was his

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[3] After failing to respond to Mother's request for summer 1999 visitation, Mother moved the family court which awarded Mother several weeks of summer visitation. In November 1999, Mother sought modification of her visitation which Father opposed. The family court increased her visitation to every Wednesday night and granted Mother her requested visitation over the Christmas holiday. When summer vacation approached in 2000, the GAL proposed extended visitation again for Mother. Mother made a written proposal to Father, but there was no response. Mother again moved the family court for relief. The family court awarded Mother over six weeks' consecutive visitation to Mother.

[4] It was not until the middle of trial that Father abandoned his claim for custody of Kristen. Although Father and Kristen enjoyed a close relationship during the parties' marriage, the relationship apparently disintegrated almost immediately upon the parties' separation. Kristen would not visit with Father, nor would she speak on the telephone to him.

weekend with Caitlyn. He called the Brownie troop leader that night and threatened to have her "disbarred" as a troop leader. He subsequently removed Caitlyn from that troop.

In addition to the evidence regarding the parents' potential for alienation, there were numerous other factual issues explored at the hearing. Most were disputed -- a true "he said-she said" situation. For example, there was conflicting testimony as to who was Caitlyn's "primary caretaker" prior to the parties' separation, exactly how much Father traveled with his job prior to the separation, when Mother exposed the children to her paramour, etc. Nonetheless, there was agreement that both Father and Mother love Caitlyn and that Caitlyn has a strong bond with both parents.

The GAL submitted a written report and also testified at the hearing. He noted several times that the custody issue was an extremely "close call." In his written report, he recommended that Mother get custody. During his testimony, he acknowledged that he considered not making any recommendation at all, but he concluded that Caitlyn would be a little bit happier with Mother and her half-sister Kristen. When asked by the family court about a joint custody arrangement, the GAL stated he did not have a problem with that since the parties lived only five blocks from each other and Caitlyn was "very bonded" with both parents.

The family court granted Father a divorce based on Mother's adultery.[5] Regarding the custody issue, the family court made numerous, detailed factual findings in the divorce decree, including that: both Mother and Father had engaged in deceitful and manipulative conduct; Mother shows dependent traits; Father demonstrates "a consistent need to control and exclude;" and both were "guilty of placing their own interests above the interests of their children."

Most significant, the family court found as follows:

[5] Mother did not contest the adultery issue. She subsequently married her paramour.

> Although the Court finds both parents to be fit insofar as each is able to meet the basic needs of Caitlyn, the Court has serious concerns about the propensity of both parties to place their own emotional needs above the needs of Caitlyn. **If this Court were to give sole custody of Caitlyn to either parent, the Court is convinced that the ability of Caitlyn to have a normal parent/child relationship with the other parent would be seriously compromised.** Therefore, the decision articulated hereinafter is designed to insure that Caitlyn has regular contact with both parents. It is further designed to attempt to ameliorate some of the destructive behaviors and attitudes in these parents and to teach these parents to share.

(Emphasis added). The family court found joint custody was in Caitlyn's best interest, and ordered that custody alternate between Father and Mother every four weeks.[6]

Father filed a Rule 59(e), SCRCP, motion for reconsideration. The family court made minor amendments, but denied the motion in material part. Regarding joint custody, the family court noted that by statute it had the power to award joint custody. The family court further stated it was "convinced" that joint custody was Caitlyn's only hope for an "equal relationship with both parents."

ISSUES

1. Was the award of joint custody appropriate under the circumstances of this case?

2. Is the restraining order in the divorce decree regarding overnight guests of the opposite sex overly broad and unreasonable?

[6] In addition, the non-custodial parent during the four-week period gets a weekend visitation with Caitlyn.

3. Is Mother entitled to an award of attorney's fees?

JOINT CUSTODY

Father argues the family court erred in awarding joint custody and that he should have been awarded custody of Caitlyn. In response to Father's joint custody argument, Mother maintains that although it is unusual for the family court to award joint custody, she believes the arrangement was appropriate under the unique circumstances of this case. She alternatively argues, however, that she should be awarded custody of Caitlyn if the joint custody decision is reversed. Because we find exceptional circumstances exist in the instant case, we affirm the family court's decision awarding joint custody.

When reviewing the factual determinations of the family court, an appellate court may take its own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). However, where there is disputed evidence, the appellate court may adhere to the findings of the family court. Id. Because the family court is in a superior position to judge the witnesses' demeanor and veracity, its findings should be given broad discretion. Id. Furthermore, the appellate court "should be reluctant to substitute its own evaluation of the evidence on child custody for that of the [family] court." Id.

The controlling factor in a custody case is the best interest of the child. E.g., Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001). Moreover, in making custody decisions "the totality of the circumstances **peculiar to each case** constitutes the only scale upon which the ultimate decision can be weighed." Parris v. Parris, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995) (emphasis added).

This Court has stated that "[d]ivided custody[7] is usually harmful to and not conducive to the best interest and welfare of the children." Mixson v. Mixson, 253 S.C. 436, 446, 171 S.E.2d 581, 586 (1969). Therefore, only under "exceptional circumstances" should joint custody be ordered. Id. at 447, 171 S.E.2d at 586; see also Courie v. Courie, 288 S.C. 163, 168, 341 S.E.2d 646, 649 (Ct. App. 1986) ("Divided custody is avoided if at all possible, and will be approved only under exceptional circumstances.").

In 1996, the Legislature amended the statute governing the family court's jurisdiction to specifically grant the family court the exclusive jurisdiction "[t]o order joint or divided custody where the court finds it is in the best interests of the child." S.C. Code Ann. § 20-7-420 (Supp. 2002). Thus far, the only published decision to comment on this subsection is Stanton v. Stanton, 326 S.C. 566, 484 S.E.2d 875 (Ct. App. 1997), where the Court of Appeals stated the following: "Although joint or divided custody is now permitted under S.C. Code Ann. § 20-7-420(42) (Supp.1996), visitation amounting to divided custody is disfavored by our supreme court." Id. at 573, 484 S.E.2d at 878-79.

It is our opinion section 20-7-420(42) did not change the law in this State that, generally, joint custody is disfavored. Mixson, supra. Nevertheless, our focus remains on the best interest of the child. See Patel, supra; § 20-7-420(42). The issue therefore is whether this case presents exceptional circumstances such that the best interest of the child requires an award of joint custody. We conclude it does.

The Mixson Court explained why it disfavored a divided custody arrangement:

> The courts generally endeavor to avoid dividing the custody of a child between contending parties, and are particularly reluctant to award the custody of a child **in brief alternating periods**

[7] This Court has, in the past, used the term "divided custody" to describe what in this case has been termed "joint custody," which is also sometimes referred to as "joint physical custody."

> between estranged and quarrelsome persons. Under the facts and circumstances of particular cases, it has been held improper to apportion the custody of a child between its parents, or between one of its parents and a third party, for ordinarily it is not conducive to the best interests and welfare of a child for it to be shifted and shuttled back and forth **in alternate brief periods** between contending parties, particularly during the school term. Furthermore, such an arrangement is likely to cause confusion, interfere with the proper training and discipline of the child, make the child the basis of many quarrels between its custodians, render its life unhappy and discontented, and prevent it from living a normal life.

253 S.C. at 447, 171 S.E.2d at 586 (emphasis added, internal quotation marks and citation omitted).

The family court in this case fashioned the joint custody to alternate in four-week intervals. In our opinion, this is not a "brief" period as envisioned by Mixson. See id. (reversing joint custody on **daily** basis); Stanton, supra (reversing a **week-to-week** visitation arrangement for a special needs child). Clearly, the family court fashioned the joint custody arrangement to be the least disruptive for Caitlyn in an effort to combat the dangers generally associated with joint custody.

More significantly, however, we concur with the family court that the evidence indicates a serious concern about the effects a sole custody arrangement would have on Caitlyn because of the potential for the custodial parent to effectively alienate Caitlyn from the non-custodial parent. We hold the peculiar facts of this case amount to exceptional circumstances warranting joint custody. See Sanders v. Sanders, 232 S.C. 625, 103 S.E.2d 281 (1958) (affirming divided custody order).

The exceptional circumstances in this case are reminiscent of those in Sanders.[8] As here, the parties in Sanders were considered fit; both loved and wanted their children. The trial court decided that a divided custody arrangement, alternating every six months, was appropriate under the circumstances. The mother appealed, arguing that divided custody would not be "as good for the children as a permanent home with her would be." This Court commented as follows:

> Divided custody is probably not the perfect solution, for problems of this kind are rarely if ever susceptible of perfect solution; **but in the circumstances of the instant case it seems the best one possible from the standpoint of the children's welfare**….
>
> We speak from the bench, not the pulpit; but we are moved, nevertheless, to say that had the love of these parents for their children been less [sic] selfish and more considerate, this unhappy proceeding would never have been before us.… The family structure of these people has now been wrecked. Whether it can ever be wholly restored is not for us to say. But [the trial court's] decree sheds a ray of hope upon the future relationship between these parents and their children. Obedience to that decree, and patience and charity toward each other and toward them, may yet bring to the latter happy and normal development, and to the former a more satisfying parenthood than they have heretofore known.

Id. at 633-34, 103 S.E.2d at 286 (emphasis added).

Although arguably not a "perfect solution," the joint custody ordered by the family court in the instant case perhaps "sheds a ray of hope" on the future relationship between these parents and their daughter Caitlyn. Id. We

[8] We note that while Sanders was an annulment action and this is a divorce action, the relevant circumstances regarding the custody issue are analogous.

implore Father and Mother to obey both the letter and the spirit[9] of the decree.

RESTRAINING ORDER ON OVERNIGHT GUESTS

Father takes issue with the following provision in the divorce decree:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all parties be, and are hereby, enjoined and restrained from having contact with a member of the opposite sex not related by blood or marriage in the presence of either child from the hours of 10:00 p.m. until 8:00 a.m. This injunction and restriction applies to any structure or open area where the children and the party will sleep in close proximity to each other.

Father argues that this restriction is overly broad and unreasonable. For example, he contends that if read literally, Caitlyn would not be allowed to have any girlfriends sleep over when Father has custody of Caitlyn. We agree.

The Court of Appeals struck down a similar provision in Jackson v. Jackson, 279 S.C. 618, 310 S.E.2d 827 (Ct. App. 1983). In that case, the father was allowed to have his son visit only if the child was "not exposed to persons not related to [the father] by blood or marriage." The Jackson court explained as follows:

> This restriction was intended to prevent the child from visiting in the presence of [the father's] live-in girlfriend. The restriction is

[9] We share Father's dissatisfaction with the family court's attempt to teach the parents how "to share" using Caitlyn as the teaching tool. It is regrettable the family court used this language in its order. Cf. Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975) ("Custody of a child is not granted a party as a reward or withheld as a punishment."). Nonetheless, we note Father has shown he will "share" Caitlyn no more than what a court order allows.

> overly broad and unreasonable as there was no finding that the presence of [the girlfriend] would adversely affect the welfare of the child. … Even if this finding had been made, the restriction is overly broad in carrying out its intended purpose. Carried to its logical extreme, it would prevent the child from entertaining his own friends at his father's home.

Id. at 622, 310 S.E.2d at 829 (citation omitted).

The restriction in this case likewise is overly broad and therefore is reversed. Id.

ATTORNEY'S FEES

The family court concluded that neither party was responsible for the other's attorney's fees. Mother argues, however, that she is entitled to attorney's fees because: (1) she prevailed on the custody issue involving Kristen; (2) she obtained joint custody of Caitlyn when Father had had temporary custody of her; and (3) she succeeded in her attempts to modify visitation while litigation was pending. We find the family court was within its discretion to deny Mother attorney's fees and therefore affirm on this issue. See Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989) ("An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court."); Cullen v. Prescott, 302 S.C. 201, 207, 394 S.E.2d 722, 726 (Ct. App. 1990) ("The award of attorney fees is within the sound discretion of the court.").

CONCLUSION

We affirm the family court's award of joint custody and the denial of attorney's fees, and reverse the restraining order regarding overnight guests.

AFFIRMED IN PART; REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Douglas Edward McCloud, Appellant.

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

Opinion No. 3625
Heard February 25, 2003 - Filed April 14, 2003

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; Solicitor John R. Justice, of Chester; for Respondent.

GOOLSBY, J.: Douglas Edward McCloud appeals his conviction for criminal domestic violence of a high and aggravated nature (CDVHAN), arguing the indictment did not enumerate the elements of the offense and was therefore insufficient to confer subject matter jurisdiction on the trial court. We affirm.

The indictment was captioned "INDICTMENT FOR CRIMINAL DOMESTIC VIOLENCE – AGGRAVATED." The body of the indictment read as follows: "That Douglas Edward McCloud did in Fairfield County on or about June 16, 2000 commit an act of violence against Kermisha L. Golden, by striking her in [the] face with his closed fist, also hit her in [the] head and pulled her hair an[d] scratched her neck." The indictment concluded with the standard phrase "[a]gainst the peace and dignity of the State and, contrary to the statute in such case made and provided."

When the case was called for trial on October 26, 2000, McCloud failed to appear and was tried in his absence. The jury found him guilty, and a bench warrant was issued for his arrest. On April 19, 2001, McCloud was brought before the trial court, at which time the clerk read the sentence imposed on him.

1. McCloud first argues that the indictment was deficient because it failed to allege that the victim was a "household member." We disagree.

South Carolina Code section 16-25-20 provides that "[i]t is unlawful to: (1) cause physical harm or injury to a person's own household member, (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril."[1] Section 16-25-10 defines "household member" as "spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have

[1] S.C. Code Ann. § 16-25-20 (2003). This statute was last amended in 1994. 1994 S.C. Acts 519, § 1.

cohabited."[2] Section 16-25-65(A) provides that "[t]he elements of the common law crime of assault and battery of a high and aggravated nature are incorporated in and made a part of the offense of criminal domestic violence of a high and aggravated nature when a person violates the provisions of Section 16-25-20 and the elements of assault and battery of a high and aggravated nature are present."[3]

At trial, Golden testified that McCloud had been her boyfriend for six years and they had a three-year-old child together. Admittedly, however, the indictment does not allege that Golden was McCloud's "household member" or otherwise set forth the criteria that would accord her this status. Nevertheless, we believe this deficiency did not deprive the trial court of jurisdiction to hear the case.

"An indictment is adequate if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction."[4] Moreover, these indictment sufficiency criteria "must be viewed with a practical eye; all the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached."[5] "[O]ne is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been

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[2] S.C. Code Ann. § 16-25-10 (2003).

[3] Id. § 16-25-65(A).

[4] State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

[5] State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 588 (1981) (emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him."[6]

Here, the pretrial surrounding circumstances of this case do not warrant dismissing the indictment. Although the indictment failed to allege that Golden was McCloud's household member or specify how she would qualify as such, there was no dispute either at trial or on appeal that she was the alleged victim in this case and had "a child in common" with McCloud.[7] In addition, McCloud had received a preliminary hearing, a circumstance that would support the conclusion that, under the "practical eye" test, he "obviously knew the crimes for which he was being tried"[8] and was therefore not unduly prejudiced by the alleged defect in the indictment. Moreover, the indictment contained the standard language that the offense alleged was "[a]gainst the peace and dignity of the State, and contrary to the statute in such case made and provided"; therefore, we hold it satisfied the statutory requirements to be deemed sufficient to give the trial court subject matter jurisdiction to hear the case.[9] Finally, the caption of the indictment named

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[6] State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

[7] See State v. Reddick, 348 S.C. 631, 560 S.E.2d 441 (Ct. App. 2002) (holding that an indictment alleging the defendant threw bodily fluids on a correctional officer but failing to specify that he was an "inmate" was sufficient to vest the trial court with subject matter jurisdiction because there was no confusion regarding his status as an inmate), cert. denied (Oct. 11, 2002).

[8] Adams, 277 S.C. at 126, 283 S.E.2d at 588.

[9] See S.C. Code Ann. § 16-25-65(C) (2003) (stating the statute creates "a statutory offense of criminal domestic violence of a high and aggravated nature"); id. § 17-19-20 (1985) (listing the necessary criteria for an indictment to be "sufficient and good in law," including the requirement that, "if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided").

the offense that McCloud was alleged to have committed, and although it was not a part of the indictment, it was "consistent with the charging language."[10]

2. We further reject McCloud's argument that the indictment failed to specify circumstances of aggravation necessary to establish CDVHAN. Among other things, the indictment alleged that McCloud struck the victim in the face with his closed fist, hit her in the head, pulled her hair, and scratched her neck. Furthermore, the arrest warrant contained an affidavit stating the victim suffered swelling and bruising to her right eye and had to seek medical attention at the hospital. Finally, it is apparent from the indictment that there was a difference in gender between McCloud and Golden, as evidenced by the allegation that McCloud committed an act of violence against Golden "by striking her in [the] face with his closed fist" [emphasis added]. These averments in the indictment, when considered with the surrounding circumstances that had surfaced before the commencement of the trial, were sufficient to notify McCloud that he was charged with causing serious bodily injury to the victim.[11]

AFFIRMED.

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

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[10] State v. Wilkes, Op. No. 25607 (S.C. Sup. Ct. filed Mar. 17, 2003) (Shearouse Adv. Sh. No. 10 at 24, 27).

[11] See State v. Wright, 349 S.C. 310, 312 n.1, 563 S.E.2d 311, 312 n.1 (2002) (noting that CDVHAN incorporates the elements of ABHAN, including "circumstances of aggravation," which include "infliction of serious bodily injury" and "a difference in gender" between the defendant and the victim).

SHULER, J., dissenting: Because I believe the language of McCloud's indictment did not sufficiently state the offense of criminal domestic violence of a high and aggravated nature (CDVHAN), I respectfully dissent.

The majority concludes McCloud's indictment is sufficient because they find, in evaluating the circumstances surrounding the indictment, he was apprised of the charge against him. However, as I interpret South Carolina precedent regarding indictments and subject matter jurisdiction, the body of the indictment must sufficiently identify the elements of the charged offense. See, e.g., Locke v. State, 341 S.C. 54, 56, 533 S.E.2d 324, 325 (2000) (holding "[a] circuit court has subject matter jurisdiction if . . . there has been an indictment which sufficiently states the offense. . . ."") (emphasis added); Granger v. State, 333 S.C. 2, 4, 507 S.E.2d 322, 323 (1998) (finding the true test of the sufficiency of an indictment is whether it contains the elements of the offense and sufficiently apprises the defendant of what he must be prepared to meet) (emphasis added). As such, McCloud's indictment for CDVHAN is clearly insufficient, as it neither identifies the victim as a household member nor specifically alleges an aggravating circumstance.

The elements of CDVHAN are satisfied when an individual causes physical harm to a household member and the elements of assault and battery of a high and aggravated nature (ABHAN) are present. S.C. Code Ann. §§ 16-25-20, 16-25-65 (2003). "A 'household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited." S.C. Code Ann. § 16-25-10 (2003). As the majority acknowledges in its opinion, McCloud's indictment clearly fails to allege the victim's status as a "household member," an element necessary to sustain an indictment for CDVHAN. While McCloud and the victim have a child together, this fact is not stated in the indictment. Thus, the key element necessary for a proper CDVHAN indictment is missing.

There is no mention of the statute or code section in either the body of

the indictment or the caption. Thus, the elements cannot be implied in that manner. See, e.g., State v. Owens, 346 S.C. 637, 649, 552 S.E.2d 745, 751 (2001) (holding the failure to include an element of a statutory offense in the body of an indictment will not invalidate the indictment if specific reference to the statute is made in the body of the indictment). Furthermore, one cannot infer the elements of an offense from the caption of the indictment. See State v. Lark, 64 S.C. 350, 353, 42 S.E. 175, 176-77 (1902) (finding the caption of the indictment cannot be used to expand or contract the allegations, because it is not a part of the findings by the grand jury); cf. State v. Tabory, 262 S.C. 136, 141, 202 S.E.2d 852, 854 (1974) (holding the State may not support a conviction for an offense intended to be charged by relying upon a caption to the exclusion of the language contained in the body of the indictment). As such, the fact that McCloud's indictment was captioned as "criminal domestic violence – aggravated" is not enough to render the indictment sufficient.

Therefore, all that should be examined in this particular situation is the actual body of the indictment itself. See Tate v. State, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001) (finding it is the body of the indictment that is controlling). In the instant case, the body of the indictment alone does not sufficiently describe the elements needed for a CDVHAN offense. In fact, the description of the offense in the body of McCloud's indictment is sufficiently vague that it could satisfy the elements of either ABHAN[12] or simple assault and battery.[13] Without mention of the crucial element of CDVHAN – the victim's status as a household member – it is impossible to determine from the body of the indictment the crime with which McCloud

[12] State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000) (defining ABHAN as "the unlawful act of violent injury to another, accompanied by circumstances of aggravation.").

[13] State v. Patterson, 337 S.C. 215, 231, 522 S.E.2d 845, 853 (Ct. App. 1999) (holding simple assault and battery is an unlawful act of violent injury to another unaccompanied by any circumstances of aggravation).

was charged. As such, I believe McCloud's indictment for CDVHAN was deficient. See S.C. Code Ann. § 17-19-20 (2003) (an indictment is sufficient if it "charges the crime substantially in the language . . . of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood."); see also State v. Bullard, 348 S.C. 611, 614, 560 S.E.2d 436, 437 (Ct. App. 2002).

Furthermore, common sense dictates that adopting the majority's reasoning undermines the purpose of the grand jury system. The 18 members of the grand jury are convened as an impartial panel for the purpose of reviewing the State's evidence against a criminal defendant. The grand jury must pass on the elements alleged in the indictment before the indictment can be true-billed. If the majority's analysis is adopted, the actual body of the indictment will become inconsequential because – long after the grand jury has deliberated – a court will be able to supplement the language of the indictment by examination of pre-trial circumstances. In my view, this type of analysis after the fact serves to weaken the role and function of the grand jury system.

For the foregoing reasons, I would vacate McCloud's conviction for CDVHAN.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Nelson, Jr., as guardian ad litem for Ty'Quain S. Nelson, a minor child, **Appellant,**

v.

QHG of South Carolina, Inc., d/b/a Carolina Hospital System, Quorum Health Group, Inc., Drs. Coker, Phillips, and Haswell, P.A., and Thomas W. Phillips, M.D., **Defendants,**

of whom Drs. Coker, Phillips, and Haswell, P.A. and Thomas W. Phillips, M.D. are **Respondents.**

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

Opinion No. 3626
Heard March 13, 2002 - Filed April 14, 2003

REVERSED AND REMANDED

Edward L. Graham, of Florence, for Appellant.

Robert H. Hood, Hugh W. Buyck, and D. Nathan Hughey, all of Charleston, for Respondents.

ANDERSON, J.: Ty'Quain S. Nelson's guardian ad litem brought suit against Thomas W. Phillips, M.D., Drs. Coker, Phillips, and Haswell, P.A., QHG of South Carolina, Inc., d/b/a Carolina Hospital System, and Quorum Health Group, Inc. seeking recovery for damages caused by alleged medical malpractice during Nelson's delivery. The circuit court granted the motion to dismiss on behalf of Drs. Coker, Phillips, and Haswell, P.A. and Thomas W. Phillips, M.D. Nelson appeals. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Ty'Quain S. Nelson was born on March 5, 1993. Thomas W. Phillips, M.D. was the attending obstetrician during Nelson's delivery. During delivery, a complication occurred where Nelson's shoulder became lodged behind the mother's pubic bone. This is known as shoulder dystocia. Nelson's upper and lower portions of his right-side brachial plexus nerves were injured during the delivery. The damage to the upper portion, called "Erb's palsy," involves primarily the shoulder, elbow, and their related muscles. The damage to the lower portion, known as "Klumpke's palsy," causes paralysis to the hand and results in fingers which are grossly deformed, misshapen, twisted, and contorted.

On February 26, 2001, Nelson sued Thomas W. Phillips, M.D., his medical group, Drs. Coker, Phillips, and Haswell, P.A., QHG of South Carolina, Inc., d/b/a Carolina Hospital System, and Quorum Health Group, Inc., alleging that Thomas W. Phillips, M.D. was negligent in managing and resolving the shoulder dystocia and Drs. Coker, Phillips, and Haswell, P.A. was liable under vicarious liability. This suit was brought by Nelson's maternal grandfather and current guardian ad litem, James Nelson, Jr. Shortly after filing the summons and complaint, Nelson's current counsel discovered that Nelson's mother, Latonia Nelson, who had previously been Nelson's guardian ad litem, had filed an earlier suit involving the same injuries.

The first lawsuit, filed in 1996, was styled "Tyqun [sic] Nelson, a minor under the age of fourteen (14) years, by his duly appointed Guardian Ad Litem Latonia Nelson, vs. Carolina Women's Center [sic] and Thomas W. Phillips, M.D." During the litigation of the 1996 suit, Thomas W. Phillips, M.D. made a motion to compel Nelson to answer interrogatories and requests for production. The circuit court issued an order compelling the discovery responses within fifteen days. Nelson failed to comply, and Thomas W. Phillips, M.D. filed a motion to dismiss based upon Nelson's failure to respond. Thomas W. Phillips, M.D. also moved for summary judgment on the grounds that Nelson had failed to offer any evidence of a breach of the reasonable standard of care through an expert witness.

The circuit court held the motion to dismiss in abeyance and gave Nelson forty-five additional days "in which to identify an expert witness and to provide a summary of the witnesses [sic] anticipated trial testimony." Nelson's attorney failed to comply, and the circuit court granted Thomas W. Phillips, M.D.'s summary judgment motion because there was no expert testimony establishing Thomas W. Phillips, M.D. had breached the standard of care. The order dismissed Nelson's 1996 complaint with prejudice. However, the circuit court granted Nelson an additional thirty days to file a motion to reconsider with an expert affidavit to establish a prima facie case. Nelson did not file a motion to reconsider.

Nelson's attorney in the current case filed a notice of dismissal voluntarily dismissing Thomas W. Phillips, M.D. pursuant to Rule 41(a)(1)(A), SCRCP. Nelson's notice of dismissal expressed his intent to proceed against all the other named defendants. After dismissal of the lawsuit against Thomas W. Phillips, M.D. pursuant to Rule 41(a)(1)(A), a motion to dismiss was filed on behalf of Drs. Coker, Phillips, and Haswell, P.A. and Thomas W. Phillips, M.D. The circuit court granted the motion to dismiss with prejudice for both Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. The circuit court ruled: (1) res judicata barred this action because the 1996 order granting Thomas W. Phillips, M.D. summary judgment was an adjudication of Nelson's case on the merits; (2) Nelson was collaterally estopped from asserting the same argument in this case because the summary judgment motion was an adjudication on the

merits; and (3) under the theory of respondeat superior, a master is not liable if the servant is not liable.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based upon the plaintiff's failure to state a claim constituting a cause of action. Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). The trial judge may dismiss the claim if the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001) (quoting Rule 12(b)(6), SCRCP). When considering the motion to dismiss for failure to state a claim, the trial court must base its ruling solely upon the allegations made on the face of the complaint. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). If the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). The facts and inferences alleged on the complaint are viewed in the light most favorable to the plaintiff. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987); Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999); Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995).

Dismissal of an action pursuant to Rule 12(b)(6) is appealable. Williams, 347 S.C. at 233, 553 S.E.2d at 500. The court of appeals applies the same standard of review that was implemented by the trial court. Id. In determining whether the trial court properly granted the motion to dismiss, we must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Bergstrom, 352 S.C. at 233, 573 S.E.2d at 811.

LAW/ANALYSIS

I. EFFECT OF VOLUNTARY DISMISSAL

Nelson argues the circuit court erred when it granted the motion to dismiss of Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. because Thomas W. Phillips, M.D. had been voluntarily dismissed from the case and lacked standing to bring the motion on his behalf. Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. argue that Nelson's notice of voluntary dismissal was ineffective because it was conditioned upon allowing for continued viability against Drs. Coker, Phillips, and Haswell, P.A., while only dismissing Thomas W. Phillips, M.D. Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. also assert the notice of voluntary dismissal was ineffective because Drs. Coker, Phillips, and Haswell, P.A. and Thomas W. Phillips, M.D. were prejudiced when the notice on the voluntary dismissal did not provide the dismissal was without prejudice. We agree with Nelson.

Rule 41 of the South Carolina Rules of Civil Procedure allows a plaintiff to voluntarily dismiss a defendant from a lawsuit:

> Subject to the provisions of Rule 23(c), of Rule 66(a), and of any statute, an action may be dismissed by the plaintiff without order of court (A) by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment . . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . .

Rule 41(a)(1), SCRCP.

Under Rule 41(a)(1)(A), SCRCP, a plaintiff may dismiss an action without leave of court before the defendant files an answer or motion for summary judgment. Burry & Son Homebuilders, Inc. v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992); In re Morrison, 321 S.C. 370, 373, 468 S.E.2d 651, 652-53 (1996) ("[U]nder the plain language of paragraph (a)(1), a plaintiff

has an unconditional right to voluntarily dismiss an action anytime before an answer or motion for summary judgment has been served."). Unless otherwise stated in the notice of dismissal or stipulation, the voluntary dismissal of an action by a plaintiff with the consent of the opposing party is without prejudice. Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989). Generally, a plaintiff is entitled to a voluntary non-suit without prejudice as a matter of right unless the defendant shows legal prejudice or important issues of public policy are present. Burry & Son Homebuilders, 310 S.C. at 531, 426 S.E.2d at 314; Bowen & Smoot v. Plumlee, 301 S.C. 262, 391 S.E.2d 558 (1990); Prime Med. Corp. v. First Med. Corp., 291 S.C. 296, 353 S.E.2d 294 (Ct. App. 1987).

In J.J. Lawter Plumbing v. Wen Chow Int'l Trade & Inv., Inc., 286 S.C. 49, 331 S.E.2d 789 (Ct. App. 1988), Wen Chow hired a general contractor, Padgett, to convert a health spa into a restaurant. Padgett hired Lawter as a subcontractor to work on the project. Lawter sued Padgett and Wen Chow for nonpayment of fees. Before Padgett filed a pleading or a summary judgment motion, Lawter filed a notice of dismissal voluntarily dismissing Padgett from the suit. Wen Chow argued the notice of voluntary dismissal as to Padgett was improperly granted because Wen Chow had answered and therefore the action could not be dismissed. This court rejected Wen Chow's argument by adopting federal case law interpreting the federal version of Rule 41, which is identical to Rule 41, SCRCP. "The word 'action' in the federal rule has been interpreted to mean all of the claims against any one defendant, not necessarily all of the claims against all the defendants. Thus, a voluntary dismissal [under Rule 41] is effective against a defendant who has not answered, even though another defendant has." Id. at 52-53, 331 S.E.2d at 791. Citing Wen Chow, James Flanagan in South Carolina Civil Procedure 2d ed. states, "Only the defendants who answered or moved for summary judgment are unaffected by the notice of dismissal." James F. Flanagan, South Carolina Civil Procedure 343 (2d ed. 1996). "A plaintiff's motive for dismissal is generally irrelevant where the dismissal is effected by notice in the early stages of the litigation." 8 James Wm. Moore et al., Moore's Federal Practice ¶ 41.11 41-24 (3d ed. 2002).

The arguments of Drs. Coker, Phillips, and Haswell, P.A. and Thomas W. Phillips, M.D. are unavailing. According to Wen Chow, a plaintiff may dismiss only one party to a suit because "action" only applies to the plaintiff's claims against one defendant and not all the defendants in a lawsuit. A plaintiff may make a voluntary dismissal by complying with the mandate of Rule 41(a)(1)(A), SCRCP, provided the defendant has not yet filed a pleading or summary judgment motion. Nelson's notice of dismissal was not improperly conditioned and was effective. The circuit court erred when it dismissed Nelson's lawsuit against Drs. Coker, Phillips, and Haswell, P.A. and Thomas W. Phillips, M.D. because Thomas W. Phillips, M.D. was no longer a party to the lawsuit and his motion was ineffective.

II. STANDING OF THOMAS W. PHILLIPS, M.D.

"A Court of law can know no other persons as parties, than those whose rights are made to appear by the record . . . ." M'Elwee v. House, 17 S.C.L. (1 Bail.) 108, 109 (1828). A person without interest in the subject matter of the lawsuit has no legal standing to be heard. Duke Power Co. v. S.C. Pub. Serv. Comm'n, 284 S.C. 81, 326 S.E.2d 395 (1985); Furman Univ. v. Livingston, 244 S.C. 200, 136 S.E.2d 254 (1964).

This court has concluded that Thomas W. Phillips, M.D. does **not** have standing because Thomas W. Phillips, M.D. was voluntarily dismissed under Rule 41(a)(1)(A), SCRCP. Assuming **arguendo** that Thomas W. Phillips, M.D. has standing, we address other issues seriatim. Indubitably, Drs. Coker, Phillips, and Haswell, P.A. has standing to address all issues.

III. RES JUDICATA AND COLLATERAL ESTOPPEL

"The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the

issues actually litigated and as to issues that might have been litigated in the first action. Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992); Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996); Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993).

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999); Rogers v. Kunja Knitting Mills, U.S.A., 336 S.C. 533, 520 S.E.2d 815 (Ct. App. 1999). Res judicata prevents a litigant "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987); accord Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). "Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." James F. Flanagan, South Carolina Civil Procedure 642 (2d ed. 1996).

To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Rogers, 336 S.C. at 537, 520 S.E.2d at 817; Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). Even when the defendant meets all of the required elements, res judicata will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

Collateral estoppel differs from res judicata. This distinction is explained in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984):

> The doctrines of res judicata and collateral estoppel are . . . two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues "actually and necessarily litigated and determined in the first suit."

Id. at 369 n.1, 315 S.E.2d at 190 n.1.

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986); see also State v. Bacote, 331 S.C. 328, 330, 503 S.E.2d 161, 162 (1998) ("'When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.'"); McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996) (noting that collateral estoppel will bar relitigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit). A party may assert nonmutual collateral estoppel to thwart relitigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue. Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).

The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: whether privity exists, whether the doctrine is used offensively or

defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). Only a party to a prior action or one in privity with the party can be precluded from relitigating an issue on the basis of offensive collateral estoppel. Carrigg, 347 S.C. at 80, 552 S.E.2d at 770.

There are numerous exceptions to the application of res judicata and collateral estoppel. In Pye, this court adopted the Restatement (Second) of Judgments section 28, which states:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Pye, 325 S.C. at 437-38, 480 S.E.2d at 460-61.

In Beall v. Doe, this court adopted section 29 of the Restatement (Second) of Judgments:

> A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:
>
> (1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the

presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Beall, 281 S.C. at 371, 315 S.E.2d at 190-91.

Nelson contends the circuit court erred when it granted the motion to dismiss on res judicata and collateral estoppel grounds because the parties in the two actions were not the same, the summary judgment order in the first case was not an adjudication on the merits, an order entered into by consent does not trigger res judicata or collateral estoppel, public policy considerations preclude the use of res judicata and collateral estoppel, and

Nelson did not get the opportunity to fully and fairly litigate the issues in the first action.

A. Identity of the Parties

Nelson asserts the parties are not the same in the two lawsuits because Nelson is represented by a different guardian ad litem in the respective suits and the 1996 complaint named the Carolina Women's Center and Thomas W. Phillips, M.D. as defendants.

For determining whether res judicata applies, the identity of the parties in the first lawsuit also includes persons in privity with the named parties. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). One not a party to a prior action can be precluded from relitigating the issue only if he is in privity with a party to the prior action against whom an adverse finding is made. Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994). In regard to res judicata or collateral estoppel, privity "does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." Wyndam v. Lewis, 292 S.C. 6, 8, 354 S.E.2d 578, 579 (Ct. App. 1987). "Privity" means one so identified in interest with another that he represents the same legal right. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). In Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998), this court discussed privity by stating:

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.

Id. at 317, 498 S.E.2d at 687 (citations omitted).

The viability and efficacy of one guardian ad litem as juxtapose to a later appointed guardian ad litem in two different suits is novel. In Stevens v. Kelley, 134 P.2d 56 (Cal. Dist. Ct. App. 1943), a minor child brought an action through her guardian ad litem against her alleged natural father to establish paternity and obtain child support. The child's mother had previously brought a suit to establish paternity against the same man when the minor child was a three-month-old baby. The mother entered into an agreement to settle the suit for a cash payment. The court found that according to California statute, the mother was the child's guardian when the mother brought the first suit. The child argued that she was not bound by the judgment in the first case because she was not a party in the first action and the first case was compromised without the consent of the court in which it was tried. The court found the child's arguments to be meritless:

> Plaintiff's rights, having been determined in an action in her behalf brought by her mother, cannot be again litigated in an action brought by her guardian ad litem. . . .
>
> If the present judgment were allowed to stand, we would have two judgments of the same court, adjudicating identical rights between the same parties in interest, the second the exact opposite of the first. Both cannot be valid. Where the defense of former adjudication was pleaded and the earlier of the judgments was established by sufficient proof, it had to prevail over the later judgment unless it was . . . vulnerable to attack upon equitable grounds.

Id. at 59. The court additionally found the mother's actions in the first suit did not improperly compromise the child's interests. Id. at 61.

Here, the minor child was the injured party in interest in both lawsuits. The identity of the guardian changed, but the basic facts underlying the cause of action remained identical and required the presence of the child. There is no question that a minor ward and her guardian are in privity with each other. First Nat'l Bank of Greenville v. United States Fid. & Guar. Co., 207 S.C. 15, 26, 35 S.E.2d 47, 57 (1945) ("[W]e do not think there could be a much

clearer case of mutual relationship than that existing between a ward and her guardian.").

Res judicata applies to bar the action against Thomas W. Phillips, M.D., who was the named person in the first lawsuit.

B. Adjudication on the Merits

Nelson asserts that the circuit court dismissed his first complaint on procedural grounds because his attorney failed to comply with discovery orders; therefore, the order dismissing the first case was not an adjudication on the merits and res judicata and collateral estoppel do not apply to bar this case.

Medical malpractice is the failure of a physician to exercise that degree of care and skill which is ordinarily employed by the profession generally, under similar conditions and in like surrounding circumstances. Jernigan v. King, 312 S.C. 331, 440 S.E.2d 379 (Ct. App. 1993); Welch v. Whitaker, 282 S.C. 251, 317 S.E.2d 758 (Ct. App. 1984). A plaintiff must show the physician failed to exercise the degree of care and skill which is ordinarily employed by the profession under similar conditions and in like circumstances. Keaton v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999). In South Carolina, to sustain a cause of action in a medical malpractice case, the plaintiff is required to establish the relevant standard of care and a breach of the standard of care by expert witness testimony. Pederson v. Gould, 288 S.C. 141, 341 S.E.2d 633 (1986); Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984). Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997), articulates the quintessential mandate thrust upon a plaintiff in a medical malpractice case. Gooding inculcates:

> [T]he plaintiff must present (1) evidence of the generally recognized practice and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances and (2) evidence that the defendant doctor departed from the recognized and generally

> accepted standards, practices, and procedures in the manner alleged by the plaintiff. Further, unless the subject is a matter of common knowledge, the plaintiff must use expert testimony to establish both the standard of care and the defendant's failure to conform to that standard.

Id. at 254, 487 S.E.2d at 599.

A case that is dismissed "with prejudice" indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication. Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); Nunnery v. Brantley Constr. Co., 289 S.C. 205, 345 S.E.2d 740 (Ct. App. 1986). When an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication. Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997). If the first case is dismissed with prejudice on purely procedural grounds without a consideration of the underlying merits of the action, then the party is barred from asserting collateral estoppel or res judicata. Id.; see also Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986) (holding that a medical malpractice action was not barred by res judicata where the initial action did not involve an adjudication on the merits but instead involved the child's capacity to sue and whether there was an improper joinder of the causes of action).

Nelson contends that the circuit court's dismissal was for failure to comply with the court's extensions of time to present expert witness testimony and was procedural rather than substantive. The circuit court, however, did not dismiss the case for failure to comply with its extensions in a timely fashion, but ultimately dismissed the case because of Nelson's failure to present an expert. South Carolina law requires an expert witness in medical malpractice cases. When the circuit court dismissed the case for lack of expert testimony, it was a dismissal on the merits because Nelson failed to sustain his burden of proof. The circuit court did not err when it dismissed Thomas W. Phillips, M.D. because the identity of the parties in the two suits

was the same and the first lawsuit was disposed of by an adjudication on the merits.

We conclude granting summary judgment in favor of a physician in a medical malpractice case because of the plaintiff's failure to produce an expert witness as to the applicable standard of care and departure from the standard of care by the physician is an adjudication of the case on the merits. We reject the contention of Nelson that this factual scenario is **only** a discovery delinquency and does not rise to the level of a disposition on the merits.

Our decision on this issue is efficacious as to Thomas W. Phillips, M.D., but **not** as to Drs. Coker, Phillips, and Haswell, P.A.

C. Consent Order

Nelson argues that when his counsel consented to the summary judgment order in the first action, the consent barred the use of collateral estoppel or res judicata in this action.

Because a consent judgment has substantially the same effect as any other judgment rendered in the ordinary course, it is generally entitled to the defense of res judicata. 46 Am. Jur. 2d Judgments § 222 (1994). However, even in consent orders, the public policy underlying res judicata may have to yield to other public policies. Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992); James F. Flanagan, South Carolina Civil Procedure 654 (2d ed. 1996). In Johns, a husband and wife signed a consent order where the family court found they were married at common law and ordered their legal separation. At the time the parties entered into the consent order, the husband was married to another person. The wife brought suit against the husband seeking a divorce, custody of the couple's child, an increase in alimony and child support, and attorney's fees. The husband contested the divorce, arguing the parties were not married. The wife sought to use the consent order declaring they were married at common law to bar the husband's defense under res judicata and collateral estoppel grounds. This court did not allow the wife to assert res judicata or collateral estoppel to bar the husband's

defense because public policy declaring bigamous marriages void overrode the policy concerns for res judicata.

Johns is inapposite to this case, however. Nelson misconstrues the nature of his consent in the first case. The circuit court imposed monetary sanctions against Nelson's counsel for discovery abuse. Nelson's counsel consented to the imposition of monetary sanctions. He did not consent to the grant of the summary judgment motion. In Johns, the consent order was directly on point as to what was in dispute in the second case. There was no effective consent given allowing the entry of summary judgment and the general rule disallowing the use of res judicata or collateral estoppel for consent orders does not apply.

For the sake of clarity, this conclusion applies **only** to Thomas W. Phillips, M.D., but not to Drs. Coker, Phillips, and Haswell, P.A.

D. Inadequate Representation in the First Suit

Nelson contends that his counsel's representation in the first suit was inadequate so the doctrines of res judicata and collateral estoppel should not apply.

In Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997), the appellant raised the issue that collateral estoppel should not apply because of an inadequate defense and failing to identify witnesses in the first action. This court rejected that argument stating:

> [Appellant] presented no affidavits or depositions to the trial court regarding the purported testimony of the alleged additional witnesses. Further, prior to the federal action, both parties had a substantial amount of time to prepare for trial and conduct extensive discovery. Both cases had been on the docket for well over a year prior to the [first action].

Id. at 439, 480 S.E.2d at 461. Inadequate representation is not a basis for attacking res judicata. In re Fuhrman, 118 B.R. 72 (E.D. Mich. 1990). In

Dennis v. First State Bank of Texas, 989 S.W.2d 22 (Tex. App. 1998), the Texas Court of Appeals stated:

> To allow appellants another chance to relitigate the issues that should have been brought in the [first suit] would circumvent the purpose behind the doctrine of res judicata and would allow a losing party to relitigate a cause of action based solely on an assertion of inadequate representation. The doctrine of res judicata does not allow for such a result.

Id. at 28.

Nelson's attorney had ample time to develop witnesses. The circuit court even granted additional days after the entry of summary judgment to present an expert witness with a motion for reconsideration.

While we sympathize with Nelson and agree that the first attorney's conduct in handling the case was reprehensible, the proper course of action to rectify the attorney's behavior is legal malpractice and not punishing the opposing party by suspending the operation of res judicata or collateral estoppel.

For the sake of clarity, this conclusion applies **only** to Thomas W. Phillips, M.D., but not to Drs. Coker, Phillips, and Haswell, P.A.

E. Policy Considerations

Nelson asserts public policy considerations should bar Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. from invoking the doctrines of collateral estoppel and res judicata.

The doctrines of collateral estoppel and res judicata exist to "reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided." State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998). Even when the elements of res judicata and collateral estoppel

have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results, or public policy requires it. Id.; Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). "Thus application of res judicata will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992). We recognize that there have been instances when collateral estoppel or res judicata have not been invoked for countervailing public policy concerns. See Bacote, 331 S.C. at 331, 503 S.E.2d at 163 (declining to give collateral estoppel effect to proceedings which occur during an administrative hearing for a driver's license revocation); Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997) (finding that giving administrative hearings held in front of the Employment Security Commission collateral estoppel effect would frustrate the purposes of the Employment Security Commission); Johns, 309 S.C. at 203, 420 S.E.2d at 859 (refusing to apply a consent order entered by the family court finding husband and wife married at common law because giving the order collateral estoppel effect would violate the State's policy finding bigamous marriages void as mandated by statute). However, in these cases, collateral estoppel was in conflict with existing public policy concerns.

In Bacote and Shelton, the public policy weighed against res judicata was the efficiency and speed of administrative procedures. In Johns, the policy of res judicata was in direct contravention with a statutorily expressed policy prohibiting bigamous marriages. In this case, Nelson merely states it would be unfair to impose collateral estoppel or res judicata without expressing what public policy considerations are violated. Since we can see no existing public policy concerns in preventing litigation for failure to provide sufficient proof in the first action, we find the summary judgment order in the first action has collateral estoppel and res judicata effect which does not run contrary to any public policy. Consequently, the circuit court was correct in finding the second suit against Thomas W. Phillips, M.D. was barred by res judicata and collateral estoppel.

For the sake of clarity, this conclusion applies **only** to Thomas W. Phillips, M.D., but not to Drs. Coker, Phillips, and Haswell, P.A.

IV. MASTER-SERVANT LIABILITY

Nelson argues the circuit court erred when it found that Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. were in a master-servant relationship and the master could not be found liable when the servant was not liable. We agree.

Normally, a master cannot be held liable for the actions of the servant if its liability is based solely upon the actions of its servant. Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000). However, when a master's liability is based on its own conduct or the conduct of a non-defendant servant, an exoneration of its defendant servant does not absolve it from liability. Id.

In Rite Aid, the plaintiff sued the pharmacy and the pharmacist for damages that occurred from an improperly filled prescription. The jury returned a verdict in favor of the plaintiff, awarding the plaintiff punitive damages against the pharmacy, but not against the pharmacist. Rite Aid argued it could not be held liable for punitive damages when the jury failed to find the pharmacist's action was willful because its liability was predicated on the actions of its servant. This court disagreed, finding that the allegations in the complaint that Rite Aid negligently supervised the pharmacist were a separate basis of liability independent of the pharmacist's liability.

We have reviewed the complaint in this case and, giving Nelson the benefit of all reasonable inferences, as we must when considering a motion to dismiss, we find that the claims against Drs. Coker, Phillips, and Haswell, P.A. regarding the sufficiency of its medical record keeping is an independent basis of liability separate from Thomas W. Phillips, M.D.'s liability. Therefore, Nelson may maintain the suit against Drs. Coker, Phillips, and Haswell, P.A., even though Thomas W. Phillips, M.D. is not liable, due to the entry of the summary judgment motion and Nelson voluntarily dismissing Thomas W. Phillips, M.D.

This holding does not run afoul of either of the cases cited by Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. In Rookard v. Atlanta & Charlotte Air Line R.R., 84 S.C. 190, 65 S.E. 1047 (1909), the plaintiff sued Atlanta for damages which occurred in a railroad crossing accident. Southern Railroad Company, a lessee of Atlanta, was operating the rail line at the time of the accident. The court set forth the principle that "[a] judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent." Id. at 192, 65 S.E. at 1047. The same principle is espoused in Logan v. Atlanta & Charlotte Air Line R.R., 82 S.C. 518, 64 S.E. 515 (1909): "Where an agent is sued, and, after trial on the merits, the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when sued by the same plaintiff on the same cause of action." Id. at 523, 64 S.E. at 516. However, both of these cases refer to barring liability for the master when the servant is found not liable for the same cause of action brought against the master. In this case, negligence in keeping medical records and medical record procedures are separate from Thomas W. Phillips, M.D.'s potential liability. Rookard and Logan are not germane.

V. ADDITIONAL SUSTAINING GROUNDS

Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. assert as an additional sustaining ground that Nelson's suit is barred because it violates the statute of repose. We disagree.

The complaint alleges the negligent medical treatment arising from Nelson's delivery occurred on March 5, 1993. The complaint was filed almost eight years later on February 26, 2001.

The time limit to bring a cause of action by a minor in a medical malpractice action is:

> (D) Notwithstanding the provisions of Section 15-3-40, if a person entitled to bring an action against a licensed health care provider acting within the scope of his profession is under the age

> of majority at the date of the treatment, omission, or operation giving rise to the cause of action, the time period or periods limiting filing the action are not tolled for a period of more than seven years on account of minority, and in any case more than one year after the disability ceases. Such time limitation is tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor.

S.C. Code Ann. § 15-3-545 (Supp. 2002).

Thomas W. Phillips, M.D. and Drs. Coker, Phillips, and Haswell, P.A. contend that there is no allegation of fraud or collusion by the parent or guardian with the defendants or their insurance companies and therefore the statute clearly bars the suit.

This court has discretion on whether to address additional sustaining grounds. "[A] respondent - - 'the winner' in the lower court - - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "An appellate court may not rely on Rule 220(c) SCACR, when the reason [supporting the additional sustaining ground] does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds." Id. at 420, 526 S.E.2d at 723. "While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." Id. at 421, 526 S.E.2d at 724.

We decline to address this issue in the present case because the issue was presented by Thomas W. Phillips, M.D.'s motion to dismiss, and therefore Drs. Coker, Phillips, and Haswell, P.A. lacked standing to argue

this issue in front of the circuit court and it would be inequitable for us to address this issue.

CONCLUSION

We hold that pursuant to Rule 41(a)(1)(A), SCRCP, a plaintiff may dismiss an action without order of court by filing and serving a notice of dismissal before service by the adverse party of an answer or notice of appearance. A voluntary dismissal under Rule 41(a)(1)(A) is efficacious against a defendant who has not answered or made an appearance, even though another defendant has answered and made an appearance. Once a voluntary dismissal under Rule 41(a)(1)(A) has been filed and served before service by the adverse party of an answer or notice of appearance, the circuit court lacks jurisdiction over the dismissed party and the dismissed party has no **standing** to subsequently file a motion to dismiss.

We rule that a minor is the plaintiff in an action and the fact that there are two different guardians ad litem is irrelevant to the privity element in a res judicata/collateral estoppel analysis.

We **REVERSE** the order of the circuit judge dismissing **"Drs. Coker, Phillips, and Haswell, P.A."** with prejudice and **REMAND** the case against **"Drs. Coker, Phillips, and Haswell, P.A."** for further proceedings consistent with this opinion.

Finally, we **REVERSE** the order of the circuit judge dismissing Thomas W. Phillips, M.D. with prejudice because the plaintiff had previously filed a voluntary dismissal of Thomas W. Phillips, M.D. under Rule 41(a)(1)(A), SCRCP.

REVERSED and REMANDED.

HUFF, J., and MOREHEAD, Acting Judge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Pendergast/Father, Appellant,

v.

Charlene Pendergast/Mother, Respondent.

Appeal From Charleston County
Jack Alan Landis, Family Court Judge

Opinion No. 3627
Submitted March 10, 2003 - Filed April 14, 2003

AFFIRMED

Cynthia Barrier Castengera, of Newland, N.C.; David Dusty Rhoades, of Charleston, for Appellant.

Lon H. Shull, III, of Mt. Pleasant, for Respondent.

STILWELL, J.: James Pendergast (Father) appeals the family court order which failed to reduce his unallocated support obligation following the graduation from college of the parties' child, and also required him to

contribute $6,000 toward Charlene Pendergast's (Mother) attorney fees. We affirm.[1]

FACTS

The parties were married in 1970, had a child in 1979, and were divorced in 1980 in New York. The original decree specified alimony and child support, which was later recast as unallocated support pursuant to a 1984 consent order in New York. Father relocated to South Carolina, but Mother and child remained in New York. In 1997, a South Carolina family court continued this characterization of Father's support obligations in a subsequent consent order.

In the present action, the family court terminated Father's child support obligation. However, it refused to reduce Father's unallocated support because he had shown no change in circumstances warranting a reduction in the support paid to Mother, and further held that the unallocated support was now clearly alimony. The court found Mother's recurring monthly expenses were reasonable and found the fact that the parties' child was emancipated did not provide a basis for reducing or terminating alimony and that Mother had received no increase in support since 1980 while Father's income had substantially increased.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). Furthermore, our broad scope of review does not "relieve the appellant of the burden of convincing this Court that the family court committed error." Skinner v. King, 272 S.C. 520, 523, 252 S.E.2d 891, 892 (1979).

LAW/ANALYSIS

I. Apportionment of Unallocated Support

Father argues that the family court erred by not reducing his unallocated support obligation by the portion attributable to child support, which the family court terminated. Father further argues that the court is required to allocate the support between child support and alimony under section 20-3-150. S.C. Code Ann. § 20-3-150 (1976 & Supp. 2001). We disagree with this application of the law based on the facts of this case.

In the absence of South Carolina authority on point, we find it helpful to look to other jurisdictions for guidance. "[A]n alimony award given for the support of a wife and her children is an award to the group as a family unit and cannot automatically be prorated among the wife and children upon the happening of some contingent event regarding the children, . . . except as specifically provided in the decree." Van Dyck v. Van Dyck, 429 S.E.2d 914, 916 (Ga. 1993). Such an award is subject to modification based on the changes in financial circumstances of the parties because of events involving the children. Id. at 916-17. However, the reduced support obligation presented by a child's emancipation may be offset by changes in circumstances affecting the remaining support obligations. See Graffeo v. Graffeo, 180 N.Y.S.2d 844 (N.Y. App. Div. 1958) (denying modification where the fact that one child had become self-supporting was offset by a change in circumstances due to the increased cost of maintaining the other child); Barker v. Barker, 45 N.Y.S.2d 809 (N.Y. Sup. Ct. 1943) (continuing the original allowance for the benefit of the wife, who was afflicted with a chronic ailment which rendered her unable to work, even though one of the daughters had married and the other was employed, the original award in a separation being for the support of the wife and the two daughters).

Here, a New York consent order subsequent to the divorce decree changed the support from child support and alimony to unallocated support, and the 1997 South Carolina enforcement order continued that characterization. Father's time to appeal these underlying orders is long past. The award was both fully child support and fully alimony with no distinction or proration. Neither provided for automatic proration based upon the contingent event of the parties' child's emancipation.

The family court in the order under appeal held that the support is clearly alimony and should now be characterized as such. The amount of alimony is within the trial court's sound discretion and "will not be disturbed on appeal unless an abuse of discretion is shown." Smith v. Smith, 264 S.C. 624, 627-28, 216 S.E.2d 541, 543 (1975). Father deducted amounts paid on his income taxes as alimony. The family court was therefore correct in holding that the entire amount is alimony.

II. Reduction of Alimony

Father asserted a material and substantial change of circumstances had occurred because the parties' child was now emancipated and Mother's living and housing expenses had reduced substantially while she was earning more money than at the time of the divorce hearing and no longer required support. Thus, Father argues he is entitled to termination or modification of alimony.

South Carolina law authorizes a spouse to request modification of alimony based upon a change of circumstances. S.C. Code Ann. § 20-3-170 (1976 & Supp. 2001). After a hearing in which the parties are given the opportunity to be heard and present evidence, the family court may "make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the supporting spouse, decreasing or increasing or confirming the amount of alimony provided for in such original judgment or terminating such payments." S.C. Code Ann. § 20-3-170 (1976).

The determination "'of whether to increase or decrease support based on a finding of changed circumstances is a matter committed to the sound

discretion of the family court.'" Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997) (quoting Brunner v. Brunner, 296 S.C. 60, 64, 370 S.E.2d 614, 616 (Ct. App. 1988). Thus, "the family court's determination whether to modify support will not be disturbed on appeal unless the family court abused its discretion." Id. To justify modification, the changes in circumstances must be substantial or material. Id. We find the family court did not abuse its discretion in determining there has been no substantial change in circumstances warranting modification of alimony.

The family court found that the child's completing college would do relatively little to decrease Mother's expenses or cost of living. In spite of child's graduation from college, we find no evidence in the record that Mother's monthly expenses would decrease. Moreover, in the twenty years since the divorce, Mother never sought a cost-of-living increase. Her income and standard of living has remained relatively unchanged, whereas Father's income and concomitant ability to pay alimony has substantially increased. Father argued that Mother's living circumstances had changed and asserted that she was living with a man. The family court found, and we agree, that Father's own investigator's findings support Mother's testimony that she is living in the basement of a single family home and moved out of her apartment and sublet it because gangs had moved into the neighborhood. We agree this evidence does not support a decrease in Father's monthly alimony obligation.

III. Attorney Fees

Father argues that because much of Mother's attorney's time was devoted to her motions which were denied, she has not prevailed and should not be awarded partial attorney fees. We disagree.

"The award of attorney fees is within the discretion of the court." Hardwick v. Hardwick, 303 S.C. 256, 261, 399 S.E.2d 791, 794 (Ct. App. 1990). In determining whether to award attorney fees, the Court should consider each party's ability to pay his or her own fees, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307

S.C. 471, 476-77, 415 S.E.2d 812, 815 (1992). In determining the amount of attorney fees to award, the court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Father sued Mother in South Carolina to reduce the support. She was required to take time from work and defend the action in South Carolina. Her defense of the alimony reduction action was successful. Moreover, the court found Father chose to bring this action in South Carolina and had the income to afford attorney fees, whereas Mother did not without substantially impacting her standard of living. The family court ordered Father to pay part but not all of Mother's attorney fees. It is apparent from the record that the judge appropriately considered the Glasscock factors in determining the amount of attorney fees to award. The court did not err in requiring Father to contribute $6,000 toward Mother's attorney fees.

CONCLUSION

Because the court's findings are supported by the evidence and the record and are not affected by any error of law, the order of the family court is

AFFIRMED.

CURETON and HOWARD, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Wayne Wright Appellant.

Appeal From Richland County
Marc H. Westbrook, Circuit Court Judge

Published Opinion No. 3628
Submitted March 10, 2003 – Filed April 14, 2003

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, and Warren B. Giese, all of Columbia, for Respondent.

HOWARD, J.: Wayne Wright was convicted of attempted second-degree burglary. Wright appeals, arguing the indictment was insufficient to confer subject matter jurisdiction, and the State violated Batson v. Kentucky, 476 U.S. 79 (1986), by improperly striking a juror based on racial considerations. We affirm.

FACTUAL/PROCEDRUAL BACKGROUND

A grand jury indicted Wright for attempted first-degree burglary. The caption of the indictment stated, "Attempted Burglary (Dwelling) FIRST DEGREE Common Law – No Classification," and the text of the indictment alleged:

> That TONY WAYNE WRIGHT AKA WAYNE BRUCE WRIGHT did in Richland County on or about June 7, 2000 attempted [sic] to enter the dwelling of Marion Summers without consent and with the intent to commit a crime therein and the defendant has two or more prior convictions for burglary and/or housebreaking or a combination thereof . . . .

When the case was called for trial, the State exercised peremptory challenges to strike three black jurors. Wright objected and requested a Batson hearing. The State averred Juror 22 and Juror 163 were dismissed because they had criminal records. Neither strike is in contention here. As to the dismissal of Juror 29, the assistant solicitor gave the following explanation:

> HER EMPLOYMENT IS LISTED AS A BILINGUAL TRANSLATOR. WE DIDN'T SEAT ANY OTHER TRANSLATORS FOR SURE. AND JUST BASED ON HER ACCENT, I DON'T KNOW, I JUST AM NOT SURE OF HER COMMAND OF THE ENGLISH LANGUAGE. MY FIRST -- MY GUT INSTINCT WAS THAT, EVEN

> THOUGH SHE IS A TRANSLATOR, SHE MIGHT NOT HAVE, YOU KNOW, JUST BASED ON HER ACCENT, I DON'T KNOW WHERE SHE IS FROM, IF SHE IS FROM THE UNITED STATES, AND THAT JUST GAVE ME SOME CAUSE OF CONCERN.

Responding to the State's explanation, Wright's counsel noted the State did not strike Juror 123 who was German and had a "huge accent." The State responded:

> [JUROR 29] WAS JUST MORE SOFT-SPOKEN THAN [JUROR 123], BUT -- AND MAYBE I'M JUST MISREADING HER EMPLOYMENT. I GOT THE SENSE THAT [JUROR 123] WAS SORT OF -- SHE INDICATED THAT SHE WORKED FOR THE FIRE DEPARTMENT. SHE IS SOME SORT OF COMPUTER OPERATOR. I GOT THE SENSE FROM THAT THAT SHE WAS SOME SORT OF -- I WON'T SAY 911 OPERATOR, BUT SOMETHING TO DO WITH COMMUNICATIONS BETWEEN THE FIRE DEPARTMENT AND THE PUBLIC. I COULD BE MISREADING HER EMPLOYMENT, BUT I FELT BECAUSE THAT THAT WAS HER LINE OF WORK SHE WAS PROBABLY MORE IN TUNE WITH, YOU KNOW, THE ENGLISH LANGUAGE THAN THE [JUROR 29].

The State further explained:

> I DIDN'T HAVE ANY INFORMATION THAT [JUROR 123] WAS FROM GERMANY, AND IN FACT AT THE JURY QUALIFICATION SHE INDICATED THAT

> SHE WORKED AT THE FIRE DEPARTMENT, THAT IS WHY I MADE THAT CONNECTION BECAUSE SHE WORKS ON COMPUTERS AND SHE WORKS AT THE FIRE DEPARTMENT THAT SHE MUST DO SOME SORT OF COMMUNICATIONS THERE AKIN TO 911 OPERATIONS.

The circuit court ultimately ruled the State's peremptory strikes did not violate Batson, and the jury was seated and sworn. Wright was convicted of attempted second-degree burglary and sentenced to fifteen years imprisonment. Wright appeals.

I. Indictment

Wright argues the indictment does not confer subject matter jurisdiction on the circuit court because common law burglary requires that the entry occur during the nighttime. State v. Washington, 338 S.C. 392, 397, 526 S.E.2d 709, 711 (2000). Wright argues the indictment contains no allegation that the entry was attempted at night, and since the caption and body of the indictment label the offense as attempted burglary – common law, it fails to sufficiently allege the elements of the offense. We disagree with this reading of the indictment.

Subject matter jurisdiction may be raised at any time by the parties or sua sponte by the court. See State v. Castleman, 219 S.C. 136, 139, 64 S.E.2d 250, 252 (1951). The circuit court does not have subject matter jurisdiction to convict a defendant of an offense unless there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Owens, 346 S.C. 637, 648, 552 S.E.2d 745, 751 (2001). "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must

be prepared to meet." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995).

The caption of the indictment reads, "Attempted Burglary (Dwelling) FIRST DEGREE Common Law – No Classification."

Until 1985, burglary was a common-law offense. See Patricia Seets Watson & William Shepard McAninch, Guide to South Carolina Criminal Law and Procedure, 270-71 (4th ed. 1994). Common law burglary did not have separate degrees. See Washington, 338 S.C. at 397, 526 S.E.2d at 711.

In 1985, the South Carolina legislature enacted South Carolina Code Annotated section 16-11-311 (2003), which divided the offense into three degrees of burglary, including first-degree burglary. See Guide to South Carolina Criminal Law and Procedure, supra, at 270-71. First degree burglary is defined 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:
>
> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
>
> (a) is armed with a deadly weapon or explosive; or
>
> (b) causes physical injury to a person who is not a participant in the crime; or
>
> (c) uses or threatens the use of a dangerous instrument; or
>
> (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
>
> (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 or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311 (2003).

The indictment accused Wright of attempting to commit first-degree burglary. Although first-degree burglary is a statutory offense, an attempt to commit the crime is a common-law offense. See William S. McAninch & W. Gaston Fairey, The Criminal Law of South Carolina, 354 (3d ed. 1996); see also S.C. Code Ann. § 16-1-80 (2003) ("A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense."). Thus, the State accused Wright of the common-law offense of attempting to commit the statutorily defined crime of burglary in the first degree. Therefore, for the indictment to be sufficient to confer jurisdiction, the State was required to allege the elements of both attempt and first-degree burglary, not attempt and common-law burglary.

The indictment alleges Wright attempted to enter the dwelling of another, without consent, and with the intent to commit a crime. The indictment also alleges Wright has two or more prior convictions for burglary and/or housebreaking, or a combination of the two. These allegations are sufficient to allege attempted first-degree burglary,[1] and the circuit court had subject matter jurisdiction.[2]

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[1] Furthermore, even assuming the caption was defective, there is no jurisdictional flaw. See Tate v. State, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001) ("It is the body of the indictment rather than its caption that is important. If the body specifically states the essential elements of the crime and is otherwise free from defect, defect in the caption will not cause it to be invalid." (quoting State v. Marshall & Brown-Sidorowicz, P.A., 577 P.2d 803, 811 (Kan. App. 1978))); cf. State v. Wilkes, Op. No. 25607 (S.C. Sup. Ct. filed March 17, 2003) (Shearouse Adv. Sh. No. 10 at 24, 27) (holding when reviewing an

II. Batson Violation

Wright argues the circuit court erred by allowing the State to exercise peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986).

It is well settled "[t]he Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 811 (2001). When one party strikes a member of a cognizable racial group, the circuit court must, upon request by the opposing party, hold a Batson hearing. See State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90-91 (1999). The proponent of the strike, to successfully rebut the presumption of a Batson violation, must then offer a race-neutral explanation. Id. The opponent must then show the race-neutral explanation was mere pretext, which can be established by

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indictment for jurisdictional sufficiency, the caption, when consistent with the body, may be used to supplement the body of the indictment).

[2]The circuit court had subject matter jurisdiction to convict Wright of attempted second-degree burglary because attempted second-degree burglary is a lesser-included offense of attempted first-degree burglary. See Owens, 346 S.C. at 648, 552 S.E.2d at 751 (holding the circuit court has subject matter jurisdiction to convict a defendant of an offense where: 1) there is an indictment that sufficiently states the offense, 2) the defendant waives presentment, or 3) the offense is a lesser-included offense of the crime charged in the indictment); State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) ("The primary test for determining if a particular offense is a lesser included of the offense charged is the elements test. The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense." (internal citations omitted)); S.C. Code Ann. § 16-11-312 (2003) ("A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.").

showing the proponent did not strike a similarly situated member of another race. Id.

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. Shuler, 344 S.C. at 615, 545 S.E.2d at 810. The opponent of the strike carries the ultimate burden of persuading the circuit court the challenged party exercised strikes in a discriminatory manner. State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996).

The record indicates Wright timely objected to the State's peremptory strikes. Thereafter, the State averred a race-neutral reason for each of the peremptory strikes. Specifically, as to Juror 29, the State explained that although she was a bilingual translator, she had a heavy accent, and the State was unsure as to her command of the English language. Wright then responded the State did not strike Juror 123, a white German woman who also had a "huge accent." The State countered that it was under the impression Juror 123 worked in communications at the fire department and would thus have a better grasp of the English language. Based on this dialogue, the circuit court found the State's peremptory strike did not violate Batson.

The circuit court's findings regarding purposeful discrimination rest largely on its evaluation of demeanor and credibility, matters within the peculiar province of the circuit court. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994); Hernandez v. New York, 500 U.S. 325, 364 (1991) (holding often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and "evaluation of the prosecutor's mind lies peculiarly within a circuit court's province"). Even though we are skeptical of the reasons advanced by the striking party, we will not disturb the decision of the circuit court unless its ruling is clearly erroneous. Shuler, 344 S.C. at 615, 545 S.E.2d at 810; see also Hernandez, 500 U.S. at 365 (holding the United States Supreme Court, when reviewing a state court's decision on a Batson claim, will use the clearly erroneous standard).

Viewing the record in light of our standard of review, the circuit court's conclusion was not clearly erroneous. Although we recognize Juror 29 and Juror 123 are similarly situated in that they both have foreign accents, the State distinguished them by their observable command of the English language, as well as what the State perceived their occupations to be. These were proper race-neutral considerations. See Matthews v. Evatt, 105 F.3d 907, 918 (4th Cir. 1997) (holding the State is allowed to consider tone, demeanor, facial expression, and any other race-neutral factors when striking jurors). Thus, the circuit court did not err.

CONCLUSION

Based on the foregoing, Wright's conviction for attempted second-degree burglary is

AFFIRMED.

CURETON and STILWELL, JJ., concur.