The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF BARRY T. WIMBERLY, PETITIONER

On December 1, 2003, Petitioner was definitely suspended from the practice of law for twelve months. In the Matter of Wimberly, 356 S.C. 436, 590 S.E.2d 335 (2003). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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These comments should be received no later than May 23, 2005.

Columbia, South Carolina

March 23, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14

March 28, 2005

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Lee Leamon, Petitioner

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Charles B. Simmons, Jr., Trial Judge
John W. Kittredge, Post-Conviction Judge

Opinion No. 25957
Submitted February 16, 2005 - Filed March 28, 2005

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Petitioner.

Henry Dargan McMaster, John W. McIntosh, Salley W. Elliott, and Elizabeth R. McMahon, all of the Office of the Attorney General, of Columbia, for Respondent.

JUSTICE BURNETT: Robert Lee Leamon (Petitioner) pled guilty to five counts of armed robbery and was sentenced to concurrent terms of imprisonment for twenty-five years on each count. The post-conviction relief (PCR) judge concluded Petitioner's PCR application was time-barred. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner was jailed in North Carolina on December 6, 1992. On December 9, 1992, South Carolina placed a detainer on Petitioner. In October 1995, Petitioner was indicted by the Greenville County Grand Jury for five counts of armed robbery. Petitioner was transported to South Carolina and on November 20, 1995, he pled guilty to those charges. After pleading guilty, Petitioner was returned to North Carolina to serve his remaining sentence for crimes committed in that jurisdiction.

On November 22, 1999, after serving his sentence in North Carolina, Petitioner was transferred to South Carolina to complete his sentence for the armed robbery convictions. Petitioner filed his PCR application on May 19, 2000. The PCR judge dismissed the PCR application, finding it was filed after the one-year statutory filing period. Petitioner appeals and requests this Court remand the case for a full evidentiary hearing.

ISSUE

Does the statute of limitations for PCR applications, S.C. Code Ann. § 17-27-45(A) (2003), apply to an applicant who is incarcerated in another jurisdiction?

STANDARD OF REVIEW

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b) and (c) (2003). When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume

facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Similarly, when reviewing the propriety of a dismissal, this Court must view the facts in the same fashion. See S.C. Code Ann. § 17-27-80 (2003) (PCR actions are governed by usual rules of civil procedure); Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000).

In a case raising a novel issue of law, the appellate court is free to decide the question of law with no particular deference to the trial court. Osprey v. Cabana Ltd. Partn., 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); I'On v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718 (2000). The Court will reverse the PCR judge's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004); Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

Petitioner argues he filed his PCR application within one year from the date he returned to South Carolina. Petitioner contends this Court should extend the rationale set forth in Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), and rule Petitioner was denied his "one bite at the apple" because his involuntary detention in North Carolina prevented him from timely filing his PCR application. We disagree.

A PCR application ordinarily "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(A) (2003).

We conclude incarceration in another state does not toll the running of the statute of limitations. Petitioner had a full year to submit a post-conviction petition. Ignorance of the statute of limitations is not an excuse for late filing, even when the Petitioner claims he did not learn of the statute because he was incarcerated in another state. See e.g., Brown v. State,

928 S.W.2d 453, 456 (Tenn. Crim. App. 1996); Phillips v. State, 890 S.W.2d 37, 38 (Tenn. Crim. App. 1994).

Petitioner relies on this Court's decisions in Carter v. State, 337 S.C. 17, 522 S.E.2d 342 (1999) and Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002) in arguing for equitable relief. These cases are distinguishable from the present case.

In Carter, the defendant was incarcerated in federal prison. The PCR judge dismissed the defendant's PCR application without prejudice allowing the defendant the right to apply for PCR when he was later incarcerated in a State facility. This Court affirmed the PCR judge's dismissal of the case without prejudice to the defendant's right to later file an application. The present case is distinguishable. In Carter, the State consented to the dismissal of the PCR application after the statute of limitations had run and agreed the defendant should be allowed to refile at a subsequent date. Therefore, the State was estopped from asserting the statute of limitations. Carter, 337 S.C. at 19, 522 S.E.2d at 342.

Petitioner contends this Court's holding in Wilson supports Petitioner's argument for equitable relief. We disagree. In Wilson, the defendant instructed his attorney to appeal his conviction and the attorney failed to do so. Wilson filed a PCR application alleging ineffective assistance of counsel. The PCR judge dismissed the defendant's claim because it was untimely under the statute of limitations. This Court reversed the PCR judge and remanded the case for an evidentiary hearing to determine if the defendant knowingly and intelligently waived his right to direct appeal. Wilson, 348 S.C. at 218, 559 S.E.2d at 583. In the present case, Petitioner does not allege he instructed his attorney to appeal his conviction.

Petitioner also relies on this Court's decision in Clayton v. State, 278 S.C. 655, 301 S.E.2d 133 (1983). In Clayton, the Court concluded the State does not have the duty and authority to ensure an out-of-state prisoner's presence at a South Carolina PCR hearing. However, the fact that the State is not required to transport federal inmates for State PCR proceedings, does not

prevent an out-of-state inmate from *filing* a PCR application within the statute of limitations.

CONCLUSION

For the foregoing reasons, we affirm the decision of the PCR judge and conclude a prisoner's incarceration in another jurisdiction does not equitably toll the limitations period for post-conviction relief.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Herman Winns, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

ON WRIT OF CERTIORARI

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge
Daniel F. Pieper, Post-Conviction Relief Judge

Opinion No. 25958
Submitted December 2, 2004 – Filed March 28, 2005

REVERSED

Capers G. Barr, III, of Barr, Unger & McIntosh, of Charleston, for respondent-petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, all of Columbia, for petitioner-respondent.

CHIEF JUSTICE TOAL: The post-conviction relief (PCR) judge vacated respondent-petitioner Herman Winns's conviction for murder, after finding that the indictment was defective because it failed to state the time and place of the victim's death. The PCR judge also ruled that Winns's claims regarding ineffective assistance of counsel lacked merit. This Court granted the State's petition for certiorari on the indictment issue and Winns's petition for certiorari on the ineffective assistance of counsel issues. After careful consideration, we dismiss Winn's petition for certiorari as improvidently granted on the ineffective assistance of counsel issues, and we reverse the PCR's judge's ruling on the indictment issue.

FACTUAL/PROCEDURAL BACKGROUND

On a Friday afternoon, after having been laid off from his job earlier in the week, Winns went to St. Stephens, South Carolina, to visit some family and friends. Once there, Winns decided to buy some crack cocaine. A friend suggested that Winns visit John Arthur Mouzon, the victim, who was a known drug dealer and lived in Belangia Apartments. Winns and Mouzon had never met before. At approximately 1:30 p.m., Winns went to Mouzon's apartment and bought $50 worth of crack cocaine and smoked it in Mouzon's apartment.

After Winns spent all of his money, he asked Mouzon for a ride to Winns's aunt's house. Winns's aunt gave him $20, which he used to buy more crack cocaine. Although Winns went to a local convenience store at least four or five times to purchase beer, and visited other people in the area, he spent most of the afternoon and evening at Mouzon's apartment. Winns eventually ran out of money again, and asked Mouzon if he would give Winns some crack cocaine anyway, and Mouzon did.

Winns testified that later that night, he and Mouzon were sitting on the couch when Mouzon put his hand on Winns's thigh. Because of this, Winns decided to leave. But before leaving, Winns went into the bathroom, and when he came out, Winns found Mouzon lying on the bed, naked, with a sheet pulled up to his waist. Winns testified that, instead of leaving right away, he walked toward the bed to get more crack cocaine. When Winns

was by the bed, Mouzon grabbed Winns by the groin, pulled him onto the bed, and told him that he needed to pay him back for the crack he had given him. Winns reacted by hitting Mouzon on the head several times with an iron[1] until Mouzon released his grip.

At approximately 3:40 a.m., Winns left the apartment with the iron in his hand, eventually throwing it into the bushes. Later, at approximately 7:30 a.m., Mouzon's cousin came to the apartment and found Mouzon lying on the bed. She said he was cold and did not have a pulse. The police arrived later that morning and determined that Mouzon had been dead for a while. That afternoon, Winns turned himself in and admitted that he struck Mouzon with the iron.

At trial, the central issue was whether Winns acted in self-defense or whether his actions constituted manslaughter or murder. The jury found Winns guilty of murder and the judge sentenced Winns to life imprisonment. Winns appealed and this Court affirmed his conviction. *State v. Winns*, Mem. Op. No. 00-MO-078 (S.C. Sup. Ct. filed May 26, 2000). Winns applied for PCR.

After a hearing, the PCR judge found that the indictment was flawed because it did not state the time and place of the victim's death. As a result, the judge vacated the conviction, finding that the trial court did not have subject matter jurisdiction. The judge also ruled that Winns's ineffective assistance of counsel claims lacked merit.

The State petitioned this Court for certiorari on the indictment issue, and Winns petitioned on the ineffective assistance of counsel issues. This Court granted both petitions. But after careful consideration, we dismiss certiorari as improvidently granted on the ineffective assistance of counsel issues, and address only the following issue, raised by the State:

[1] The iron was the type heated by a stove and used for ironing clothes.

Did the PCR court err in vacating Winns's conviction on the basis that the indictment failed to state the time and place of the victim's death?

LAW/ANALYSIS

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. *Id.* at 109-110, 525 S.E.2d at 517.

To establish a claim that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 688, 694 (1984); *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

INDICTMENT

The State argues that the PCR judge erred in ruling that the trial court lacked subject matter jurisdiction because the indictment failed to state the time and place of the victim's death. We agree.

South Carolina statutory law provides the following:

> Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously,

> wilfully and of his malice aforethought kill and murder the deceased.

S.C. Code Ann. § 17-19-30 (1985).

Moreover, this Court has held that an indictment for murder is sufficient "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 if an acquittal or a conviction thereon may be pleaded as a bar to any subsequent prosecution." *Joseph v. State*, 351 S.C. 551, 561, 571 S.E.2d 280, 285 (2002) (citing *State v. Owens*, 346 S.C. 637, 648, 552 S.E.2d 745, 751 (2001)). In addition, the court must look at the indictment with a practical eye in view of the surrounding circumstances. *State v. Gunn*, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993). Whether an indictment could be more certain or definite is irrelevant. *State v. Knuckles*, 354 S.C. 626, 628, 583 S.E.2d 51, 51-52 (2003).

In the present case, the PCR judge ruled that the trial court lacked subject matter jurisdiction because the indictment did not allege the time and place of the victim's death. Accordingly, the PCR judge vacated Winns's conviction. In support of this ruling, the PCR court cited *State v. Rector*, 158 S.C. 212, 155 S.E. 383 (1930). In that case, the Court held that the use of the words "then and there" sufficiently stated the time and place of death because those terms clearly referred back to the only date and place listed in the indictment. *Id.* at 216, 155 S.E. at 387.

In the case at hand, the indictment reads as follows:

> That HERMAN WINNS did in Berkeley County on or about October 4, 1997 while at apartment #5 at Belangia Apartments in the town of St. Stephen, South Carolina, with malice aforethought, strike John Arthur Mouzon several times in the head with a metal object, said blows to the head being the proximate cause of the death of John Arthur Mouzon. This action being in violation of §16-3-10, South Carolina Code of Law (1976), as amended.

We hold that the PCR court erred in finding the indictment defective. Although the indictment did not state that Mouzon did "then and there" die, the only logical reading of the indictment is that on October 4, 1997, Winns hit Mouzon in the head several times, at the Belangia Apartments, and Mouzon died either at the time he was attacked or soon thereafter. The indictment provides the time of death (October 4, 1997) and the place of death (the Belangia Apartments, St. Stephens, South Carolina). Had the victim been found in a different location or on a different date, the indictment, as written, may have been insufficient. But because Mouzon was found dead in his bed, on the same day and in the same place where Winns struck him, and because the indictment explained that the blows to the head were the "proximate cause of death," we find that the indictment states the offense of murder with sufficient certainty and particularity such that Winns knew what he was being called upon to answer.[2] Accordingly, the indictment was not defective.

CONCLUSION

For the foregoing reasons, we REVERSE the PCR court's ruling vacating Winns's conviction, and hold that the indictment was sufficient to confer subject matter jurisdiction.

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

[2] We note that our decision in this case is consistent with the recently published opinion of *State v. Gentry*, Op. No. 25949 (S.C. Sup. Ct. filed March 7, 2005), which explains that indictments are notice documents, not documents required to confer subject matter jurisdiction. *See* S.C. Const. art. V, § 11 (providing that circuit courts are "general trial court[s] with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law").

JUSTICE PLEICONES: I respectfully dissent. In reviewing the sufficiency of an indictment, we look solely to the words used therein and not to the evidence adduced at trial. Here, the post-conviction relief (PCR) judge, relying upon this Court's long-established precedent, found the murder indictment invalid because it failed to sufficiently allege the time and place of the victim's death as required by S.C. Code Ann. § 17-19-30 (1985). I agree, and would therefore affirm.

The "time and place of death" requirement found in § 17-19-30 merely codifies the common law. State v. Rector, 158 S.C. 212, 155 S.E. 385 (1930). Where the indictment references the place and date of the assault, and alleges that the victim died "then and there," this requirement has been satisfied. Id.; see also State v. Platt, 154 S.C. 1, 151 S.E. 206 (1930); State v. Blakeney, 33 S.C. 111, 11 S.E. 637 (1890). The present indictment alleges the time and place of the assault, but is silent on the time and place of the victim's death. As the Court said in State v. Rector:

> The crime of murder is a composite one. It includes the assault committed upon a person . . . and the resulting death from that assault. The State must prove not only the assault and the death occurring from it, but the time of the assault and the time of the death, as time is recognized in the law. In addition, the state [sic] must prove the place of the assault and the place of death. These necessary elements of the crime of murder must not only be proved, before a person accused may be lawfully convicted, but they must be alleged in the indictment returned against the accused by the grand jury. The provisions of the Constitution, recognizing and following the principles of the common law, require the indictment to contain allegations to those effects.

The PCR judge correctly vacated respondent-petitioner's murder conviction, there being no valid indictment charging him with that offense. In light of this, there is no need to address the allegations of ineffective assistance of counsel.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jack Hurd, Respondent,

v.

Williamsburg County and
Williamsburg County Transit
Authority, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
John M. Milling, Circuit Court Judge

Opinion No. 25959
Heard January 4, 2005 – Filed March 28, 2005

AFFIRMED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, and Stephen Paul Bucher, of Bucher Firm, P.C., of North Charleston, for Petitioners.

Ladson Fishburne Howell, Jr., of Howell and Christmas, L.L.C., and Richard G. Wern, of The Wern Law Firm, P.A., both of North Charleston, and Ronnie Alan Sabb, of Law Offices of Ronnie A. Sabb, of Kingstree, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision in Hurd v. Williamsburg County, 353 S.C. 596, 579 S.E.2d 136 (Ct. App. 2003). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On February 1, 1996, Respondent (Hurd) was struck by an automobile after he exited a bus owned and operated by Petitioners Williamsburg County and the Williamsburg County Transit Authority (collectively referred to as the "Transit Authority").

At approximately 6:00 AM on February 1, 1996, Hurd boarded the bus in route to Myrtle Beach. The bus' interim destination was a transfer station, known as a "Park and Ride," where passengers could purchase tokens, board buses, and transfer to other locations. Before arriving at the Park and Ride, the bus stopped on the shoulder of the road across a two-lane highway from Mingo's store, a gas station and restaurant. Hurd testified he was "half awake and half asleep" when the bus stopped. The stopping of the bus roused Hurd, whereupon he asked the bus driver where the disembarking passengers were going. The driver informed Hurd the passengers were going for breakfast at Mingo's. Hurd stated he exited and walked to the rear of the bus, to join the other passengers, without any instructions from the driver.

Hurd testified the bus began to pull off the shoulder and into the highway as Hurd approached the highway. The bus was moving when Hurd stepped into the highway. Because Hurd was standing at the rear of the bus where the engine is located, he was not able to hear the oncoming car. Hurd testified he was unable to see the car because of the angle of the moving bus and stepped into the highway. The driver of the car stated he never saw Hurd prior to impact.

Respondent filed suit against Petitioners and the jury returned a verdict finding Hurd 42 percent at fault and the Transit Authority 58 percent at fault. The jury awarded Hurd $675,000 in damages. The trial court reduced the award of damages to $250,000 pursuant to the South Carolina

Tort Claims Act (SCTCA). The Court of Appeals affirmed the jury's verdict finding the trial court did not err in denying Transit Authority a directed verdict. Transit Authority appeals.

ISSUES

I. Did the Court of Appeals change the common law standard of negligence in determining the trial judge properly submitted the case to the jury?

II. Did the Court of Appeals err in concluding Hurd presented evidence allowing the inference that the Transit Authority's actions were the proximate cause of the accident?

III. Did the Court of Appeals err in concluding Hurd presented evidence Transit Authority's negligence exceeded Hurd's negligence?

LAW/ANALYSIS

When reviewing a ruling on a motion for directed verdict, we must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. F & D Elec. Contractors, Inc. v. Powder Coaters, Inc., 350 S.C. 454, 567 S.E.2d 842 (2002). If the evidence as a whole is susceptible of more than one reasonable inference, the trial judge must submit the case to the jury. Quesinberry v. Rouppasong, 331 S.C. 589, 503 S.E.2d 717 (1998). We will reverse the trial court if there is no evidence to support the trial court's decision to submit the case to the jury. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

I.

Transit Authority argues the Court of Appeals erred in changing the common law standard of negligence from reasonable care to "best choice care" in concluding Transit Authority was not entitled to a directed verdict.

Specifically, Transit Authority contends Hurd was let off in a position of reasonable safety and Hurd failed to present evidence establishing Transit Authority breached any duty of safety owed to Hurd. We disagree.

During the trial, Robert Roberts, an expert in the area of traffic engineering and traffic and pedestrian safety, testified it was unreasonable for the bus driver to discharge the passengers on the shoulder of Highway 41. Roberts also testified that the Park and Ride was a safety device, among other things. Booker T. Pressley, a former director of the Transit Authority, testified that chief among the concerns that led to the County's construction of the Park and Ride was high traffic congestion. Pressley stated Transit Authority's policy is to only let passengers off at the Park and Ride on Highway 41 because of the congestion. See Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct. App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages). Because more than one inference could be drawn from this evidence, we conclude the Court of Appeals correctly found the trial judge did not err in denying Transit Authority's motion for directed verdict.[1]

The Court of Appeals did not heighten the standard of care in concluding Hurd presented evidence supporting his allegation that he was not discharged in a reasonably safe place. Instead, the Court of Appeals relied on this Court's decision in Flynn v. Carolina Scenic Stages, 237 S.C. 340, 117 S.E.2d 364 (1960). In Flynn, this Court acknowledged that the relation of passenger and a common carrier ordinarily ends when the passenger steps from a bus into a reasonably safe place on a public highway. However, a carrier is not then wholly discharged of any duty whatsoever to such passenger. It still owes the duty of exercising ordinary care to see that after

[1] The logic of the dissent is inescapable, however, our duty is guided by a standard requiring submission to the fact-finder of contested issues of fact. Whether the shoulder of the road was a reasonably safe place for the discharge of passengers was a contested issue the jury resolved against Transit Authority.

alighting safely the passenger is not in a position or situation as to be imperiled by the starting up of the bus. Flynn, 237 S.C. at 345, 117 S.E.2d 364 at 367. We conclude the trial judge properly submitted the case to the jury because Hurd presented evidence based on the facts of this case that the shoulder of the highway was not a reasonably safe place to allow Hurd to exit the bus.

II.

Transit Authority argues the Court of Appeals erred in concluding Hurd presented evidence that Transit Authority's actions were the proximate cause of Hurd's injuries. Transit Authority contends the side of the road where the bus discharged passengers departing for Mingo's was a place of reasonable safety as a matter of law. We disagree.

In a negligence action the plaintiff must prove proximate cause. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). Proximate cause requires proof of both causation in fact and legal cause. Oliver v. South Carolina Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Oliver, 309 S.C. at 316, 422 S.E.2d at 130. Legal cause is proved by establishing foreseeability. Id. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001).

We conclude Hurd presented evidence of both factual and legal causation. Hurd presented evidence that "but for" the bus pulling out concurrently with Hurd attempting to cross the road, Hurd would not have been struck by the oncoming car. Hurd also presented evidence that the vehicle-pedestrian accident was foreseeable. Pressley's testimony is

evidence suggesting (1) the Transit Authority knew that the location of the accident was dangerous to pedestrians; (2) the County constructed the Park and Ride to minimize known dangers at this intersection; (3) the Transit Authority implemented a policy that all drivers were to use the Park and Ride rather than the shoulder of the Highway; (4) the Transit Authority violated its own safety policy by discharging Hurd and the other passengers on the side of the highway; (5) Transit Authority issued the bus driver a warning for violating the safety policy on the date of the accident; and (6) the starting of the bus prevented Hurd from hearing or seeing traffic on the highway.

Based on the foregoing evidence, the Court of Appeals was correct in affirming the trial judge's decision to allow the question of proximate cause to go to the jury. Hurd does not contend the Transit Authority's negligence was the sole cause of his injuries. Nevertheless, Hurd presented evidence at trial that the Transit Authority's negligence contributed to the accident. Therefore, the case was properly submitted to the jury.

III.

Transit Authority argues the Court of Appeals erred in concluding Hurd presented evidence that Transit Authority's negligence exceeded Hurd's own negligence. We disagree.

A plaintiff may only recover damages if his own negligence is not greater than that of the defendant. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). The determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn. Creech v. South Carolina Wildlife and Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). In a comparative negligence case, the trial court should grant a motion for directed verdict if the sole reasonable inference from the evidence is that the non-moving party's negligence exceeded fifty percent. Bloom, 339 S.C. at 422, 529 S.E.2d at 713.

We conclude the Court of Appeals correctly determined Hurd presented evidence allowing the jury to draw a reasonable inference that

Transit Authority's negligence exceeded fifty percent. A directed verdict for Transit Authority would have been inappropriate because Hurd presented evidence that Transit Authority violated its own safety policy by discharging passengers on the shoulder of the road. This evidence is reinforced by Transit Authority's own admission that the driver of the bus was given a warning in connection with the incident.

CONCLUSION

Because there is evidence that would allow a jury to conclude Transit Authority was negligent in discharging Hurd on the shoulder of the road, we affirm the Court of Appeals' decision.

MOORE and WALLER, JJ., concur. TOAL, C.J., and PLEICONES, J., dissenting in separate opinions.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, the Transit Authority exercised reasonable care in dropping off its passenger. Therefore, I would reverse the court of appeals' decision holding that the Transit Authority breached its duty of care to Hurd.

I disagree with the majority because, in my opinion, the majority holds the Transit Authority to a higher duty of care than what is required of common carriers. A common carrier is required to allow a passenger to exit the bus in a reasonably safe place. *Flynn v. Carolina Scenic Stages*, 237 S.C. 340, 345, 117 S.E.2d 364, 366-367 (1960). Further, the relationship between passenger and carrier ordinarily ends when the passenger steps from a bus into a reasonably safe place on a public highway. *Id*. Other courts have been reluctant to hold common carriers liable for injuries suffered after the passenger safely exits. *See e.g. Burton v. Des Moines Metro. Transit Auth.*, 530 N.W.2d 696, 699 (Iowa 1995) (holding that the duty of a common carrier ends when the passenger safely exits and carriers are not liable for injuries caused by the passengers decision to step into traffic). In *Burton*, the Iowa Supreme Court explained the rationale for holding that a carrier's duty ends once a passenger exits the bus:

> [A]fter alighting, *the passenger's individual choice directs where he or she will walk, the passenger is in a better position to guard against the dangers of moving vehicles* and common sense, logic, and public policy simply do not support extending a duty of care of the public carrier to insure that once the passenger has safely departed, the streets will be free from defect.

Id. (citing *Connolly v. Rogers*, 599 N.Y.S.2d 731, 732 (N.Y. App. Div. 1993) (quoting *Blye v. Mahattan*, 511 N.Y.S.2d 612, 615, *aff'd*, 528 N.E.2d 1225 (N.Y. 1988)) (emphasis added).

In the present case, the Transit Authority dropped Hurd off on the shoulder of the road, out of harm's way. The gravel shoulder was a defined turn out at least 200 feet long and at least twice as wide as the bus. Hurd then chose to cross the street, taking himself out of a safe place and inserting himself into a dangerous place, that is, the middle of the road. Hurd claims

that the Transit Authority bus blocked vision when it pulled off, but the fact is, Hurd was in a safe place until he decided to cross the street before he could see clearly.[2] In essence, he walked right out in front of a car with its lights on. In my opinion, the Transit Authority fulfilled the duty owed to Hurd by allowing Hurd to exit in a reasonably safe place – the shoulder of the highway. Because I believe the majority's holding heightens the duty of care owed by common carriers to a level beyond reasonable care, I would reverse the court of appeals' decision and hold that the Transit Authority was entitled to a directed verdict.

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[2] It is undisputed that the shoulder of the road was a reasonably safe place. In fact, on cross-examination of Hurd's expert, the following exchange took place:

> Q. [W]hen the bus driver discharged Mr. Hurd along the roadside in the shoulder that at the moment that he got out of the bus and was there along the shoulder he was in a place where it was safe for him to be…
>
> A. As long as he stood there. Yes. Reasonably safe, sir.

Instead the issue on appeal has been framed to determine whether the existence of a "safer" drop off area, such as a Park and Ride, makes the place the passenger actually exited unsafe. This is simply not the appropriate standard that common carriers are charged to uphold. The majority heightens the duty a common carrier owes to its passengers to a "best choice" standard, which is inconsistent with the current standard of care for common carriers. I fear that heightening the standard of care for a common carrier could create a nightmare scenario for rural area transit authorities. For example, under the rationale of the majority, a carrier could be found negligent for dropping off a passenger in a *reasonably safe place* because the carrier did not choose the best place to drop off the passenger, which might be two blocks down the street.

JUSTICE PLEICONES: I agree with the dissent that the Transit Authority was entitled to a directed verdict, as there was no evidence that the shoulder of the road was an unreasonable place to let Hurd exit the bus.

The Supreme Court of South Carolina

In the Matter of James
Carroll Sexton, Jr., Respondent.

ORDER

Respondent was indicted on charges of mail and wire fraud, money laundering, conspiracy to money launder, forfeiture, and aiding and abetting/causing an act to be done in violation of various provisions of the United States Code.[1] The indictment alleges respondent and others conspired to defraud individuals through an offshore banking/investment scheme. The Office of Disciplinary Counsel seeks to place respondent on interim suspension pursuant to Rule 17(a) and (b), RLDE, of Rule 413, SCACR.

The petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

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[1] In documentation submitted by respondent, respondent states he pled guilty to various counts of the indictment on March 9, 2005.

IT IS SO ORDERED.

s/Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

March 22, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Johnny McMillan, Jimmie Griner and Hughsie Trowell, Respondents,

v.

South Carolina Department of Agriculture, Appellant.

Appeal From Hampton County
Luke N. Brown, Jr., Special Referee

Opinion No. 3963
Heard February 9, 2005 – Filed March 14, 2005

AFFIRMED IN PART and REVERSED IN PART

Andrew F. Lindemann and William H. Davidson, II, both of Columbia, for Appellant.

John E. Parker and Ronnie L. Crosby, both of Hampton, for Respondents.

BEATTY, J.: The South Carolina Department of Agriculture (SCDA) appeals the decision of the special referee finding Johnny McMillan and Jimmie Griner (collectively Respondents) were entitled to recover damages, pre-judgment interest, and attorney's fees from the Warehouse Receipts Guaranty Fund.[1] We affirm in part, and reverse in part.

FACTS

McMillan and Griner are farmers in Hampton County. Each contracted with Hampton County Warehouse (the warehouse) to store cotton. The warehouse was a licensed facility by the SCDA pursuant to sections 39-22-10 through –200 of the South Carolina Code (Supp. 2004). McMillan stored 1,180 bales of cotton and Griner stored 358 bales of cotton.

In addition to contracting with the warehouse for storage, Respondents both contracted with Sea Island Cotton Trading Company (the broker) to sell the cotton.[2] Approximately three months after entering the contract with the broker, Respondents each received an advance of 80 percent of the market price for cotton at that time with the understanding that when the market price increased the cotton would be sold as authorized by Respondents. Although warehouse receipts for the cotton indicated ownership was transferred to the broker, it is unclear from the record when this took place.

The warehouse and the broker each declared bankruptcy in 1998. Respondents were unable to sell their cotton and failed to collect the remaining 20 percent owed for the cotton. Pursuant to the Warehouse Receipts Guaranty Fund and section 39-22-15 of the South Carolina Code (Supp. 2004), Respondents filed claims with SCDA to recover the 20 percent loss they claim resulted from the warehouse's bankruptcy. The former director of SCDA denied the claims. In the denials, he noted the receipts

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[1] Because Hughsie Trowell's claim was paid in full, he is not a party in this appeal.

[2] Hampton County Warehouse and Sea Island Cotton Trading Company were both owned by David Prosser.

indicating a sale to the broker and suggested Respondents seek other legal action. The denial makes no mention of any further administrative remedy, including no mention of an appeal of his decision.

Respondents then filed claims in bankruptcy court, seeking to collect the losses. However, the bankruptcy court, upon a finding that ownership was never transferred to the broker and remained with Respondents, rejected the claims.

Respondents then filed the underlying action, seeking to collect a "loss" from the Warehouse Receipts Guaranty Fund. SCDA filed a motion for summary judgment, arguing Respondents failed to exhaust their administrative remedies prior to bringing suit in circuit court. Circuit Court Judge Diane Goodstein denied the motion.

The Honorable Luke Brown, acting as special referee, heard the claim. At the hearing, McMillan and Griner each testified regarding their transactions with the warehouse and the broker. Both maintained they never sold the cotton to the broker, but merely received an advance. Each asserted ownership should not have been transferred to the broker.

Additionally, Louie Conder, former director of the warehouse system, testified extensively regarding the receipts issued to the broker and whether the receipts were proper under the statute or the regulations. He also testified Respondents had not been paid the full amount for their cotton.

The referee found Respondents had not transferred ownership of the cotton to the broker and the receipts were not valid. The referee concluded Respondents demonstrated a "loss" under section 39-22-15 and were entitled to recover the 20 percent still owed for the cotton. He also found Respondents were entitled to recover pre-judgment interest and attorney's fees.

SCDA filed a motion to alter or amend pursuant to Rule 52(b), SCRCP. The referee denied SCDA's requested relief. He found the action was not an appeal from an administrative decision, and Respondents were not required to

exhaust administrative remedies. Finally, the referee set the award of attorney's fees to Respondents. This appeal followed.

DISCUSSION

I. Exhaustion of Administrative Remedies

SCDA contends the referee erred in finding Respondents were not required to exhaust their administrative remedies prior to filing suit in circuit court for damages. Additionally, SCDA maintains because section 22 of Article I of the South Carolina Constitution provides due process and requires an opportunity for an individual to be heard, Respondents still had administrative remedies that could be pursued. We disagree and find nothing requiring Respondents to exhaust administrative rights prior to bringing this action in circuit court.

First, this issue is not preserved for review on appeal. A party must raise the issue of the exhaustion of administrative remedies and receive a ruling by the trial court in order to preserve it for review on appeal. Food Mart v. South Carolina Dep't of Health & Envtl. Control, 322 S.C. 232, 233, 471 S.E.2d 688, 688 (1996). "A denial of a motion for summary judgment does not establish the law of the case, and the issues raised in the motion may be raised later in the proceedings." Brown v. Pearson, 326 S.C. 409, 416, 483 S.E.2d 477, 481 (Ct. App. 1997).

While SCDA raised the issue in a summary judgment motion prior to trial, the issue was never raised to the referee until SCDA made its motion to alter or amend under Rule 52(b), SCRCP. Accordingly, the issue is not preserved because it cannot be raised for the first time in a motion to alter or amend. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

The Administrative Procedures Act (APA) provides for judicial review of a contested case after agency action upon the party's exhaustion of

administrative remedies. S.C. Code Ann. § 1-23-380 (2005). Pursuant to section 1-23-310(3) of the South Carolina Code: "'Contested case' means a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(3) (2005).

This court explicated:

> "The doctrine of exhaustion of administrative remedies *only* comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs., 92 Md. App. 551, 609 A.2d 353 (1992). A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered." Id. at 360.

Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2002).

In the instant case, a statutory procedure does not exist to provide an administrative remedy. There is no "contested case" for which the provisions of the APA would apply. As additional proof of the lack of remedies, the denial by the director of SCDA does not point to any further administrative avenues available to Respondents. The director of SCDA suggests bankruptcy or other legal proceedings may be available to Respondents. The denial does not mention the availability of an appeal or subsequent hearing of any type. Accordingly, as there are no administrative remedies set forth and available to Respondents, they should not be barred from bringing this action in circuit court.

Section 22 of Article I of the South Carolina Constitution states:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22.

In discussing Section 22 of Article I, the South Carolina Supreme Court explained:

> In recognition of the increasing number of governmental powers delegated to administrative agencies, South Carolina Constitution article I, § 22 was added to the 1895 Constitution in 1970 "as a safeguard for the protection of liberty and property of citizens." *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895,* p. 21 (1969).
>
> . . .
>
> We have interpreted this provision as specifically guaranteeing persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved. Stono River EPA v. Department of Health and Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991).

Ross v. Med. Univ. of South Carolina, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997).

Respondents filed a claim with SCDA, which was ultimately denied. Respondents have not claimed a violation of their due process rights under section 22 of Article I. Nor have they asserted they were deprived of notice or an opportunity to be heard. They have brought suit seeking to collect money damages owed pursuant to a statutorily created reimbursement fund. It does not appear section 22 of Article I was intended to be used by the agency to force a claimant to proceed under the Administrative Procedures Act when the agency does not have a procedure in place. Accordingly, we find the referee properly determined Respondents were not required to exhaust any additional administrative remedies prior to brining suit in circuit court.

II. Type of Action

SCDA asserts the referee failed in determining the type of action involved in the underlying case. The SCDA avers the action is an appeal from an administrative agency or an action under the Tort Claims Act and not an action for money damages. We find the issue is not preserved for review on appeal and, on the merits, the action would be in the nature of a declaratory judgment action or an action for money damages under a statute.

This issue was never raised to the referee for a ruling or a determination prior to the court's issuance of its final order. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Additionally, the first time it was raised to the court was in SCDA's motion to alter or amend. It is not appropriate to raise an issue for the first time in a Rule 52(b) motion that could have been raised at trial. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

As discussed above, this case is not a continuation of an administrative process. There is no provision in the code or the regulations allowing for administrative hearings or requiring the Warehouse Receipts Guaranty Fund to follow the APA. Thus, SCDA's argument that this case is nothing more than an appeal of an administrative decision is without merit.

Additionally, this case does not fall within the auspices of the Tort Claims Act, section 15-78-10 of the South Carolina Code (2005). "The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against the government." Washington v. Lexington County Jail, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct. App. 1999) (emphasis added). This is not a case in which Respondents brought suit based upon the government's negligence or to redress a tort committed by SCDA. They are bringing a suit to collect monetary damages pursuant to a section of the South Carolina Code, which establishes the fund to pay those damages. Therefore, the trial court did not err in finding the appeal was not covered by the South Carolina Tort Claims Act.

While section 39-22-15 of the South Carolina Code (Supp. 2004) does not specifically authorize a suit to collect money owed from the fund, it is clear the only means of redress would be a cause of action against the Warehouse Guaranty Fund for monetary damages or a declaratory judgment action. Accordingly, we find the underlying action is an action to collect monetary damages pursuant to statute, which authorizes the payment for a "loss."

III. Loss

SCDA contends Respondents failed to prove they suffered a loss as a result of having cotton stored with the warehouse. SCDA maintains Respondents' loss is the result of the bankruptcy of the broker and not in any way connected to the storage of the cotton at the warehouse. We disagree.

According to section 39-22-15 of the South Carolina Code:

> For purposes of this chapter, "loss" means any monetary loss over and beyond the amount protected by a warehouseman's bond sustained as a result of storing a commodity in a state-licensed warehouse including, but not limited to, any monetary loss over and beyond the amount protected by a warehouseman's bond sustained as a result of the warehouseman's bankruptcy, embezzlement, or fraud.

S.C. Code Ann. § 39-22-15 (Supp. 2004).

Respondents each stored cotton in the warehouse at the time it declared bankruptcy. At that time, Respondents had each been paid an 80 percent advance by the broker and were waiting to sell their cotton to collect the remaining 20 percent. SCDA claims the loss was the result of the bankruptcy of the broker and not of the warehouse. SCDA asserts any additional payment to Respondents would have been from the broker. However, this ignores the fact that the warehouse also declared bankruptcy, thereby preventing Respondents from selling their cotton, whether through the broker or in any other fashion.

Section 39-22-15 only requires the parties to have suffered a loss "as a result of storing a commodity in a state-licensed warehouse." This occurred when the warehouse declared bankruptcy and Respondents were unable to sell their cotton for an appropriate price to recover the remaining 20 percent owed to them after their advance. Accordingly, we find Respondents demonstrated they suffered a loss compensable under section 39-22-15.

IV. Receipts

SCDA contends the referee erred in finding Respondents' cotton was not sold to the broker. SCDA asserts the court erred in relying upon section 39-22-200 of the South Carolina Code and Regulation 5-493 to find the

receipts issued by the warehouse were invalid and no transfer of the cotton occurred. We disagree.

Section 39-22-200 of the South Carolina Code states in pertinent part:

> A state warehouse receipt must be issued by the warehouseman to a person storing commodities who requests it. . . . No receipt may be issued in the name of the storing warehouse, or its owners, on commodities being purchased by the warehouse until the commodity has been paid for in full, even if a contract has been executed establishing that the title to the commodity has passed to the warehouse or its owners unless the buyer and seller execute an affidavit within the contract stating that the seller conveys title and ownership of the commodity and forfeits all of his rights under the Dealer and Handler Guaranty Fund.

S.C. Code. Ann. § 39-22-200 (Supp. 2004) (emphasis added). Additionally, regulation 5-493 provides:

> G. A warehouse receipt shall not be issued in the name of the purchaser of any commodity being purchased on a deferred-price, delayed payment or similar credit-type sale arrangement until the seller has received payment for the commodity in full unless he has executed the affidavit relinquishing title and ownership to the buyer and forfeiting his rights under the Dealers and Handlers Guaranty Fund and has fully complied with the requirements set out in Section 39-22-200.

23 S.C. Code Ann. Regs. 5-493(G) (Supp. 2004) (emphasis added). Finally, the definition of "commodity" is contained in regulation 5-490:

> G. "Commodity" means:
>
> (1) Cotton.
>
> (2) "Non-perishable farm product" as defined by definition (F) or which may hereafter be included in this special definition.

23 S.C. Code Ann. Regs. 5-490(G) (Supp. 2004) (emphasis added).

"The words of a statute or regulation 'must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.'" Sloan v. Greenville County, 356 S.C. 531, 563, 590 S.E.2d 338, 355 (Ct. App. 2003) (quoting Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002) ("When the statute's terms are clear and unambiguous, there is no room for an alternate construction, and courts must apply them according to their literal meaning.").

Initially, we disagree with SCDA's contention that section 39-22-200 has no application in this case. Although the section applies to "commodities being purchased by the warehouse," the circumstances of this case come within the ambit of that limitation. Griner testified that David Prosser was a broker with the Hampton County Warehouse, but was also the principal in Sea Island Cotton Trading Company. A review of the articles of incorporation for both entities confirms Prosser's dual involvement. Thus, even though the receipts in this case were issued to the broker and not the warehouse, that alone not would not preclude the application of section 39-22-200 given the Hampton County Warehouse and Sea Island Cotton Trading Company were essentially the same entity. Applying the requirements of section 39-22-200, we find the transfer from the Hampton County Warehouse was invalid given payment had not been made in full and the requisite affidavit conveying title and ownership of the cotton was not executed.

Furthermore, regulation 5-493 does not limit the purchaser to the warehouse. It expressly states: "A warehouse receipt shall not be issued in the name of the purchaser of any commodity being purchased on a deferred-price, delayed payment or similar credit-type sale arrangement until the seller has received payment for the commodity in full." As defined in regulation 5-490, cotton is a commodity and would be covered by regulation 5-493.

SCDA maintains because regulation 5-493 requires the waiver of rights under the Dealer and Handler Guaranty Fund, and not the Warehouse Guaranty Fund, it should not be applicable. While it does reference the rights under one fund and not the other, there is nothing limiting it to claims under the Dealer and Handler Guaranty Fund. The first portion states very clearly how the regulation is to apply, and it explicitly prohibits issuing a receipt in the name of any purchaser of any commodity unless the seller has received full payment. See Ferguson, 349 S.C. at 563, 564 S.E.2d at 97 ("When the statute's terms are clear and unambiguous, there is no room for an alternate construction, and courts must apply them according to their literal meaning.").

The receipts in the instant case were issued in the name of the broker, even though Respondents had not received full payment from the broker. Accordingly, under section 39-22-200 and regulation 5-493, the receipts were improperly issued and were not evidence of a sale of the cotton to the broker. Additionally, refusal to provide payment from the fund on the ground that the receipts were not issued in Respondents' name is not proper. Accordingly, we find the referee correctly concluded the receipts were invalid and ownership of the cotton remained with Respondents based upon the amounts they placed in the warehouse respectively.

V. Pre-judgment Interest

SCDA asserts the referee erred in awarding Respondents pre-judgment interest. SCDA avers pre-judgment interest must be specifically pled, and Respondents failed to properly plead a claim for pre-judgment interest. In

addition, SCDA contends Respondents' motion to amend the pleading was not sufficient to raise the claim. We agree.

"In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." S.C. Code Ann. § 34-31-20(A) (1987). Pre-judgment interest must be specifically pled in order to be recovered. Hopkins v. Hopkins, 343 S.C. 301, 307, 540 S.E.2d 454, 458 (2000); Calhoun v. Calhoun, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000). "If no request for pre-judgment interest is made in the pleadings, it cannot be recovered on appeal." Tilley v. Pacesetter Corp., 355 S.C. 361, 375, 585 S.E.2d 292, 299 (2003).

Rule 15(b), SCRCP, governs amendments to conform to the evidence. "The rule covers two situations. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary." Sunvillas Homeowners Ass'n, v. Square D Co., 301 S.C. 330, 334, 391 S.E.2d 868, 870-71 (Ct. App. 1990).

In the instant case, there is no dispute Respondents failed to ask for pre-judgment interest in their complaints. The dispute is whether their motion to amend the complaint to conform to the evidence was sufficient to properly raise the issue.

At trial, when Respondents attempted through Griner's testimony to enter into evidence the issue of pre-judgment interest, SCDA objected. After the objection the court indicated: "All right. I'll look at [the complaint]. Go ahead. And I'll note your objection." Nothing further was ever ruled upon by the court. During McMillan's testimony, interest was mentioned a second time. However, it was a vague reference to the amount was owed. In addition, SCDA did not specifically object to the comment.

At the end of trial, Respondents stated: "I was just going to move to amend our pleadings to conform to any evidence to the extent there's evidence outside, you know, that - - but I don't think there is." The court responded: "Well, I took the position that it asked for everything. I read your part of the complaint." No objection was made by SCDA.

We do not find the motion made by Respondents was sufficient to properly amend the complaint to include a claim for pre-judgment interest, which must be specifically pled in order to be recovered. The motion was extremely general and not completely clear. Additionally, in making the motion, Respondents' counsel indicated he does not believe there is any evidence outside the complaint when he moves to "conform to any evidence to the extent there's evidence outside, you know, that - - but I don't think there is." (Emphasis added.) Accordingly, we find this motion was insufficient to properly raise the issue of pre-judgment interest. Because the issue was not pled in the complaint, nor included within the motion to amend, we find the referee erred in awarding pre-judgment interest. Tilley, 355 S.C. at 375, 585 S.E.2d at 299.

VI. Attorney's Fees

Finally, SCDA asserts the referee erred in awarding attorney's fees because the statute does not provide for an award of attorney's fees. We disagree and find the award appropriate.

We agree the statute does not specifically provide for recovery of attorney's fees. However, the code section does not explicitly exclude the attorney's fees as a "loss" to be recovered. In the instant case, we need not determine whether attorney's fees would be included as a "loss" under section 39-22-15, because we find attorney's fees are collectible under section 15-77-300 of the South Carolina Code.

Section 15-77-300 provides in part:

> In any civil action brought by . . . any party who is contesting state action, . . ., the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

S.C. Code Ann. § 15-77-300 (2005).

"On appeal, the trial judge's decision regarding an award of attorney's fees under this statute will not be disturbed absent an abuse of discretion." Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 51, 398 S.E.2d 498, 499 (1990).

We find Respondents are clearly the prevailing parties in this action. Thus, we must determine whether they have shown SCDA acted without substantial justification in pressing its claim and no special circumstances exist to make the award of attorney's fees unjust.

In Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990), the supreme court held "substantial justification," for the purposes of this statute, means justified to a degree that could satisfy a reasonable person. Heath, 302 S.C. at 183, 394 S.E.2d at 712. "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." McDowell v. South Carolina Dep't of Soc. Servs., 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991) (citing Pierce v. Underwood, 487 U.S. 552 (1988)).

In determining whether there was substantial justification in this case, we look to the substance and outcome of the underlying matter. We find

SCDA was without substantial justification in denying recovery from the Warehouse Guaranty Fund and in claiming Respondents must pursue administrative remedies that are not in place. We see no reason or circumstance to declare the award of attorney's fees unjust. Accordingly, we find the award of attorney's fees by the referee was proper under section 15-77-300.

CONCLUSION

We find the referee properly concluded this was an action for money damages pursuant to a statute and Respondents were not required to pursue any additional administrative remedies prior to bringing suit under section 39-22-15. Additionally, we find the trial court properly concluded there was no sale of the cotton from Respondents to the broker, and Respondents proved they suffered a loss as a result of storing the cotton at the warehouse. Therefore, we conclude the award of the remaining 20 percent was proper. The award of attorney's fees was also justified under section 15-77-300. However, we find the award of pre-judgment interest was improper when it was not properly pled and Respondents' motion to amend did not specifically include the claim for pre-judgment interest. Accordingly, the decision of the referee is

AFFIRMED IN PART AND REVERSED IN PART.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Terry K. Jones, **Appellant,**

v.

State Farm Mutual Automobile Insurance Co., **Respondent.**

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 3964
Submitted March 1, 2005 – Filed March 21, 2005

AFFIRMED

Gary W. Poliakoff, of Spartanburg, for Appellant.

Michael T. Cole and Charles R. Norris, both of Charleston, for Respondent.

ANDERSON, J.: Terry K. Jones (Jones) initiated this action against State Farm Automobile Insurance Company (State Farm) seeking a declaration that his 1986 Mazda pickup truck was covered under a State Farm policy at the time he was involved in an automobile collision. The trial judge entered summary judgment in favor of State Farm, finding that State Farm had cancelled coverage on the 1986 Mazda prior to the accident. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

As late as November of 1999, State Farm provided insurance for three of Jones's vehicles, including the 1986 Mazda pickup truck. However, on November 5, 1999, State Farm sent a cancellation notice informing Jones that effective November 24, 1999, coverage of the 1986 Mazda would be cancelled due to nonpayment of premiums.

On December 19, 1999, Jones was seriously injured in a motor vehicle collision with Arthur W. Campbell. Jones had been driving the 1986 Mazda. Sometime after the accident, Jones's State Farm agent signed a Form FR-10 which stated: "I hereby affirm that to the best of my knowledge the vehicle described above was insured by State Farm insurance company on the date and time of the accident."

Jones's medical bills exceeded $200,000. After settling with Campbell's liability carrier, Jones sought a declaration that (1) the 1986 Mazda was covered by State Farm at the time of the collision, (2) he was entitled to $50,000 of underinsured motorist coverage on the Mazda, and (3) he was entitled to stack $50,000 of underinsured motorist coverage from each of the two additional vehicles covered by State Farm. State Farm moved for summary judgment, claiming the policy had been cancelled.

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

The trial judge ruled that State Farm was entitled to summary judgment because State Farm's cancellation notice complied with S.C. Code Ann. § 38-77-120 (1985), and the Form FR-10 did not affect the cancellation.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003), cert. denied. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Const. Mach. Co., Ltd., Op. No. 3936 (S.C. Ct. App. filed January 28, 2005) (Shearouse Adv. Sh. No. 7 at 48). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Belton v. Cincinnati Ins. Co., 360 S.C. 575, 602 S.E.2d 289 (2004); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall, 359 S.C. at 376, 597 S.E.2d at 183. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must

come forward with specific facts showing there is a genuine issue for trial. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004); Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

The determination of legislative intent is a matter of law. City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 543 S.E.2d 538 (2001); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995); Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003); see also Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942) (acknowledging that statutory construction is the province of the courts); Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942) (noting that the interpretation of the meaning of a statutory term is not a finding of fact).

LAW/ANALYSIS

I. Requirements of § 38-77-120

Jones argues the trial judge erred in granting summary judgment to State Farm because the cancellation notice mailed to Jones did not comply with the requirements of South Carolina Code Ann. § 38-77-120 (2002). We disagree.

Section 38-77-120 provides, in pertinent part:

(a) No cancellation . . . is effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation . . . . This notice:

> (1) must be approved as to form by the director or his designee before use;
>
> (2) must state the date not less than fifteen days after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;
>
> (3) must state the specific reason of the insurer for cancellation . . . and provide for the notification required by subsection (B) of Section 38-77-390 . . . .
>
> (4) must inform the insured of his right to request in writing within fifteen days of the receipt of notice that the director review the action of the insurer. . . .
>
> (5) must inform the insured of the possible availability of other insurance which may be obtained through his agent, through another insurer, or through the Associated Auto Insurers Plan. It must also state that the Department of Insurance has available an automobile insurance buyer's guide regarding automobile insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

Nothing in this subsection prohibits any insurer or agent from including in the notice of cancellation . . . , any additional disclosure statements required by state or federal laws, or any additional information relating to the availability of other

insurance. **The insurer must disclose in writing whether the insured is ceded to the facility.**

S.C. Code Ann. (2002) (emphasis added). The language at the center of this logomachy is the last sentence of § 38-77-120(a)—"The insurer must disclose in writing whether the insured is ceded to the facility." State Farm concedes it did not notify Jones that he was not being ceded to the Reinsurance Facility and contends § 38-77-120 does not require it to do so.

A. Rules of Statutory Interpretation

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Georgia-Carolina Bail Bonds. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003); see also Gordon v. Phillips Utils. Inc., Op. No. 25930 (S.C. filed January 24, 2005) (Shearouse Adv. Sh. No. 4 at 44) ("The primary purpose in construing a statute is to ascertain legislative intent."); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 205, 544 S.E.2d 38, 44 (Ct. App. 2001) ("The quintessence of statutory construction is legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582. The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. Smith v. South

Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Cowan v. Allstate Ins. Co., 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct. App. 2002); Olson, 344 S.C. at 207, 544 S.E.2d at 45; see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 503 S.E.2d 465 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 475 S.E.2d 762 (1996); Worsley Cos. v. South Carolina Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561, 486 S.E.2d at 495; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002); Adams v. Texfi Indus., 320 S.C. 213, 464 S.E.2d 109 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of the words." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."); Municipal Ass'n of South Carolina v. AT & T Communications of S. States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004) (observing that the language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Hinton v. South Carolina Dept. of Prob., Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004), cert. granted

(Jan. 12, 2005); Doe v. Roe, 353 S.C. 576, 578 S.E.2d 733 (Ct. App. 2003), cert. denied.

B. Interpretation of § 38-77-120

The "facility" referred to in § 38-77-120 is the South Carolina Reinsurance Facility (the Facility) created by S.C. Code Ann. § 38-77-510. "The South Carolina Reinsurance Facility . . . is a nonprofit organization which enables automobile insurers to obtain reinsurance for high risk drivers which they normally would not insure." State Farm Mut. Auto. Ins. Co. v. Lindsay, 288 S.C. 327, 328, 342 S.E.2d 599, 599 (1986). The Facility is soon to be defunct, however, due to Act. No. 154 § (1997), which repealed §§ 38-77-510 through -640 effective January 1, 2006. Pursuant to S.C. Code Ann. § 38-77-590(g), "A producer designated under this section may not write new private passenger and commercial automobile insurance business to be placed in the facility after March 1, 1999. A policy with an effective date after March 1, 2002 shall not be accepted by the facility." S.C. Code §§ 38-91-10 through –420 created the Joint Underwriting Association to temporarily replace the Facility as the primary residual market mechanism from March 1, 1999 through February 28, 2003. See Note, Lifting the Iron Curtain of Automobile Insurance Regulation, 49 S.C.L.Rev. 1193, 1207 (Summer 1998). Currently, the Associated Auto Insurers Plan serves as the residual market mechanism. S.C. Code Ann. 38-77-810 through –880 (2002). See generally Maybank et al., The Law of Automobile Insurance in South Carolina I-74 – I-98 (4th ed. 2000); Lifting the Iron Curtain, 49 S.C.L.Rev. 1193.

Undisputedly, § 38-77-120 required an insurance company to notify an insured when he or she had been ceded to the Facility. This requirement served to notify the insured that he or she had been deemed a high-risk driver subject to recoupment charges. See Lifting the Iron Curtain, 49 S.C.L.Rev. n.167 (noting that former § 38-77-600 set a recoupment fee to cover operating losses the Facility incurred during the preceding year). However, State Farm contends, and we agree, that an insurer is not required to inform the insured he or she **has not** been ceded to the Facility. We do not believe

that Jones's specious construction of § 38-77-120 comports with the intent of that section.

Section 38-77-120 serves to put on notice drivers whose policies are being cancelled or will not be renewed. In subsection (a), the statute sets forth five mandates aimed at giving the insured adequate notice of the cancellation of his or her policy. The notice must: (1) be approved by the Director; (2) state the effective date of cancellation; (3) state the reason for cancellation; (4) inform the insured of his right to request review of the termination; and (5) provide the insured with information regarding other available sources of insurance. State Farm mailed a complying cancellation notice on November 5, 1999—approximately forty days before the December 19 accident. Jones does not contest that State Farm notified him of the cancellation of his policy.

Jones's rendering of the statute would require disclosure of a non-event—i.e., that he has not been deemed a high risk driver; therefore he will not be ceded to the Facility; and he will not be subject to recoupment fees. Such an interpretation of § 38-77-120 is not a practical and reasonable interpretation consistent with the design of the legislature. Instead, Jones's interpretation would "lead to a result so plainly absurd it could not have been intended by the legislature." Unisun, 339 S.C. at 368, 529 S.E.2d at 283. Jones states no rationale supporting a policy of requiring an insurance company to inform insureds they are **not** being ceded to an organization designed to facilitate the acquisition of insurance for high-risk drivers.

Moreover, the sentence at issue is not one of the five enumerated mandates, but is provided in the flush paragraph at the end of the subsection. The penultimate sentence of subsection (a) informs insurers that they are not prevented from providing additional information in the notice. The sentence in controversy then gives one piece of additional information that must be provided. Although the placement of the controverted sentence does not dictate our decision, the sentence's location does suggest the legislature did not consider the final sentence of subsection (a) as significant as the enumerated directives.

Considering the content of the sentence; the purpose of the statute; and the placement of the sentence, we hold, as a matter of law, that State Farm was not required to notify Jones that he had **not** been ceded to the Facility.

II. Effect of Form FR-10

Jones asserts the trial judge erred in granting summary judgment because the FR-10 form signed by his insurance agent raised factual issues as to the existence of coverage. We disagree.

First, this issue is not preserved for our review. In his memorandum in opposition to summary judgment, and in his argument to the trial judge, Jones simply asserted that the Form FR-10 created an issue of fact. He did not set forth a concomitant legal theory which would entitle him to recovery based on the FR-10. Jones did not make a Rule 59(e) motion to alter or amend the judgment. For the first time on appeal, Jones contends the Form FR-10 estops State Farm from denying coverage.

An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004); United Student Aid Funds, Inc. v. South Carolina Dep't of Health and Envt'l Control, 356 S.C. 266, 588 S.E.2d 599 (2003); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004); see also QZO, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) (noting it is axiomatic than an issue cannot be raised for the first time on appeal). An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment. Hawkins v. Mullins, 359 S.C. 497, 597 S.E.2d 897 (Ct. App. 2004). Jones did not present an estoppel argument to the trial judge; therefore, this issue is not preserved.

Second, as to the merits, we find the trial judge properly granted summary judgment. In a light most favorable to Jones, the FR-10 did not raise an issue as to the validity of State Farm's cancellation notice. The form

simply states "**to the best of my knowledge** the vehicle described above was insured by State Farm insurance company on the date and time of the accident." (Emphasis added). State Farm presented evidence that Jones, in fact, was not insured by State Farm at the time of the accident because his policy had been cancelled weeks earlier. Jones cites no legal authority establishing that a policy, once effectively canceled, can somehow become renascent by virtue of a qualified representation of coverage by an agent after a loss.

Even if Jones's estoppel argument were properly preserved, he presented no evidence demonstrating his ability to establish the elements of estoppel. In Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994), we observed that "[u]nder South Carolina law, the essential elements of estoppel are divided between the estopped party and the party claiming estoppel." Id. at 477, 451 S.E.2d at 928 (citations omitted).

> As to the estopped party, the essential elements are: (1) conduct amounting to a false representation or concealment of material facts, or conduct calculated to convey the impression that the facts are otherwise than, and inconsistent with, the party's subsequent assertions; (2) intention or expectation that such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. As to the party claiming estoppel, the essential elements are: (1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts; (2) reasonable reliance on the other party's conduct; and (3) a prejudicial change in position.

Id. (citations omitted). Accord Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000). Jones did not present evidence that State Farm made a knowingly false representation with the intent to induce Jones into action. Further, Jones failed to submit evidence that he did not have notice of the cancellation, and that he detrimentally relied on the Form FR-10.

In Bannister v. Ohio Cas. Ins. Co., 314 S.C. 388, 444 S.E.2d 528 (Ct. App. 1994), the appellant argued, "Ohio Casualty is estopped to deny coverage because an FR-10 form was executed by one of the company's agents." Id. at 393, 444 S.E.2d at 531. We rejected the appellant's argument, finding he "ha[d] not demonstrated any of the elements of estoppel." Id. Similarly, Jones has failed to demonstrate any of the elements of estoppel in the instant case.

Jones has not presented to this Court a reviewable argument, based on the Form FR-10, that would compel reversal of the trial judge's grant of summary judgment.

CONCLUSION

We hold S.C. Code Ann. § 38-77-120 does not require an insurer to notify an insured that he or she has **NOT** been ceded to the South Carolina Reinsurance Facility. Further, the Form FR-10 did not create an issue of fact which could have entitled Jones to the relief he sought. The trial judge correctly granted summary judgment in favor of State Farm. Accordingly, the decision is

AFFIRMED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Karen Ann McCall, Appellant.

Appeal From Anderson County
John W. Kittredge, Circuit Court Judge

Opinion No. 3965
Heard January 12, 2005 – Filed March 21, 2005

AFFIRMED

Acting Deputy Chief Attorney Wanda P. Hagler, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Amie L. Clifford, all of Columbia; and Solicitor Druanne Dykes White, of Anderson, for Respondent.

SHORT, J.: In this appeal from a criminal case, Appellant Karen Ann McCall argues that her conviction should be overturned on the ground that the State should be judicially estopped from prosecuting her. We affirm.

FACTS

In December 2000, John Richard Wood left the scene of an incident in Greenville County[1] on a moped scooter, weaving through heavy traffic. Wood then rode behind a building, parked the scooter and got into a Jeep driven by McCall. The Jeep sped off with McCall at the wheel and witnesses called the police with the Jeep's license tag number. Wood and McCall fled to Anderson County where authorities located and followed them before a high-speed chase ensued. The Jeep's back window rolled down and Wood fired several rounds of shots at police with a gun owned by McCall, resulting in a bullet fragment striking an officer in the head. Subsequently, the Jeep rammed into a van and veered into oncoming traffic, and Wood carjacked a pickup truck. Wood and McCall continued fleeing from the police. The chase ultimately ended in a standoff in which Wood was also shot.

A trial of Wood was held in Greenville County and McCall was not named as a defendant. She testified that she had acted under duress, arguing essentially that Wood coerced her into assisting him through threats with the gun as well as with physical force. The State offered her no grant of immunity, nor made any promises or deals in order to obtain this testimony.

Subsequently in Anderson County, McCall was charged with, among other things, criminal conspiracy. At a pretrial hearing, McCall moved to quash the indictments, arguing that because the State called her as a witness in the Greenville trial and allowed her to testify she acted under duress, the State should be judicially estopped from prosecuting her as a co-conspirator in the Anderson case. The trial court denied the motion, finding McCall's testimony in Greenville largely self-serving.

After a joint trial with co-defendant Wood, where McCall asserted the defense of duress in keeping with her testimony in Greenville, the jury

[1] See State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004).

convicted her of criminal conspiracy, failure to stop when signaled by a law enforcement vehicle, resisting arrest with a deadly weapon, armed robbery, three counts of assault with intent to kill, one count of assault and battery with intent to kill, and one count of assault and battery of a high and aggravated nature. The circuit court sentenced McCall to prison for twenty-five years. This appeal follows.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This court is bound by the trial court's factual findings unless they are clearly erroneous. Id. at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

South Carolina officially recognized the doctrine of judicial estoppel in Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. The purpose of judicial estoppel is to protect the integrity of the courts, not to protect litigants from allegedly improper or deceitful conduct by their adversaries. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003); see also Quinn v. Sharon Corp., 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Anderson, J., concurring) (providing a thorough discussion of the history, purpose, and application of judicial estoppel). Judicial estoppel in South Carolina generally applies only to inconsistent statements of fact, not inconsistent positions of law. Carrigg v. Cannon, 347 S.C. 75, 82-83, 552 S.E.2d 767, 771 (Ct. App. 2001).

The elements of judicial estoppel are as follows: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead

the court; and (5) the two positions must be totally inconsistent. Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

South Carolina courts have not addressed the applicability of judicial estoppel in criminal cases. To date, all cases involving judicial estoppel have arisen in the civil context, although one court considered applying judicial estoppel in a civil case based on a prior guilty plea. Carrigg, 347 S.C. at 84, 552 S.E.2d at 772 (holding that judicial estoppel did not apply based on lack of privity). North Carolina has recently rejected the use of judicial estoppel in criminal cases. See Whitacre Partnership v. Biosignia, Inc., 591 S.E.2d 870 (N.C. 2004) (providing extensive discussion of the doctrine and holding that judicial estoppel applies only in civil cases).

We need not reach the issue of whether judicial estoppel applies in criminal cases, however, because even if the doctrine applied, McCall's case fails to meet the required elements. The purpose of judicial estoppel would not extend to cases such as this one. Nothing in the State's conduct would impinge on the integrity of the courts. McCall was simply permitted to testify in the prior proceeding as a fact witness.

Secondly, judicial estoppel would not apply here because the allegedly contradictory positions involve issues of law. The facts are undisputed. McCall is simply arguing that the State impliedly acknowledged the validity of her defense of duress in the prior case. Additionally, since McCall was not charged in Greenville, a separate judicial circuit from Anderson, the State had no reason to challenge her testimony. Thirdly, the privity requirement is not met. The Greenville case was against Wood and McCall was only a witness. As the trial judge noted, although both cases involved the same incident involving McCall and Wood, the State did not have the same motive to cross-examine McCall.

Finally, there is absolutely no evidence that the allegedly contradictory positions were taken in a deliberate attempt to mislead the court. See Cothran, 357 S.C. at 217, 592 S.E.2d at 632 (requiring some evidence of intent to mislead). The trial judge noted "as a fact witness, Ms. McCall's purpose was obviously to link the primary defendant, Mr. Wood, to the crimes in Greenville County." "The doctrine of judicial estoppel . . . should

be applied sparingly, with clear regard for the facts of the particular case." Id. Judicial estoppel "must not be applied to impede the truth-seeking function of the court." Id.

We think the application of judicial estoppel in a case such as this one would impede the truth-seeking function of the court. McCall's testimony was necessary in Wood's trial for purposes unrelated to her case. Estopping the State from later prosecuting McCall would have the effect of unduly limiting the prosecution's ability to seek justice. Thus, without reaching the issue of whether judicial estoppel applies in South Carolina in criminal cases, we hold that McCall has failed to make out a case for judicial estoppel. We affirm the trial court's denial of McCall's motion to quash the indictments.

AFFIRMED.

ANDERSON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anna H. Lanier, **Appellant,**

v.

Robert F. Lanier, Jr., **Respondent.**

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 3966
Heard March 9, 2005 – Filed March 21, 2005

AFFIRMED

Donald Bruce Clark and Mary Ann Hall, both of Charleston, for Appellant.

Marvin I. Oberman and Paul E. Tinkler, both of Charleston, for Respondent.

ANDERSON, J.: Anna H. Lanier (Wife) and Robert F. Lanier (Husband) entered into a divorce settlement agreement which the family court incorporated into its final order of divorce. Wife appeals the family

court's denial of her Rule 60(b)(2), SCRCP motion for relief from the final order. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Husband and Wife, who had been married since 1984, were divorced in March of 2003. Wife alleges that prior to their marriage, the parties entered into an antenuptial agreement (the agreement) in which Husband released his marital rights in Wife's property if they divorced. During the course of the marriage, the agreement was lost. Wife searched for the document when she initiated the proceeding. She checked with Husband, her bank (where the document had been stored), and her financial advisor, but her search was not successful. However, several months after the family court entered its final order, Wife found a copy of the agreement folded in a greeting card in her desk drawer.

The content of the agreement was not pled in the original action for divorce. After she found the agreement, Wife filed a motion for relief from the judgment pursuant to Rule 60(b)(2), SCRCP. The family court heard the matter and denied the motion. On appeal, Wife argues that the requested relief should have been granted because the agreement qualified as newly discovered evidence. Additionally, she disputes the family court's award of attorney's fees.

STANDARD OF REVIEW

In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. Moghaddassi v. Moghaddassi, Op. No. 3932 (S.C. Ct. App. filed January 31, 2005) (Shearouse Adv. Sh. No. 6 at 48); Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (citing Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992)). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Nor must we 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. Cherry v.

Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (noting that because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the family court's findings where matters of credibility are involved). An appellate court "should be reluctant to substitute its own evaluation of the evidence on child custody for that of the trial court." Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). Our broad scope of review does not relieve appellant of her burden to convince this Court the family court committed error. Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979).

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003). "The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." Bowman v. Bowman, 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct. App. 2004) (citing Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992)); see also Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (noting that Rule 60(b) motions are addressed to the discretion of the court and appellate review is limited to determining whether the trial court abused its discretion). Review is thus limited to determining whether the family court abused its discretion in granting or denying the motion. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004); Bowman at 151, 591 S.E.2d at 656.

LAW/ANALYSIS

I. Rule 60(b)(2) Motion

Wife argues she is entitled to relief from the judgment under Rule 60(b)(2). We disagree.

A. Propriety of Attacking a Consent Judgment Through a Rule 60(b) Motion

As a preliminary matter, we address whether a consent judgment may be attacked via a Rule 60(b) motion. Husband argues that consent orders are "binding and conclusive and cannot be attacked by the parties either on direct appeal or in a collateral proceeding." See Johnson v. Johnson, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992). Although this is the general rule, consent judgments are subject to attack in particular circumstances, including for the reasons specified in Rule 60(b). See Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 18 n.3, 594 S.E.2d 478, 482 n.3 (2004) ("[E]ven consent judgments are subject to attack under particular circumstances."). Indeed, the Johnson court ultimately granted relief under Rule 60(b)(5). Id.; Johnson, 310 S.C. at 47, 425 S.E.2d at 48. Additionally, consent orders could be vacated under the statutory predecessor to Rule 60. See Lord Jeff Knitting Co., Inc. v. Mills, 281 S.C. 374, 376, 315 S.E.2d 377, 378 (Ct. App. 1984) (acknowledging availability of relief but refusing it on other grounds). Therefore, we find no error in the family court's decision to consider Wife's motion on the merits.

B. Rule 60(b)(2)

The South Carolina Rules of Civil Procedure apply in family court when no family court rule provides otherwise. Rule 2, SCRFC. Rule 60(b), SCRCP, reads:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> . . . .

This rule is substantially the same as the federal rule. See Rule 60, SCRCP, note ¶ 1; Thynes v. Lloyd, 294 S.C. 152, 363 S.E.2d 122 (Ct. App. 1987).

C. Elements for Obtaining a New Trial Under Rule 60(b)(2)

To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence:

> (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

James F. Flanagan, South Carolina Civil Procedure 484 (2nd ed. 1996) (citing Johnston v. Belk-McKnight Co., 188 S.C. 149, 198 S.E. 395; McCabe v. Sloan, 184 S.C. 158, 191 S.E. 905 (1937)); see Lans v. Gateway 2000, Inc., 110 F. Supp. 2d 1 (D.D.C. 2000); Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991); Duffy v. Clippinger, 857 F.2d 877 (1st Cir. 1988); Lloyd v. Gill, 406 F.2d 585 (5th Cir. 1969); Johnson v. United States, 32 F.2d 127 (8th Cir. 1929); Kettenbach v. Demoulas, 901 F.Supp 486 (D.Mass. 1995); see also Wright & Miller, 11 Fed. Prac. & Proc. Civ. 2d § 2859 (1995) (noting the standard applied to newly discovered evidence is the same for Rule 59(b) and Rule 60(b)(2), and discussing the elements); 12 Moore's Federal Practice § 60.42[2] (Matthew Bender 3rd ed.) (discussing various elements tests for Rule 60(b)(2)).

D. Newly Discovered Evidence

First, we note that courts have found evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, and (2) in the party's possession.

1. Known to the Party at the Time of Trial

In Lans v. Gateway 2000, Inc., 110 F.Supp.2d 1 (D.D.C. 2000), the movant, Lans, made a Rule 60(b)(2) motion based on a "Clarification-Contract" which he found after trial. Lans knew the document existed prior to trial, but was unable to locate it. The Lans court stated:

> Lans even admits that he had knowledge of the Clarification-Contract prior to the Court's grant of summary judgment to Gateway. . . . [T]he Court cannot conceive of why Lans failed to notify the Court of the potential existence of the Clarification-Contract and request more time to search for it. . . . Rule 60(b)(2) was not designed to afford parties the opportunity to revisit choices made in the thick of litigation. Since Lans knew of the Clarification-Contract's existence, he cannot now claim that it is newly discovered evidence.

Id. at 5. See also Andrews Distrib. Co. v. Oak Square at Gatlinburg, Inc., 757 S.W.2d 663, 667 (Tenn. 1988) (finding that when both parties know an item of evidence existed before trial, but the evidence is simply lost or misplaced, finding it afterward does not transform it into newly discovered evidence), overruled on other grounds by Spence v. Allstate Ins. Co., 883 S.W.2d 586 (Tenn. 1994).

We find the instant case analogous to Lans. Wife was well aware the agreement existed; yet, she did not plead its contents or otherwise inform the court of the document's potential application. Instead, she chose to initiate this action and negotiate a property settlement without asserting any potential rights which the agreement might have afforded her. Consequently, the agreement was not newly discovered.

2. In the Possession of the Party

The Lans court addressed whether evidence can be newly discovered when it is in the movant's possession. The court observed that "the Clarification-Contract was in Lans's possession, even if he could not recall its physical location." Id. Accordingly, the evidence was deemed not newly discovered:

> [T]his Court has previously held that evidence "in the possession of the party before the judgment was rendered . . . is not newly discovered evidence that affords relief." American Cetacean Soc'y v. Smart, 673 F.Supp. 1102, 1106 (D.D.C. 1987) (Richey, J.). See Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833

> F.2d 208, 211-12 (9th Cir. 1987) (evidence that is somehow in possession of a party at time of trial may not be "discovered"); see also Longden v. Sunderman, 979 F.2d 1095, 1103 (5th Cir. 1992) (misplaced evidence is not newly discovered evidence); Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987) (party may not "discover" after trial evidence that was within knowledge of employees at time of trial).

Id. "Furthermore," the Lans court noted, the evidence "turned up in the possession of [Lans's] accountant." Id. Thus, the court went on to explain that "documents in the possession of a party's agent, such as an attorney or accountant, are deemed to be in the party's possession because the party retains control over the documents." Id. (citations omitted). See also Longden v. Sunderman, 979 F.2d 1095, 1103 (5th Cir. 1992) (finding presence of the missing document in appellant's files prior to the hearing alone sufficient to deny the Rule 60(b)(2) motion).

Wife admits that the agreement was in her possession and was ultimately found in her desk drawer. Because she both knew of and possessed the agreement prior to trial, we find this evidence does not constitute newly discovered evidence for the purpose of Rule 60(b)(2).

E. Exercise of Due Diligence

Finally, even if the agreement did constitute newly discovered evidence, the family court did not abuse its discretion by refusing to grant a new trial under Rule 60(b)(2) where: (1) Wife knew of the agreement prior to trial, (2) Wife did not plead the agreement, and (3) the agreement was in Wife's possession and control prior to trial, but was only later discovered in a desk drawer.

Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. Black's Law Dictionary defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." Id. at 468 (7th ed. 1999). "Diligence looks not to what the litigant actually discovered, but what

he or she could have discovered." 12 Moore's Federal Practice § 60.42[5] (Matthew Bender 3rd ed.).

When evidence is misplaced, a party must make a specifically targeted search to find the missing evidence. See Lans, 110 F. Supp. 2d at 6 ("[W]hatever actions [the appellant] took to locate the [evidence] are undermined by the plain fact that [he] knew that the [evidence] existed, regardless of whether he could actually get his hands on it. The Court is unsympathetic to arguments that [he] could not remember where [it] was."). Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2). Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004) (citing Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654, (Ct. App. 2004)). When a party simply misplaces evidence at home, the court will treat the failure to discover it as a failure to exercise due diligence. Johnson Waste Materials v. Marshall, 611 F.2d 593, 598-99 (5th Cir. 1980). Here, Wife eventually found the agreement in a desk drawer in her home. Cognizant of our standard of review, we are unable to find an abuse of discretion where Wife could have located the agreement by conducting a more thorough search of the desk drawer.

In Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654, (Ct. App. 2004), this Court held that "South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial." Id. at 152, 591 S.E.2d at 657. Similarly, when a party is on notice that evidence exists and settles the case without further inquiry, relief under Rule 60(b) is unavailable. Raby Constr., 358 S.C. at 22-23, 594 S.E.2d at 484.

We recognize that in some out-of-state cases new trials were allowed when lost documents were subsequently found. See Wasem v. Ellens, 4 N.W.2d 850 (S.D. 1942); Misel v. Cottonwood Live Stock & Loan Co., 205 N.W. 663 (S.D. 1925); Zarneke v. Kitzman, 183 N.W. 867 (S.D. 1921); Waite v. Fish, 95 N.W. 928 (S.D. 1903); Askew v. Gaskins, 151 S.E. 539 (Ga. Ct. App. 1930); The Protection Life Ins. Co. v. Dill, 91 Ill. 174 (Ill. 1878); Winfield Bldg. & Loan Ass'n v. McMullen, 53 P. 481 (Kan. 1898). However, most of these cases sounded in equity and were decided before the advent of Rule 60(b). Additionally, in all of the cases cited, existence of the

lost document was alleged at trial. When the documents were found, the courts held that the original documents themselves were material and not merely cumulative of other evidence as to their contents. Thus, retrials were merited. In contrast, Wife did not allege the existence of the agreement at all and made no attempt to recreate any of its contents before settling the case.

In light of this State's strong policy emphasizing finality of judgments, we hold the family court correctly concluded that Wife is not entitled to relief under Rule 60(b). Because we find the evidence was not newly discovered for Rule 60(b) purposes, and the requisite due diligence was not exercised to find it, we affirm the family court's refusal to grant Wife a new trial.

II. Attorney's Fees

The family court is authorized by statute to order attorney's fees to either party in a divorce action. S.C. Code Ann. §§ 20-3-120 and -130 (1985); Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). The award of attorney's fees is at the sound discretion of the family court. Lacke v. Lacke, Op. No. 3920 (S.C. Ct. App. filed January 10, 2005) (Shearouse Adv. Sh. No. 3 at 57) (citing Stevenson, 295 S.C. 412, 368 S.E.2d 901). In deciding whether to award attorney's fees, the family court should consider: (1) the parties' ability to pay their own fee; (2) the beneficial results obtained by counsel; (3) the respective financial conditions of the parties; and (4) the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 415 S.E.2d 812 (1992); Moghaddassi v. Moghaddassi, Op. No. 3932 (S.C. Ct. App. filed January 31, 2005) (Shearouse Adv. Sh. No. 6 at 48); Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000). Our supreme court has identified the following factors for determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991); Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001).

Wife requested that "[i]f this Court reverses the family court on Issue I, then it should accordingly reverse the award of attorney's fees." Because we affirm the family court's denial of Wife's Rule 60(b)(2) motion, we concomitantly affirm the award of attorney's fees.

CONCLUSION

Based on the foregoing, the order of the family court is hereby

AFFIRMED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Antwan Lamont Zeigler, **Appellant.**

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 3967
Heard March 8, 2005 – Filed March 21, 2005

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Robert D. Robbins, of Summerville, for Respondent.

ANDERSON, J.: Antwan Lamont Zeigler appeals from his conviction for murder. He argues the trial court erred in (1) denying his motion for a directed verdict; (2) giving an inadequate jury charge on mere presence; and (3) failing to take sworn juror testimony and denying Antwan's motion for a new trial based on allegations of juror misconduct. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Gregory McDonald, also know as Boobie, was murdered on January 19, 2001, near a trailer on Land Fill Road in Orangeburg County. On the night of the murder, McDonald traveled to the trailer with Larry Zeigler, George Zeigler, and Barry Collier. Troy Zeigler, his cousin Antwan Zeigler, James Hallman, Germaine Eric Hallman, and Kenneth Kirk Thomas were already inside the trailer when McDonald arrived.

According to Collier, when he entered the trailer, Antwan looked at him as if Collier had "done something bad." Because Antwan and Troy were whispering to each other and staring at him, Collier began to feel uncomfortable and decided to exit the trailer. Antwan and Troy attempted to prevent Collier from leaving. Antwan and Troy followed Collier outside. Collier stated he "felt unsafe." At that point, Antwan and Troy threw "one or two" beer bottles at Collier. Collier jumped in his vehicle and drove away.

Kenneth Kirk Thomas testified Antwan entered the trailer and "told Boobie he was the police," meaning McDonald was working for the police as a confidential informant. Troy, Antwan, and the Hallmans surrounded McDonald. George Zeigler, Troy and Antwan's cousin, declared Antwan "told [McDonald] he had to leave" and that Antwan and McDonald "got into an argument." Thomas observed Antwan throw a beer bottle at McDonald. Larry Zeigler, Troy's brother and Antwan's cousin, saw Troy and Eric Hallman hit McDonald. George testified he "thought that [Antwan] . . . thr[e]w a punch." When McDonald attempted to leave, Troy and the Hallmans threw bottles at him. McDonald ran out of the trailer onto Land Fill Road. Troy, Antwan, and the Hallmans followed McDonald.

Approximately ten to fifteen minutes later, Antwan, Troy and the Hallmans had not returned. Thomas, Larry Zeigler, and George Zeigler decided to leave. As the men were leaving the trailer, Thomas saw Antwan and Troy walking back up the dirt road toward the trailer from about twenty feet away. When Thomas, Larry Zeigler, and George Zeigler reached "the end of the road," they noticed McDonald's body lying facedown on the side of the road. McDonald was not moving. George asked Thomas to stop the car so they could help McDonald. Thomas refused to help and instructed George: "Don't get yourself in nothing."

Thomas, Larry Zeigler, and George Zeigler drove to the Zeiglers' grandmother's house. Antwan and Troy arrived at the home after the others. Thomas testified Troy said: "I kicked that nigger to death." Antwan responded: "He deserved it." Thomas noted Troy was walking with a limp and that he thought Troy's toe was swollen.

The police, acting on a tip, located McDonald's body in a ditch near the trailer on Land Fill Road. Dr. Janice Ross, a forensic pathologist, performed the autopsy on McDonald. McDonald had suffered injuries to his eyeballs and both sides of his head, had bruising under the scalp, and bleeding around the brain. Dr. Ross opined McDonald died from "bleeding around the brain . . . due to a beating." McDonald died "within minutes" from this severe beating. Dr. Ross testified the type of injuries sustained by McDonald allowed her to discount an assertion that the injuries were caused by McDonald falling down or being struck by a car. Dr. Ross concluded McDonald's injuries were a result of "blows delivered by someone else." She stated the injuries were consistent with "what [she's] seen caused by fists." The Solicitor asked Dr. Ross: "Would [McDonald's injuries] also have been consistent with him being kicked?" Dr. Ross answered: "It could."

Antwan and Troy were indicted for the murder of McDonald. The case proceeded to trial. At the close of the State's evidence, counsel for Antwan moved for a directed verdict, claiming there was "absolutely no evidence to connect either of these defendants with the murder of Mr. McDonald." Troy's attorney adopted Antwan's lawyer's argument. The State argued the evidence showed "Antwan Zeigler started an altercation in the trailer, hit the

deceased, threw a bottle at him, and chased him out of the trailer," along with Troy Zeigler. The trial court denied the motion, finding "the fact that they left right after the victim did, came back without him, very shortly thereafter the body was seen, and we've got . . . statements that . . . one of them kicked him and the other one said he deserved it, would be strong enough circumstantial evidence to make it a jury case."

The jury found both Troy and Antwan guilty of murder. They were each sentenced to forty-five years.

ISSUES

I. Did the trial court err in denying Antwan's motion for a directed verdict?

II. Did the trial court give a proper and correct instruction on mere presence?

III. Did the trial court err in refusing to take sworn juror testimony and denying Antwan's motion for a new trial based on allegations of juror misconduct?

LAW/ANALYSIS

I. DIRECTED VERDICT

Antwan contends the trial court erred in denying his motion for a directed verdict because "there was not any direct evidence or any substantial circumstantial evidence that [Antwan] killed [McDonald]." Antwan maintains his mere presence at the scene was insufficient to prove his guilt in the murder. He asserts the "evidence against [him] only raised a suspicion of his guilt, and he was convicted based on that suspicion." We disagree.

A. Standard of Review

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Crawford, Op. No. 3933 (S.C. Ct. App. filed Jan. 31, 2005) (Shearouse Adv. Sh. No. 6 at 68); State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005); State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003).

If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. Cherry, 361 S.C. at 593-94, 606 S.E.2d at 478; State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002); see also State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004) (noting judge should deny motion for directed verdict if there is any direct or substantial circumstantial evidence which reasonably tends to prove accused's guilt, or from which his guilt may be fairly and logically deduced). When a motion for a directed verdict is made in a criminal case in which the State relies exclusively on circumstantial evidence, the trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001); Al-Amin, 353 S.C. at 411, 578 S.E.2d at 35; see also State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) (stating trial court has duty to submit case to jury where evidence is circumstantial, if there is substantial circumstantial evidence which reasonably tends to prove guilt of accused or from which his guilt may be fairly and logically deduced). On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Cherry, 361 S.C. at 593, 606 S.E.2d at 478; Horton, 359

S.C. at 563, 598 S.E.2d at 284; State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct. App. 2003).

The trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478; State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. Cherry, 361 S.C. at 594, 606 S.E.2d at 478; State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996).

The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002).

B. Definitional Analysis of Murder

South Carolina law defines murder as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003); Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005). Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998).

Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); State v. Griggs, 184 S.C. 304, 192 S.E. 360 (1937). Mere presence at the scene of a crime is insufficient to convict one as a principal on the theory of aiding and abetting. State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002).

Antwan relies on State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), arguing "[t]here is less evidence against the two appellants in this case than

there was against the defendant" in Martin. This reliance is misplaced as Martin is inapposite.

In Martin, the supreme court found the trial court erred in failing to grant the defendant's motion for directed verdict because there was a total lack of evidence, either direct or circumstantial, linking the defendants to the murder. In that case, the State was unable to establish a time of death of the victim, lacked any witnesses identifying the defendants at the scene of the crime at the time of the murder, and had no evidence of the defendants being in the victim's apartment any time after the victim was last seen. The Martin court inculcated:

> In this case, the State failed to meet the "any substantial evidence" standard. Most significantly, the State's evidence failed to place either defendant inside the apartment. The Solicitor himself summed up the State's failure of proof by confessing to the trial judge "we don't know which person actually held [Victim's] head in that pan of water" and "Your Honor, the whole point is we don't know if they acted in concert." Put another way, unlike the usual accomplice liability case or aiding and abetting situation, here the State had no proof that either defendant held Victim's head under water and the State had no proof that the defendants were working together to bring about the Victim's death.
>
> Taken in a light most favorable to its position, the State has shown that a car resembling the one in possession of the Defendant was parked at the Victim's apartment complex the night the murder was committed. There is no evidence (such as a license tag number) that the black car was actually [defendant's girlfriend's] black mustang. The State also presented no evidence that both defendants arrived at the apartment complex in that car or that either defendant entered Victim's apartment. Furthermore, there is no evidence establishing the death occurred during the time the black car was in front of the building.

> This case is similar to State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), in which this Court reversed the denial of a directed verdict in a murder conviction. In Schrock, the State presented evidence the defendant was in the area of the murders and that footprints at the scene of the crime were similar to footprints found in the area in which Schrock admitted he had been walking. In this case, the black car seen at the apartment is not identified as [the defendant's girlfriend's] car. Like the footprints in Schrock, the possibility that it was the same car, without any other evidence placing the defendants at the scene, is not enough evidence to place Defendant inside Victim's apartment.

Martin, 340 S.C. at 602-03, 533 S.E.2d at 574-75. In contrariety to the present case, there was virtually no evidence linking the defendants in Martin to the drowning death of the victim.

C. Evidentiary Record

In the instant case, the record provides substantial circumstantial evidence reasonably tending to prove Antwan's guilt. Viewed in the light most favorable to the State, there was substantial circumstantial evidence to submit the murder charge to the jury. Antwan accused McDonald of working for the police and told him he had to leave the trailer. Antwan and McDonald then "got into an argument." Thomas saw Antwan throw a beer bottle at McDonald. Larry Zeigler observed Troy and Eric Hallman hit McDonald. George Zeigler stated he "thought that [Antwan] . . . thr[e]w a punch." When McDonald attempted to leave, Troy and the Hallmans threw bottles at him. McDonald ran out of the trailer onto Land Fill Road. Troy, Antwan, and the Hallmans pursued McDonald. Approximately ten to fifteen minutes later, when Thomas, Larry Zeigler, and George Zeigler decided to leave the trailer, Antwan, Troy and the Hallmans had not returned. As the three men left the trailer, Thomas noticed Antwan and Troy walking back up the dirt road toward the trailer from about twenty feet away. At "the end of the road," Thomas, Larry Zeigler, and George Zeigler observed McDonald's body lying motionless facedown on the side of the road. Importantly, there was a

specific window of about ten to fifteen minutes from the time (1) McDonald ran out of the trailer; (2) he was chased by Troy and Antwan; (3) he suffered a severe beating; (4) Thomas saw Antwan and Troy walking back up the dirt road toward the trailer; and (5) McDonald was seen lying motionless on the side of the road. The pathologist confirmed McDonald died "within minutes" from bleeding around the brain due to a beating. Later that night, at the Zeiglers' grandmother's house, Troy informed Thomas: "I kicked that nigger to death." Antwan then stated: "He deserved it." Thomas noted Troy was limping and that he thought Troy had a swollen toe.

The trial judge did not err in denying Antwan's motion for a directed verdict on the charge of murder.

II. JURY CHARGE

Antwan asserts the trial court "erred by refusing to give a proper mere presence charge." We disagree.

At the conclusion of the judge's charge to the jury, Antwan's attorney complained: "Your Honor, you mentioned something about being merely present in with the hand of one is the hand of all theory but I didn't hear the mere presence theory that I was expecting to hear, as far as a charge, and we would ask that you charge the mere presence." The judge denied the request and found the charge he had given was sufficient.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004); State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002); see also State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) (holding jury charge is proper if, as a whole, it is free from error and reflects current and correct law of South Carolina). In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003). If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. State

v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989).

A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); State v. Johnson, 315 S.C. 485, 445 S.E.2d 637 (1994); see also State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) (charge is sufficient if, when considered as a whole, it covers law applicable to case). The substance of the law is what must be charged to the jury, not any particular verbiage. Burkhart, 350 S.C. at 261, 565 S.E.2d at 303; State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994); Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464.

A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000); Adkins, 353 S.C. at 319, 577 S.E.2d at 464.

The mere presence charge was sufficient. To be guilty as an aider or abettor, the participant must have knowledge of the principal's criminal conduct. State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987). Mere presence at the scene is not sufficient to establish guilt as an aider or abettor. Id. at 137, 355 S.E.2d at 272; State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987); State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973).

The trial court gave the following jury instruction in regard to mere presence:

> The mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed is not sufficient to convict the defendant as a principal. Guilt is shown by active or constructive presence at the scene, and the State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of

> all. A principal in a crime is one who either actually commits the crime or who is present, aiding, abetting or assisting in the commission of the crime. When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more acting with a common plan or intent [are] present at the commission of a crime, it does not matter who actually commits the crime, all are guilty. The hand of one is the hand of all. Present means to be sufficiently near to aid and abet and assist in the commission of the crime. Intent is also a necessary element, for there must have been a common design or intent to commit the crime, and the crime must have been committed pursuant to that plan, with the person aiding and abetting by some overt act.

The charge in the case sub judice adequately apprises the jury as to the law regarding mere presence. The charge contains the correct definition for mere presence and adequately covers the law.

Additionally, Antwan claims the charge was not sufficient because it did not track the jury instruction given in State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). This argument is without merit. The substance of the law is what must be charged to the jury, not any particular verbiage. See Burkhart, 350 S.C. at 261, 565 S.E.2d at 303. Because the trial judge adequately charged the jury as to the law of mere presence, we need not look to the particular verbiage used in giving the instruction.

III. JUROR MISCONDUCT

Antwan alleges the trial court erred in finding he failed to present any evidence regarding juror misconduct that would warrant sworn juror testimony or a new trial. We disagree.

On appeal, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993). A denial of a new trial based on alleged jury misconduct is reviewed for an abuse of

discretion. State v. Covington, 343 S.C. 157, 539 S.E.2d 67 (Ct. App. 2000). The trial court has broad discretion in assessing allegations of juror misconduct. Kelly, 331 S.C. at 141, 502 S.E.2d at 104. Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999); Kelly, 331 S.C. at 141, 502 S.E.2d at 104.

The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct. App. 1999). Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004); see also State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial). Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. Smith, 338 S.C. at 71, 525 S.E.2d at 266.

In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Kelly, 331 S.C. at 141, 502 S.E.2d at 104; see also State v. Salters, 273 S.C. 501, 257 S.E.2d 502 (1979) (finding a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury and, in order to fully safeguard this basic protection, it is required that the jury render its verdict free from outside influences).

Initially, the trial judge must make a factual determination as to whether juror misconduct has occurred. See Smith, 338 S.C. at 71, 525 S.E.2d at 266; see also Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred). "Only if the trial court finds a juror is guilty of misconduct must the judge determine whether the misconduct affected the verdict, warranting a new trial." Covington, 343 S.C. at 164, 539 S.E.2d at 70.

As a general rule, juror testimony is inadmissible to impeach a jury verdict. State v. Hunter, 320 S.C. 85, 463 S.E.2d 314 (1995). Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict. Id. Traditionally, a juror's testimony was not admissible to prove either his own misconduct or the misconduct of other jurors. Galbreath, 359 S.C. at 405, 597 S.E.2d at 848. However, Rule 606(b), SCRE, altered this common law rule, and now, juror testimony regarding external prejudicial information or improper outside influence is allowed. Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Thus, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence. See State v. Franklin, 341 S.C. 555, 534 S.E.2d 716 (Ct. App. 2000); see also Aldret, 333 S.C. at 310, 509 S.E.2d at 812 (juror testimony or affidavits are generally admissible in the case of an extraneous influence); Hunter, 320 S.C. at 88, 463 S.E.2d at 316 (juror testimony may normally be used when an extraneous influence is alleged). External influence on a jury involves situations where jurors receive information during deliberations from some outside source. Galbreath, 359 S.C. at 405, 597 S.E.2d at 848. The judge noted that no extraneous influence was present in the case at bar. In addition, Antwan concedes the misconduct alleged in this case is internal juror misconduct.

If the alleged misconduct is internal, as we have in this matter, courts are more strict. Hunter, 320 S.C. at 88, 463 S.E.2d at 316. Internal influences involve information coming from the jurors themselves. Galbreath, 359 S.C. at 406, 597 S.E.2d at 849. Until 1995, the prohibition against juror testimony regarding allegations of internal jury misconduct remained intact. In State v. Hunter, our supreme court carved out an exception to this rule, holding that juror testimony is competent in cases involving internal misconduct where necessary to ensure due process, i.e., fundamental fairness. Id.; see also Aldret, 333 S.C. at 312, 509 S.E.2d at 813 (finding premature jury deliberations may affect fundamental fairness of a trial such that the trial court may inquire into such allegations and may consider juror affidavits in support of such allegations); Ex Parte Greenville News, 326 S.C. 1, 482 S.E.2d 556 (1997) (stating juror testimony regarding internal misconduct is generally inadmissible to impeach a verdict except when necessary to ensure fundamental fairness); Hunter, 320 S.C. at 88, 463 S.E.2d at 316 (noting juror's testimony was properly considered as basis for impeaching jury verdict, where juror claimed racial prejudice played role in determining defendant's guilt). In State v. Franklin, the court of appeals held:

> [W]e emphasize that the exception to the general rule against review of internal jury deliberations carved out in Hunter is a narrow one, limited by our supreme court to those few situations which implicate due process raising a question of fundamental fairness. . . . But the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made.

Franklin, 341 S.C. at 562, 534 S.E.2d at 720.

After a three-day trial, the judge submitted the case to the jury. On the second morning of deliberations, the jury sent the trial court a note, asking: "Is it a possibility that the defendants go under oath and tell their side of the story?" After a brief discussion with counsel for Antwan and Troy, the trial court instructed: "[W]e cannot receive new evidence at this time. Please remember that you should not consider the fact that defendants did not

testify." Counsel for Antwan and Troy concurred in the instruction. The jury resumed deliberations and returned a guilty verdict as to both defendants. Attorneys for Antwan and Troy moved for a new trial, arguing the jury "made it clear that they were considering things that [the trial court] specifically instructed them not to consider when they sent out the note saying that they wanted testimony from the defendants. Clearly, they were considering whether the defendants testified or not." The trial court denied the motion.

Lawyers for both Antwan and Troy filed a joint motion to impeach the verdict, take sworn testimony of jurors, and for a new trial. At the hearing, it was argued that the jurors "were basing their verdict, many of them, on the fact that the Zeiglers did not testify." The trial court considered the statements taken from the jurors by investigators hired by the Zeiglers, even though the statements were not sworn affidavits. The court ruled: "I just don't see any evidence that this jury made its decision based on an improper consideration of the defendants failing to testify."

Initially, we note that at the end of the trial the judge gave a detailed charge to the jury instructing them not to consider the fact that the defendants did not testify:

> Because the defendant, ladies and gentlemen, in a criminal trial, is presumed to be innocent, as I told you, the law never imposes upon a defendant the burden or the duty of testifying, of calling any witnesses, or producing any evidence. The defendant in a criminal trial has the absolute right under the Constitution of the United States and the State of South Carolina not to take the witness stand and testify. The exercise by a defendant of this right not to testify or present any evidence must not be considered by you in any way against the defendant, and should play no role whatsoever in your discussions or your deliberations. No inference of any kind may be drawn from the defendant's exercise of his constitutional right not to testify or present other evidence.

The judge reiterated this principle in a charge after receipt of the jury note.

Investigators for Antwan and Troy contacted eight jurors. Seven of the jurors provided statements, not affidavits, to the investigators. Three of the jurors expressed very clearly they based their decision in the case on the evidence presented at trial only. Although the other four jurors who provided statements all professed they thought the defendants should have testified, none of the jurors stated that was the reason they found the defendants guilty. Each of the four jurors declared their decision was based upon the evidence presented by the State at trial. The statements given by the four jurors support the trial court's finding that further investigation was not merited.

Antwan relies on State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003), for the proposition that the judge "should have heard the testimony from the jurors as requested in the motion." Bryant is distinguishable from the case sub judice. Bryant involved the questioning of jurors' family members by Horry County Police detectives before trial in a death penalty setting in a case in which the victim was a Horry County Police Department Officer. Unlike the present case, Bryant was an extraneous influence case.

Here, the trial judge considered the statements even though no sworn affidavits of the jurors were introduced at the hearings. The judge noted: "[W]e don't have any affidavits . . . . I'm not sure we really have any competent evidence before the court, but I'm considering what evidence we have as competent evidence, even though there are no affidavits." The extant precedent mandates the presentation of affidavits or sworn testimony of jurors. This evidentiary record is devoid of the required showing in a case involving internal juror misconduct.

The trial court did not err in refusing to take sworn juror testimony and denying Antwan's motion for a new trial based on allegations of juror misconduct.

CONCLUSION

For the reasons stated herein, Antwan Zeigler's conviction is

AFFIRMED.

BEATTY and SHORT, JJ., concur.