The Supreme Court of South Carolina

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APRIL 23, 2007

NOTICE

The State of South Carolina, through the Committee established under S.C. Code Ann. § 14-3-820 (1976), is soliciting proposals to publish the South Carolina Reports for a five (5) year term beginning July 1, 2007. The South Carolina Reports is the official publication of the opinions of the Supreme Court of South Carolina and the South Carolina Court of Appeals.

The South Carolina Reports is published on a periodic basis averaging five to six volumes per year plus approximately five or six Advance Sheets per volume. Each volume contains approximately 650 pages. The State currently purchases approximately 160 copies of each volume. Proposals should specify a per book price for the copies purchased by the State. The quoted price should include the Advance Sheets and delivery to Columbia, South Carolina. The publisher can market additional volumes to attorneys and the general public.

For a sample of the style and format to be used, see Volume 370 of the South Carolina Reports. The successful publisher must either obtain a copyright waiver from Thomson/West (the current publisher) to continue to include the West headnotes, or include in the proposal a detailed description of how it proposes to prepare headnotes for each case in the Reports which are comparable in functionality to those contained in the current Reports.

Proposals should be submitted in writing on or before June 1, 2007. Proposals and any questions should be directed to the Clerk of the Supreme Court of South Carolina at the above address. The Committee reserves the right to reject any and all proposals.

The Supreme Court of South Carolina

In the Matter of S. Jeff Boyd, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 1, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the SC Supreme Court, dated March 4, 2007, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of S. Jeff Boyd shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

April 18, 2007

The Supreme Court of South Carolina

In the Matter of Shirley Jane Esperanza, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 6, 1996, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated January 25, 2007, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Shirley Jane Esperanza shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

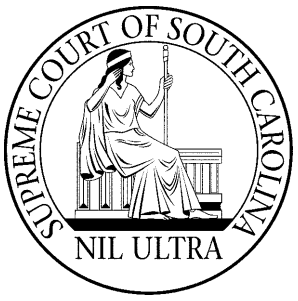
s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

April 18, 2007



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16

April 23, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Steven
Robinson Cureton, Respondent.

ORDER

Following the issuance of this Court's opinion imposing a two year suspension in this matter, information was received from the parties regarding the disposition of the charges which form the basis for that suspension. In order to accurately reflect the status of the charges, we withdraw the former opinion and substitute the attached opinion.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
April 23, 2007

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Steven Robinson Cureton, Respondent.

Opinion No. 26301
Submitted March 12, 2007 – Refiled April 23, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, of Columbia, for the Office of Disciplinary Counsel.

Perry Hudson Gravely, of Pickens, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension or any lesser sanction set forth in Rule 7(b), RLDE. Respondent requests that, if a definite suspension is imposed, it run from the date of his interim suspension.[1] We accept the Agreement and find a two year suspension from the practice of law is the appropriate sanction; however, we deny respondent's request that the definite suspension run from the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

[1] In re Cureton, 363 S.C. 78, 609 S.E.2d 527 (2005).

Facts

A. Criminal Matter

Respondent was arrested and charged with possession of alprazolam, a generic form of Xanax; possession of hydrocodone biterate, a generic form of Lortab; and possession of morphine sulfate, all in violation of S.C. Code Ann. § 44-53-370(d)(2). He was also charged with possession of marijuana, less than 28 grams, in violation of S.C. Code Ann. § 44-53-370(d)(3), and possession of cocaine with intent to distribute, based on his possession of 3.84 grams of cocaine, in violation of S.C. Code Ann. § 44-53-370(b)(1). The charges for possession of alprazolam and possession of morphine sulfate were dismissed. With regard to the remaining charges, respondent pled guilty to possession of hydrocodone and acetaminophen, possession of marijuana and possession of cocaine. Respondent does not dispute that he committed the offenses and admits that, at the time of his arrest, he suffered from a cocaine dependency for which he has since sought and completed inpatient and outpatient treatment.

B. Legal Representation Matter

Respondent was retained by three clients and was paid a fee of either $3,000 or $3,500 by or on behalf of each client. The clients maintain that, upon his suspension, respondent failed to adequately communicate with them regarding their cases and they were required to retain other counsel to complete their litigation.

Respondent acknowledges he did not communicate with the clients with reasonable diligence and promptness as required by Rules 1.3 and 1.4 of the Rules of Professional Conduct, Rule 407, SCACR, and that his physical and mental condition, caused by his drug dependency, may have impaired his ability to handle the clients' cases, in violation of Rule 1.16(a)(2), RPC, Rule 407, SCACR. Respondent also acknowledges the clients are entitled to a refund of their retainer fees, less any amount respondent earned by performing work on the clients' behalf.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); Rule 1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fees or expenses that has not been earned or incurred); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and Rule 8.4(c) (it is professional misconduct for a lawyer to commit a criminal act involving moral turpitude).

Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law).

Conclusion

We find a two year suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for

two years. Respondent shall not be eligible for reinstatement until respondent has paid his fine and completed the sentence imposed, including release from the period of probation. See Rule 33(f)(10), RLDE. Finally, respondent shall, within thirty days of the date of this opinion, enter into a restitution plan with the Office of Disciplinary Counsel, and begin making restitution to presently known and/or subsequently identified clients, banks, and other persons and entities, including the Lawyers' Fund for Client Protection, who have incurred losses as a result of respondent's misconduct in connection with these matters. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bryan Ladner, Appellant.

Appeal From Berkeley County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26310
Heard February 14, 2007 – Filed April 23, 2007

AFFIRMED

Appellate Defender Aileen P. Clare, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, Patricia Ann Kennedy and Keshia V. White, of Berkeley Public Defenders, Inc., of Moncks Corner, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Shawn L. Reeves, all of Columbia, and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

JUSTICE WALLER: Appellant Bryan Ladner was indicted for criminal sexual conduct with a minor, first degree. A jury found appellant guilty, and the trial court sentenced him to 14 years' imprisonment. Appellant directly appeals from his conviction. We affirm.

FACTS

Appellant was charged with digitally penetrating the victim's vagina on October 31, 2003. The victim, at the time, was approximately two and a half years old.

After the jury had been selected, but prior to any testimony being taken, the State informed the trial court it was not planning to call the victim as a witness.[1] Instead, the State intended to introduce the victim's statement implicating appellant through the excited utterance exception to the hearsay rule. In response, defense counsel stated that the victim might be called in the defense's case-in-chief, and therefore, appellant requested a competency hearing. Appellant also made a motion *in limine* to determine the admissibility of the hearsay statement.

The hearing on the motion *in limine* proceeded, and the State put up Marla Jackson.[2] Marla testified that on Halloween 2003 at around 7 p.m., appellant and others arrived at her house to take the victim trick-or-treating. About one hour later, appellant returned the victim to Marla's house. Within approximately 45 minutes of the victim returning to Marla's house, the victim went to the bathroom and complained that her crotch area[3] hurt when she urinated. It was discovered that the victim was bleeding, so Marla laid

[1] At the time of trial, the victim was approximately three and a half years old. The State indicated to the trial court that although it originally had planned on calling the victim as a witness, the State's position was that the child could not testify because of her tender years.

[2] The victim was staying at Marla's house when the relevant events occurred. The relationships between the victim and her various caretakers will be further explained *infra*.

[3] The child referred to her crotch area as her "tooch."

her down in the bedroom and saw that she was red and swollen in her vaginal area. Marla asked the victim what happened, and the victim said, "Bryan did it." The victim then stated, "No, Bryan didn't do nothing."

The trial court ruled that the victim's statement to Marla identifying appellant as the perpetrator was admissible because it met all the elements of the excited utterance hearsay exception. Further, the trial court stated that the victim's incompetency based on her youth would not bar admission under the excited utterance rule. Defense counsel then requested the competency hearing. The victim was questioned by defense counsel and so clearly demonstrated she was incompetent to testify that at the close of questioning, defense counsel conceded she was not competent as a witness. Appellant requested that the trial court reconsider its hearsay ruling, but the trial court again ruled the statement admissible.

The following additional facts were developed during trial testimony. Appellant lived with his fiancée Joanna Sweatman. Joanna had been the victim's primary caretaker until September 2003, when the victim was sent to Tennessee to be taken care of by Joanna's mother, Eloise Cales.[4] Eloise traveled with the victim back to South Carolina on October 30, 2003. Arrangements were made on that day for Joanna and appellant to take the victim trick-or-treating the next evening.

Marla was the State's primary witness. She testified that she was an "aunt figure" to the victim. Marla drove Eloise and the victim from Tennessee to South Carolina the day before Halloween 2003; both Eloise and the victim stayed at Marla's house on October 30 and 31. Marla described how she got the victim ready for trick-or-treating around 6 p.m. on October 31:

[4] Both Joanna and Eloise were defense witnesses. Eloise testified that the victim's mother was "unable" to take care of the victim and asked Joanna to take care of her. Joanna testified that her brother was dating the victim's mother "and he didn't want a baby in the house so they brought her to me and gave her to me and asked me to keep her." Joanna explained that she was paid to take care of the victim and she did so for approximately one year.

> [B]efore I put her panty hose on, I took her pull-up[5] off and washed her down because she had peed in her pull-up that we originally put on her after she had taken a bath earlier and I had to wash her, wipe her down and then put a new pull-up on her before I put her tights on her.

The victim was outfitted as a princess for Halloween: she had on a dress, make-up, and tights as her costume.

Around 7 p.m., Joanna picked the victim up from Marla's house; appellant was driving, and several others were in the car. Appellant drove the group to a neighboring subdivision to go trick-or-treating. Between 7:45 and 8 p.m., appellant returned the victim to Marla's house. Marla testified that she was on the porch giving out candy when the victim returned, and she noticed the victim had been crying because her face was red and her make-up was smeared.

Appellant explained that he brought the victim back because she was having a temper tantrum. According to Marla, appellant did not even stay two minutes at her house. Eloise came to the door and took the victim inside. Shortly thereafter, Marla also went inside the house. The victim sang a couple of songs, karaoke-style. After her singing, while sitting on the couch, the victim grabbed at her crotch and said she had "to pee." Eloise took her in the bathroom, and Marla went in to "find out what was going on." Eloise wiped the child and noticed blood on the toilet paper.[6] She told Marla to take a look at the victim. Marla testified as follows:

> And me and my mom and Eloise was [sic] in the room and [the victim] was all red in her crotch area and swollen and she had scratches all behind her legs. She had a hand print – a large hand print on her arm, a larger hand print on her leg. She had scratches around her wrist. **And I asked her what happened,**

[5] A pull-up is similar to a diaper and is used by toddlers who are not fully potty-trained.

[6] Blood was also observed on the victim's pull-up.

> **because she said her tooch hurt, and I asked her what happened and she said, Bryan did it. And then she goes, No, Bryan didn't do nothing, Bryan didn't do nothing.**

(Emphasis added).

The victim was taken to an emergency room and treated by Dr. Charles Staples. Qualified as an expert in sexual assault examinations, Dr. Staples testified the victim had bruises on her left cheek, arm, and inside thigh; his vaginal exam revealed redness. In Dr. Staples' opinion, the victim's injuries were consistent with sexual abuse that was acute, i.e., it had occurred in the previous 12 to 24 hours.

The victim was transported to, and examined at, Carolina Medical Assessment Center for a full sexual assault examination. Dr. Elizabeth Gibbs, who was qualified as an expert in child sexual examinations, testified that her examination occurred around 1 a.m. on November 1, 2003. She reported that the victim's left leg had been constricted from her left leg being held up. Regarding the victim's vaginal injuries, Dr. Gibbs testified that the area was extremely swollen, there was a laceration on the left side, and bleeding was coming from the hymen. She also stated the victim was in a great deal of pain from the vaginal injuries. Dr. Gibbs opined the victim had suffered a blunt force penetrating injury to her vagina that had occurred within 24 hours of the time of examination. Moreover, Dr. Gibbs stated that although cases of digital penetration generally present with much less trauma than this victim had, her injuries nonetheless could have been caused by digital penetration.

Based on the victim's identification of appellant, the police interrogated appellant in the early morning hours of November 1, 2003. He gave two statements to Detective Aldo Bassi. In his second statement, appellant wrote the following:

> [the victim] was tired and crying so [Joanna] asked me to take her home. She put [the victim and another child] in the car. [The victim] was crying [hysterically] and from the front seat I

> grabbed her arm to get her to stop, she didn't so I grabbed her leg still trying to get her attention for her to stop. She kept crying and I pushed on her diaper in groin area. She still wouldn't stop so I pushed on her crotch w/my finger. She [stopped] crying and was fine the rest of the way home. (It was my right hand and my finger slightly penitrated [sic] her) I did this out of frustration [and] anger to make her stop crying [hysterically].

At trial, however, appellant testified that the victim was "throwing a fit" as he was driving her back from trick-or-treating so he reached back and "popped her on the leg." Appellant stated that Detective Bassi put words in his mouth about what had happened to the victim. Appellant testified that he wrote the second statement because he "just wanted to go home."

ISSUES

1. Was the victim's hearsay statement testimonial and therefore inadmissible under Crawford v. Washington?

2. Did the trial court err by admitting the victim's hearsay statement under the excited utterance exception?

3. Did the trial court err by denying appellant's request for a directed verdict?

DISCUSSION

1. Testimonial vs. Nontestimonial under Crawford v. Washington

Appellant argues it was error to admit the victim's hearsay statement because pursuant to Crawford v. Washington, 541 U.S. 36 (2004), the hearsay statement was testimonial and therefore inadmissible because he had no prior opportunity to cross-examine the victim. We disagree.[7]

[7] Regarding issue preservation, we agree with appellant that although there was no contemporaneous objection during Marla's trial testimony, the hearsay issues are not procedurally barred because proper objections were made at the pretrial

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, the United States Supreme Court (USSC) held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. at 54. With regard to testimonial statements, Crawford overruled Ohio v. Roberts, 448 U.S. 56 (1980), which held that a hearsay statement is admissible if it bears adequate "indicia of reliability," i.e., it falls under a firmly rooted hearsay exception or there is an adequate showing of "particularized guarantees of trustworthiness." See Crawford v. Washington, 541 U.S. at 60; Ohio v. Roberts, 448 U.S. at 66.

The Crawford Court declined to comprehensively define "testimonial." It did, however, state that the "core class of 'testimonial' statements" includes:

> - *ex parte* in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
>
> - extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
>
> - statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and

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proceedings held just before Marla's testimony. See State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001) (where no evidence is taken between the trial court's *in limine* ruling and the admission at trial of the evidence, the issue is preserved).

- statements taken by police officers in the course of interrogations.

Crawford v. Washington, 541 U.S. at 51-52 (citations omitted). In addition, the USSC stated that testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The Crawford Court further observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 51.

Just last year, the USSC provided further guidance on the Crawford decision in Davis v. Washington, ___ U.S. ___, 126 S.Ct. 2266 (2006). There, the USSC dealt with two different domestic violence cases and held (1) a victim's identification of her abuser in response to initial questions from a 911 emergency operator was **not** testimonial, but (2) where police responded to a domestic disturbance, found the wife and husband at home, and took a statement from the wife about the husband's abuse (while the husband was in another room), the wife's statements were testimonial. The Davis Court explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 126 S.Ct. at 2273-74. The Davis Court specifically noted that its holdings related to police interrogations. Id. at 2274 n.1.

Furthermore, while Crawford apparently left Roberts viable as the primary authority for analyzing nontestimonial hearsay, Davis arguably "declared that the Sixth Amendment simply has no application outside the scope of testimonial hearsay." Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 Tex. L. Rev. 271, 285 (2006); see also U.S. v. Tolliver, 454 F.3d 660, 665 n.2 (7th Cir. 2006) (Davis "appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause"), cert. denied 127 S.Ct. 1019 (2007).

The hearsay statement at issue in the instant case was made by a two-and-a-half year old girl to her caretakers immediately after they discovered blood coming from her vaginal area. The victim indicated that her "tooch" hurt, and Marla asked what happened. The victim responded by saying appellant "did it," and then quickly stating he "didn't do nothing."[8]

We find the victim's statement to Marla is clearly nontestimonial. Significantly, the victim's statement is much more akin to a remark to an acquaintance rather than a formal statement to government officers. See Crawford v. Washington, 541 U.S. at 51. Given the circumstances surrounding the victim's statement identifying appellant as the person who hurt her, as well as to whom the statement was made, the statement does not

[8] Other hearsay statements by the victim identifying appellant were also admitted during the State's case. When asked if the victim told him what had happened, Dr. Staples testified, without objection, as follows: "She indicated to me that she had been touched by her aunt's boyfriend that was previously identified at triage as someone named Bryan. And I asked her if the aunt's boyfriend was Bryan and she told me yes." Because the trial court's ruling dealt only with Marla's testimony, however, we restrict our analysis to this particular statement by the victim. Nonetheless, we note that since there was no objection to this part of Dr. Staples' testimony, any arguable error regarding Marla's testimony would be deemed harmless. See State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) (erroneous admission of hearsay evidence is subject to harmless error analysis; error is only harmless when it could not reasonably have affected the result of the trial); State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

amount to "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. Significantly, Marla's questions, as well as the victim's responses, were not designed to implicate the criminal assailant, but to ascertain the nature of the child's injury. Cf. State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006) (generally, statements made outside of an official investigatory or judicial context are nontestimonial).

Cases in other jurisdictions with similar facts have also held the child-victim's statements to be nontestimonial. See generally Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact On How Hearsay Is Analyzed Under The Confrontation Clause*, 36 Seton Hall L. Rev. 327, 364-66 (2006) (statements made by children to persons unconnected to law enforcement have consistently been found to be nontestimonial). For example, in Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005), cert. denied, 126 S.Ct. 1580 (2006), the court held that the ten-year-old victim's statements to his mother and her boyfriend immediately after the boy was molested were not testimonial. The victim, after being asked by the mother's boyfriend "what happened?" stated that the defendant had "put his 'private' into [the victim's] mouth and made [the victim] 'suck on it.'" The boy repeated similar statements to his mother soon afterward. Id. at 576-77.

In finding no Confrontation Clause violation under Crawford, the Purvis court explained as follows:

> The rationale of the rule in Crawford is to exclude from evidence statements that have not been cross-examined that were gathered for the purpose of use at a later trial. [The victim's] statements to [his mother and the man he treated as his father] were not elicited for the purpose of preparing to prosecute anyone but rather to gain information about what happened, find out if [the victim] was harmed, and remedy any harm that had befallen him.

Id. at 579. The court also noted that simply because "parents turn over information about crimes to law enforcement authorities does not transform their interactions with their children into police investigations." Id.

In State v. Aaron L., 865 A.2d 1135 (Conn. 2005), the Connecticut Supreme Court found that a statement made by the victim when she was two-and-a-half years old was properly admitted. The child had spontaneously told her mother: "'I'm not going to tell you that I touch daddy's pee-pee.'" Id. at 1145. Regarding the Crawford issue, the Court stated that "the victim's communication to her mother clearly does not fall within the core category of *ex parte* testimonial statements that the court was concerned with in Crawford." Id. at 1146 n.21.

In Herrera-Vega v. State, 888 So.2d 66 (Fla. Dist. Ct. App. 2004), a three-year-old girl "spontaneously told her mother, as she was putting on the child's underpants, that twenty-year-old Vega had placed his tongue in her 'private parts.' [The victim] reluctantly repeated the story to her father minutes later." Id. at 67. The court there held the trial court did not violate Crawford by allowing the parents to testify to their daughter's statements. Id. at 69.

In sum, the victim's hearsay statement in the instant case was not admitted in violation of Crawford because it is a nontestimonial statement. Accordingly, there was no Confrontation Clause violation.

2. Excited Utterance

Appellant also argues the victim's statement was improperly admitted under the excited utterance hearsay exception. Appellant's arguments on this issue are twofold. First, appellant contends the statement does not qualify as an excited utterance. Specifically, appellant argues the victim was no longer under the influence of the startling event as evidenced by her singing karaoke songs and eating candy after she returned to Marla's home. Second, appellant contends that because the victim was declared incompetent to testify at trial, her hearsay statement made over one year prior to trial is similarly unreliable. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not

admissible. Rule 802, SCRE. There are, however, numerous exceptions to this rule, such as the excited utterance exception. The rules of evidence define excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

An excited utterance may be admitted whether or not the declarant is available as a witness. See Rule 803, SCRE (entitled "Hearsay Exceptions; Availability of Declarant Immaterial"). Moreover, when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted. State v. Dennis, 337 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999). Consequently, in the instant case, if the victim's statement qualifies as an excited utterance, the State properly admitted it to prove that appellant committed the assault.

Looking at the rule, there are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Dennis, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. Sims, supra.

In our opinion, the trial court did not abuse its discretion by admitting the victim's statement as an excited utterance. Clearly, the statement related to the startling event of the victim being severely injured in her vaginal area. The victim was complaining of pain and was bleeding when the statements were made, and thus, the victim made the declaration while under the stress of her attack. Finally, this stress obviously was caused by the startling event of the sexual assault itself. The requirements of Rule 803(2), SCRE, were easily satisfied in this case. See also Purvis v. State, 829 N.E.2d at 581 (where the court found the victim's statement to his father figure, made

almost immediately after being molested, and while the boy was "plainly upset," clearly "met all the criteria" for excited utterances).

We turn now to appellant's claim that because the victim was declared incompetent to testify, her excited utterance was inherently unreliable and therefore was erroneously admitted. This is a novel issue in South Carolina.[9]

The majority of courts that have encountered this issue have held that even though a child could be declared incompetent to testify at trial, the child's "spontaneous declarations or *res gestae* statements" are nonetheless admissible. See Jay M. Zitter, Annotation, *Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial*, 15 A.L.R. 4th 1043 (1982); see also 2 MCCORMICK ON EVIDENCE § 272 (6th ed. 2006) ("an excited utterance is admissible despite the fact that the declarant was a child and would have been incompetent as a witness for that reason"); 2 Wharton's Criminal Evidence § 7:1 (15th ed. 1998) (noting that courts have admitted out-of-court statements by children found incompetent to testify).

In Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988), the Fourth Circuit dealt with this issue in a civil case for damages arising out of child sexual abuse. Before proceeding to the legal analysis of the evidentiary issues, the Morgan court noted generally the following:

> An estimated one in five females suffers from sexual abuse as a child…. [I]n two-thirds of child abuse cases, the incident is never even reported…. Even when the incident is reported,

[9] In Sims, there was a somewhat similar factual scenario; however, this precise legal issue was not raised. There, a five-year-old boy witnessed a brutal attack on his mother, who later died. At trial, the boy was declared competent to testify, but while on the stand, he stopped answering questions and would not tell the jury the identity of the person who was in the apartment on the night his mother was attacked. The responding police officer was recalled to the stand and testified that the boy had identified the defendant. The trial court subsequently ruled the statement was admissible hearsay. Sims, 348 S.C. at 20, 558 S.E.2d at 520. This Court affirmed, finding the boy's statement was an excited utterance.

> prosecution is difficult and convictions are few. Much of this difficulty stems from the fact that methods of proof in child abuse cases are severely lacking. Often, the child is the only witness. Yet age may make the child incompetent to testify in court, and fear, especially when the perpetrator is a family member, may make the child unwilling or unable to testify.

Id. at 943 (footnotes and citations omitted).[10] After thoroughly analyzing the hearsay issue, the court decided that four of the victim's statements made to her mother when the victim was two and three years old should have been admitted as excited utterances; significantly, the court also found that the victim's "youthful incompetency" would not prevent the admission of the hearsay statements. Id. at 946-48.

The Washington Court of Appeals faced this exact issue in a case with facts strikingly similar to the case at bar. See State v. Bouchard, 639 P.2d 761 (Wash. Ct. App. 1982). In Bouchard, the defendant's conviction for indecent liberties with his three-year-old granddaughter was affirmed; the victim had suffered a perforated hymen which the State asserted was the result of the grandfather's digital penetration of the victim. Id. at 762. The hearsay evidence was described by the court as follows:

> The little girl's mother testified that when her daughter returned home she complained of "water" in her pants. When the mother changed the child's clothing, she found blood around her daughter's lower abdominal and vaginal areas. When questioned about the blood, the child told her mother, "Grandpa did it." The father and attending physicians testified that the child made similar statements to them.

[10] See generally Robert G. Marks, Note, *Should We Believe The People Who Believe The Children?: The Need For A New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 Harv. J. on Legis. 207, 207, 214 (1995) (where the author observes that the "sexual abuse of children is one of America's most terrifying social problems" and child sexual abuse "is an extremely difficult crime to prosecute").

Id. at 763. The Bouchard court rejected the defendant's arguments that the statements were inadmissible hearsay and the victim's incompetency should have prevented the admission of the statements. The court held the victim's statements fell within the excited utterance exception to the hearsay rule and specifically stated "[t]he fact that the declarant herself (an infant) would not be competent to testify does not prohibit the use of the excited utterances." Id.

We hold that the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness. See, e.g., State v. Bauer, 704 P.2d 264, 267 (Ariz. Ct. App. 1985) ("excited utterances of children who are incompetent to testify because of their age are admissible in evidence"); Kilgore v. State, 340 S.E.2d 640, 643 (Ga. Ct. App. 1986) (rejecting the contention "that because the victim would have been incompetent to testify in court, her out-of-court statements were thus unreliable and incompetent"); People v. Smith, 604 N.E.2d 858, 871 (Ill. 1992) (excited utterances are sufficiently reliable to be admitted even where the declarant is incompetent); Com. v. Pronkoskie, 383 A.2d 858, 861 n.5 (Pa. 1978) ("a finding of incompetency to testify does not necessarily undermine the indicia of reliability attendant upon an excited utterance of the incompetent witness"); Bouchard, supra.

The legal rationales underlying the rules about both competency and the excited utterance hearsay exception make plain that one ruling has little to do with the other. The competency of a witness depends solely on the facts as they exist when the testimony is given. 81 AM. JUR. 2D *Witnesses* § 160 (2004).[11] Conversely, the intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered. Sims, supra.

[11] Under South Carolina law, a person will be found incompetent as a witness "if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE.

This reliability "will normally remain undiluted by faulty memory, inability to understand questions or otherwise to communicate on the witness stand." Pronkoskie, 383 A.2d at 861 n.5. In other words, the trustworthiness of the excited utterance "stems not from [the declarant's] competency, but rather from the unique circumstances in which [the] statements were made." People v. Smith, 604 N.E.2d at 871. Thus, the fact that a declarant is not able to testify at trial does not diminish the reliability of that declarant's excited utterance. Because the reliability of the excited utterance is unaffected by the incompetency determination, but rather is independently evaluated under long-standing rules developed from the common law, we find appellant's argument that the victim's incompetency at the time of trial should disqualify the admission of her excited utterance untenable.

Accordingly, in the instant case, it was well within the trial court discretion to admit the victim's statements under the excited utterance exception to the hearsay rule.

3. Directed Verdict

Finally, appellant argues the trial court erred by denying his directed verdict motion because the evidence only raised a suspicion that he was guilty. We disagree.

On a directed verdict motion in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. E.g., State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could fairly and logically be deduced, the case must go to the jury. Id. A defendant is only entitled to a directed verdict when the State fails to put up evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). On appeal from the denial of a directed verdict motion, this Court must view the evidence in a light most favorable to the State. Burdette, supra.

We find the trial court correctly denied the directed verdict motion in this case. Viewing the evidence in a light most favorable to the State,

including the testimony which places appellant with the victim at the most likely time the injury was inflicted, the victim's identification of appellant as the perpetrator, as well as appellant's inculpatory statements, it is clear that the case was properly submitted to the jury. To the extent appellant is arguing that the State's case was based on unreliable evidence, the trial court is only concerned with the existence of the evidence, not its weight, when deciding a directed verdict motion. McHoney, supra; Burdette, supra.

CONCLUSION

For all the above reasons, appellant's conviction is **AFFIRMED.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard M. Campbell, Jr., Respondent.

Opinion No. 26311
Submitted March 27, 2007 – Filed April 23, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Richard M. Campbell, Jr., of Greenville, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a definite suspension not to exceed 331 days, retroactive to January 26, 2007, the date respondent ceased the practice of law. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for fifty-nine (59) days, retroactive to January 26, 2007. The facts, as set forth in the Agreement, are as follows.

FACTS

On March 2, 2006, respondent's membership in the South Carolina Bar was administratively suspended due to non-compliance with his 2005 Continuing Legal Education (CLE) requirements. On April 5, 2006, the Court issued an order suspending respondent from the practice of law due to his failure to correct the CLE requirements for membership in the South Carolina Bar.

Notwithstanding his suspensions, respondent continued to practice law in his solo real estate practice until January 26, 2007, when one of the parties to a real estate transaction refused to go forward with a closing due to the fact that respondent was not in good standing with the Bar. Upon receiving this notice, respondent represents he cancelled all of his scheduled closings, closed his office for further business, and immediately contacted ODC to report what had happened and to seek guidance as to what to do.

Respondent represents that, on April 28, 2006, he submitted a completed CLE compliance report and check in the amount of $320.00 (representing the filing fee, the late filing fee, and the reinstatement fee) payable to the Commission on Continuing Legal Education and Specialization (Commission) to the Commission. The Commission confirms it received the check and completed CLE compliance report and deposited the check in the Commission's bank account. However, the Commission did not acknowledge receipt of the check or the CLE compliance report to respondent. Respondent represents he never received any correspondence via regular or certified mail from the Commission or the Court even though his address had not changed.

Respondent did not petition the Court for reinstatement of his license as required by Rule 419, SCACR.[1]

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[1] After respondent's suspension, the filing deadline for CLE fees and compliance reports was changed and the timeline for

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5(a) (lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction) and Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct). Respondent further admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully violate a valid order of this Court), and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement and definitely suspend respondent from the practice of law for fifty-nine (59) days, retroactive to January 26, 2007. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

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suspensions for failure to file CLE fees and compliance reports was amended. See Order dated May 3, 2006.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark S. Keegan, Respondent.

Opinion No. 26312
Submitted March 27, 2007 – Filed April 23, 2007

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Mark S. Keegan, of Greenville, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the issuance of a letter of caution, an admonition, or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent employed an individual as a paralegal for approximately one year. On October 23, 2006, October 30, 2006, and January 3, 2007 the paralegal manipulated the software system on the law firm computer and caused checks to be issued payable to herself in the amounts of $1,571.13, $1,224.00, and $3,400.00 from the Real

Estate Trust Account. The paralegal negotiated the checks for her own purposes. On November 13, 2006, the paralegal misappropriated $2,813.73 from the General Trust Account by providing false payouts representing client liability, but listing personal account numbers for her vehicle taxes and vehicle payment. These checks were used for the paralegal's personal purposes.

Respondent represents that in October 2005 he retained an accountant to reconcile his Real Estate Trust Account. The accountant reconciled his Real Estate Trust Account for the previous six months. Thereafter, the accountant reconciled the account on a monthly basis from October 2005 through September 2006. The accountant did not receive respondent's monthly bank statements for October, November, and December 2006. The accountant telephoned respondent's office in January 2007 and the paralegal told her they no longer needed her services.

Respondent was aware that no account reconciliations were conducted from October 2006 until January 2007. When the reconciliations resumed, the misappropriations were discovered. Respondent transferred funds from his operating account to the trust accounts to cover the losses.

Respondent reported the misappropriation to federal authorities. The paralegal confessed to the theft and has executed a note and mortgage to respondent to reimburse him for the stolen money.

Respondent represents he did not understand that account reconciliations must be conducted on a monthly basis, not in large monthly groups. He agrees that, had he been properly supervising the paralegal, she would not have been able to unilaterally cancel the accountant's reconciliation services and, consequently, conceal her thefts. He further agrees that, had he followed the financial recordkeeping provisions of Rule 417, SCACR, the first stolen check would have been quickly discovered and additional client funds would not have been compromised. After discussing these matters with ODC

and reviewing the applicable rules, respondent recognizes the shortcomings in his reconciliation system and has implemented procedures which comply with the Court's rules.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall safekeep client funds); Rule 5.3 (lawyer shall make reasonable efforts to ensure that his firm has in effect measures giving reasonable assurance that conduct of non-lawyer employees is compatible with professional obligations of the lawyer); and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct). He further admits that his misconduct violated the recordkeeping provisions of Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Aiken, Respondent,

v.

World Finance Corporation of South Carolina & World Acceptance Corporation, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26313
Heard February 13, 2007 – Filed April 23, 2007

AFFIRMED AS MODIFIED

Judson K. Chapin, III, of Greenville, for Petitioners.

Matthew Price Turner and Rhett D. Burney, both of Turner and Burney, P.C., of Laurens, for Respondent.

CHIEF JUSTICE TOAL: Respondent Richard Aiken ("Aiken") filed a law suit against Appellants World Finance Corporation of South Carolina and World Acceptance Corporation (collectively, "World Finance") alleging various torts arising from the misuse of Aiken's personal financial information by employees of World Finance. The circuit court denied World Finance's motion to

compel arbitration on the grounds that Aiken's claims were not within the scope of the arbitration clause. The court of appeals affirmed and this Court granted certiorari. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

World Finance is a nationwide consumer finance company with branch offices in South Carolina. Aiken obtained a series of consumer loans from World Finance beginning in 1997 and continuing through late 1999. Aiken paid off his last loan from World Finance in 2000.

In order to apply for a loan, Aiken was required to supply non-public, personal information to World Finance, including his date of birth and social security number. Upon approval of each loan, Aiken entered into an arbitration agreement with World Finance. Each arbitration agreement provided, in relevant part:

> . . . ALL DISPUTES, CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN CONNECTION WITH THE LOAN AGREEMENT, OR ARISING OUT OF ANY TRANSACTION OR RELATIONSHIP BETWEEN LENDER AND BORROWER OR ARISING OUT OF ANY PRIOR OR FUTURE DEALINGS BETWEEN LENDER AND BORROWER, SHALL BE SUBMITTED TO ARBITRATION AND SETTLED BY ARBITRATION IN ACCORDANCE WITH THE UNTIED STATES ARBITRATION ACT, THE EXPEDITED PROCEDURES OF THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "ARBITRATION RULES OF THE AAA"), AND THIS AGREEMENT.

Beginning in late 2002, several World Finance employees conspired to use the personal information provided by Aiken and other clients to obtain sham loans and embezzle the proceeds for the

employees' personal benefit.[1] Upon discovering the misuse of his personal information, Aiken filed suit against World Finance in the court of common pleas for Laurens County seeking damages for outrage and emotional distress, negligence, negligent hiring/supervision, and unfair trade practices. World Finance filed an answer, a motion to dismiss, and a motion to compel arbitration.

The trial court found that the effectiveness of the arbitration agreement ceased when the relationship of the parties ended. Because Aiken paid off his last loan with World Finance prior to the tortious acts of the employees, the court concluded that Aiken's tort claims were completely independent of the loan agreements and not subject to the arbitration agreements. Therefore, the court denied World Finance's motions to compel arbitration.

The court of appeals affirmed the decision of the trial court. *See Aiken v. World Finance Corp. of South Carolina*, 367 S.C. 176, 623 S.E.2d 873 (Ct. App. 2005). This Court granted certiorari and World Finance raises the following issues for review:

I. Did the court of appeals err in deciding whether Aiken's underlying claims were subject to arbitration without first submitting the issue to an arbitrator?

II. Did the court of appeals err in finding that Aiken's claims were not significantly related to the underlying loan agreement and therefore not within the scope of arbitration?

[1] The now-former employees pleaded guilty for these offenses and were sentenced in the United States District Court for the District of South Carolina.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

I. The appropriate forum for determining the scope of the arbitration clause.

World Finance argues that under the terms of the arbitration agreement, arbitration is the proper forum for determining the scope of the arbitration agreement. Therefore, World Finance claims that the court of appeals erred in determining whether the arbitration agreement covered Aiken's claims without first submitting the issue to an arbitrator. We find that this issue is not properly preserved for review.

In order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). World Finance made no argument regarding the proper forum for determining the arbitrability of the underlying claims in either its motion to compel arbitration or in the hearing before the circuit court. Instead, World Finance's argument focused solely on the merits of the motion (i.e., whether Aiken's claims were within the scope of the arbitration agreement). Consequently, the trial court's order only addresses whether the scope of the arbitration agreement encompasses the underlying claims.

We agree with the court of appeals that the issue of the proper forum for determining the scope of the arbitration agreement is not properly preserved for review. Accordingly, the court of appeals did

not err in deciding the question of whether Aiken's underlying claims were within the scope of the arbitration agreement.

II. Significant relationship between the underlying claims and the contract containing the arbitration agreement.

World Finance argues that the court of appeals erred in finding that Aiken's claims were not within the scope of the parties' arbitration agreement. We disagree.

Both state and federal policy favor arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118. Given these principles, courts generally hold that broadly-worded arbitration agreements[2] apply to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Id.* at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001)).

World Finance primarily argues that because Aiken's contracts with World Finance gave the conspirators access to Aiken's information in order to carry out their crimes, there is a significant

[2] Courts typically characterize arbitration agreements purporting to govern disputes "arising out of or related to" the underlying contract between the parties as "broad" arbitration clauses encompassing a wide range of issues. *See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988).

relationship between Aiken's claims and the underlying loan agreement, thereby warranting arbitration. We find this argument unpersuasive. In our opinion, the "relationship" asserted by World Finance between Aiken's tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of "significant." Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable. *See Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 638 (Fla. 1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement."). *See also The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct. App. 2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.").

The court of appeals also rejected this overly simplified approach. Relying heavily on the fact that Aiken had paid his loans in full when the employees' tortious acts occurred, the court of appeals found that there was no significant relationship between Aiken's tort claims and his loan agreements with World Finance. *See Aiken*, 367 S.C. at 182-83, 623 S.E.2d at 876. Therefore, the court held that Aiken's claims were not within the scope of the arbitration agreement found in the underlying contract.[3]

[3] While relying mainly on the "significant relationship" test to determine whether a claim is arbitrable, the court of appeals also seemed to endorse an additional test used specifically for determining whether a tort claim is arbitrable. The court cited to *Zabinski* for the proposition that tort claims were within the scope of arbitration when "the particular tort claim is so interwoven with the contract that it could not stand alone." *Aiken*, 367 S.C. at 181, 623 S.E.2d at 875 (citing 346 S.C. at 597 n.4, 553 S.E.2d at 119 n.4). We note that the *Zabinski*

Although we agree with the ultimate conclusion reached by the court of appeals, we do not consider the timing of the employees' tortious conduct to be relevant to the arbitrability of Aiken's claim. Instead, we pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.[4]

In this case, we find the theft of Aiken's personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance. Consequently, in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct.[5] Accordingly, we hold that Aiken's claims for unanticipated

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articulation of this test is found in a footnote containing references to tests used by "other jurisdictions" and therefore has not been adopted by this Court as a separate test applicable specifically to tort claims in this context.

[4] Because the parties do not raise the issue of whether any arbitration agreement purporting to apply to such outrageous and unforeseen tortious acts is unconscionable, we leave this determination for another day.

[5] *See also Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) ("When a party invokes an arbitration agreement after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract." (citing *Zandford v. Prudential-Bache Sec., Inc.*, 112 F.3d 723, 727 (4th Cir. 1997))).

and unforeseeable tortious conduct by World Finance's employees are not within the scope of the arbitration agreement with World Finance.[6]

In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underlying contract (e.g., breach of fiduciary duty, misappropriation of trade secrets) would be within the contemplation of the parties in agreeing to arbitrate. We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties. *See McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189, 191 (S.D.N.Y. 1985).

Our decision today does not ignore the state and federal policies favoring arbitration as a less formal and more efficient means for resolving disputes. *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 902 (Ct. App. 1998). This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal.

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[6] Additionally, we are somewhat puzzled by the concurring opinion's characterization of identity theft as a foreseeable tort. Although this Court indicated its concern over the "rampant growth of identity theft" in *Huggins v. Citibank, N.A.*, 355 S.C. 329, 334, 585 S.E.2d 275, 277 (2003), the rule we set forth today is based on the concept of the expectations of a "reasonable man," a standard deeply rooted in tort law. Therefore, a determination of foreseeability under the rule is to be made from the standpoint of the injured party; not this Court. We do not believe that this Court should proclaim that fraudulent acts such as identity theft are foreseeable in the course of normal business dealings.

CONCLUSION

For the foregoing reasons, we affirm as modified the decision of the court of appeals denying World Finance's motion to compel arbitration.

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

JUSTICE PLEICONES: I agree with the majority that the first issue is not preserved, and I concur in the decision holding that Aiken's tort claims are without the parties' arbitration agreement. I write separately, however, as I do not agree with the majority's decision to the extent it finds that identity theft is not foreseeable. See Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275 (2003) ("[The Court] is greatly concerned with the rampant growth of identity theft and financial fraud . . . ."). I would hold that parties executing a lender-borrower contract containing an arbitration provision do not intend identity theft to be within the ambit of the contract, and further that there is no "significant relationship" between the loan agreement and the allegations of Aiken's tort claims. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001).

With this reservation, I concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tawanda Simpson, Respondent,

v.

World Finance Corporation of South Carolina and World Acceptance Corporation, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26314
Heard February 13, 2007 – Filed April 23, 2007

AFFIRMED

Judson K. Chapin, III, of Greenville, for Petitioners.

Matthew Price Turner, Rhett D. Burney, both of Turner and Burney, P.C., of Laurens, for Respondent.

PER CURIAM: We granted a writ of certiorari to review *Simpson v. World Finance Corp. of South Carolina*, 367 S.C. 184, 623 S.E.2d 877 (Ct. App. 2005).

We affirm the court of appeals' decision pursuant to Rule 220(b), SCACR, and the following authority: *Aiken v. World Finance Corp. of South Carolina*, Op. No. 26313 (S.C. Sup. Ct. filed April 23, 2007) (Shearouse Adv. Sh. No. 16 at 47) (holding that this Court will not interpret an arbitration agreement to apply to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings).

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte:

Government Employee's Insurance Company, Appellant,

In Re:

Ronnie Cooper, Respondent,

v.

Yolanda Goethe, Respondent.

Appeal from Beaufort County
Robert S. Armstrong, Family Court Judge

Opinion No. 26315
Heard December 6, 2006 – Filed April 23, 2007

AFFIRMED

Margaret M. Fanning, of Wilson & Heyward, of Charleston, for Appellant.

Peter George Currence, of McDougall & Self, of Columbia, for Respondent Cooper.

CHIEF JUSTICE TOAL: We certified this case for review from the court of appeals pursuant to Rule 204(b), SCACR. Government Employee's Insurance Company ("GEICO") appeals the family court's denial of its petition to join or intervene in Ronnie Cooper's ("Cooper") family court proceeding involving the validity of his common law marriage with Yolanda Goethe ("Goethe"). We affirm

FACTUAL / PROCEDURAL BACKGROUND

GEICO brought a declaratory judgment action against Cooper to determine the parties' rights pursuant to an automobile insurance policy issued to Goethe. Specifically, Cooper claims he is entitled to stack underinsured motorist coverage provided by the Goethe policy on the grounds that he is a Class I insured. GEICO denied Cooper's claim, alleging that Cooper is not a Class I insured because he is neither the spouse nor resident relative of Goethe.

After GEICO denied Cooper's claim to stack coverage, Cooper filed an action in family court seeking an order validating his common law marriage to Goethe since 1991. GEICO petitioned the family court to permit it to join the action pursuant to Rule 19, SCRCP, or to intervene pursuant to Rule 24, SCRCP. As grounds supporting its motion, GEICO alleged that the family court's decision on the parties' common law marriage would impact GEICO's ability to protect its interests under the insurance policy issued to Goethe.

After a hearing on the petition, the family court denied GEICO's motion. The family court found that GEICO was not a necessary party for joinder and did not have standing to intervene. GEICO appeals raising the following issues for review:

I. Did the family court err in denying GEICO's petition to join Cooper's family court action regarding the validity of a common law marriage?

II. Did the family court err in denying GEICO's petition to intervene in Cooper's family court action regarding the validity of a common law marriage?

STANDARD OF REVIEW

The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court. *See Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); *and Hunnicutt v. Richenbacker*, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." *Jeter v. South Carolina Dep't of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 146 (2006).

LAW / ANALYSIS

I. Joinder

GEICO argues that the family court erred in denying its petition for joinder pursuant to Rule 19, SCRCP. We disagree.

Rule 19(a), SCRCP provides in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) *he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest* or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple,

> or otherwise inconsistent obligations by reason of his claimed interest.

Id. (emphasis added). "The principle behind this Rule is that whenever possible persons materially interested in the action should be joined so that they may be heard and a complete determination had." Rule 19, SCRCP note.

GEICO alleges that Cooper and Goethe commenced the family court action to bolster Cooper's position against GEICO in the pending litigation involving Cooper's rights under the Goethe policy. The crux of GEICO's argument for joinder is that failure to join it as a party in the family court action will perpetuate a fraud on the court and ultimately impair GEICO's ability to protect its interests under the insurance policy. We find that although GEICO may be affected by the outcome of the family court action, its interest is insufficient to meet the requirements for joinder pursuant to Rule 19(a)(2)(i), SCRCP.

GEICO relies on Rule 19(a)(2)(i), SCRCP to support its motion for joinder. This provision of the rule allows a party to join an action where "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest." *Id*. In the instant case, however, GEICO has failed to show that it has an interest relating to the subject of the action. The family court action involves the subject of whether Cooper and Goethe are common law married, and GEICO's economic interest under the Goethe policy is merely tangential to the family court action. While the existence of a common law marriage may impact GEICO's liability to Cooper, GEICO has no real interest in the subject matter before the family court.

Furthermore, the family court did not err in finding that GEICO was not a necessary party to the family court action. This Court has interpreted Rule 19, SCRCP to require that a party be a "necessary party" to be joined in an action pursuant to the rule. *See Slatton v. Slatton*, 289 S.C. 128, 130, 345 S.E.2d 248, 249 (1986). "A necessary party is one whose rights must be

ascertained and settled before the rights of the parties to the action can be determined." *Id*.

In this case, the family court had no need to ascertain or settle GEICO's rights before it determined the rights of Cooper and Goethe in their action to recognize their common law marriage. GEICO argues that the family court's reliance on this definition of necessary party as defined in *Slatton* is misplaced because it is based on a repealed section of the South Carolina Code. *See Slatton*, 289 S.C. at 130 n.1, 345 S.E.2d at 249 n.1. Although *Slatton* does not interpret Rule 19, SCRCP, we note (1) that the repealed statute, S.C. Code Ann. § 15-5-200 (1976), upon which the definition of "necessary party" is based was replaced with Rule 19, SCRCP, (2) that this Court recognized the continued application of the definition despite the repeal of the statute, and (3) that the Court decided *Slatton* after the adoption of Rule 19, SCRCP. Accordingly, the definition of necessary party as used in *Slatton* remains an accurate articulation of the law of South Carolina.

The dissent argues that a finding by the family court validating the existence of the common law marriage between Cooper and Geothe will increase GEICO's burden of proof in its pending declaratory judgment action, thereby impairing GEICO's ability to protect its economic interest in the payment of insurance benefits. This argument misses the mark. First, GEICO's interest is merely peripheral to the subject matter of the family court action. Second, while it is true that GEICO may need to meet an increased burden of proof, GEICO maintains the ability to protect any economic interest which may be affected by the family court action. Although the rules of joinder and intervention are to be liberally construed, permitting GEICO to join in a family court action in which it has no real interest stretches beyond liberal construction and creates a situation in which any party with a remotely tangential interest will be allowed to interject themselves into pending litigation. We do not interpret the rules to allow such manipulation.

For these reasons, we hold that the family court did not err in denying GEICO's petition to join the family court action pursuant to Rule 19, SCRCP.

II. Intervention

GEICO argues that the family court erred in denying its petition to intervene pursuant to Rule 24, SCRCP. We disagree.

Rule 24(a), SCRCP provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties. *Berkeley Elec. Coop.*, 302 S.C. at 189, 394 S.E.2d at 714. Accordingly, the Court should consider the practical implications of a decision denying or allowing intervention. *Id.* However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP. *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994). A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a "real party in interest." *Id.* "A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id.* (citations omitted).

We find that GIECO does not have "an interest relating to the property or transaction which is the subject of the action" as required by Rule 24(a)(2), SCRCP. Additionally, we hold that the family court correctly found GEICO lacked standing because GEICO does not have an interest in the subject matter of the family court action. Stated differently, GEICO has no real interest in whether Cooper and Goethe have a valid common law marriage. GEICO's interest is in the financial implications of the family court's

decision, which is peripheral to the subject matter before the court. This interest is insufficient to warrant GEICO's intervention in Cooper's family court action under Rule 24(a)(2), SCRCP.

GEICO claims that this Court's decision in *Bailey* is inapplicable and distinguishable from the case at hand. In *Bailey*, the former wife's prior attorneys moved to intervene in a divorce proceeding for the purposes of challenging the parties' settlement agreement. *Id*. at 454, 441 S.E.2d at 325. The Court found that the attorneys did not have standing to intervene because the order directing payment from the former husband to the former wife in care of attorneys did not direct payment of fees and that the attorneys could litigate fee disputes in an alternative forum. *Id.* The Court further stated that intervention is only appropriate where the party seeking intervention has "a real proprietary interest in the subject matter of the proceedings;" an interest which is merely "peripheral and not the real interest at stake" will not warrant intervention. *Id*.

GEICO's purported distinction is not persuasive. Similarly to the analysis in *Bailey*, we find that the subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits. Accordingly, GEICO does not have standing to intervene in the family court action because it does not have an interest sufficiently related to the subject matter of the action.

For these reasons, we hold that the family court did not err in denying GEICO's petition to intervene in Cooper's family court action.

CONCLUSION

For the foregoing reasons, we affirm the family court's order denying GEICO's petition to join or intervene in Cooper's family court action.

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

JUSTICE PLEICONES: I respectfully dissent, and would hold the family court judge erred in declining GEICO's petition for joinder under Rule 19, SCRCP, and that he abused his discretion in denying GEICO's petition to intervene under Rule 24, SCRCP.

Respondent Cooper claimed that he was a Class I insured under an automobile policy appellant GEICO issued to respondent Goethe. GEICO denied Cooper's claim, and brought a declaratory judgment action in circuit court to determine Cooper's rights, if any, under the Goethe policy. By filing this circuit court action, GEICO undertook the burden of proving, by a preponderance of the evidence, that Cooper was not a Class I insured under Goethe's policy. Vermont Mut. Ins. Co. v. Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994).

After GEICO's circuit court suit was commenced, Cooper brought a family court action against Goethe to establish that they had entered a common law marriage. Cooper's declaratory judgment suit was brought pursuant to S.C. Code Ann. § 20-1-520 (1985) which provides:

> When the validity of a marriage shall be denied or doubted by either of the parties, [1] the other may institute a suit for affirming the marriage and, upon due proof of the validity thereof, it shall be decreed to be valid **and such decree shall be conclusive upon all persons concerned**. (emphasis supplied).

For purposes of this appeal, the critical part of § 20-1-520 is the last phrase: "upon due proof of the validity thereof, [the marriage] shall be decreed to be valid and such decree shall be conclusive upon all persons concerned." An adjudication of a valid marriage under this statute is "conclusive upon the world" and can only be attacked by a non-party to the judgment upon grounds of fraud. Headen v. Pope & Talbot, Inc., 252 F.2d 739 (3rd Cir. 1958). Accordingly, if GEICO is not permitted to participate in

[1] Given Ms. Goethe's non-participation in this appeal, it would appear that neither she nor Cooper truly denies or doubts the marriage.

this family court adjudication, and that court determines that Cooper and Goethe are lawfully married, GEICO will no longer be required to prove in circuit court that there is no marriage by a preponderance of the evidence, but will instead need to prove, by clear and convincing evidence, that Cooper procured the family court judgment by fraud. See Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). Keeping this increased burden of proof in mind, I turn to the issues raised by GEICO in this appeal.

A. Rule 19, SCRCP

GEICO first contends the family court erred in denying its petition for joinder under Rule 19, SCRCP. I agree. Rule 19(a) provides:

> **(a) Person to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

Rule 19(a) is the same as Rule 19(a), FRCP,[2] and expresses the principle that "whenever possible persons materially interested in the action should be

[2] And differs significantly from that of former S.C. Code Ann. § 15-5-200, which is the basis for the definition of "necessary party" in Slatton v. Slatton, 289 S.C. 128, 345 S.E.2d 248 (1986). That statute provided:

joined so that they may be heard and a complete determination had." Notes, Rule 19, SCRCP.

The majority first holds that GEICO has no real interest in the family court action as its economic interest in the Goethe policy is "merely tangential." In my view, GEICO "claims an interest relating to the subject of the [family court] action," whether there is a valid marriage, which is all that Rule 19(a)(2) requires. Further, as explained above, should the family court hold that Cooper and Goethe have entered a common law marriage, that

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§ 15-5-200. New parties; interpleader.

The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action but having an interest in the subject thereof makes application to the court to be made a party it may order him to be brought in by proper amendment.

A defendant against whom an action is pending upon a contract or for specific real or personal property may, at any time before answer, upon affidavit that a person not a party to the action and without collusion by him makes against him a demand for the same debt or property and upon due notice to such person and the adverse party, apply to the court for an order to substitute such a person in his place and discharge him from liability to either party on his depositing in court the amount of the debt or delivering the property, or its value, to such a person as the court may direct. The court may, in its discretion, make such an order.

finding will be conclusive against GEICO, unless it can prove by clear and convincing evidence, that the judgment was procured by fraud. I would find GEICO's exclusion from the family court suit may "as a practical matter impair or impede [its] ability to protect that interest."

Moreover, since we have no state precedent interpreting Rule 19, SCRCP, we may look to federal precedent.[3] See Gardner v. Newsome Chevrolet-Buick, 304 S.C. 328, 404 S.E.2d 200 (1991). I note that Rule 19(a), SCRCP, does not contain the term "necessary party." That term was intentionally omitted when Rule 19, FRCP, was amended in 1966, and South Carolina chose to model its rule on the amended version of the federal rules. As the commentators explain, the term was omitted in order to encourage courts to make pragmatic decisions concerning joinder. See Wright Miller Kane 7 *Federal Practice and Procedure* § 1601.

Rule 19(a)(2), SCRCP asks first, whether the party seeking joinder claims an interest relating to the subject of the action, which I would find GEICO does. Second, it asks whether that party is in such a position that disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest. I would find GEICO meets this criterion.

I would hold that GEICO has met the requirement for Rule 19(a) joinder, and that the family court erred in failing to grant its petition.

B. Rule 24, SCRCP

GEICO next argues that the family court erred in denying its request to intervene made pursuant to Rule 24, SCRCP. I agree.

Rule 24(a)(2) provides for intervention of right:

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[3]Unlike the majority, I do not read Slatton as interpreting, defining, or applying Rule 19. See Slatton, fn. 1: "After the trial of this action, S.C. Code Ann. § 15-5-200 (1976) was repealed by Act. [sic] No. 100 of 1985. See Rule 19, SCRCP."

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The decision to grant or deny a Rule 24(a)(2) motion is reviewed under an abuse of discretion standard, and each case is viewed in the context of its unique facts and circumstances. Berkely Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990). "We interpret [Rule 24(a)(2)] to permit liberal intervention particularly where, as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected." Id. In determining whether intervention is warranted, "we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of [the rule]." Id.

For the reasons given in the preceding section, I would find that GEICO meets the intervention criteria of Rule 24(a)(2). Furthermore, I cannot reconcile the standing discussion in Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994) with my understanding of Rule 24. As I read Bailey, there is no discussion of Rule 24(a)(2), and it is patent that the Court conducted no rule-based analysis. In my opinion, if a party meets the requirements of Rule 24(a)(2), that is, it is entitled to intervene as a matter of right, then it *ipso facto* has "standing." Bailey may have reached the correct result, but its discussion of intervention as an issue of "standing" rather than as a matter governed by Rule 24, SCRCP, is simply misdirected. I would hold the family court abused its discretion in denying GEICO's request to intervene under Rule 24 (a)(2).

Conclusion

I would reverse, and allow GEICO to participate in the family court action. Under the somewhat unusual facts and procedural posture of this

appeal, such a “pragmatic” result will allow the issue of a common law marriage to be resolved in a single suit.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Brandon Turner, Appellant.

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

Opinion No. 26316
Heard March 20, 2007 – Filed April 23, 2007

AFFIRMED

J. Falkner Wilkes, of Craven & Wilkes, of Greenville, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Robert M. Ariail, of Greenville, for respondent.

JUSTICE MOORE: Appellant was found guilty on charges of armed robbery and assault and battery of a high and aggravated nature (ABHAN). He was sentenced to fifteen years imprisonment for armed robbery and ten years imprisonment for ABHAN. The terms were to be served concurrently. His appeal was certified from the Court of Appeals.

Appellant was identified as the robber of a pizza delivery woman. On a sunny afternoon, the victim arrived at a house to deliver a pizza but no one answered the door. She heard the back door of the house slam so she went behind the house. She saw two black males coming towards her. The male walking in front, later identified as appellant, looked angry. The victim stated he came towards her and pulled a gun from behind his back and demanded money. The assailant pulled the victim by her shirt towards the back of the home. The victim told the assailant to take her money and he did so by pulling money out of her pocket. The victim was then told to lie down on the ground. While on the ground, the assailant held the gun beside her head. After a few moments, the assailant and the other male left. Based on the victim's identification of appellant as her assailant, appellant was found guilty of armed robbery and ABHAN.

ISSUES

I. Did the court err by admitting identification testimony where the photographic line-up was unduly suggestive?

II. Did the court err by sending written charges to the jury?

III. Did the court err by limiting the cross-examination of the victim by not allowing questions regarding her schizophrenia diagnosis, her treatment, and her medications?

DISCUSSION

I. Identification

Prior to trial, a suppression hearing was held regarding the victim's pre-trial identification of appellant. The victim testified about how the crimes occurred and described her assailant by stating he was "fairly tall," "built pretty good," did not have a shirt on, and he "was dark." She stated she went to the law enforcement center the same day to look at pictures in a line-up. She stated Investigator Wes Smith did not instruct her she must choose someone and did not tell her that the person who attacked her was in the line-up. She stated he told her to only choose someone if she was sure. She testified she chose appellant as her assailant.

Investigator Smith testified at the suppression hearing. He stated appellant voluntarily came in and had his photograph taken. Smith placed appellant's picture with five other pictures of similar-looking males and showed the pictures to the victim. Prior to presenting the pictures, Smith told the victim that the suspects may or may not be one of the people in the photographs and that he wanted her to look at the photographs and identify someone only if she was sure beyond a reasonable doubt. He stated she indicated she understood his instructions. The victim identified appellant after looking only momentarily at the pictures.

On cross-examination, Investigator Smith stated he pulled the other five pictures from his photographic database and that he tried to choose people that had a similarly shaped face with some facial hair because the assailant had some facial hair. He stated he did not pay attention to the contrast of the background but just tried to choose people who looked similar. He admitted that four pictures had purple backgrounds and two pictures had gray backgrounds. He stated he did not have any choice in the use of the gray background in appellant's picture.

Following the testimony, appellant objected that the photo line-up was suggestive in that only two of the persons in the line-up can be identified as

dark-skinned due to the use of the light background. The court ruled that, while there were some differences in the photographs, there will always be differences. The court ruled the line-up was not unduly suggestive.

At trial, the victim testified regarding the photo line-up. Over appellant's objection, the photo line-up was admitted into evidence. Following that exchange, the victim then identified appellant as her assailant.

Appellant argues the line-up was suggestive because, due to the different color background, appellant's picture stands out from all but one other picture.[1]

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004).[2] An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Id.*

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. *Id.* (citing Neil v. Biggers, 409 U.S. 188 (1972)). A court must ascertain whether the identification process was unduly suggestive. *Id.* Even assuming an identification procedure is suggestive, it need not be excluded so long as, under all the circumstances, the identification was reliable notwithstanding

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[1]Appellant further argues that the fact the victim was shown the photo line-up two more times in court prior to her in-court identification of him multiplies the suggestive impact of the photo line-up. However, when the victim identified appellant as her assailant in the courtroom, he did not object. Therefore, appellant's argument regarding the in-court identification is not preserved for review. *See* State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) (issues not raised and ruled upon in the trial court will not be considered on appeal).

[2]*Cert. denied*, 543 U.S. 1063 (2005).

the suggestiveness. State v. Traylor, *supra*. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. *Id.* The following factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Id.*

The photo line-up here is not unduly suggestive. Despite the variation in the background colors, appellant does not stand out in comparison with the other individuals in the line-up. All six men have facial hair and all appear to be "built," as described by the victim. The gray background does not make appellant's complexion seem darker than the complexions of the other four individuals who have purple backgrounds. Accordingly, the photo line-up is not unduly suggestive. *See, e.g.*, United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974) (fact appellant's photo was in color and photos of the other individuals in the line-up were in black and white is not impermissibly suggestive); Burgess v. State, 827 So.2d 134 (Ala. Crim. App. 1998), *aff'd*, 827 So.2d 193 (Ala. 2000) (fact appellant was wearing a dark jacket or that he was standing before a blank wall while others were standing in front of a curtain did not render line-up unduly suggestive); State v. Holmes, 931 So.2d 1157 (La. App. 4th Cir. 2006) (fact appellant's photo was placed in the top center position of a line-up and had a lighter background shade than the other photos did not render the line-up unduly suggestive); State v. Gullett, 633 S.W.2d 454 (Mo. App. 1982) (fact appellant's photo was in color and was slightly larger than other photos, which were in black and white, did not render the line-up unduly suggestive).

Regardless of whether the photo line-up was suggestive, the identification was reliable. The victim had an ample opportunity to view her assailant at the time of the crime. The crime occurred outside during a sunny afternoon. The victim had a full facial view of him while he asked her questions. Her degree of attention was manifested by the description she gave police. Her description included the details that the assailant was tall,

was built, was not wearing a shirt, was dark, and had some facial hair. This description she gave police matched the photograph she chose from the line-up. The victim had a high degree of certainty regarding her identification because she looked at the photographs only momentarily before identifying appellant. Finally, the time between the crime and the confrontation was very short as the line-up occurred on the same day as the crime. All of these factors point to the reliability of the victim's identification of appellant as her assailant. Even assuming the line-up was suggestive due to the different background colors, there is not a substantial likelihood of irreparable misidentification. Accordingly, the trial court properly admitted the identification.

II. Submission of Written Charge to the Jury

At the conclusion of the court's charge to the jury, the court informed the jury they would receive a written copy of his charge in the jury room. Following the attorneys' review of the charge, appellant objected. The court submitted the written charge to the jury without addressing appellant's objection. Appellant argues the trial court erred by sending the jury charge in written form to the jury.

A trial court may, in its discretion, submit its instructions on the law to the jury in writing. *Cf.* Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) (an appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion); *see* State v. McAvoy, 417 S.E.2d 489 (N.C. 1992) (trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing).

Further, appellant has not shown how he was prejudiced by the court's alleged error. *See* State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006) (appellate courts will not set aside convictions due to insubstantial errors not affecting the result). Although no error was made in the instant case, we remind the Bench that the submission of written instructions to the jury is not appropriate for every case. While the written submission of the jury instructions could aid a jury in properly applying the law to the facts before it, this practice should be carefully exercised by the Bench.

III. Limitation of Cross-examination

Prior to trial, the State moved to preclude appellant from using the terms "schizophrenia" or referring to that particular diagnosis during appellant's cross-examination of the victim. Before determining whether the testimony should be limited, the court allowed an *in camera* cross-examination of the victim. The victim testified she has schizophrenia and that she takes Prozac and Risperdal for that condition. She stated that if she does not take her medication she becomes confused, hears voices, and has problems with her memory. However, she indicated she was taking her medication on the date of the crimes. The court asked her if she had been without her medicine either during the time of the crimes or anytime recently and the victim stated she had not.

The court found there would be very little that would assist the jury in evaluating her ability to recall what happened or her credibility. The court felt it would require speculation on the jury's part to connect the medical testimony to her ability to testify truthfully. The court stated there was a significant potential for unfair prejudice because it may cause the jury to decide the case on an improper basis.

Appellant then requested that he be allowed to ask the following questions: Do you take medication? What do you take? If you do not take your medication over a long period of time, what is your condition? The court stated that the identification of the medicines is prejudicial because it is medication that people associate with mental illness and that the naming of those medicines would not add any probative value. The court asked the questions *in camera* and concluded that questioning the victim regarding the names of her medicines should not be allowed under Rule 403, SCRE. The court then allowed the State to reopen its direct examination of the victim.

On direct, the victim stated she took medication and that she was taking it on the day of the robbery. On cross-examination, the victim indicated that if she does not take her medication over a period of time she gets confused, is forgetful, and can hear voices.

Appellant argues the court erred by not allowing him to question the victim regarding her diagnosis of schizophrenia and the names of her medications.

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. *Id.* On the contrary, trial courts retain wide latitude, insofar as the Confrontation Clause is concerned, to impose reasonable limits on such cross-examination based on concerns about, among other things, prejudice, confusion of the issues, or interrogation that is only marginally relevant. *Id.*

The court's limitation on the cross-examination of the victim was reasonable. Because the victim was taking her medication at the time of the robbery and at the time of the trial, her schizophrenia diagnosis and the types of medications she was taking were irrelevant to her ability to truthfully recall the events. Further, appellant has not shown why the specific information was needed or any nexus between the medications the victim was taking and any alleged misidentification of appellant.

In any event, the victim testified she takes medication and what happens if she does not take her medication. The jury was made aware that the victim is required to be medicated and that if she does not take her medication she is confused, forgetful, and can hear voices. Although appellant could not elicit testimony about the victim's specific mental illness and her specific medication, the gist of what appellant wished to elicit from her testimony was elicited. Therefore, appellant has not shown he was unfairly prejudiced by the limitation. *Cf.* State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) (if the defendant establishes he was unfairly prejudiced by the limitation on cross-examination, it is reversible error). The court did not abuse its discretion by limiting the victim's cross-examination.

CONCLUSION

We find the photo line-up in this case was not unduly suggestive and, even assuming the line-up was suggestive, we find the victim's identification of appellant to be reliable. We further find the trial court did not abuse its discretion by submitting his written charge to the jury. Finally, we find the trial court did not abuse its discretion by limiting appellant's cross-examination of the victim. Accordingly, the decision of the trial court is **AFFIRMED.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ned B. Majors and Tax Lien Agents, Inc., Appellants,

v.

South Carolina Securities Commission, Respondent.

Appeal From Horry County
James E. Lockemy, Circuit Court Judge

Opinion No. 26317
Heard November 14, 2006 – Filed April 23, 2007

AFFIRMED

John F. Beach and John J. Pringle, Jr., both of Ellis, Lawhorne & Sims, of Columbia, and Ned Majors, of Myrtle Beach, for Appellant

Scott E. Hultstrand and Tracy A. Meyers, both of Office of the Attorney General, of Columbia, for Respondent.

JUSTICE WALLER: We certified this case from the Court of Appeals pursuant to Rule 204 (b), SCACR. The South Carolina Securities Exchange Commission ordered Appellants, Ned Majors and Tax Lien Agents, Inc. (collectively TLA), to "Cease and Desist Selling Unregistered

Securities and Engaging in Securities Fraud." TLA appeals, contending it is not engaged in the sale of "securities." We disagree and therefore affirm.

FACTUAL BACKGROUND

Ned Majors is President and sole shareholder of TLA, a South Carolina Corporation operating in Myrtle Beach since 1998. TLA's business centers around the purchase of tax lien certificates (TLCs) at city and county tax lien auctions throughout the country. Pursuant to TLA's "Agency Contract," TLA is the purchasing agent for its Principals. TLA Agents make all purchasing decisions, and they bid competitively for purchases at auctions by offering to accept a lower interest rate than the statutory rate to which purchasers would otherwise be entitled. Pursuant to the contract, the Agent bids on tax liens which TLA believes have a reasonable prospect of not being redeemed. The Principal agrees to pay Agent a "non-refundable agency fee" (between 12-25% of the principal's initial tax lien purchase amount) and grants TLA an inchoate interest of 50% ownership in any unredeemed TLCs.

For each TLC purchased on a principal's behalf, the principal gives the Agent a cashiers check (or a Trust directive if using a trust) made payable to the "County Treasurer for Tax Liens." The TLCs purchased are listed in the principal's name. If a TLC is redeemed before its maturity date (usually 1-3 years), the Principal keeps all redemption monies, including interest and penalties; however, if the TLC is not redeemed, the Principal agrees to immediately sign papers to assign, convey and register the property, and to confirm the Agent has a 50% ownership interest in the net profit of the TLC and any resultant deed issued. The Principal is required (unless agreed upon with the Agent) to commence good faith efforts to quiet the title and sell the property. Although Principals have the right to select closing attorneys and quiet title, etc., they very seldom do so as the majority are absentee owners living a considerable distance from the properties; the majority use TLA's services to facilitate both the sale and quieting title. Although TLA represents only one principal for each TLC purchased, an agent represents 15-20 principals (also referred to as "employers") at each tax sale or as many as 200 "employers" over a two week period.

If a Principal wishes to sell TLCs, the Agent has first right of refusal, and if the TLC is sold to any other party, the third party must agree to the same contract terms as the Principal. If either party elects, the underlying property which was not redeemed may be purchased by paying 50% of the average of three appraisals. The agency contract also states that "while there are no risks in owning government sold and issued TLCs that are redeemed (paid off), there are potential down side financial risks if a TLC matures into a property deed as the underlying property market value could substantially drop during the tax lien maturity period."

PROCEDURAL BACKGROUND

In September 2003, the Attorney General, acting as the South Carolina Securities Exchange Commissioner (Commissioner), entered an order for Majors and TLA to "Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud" and gave them notice of a right to a hearing. The Commissioner appointed G. Marcus Knight as the Administrative Hearing Officer for the matter, and a public hearing was held on Oct 30-31, 2003. Thereafter, Knight issued a detailed report and recommendation concluding that 1) the South Carolina Uniform Securities Act (the Act) applied because TLA was engaged in the sale of "securities" as defined in that Act, S.C. Code Ann. § 35-1-20 (15) because its contract constituted an "investment contract." The Hearing Officer also rejected TLA and Majors' contention that the manner of issuance of the cease and desist order deprived them of due process, or that their due process rights were violated by his appointment as Hearing Officer. The Hearing Officer concluded that the Commissioner should order a final Cease and Desist Order, pursuant to S.C. Code Ann. § 35-1-60, due to a violation of the registration requirements § 35-1-810 of the Act. However, the Commissioner opined the Final Order should exclude any reference to TLA making "material misrepresentations and/or omissions" in connection with its sale of TLCs, and should not pursue any criminal or civil penalties.

In February 2004, the Commissioner issued a "Final Order to Cease and Desist Selling Unregistered Securities." The Commissioner found TLA's investment opportunity constituted a "security" under the Act and also

found a violation of the registration requirements § 35-1-810. TLA and Majors were ordered to cease and desist from offering or selling the TLC investment opportunity in or from the State of South Carolina. The final order did not find TLA was engaged in securities fraud.

Majors and TLA appealed to the circuit court which ruled 1) the investment opportunity offered was a security, 2) the SEC Commission had authority to issue the original cease and desist order, and 3) Majors and TLA were afforded due process in the underlying administrative proceeding.

ISSUES

1. What is the proper standard of review?
2. Did the SEC have authority to issue the initial cease and desist order?
3. Were Appellants afforded due process in the underlying administrative proceeding?
4. Were Appellants properly ordered to cease and desist from the sale of unregistered securities in violation of the S.C. Uniform Securities Act?

1. STANDARD OF REVIEW

The issue in this case involves a decision of whether TLA's sale of TLCs constitutes the sale of securities. We find this is a novel question of law, such that we are free to decide the issue with no particular deference to the lower court. Baggerly v. CSX Transp. Inc., 370 S.C. 362, 635 S.E.2d 97 2006), *citing* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000).

2. INITIAL CEASE AND DESIST ORDER

TLA asserts the Commissioner had no statutory authority to enter the initial Cease and Desist order, such that the whole proceeding should be voided for lack of subject matter jurisdiction. We disagree.

This issue is not one of subject matter jurisdiction. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 236, 442 S.E.2d 598, 600 (1994); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In any event, S.C. Code Ann. § 35-1-60 (2004 Supp), as it read at the time this matter arose, stated in pertinent part, "The Securities Commissioner may make, amend, and rescind those rules, forms, and orders, **including cease and desist orders**, as are necessary to carry out the provisions of this chapter. . ." (emphasis supplied).

As originally written, S.C. Code Ann. § 35-1-60 did not allow the Commissioner to issue cease and desist orders. It was amended in 1992 to permit the Commissioner to make, amend, and rescind those rules, forms, and orders, including cease and desist orders. . ." 1992 Act No. 451 § 1, eff. June 15, 1992. We find it was within the Commissioner's authority to issue the initial cease and desist order.[1]

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[1] We note also that, effective Jan. 1, 2006, Chapter 1 of the South Carolina Uniform Securities Act was repealed and replaced with a new Chapter 1, to comport with the Uniform Securities Act promulgated by the National Conference of Commissioners on Uniform State Laws. Section 35-1-60 has been repealed. In its place, §§ 35-1-603 and 35-1-604 now govern civil and administrative enforcement of the Act. Section 35-1-603 permits the Commissioner to maintain a civil action in the court of common please. Section 35-1-604 (Supp 2005) states, in pertinent part, as follows:

> a) If the Securities Commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter, the Securities Commissioner may: (1) issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter. . .

Clearly, the Commissioner has authority to issue cease and desist orders prior to commencement of a civil proceeding.

3. DUE PROCESS

TLA and Majors next assert issuance of the cease and desist order in violated their rights to due process. We disagree.

The initial cease and desist order, prior to a hearing, was permissible. See Ross v. MUSC, 328 S.C. 51, 72, 492 S.E.2d 62, 69 (1997) (Article I, § 22, requires an administrative agency provide notice and an opportunity to be heard, but does not require notice and an opportunity to be heard at each level of the administrative process. It mandates notice and opportunity to be heard at some point before the agency makes its final decision).

Moreover, contrary to TLA's contention, we find no due process violation in the SEC Commissioner's role in this matter.

In Ross v. MUSC, 328 S.C. 51, 492 S.E.2d 62 (1997), we held the purpose of S.C. Const., Art. I, § 22 is to ensure adjudications are conducted by impartial administrative bodies. Partiality exists where an adjudicator either has ex parte information as a result of prior investigation or has developed, by prior involvement with the case, a "will to win." Ross, 328 S.C. at 69, 492 S.E.2d at 72. In Ross, we found no violation of Section 22 where MUSC's president investigated a tenured professor's conduct, terminated the professor, and then testified against him at a committee hearing. We found no due process violation because the president did not later participate as an adjudicator, and he did not improperly consider ex parte information. Id. at 70, 492 S.E.2d at 72.[2]

In Garris v. Governing Board of S.C. Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998), this Court recognized, "the fact that investigative, prosecutorial, and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more, constitute a violation of due process." 333 S.C. 443, 511 S.E.2d at 54. In that case, Garris was a designated insurance agent for the

[2] However, we did find a violation of Section 22 where the university vice-president investigated the professor's case, testified as an adverse witness at a committee hearing, and sat as the intermediate judge in a three-step disciplinary procedure. Id.

South Carolina Reinsurance Facility. The Facility began investigating Garris, alleging irregularities in his underwriting practices. After a hearing, the Governing Board of the Facility voted to revoke Garris' status as a designated agent. Garris appealed, contesting the composition of the Board which revoked his designation. In Garris, the five Governing board members and one non-member of the South Carolina Reinsurance Facility attended one or more committee meetings at which Garris' case was discussed extensively in open and executive sessions, and all six voted to revoke Garris' status as a designated agent. Of those six, four were members of the committees which considered the Garris matter. Further, two other Governing Board members attended committee meetings and the hearing, but did not vote. We concluded the procedure violated due process, stating:

> we conclude that Governing Board members who participate in the investigation or prosecution of a designated agent as a member or observer at a committee meeting may not participate as adjudicators of that agent's case at a subsequent hearing. Members who participate in the investigation or prosecution of a case must distance themselves from the adjudicatory process, and should refrain from even discussing that case with future adjudicators.

333 S.C. at 446, 511 S.E.2d at 55.

Garris and Ross are distinguishable from the present case. Unlike those cases, the Commissioner did, in this instance, appoint a Hearing Officer to take evidence and make a report and recommendation. Further, the Commissioner did not personally participate in the gathering of the evidence before the Hearing Officer, and there is no evidence he discussed the underlying case with the Hearing Officer.

Moreover, we find the power of the SEC Commissioner is akin to this Court's power to issue an order of interim suspension of an attorney, and then, after an investigation by the Commission on Lawyer Conduct and a Report and Recommendation, issue the ultimate sanction. See Kirven v. Board of Grievances and Discipline, 271 S.C. 194, 246 S.E.2d 857 (1978)

(members of Board of Grievance are officers of this Court commissioned and charged by this Court with the duty of investigating alleged acts of professional misconduct on the part of their fellow members of the bar, and of reporting to this Court the proceedings of their inquiry, their findings and recommendations); Matter of Iseman, 356 S.C. 280, 588 S.E.2d 606 (2003) (Supreme Court holds ultimate authority to sanction attorneys).

We find TLA and Majors have been afforded due process in this matter. The initial cease and desist order provided them with the right to a hearing, which they requested and were afforded by an independent Hearing Officer. Thereafter, they were permitted to appeal the SEC Commissioner's Final Cease and Desist Order, and were allowed to post a bond to stay enforcement of that order pending appeal. The order has further been stayed by this appeal.

4. SECURITY

Finally, TLA asserts that its sale of TLCs does not involve the sale of a security, and it is therefore not in violation of the Act, because it was not required to register under S.C. Code Ann. § 35-1-810 (1987) (making it unlawful to sell any security in this state unless it is either registered or exempt). We disagree. The Commissioner and the circuit court properly held the sale of TLCs in this case constituted the sale of "securities" within the meaning of the Act.

S.C. Code Ann. § 35-1-20 (12), as it read at time of the cease and desist order, defined a "security" as, inter alia, "any certificate of interest or participation in any . . . investment contract . . . or, in general, any interest or instrument commonly known as a security . . ."

As noted by the Court of Appeals in Garrett v. Snedigar, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987), *overruled on other grounds*, Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003), "in construing the state Act, [the Court] may look for guidance to cases construing its federal counterpart." In Garrett, the Court of Appeals recognized that both our Act and the Federal Act define the word "security"

to include any "certificate of interest or participation in any profit-sharing agreement, [or] investment contract." The Court of Appeals cited the seminal United States Supreme Court case of Securities and Exchange Commission v. W.J. Howey Co., 328 U.S. 293, *reh'g denied*, 329 U.S. 819 (1946) in which the Court defined an investment contract as a "transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." Id. at 298-299.

Under the Howey test, an investment contract exists where there has been (i) an investment of money, (ii) in a common enterprise, (iii) with an expectation of profits garnered solely from the efforts of others. See Teague v. Bakker, 35 F.3d 978, 986 (4th Cir.1994). The test is a flexible one, "capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." Howey, 328 U.S. at 299.

We find the Commissioner and the circuit court properly found TLA's sale of TLCs constitutes the sale of an "investment contract," such that under § 35-1-20 (12), it constitutes a security and therefore TLA and Majors were properly ordered to cease and desist from the sale absent proper registration with the SEC Commission.

a. Investment of Money

An "investment of money" under Howey means the investor must have committed his assets to the enterprise in such a manner as to subject himself to financial loss. SEC v. Pinckney, 923 F. Supp. 76, 80 (E.D. NC 1996).

It is indisputable that Principals meet this test. They paid an up-front, non-refundable agency fee of 12-25 % of their TLC purchase price, they paid all fees and expenses associated with the purchase of the TLCs, as well as the expenses associated with establishing clear title to those properties which were not redeemed, and agreed to pay TLA 50% of the profits from the sale of any properties which were not redeemed. It cannot seriously be argued that Principals here did not make an investment of money.

TLA also asserts Principals were not subject to financial loss. However, its contract specifically states that, "while there are no risks in owning government sold and issued TLCs that are redeemed (paid off), there are potential down side financial risks if a TLC matures into a property deed as the underlying property market value could substantially drop during the tax lien maturity period." Accordingly, we find the first prong of Howey is met inasmuch as there is an "investment of money."

b. Common Enterprise Test

TLA next contends the Commissioner, and the circuit court, erred in applying a "strict vertical commonality" test to determine whether it is engaged in a common enterprise. We disagree.

In order to meet the "common enterprise" prong of the Howey test, courts around the country have struggled with discerning whether vertical or horizontal commonality, or both, must exist. See Top of Iowa Cooperative v. Schewe, 6 F.Supp.2d 843, 852 (N.D. Iowa 1998) (noting that the Eighth Circuit had not ruled on whether either vertical or horizontal commonality or both are required under the "common enterprise" prong of Howey, such that the court examined the contracts for either kind of commonality); see also S.E.C. v. SG Ltd., 265 F.3d 42, 49 (1st Cir.2001) (citing and discussing the different standards in courts across the country); S.E.C. v. Pinckney, 923 F.Supp. 76, 81 (E.D.N.C. 1996) (same). As a general guide, vertical commonality requires only a pooling of the interests of the developer or promoter and each individual investor, while "horizontal commonality" requires as well a pooling of interests among the investors. Schewe, 6 F.Supp.2d at 852 (citing Wals v. Fox Hills Development Corp., 24 F.3d 1016, 1017-18 (7th Cir. 1994)). See also SEC v. Alpha Telcom, Inc., 187 F.Supp. 2d 1250 (9th Cir. 2002) (holding the second element of the Howey test can be satisfied by the existence of either vertical commonality or horizontal commonality. Vertical commonality is the dependence of the investors' fortunes on the success or expertise of the promoter. Horizontal commonality

is the pooling of investor funds and interests. *Citing*Brodt v. Bache & Co., Inc., 595 F.2d 459, 460 (9th Cir. 1978).)

The courts have further identified two kinds of vertical commonality: broad vertical commonality and strict vertical commonality. To establish "broad vertical commonality," the fortunes of the investors need be linked only to the efforts of the promoter. See Long v. Shultz Cattle Co., Inc., 881 F.2d 129, 140-41 (5th Cir.1989). "Strict vertical commonality" requires the fortunes of investors be tied to the fortunes of the promoter. Brodt v. Bache & Co.

TLA asserts the only proper test is horizontal commonality which, by its nature, requires a pooling of interest among investors. We disagree.

Initially, we note that many courts have applied an "either/or" test of vertical and horizontal commonality such that there is a common enterprise if either test is met. See e.g. Integrated Research Svcs. v. Illinois Sec. of State, 765 N.E.2d 130 (Ill. 2002); SEC v. Parkersburg Wireless LLC, 991 F.Supp. 6 (D. Col. 1997); Securities and Exchange Commission v. R.G. Reynolds Enterprises, Inc., 952 F.2d 1125 (9th Cir.1991).

We find the newly revised Uniform Securities Act lend guidance to resolution of this issue. The comments to S.C. Code Ann. § 35-1-102 (29)(D) state, in pertinent part:

> The courts have divided over the interpretation of the "common enterprise"" element of an investment contract. The courts generally recognize that "horizontal" commonality (for example, the pooling of an investment by two or more investors) is a common enterprise. A small minority of the federal circuits will also find a common enterprise in a "vertical" relationship when a single investor is dependent upon the expertise of a single commodities broker. Since two or more persons do not share in the profitability of an undertaking, it is difficult to argue that there is a common enterprise. Section 102(29)(D) follows a significantly larger number of federal circuits and adopts a more restrictive form of vertical commonality

> that occurs only when there is profit sharing between two persons even if, for example, one is a conventional investor and one is a promoter. See generally 2 Louis Loss & Joel Seligman, Securities Regulation 989-997 (3d ed. Rev. 1999). In interpreting all elements of the investment contract, the courts have emphasized substance, not form.

Clearly, it appears the Legislature intends a strict vertical commonality test to apply. Accordingly, we find the trial court and Commissioner applied the proper test.

TLA and Majors also assert that, even under a strict vertical commonality test, the Commissioner erred in finding a common enterprise because the relationship here is precisely the opposite of that found in cases of strict vertical commonality. It contends for such a relationship to exist, there must be a showing that the investors' profits are dependent upon the promoter's profits whereas, here, TLA's profits are dependent upon the profits of the principals. We disagree.

The court in SEC v. TLC Investments, 179 F.Supp. 2d 1149, 1156 (D. CA. 2001), specifically rejected such a claim, holding that "TLC's fortunes were inextricably linked to the fortunes of the individual investors. So long as the promoter's gain is contingent on the investor's gain, there is a common enterprise."

c. Efforts of others

Lastly, TLA asserts that because its Principals have input into purchasing and sales decisions, they do not have "an expectation of profits garnered solely from the efforts of others." We disagree.

As noted by the Court of Appeals in Garrett, the third prong of Howey has been relaxed. In Garrett, the Court of Appeals held:

> Later cases have eliminated the requirement that one must expect profits solely from the efforts of others in order for an interest to be a

security. See United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852, *reh'g denied*, 423 U.S. 884 (1975) (the touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others); O'Quinn v. Beach Associates, 272 S.C. 95, 105, 249 S.E.2d 734, 739 (1978) (investment contracts may be found where the investor has duties that are nominal and insignificant or where the investor lacks any real control over the operation of the enterprise).

The key determination is whether the promoters' efforts, not that of the investors, form the "essential managerial efforts which affect the failure or success of the enterprise. Unique Financial Concepts, 196 F.3d at 1201 (*citing* SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 (9th Cir.1973)). See also SEC v. Rubera, 350 F.3d 1084 (9th Cir. 2003) (test is whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise).

We find the test is met here. As noted in the Commission's order, although TLA's Principals retained some contractual rights of control, in practice their control was very limited. TLA made all of the purchasing decisions, and exercised the majority of control in issues relative to clearing title, picking closing attorneys, etc., because the majority of its investors lived a considerable distance away. As further noted in the Commissioner's order, TLA's marketing material indicated "we do all the work."

CONCLUSION

In summary, we hold the SEC Commissioner has authority to issue initial cease and desist orders prior to a hearing, so long as a hearing is thereafter afforded. Further, we find the procedure utilized here did not violate TLA's due process rights, and that the final cease and desist order was properly issued because TLA's sale of tax lien certificates was properly found to be the sale of "securities" within the meaning of the S.C. Uniform Securities Act. Accordingly, the order on appeal is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vicki F. Chassereau, Respondent,

v.

Global-Sun Pools, Inc. and Ken Darwin, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Hampton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 26318
Heard February 13, 2007 – Filed April 23, 2007

AFFIRMED

Michael H. Montgomery and Frank S. Potts, both of Montgomery Patterson Potts & Willard, of Columbia, for Petitioners.

John E. Parker and Lee D. Cope, both of Peters Murdaugh Parker Eltzroth & Detrick, of Hampton, for Respondent.

CHIEF JUSTICE TOAL: This case involves the interpretation of an arbitration agreement. The trial court denied Petitioners' motion to compel arbitration of several claims Respondent asserted as a result of Petitioners' aggressive debt collection practices, and the court of appeals affirmed the trial court's decision. We granted certiorari, and we now affirm.

FACTUAL/PROCEDURAL BACKGROUND

In April 2003, Respondent Vicki Chassereau ("Chassereau") contracted with Petitioner Global Sun Pools ("Global-Sun") to purchase an above ground pool. Chassereau contends that sometime thereafter, the pool began malfunctioning or was otherwise in need of repair. After Global-Sun allegedly refused to remedy the problems, Chassereau ceased making payments on the pool.

According to Chassereau, Petitioner Ken Darwin ("Darwin"), an employee of Global-Sun, began systematically harassing her as a result of her cessation of payments on the pool. Specifically, Chassereau alleges that Darwin repeatedly phoned her at her workplace; disclosed private information to Chassereau's friends, relatives, and co-workers; and also made false and defamatory statements about Chassereau to these same people. Ultimately, Chassereau sued Darwin and Global-Sun for defamation, intentional infliction of emotional distress, and a violation of S.C. Code Ann. § 16-17-430 (2003) (defining the criminal offense of "unlawful communication").

Global-Sun and Darwin moved to compel arbitration of Chassereau's claims, arguing principally that two documents executed during the course of the sale of the pool required that these claims be arbitrated.[1] The trial court disagreed and denied the motion to compel arbitration. Global-Sun and Darwin appealed.

[1] The parties refer to these documents as the "Installation Agreement" and the "Retail Installment Agreement." For the sake of convenience, we will refer to the latter document as the "Financing Agreement."

The court of appeals affirmed the trial court's decision. *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 611 S.E.2d 305 (2005). In determining whether Chassereau's claims were required to be arbitrated, the court of appeals examined only the arbitration clause contained in the Installation Agreement. *Id*. at 633 n.8, 611 S.E.2d at 307 n.8. The court held that because the trial court's order relied only on the arbitration clause in the Installation Agreement, any argument regarding the arbitration clause contained in the Financing Agreement was not preserved for review. *Id*. Ultimately, the court of appeals agreed with the trial court's conclusion that Chassereau's claims were "based upon tortious conduct of the employees of [Global-Sun Pools] unrelated to the contract," and that the claims did not arise out of or relate to the contract. *Id*. at 635, 611 S.E.2d at 308. Accordingly, the court held that the arbitration clause in the Installation Agreement did not require that Chassereau's claims be arbitrated. *Id*.

Global-Sun and Darwin unsuccessfully petitioned the court of appeals to supplement the record on appeal with the Financing Agreement and to grant rehearing in the matter. This Court granted certiorari to review the court of appeals' decision, and Global-Sun and Darwin present the following issue for review:

> Did the court of appeals err in determining that the Installation Agreement's arbitration clause did not apply to Chassereau's claims?

STANDARD OF REVIEW

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The determination of whether a claim is subject to arbitration is subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005); *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001). Nevertheless, a circuit court's factual findings will not be reversed on appeal

if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

Global-Sun and Darwin argue that the court of appeals erred in determining that the Installation Agreement's arbitration clause did not apply to Chassereau's claims. We disagree.

Both state and federal policy favor arbitration of disputes. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Id.* at 597, 553 S.E.2d at 118-119. However, arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate. *Id.* at 596, 553 S.E.2d at 118.

The resolution of this case is controlled by our recent pronouncement in *Aiken v. World Finance Corporation of South Carolina*, Op. No. 26313 (S.C. Sup. Ct. filed April 23, 2007). In that case, we refused to interpret an arbitration agreement with similar, though not identical, language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate. We instructed:

> Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Id.

From the beginning of her relationship with Global-Sun, Chassereau certainly knew that she would be required to make payments on the pool she purchased. Furthermore, Chassereau must have expected that Global-Sun employees would contact her and request that she make payments on the pool

if she ceased doing so. However, we believe a reasonable person would not have foreseen and would not have expected (and ought not to expect) Global-Sun employees to commit acts historically associated with the common law tort of outrage in seeking to collect an overdue debt. Our opinion in *Aiken* unequivocally provides that although these types of uncivilized acts often arise in the course of performance of contracts containing arbitration clauses, South Carolina courts will not interpret arbitration clauses to apply to such acts which are outrageous and unforeseen.

Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case. [2]

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

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

[2] On appeal, Global-Sun and Darwin also contend that the court of appeals erred in holding that any argument regarding the arbitration clause contained in the Financing Agreement was not preserved for review. In light of the foregoing analysis, however, it is unnecessary for us to address this contention. *See Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address additional issues if the resolution of another issue is dispositive).

JUSTICE PLEICONES: I respectfully dissent. The majority does not explicitly find that the claims alleged by Mrs. Chassereau do not arise in any matter relating to her agreements with Global-Sun, yet nonetheless holds that the arbitration clause contained in the Installation Agreement does not require Mrs. Chassereau's claims to be arbitrated.

We must decide whether Mrs. Chassereau's claims arise in any manner or are related to her agreement with Global-Sun.[3] Because I would hold that these claims qualify on both counts, I would reverse the decision of the court of appeals.

In examining whether an arbitration agreement extends to a particular tort claim, South Carolina courts must focus on the factual allegations supporting the claim to determine whether the allegations implicate the contractual agreement, regardless of the legal label assigned to the claim. *See* Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). We have held that a tort claim that does not arise under the governing contract is nevertheless required to be arbitrated if there is a "significant relationship" between the tort claim and the contract in which the arbitration clause is contained. Zabinski, 346 S.C. at 598, 553 S.E.2d at 119. Nothing relates more significantly to a contract than efforts to collect amounts due thereunder.

Case law from other jurisdictions supports this conclusion. In Green Tree Fin. Corp. v. Shoemaker, 775 So.2d 149 (Ala. 2000), the purchasers of a mobile home sued the company which financed the purchase. The purchasers claimed that after they became delinquent in their payments, the finance company began a systematic course of harassing them and invading their privacy. *Id*. at 150. Although the arbitration clause in Shoemaker was

[3] This limitation of our inquiry is based on the fact that the arbitration agreement at issue provides that "any disputes *arising in any manner relating to this agreement* . . . shall be subject to mandatory, exclusive and binding arbitration." (emphasis added).

broader than the clause at issue in the instant case, the Alabama Supreme Court held:

> The plain language of this provision requires the plaintiffs to submit to arbitration all controversies that arise from, or relate to, the contract. That language clearly encompasses the plaintiffs' claim alleging invasion of privacy, a claim that arose out of the underlying business transaction of collecting delinquent monthly payments.

Id. at 151.[4]

The case of In re Conseco Fin. Servicing Corp., 19 S.W.3d 562 (Tx. Ct. App. 2000), also arose out of a financed purchase of a mobile home. Interpreting whether an arbitration clause identical to the clause at issue in *Shoemaker* applied to virtually identical claims, the court held:

> [The complaint] arises from Conseco's alleged efforts to collect the amounts due under the terms of the agreement. Absent the contract, there would be no relationship between [the parties], and there would have been no debt collection . . . . Therefore, we conclude that [the plaintiff's] claims based on Conseco's acts in collecting the debt owed on the contract arise from or relate to the contract and so are within the scope of the arbitration clause.

Id. at 570.

[4] The arbitration clause in Shoemaker purported to apply not only to all claims arising out of or relating to the agreement, but also to all claims *between the parties*. *Id*. at 150. This distinction is insignificant, however, because the court in Shoemaker rests its holding only on the relationships of the claims to the agreement. *See id*. at 151. Thus, Mrs. Chassereau's attempt to distinguish Shoemaker on this ground is unpersuasive.

I believe the reasoning of both Shoemaker and Conseco applies with equal force in the instant case. In my view, it is difficult to imagine something more related to a debt agreement than actions taken to collect the debt. Under any conceivable definition of the word "significant," actions taken in seeking to collect a debt *must* be significantly related to the debt.

The rule the majority announces is troubling in several regards. Primarily, the rule is inconsistent with the notion that all doubts regarding the question of arbitration are to be construed in favor of arbitration. *See* Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. Similarly, the rule runs afoul of the oft repeated notion that unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *See id*. Admittedly, these arbitration principles run counter to general notions of contract interpretation; namely, that a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement. *See* Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (citing 17A C.J.S. *Contracts* § 324). In contrast to the majority's rule, however, the principle that doubts are construed in favor of arbitration is rooted in a statutory proscription. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (stating that § 2 of the Federal Arbitration Act, 9 U.S.C. § 1, et seq., is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary).

Mrs. Chassereau's claims unquestionably arise out of and are significantly related to the Installation Agreement. Accordingly, I would reverse the decision of the Court of Appeals.