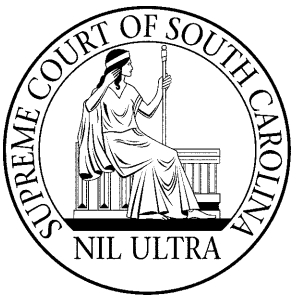

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 5, 2003

ADVANCE SHEET NO. 17

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(Lancaster, Judge Paul E. Short, Jr.)

2003-UP-295 - The State v. David Thomas Oakes
(York, Judge John C. Hayes, III)

2003-UP-296 - The State v. Corey Pearson
(Lee, Judge Clifton Newman)

2003-UP-297 - The State v. Casandra Cae Laster
(Greenville, Judge John C. Few)

2003-UP-298 - Derek w. Kinzer v. Waterhead
(Greenville, Judge Henry F. Floyd)

2003-UP-299 - The State v. James Medford
(Union, Judge J. Derham Cole)

2003-UP-300 - The State v. Jimmy Watts
(Laurens, Judge James W. Johnson, Jr.)

2003-UP-301 - The State v. Donald W. Robinson
(Charleston, Judge Steven H. John)

2003-UP-302 - The State v. Claude Ray Watford
(Florence, Judge B. Hicks Harwell, Jr.)

2003-UP-303 - The State v. Gerald Vincent Williams
(Chester, Judge Paul E. Short, Jr.)

2003-UP-304 - The State v. Mark Anthony Shaw
(Anderson, Judge John W. Kittredge)

PETITIONS FOR REHEARING

3600 - The State v. Lewis Pending

3608 - The State v. Padgett Pending

3610 - Wooten v. Wooten	Pending
3620 - Campbell v. Marion County Hospital	Pending
3623 - Fields v. Regional	Pending
3626 - Nelson V. QHG	Pending
3629 - Redwend v. Edwards	Pending
3630 - The State v. Turron, Danny	Pending
2003-UP-102 - The State v. Patterson	Pending
2003-UP-112 - Northlake v. Continental	Pending
2003-UP-191 - The State v. Massey	Pending
2003-UP-196 - T.S. Martin Homes v. Cornerstone	Pending
2003-UP-225 - Cassidy v. Wilson	Pending
2003-UP-227 - Lynn v. Rebashares	Pending
2003-UP-228 - Pearman v. Sutton	Pending
2003-UP-234 - Williamsburg v. Williamsburg	Pending
2003-UP-237 - Green v. Medical University	Pending
2003-UP-244 - The State v. Fowler	Pending
2003-UP-245 - Bonte v. Breenbrier	Pending
2003-UP-255 - BB&T v. Williamsburg	Pending
2003-UP-258 - Glaze v. Glaze	Pending
2003-UP-265 - The State v. Smith	Pending
2003-UP-268 - Gee v. Drakeford	Pending
2003-UP-269 - Golf Restaurants v. Tilghman	Pending

2003-UP-270 - Guess v. Benedict College	Pending
2003-UP-271 - Bombardier v. Green	Pending
2003-UP-274 - The State v. Brown	Pending
2003-UP-275 - Bonaparte v. Ambler Industries	Pending
2003-UP-277 - Jordan v. Holt	Pending
2003-UP-278 - Love v. Peake	Pending
2003-UP-281 - The State v. Taylor	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3314 - The State v. Woody, Minyard	Pending
3489 - The State v. Jarrell	Pending
3500 - The State v. Cabrera-Pena	Granted 4/25/03
3505 - L-J v. Bituminous	Pending
3518 - Chambers v. Pingree	Pending
3521 - Pond Place v. Poole	Pending
3533 - Food Lion v. United Food	Pending
3540 - Greene v. Greene	Pending
3541 - Satcher v. Satcher	Pending
3543 - SCE&G v. Town of Awendaw	Pending
3545 - Black v. Karrottukunnel	Pending
3549 - The State v. Brown	Pending

3550 - State v. Williams	Pending
3551 - Stokes v. Metropolitan	Pending
3552 - Bergstrom v. Palmetto Health Alliance	Pending
3558 - Binkley v. Burry	Pending
3559 - The State v. Follin	Pending
3562 - Heyward v. Christmas	Granted 4/25/03
3563 - The State v. Missouri	Pending
3568 - Hopkins v. Harrell	Pending
3573 - Gallagher v. Evert	Pending
3574 - Risinger v. Knight	Pending
3587 - The State v. Vang	Pending
3588 - In the Interest of Jeremiah W.	Pending
3591 - Pratt v. Morris Roofing, Inc.	Pending
3592 - Gattis v. Murrells	Pending
3597 - Anderson v. Augusta Chronicle	Pending
3598 - Belton v. Cincinnati	Pending
2002-UP-220 - The State v. Hallums	Pending
2002-UP-329 - Ligon v. Norris	Pending
2002-UP-368 - Roy Moran v. Werber Co.	Pending
2002-UP-489 - Fickling v. Taylor	Granted 3/24/03
2002-UP-498 - Singleton v. Stokes Motors	Granted 4/25/03

2002-UP-513 - Frazier, E'Van v. Badger	Granted 4/25/03
2002-UP-514 - McCleer v. City of Greer	Pending
2002-UP-537 - Walters v. Austen	Pending
2002 -UP-538 - The State v. Ezell, Richard	Pending
2002-UP-587 - Thee Gentlemen's Club v. Hilton Head	Pending
2002-UP-594 - Williamson v. Bermuda	Pending
2002-UP-598 - Sloan v. Greenville	Pending
2002-UP-599 - Florence v. Flowers	Pending
2002-UP-603 - The State v. Choice	Pending
2002-UP-609 - Brown v. Shaw	Pending
2002-UP-613 - Summit Contr. v. General Heating	Pending
2002-UP-615 - The State v. Floyd	Pending
2002-UP-623 - The State v. Ford, Chris	Pending
2002-UP-656 - SCDOT v. DDD(2)	Pending
2002-UP-657 - SCDOT v. DDD	Pending
2002-UP-691 - Grate v. Georgetown	Pending
2002-UP-704 - The State v. Webber	Pending
2002-UP-715 - Brown v. Zamias	Pending
2002-UP-734 - SCDOT v. Jordan	Pending
2002-UP-742 - The State v. Johnson	Pending
2002-UP-748 - Miller v. DeLeon	Pending

2002-UP-749 - The State v. Keenon	Pending
2002-UP- 753 - Hubbard v. Pearson	Pending
2002-UP-760 - State v. Hill	Pending
2002-UP-769 - Babb v. Estate of Charles Watson	Pending
2002-UP-775 - The State v. Charles	Pending
2002-UP-785 - The State v.Lucas	Pending
2002-UP-787 - Fisher v. Fisher	Pending
2002-UP-794 - Jones v. Rentz	Pending
2002-UP-795 - Brown v. Calhoun	Pending
2002-UP-800 - Crowley v. NationsCredit	Pending
2003-UP-014 - The State v. Lucas	Pending
2003-UP-018 - Rogers Grading v. JCM Corp	Pending
2003-UP-019 - The State v. Wigfall	Pending
2003-UP-021 - Capital Coatings v. Browning	Pending
2003-UP-023 - The State v. Killian	Pending
2003-UP-029 - SCDOR v. Springs	Pending
2003-UP-033 - Kenner v. USAA	Pending
2003-UP-036 - The State v. Traylor	Pending
2003-UP-054 - University of GA v. Michael	Pending
2003-UP-062 - Lucas v. Rawl	Pending
2003-UP-083 - Miller v. Miller (3)	Pending

2003-UP-084 - Miller v. Miller (4)	Pending
2003-UP-085 - Miller v. Miller (5)	Pending
2003-UP-088 - The State v. Murphy	Pending
2003-UP-098 - The State v. Dean	Pending
2003-UP-101 - Nardone v. Davis	Pending
2003-UP-113 - Piedmont Cedar v. Southern Original	Pending
2003-UP-125 - Carolina Travel v. Milliken	Pending
2002-OR-405 Collins v. IGT	Denied 4/24/03
0000-00-000 - Dreher v. Dreher	Pending

PETITIONS - UNITED STATES SUPREME COURT

2002-UP-680 - Strable v. Strable	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Horry County
John L. Breeden, Jr., Master-in-Equity

Opinion No. 25642
Heard March 18, 2003 - Filed April 28, 2003

REVERSED

Leslie W. Stidham, of Charleston; and John D. Echeverria, Hope Babcock, and Michael D. Beach, all of Washington, D.C., for petitioner.

Ronald R. Norton, of Conway; and Daniel J. Popeo, Paul D. Kamenar and R. Shawn Gunnarson, all of Washington, D.C., for respondent.

James S. Chandler, Jr., of Pawleys Island, for amici curiae South Carolina Coastal Conservation League, Sierra Club, National Wildlife Federation, and League of Women Voters of Georgetown County.

Nancy Bloodgood, of Young, Clement, Rivers & Tisdale, L.L.P., of Charleston; and Timothy J. Dowling, of Washington, D.C., for amici curiae Municipal Association of South Carolina and International Municipal Lawyers Association.

Kenneth E. Ormand, Jr., of Columbia; and Christopher G. Senior, of Washington, D.C., for amici curiae Home Builders Association of South Carolina, Home Builders Association of Hilton Head Island, Home Builders Association of Greater Columbia, Home Builders Association of the Low Country, Charleston Trident Home Builders Association, Home Builders Association of Horry-Georgetown, and the National Association of Home Builders.

James T. Young, of Conway; and J. David Breemer, of Sacramento, California, for amicus curiae Pacific Legal Foundation.

JUSTICE MOORE: This regulatory takings case is before us on remand from the United States Supreme Court to reconsider our

previous decision[1] in light of Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

FACTS AND PROCEDURE

In the early 1960's, respondent McQueen purchased two non-contiguous lots located on manmade saltwater canals in the Cherry Grove section of North Myrtle Beach. He paid $2,500 in 1961 for a lot on 53rd Avenue and $1,700 in 1963 for a lot on 48th Avenue. Since then, both lots have remained unimproved. The lots surrounding McQueen's are improved and have bulkheads or retaining walls.

In 1991, McQueen filed applications with petitioner Office of Ocean and Coastal Resource Management (OCRM)[2] to build bulkheads on his lots. After an administrative delay, he reapplied in 1993 requesting permits to backfill his lots and build bulkheads. In January 1994, a hearing was held at which the following facts were put into evidence.

At the time of the hearing, the majority of both lots had reverted to tidelands or critical area saltwater wetlands. This reversion was caused by "continuous" erosion, although little change had occurred since the permits were originally sought in 1991. The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street. The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation. On both lots, only some irregular portions of high ground remain.

The proposed backfill would permanently destroy the critical area environment on these lots. Without the backfill and bulkheads, the property does not have enough high ground to be developed. Eventually tidal water will reach the roads bordering these lots which will require bulkheads to protect the public roads.

---

[1]McQueen v. South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000).

[2]Formerly South Carolina Coastal Council.

In October 1994, a final decision[3] was issued denying both permits based on OCRM's evaluation of McQueen's lots as predominantly critical area wetlands.[4] McQueen then commenced this action seeking compensation for a regulatory taking. The master-in-equity found the denial of the permits deprived McQueen of all economically beneficial use of the lots and awarded him $50,000 per lot as just compensation.

OCRM appealed. By a divided court, the Court of Appeals affirmed the finding of a taking because McQueen was deprived of all economically beneficial use of his property. The majority held: "The definitive issue is what rights McQueen possessed when he purchased the lots and . . . the right to add a bulkhead and fill were McQueen's at the time of purchase." McQueen v. South Carolina Coastal Council, 329 S.C. 588, 595, 496 S.E.2d 643, 647 (Ct. App. 1998). The Court of Appeals found the evidence insufficient, however, to support the amount of compensation awarded by the master and the case was remanded. OCRM then sought a writ of certiorari in this Court which was granted.

On review of the Court of Appeals' decision, we reversed. We found it was uncontested that McQueen was deprived of all economically beneficial use of his property but found he had no reasonable investment-backed expectations because of pre-existing wetlands regulations, therefore no taking had occurred. McQueen v.

---

[3]The Coastal Zone Management Appellate Panel upheld denial of the permits.

[4]S.C. Code Ann. § 48-39-130(C) (Supp. 2002) provides that "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department." Under § 48-39-10(J), "critical area" includes tidelands. "Tidelands" means "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved." § 48-39-10.

South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000). The United States Supreme Court then granted McQueen's petition for a writ of certiorari, summarily vacated our opinion, and remanded for further consideration in light of the recent Palazzolo decision.

Palazzolo involved a partial taking of property including wetlands. The Rhode Island Supreme Court found the landowner had not been deprived of all economically beneficial use of his property and, even if he had, the right to fill wetlands was not part of his ownership estate because regulations prohibiting such activity were enacted before he acquired title. Palazzolo v. State, 746 A.2d 707 (2000). On writ of certiorari, the United States Supreme Court reversed holding that pre-existing regulation was not dispositive in itself, either in the context of determining ownership rights under background principles of state law or in determining the investment-backed expectation factor in a partial taking. Palazzolo, 533 U.S. at 626 & 629-30.

ISSUE

Do background principles of South Carolina property law absolve the State from compensating McQueen?

DISCUSSION

First, we accept as uncontested that McQueen's lots retain no value and therefore a total taking has occurred.[5] When there has been a

[5] Our analysis differs depending on whether a taking is characterized as partial or total. When there has been a partial taking by government regulation, the court determines if compensation is due by applying a complex of factors referred to as the Penn Central factors: the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. Palazzolo, 533 U.S. at 617. Where regulation compels the property owner to suffer a physical occupation or deprives the owner of all economically

total deprivation of all economically beneficial use, the threshold issue in determining whether compensation is due is whether the landholder's rights of ownership are "confined by limitations on the use of land which 'inhere in the title itself.'" Palazzolo, 533 U.S. at 629 (*quoting* Lucas, 505 U.S. at 1029); *see also* Rick's Amusement, Inc. v. State, 351 S.C. 352, 570 S.E.2d 155 (2001) *cert. denied* 122 S.Ct. 1909 (2002) (threshold inquiry in regulatory taking is whether the property interest affected is inherent in the plaintiff's ownership rights). Background principles of State property and nuisance law inform this inquiry. Palazzolo, 533 U.S. at 629. Where the proscribed use is not part of the owner's title to begin with, no compensatory taking has occurred. Lucas, 505 U.S. at 1027.

---

beneficial use of his property, however, with "certain qualifications," compensation is due. Palazzolo, 533 U.S. at 617; *see also* Sea Cabins on Ocean IV Homeowners' Assoc., Inc. v. City of North Myrtle Beach, 345 S.C. 418, 548 S.E.2d 595 (2001). In these two instances, the owner must be compensated "without case-specific inquiry into the public interest advanced in support of the restraint," a factor in the Penn Central complex. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

Lucas left much confusion, however, about whether another Penn Central factor, "investment-backed expectations," survived in the context of a total deprivation case. *Compare* Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) (this factor applies even in total deprivation case) *and* Palm Beach Isles Assocs., 231 F.3d 1354 (Fed. Cir. 2000) (Lucas eliminated this factor in total deprivation case), *petition for rehearing en banc denied* 231 F.3d 1365 (Gajarsa, J. dissenting); *see also* Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000) (following Good). Palazzolo has not clearly resolved this issue. In light of our disposition on the threshold issue of background principles of state law discussed below, we need not decide whether this factor applies to a total taking.

Public Trust Doctrine

As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum,* in trust for the benefit of all the citizens of this State. State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); *see also* State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972); Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950), *overruled on other grounds*, McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).[6]

The State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access. Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995); *see also* Heyward v. Farmers' Min. Co., 42 S.C. 138, 19 S.E. 963 (1884) (public trust land cannot be placed entirely beyond direction and control of the State); Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928) (protected public purposes of trust include navigation and fishery). The State's presumptive title applies to tidelands. State v. Yelsen Land Co., 265 S.C. 78, 216 S.E.2d 876 (1975).

---

[6]The State's presumptive title may be overcome only by showing a specific grant from the sovereign which is strictly construed against the grantee. Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (1979). *Cf.* City of Folly Beach v. Atlantic House Props., Ltd., 318 S.C. 450, 458 S.E.2d 426 (1995) (without considering public trust, compensation was ordered where it was uncontested plaintiff was "owner of record" of land below high water mark).

Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 458 S.E.2d 547 (1995). Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State's presumptive title to tidelands. State v. Fain, 273 S.C. 748, 259 S.E.2d 606 (1979).

As described above, each of McQueen's lots borders a man-made tidal canal.[7] At the time the permits were denied,[8] the lots had reverted to tidelands with only irregular portions of highland remaining. This reversion to tidelands effected a restriction on McQueen's property rights inherent in the ownership of property bordering tidal water.

The tidelands included on McQueen's lots are public trust property subject to control of the State. McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do. *Accord* Esplanade Props., Inc. v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (finding no taking where state public trust doctrine precludes dredging and filling tidelands). Any taking McQueen suffered is not a taking effected by State regulation

---

[7]While many of the cases cited above refer to land bordering "navigable tidal" water, under South Carolina law tidal water is presumed navigable unless shown incapable of navigation in fact, a showing not made here. State v. Pacific Guano Co., *supra.* The fact that a waterway is artificial is irrelevant since it is considered the functional equivalent of a natural waterway. Hughes v. Nelson, 303 S.C. 102, 399 S.E.2d 24 (1990).

[8]The value of the interest in land is to be determined at the time of condemnation. City of Folly Beach v. Atlantic House Props., Ltd., 318 S.C. 450, 458 S.E.2d 426 (1995). Condemnation occurred when the permits were denied by a final decision. *See* Palazzolo, 533 U.S. at 618. Regulatory delay does not give rise to a compensatory taking. Sea Cabins, *supra.*

but by the forces of nature and McQueen's own lack of vigilance in protecting his property.

We find no compensation is due. After reconsideration in light of Palazzolo, we reach the same conclusion we originally reached in this case and reverse the Court of Appeals.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James C. Christy, Respondent,

v.

Vida L. Christy, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Alvin C. Biggs, Family Court Judge
John T. Black, Family Court Judge
Frances P. Segars-Andrews, Family Court Judge
H. T. Abbott, III, Family Court Judge

Opinion No. 25643
Heard April 2, 2003 - Filed April 28, 2003

AFFIRMED AS MODIFIED

Robert N. Rosen and Donald B. Clark, of Rosen, Rosen & Hagood, LLC, of Charleston, for Petitioner.

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, PA, of Charleston, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the decision of the Court of Appeals interpreting Rule 63, SCRCP, in a case in which the trial judge in a nonjury case became disabled before the filing of an order containing his findings of fact and conclusions of law. Christy v. Christy, 347 S.C. 503, 556 S.E.2d 701 (Ct. App. 2001). The Court of Appeals held that under the circumstances of this case, a new trial was required. We agree, but base our decision on our long established rule that a judge may change or alter his order in any way prior to its delivery to the clerk of court for filing. Since no order was filed prior to the trial judge's incapacity, a new trial is required.

FACTS

Respondent brought this action to terminate his alimony obligation to petitioner alleging that petitioner had, in effect, entered into a common law marriage. Alternatively, respondent sought an alimony reduction based upon his changed financial circumstances. Petitioner counterclaimed for an increase in alimony.

The common law marriage issue and the claims for modification of alimony were bifurcated. Family Court Judge Black heard the common law marriage evidence, but became incapacitated before signing an order.[1] Judge Segars-Andrews, who had succeeded Judge Black, denied respondent's motion for a new trial filed pursuant to Rule 63, SCRCP. Judge Segars-Andrews later signed an order, based in part on a draft order submitted to Judge Black, finding there was no common law marriage. Judge Biggs subsequently heard the alimony modification claims, and issued an order finding in petitioner's favor. In a later order, Judge Biggs awarded petitioner attorney's fees and costs for the entire litigation.

[1] The Court of Appeals' opinion contains a detailed recitation of the events following the evidentiary hearing and preceding Judge Black's incapacity.

Respondent appealed[2] all these family court orders. The Court of Appeals held that Judge Segars-Andrews erred in denying respondent's request for a new trial following Judge Black's incapacity, vacated her order, and remanded the common law marriage issue for a new determination.[3] Further, the Court of Appeals vacated Judge Biggs' orders since they relied, at least in part, on the resolution of the common law marriage claim. Christy v. Christy, *supra.* We granted certiorari, and now affirm as modified.

ISSUE

> Whether a new trial is required when the trial judge who heard a nonjury matter dies or becomes incapacitated before the filing of a signed order containing findings of fact and conclusions of law?

ANALYSIS

Rule 63, SCRCP,[4] by its terms governs those situations where the trial judge becomes incapacitated or dies after the filing of his findings of fact and conclusions of law, but prior to the completion of post-trial acts authorized by

---

[2] Petitioner cross-appealed, but the Court of Appeals did not reach the merits of her claims in light of its decision to vacate the appealed orders and remand the case.

[3] The Court of Appeals held that, if the parties consented, this claim could be determined based upon the existing records from the proceedings before Judge Black.

[4] Rule 63. Disability of a Judge

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

the SCRCP. As the Court of Appeals found, other jurisdictions having our version of Rule 63 have derived a 'negative inference' from the language of the rule, and concluded that a new trial is mandated where, as here, the incapacity or death precedes the filing of an order. While we find no error in the Court of Appeals' analysis of the rule, nor in its suggestion that two exceptions adopted by other jurisdictions would be applicable under the appropriate circumstances,[5] we hold that this case is governed not by any negative inference derived from Rule 63, but rather by another principle of state law.

"Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may be withdrawn at any time before such delivery." Archer v. Long, 46 S.C. 292, 24 S.E. 83 (1896); see also e.g., Bowman v. Richland Mem. Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999)(citing Archer v. Long); compare Rule 58 (a), SCRCP ("A judgment is effective only when . . . entered on the record"); see also Ford v. State Ethics Comm'n, 344 S.C. 642, 545 S.E.2d 821 (2001)("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling").

No written order having been filed with the clerk of court by Judge Black prior to his incapacity, a new trial is required. Further, Judge Biggs' orders cannot stand in light of our decision that a new trial is required on the common law marriage claim.

---

[5] These two exceptions to the requirement that a new trial be had when the trial judge is unable to file an order after hearing the entire case are:

(1) If all parties consent, the successor judge may make findings of fact and conclusions of law based on the trial transcript; or

(2) The successor judge may consider the transcript as 'supporting affidavits' and entertain a summary judgment motion.

We agree with the Court of Appeals that the appealed orders in this matter must be vacated, and the entire matter remanded for further proceedings. The Chief Judge for Administrative Purposes of the Family Court for Charleston County shall ensure that this case is scheduled, heard, and decided in an expeditious matter.

We also agree with the Court of Appeals' suggestion that the parties may consent to have all or some of the issues determined by the family court judge upon the existing record. In light of the protracted nature of this litigation, we encourage the parties to expedite the disposition of these stale claims through consent or stipulations. Further, we order that should any appeal be taken from orders issued on remand in these proceedings, such appeal shall be made directly to this Court. The decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Antoine Cutner, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 25644
Submitted April 17, 2002 - Filed April 28, 2003

AFFIRMED IN PART; REVERSED IN PART

Chief Attorney Daniel T. Stacey, of Columbia; for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard Assistant Attorney General David Spencer, of Columbia; for Respondent.

CHIEF JUSTICE TOAL: Antoine Cutner ("petitioner") appeals his conviction, claiming the trial court lacked subject matter jurisdiction over the charge of possession with intent to distribute marijuana within proximity of a school, and that the trial court erred by allowing evidence that indicated petitioner was a dealer of crack cocaine. We affirm in part, reverse in part.

Factual/Procedural Background

Petitioner was convicted, after a trial in his absence, of possession with intent to distribute ("PWID") marijuana and PWID marijuana within proximity of a school. Two days later, petitioner pled guilty to other charges and was sentenced on those charges. His sealed sentence was opened and he was sentenced to ten years imprisonment for PWID marijuana and five years imprisonment, to be served consecutively, for PWID marijuana within proximity of a school. No direct appeal was taken.

Petitioner filed for post-conviction relief. After a hearing, the PCR court issued an order dismissing the PCR application without prejudice and granting petitioner a belated direct appeal under *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Petitioner raises the following issues on appeal.

> I. Whether the trial court lacked subject matter jurisdiction over the charge of PWID marijuana within proximity of a school?
>
> II. Whether the trial court erred by permitting evidence that petitioner was a dealer of crack cocaine?

Law/Analysis

I. Subject Matter Jurisdiction

Before trial, the State moved to amend the indictment regarding the charge of PWID marijuana within proximity of a school. The indictment read:

> That ANTOINE CUTNER did in Richland County on or about March 30, 1998, distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute, a controlled substance, to wit: marijuana, while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle or secondary school; a public playground or park; a public vocational or trade school or a technical educational center; or a

public or private college or university, to wit: Ridgewood Missionary Baptist Church.

(emphasis added). The State, claiming a scrivener's error, requested the indictment be amended to read "to wit: Eau Claire High School and/or Ridgewood/Babcock Center."

Petitioner's counsel argued against the amendment stating the amendment would change the nature of the offense charged.[1] The trial court overruled petitioner's objection, stating petitioner was placed upon sufficient notice as to the charge he was facing.

Petitioner claims the trial court erred by granting the State's motion to amend the indictment to show the drugs were possessed within proximity of Eau Claire High School, rather than Ridgewood Baptist Church, as set forth in the indictment.

A circuit court has subject matter jurisdiction if: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of the indictment; or (3) the charge is a lesser-included charge of the crime charged in the indictment. *Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001) (citing *Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998)). "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, *but whether it contains the necessary elements of the offense intended to be charged* and sufficiently apprises the defendant of what he must be prepared to meet." *Id.* (quoting *Browning v. State*, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) (emphasis added by *Brown*).

---

[1] S.C. Code Ann. § 44-53-445 (2002) provides:

> It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university.

Under South Carolina Code Ann. § 17-19-100 (1985), the trial court "may amend the indictment if such amendment does not change the nature of the offense charged." Generally, amendments are permitted for the purposes of correcting an error of form, such as a scrivener's error. *State v. Jones,* 211 S.C. 319, 45 S.E.2d 29 (1947). Otherwise, if the defendant objects to an amendment on grounds that the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the necessity of reindictment or obtain a waiver of presentment from the defendant. *Hopkins v. State*, 317 S.C. 7, 10, 451 S.E.2d 389 (1994).

In the case at hand, amending the indictment from "to wit: Ridgewood Missionary Baptist Church" to state "to wit: Eau Claire High School and/or Ridgewood/Babcock Center" is not a scrivener's error. Ridgewood Missionary Baptist Church, Eau Claire High School, and Ridgewood/Babcock Center are all entities within a one-half mile radius of where petitioner was arrested, but only the schools make petitioner eligible for the additional penalties under South Carolina Code Ann. § 44-53-445 (2002). Section 44-53-445 does not separately criminalize distributing marijuana within proximity of a church, but the statute *does* create a separate offense for distributing marijuana within proximity of a school. As such, amending the indictment to name Eau Claire High School and/or Ridgewood/Babcock Center changes the nature of the offense.

Counsel for petitioner objected to the amended indictment, which the trial court overruled. Since the amendment was not the result of a scrivener's error and defense counsel objected, the trial court only had two options under *Hopkins*: reindictment or waiver of presentment. The court pursued neither option to correct the defective indictment, and consequently it lost its subject matter jurisdiction. Thus, petitioner's conviction for PWID within the proximity of a school must be reversed.

II. Crack Cocaine Evidence

Petitioner argues the trial court erred by permitting evidence indicating he was a dealer of crack cocaine.

After receiving a tip, Investigator Wendell Harris and several other officers went to a wooded area in search of a person suspected of dealing drugs. Investigator Harris observed a known crack cocaine user exiting the woods where the suspect was alleged to be. Before Harris exited the car in which he was riding, he saw a person fitting the description of the suspect and recognized the person to be petitioner. Upon exiting the car, he saw petitioner "turn to run and . . . observed a black-like bag in his hand as he made the turn."

Harris testified petitioner ran a few feet into the woods with the bag before dropping it. He chased petitioner through the woods and by the time he reached the other side, another officer had apprehended petitioner. Petitioner indicated he had been in the woods to cut firewood. An officer later emerged from the woods with the bag Harris saw petitioner drop and a beeper. The bag had been located approximately fifteen feet into the wooded area. Inside the bag were plastic baggies, containing approximately 37 grams of marijuana, and a small scale.

The officer who located the bag and beeper asked to whom the beeper belonged. Petitioner indicated the beeper was his, but the bag was not. The beeper had been found within a few feet from the bag.

During trial, Investigator Harris testified that while chasing petitioner, he observed petitioner "pulling out what appeared to be white-like rocks and throwing them to the left and to the right." He also testified "[b]ased on [his] experience, no doubt [petitioner] was getting rid of crack cocaine." At this point, defense counsel objected. Following an off-the-record bench conference, the trial court instructed the jury:

> . . . this defendant upon this indictment is charged with possession with intent to distribute a quantity of marijuana, to which charge he has pled not guilty. There is some testimony here about crack cocaine. This defendant is not charged with possession of crack cocaine, he is not charged with crack cocaine in any way whatsoever, so do not consider any testimony relative to crack cocaine. That is simply not an issue in this case.

Following the instruction, Harris was again asked about observing petitioner throwing out white objects without objection by defense counsel. The solicitor then questioned Harris about the fact that petitioner was not charged with crack cocaine and that crack cocaine was not found at the scene. The following also occurred during Harris' direct examination:

> Question: Speaking of not being able to find the crack cocaine on the ground and all this concern about children, because children were out at 4 o'clock when the defendant was selling drugs; correct?
> Answer: That's correct.
> Question: All right. You even lost your –
> Defense counsel: Objection . . .[t]here is no allegation the defendant was selling drugs.
> Solicitor: He says it in his statement. . . . I withdraw the question. . . .
> The court: Withdraw the question. . . . Sustained.

On cross-examination, defense counsel asked why the case summary and the incident report prepared by Harris did not mention "seeing [petitioner] reach into his waistband and throw crack cocaine on the ground." Harris stated he did not include that information because it was irrelevant. Counsel then asked Harris if it was irrelevant, why he mentioned it in his trial testimony. Harris dodged this question. The questioning continued:

> Question by defense counsel: . . . you thought you saw him throw crack cocaine on the ground and you didn't go back there and try to find it, you just left it there for anybody to find, kids can walk back there and get crack cocaine on the ground?
> Answer: No, we tried to recover it, but due to the density of the woods and you talking about [sic] micrograms of crack, it would be almost impossible to locate.

Prior to trial, petitioner's statement to the police was read aloud during the Jackson v. Denno[2] hearing. The statement is as follows:

> Question by Investigator Harris: Tell me what you were doing in the woods at Ridgewood Apartments.
> Answer: I went in the woods to get my money from a crack dealer that sells for me.
> Question: How much dope did you have?
> Answer: Three hundred dollars' worth.
> Question: Why did you run from the police?
> Answer: I was scared because I got charges on me.
> . . .
> Question: Who was the other guys [sic] out there with you?
> Answer: Quinton Johnson and a subject named Terry.
> Question: Was Quinton selling drugs?
> Answer: Yes.
> Question: What does the crackhead sell for you?
> Answer: He sells crack for me.
> Question: Is there anything else you would like to add?
> Answer: No.

At the end of the hearing, defense counsel objected to the statement under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and Rule 404(b), SCRE, on the basis the statement was evidence of other bad acts and that the prejudice of admitting the statement outweighed its probative value. The court admitted the statement under Rule 404(b). The court also noted the statement went "to the issue then being investigated." Upon the defense's request, the court indicated it would give a limiting instruction regarding the evidence.

[2] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

During Investigator Harris' testimony, petitioner's statement was read into the record. The solicitor again asked Harris questions about the relevancy of the crack evidence. Harris indicated even though petitioner gave a statement regarding crack, petitioner was not charged with crack possession because no crack was located. Counsel did not object or request a limiting instruction at this time apparently because he had previously objected and the court had given a limiting instruction regarding the evidence.

In closing argument, the solicitor stated:

> The only evidence in this case is that the defendant profits by selling this garbage on our streets. And the only evidence is that he uses other people to sell this garbage as well as other types of trash and drugs on our streets, and he profits from those people.
>
> . . . is the defense that the defendant was cutting wood, is the defense that he doesn't deal in marijuana he only deals in crack . . .

Defense counsel, in closing argument, also discussed the crack cocaine evidence.

The jury found petitioner guilty as charged. Counsel's motion for a new trial based on previous objections that the crack cocaine evidence was irrelevant to the case was denied.

Petitioner argues the extensive crack cocaine evidence was inadmissible and prejudicial.

We find the crack cocaine evidence was inadmissible under Rule 402, SCRE, which states that evidence that does not relate to the crime charged, is irrelevant and inadmissible. The crack cocaine evidence did not bear on the crime charged, which was PWID of marijuana. Irrelevant evidence that was admitted by the trial judge is subject to a harmless error analysis upon appellate review. *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100

(1999). We find the error harmless because there was sufficient evidence presented to prove the PWID of marijuana charge. Investigator Harris testified that petitioner dropped a bag while he was chasing petitioner in the woods. Another officer picked up the bag, which contained a scale, plastic baggies, and 37 grams of marijuana.

Accordingly, we find that the introduction of the irrelevant crack cocaine evidence did not prejudice petitioner's conviction on the PWID of marijuana charge.

Conclusion

We find the trial court lacked subject matter jurisdiction over the charge of PWID marijuana within proximity of a school. We further find the admission of the crack cocaine evidence was a harmless error. Accordingly, petitioner's conviction for PWID is **AFFIRMED,** and petitioner's PWID within the proximity of a school is **REVERSED.**

WALLER and PLEICONES, JJ., concur. MOORE, J., concurring in part and dissenting in part in which BURNETT, J., concurs.

JUSTICE MOORE (concurring in part and dissenting in part): I respectfully dissent from the portion of the majority's opinion that reverses appellant's conviction for PWID within the proximity of a school.

Amending the indictment for PWID within proximity of a school to list a school rather than a church did not change the nature of the offense charged. State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001) (indictment may be amended provided such amendment does not change nature of offense charged). Prior to and after the amendment, appellant was charged with violating S.C. Code Ann. § 44-53-445 (2002), the statute prohibiting the possession of drugs with the intent to distribute within the proximity of a school. The possible punishment appellant faced did not change, nor did the amendment alter the charge in any fashion other than to correct a scrivener's error naming a church instead of a school. *See, e.g.,* State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973) (amendment of indictment to insert name of agent to whom defendant allegedly sold LSD did not change nature of offense charged and was permissible); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947) (amendment correcting misnomer as to name of victim in indictment charging assault with intent to kill was not error where defendant was not misled and nature or grade of offense was not changed).

Accordingly, because the amended indictment contained the necessary elements of the offense, did not change the nature of the offense charged, and sufficiently apprised appellant of what he must be prepared to meet,[3] the trial court had subject matter jurisdiction over the offense of PWID marijuana within proximity of a school. *See* Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

I concur with section II of the majority opinion, which affirms the trial court's ruling regarding the admission of crack cocaine evidence.

Accordingly, I would affirm appellant's convictions for PWID marijuana and PWID marijuana within proximity of a school.

---

[3]While arguing against the amendment, counsel for appellant admitted appellant was clearly on notice from the indictment that the State proposed to try appellant under the PWID within proximity of a school statute.

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of W. Smith Strickland, Jr., Respondent.

Opinion No. 25645
Heard April 3, 2003 - Filed April 28, 2003

DISBARRED

Henry B. Richardson, Jr., and James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the sole issue before the Court is the appropriate sanction to be imposed upon respondent, who has been on interim suspension since August 12, 1998.[1] The Panel recommended that respondent be disbarred, that the disbarment be made retroactive to the August 12, 1998, suspension date, and that respondent be ordered to pay the costs of the disciplinary proceedings. Neither the Office of Disciplinary Council (ODC) nor the respondent has filed a brief. We disbar respondent, retroactive to August 12, 1998.

[1] In the Matter of Strickland, 332 S.C. 87, 504 S.E.2d 317 (1998).

FACTS

Respondent has admitted the allegations of the complaint, which are summarized below:

1. Trust Fund Matter

Respondent was the sole proprietor of a firm that did a large amount of collection work. In 1997, he merged his practice with that of another firm [Firm]. As a result of the merger, certain unethical practices of respondent came to light.

From 1995 to 1997, respondent failed to maintain the integrity of his trust account and of his operating account. Respondent did not timely transmit documents and checks. Further, he misrepresented and/or converted some client funds to pay other clients.

Respondent handled a large number of collection matters for a Bank. He would collect funds from the Bank's debtors, then use those funds to pay himself fees for other Bank matters. The ODC identified fifteen checks whereby approximately $89,000 was improperly withdrawn from respondent's trust fund and paid into respondent's operating account.

Following the 1997 merger between respondent's practice and the Firm, an audit revealed a shortfall in respondent's trust account of $37,000 to $45,000. The Firm immediately deposited $45,000 into the account. Respondent's largest client, Bank, was subsequently billed and then paid $90,000 in legal fees for work done by respondent. This money was used to offset the Firm's $45,000 deposit into respondent's trust account and to offset any client fund shortfall. The Firm eventually paid respondent $16,000, apparently after repaying itself and making all of respondent's clients whole.

2. Bank Matter

Respondent settled a matter for a client for $15,000, and deposited those funds into his trust account. In October 1996, he prepared a trust

account check for $10,000, payable to client, and placed the check in the client's file. In February 1997, the balance in the trust account fell to $507.22, an amount insufficient to cover the $10,000 check that had still not been delivered to respondent's client. The client was finally paid by a different check in May 1997.

Respondent misappropriated these funds, or misapplied them.

3. Overpayment

Respondent's client received a $9,410 judgment against W. W paid respondent approximately $7,000 toward the judgment. From this payment, respondent sent his client a check for $5,424 and retained approximately $1,576 as his fee. The judgment against W remained on the record, and during a real estate transaction involving W's property, the closing attorney tendered respondent a check for the full amount of the judgment, $9,410. Respondent deposited this check in a different trust account, and drew two checks, one to his client paying the remainder due on the judgment and one to himself representing the balance of his fee. Respondent placed the client's check and a cover letter in the client's file.

Respondent contemporaneously prepared a check representing the overpayment made payable to the closing attorney, and also placed this check in the client's file. Approximately nine months later, one of respondent's employees directed respondent's attention to these documents in the client's file. They remained in the file sixteen months later when this investigation began. Only after the ODC inquired were the funds returned, with interest, to W.

4. Candor

During this investigation, respondent failed to identify two open trust accounts under his control, and misrepresented to the ODC that he lacked signatory authority over any of the Firm's accounts. Further, he misrepresented that he was advancing fees when in fact he was misappropriating funds, and misrepresented that he had deposited $5,000 into his trust account when he had not.

LAW

The Panel concluded respondent had violated Rules 7(a)(1), (a)(5), and (a)(6) of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR. It also concluded respondent had violated the following Rules of Professional Conduct, Rule 407, SCACR: Rules 1.1, 1.3, 1.4, 1.5, 1.15, 3.3, 8.4(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(e).

The Panel noted respondent has no prior disciplinary record, and that he offered no mental or physical infirmities in mitigation. It recommended a retroactive disbarment. This Court is not bound by this recommendation, but administers the sanction it deems appropriate after a thorough review of the record. E.g., In the Matter of Zenner, 348 S.C. 499, 560 S.E.2d 406 (2002).

CONCLUSION

We hold that the appropriate sanction in this matter is disbarment, with the date of the disbarment to run from August 12, 1998. 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, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Further, respondent shall, within thirty days of the date of this opinion, pay the costs of this proceeding ($538.48).

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clifton E. Harris, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

From Greenville County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 25646
Submitted November 21, 2002 - Filed May 5, 2003

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General William Bryan Dukes, all of Columbia, for Petitioner.

Assistant Appellate Defender Tara S. Taggart, of S.C. Office of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Petitioner asks this court to review the post-conviction relief ("PCR") judge's grant of Respondent's PCR application on the grounds that Respondent's trial counsel failed to object to the trial judge's refusal to charge voluntary manslaughter.

Factual/Procedural Background

On August 3, 1979, Harold Medlin ("Harold") drove over to Dorothy Roberts' ("Dorothy") home to pick up a refrigerator. Harold's ex-wife, Linda Jean Medlin ("Linda Jean"), was also at Dorothy's house. Harold pulled his pick-up truck underneath a carport where the refrigerator was located, and Linda Jean came over and was trying to help him place the refrigerator in the truck bed when Linda Jean's boyfriend Clifton Harris ("Clifton") pulled up in his station wagon.

Harold said, "You got here just in time to help me load the refrigerator," and Clifton helped him load the refrigerator. Harold testified that despite Linda Jean and Clifton's adulterous affair, which led to his divorce from Linda Jean, he maintained a friendly relationship with Clifton.[1] Clifton had been drinking most of the day and was taking prescription painkillers that a doctor prescribed after Clifton hurt his back in a car accident. Clifton then asked Linda Jean to go out to dinner with him, but she responded that she could not because she had previously arranged to take her sons out to dinner.

Harold and a neighbor across the street, Lillie Long,[2] testified that Clifton and Linda Jean got into a scuffle as Clifton tried to force her into the back seat of his car. Harold said, "Clifton, don't start hitting her like that."

---

[1] While Clifton's willingness to help load the refrigerator supports Harold's testimony that Clifton and Harold were friendly to each other, both Harold and Clifton testified that they had an altercation one-year earlier that involved guns. Harold filed charges against Clifton, but Linda Jean convinced him to dismiss them.

[2] Lillie Long died after the first trial and before the second trial, so the State put forth her testimony from the original trial.

Linda Jean resisted being forced into the car and scampered away from him in the direction of Harold. Clifton then grabbed an automatic .22 rifle from the car and fired three shots in the direction of Linda Jean and Harold. Clifton testified that Harold had picked up a steel refrigerator grate and was heading in his direction, so he fired three warning shots to keep Harold from advancing. Harold testified that he did not pick up a grate nor advance towards Clifton.

Two of the shots hit the ceiling of the carport and the third hit Linda Jean in her back, and she fell to the ground. Harold testified that Clifton had raised the rifle to his shoulder before firing the shots, and Clifton testified that he shot the gun from his waist.

Harold then ran out of the carport towards the back yard, and Clifton began shooting at him. Clifton shot him four times before he fell. Harold "played dead," and Clifton approached him, placed the barrel of the rifle on his throat, and shot him. Clifton ran towards his car but turned around once more and shot Harold in the left hip. Linda Jean was found dead by the police and paramedics, and miraculously, Harold survived.

Clifton pled guilty to assault and battery with intent to kill (ABIK) Harold and was convicted of the murder of Linda Jean, which was affirmed on direct appeal. *State v. Harris*, 275 S.C. 463, 272 S.E.2d 636 (1980). The trial court granted Clifton's PCR on the murder conviction, and this Court denied certiorari. On retrial, Clifton was convicted of murder and received a sentence of life imprisonment, and the conviction and sentence were affirmed on direct appeal. Op. No. 98-MO-002 (S.C. Sup. Ct. filed January 5, 1998). Clifton then applied for and was granted PCR again. The State now petitions for a writ of certiorari to review the Circuit Court's grant of Clifton's PCR application.

The Court granted certiorari on the following issue:

> Did the PCR judge err in finding that Clifton's trial counsel was ineffective in not objecting to the trial judge's failure to charge voluntary manslaughter?

Law/Analysis

The State argues that the PCR judge erred in finding that Clifton's trial counsel was ineffective in failing to object to the trial judge's refusal to charge voluntary manslaughter.[3] We agree.

This Court will sustain the PCR judge's fact-finding concerning ineffective legal counsel if there is any probative evidence in the record that supports those findings. *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). In order to prove ineffective counsel, the applicant must show that counsel's performance was deficient according to reasonable professional norms and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Legge v. State*, 349 S.C. 222, 224, 562 S.E.2d 618, 619-620 (2002).

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Locklair*, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000). Sufficient provocation necessary to justify a voluntary manslaughter charge *must come from the*

---

[3] The PCR judge orally granted Clifton's PCR application for counsel's failure to request a charge on voluntary manslaughter and self-defense. The written order, prepared by Clifton's counsel, failed to specifically address the self-defense charge. Under section 6, which addresses voluntary manslaughter, the order states, "Further, the intended object of the warning shots was the estranged husband of the victim, there was testimony that he was approaching [Clifton] with a deadly weapon at the time of the shooting, and there was evidence of prior difficulties between the parties." In our opinion, this reference to self-defense does not constitute a specific ruling that self-defense should have been charged. Clifton's counsel should have filed a Rule 59(e) motion to amend the judgment to include a finding on the lack of a self-defense charge. Since no motion was filed, we believe that the self-defense issue was not preserved. *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992) (This Court held that counsel has an obligation to meticulously review the PCR order and file a Rule 59(e) motion if it does not address the merits of the issues).

victim and not be transferred from a third-party to the victim. *Id*. at 362-363, 535 S.E.2d at 425; *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

Clifton testified that when he arrived at Dorothy's house,[4] he asked Linda Jean to go out to dinner with him, and she replied, "No, I'm not going … You're drunk." Clifton testified that a scuffle did not result from Linda Jean's unwillingness to go out to dinner. He said that when she freed herself from him after refusing to go in his car, she ran in the direction of Harold, who was holding a refrigerator grate as if to threaten Clifton. Clifton testified that he then fired three "wild shots" in the direction of Harold to keep Harold from advancing with the refrigerator grate, and Linda Jean ran in between the two men and was hit by one of the bullets.[5]

Since Clifton put forth no evidence that Linda Jean provoked him, he cannot prove his entitlement to a charge on voluntary manslaughter. Clifton testified that he was provoked by Harold, who was not the murder victim.[6] Therefore, Clifton cannot allege that the trial counsel's failure to object to the lack of a voluntary manslaughter charge would have prejudiced his defense since he was not provoked by the victim. *Locklair*.

In our opinion, this PCR review for failure to give a *voluntary* manslaughter charge has been mislabeled. We believe the PCR court intended to grant PCR based on a failure to charge *involuntary* manslaughter,[7] not voluntary manslaughter.

---

[4] Dorothy was Clifton's sister.

[5] Harold and Lillie Long's testimonial account of the "scuffle" between Clifton and Linda Jean differs with Clifton's account. Harold testified that Clifton had an arm-lock on Linda Jean. Lillie Long testified that Clifton and Linda Jean were "struggling."

[6] Although Harold became a victim after Clifton shot Linda Jean, he was not the murder victim.

[7] "Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to

At trial, Clifton's trial counsel, the solicitor and the trial judge had a lengthy discussion about what the judge would charge to the jury. The parties discussed the possibility of charging the jury with murder, self-defense and involuntary manslaughter. The court recessed and returned the following morning and the discussion continued. Clifton's attorney said: "Judge, we were talking yesterday about the charge and we had a lot of discussions. I wanted to put on the record that I requested an accidental in relating to a self-defense, and involuntary in addition to murder and you are only going to charge murder? Correct?" The judge responded, "I'm charging murder and that's all." Clifton's attorney failed to object to the trial judge's failure to charge involuntary manslaughter.

At the PCR hearing, we believe that the court accidentally associated the term "voluntary manslaughter" with the law of involuntary manslaughter. In support of the her argument that involuntary manslaughter should not have been charged, State Attorney Barbara Tiffen cited cases involving dangerous weapons where involuntary manslaughter was not charged. When the PCR judge made his finding, he said:

> Now, this court is concerned about the failure of trial counsel to protect the record and object to the court's not charging voluntary manslaughter and not charging self-defense. When Mr. Harris took the stand, he put his credibility into evidence. The jury could have concluded that his actions in firing the weapon, although counsel for the State has cited some cases that seem to be contrary, under the facts of this case, his actions could have been considered so reckless and so much in disregard for the life and safety of other persons to have constituted an act of voluntary manslaughter when the death of another person was caused.

---

cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." *State v. Tyler*, 348 S.C. 526, 529, 560 S.E.2d 888, 889 (2002); *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999).

Here, the PCR judge is discussing the standard for involuntary manslaughter, but mistakenly called it voluntary manslaughter. Clifton's attorney wrote the order, which also only referred to voluntary manslaughter.

This case is being reviewed on the issue of voluntary manslaughter based on the PCR court confusing voluntary and involuntary manslaughter. The quote above illustrates that the PCR judge was referring to the law of involuntary manslaughter but calling it "voluntary manslaughter."

Regardless, even if the involuntary manslaughter issue was presented for review, we do not believe that Clifton's counsel's failure to object when involuntary manslaughter was not charged was prejudicial to Clifton's defense. This Court has stated, "[t]here is no error in the refusal to charge the law of involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed only he meant to shoot over the victim's head." *State v. Cooney*, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995); *Bozeman v. State*, 307 S.C. 172, 414 S.E.2d 144 (1992). Since Clifton admitted that he intentionally fired warning shots in the direction of Harold, he was not entitled to the involuntary manslaughter charge, and thus could not have been prejudiced by the Court's failure to charge it.

Conclusion

Since we hold that Clifton's defense was not prejudiced by his counsel's failure to object to the trial judge's refusal to charge voluntary or involuntary manslaughter, we **REVERSE** the PCR court's granting of his PCR application.

WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in result only. MOORE, J., not participating.

The Supreme Court of South Carolina

In the Matter of Timothy Vincent Norton, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that James G. Christmas, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Christmas shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Christmas may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that James G. Christmas, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James G. Christmas, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Christmas' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina
April 30, 2003

The Supreme Court of South Carolina

In the Matter of Charles
W. Blackwell, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. Respondent consents to the issuance of an order of interim suspension in this matter.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that William P. Murdock, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Murdock shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Murdock may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that William P. Murdock, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that William P. Murdock, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Murdock's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
May 2, 2003

The Supreme Court of South Carolina

RE: Amendment to Rule 3(b), SCRCP

O R D E R

By Order dated January 31, 2003, an amendment to Rule 3(b), SCRCP, was submitted to the legislature pursuant to Art. V, § 4A, of the South Carolina Constitution. More than ninety days having passed since the amendment was submitted to the General Assembly without rejection, the amendment would normally become effective.

However, the amendment did not reflect the legislative intent in amending S.C. Code Ann. § 15-30-20 and the attached Rule 3(b), SCRCP, as amended, is adopted immediately on an emergency basis until it can be submitted to the legislature in 2004.

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
May 5, 2003

Rule 3, SCRCP

(a) Commencement. A civil action is commenced by filing a summons and complaint with the clerk of court.

(b) Tolling of Statute of Limitations.

For the purpose of tolling any statute of limitations, an attempt to commence an action is equivalent to the commencement thereof when the summons and complaint are filed with the clerk of court and,

(1) delivered for service to the sheriff of the county in which defendant usually or last resided, or if a corporation be defendant, to the sheriff of the county in which any person designated by statute to accept service usually or last resided; provided that actual service must be accomplished within a reasonable time thereafter, or

(2) actually served within 120 days after filing with the clerk of court.

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules

---

O R D E R

By Order dated January 31, 2003, new Rule 41.1, SCRCP, and amendments to Rule 43, SCRCP, and Rule 232, SCACR were submitted to the General Assembly pursuant to Art. V, § 4A, of the South Carolina Constitution. More than ninety days having passed since the submission to the General Assembly without rejection, new Rule 41.1, SCRCP, and the amendments to Rule 43, SCRCP, and Rule 232, SCACR, are effective immediately.

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
May 5, 2003

Rule 41.1, SCRCP
Sealing Documents and Settlement Agreements

(a) Purpose. Because South Carolina has a long history of maintaining open court proceedings and records, this Rule is intended to establish guidelines for governing the filing under seal of settlements and other documents. Article I, § 9, of the South Carolina Constitution provides that all courts of this state shall be public and this Rule is intended to ensure that that Constitutional provision is fulfilled. However, the Court recognizes that as technology advances, court records will be more readily available and this Rule seeks to balance the right of public access to court records with the need for parties to protect truly private or proprietary information from public view and to insure that rules of court are fairly applied. This Rule does not apply to private settlement agreements and shall not be interpreted as approving confidentiality provisions in private settlement agreements where the parties agree to have the matter voluntarily dismissed under Rule 41(a)(1), SCRCP, without court involvement. The enforceability of those provisions is governed by general legal principles, not by this Rule.

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

(1) the need to ensure a fair trial;

(2) the need for witness cooperation;

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

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

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

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

(7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

The burden is on the party seeking to seal documents to satisfy the court that the balance of public and private interests favors sealing the documents. In family court matters, the judge shall also consider whether documents: 1) contain material which may expose private financial matters which could adversely affect the parties; and/or 2) relate to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter.

Unless otherwise ordered by the court, the clerk of court shall treat the motion to seal in a manner similar to all other motions filed with the court. The motion shall be entered in the Clerk's File Book and on the Motion Calendar and a hearing on the motion shall be held.

(c) Sealing Settlements. A proposed settlement agreement submitted for the court's approval shall not be conditioned upon its being filed under seal. Under no circumstances shall a court approve sealing a settlement agreement which involves a public body or institution.

Simultaneously with the filing of a motion seeking court approval of a settlement, or after a settlement has been approved, any party to the litigation may file a motion seeking to have all or part of the settlement filed under seal.

If the agreement is approved, and a motion to seal has been filed, the procedure set forth in **(b)** above shall be followed with the exception that the factors for sealing a settlement set forth below shall be addressed.

In determining whether to approve the filing of the settlement documents, in whole or in part, under seal, the court shall consider:

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

(2) the perceived harm to the parties from disclosure:

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

(4) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

In family court matters, the judge shall also consider whether the settlement: 1) contains material which may expose private financial matters which could adversely affect the parties; and/or 2) relates to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter.

(d) Orders Sealing Documents. All orders sealing documents or all or parts of settlements shall set forth with specificity the reasons that require they be sealed.

Note

Rule 41.1 was enacted to set forth with clarity the fact that the courts of this State are presumed to be open and to set forth with particularity when documents and settlement agreements, submitted to a court for approval, may be sealed.

RULE 43
CONDUCT OF TRIAL

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes or rules of evidence heretofore applied in the courts of this State. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) Scope of Examination and Cross-Examination. *Deleted*

(1) Examination, Leading Questions. *Deleted*

(2) Hostile and Adverse Witnesses. *Deleted*

(c) Record of Excluded Evidence. *Deleted*

(c)(1) Reservation of Rights Unnecessary. If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Interpreters. When a witness does not speak the English language sufficiently to testify, the court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(g) Statement of Pleadings to Jury. Counsel for any party may read his pleadings to the jury or make a statement to the jury of the facts alleged in the

pleadings and the theory of his case; but counsel shall not argue his case during his opening statement. The pleadings shall not be submitted to the jury for its deliberations.

(h) Examination of Witness. One counsel only for each party shall examine or cross-examine a witness. During examination in open court, the examining counsel shall stand. For the purpose of this subdivision of this rule, two or more parties who have pleaded jointly shall be considered one party.

(i) Argument. Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced. No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court. No more than two hours shall be taken by each side in final argument or sum up, without permission of the court. Counsel shall not address or refer to by name any member of the jury he is addressing, or otherwise personally appeal to any member thereof.

(j) Right to Open and Close. The moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party's claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter.

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

(l) Subsequent Applications for Order After Refusal. If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.

(m) Expert Testimony. *Deleted*

(1) Testimony by Experts. *Deleted*

(2) Bases of Opinion Testimony by Experts. *Deleted*

(3) Opinion on Ultimate Issue. *Deleted*

(4) Disclosure of Facts or Data Underlying Expert Opinion. *Deleted*

Note:

This Rule 43 substantially preserves present State practice as to evidence and conduct of trial. The present Federal Rule differs because of the adoption of the Federal Rules of Evidence in 1975; however, the practitioner will notice little change in present practice. Rules 43(a) through 43(d) restate present State practice under statutes, rules and case law. Rule 43(d) preserves Code § 19-1-40. Rule 43(c)(1) preserves new Circuit Rule 101. Rule 43(f) is new matter but is implied by the court's powers under Title 14, Chapter 15 of the Code. Rule 43(g) preserves Circuit Rule 85, except it prohibits submitting the pleadings to the jury for its deliberations, a needed change to avoid the jury treating pleadings as evidence or having information therefrom contrary to the judge's charge and instructions.

Note to 1986 Amendment:

The amendment to Rule 43(b)(2) clarifies the right of a litigant to call an adverse party, or a witness who may bind an adverse party, and use leading questions and impeach him if justified by the facts. The amendments to paragraphs (f) and (h) correct inadvertent omissions in those paragraphs.

Note to 1987 Amendment:

Rule 43(f) is amended to delete the reference to the hearing impaired whose interpreters are to be provided by statute.

Note to 1990 Amendment:

Rule 43(m) Expert Testimony is taken from Rules 702 to 705 of the Federal Rules of Evidence. The language in subdivision (3) is that of Federal Rule of Evidence 704 prior to its amendment in 1984. The Advisory Committee Notes to the Federal Rules of Evidence provide commentary and useful guidance on the use of expert testimony under this Rule.

Note to 1995 Amendment:

This amendment deleted subsections (b), (c) [but not (c)(1)], and (m). These matters are now governed by the South Carolina Rules of Evidence.

Note to 2003 Amendment:

This amendment changed the title of the Rule to be more reflective of its content and added the final sentence to Rule 43(k), **Agreements of Counsel** to provide that agreements regarding sealing settlements will be handled according to Rule 41.1, SCRCP.

RULE 232
AGREEMENTS AND SETTLEMENTS

(a) Agreements. No agreement between the parties or their attorneys, in respect to a proceeding before an appellate court shall be considered unless it has been reduced to writing and signed by the parties or their attorneys. After consideration, an appellate court shall either accept or reject the proposed agreement. Should the parties seek approval of a settlement agreement, the procedure set forth in Rule 41.1, SCRCP, shall be followed.

(b) Vacation of Prior Opinions, Orders or Judgments. As part of their agreement, parties may request vacation of previously rendered opinions, orders, and judgments. However, an appellate court retains the authority to deny any request for vacation. If an agreement which includes a request for vacation is rejected, the parties are free, if they so choose, to resubmit their agreement absent the request for vacation.

Note to 2003 Amendment

This amendment added the final sentence to section (a) to provide that agreements regarding sealing settlements will be handled according to Rule 41.1, SCRCP.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Margaret Murray, Respondent,

v.

Bank of America, N.A., formerly known as NationsBank, N.A., Appellant.

Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3634
Submitted February 10, 2003 - Filed April 28, 2003

AFFIRMED

William S. Brown, Christine M. Harrington, of Greenville; for Appellant.

Patrick E. Knie, of Spartanburg; for Respondent.

HUFF, J.: Margaret Murray sued Bank of America, formerly known as NationsBank, (Bank) alleging it was negligent when it

allowed an imposter to open an account in her name. The jury awarded Murray $300,000 in actual damages. The Bank appeals. We affirm.

FACTS

Margaret Murray lost her driver's license in May 1997. On May 14, 1997, a woman opened an account with the Bank in Murray's name. The imposter presented Murray's driver's license and a social security card to the Bank employee and deposited $100.00 in the account. The employee contacted Check Systems, which is a company that verifies credit, to determine if Murray had any prior check writing problems. Check Systems did not reveal any detrimental information about Murray. The imposter wrote sixty fraudulent checks from the account totaling approximately $7,500.

Murray had never had a checking account with the Bank or any other bank. Murray did not become aware of the account opened in her name until employees of Thermax Carpet Cleaning came to her apartment and asked for her to return a rented carpet cleaner. When Murray went to Thermax, the manager established that she was not the one who rented the cleaner. The manager told Murray that the cleaner had been rented by someone writing a check in her name with the account at the Bank.

On June 2, 1997, Murray went to the Bank and discovered an imposter had opened the account in her name using her driver's license. Murray demanded the Bank close the account. She also requested the Bank inform the merchants who submitted the checks that were returned for insufficient funds that she was innocent and that this was a fraudulent account. She testified that she trusted the Bank to take the requested actions. The Bank, however, failed to close the account until June 30, 1997. Murray also reported the fraudulent account to the police.

In November 1997, Murray was arrested in front of her son, and served with warrants for fifteen fraudulent checks. Murray spent

twelve hours in jail. After Murray was arrested, she obtained a letter from the Bank stating she was not the one who opened the account. Murray went to the post office box the imposter provided the bank and found forty-four letters merchants had written her about the bad checks.

Murray was required to appear at three criminal court hearings. Although she was exonerated of the criminal charges she faced, Murray continued to worry about the existence of other unresolved checks. She suffered from stress and anxiety from the incident and had difficulty sleeping. Her face tightened and became numb. She sought medical treatment from the local hospital. Murray was embarrassed by being arrested in front of her son and her neighbors and felt she had to move into another apartment, which was more expensive than the one she had lived in before.

Murray sued the Bank in negligence. The Bank moved for directed verdict at the close of Murray's case asserting the Bank did not owe any duty of care to Murray. The trial court denied the motion. The jury found for Murray and awarded her $300,000 in damages. The trial court denied the Bank's post trial motions. The Bank appealed.

LAW/ANALYSIS

I. Existence of a Duty of Care

The Bank asserts the trial court erred when it denied the Bank's directed verdict motion. We disagree.

In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. Id. The appellate courts will reverse the trial

court only when there is no evidence to support the ruling below or the ruling is controlled by an error of law. Id.

In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 76, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." Shipes v. Piggly Wiggly St. Andrews 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). Ordinarily, the common law imposes no duty on a person to act. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. Id.

On June 2, Murray went to the Bank and spoke with Thomas Wright, a former vice-president and banking center manager with the Bank. She testified that she requested the Bank close the fraudulent account and notify the merchants who submitted checks written on the account that the account was fraudulent. When she left, she felt assured that the Bank would handle the matter. Wright testified he notified the Bank's headquarters in Charlotte on May 21, 1997 that the account was overdrawn and requested its closure. The Bank did not close the account until June 30, 1997, which was almost a month after Murray requested it close the account and notify the merchants. Wright stated the Bank failed to follow its own procedures.

We find a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of the account. The Bank failed to follow its own procedures, did not timely close the account, and did not notify any merchants that the account was fraudulent. We find sufficient evidence in the record from which the jury could determine the Bank breached its duty to Murray after this duty arose. Accordingly, we find the trial court did not err in denying the Bank's motion for a directed verdict.

II. New trial absolute

The Bank argues the trial court erred in denying its motion for a new trial absolute as the jury verdict was so large it must have been the result of caprice, prejudice, or passion. We disagree.

The trial court's decision to deny a motion for new trial absolute is within its discretion and will not be reversed absent an abuse of discretion. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996). When deciding a motion to grant a new trial, the court must look at the testimony and inferences raised in favor of the nonmoving party. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408, 420 (Ct. App. 2000). The court should only grant a motion for a new trial absolute when the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive. Knoke v. South Carolina Dep't of Parks, Recreation & Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996). A jury's determination of damages is entitled to substantial deference by this court. Id. Mere undue liberality on the part of the jury does not warrant an inference that the verdict resulted from caprice, passion, prejudice, or other improper motives. Hutson v. Cummins Carolinas, Inc. 280 S.C. 552, 559, 314 S.E.2d 19, 24 (Ct. App. 1984).

Murray was arrested in front of her son and taken to the police car in front of her neighbors, causing her great humiliation. She spent

twelve hours in jail. Although Murray suffers from a kidney ailment, the jail attendant refused to allow her to use the bathroom, increasing her embarrassment and discomfort. Due to her stress over the situation, Murray suffered from sleeplessness. In addition, her face tightened up and became numb, prompting a visit to the doctor. She had to hire a lawyer and attend three hearings on the warrants. She stated that after her arrest, she was terrified that the police would come back and arrest her again on more charges. Due to her acute embarrassment of being arrested in front of her neighbors, she moved to a more expensive apartment, which strained her finances and caused more stress.

Most of the damages Murray suffered were intangible. "One cannot easily or with any mathematical certainty place a value on the amount of a person's pain and suffering." Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000). We find the jury's verdict of $300,000 is not so shocking to the conscience of the court that it clearly indicates the verdict was the result of improper motive. Thus, we hold the trial court did not err in denying the Bank's motion for a new trial absolute.

III. Supplemental jury instruction

The Bank argues the trial court committed reversible error by giving supplemental jury instructions.

After it began deliberations, the jury requested additional instructions from the trial court on actual damages. The court repeated its earlier charge on actual damages. After the jury left the courtroom, Murray's attorney suggested the jury may have been wondering what can be considered as elements of actual damages. The court agreed. The Bank objected to the court giving an additional charge, asserting the court's original charge was a fair statement of the law and Murray had waived any objection by failing to object after the original charge. Over the Bank's objection, the court charged the jury:

> Okay let me talk to you a little bit about [actual damages]. Mental anguish, pain and suffering, loss of [t]he enjoyment of life, meaning not being able to do the kinds of things you normally did or you did prior to the incident, embarrassment. Those kinds are things that can be considered as actual damages. You're not limited to medical bills, that kind of thing, in determining actual damages.

On appeal, the Bank first argues Murray waived the right to complain about the court's charge on actual damages. It relies on Lundy v. Lititz Mutual Insurance Company, 232 S.C. 1, 100 S.E.2d 544 (1957), in which the supreme court stated:

> At the conclusion of the main charge, the trial Judge . . . excused the jury and asked counsel if any further instructions were desired or if there were any objections to the charge. No objection was offered by either party but appellant's counsel requested an additional instruction relating to a certain phase of the case. The jury was then recalled and the requested instruction given. After doing so, the Court gave certain other instructions which appellant now contends constituted a charge on the facts. However, in the main charge, . . . the Court gave substantially the same instructions as those now complained of. If appellant thought these instructions violated Article 5, Section 26 of the Constitution, which we are inclined to think they did, counsel should have made timely objection when the jury was excused at the conclusion of the main charge. They waived the objection by failing to do so. Appellant cannot now complain of the Court's

> repeating substantially the same instructions to which counsel failed to object when given an opportunity to do so.

Id. at 10, 100 S.E.2d at 548.

It is certainly true that an appellant who failed to object to a jury charge at the first opportunity cannot complain about the charge on appeal. However, that appellate rule of error preservation does not prevent the trial court from supplementing its charge if it decides to do so.

The Bank also argues the trial court erred in giving the supplemental charge because it emphasized the recoverability of damages for mental distress. The Bank, however, did not raise this objection to the trial court when it gave the supplemental charge. Accordingly, we find this argument is not preserved for our review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (stating issue not preserved if party argues one ground for objection at trial and a different ground on appeal).

IV. Statements in closing argument.

The Bank argues Murray's counsel made improper remarks to the jury during his closing. We find no reversible error.

The Bank first contends Murray's counsel attempted to appeal to the sympathy of the jury by asking them to put themselves in Murray's place. During the closing, Murray's counsel stated, "And on November 25th, 1997, some four or five months later, there's an officer at her door, and just put yourself in your home, in your home---." The Bank's attorney objected.

The following colloquy then occurred:

> The Court: Mr. Knie (Murray's attorney).

> Mr. Knie: Okay.
>
> Mr. Brown (the Bank's attorney): That's improper.
>
> The Court: Rephrase that, sir.
>
> Mr. Knie: Just try to imagine the---
>
> Mr. Brown: Again, Your Honor, he's asking them to imagine being in that same position. It's improper.
>
> The Court: Mr. Knie.
>
> Mr. Knie: All right. I'll do my best, Your Honor.

Although the trial court did not use the word "sustain," it is obvious that the court sustained the Bank's attorney's objection. The Bank's attorney failed to ask the trial court to strike the statement or give the jury a curative instruction. We find the Bank's argument complaining about Murray's attorney's comments is not properly before this court. See State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (holding the alleged impropriety of closing argument was not preserved for review where the trial court sustained an objection by opposing counsel, but counsel did not move to strike or request a curative instruction).

The Bank also argues that during his closing argument Murray's counsel improperly sought the jury to make a judgment regarding questions of law. During the closing, the following colloquy occurred:

> MR. KNIE: I asked for permission to publish what [the Bank's] net worth was, and obviously

> it was met with objection as you could well imagine.
>
> MR. BROWN: I'm gonna object to that. It's for the Court to decide objections. It's not for counsel to make comments about objections.
>
> THE COURT: I'm going to overrule the objection. But Mr. Knie, you're treading on thin ice.

We find any error in the trial court overruling the Bank's objection to this testimony harmless. See GTE Sprint Communications Corp. v. Public Serv. Comm'n of S.C., 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (stating that where a party shows no prejudice, the error, if any, is harmless).

CONCLUSION

Based on the foregoing reasons, the jury's verdict in favor of Murray is

AFFIRMED.

CONNOR and ANDERSON, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

LaQuinces Delvecchio Davis, Appellant.

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

Opinion No. 3635
Heard February 13, 2003 – Filed April 28, 2003

AFFIRMED

Chief Appellate Defender Daniel T. Stacey and Deputy Chief Appellate Defender Joseph L. Savitz of SC Office of Appellate Defense, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

HOWARD, J.: LaQuinces Delvecchio Davis appeals his convictions for trafficking in crack cocaine and possession of marijuana, arguing the search warrant which led to the discovery of the illegal drugs was not based on probable cause and arguing the underlying search warrant affidavit was defective because it contained false information and did not include allegedly exculpatory information. We affirm.

FACTS/PROCEDURAL HISTORY

On July 13, 2000, Officer Brian Evans of the York County Multijurisdictional Drug Enforcement Unit received two calls from an anonymous informant stating a person known as "Q" was driving an older model Chevrolet, ice-blue or black in color with a broken front grill, and was selling crack cocaine in the Green Street area of Rock Hill. The informant provided a license plate number for the vehicle.

Officer Evans recognized the nickname "Q" as Davis' street name and knew Davis had a prior conviction involving crack cocaine. A check of South Carolina motor vehicle records revealed that the vehicle described by the informant was registered to Davis' mother and that the license plate was suspended for failure to pay insurance. Officer Evans went to the area where the informant indicated Davis was selling drugs, but was unable to locate Davis or the vehicle.

The same informant called again the next day, reporting that "Q" had left the Ramada Inn motel in Rock Hill and was headed to Green Street with crack cocaine to sell. In response, police surveilled Green Street looking for Davis. They spotted the vehicle described by the informant being driven near Green Street, at which time one of the officers turned on his blue lights to initiate a traffic stop. The vehicle accelerated, ran a stop sign, and attempted to evade the police for several blocks. Davis, the lone occupant, jumped from the moving vehicle and ran. The unguided vehicle crashed into two parked cars. Shortly thereafter, Davis was apprehended and arrested for failure to stop for a blue light. He told police he had run because he had smoked marijuana shortly before his arrest.

In a search of Davis incident to his arrest, the police found $156.00 in cash, a pager, and a motel key card. Davis stated the motel key card belonged to a motel room in Orangeburg in which he had stayed the night before. Davis repeatedly denied the key card belonged to a motel room in Rock Hill. Notwithstanding his denials, police confirmed that a "Quincy Davis" was registered as a guest at the Rock Hill Ramada Inn motel and that the key card fit the door of the motel room.

Police obtained a search warrant for the room from the local magistrate based upon the following affidavit, supplemented with oral sworn testimony:

> Affidavit for Search Warrant
>
> Attachment #1 Ramada Inn 911 Riverview Rd. Room 227 Rock Hill, S.C.
>
> The affiant, a sworn police officer with the York County Multijurisdictional Drug Enforcement Unit, with over 20 years of narcotic experience, states the following facts to support probable cause to search the premises listed within.
>
> On July 13, 2000, Officer Brian Evans of the York County Multijurisdictional Drug Enforcement Unit received information that "Q" was selling crack in the Green St. area of Rock Hill. The source stated that "Q" was in an old ice blue or ice black Chevrolet and gave Officer Evans the vehicle's license number. The source stated that "Q" does not have a driver's license. The tag came back to Rosa Hinton, which is the mother of Quincy Davis. Also the printout indicated the tag was suspended. Officers have personal knowledge that Quincy Davis is known as "Q" and has convictions for selling crack. Officer Evans was unable to locate the vehicle.
>
> On July 13, 2000, Officer Evans received a second call that "Q" was back on Green St. in a yard and selling crack. Officer Evans responded and was unable to locate Davis.

> On July 14, 2000, Officer Evans received a call from the same source that "Q" was leaving the Ramada Inn in Rock Hill going to Green St. and that "Q" had crack to sell. Officer Evans went to the area and observed the vehicle on Lucky Ln. traveling towards Whitgreen St. towards Green St. Officer Evans attempted a traffic stop and the vehicle accelerated failing to stop for the police blue light. The vehicle drove in a reckless manner speeding and failed to stop for stop signs. The driver then jumped from the vehicle while moving and the vehicle struck two parked vehicles. The driver fled on foot and was caught a short distance away and identified as Quincy Davis. Search incident to arrest revealed a Ramada Inn Motel Key Card in Davis' pants pocket. Davis stated that he spent the night in the Ramada Inn in Orangeburg and kept the motel key. Officers of the DEU went to the Ramada Inn on Riverview Rd. in Rock Hill and the key matched a room registered to Davis. Davis was asked to sign a consent form to search the room and Davis denied completely and fully that he has a motel room in Rock Hill. Davis was asked 3 times and each time he denied having a room. Davis refused to sign the consent stating that it is not his room. Davis stated that he ran because he had smoked marijuana. Record check revealed in fact that Davis has been convicted of selling crack in the past and narcotic officers of the DEU have received information from sources recently that Quincy Davis is selling crack in the Rock Hill area.
>
> Based on past narcotic investigations it is common that drug dealers secrete contraband and proceeds of drug sales in motel rooms.

In a subsequent search of the room, police found 32.44 grams of crack cocaine, 23.54 grams of marijuana, and drug paraphernalia.

In a pretrial suppression hearing, Davis argued the evidence found in the motel room should be excluded. Davis asserted the only corroborated information was his identity, and under the authority of Florida v. J.L., 529 U.S. 266 (2000), the search was not based upon probable cause.

The court denied the motion to suppress, concluding the affidavit, as orally supplemented, provided probable cause for the issuance of the search warrant. At trial, Davis was convicted of trafficking in crack cocaine, failure to stop for a blue light, and possession of marijuana. Davis was sentenced to thirty years for trafficking crack cocaine, five years for failure to stop for a blue light, and one year for possession of marijuana, with the sentences to run concurrently.

Davis appeals his convictions for trafficking in crack cocaine and possession of marijuana. In his appeal, Davis makes the same argument as he made at the suppression hearing. He also contends the drugs should have been suppressed because the affidavit stated the attesting officer had personal knowledge of Davis' prior conviction for selling crack cocaine, when in fact, his prior conviction was only for possession of crack cocaine. Davis contends the affiant's personal verification of information later determined to be incorrect provides evidence that this false information was intentionally or recklessly conveyed to the magistrate, rendering the warrant defective under a Franks v. Delaware[1] analysis. In addition, Davis argues the affidavit was defective because it did not inform the magistrate of the exculpatory fact that Davis had no drugs in his possession when he was arrested, contrary to the assertions of the informant.

ISSUES PRESENTED

1.) Did the magistrate err in issuing the search warrant because it was not based on probable cause to believe contraband would be found in the motel room?

2.) Was the incorrect information concerning Davis' prior criminal record intentionally or recklessly presented to the magistrate, rendering the search warrant defective?

3.) Did the omission of the fact that no drugs were found in Davis' possession at the time of arrest constitute exculpatory

[1] 438 U.S. 154 (1978).

information that was intentionally or recklessly withheld from the magistrate, rendering the search warrant defective?

STANDARD OF REVIEW

The duty of a reviewing court is to decide whether "the magistrate had a substantial basis for concluding that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (internal quotations omitted); State v. Bellamy, 336 S.C. 140, 144, 519 S.E.2d 347, 349 (1999) (adopting the Gates standard of review). "A reviewing court should give great deference to a magistrate's determination of probable cause." State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997); see Gates, 462 U.S. at 236 (holding the Fourth Amendment evidences a "strong preference for searches conducted pursuant to a warrant").

LAW/ANALYSIS

I. Totality of the Circumstances

Davis argues the magistrate should not have issued the search warrant because it was not based on probable cause. We disagree.

A magistrate may issue a warrant only upon a finding of probable cause. Bellamy, 336 S.C. at 143, 519 S.E.2d at 348. A probable cause determination requires the magistrate to analyze the totality of the circumstances, meaning he should "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238; see State v. Johnson, 302 S.C. 243, 247-48, 395 S.E.2d 167, 169 (1990) (adopting the Gates totality-of-circumstances test); State v. Crane, 296 S.C. 336, 338-39, 372 S.E.2d 587, 588-89 (1988) (holding the magistrate should determine probable cause based on all the information available to him at the time the warrant is issued, including sworn oral testimony); State v. Adams, 291 S.C. 132, 133-34, 352 S.E.2d 483, 485 (1987) ("A determination of probable cause depends upon the totality of the circumstances.").

In this case, a police officer received three phone calls over a two-day period from an anonymous informant stating that Davis was selling illegal drugs. In each of the phone calls, the informant referred to the suspect as "Q." The officer knew from personal knowledge that Davis was known by the street name "Q" and that Davis had a drug-related conviction. Thus, the informant's information was corroborated by the knowledge and prior experience of the police officer. See United States v. Harris, 403 U.S. 573, 583 (1971) (holding "a policeman's knowledge of a suspect's reputation . . . is . . . a 'practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely" (single quotation marks and parentheses as in original)); cf. State v. Dupree, 319 S.C. 454, 459, 462 S.E.2d 279, 282 (1995) ("The 'experience of a police officer is a factor to be considered in the determination of probable cause.'" (quoting United States v. Fisher, 702 F.2d 372, 378 (2d Cir. 1983))).

The informant also stated Davis was driving a late model Chevrolet, ice blue or black in color, with a broken front grill. The description included the license plate number. By checking the license plate number provided, the police independently verified that Davis' mother owned a vehicle fitting the description given by the informant, further corroborating the informant's information. See Gates, 462 U.S. at 244 ("Because an informant is right about some things, he is more probably right about other facts, including the claim regarding . . . illegal activity." (internal quotation marks and internal citation omitted)).

It is true that this corroboration only verified the identity of "Q" and his otherwise legal activity of driving an ice blue or black Chevrolet. Absent further information, we agree the analysis in Florida v. J.L., 529 U.S. 266 (2000), would be implicated. In J.L., the police received an anonymous tip that a suspect fitting a certain description would be standing at a certain location and would be in possession of a firearm. Id. at 271. After verifying the suspect's description and location, the police approached the suspect and frisked him. Id. at 268. The frisk was held to have violated the suspect's Fourth Amendment rights because the tip was not "reliable in its assertion of illegality," and the police had no basis for the frisk other than the tip. Id. at 271-72. However, in contrast to J.L., the independent investigation by police in this case revealed the vehicle's license plate was suspended for failure to

pay insurance. This provided a basis for a traffic stop once the police observed Davis driving the vehicle. Thus, J.L. is not controlling.

Shortly before police stopped Davis for driving with a suspended license plate, the informant made his last phone call to police in which he stated that Davis had left a Rock Hill Ramada Inn motel room and was headed to Green Street with drugs to sell. According to the affidavit, the attesting officer was a twenty-year veteran of the narcotics unit who knew from his experience that drugs and proceeds of drug sales are often kept in motel rooms. Notwithstanding Davis' argument to the contrary, the law is well settled that the officer's knowledge of general trends in criminal behavior is a relevant consideration in determining probable cause. See Gates, 462 U.S. at 243 (holding defendant's trip to Florida provided part of the basis for probable cause to issue a warrant to search defendant's vehicle and house for drugs because police work has shown that "Florida is well-known as a source of narcotics and other illegal drugs").

When a police officer observed Davis driving the vehicle with the suspended license plate towards the area where the informant stated Davis intended to sell drugs, the officer initiated a traffic stop. Based upon the status of the vehicle's suspended license plate this stop was proper, a point not contested by Davis in this appeal. After the officer turned on his blue lights, Davis tried to evade police by accelerating, running through a stop sign, jumping and running from the moving vehicle. After being arrested for failure to stop for a blue light, Davis admitted he ran from police because he had smoked marijuana earlier in the day. This information was imparted to the magistrate, and under well-settled law allows a reasonable inference of guilty conduct. See State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (holding defendant's flight from police was "at least some evidence of guilt").

In the search of Davis incident to his arrest, police found a Ramada Inn motel key card in Davis' pocket which he denied opened a room in the Rock Hill Ramada Inn. Davis repeatedly denied the key card belonged to the Rock Hill motel room, even after he was told the key card fit the door of the Rock Hill motel room. The independent verification of the identity of the key card further corroborated the informant's information, and Davis' subterfuge

provided a reasonable inference that something was located in the room which he did not want police to discover. See Gates, 462 U.S. at 241 ("Our decisions applying the totality of the circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work."); cf. State v. Bultron, 318 S.C. 323, 333, 457 S.E.2d 616, 622 (Ct. App. 1995) (holding defendant's suspicious activity was part of the basis for finding that probable cause existed for a search).

The magistrate based his decision to issue the warrant to search the motel room on the affidavit and oral sworn testimony of the officer which detailed the information provided by the informant, the police work conducted as a result of the informant's tips, the personal knowledge of the police officer, the fact that Davis engaged in the independent illegal act of driving a vehicle with a suspended license plate, and the suspicious conduct engaged in by Davis. Thus, the magistrate had a substantial basis for concluding probable cause existed. See Gates, 462 U.S. at 241-46 (upholding the issuance of a warrant to search for drugs based on an anonymous letter that outlined detailed travel plans of husband and wife, police corroboration of the couple's activities, and informant's allegation that couple was engaged in drug trafficking); cf. State v. McLaughlin, 307 S.C. 19, 22, 413 S.E.2d 819, 821 (1992) (holding probable cause to search a toolbox was established by defendant's suspicious behavior, his possession of large amounts of cash, the presence of a marijuana cigarette, and his repeated denials of ownership of the toolbox).

II. Veracity of the Warrant Affidavit

Davis next argues the magistrate should not have issued the search warrant because the warrant affidavit included false information and omitted exculpatory information. We conclude these arguments are not preserved for review.

"In Franks v. Delaware, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the

warrant had been issued and executed." State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999).

Franks outlined a two-part test for challenging the warrant affidavit's veracity. Franks v. Delaware, 438 U.S. 154, 155-56 (1978). First, to mandate an evidentiary hearing, there must be "allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof." Id. at 171. At the hearing, the defendant has the burden of proving the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. at 155-56; see State v. Jones, 342 S.C. 121, 126-27, 536 S.E.2d 675, 678 (2000) (holding a defendant is entitled to challenge misstatements in a warrant affidavit if the following criteria are met: "(1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement").

Second, if the deliberate falsehood or reckless disregard for the truth has been established, the court must consider the affidavit's remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause. If the court determines probable cause does not exist after the false material is omitted from the analysis, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Franks, 438 U.S. at 155-56; see Missouri, 337 S.C. at 553-54, 524 S.E.2d at 396-97 (adopting the two-prong Franks test).

Although Franks addressed an instance in which false information had been included in the warrant affidavit, the Franks test also applies in an instance in which exculpatory material is left out of the warrant. Missouri, 337 S.C. at 554, 524 S.E.2d at 397.

> To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless

> disregard of whether it made, the affidavit misleading to the issuing judge. There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.

Id.

In this case, Davis filed a written memorandum prior to trial arguing for suppression solely on the grounds that the information concerning illegal conduct provided by the anonymous informant was not corroborated and, thus, probable cause for the search was not established. The written memorandum did not assert that false information was intentionally or recklessly included in the affidavit, nor did it argue that exculpatory information was intentionally or recklessly omitted. At the conclusion of the suppression hearing, Davis relied upon his written memorandum, without elaboration, to support his motion. Consequently, the trial court was not presented with either issue. Furthermore, the trial court made no ruling with respect thereto. Therefore, we decline to rule upon these issues. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (holding "[a] contemporaneous objection is required to properly preserve an error for appellate review" and an "issue which is not properly preserved cannot be raised for the first time on appeal"); Dickman, 341 S.C. at 295, 534 S.E.2d at 269 (holding a party cannot argue one ground below and then argue another ground on appeal).

CONCLUSION

For the foregoing reasons, Davis' convictions for trafficking in crack cocaine and possession of marijuana are

AFFIRMED.

CURETON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ernest Steve McClain and Linda McClain, Appellants,

v.

John Carter Jarrard, M.D., Kevin McCarragher, M.D., William R. Karpik, M.D., Anesthesiology Services of Anderson, P. A., Frank E. Oliver, M.D., and Anderson Neurological Associates, P. A., Defendants, Of Whom Frank E. Oliver, M.D., and Anderson Neurological Associates, P. A., are, Respondents.

Appeal From Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 3636
Formerly Unpublished Opinion No. 2003-UP-56
Submitted November 20, 2002 – Filed January 16, 2003
Withdrawn, Substituted and Refiled February 26, 2003
Reissued as a Published Opinion May 5, 2003

AFFIRMED

J. Kirkman Moorhead, of Anderson; for Appellants.

G. Dewey Oxner, Jr., J. Ben Alexander, of Greenville; for Respondents.

PER CURIAM: Ernest Steve McClain and Linda McClain appeal the circuit court's grant of summary judgment in favor of Frank E. Oliver, M.D. and Anderson Neurological Associates, P.A. We affirm.[1]

FACTS

Mr. McClain was hospitalized for surgery related to diverticulitis; Dr. John Jarrard, an anesthesiologist, inserted a lumbar epidural catheter for post-operative pain control. After surgery, McClain experienced growing numbness in his legs and stomach and the inability to move his lower body. Based on a CT scan and a myelogram ordered by Dr. Oliver, the consulting neurosurgeon, surgery was done to remove an epidural hematoma caused by the catheter piercing a blood vessel.

During his deposition, an expert witness, Dr. Thomas A. Duc, opined that Dr. Oliver's failure to act aggressively contributed to McClain's resulting injuries. Based on this testimony, McClain amended his complaint to add Dr. Oliver and his practice, Anderson Neurological Associates (Anderson) as defendants. In their answer, Dr. Oliver and Anderson asserted the affirmative defense of the statute of limitations and moved for summary judgment. The trial court granted the motion.

---

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

McClain argues that the statute of limitations did not begin to run on his cause of action against Dr. Oliver until he was aware of facts sufficient to put him on notice that Dr. Oliver had done something wrong. We disagree.

LAW/ANALYSIS

"Under the discovery rule, the statute does not run from the date of the negligent act, but from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence." Wilson v. Shannon, 299 S.C. 512, 513, 386 S.E.2d 257, 258 (Ct. App. 1989) (emphasis added). In the medical malpractice context, our supreme court applied the reasonable diligence analysis under the general discovery rule set forth in Snell v. Columbia Gun Exchange, 276 S.C. 301, 278 S.E.2d 333 (1981). "'[A]n injured party must act with some promptness where the facts and circumstances of the injury would put a person of common knowledge on notice that some right of his has been invaded or that some claim against another party might exist.'" Strong v. Univ. of S.C. Sch. of Med., 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994) (quoting Snell at 303, 278 S.E.2d at 334) (emphasis added). While South Carolina cases have allowed some latitude for discovery of an injury in the medical malpractice context, given the expert knowledge required to ascertain an injury, we find no case extending a similar latitude to allow adding additional defendants after the statute of limitations has run where the plaintiff clearly knew of his injury. In Strong, the court declined to extend the statute where the patient clearly should have known the cause of his injury when it was noted in his medical records.

The closest case on point is Tanyel v. Osborne, 312 S.C. 473, 441 S.E.2d 329 (Ct. App. 1994). That case arose out of an automobile collision at an intersection; based on a witness' changed recollection about the light, Tanyel sought to add another defendant, arguing the statute did not begin to run until he discovered evidence of negligence by that defendant. The court rejected this argument, stating: "[t]he success or failure of his investigation is irrelevant. Undertaking such an investigation demonstrates notice of a potential claim against the [other] driver." Id. at 475, 441 S.E.2d at 331. This court held Tanyel's witnessing of the other driver's involvement was

alone sufficient to put him on notice of a potential claim, which triggered the statute of limitations.

We see no reason to distinguish this case from Tanyel, nor are we persuaded that the nature of this case—medical malpractice—removes it from the limits of common knowledge and experience. Significantly, both McClain and his wife testified specifically that Dr. Oliver treated him soon after the problem developed and continued to follow up. Dr. Oliver's involvement was known to both of them, and they discussed their concerns with him. This is not a case where discovery disclosed the existence of a treating doctor not mentioned in the medical records. Rather, McClain had actual knowledge of Dr. Oliver's treatment and that any potential claim could encompass his treatment. As we noted in Tanyel, the notice of a potential claim against a different defendant "triggered the statute of limitations, rather than the discovery of evidence actually supporting the potential claim." Tanyel at 476, 441 S.E.2d at 331.

Our supreme court refused to extend the statute of limitations under the discovery rule in a similar situation where plaintiffs chose to consult several lawyers and investigate fully before bringing a medical malpractice suit against the doctor. Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (1987). In that case, the Smiths raised concerns about the treatment before leaving the hospital and consulted an attorney within days, but did not ultimately bring suit until five years later. The court held their earlier concerns and consultation were sufficient to trigger the running of the statute of limitations. Id. at 425-26, 354 S.E.2d at 39-40.

Because the McClains sued Dr. Oliver and Anderson more than three years after discovery of the injury and after the expiration of the statute of limitations, the trial court's grant of summary judgment is

AFFIRMED.

CONNOR, STILWELL, and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Floyd Hailey, Jr., Respondent,

v.

Betty Kimbrell Hailey, Appellant.

Appeal From York County
Robert E. Guess, Family Court Judge

Opinion No. 3637
Heard November 6, 2002 - Filed May 5, 2003

AFFIRMED IN PART and
REVERSED IN PART

Lucy L. McDow, of Rock Hill, for appellant.

Forrest C. Wilkerson, of Rock Hill, for respondent.

HOWARD, J.: Charles Floyd Hailey ("Husband") brought this action against his former spouse, Betty Kimbrell Hailey ("Wife"), seeking a downward modification of his alimony obligation. Husband asserted a change in circumstances occurred because Wife

began receiving monthly Social Security benefits after the award of alimony and because income should be imputed to her for the substantial appreciation in value of her non-income-producing real property. Wife denied a decrease was warranted and counterclaimed for an increase in alimony and attorney's fees. Following multiple hearings, the family court denied Husband's motion for a reduction in alimony, declining to impute income to Wife for the appreciation in value of her real property. The court granted Wife an increase in alimony and awarded her attorney's fees. Husband appeals. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

The parties were divorced in July of 1993, after forty-three years of marriage. The divorce decree reserved all issues of support and property division for later disposition. After twelve hearings, the family court issued its final order on May 23, 1994, dividing the marital property and awarding Wife $1,250.00 per month in periodic alimony.

Wife appealed the alimony award to the supreme court, and while the appeal was pending, she began receiving Social Security benefits, prompting Husband's first motion for a reduction in alimony in September of 1993. Following a remand from the supreme court to allow the issue to be heard, the case was scheduled for hearing on August 3, 1995. At that time, however, Husband agreed to dismiss the motion because he believed it was unlikely the court would grant a modification. In a consent order, the motion was dismissed, and Husband agreed to pay Wife's attorney's fees.

In 1997, Husband again brought an action to reduce his alimony obligation, contending Wife's 1994 increase in income from Social Security and other sources, along with her substantial increase in net worth from the appreciation of non-income-producing real property, were sufficient changes in circumstances to justify an alimony reduction.

Wife denied a reduction was warranted and counterclaimed for

an increase in alimony on the grounds that she was unable to maintain the standard of living she enjoyed during the marriage.

The family court, Judge William R. Byers, Jr., conducted multiple hearings. However, Judge Byers retired before making a decision, leading to a substantial delay, and the necessity of re-trying the issues. To expedite the process, the parties reached certain factual stipulations concerning their original economic circumstances and their circumstances as of 1998.

The parties agreed the relevant time period for purposes of determining the cross-motions was between May 23, 1994, the date of the original award, and March 31, 1998, the date the motion for modification was first heard by Judge Byers. Therefore, although a substantial time has passed, we confine our review to this stipulated time period. The parties also stipulated to their net worth on May 23, 1994 and as of March 31, 1998. According to the stipulation, Wife's net worth had increased from $662,796.00 to $849,919.99, and Husband's net worth had increased from $733,010.00 to $988,414.00.

Following a hearing, the family court, Judge Robert E. Guess, found a change of circumstances had occurred. Thus, he increased Wife's alimony award from $1,250.00 to $1,675.00 per month, citing the following reasons: 1) Wife's age; 2) the deterioration of Wife's physical and emotional health; 3) the deterioration of Wife's personal residence; and 4) Wife's decreased standard of living. Additionally, Judge Guess concluded Wife's real estate holdings were less marketable than Husband contended, and he refused to impute income to Wife for them. Furthermore, because Wife prevailed on her motion, and after considering the appropriate factors, Judge Guess awarded Wife attorney's fees.

STANDARD OF REVIEW

"Questions concerning alimony rest with the sound discretion of the trial court, whose conclusions will not be disturbed absent a showing of abuse of discretion." Sharps v. Sharps, 342 S.C. 71, 79,

535 S.E.2d 913, 917 (2000). "An abuse of discretion occurs when the court is controlled by some error of law or where the order, based upon factual findings, is without evidentiary support." Kelley v. Kelley, 324 S.C. 481, 485, 477 S.E.2d 727, 729 (Ct. App. 1996). "However, an appellate court reviewing a family court order may find facts in accordance with its own view of the preponderance of the evidence." Sharps, 342 S.C. at 79, 535 S.E.2d at 917. "[W]hen an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision." Dearybury v. Dearybury, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002).

DISCUSSION

I. Husband's Motion to Decrease Alimony

Husband argues the family court erred by denying his motion to decrease alimony. He contends the original decree required the family court to decrease alimony when Wife began receiving Social Security benefits. He also asserts a decrease is warranted because the evidence shows her income increased over the applicable period and income should have been imputed to her for the non-income-producing real properties she owns.

A. Judicial Estoppel

As a threshold matter, Wife argues Husband's claim to decrease alimony is barred by judicial estoppel. We conclude this issue is not preserved for review.

After Wife began receiving Social Security in August of 1994, Husband moved for a decrease in alimony. Before the scheduled hearing, Husband agreed to dismiss the motion because he believed, given the relative financial positions of both parties, relief was unlikely.

In 1996, Husband brought another action requesting a reduction that was again dismissed without prejudice.

In 1997, Husband brought the current motion to modify the alimony award. In her answer, Wife raised res judicata as a defense based upon the orders dismissing the previous motions. However, the record does not reflect Wife raised judicial estoppel as a bar to this modification action. Furthermore, the family court, Judge Guess, did not rule on this issue.

In Noisette v. Ismail, our supreme court held issues not raised to and ruled on by the trial judge were not preserved for review by an appellate court. 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); see Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct. App. 2001) (holding issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Therefore, this issue is not preserved for our review.

B. Reduction based upon wording of the divorce decree

Husband argues the family court erred by denying his motion to decrease alimony because the original divorce decree required a reduction once Wife began receiving Social Security benefits. We disagree.

The original divorce decree contained the following language:

> "[A]limony will be reviewable upon the Wife attaining the age of sixty-five (65) years or otherwise being able to draw on . . . [Husband's] social security and [his] Medicare coverage. **These will be substantial changes in circumstances for the alimony to be modified**."

(emphasis added).

"As a general rule, judgments are to be construed like other written instruments." Eddins v. Eddins, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct. App. 1991). "The determinative factor is the intention of the court, as gathered, not from an isolated part thereof, but from all parts of the judgment itself." Id. Furthermore, "[a]n order should be construed within the context of the proceeding in which it is rendered." Dibble v. Sumter Ice & Fuel Company, 283 S.C. 278, 282, 322 S.E.2d 674, 677 (Ct. App. 1984).

This Court has noted that, "[g]enerally, changes in circumstances within the contemplation of the parties at the time the decree was entered do not provide a basis for modifying either an alimony allowance or a child support award." Calvert v. Calvert, 287 S.C. 130, 139, 336 S.E.2d 884, 889 (Ct. App. 1985). However, in applying this general rule, the family court should look not only at whether the parties contemplated the change, but also "most importantly whether the amount of alimony in the original decree reflects the expectation of that future occurrence." Sharps, 342 S.C. at 78, 535 S.E.2d at 917. Moreover, as our supreme court noted, "There are some future changes which may be in contemplation of the parties at the time of the decree but, due to other considerations, cannot be addressed at that time in the divorce decree." Id. at 77, 336 S.E.2d at 916.

The family court noted the imminent increase in Wife's income from the onset of Social Security benefits in the divorce decree. This provision in the order makes it clear that Social Security benefits were not factored into the original alimony award. Just as clearly, the family court did not attempt to allocate a reduction in alimony based on this future event. Rather, the original order stated alimony was *reviewable* once this event occurred.

The family court, Judge Guess, found Wife's income was inadequate to pay her monthly expenses, even considering her Social Security benefits. Her 1998 income was $2,297.00 per month, including her $564.00 per month Social Security benefit, leaving her with a deficit of $489.00 per month. Based on Husband's financial declaration, his income grew from $5,374.00 per month to $11,507.00

per month,[1] and, using his figures, he still had a monthly surplus of $845.00. Both parties grew in net worth, Husband greater than Wife. In relation to each other, their financial positions remained relatively stable, although the court concluded Wife had reduced her standard of living to remain within her income. Thus, based on all of the changes of circumstances that occurred, or lack thereof, between the parties, the family court declined to reduce Wife's alimony.

We agree with the family court's conclusion that the original order did not mandate a reduction in alimony when Wife began receiving Social Security benefits. Furthermore, the family court did not abuse its discretion by reviewing all of the changes in circumstances in evaluating whether or not a modification in alimony was warranted. See id. at 79, 535 S.E.2d at 917 (holding in evaluating a change in circumstances, the court must determine if the change warrants a modification of alimony, and in doing so, must consider all of the changes in circumstances that have occurred).

C. Wife's Income and Net Worth Increase

Husband argues that, even if the original alimony award did not mandate a decrease once Social Security payments began, the family court erred by denying his motion to reduce alimony because Wife's income substantially increased during the applicable period. In this regard, Husband asserts the family court failed to impute income to Wife for non-marital-real-estate assets that have appreciated in value by $148,000.00 since the divorce. Although we agree Wife's increase in net worth should not have been excluded from consideration for the reasons advanced by the family court, we disagree with the argument that income should be imputed to her warranting a decrease in alimony.

---

[1] Although we recognize the 1994 figure is net of expenses associated with the rental properties, and the 1998 income is a gross figure, Husband did not present financial evidence to aid the court in interpreting the 1998 figure.

Once a periodic alimony obligation is set, South Carolina Code Annotated section 20-3-170 (1985) governs modification of the obligation. Section 20-3-170 states in pertinent part:

> Whenever [a spouse] . . . has been required to make his or her spouse any periodic payments of alimony and *the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed* since the rendition of the judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments . . . .

(emphasis added).

Furthermore, the burden of showing by the preponderance of the evidence a change has occurred is on the party seeking the modification. Cartee v. Cartee, 295 S.C. 103, 104, 366 S.E.2d 269, 269 (Ct. App. 1988).

During the marriage, Wife inherited real property in Rock Hill ("the Rock Hill property") and Fort Mill ("the Fort Mill property") from her mother. She jointly owns the Rock Hill property with four other people, and, according to her testimony, she does not control it.

She and her two sisters inherited adjoining twenty-three acre tracts of land in Fort Mill. According to Wife, she and her sisters verbally agreed not to sell their tracts until all three could be sold, so that the proceeds could be equally divided. Although offers had been made to buy the property as a whole, and Wife had agreed to sell her portion, her sisters had declined, believing the offers to be inadequate.

Wife stipulated the value of these two properties had increased by $148,000.00 since 1994 to a 1998 value of $406,000.00. Husband's accountant testified Wife could have earned $8,983.00 per year from

the properties based on their value in 1993, $12,982.00 per year from the proceeds if she sold the properties in 1998, or $18,371.00 per year if she exchanged the properties for rental properties.

The family court declined to impute income to Wife based on these properties for two reasons. First, the court concluded Wife made a wise decision by not selling the properties in 1993, noting that the properties had appreciated in value significantly more than the combined total of the foreseeable income that could have been derived by conservatively investing the proceeds. Second, the court concluded the properties were not nearly as marketable as Husband's accountant portrayed them to be.

We disagree with the family court's analysis as to both issues. South Carolina Code Annotated section 20-3-130(C) (Supp. 2002) provides:

> In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to all of the following factors . . . (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action.

Wife owned the two subject properties at the time of the equitable distribution. Thus, when the family court determined the original alimony award, it presumably considered the impact that the two properties, and their reasonable appreciation, would have on Wife's financial condition. Therefore, absent an extraordinary event affecting the original value of these assets, the imputation of income, for purposes of determining a change of circumstances, would be an unfair duplication. See Calvert, 287 S.C. at 139, 336 S.E.2d at 889 ("Generally, changes in circumstances within the contemplation of the parties at the time the decree was entered do not provide a basis for modifying either an alimony allowance or a child support award."); see

also Gay v. Gay, 800 A.2d 1231, 1240 (Conn. App. Ct. 2002) (holding the appreciation in value of an asset "distributed at the time of the dissolution does not constitute a change in circumstances that the court may consider when deciding whether to entertain a motion for modification of alimony. Furthermore, . . . [it] cannot be used as a factor to determine the amount by which alimony is to be modified."); cf. Eubank v. Eubank, 347 S.C. 367, 374, 555 S.E.2d 413, 417 (Ct. App. 2001) (noting, where Wife received property after the equitable distribution, the family court erred by refusing to consider the property when determining whether an alimony modification was warranted because "even if Husband knew before the parties' divorce that Wife would likely receive an inheritance on the deaths of her mother and aunt, the parties could not have ascertained the amount of Wife's inheritances or when she would receive them." Thus, the property could not have been considered by the family court in the equitable distribution.").

As to the marketability of the properties, the family court stated "[t]here is nothing in the records which would lead me to believe that the wife has the ability to convert this property without significantly more expense than has been allowed by the husband's witnesses."

The parties stipulated to the value of Wife's properties for purposes of this proceeding. With the possible exception of Wife's comment that she did not control the Fort Mill property, she does not argue, and offers no proof, that the properties have less value than that to which she stipulated. Therefore, the record does not support the family court's finding, and we conclude it is an abuse of discretion.

Notwithstanding this determination, we conclude Husband failed to prove that a reduction in alimony is warranted. First, no evidence was presented to establish the appreciation in these assets was extraordinary over the stipulated period. In fact, Husband's assets increased in value by $255,404.00 during the same period, approximately the same percentage increase as that of Wife.

The family court concluded Wife managed to increase the value of her assets by allowing them to appreciate, rather than converting them into cash and spending the income. This conclusion is supported by the testimony. The family court also concluded that Wife had a monthly deficit of $489.00, a finding that is also borne out by the record. Therefore, even if income were imputable for the $148,000.00 increase in value of these assets,[2] the additional income would not make up the deficit the family court found to exist. Thus, we hold no substantial change in circumstances has occurred such that an alimony reduction is warranted. See Calvert, 287 S.C. at 138, 336 S.E.2d at 888 (holding to warrant an alimony modification, the change of circumstances must be either substantial or material).

II. Wife's Motion to Increase Alimony

Husband argues the family court erred by increasing Wife's alimony award. We agree.

To support her assertion of a change of circumstances warranting an increase in alimony, Wife testified her standard of living has declined over the applicable period. She opined she is "probably manic-depressive," she does not think she is capable of working, and she "probably need[s]" psychological assistance. At the time of the hearing, she was taking Ronase; Vasotec, a blood pressure medication; Miacalcin, a bone density medication; and Atrooent, an inhaler. In March of 1998, these medications cost her between $175.00 and $225.00 per month. She also testified she had a "protruding tooth" as of the date of hearing.

In support of her assertion that her standard of living had decreased, she testified her home needed painting and new interior furnishings. She also testified the exterior needed work. Furthermore,

---

[2] Husband's accountant opined Wife could have earned $8,983.00 per year in interest, in 1993, by investing the original value of these assets in conservative investments, and $12,982.00 per year, in 1998, based upon the increased value. ($12,982.00 - $8,983.00 = $3,999.00 ÷ 12 months = $333.25 per month additional gross income).

she provided a list of needed, allegedly unaffordable, household repairs, including everything from new upholstery and appliances to tree removal, although no cost estimates were included.

The trial court concluded this evidence established a change in circumstances warranting an increase in alimony. We disagree with this conclusion.

Wife's casual description of her own medical condition is unconvincing, especially in light of the total failure of proof as to any impact upon her income or economic circumstances. Additionally, Wife provided no evidence her medication expense increased after the initial award of alimony. Cf. Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997) (finding no abuse of discretion by award of increased alimony when relatively young wife had ongoing severe medical condition hampering her earning capability and husband's standard of living had continued to increase since initial award). Furthermore, she stipulated she had no unusual or extraordinary expenses.

Moreover, we do not agree any deterioration to Wife's residence warrants an increase. Wife's testimony reveals that the only two expenses arising after the original award of alimony involve yard work and repairs needed to a storage building. She admitted the remainder of the deterioration pre-dated the stipulated time period. We simply cannot agree the need for yard work and repair to a storage shed constitutes a change in circumstances warranting an increase in alimony, especially in view of Wife's stipulated net worth, which includes liquid assets in excess of $180,000.00.

Reviewing the record as a whole, we conclude Wife has failed to demonstrate a decline in her standard of living such that an alimony increase is warranted. Under the family court's findings, her income has increased, her net worth has increased, and her expenses have decreased. Therefore, we reverse the award of an increase in alimony.

III. Attorney's Fees

Husband argues the trial court erred by granting Wife attorney's fees. We disagree.

The award of attorney's fees is within the discretion of the court. Skipper v. Skipper, 290 S.C. 412, 414, 351 S.E.2d 153, 154 (1986). In determining whether to award attorney's fees, the court should consider each party's ability to pay his or her own fee; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

Husband brought this action to reduce his alimony obligation. Wife has successfully defended against this action. Furthermore, Wife's monthly income is less than her expenses, and Husband's income is significantly more than his expenses. Thus, we conclude Judge Guess' attorney's fee award to Wife was proper.

CONCLUSION

Based on the foregoing, the decision of the family court is

AFFIRMED IN PART and REVERSED IN PART.

GOOLSBY and SHULER, JJ., concurring.