The Supreme Court of South Carolina

O R D E R

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who were administratively suspended from the practice of law on January 31, 2005, under Rule 419(b), SCACR, and remain suspended as of April 1, 2005. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule

419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 12, 2005

ATTORNEYS SUSPENDED FOR NON-PAYMENT OF 2005 LICENSE FEES
AS OF APRIL 1, 2005

Susanna Quinn AufDerMaur
Kraft Foods Switzerland
Bellerivestrasse 203
Zurich, Switzerland 8032

Gerald J. Bertinot
University of Louisiana
P.O. Box 40794
Lafayette, LA 70504

David Scott Bowers
Live Oak Capital Advisors, Inc
1811 Oak St., Ste. 4
Myrtle Beach, SC 29577

Tiffany Erin-Lorry Bryan
Brent Adams & Assoc.
1917 Bragg St., Ste. 6
Sanford, NC 27331

Stacy Linette Bye
CobraGuard, Inc.
8527 Bluejacket St.
Lenexa, KS 66214-1656

Amy Spector Corrigan
22941 Piney Wood Cir.
California, MD 20619

Christopher Stephen Danielsen
7 N. Calvert St., Apt. 506
Baltimore, MD 21202

Joanmarie Ilaria Davoli
Notre Dame Law School
725 Howard St.
South Bend, IN 46617

Lisa Gregory Echols
18 Fish Haul Rd.
Columbia, SC 29209

Helena E. Flickinger
535 N. Michigan #2205
Chicago, IL 60611

Christopher P. Getty
Law Offices of Patrick Caffey, PA
604 Humbolt St.
Manhattan, KS 66502

Scott Richard Gorelick
Gorelick Law, PC
6000 Fairview Rd., Ste. 1415
Charlotte, NC 28210

Phillip M. Grier
2020 Pennsylvania Ave., NW # 266
Washington, DC 20006-1811

Eric Kristofer Johnson
5616 San Felipe
Houston, TX 77056

J. Keith Jones
Shaw Pittman, L.L.P.
2300 N St., NW
Washington, DC 20037-1128

Connie M. Judge
7257 Linden Tree Lane
Springfield, VA 22152

David Manuel Luna
19220 New Hampshire Ave.
Brinklow, MD 20862

Jamelle Thompson Magee
3604 NE 95th St.
Kansas, MO 64156

Andrea Leigh Malone
204 Sugar Lake Ct.
Greer, SC 29650-3352

John P. Mann

P.O. Box 10437
Greenville, SC 29603

William Thomas Maynard
147 Mills Ave.
Spartanburg, SC 29302

Lynn Marie Mizell
57 1/2 Legare St.
Charleston, SC 29401

Troy Andre' Peters
25th District Attorney's Office
201 N. Greene St.
Morganton, NC 28655

Victoria Twilford Roach
Victoria T. Roach, PC
P.O. Box 120
Wildwood, NJ 08260

Alan Brian Rogers
304 N. Congress St.
York, SC 29745

Caroline Allen Smith
PSC 477 Box 1030
FPO AP, 96306

Barbara Hankins Taylor
366 Beechwood Dr.
Greer, SC 29651

Wanda Blanche Taylor
3 Hickorywood Square
Durham, NC 27713

Clifford Charles Thomas III
Pinkerton Services Group
13950 Ballantyne Corporate Place
Ste. 300
Charlotte, NC 28277-2712

Rodman Collins Tullis
3000 S. Church St. Ext.
Spartanburg, SC 29306

Pamela Ann Wilkins
1096 Beaconsfield Ave., Apt. 15
Grosse Point Park, MI 48230

William A. Wood
11720 Hardy
Overland Park, KS 66210

SUSPENSIONS-
COMMISSION ON CLE AND SPECIALIZATION
2004 REPORT OF COMPLIANCE
AS OF APRIL 1, 2005

John A. Beam, III
PO Box 280240
Nashville, TN 37228

Barry W. Bellino
PMB 3037
PO Box 2430
Pensacola, FL 32513
(INTERIM SUSPENSION BY COURT)

Dane A. Bonecutter
160 Olde Farm Road
Lexington, SC 29072

Allen H. Brill
132 Vinge Road
Prosperity, SC 29127

Henry H. Cabaniss
317 Seewee Circle
Mt. Pleasant, SC 29464
(INTERIM SUSPENSION BY COURT)

Peng C. Chan
150 S. Los Robles Ave., Ste 440
Pasadena, CA 91101

Damon Cook
101 Meeting St., Ste 400
Charleston, SC 29401
(INTERIM SUSPENSION BY COURT)

Susan A. Cross
1012 W. Pierce St., Ste E
Carlsbad, NM 88220

Cheryl W. Davis
PO Box 3265
Harrisburg, PA 17105

Helena E. Flickinger
535 N. Michigan Ave., #2205
Chicago, IL 60611

Robert L. Gailliard
PO Box 20307
Charleston, SC 29413
(INDEFINITE SUSPENSION BY COURT)

Brian K. Greenwood
1311 Ocean Park Blvd., Ste 3
Santa Monica, CA 90405

Rosalyn K. Grigsby
PO Box 8778
Columbia, SC 29202
(INTERIM SUSPENSION BY COURT)

H. Ray Ham
PO Box 6354
West Columbia, SC 29171
(INTERIM SUSPENSION BY COURT)

Karl P. Jacobsen
PO Box 327
Columbia, SC 29202
(INTERIM SUSPENSION BY COURT)

Connie M. Judge
7257 Linden Tree Lane
Springfield, VA 22152

Jeffrey A. Kolender
14729 Myer Terrace
Rockville, MD 20853

Andrea L. Malone
204 Sugar Lake Court
Greer, SC 29650

Cletus K. Okpalaeke
5939 Two Notch Road
Columbia, SC 29203
(INTERIM SUSPENSION BY COURT)

Kenneth T. Palmer
PO Box 48
Lakehurst, NJ 08733

Alan B. Rogers
PO Drawer 11583
Rock Hill, SC 29731

Herbert S. Rosenblum
PO Box 58
Alexandria, VA 22313

Thomas E. Ruffin
PO Box 1737
Murrells Inlet, SC 29576
(INTERIM SUSPENSION BY COURT)

John C. Saydlowski
100 N. Tryon St., Ste 4700
Charlotte, NC 28202

Caroline A. Smith
PSC 477, Box 1030
FPO, AP 96306

Teri L. Stone
1429 Saratoga Lane
Aldeo, TX 76008
(SUSPENDED BY BAR)

Todd A. Strich
1215 Byron Rd.
Charleston, SC 29407
(INTERIM SUSPENSION BY COURT)

Tara A. Thompson
445 Folly Road
Charleston, SC 29412
(INTERIM SUSPENSION BY COURT)

Rodman C. Tullis
3000 S. Church St., Ext.
Spartanburg, SC 29306

Margaret L. Webster
1104 Williams Street
Baltimore, MD 21230

Chayah Yisrael
PO Box 1204
Hampton, GA 30228

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF ARTHUR T. MEEDER, PETITIONER

Arthur T. Meeder, who was definitely suspended from the practice of law for a period of eleven (11) months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, May 20, 2005, beginning at 2:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
April 15, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF ROBERT LEE NEWTON, JR., PETITIONER

Robert Lee Newton, Jr., who was definitely suspended from the practice of law for a period of one (1) year, retroactive to September 25, 2003, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, May 20, 2005, beginning at 1:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

April 15, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17

April 18, 2005

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(Aiken, Judge James R. Barber)

2005-UP-267-The State v. Laron Terrell Cobb
(Williamsburg, Judge Clifton Newman)

2005-UP-268-The State v. Emory Jenkins
(Aiken, Judge Diane Schafer Goodstein)

2005-UP-269-The State v. Derrick Woods
(York, Judge John C. Hayes, III)

2005-UP-270-The State v. Stacey Lee Morris
(Richland, Judge Doyet A. Early, III)

2005-UP-271-James L. Young v. City of Spartanburg
(Spartanburg, Judge Reginald I. Lloyd)

2005-UP-272-The State v. Michael Miller
(Bamberg, Judge Reginald I. Lloyd)

2005-UP-273-W. V. Haas, Jr, individually and as trustee v. John E. Haas, Susan K.H. Betenbaugh, individually and as trustees, Stephen D. Gillespie, Laura G. Greer, and David V. Betenbaugh
(Greenville, Judge Edward W. Miller)

PETITIONS FOR REHEARING

3902-Cole v. Raut	Pending
3918-State v. Mitchell	Pending
3928-Cowden Enterprises v. East Coast	Pending
3932-Nasser-Moghaddassi v. Moghaddassi	Pending
3935-Collins Entertainment v. White	Pending
3940-State v. Fletcher	Pending
3941-State v. Green	Pending
3944-Pinion v. Pinion	Pending

3947-Chassereau v. Global-Sun	Pending
3948-State v. Carlson	Pending
3949-Liberty Mutual v. SC Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. Miller	Pending
3953-McCall v. IKON	Pending
3954-Nationwide Mutual Ins. Co. v Erwood	Pending
3963-McMillan v. S.C. Dep't of Agriculture	Pending
3964-Jones v. State Farm	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Pending
2005-UP-025-Hill v. City of Sumter et al.	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-067-Chisholm v. Chisholm	Pending
2005-UP-080-State v. Glover	Pending
2005-UP-082-Knight v. Knight	Pending
2005-UP-084-State v. Moore	Pending
2005-UP-092-Stokes v. State	Pending
2005-UP-110-State v. Dudley	Pending

2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-114-International Order v. Johnson	Pending
2005-UP-115-Toner v. S.C. Employment Security	Pending
2005-UP-116-SC Farm Bureau v. Hawkins	Pending
2005-UP-121-State v. Delesline	Pending
2005-UP-122-State v. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-134-Hildreth v. County of Kershaw	Pending
2005-UP-137-S.C. Dep't of Probation v. Byrd	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley Cty.	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-141-Byrd v. Byrd	Pending
2005-UP-143-City of Columbia v. Faltas	Pending
2005-UP-149-Kosich v. Decker Industries	Pending
2005-UP-155-CCDSS v. King	Pending
2005-UP-156-In the interest of S., Damion	Pending
2005-UP-159-Jenkins v. Central Carolina	Pending
2005-UP-160-Smiley v. SCDHEC/OCRM	Pending
2005-UP-165-Long v. Long	Pending

2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cty. of Florence	Pending
2005-UP-173-DiMarco v. DiMarco	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-191-Woodall v. Williamson	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-200-Cooper v. Permanent General	Pending
2005-UP-201-Brown v. McCray	Pending
2005-UP-203-Germeroth v. Thomasson Brothers	Pending
2005-UP-209-Lundstrom v. Lundstrom	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler	Pending
2005-UP-224-Dallas v. Todd et al.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3676-Avant v. Willowglen Academy	Pending
3683-Cox v. BellSouth	Denied 04/07/05
3684-State v. Sanders	Pending
3690-State v. Bryant	Granted 04/07/05
3707-Williamsburg Rural v. Williamsburg Cty.	Granted 04/07/05
3712-United Services Auto Ass'n v. Litchfield	Denied 04/07/05
3714-State v. Burgess	Pending

3717-Palmetto Homes v. Bradley et al.	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Denied 04/07/05
3720-Quigley et al. v. Rider et al.	Pending
3724-State v. Pagan	Pending
3730-State v. Anderson	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending

3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending
3784-State v. Miller	Pending
3786-Hardin v. SCDOT	Pending
3787-State v. Horton	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending
3800-Ex parte Beard: Watkins v. Newsome	Pending
3802-Roberson v. Roberson	Pending
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending

3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending
3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3841-Stone v. Traylor Brothers	Pending
3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending
3851-Shapemasters Golf Course Builders v. Shapemasters, Inc.	Pending
3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending

3865-DuRant v. SCDHEC et al	Pending
3866-State v. Dunbar	Pending
3871-Cannon v. SCDPPPS	Pending
3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending
3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
3890-State v. Broaddus	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3910-State v. Guillebeaux	Pending
3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending
3917-State v. Hubner	Pending
3919-Mulherin et al. v. Cl. Timeshare et al.	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-642-State v. Moyers	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-736-State v. Ward	Pending

2003-UP-757-State v. Johnson	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-100-Westbury v. Dorchester Co. et al.	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-215-State v. Jones	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-237-In the interest of B., Justin	Pending
2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-256-State v. Settles	Pending

2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-306-State v. Lopez	Pending
2004-UP-319-Bennett v. State of S. C. et al.	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending
2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-394-State v. Daniels	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-410-State v. White	Pending
2004-UP-422-State v. Durant	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep’t of Probation	Pending

2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-485-State v. Rayfield	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending
2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending
2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-546-Reaves v. Reaves	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending
2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending

2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-607-State v. Randolph	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-627-Roberson v. State	Pending
2004-UP-632-State v. Ford	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending
2004-UP-654-State v. Chancy	Pending
2004-UP-657-SCDSS v. Cannon	Pending
2004-UP-658-State v. Young	Pending
2005-UP-002-Lowe v. Lowe	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-039-Keels v. Poston	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Chris Robertson, Plaintiff,

v.

Bumper Man Franchising Company, Inc. and Bumper Man, Inc., Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
Matthew J. Perry, United States District Judge

Opinion No. 25971
Heard March 15, 2005 – Filed April 18, 2005

Certified Questions Answered

Clinch Heyward Belser, Jr. and Michael J. Polk, both of Columbia, for Plaintiff.

Natalma M. McKnew and Thomas Warren Epting, both of Greenville, for Defendants.

J**USTICE PLEICONES:** Pursuant to Rule 228, SCACR, we accepted two questions certified by United States District Judge Matthew J. Perry:

1) Does the South Carolina Business Opportunity Sales Act (the Act) S.C. Code Ann. §§ 39-57-10 *et seq.* apply to a contract between a business located in Texas and a Texas resident, and performed in Texas and Washington?

2) Does the answer to question 1 change if the individual later moves to South Carolina and signs a new contract with a related entity to be performed in South Carolina?

We answer both questions "No."

FACTS[1]

In 2000, plaintiff entered a business agreement with Bumper Man, Inc. (BMI). This agreement, entered into in Texas, licensed plaintiff to practice the Bumper Man method of repairing automobile bumpers within a territory in San Antonio (Texas Agreement). BMI's licensing fee was $15,000: Plaintiff paid $10,000 and secured the remaining $5,000 with a promissory note.

The Texas Agreement provided, among other things, that plaintiff would be offered a franchise for no additional cost at some point in the future. About four months after entering the Texas Agreement, plaintiff moved to Seattle. He operated his business there pursuant to the Texas Agreement. The Texas Agreement had required plaintiff to pay a $2,000 relocation fee if he moved from San Antonio. Further, that agreement required him to pay the remainder of the BMI licensing fee if he relocated. In February 2001, a new entity, Bumper Man Franchising, Inc. (BMFI), prepared and sent plaintiff a Franchise Offer Circular.[2] On the same day

[1] We restrict our discussion to the facts recited in the certification order.

[2] This circular is required by the FTC Franchise Disclosure Rule, 16 CFR §§ 436 *et seq.*

that plaintiff received the Franchise Offer Circular, plaintiff signed a new promissory note in favor of BMFI for $12,000.[3]

In July 2001, plaintiff moved to South Carolina. Once here, he signed a franchise agreement with BMFI and began operating as a Bumper Man Franchise (South Carolina Agreement). In August 2002, plaintiff and BMFI had a falling out, and this litigation followed.

The parties acknowledge that the Texas licensing agreement with BMI was performed exclusively in Texas and Washington State, while the South Carolina franchise agreement with BMFI was entered into and performed here.

ISSUES

A. Does the South Carolina Business Opportunity Sales Act (the Act) S.C. Code Ann. §§ 39-57-10 *et seq.* apply to a contract between a business located in Texas and a Texas resident, and performed in Texas and Washington?

B. Does the answer to question 1 change if the individual later moves to South Carolina and signs a new contract with a related entity to be performed in South Carolina?

ANALYSIS

A. Applicability of the Act to the Texas Agreement

The first question asks whether the Act applies to the Texas Agreement, entered into in that state and wholly performed outside South Carolina. It is unnecessary to conduct any in-depth analysis in order to conclude that the answer to this question is "no." E.g., Ex parte First

[3] The $12,000 represents the $2,000 relocation fee and $10,000 licensing fee due BMI under the Texas Agreement.

Pennsylvania Banking and Trust Co., 247 S.C. 506, 148 S.E.2d 373 (1966) (state statutes have no extraterritorial effect).[4]

B. Does the Act apply to the Texas Agreement by virtue of the subsequent contract entered into by plaintiff and BMFI in South Carolina?

We answer this question 'No.' There is nothing in this record to suggest that the parties to the Texas Agreement contemplated that the plaintiff would relocate to South Carolina and that the anticipated franchise offer would be made and performed here. We hold that the subsequent South Carolina Agreement between plaintiff and BMFI does not cause the Act to relate back and apply to the Texas Agreement between plaintiff and BMI.

We note further that the Act applies to the start-up of a business. S.C. Code Ann. § 39-57-20 (Supp. 2004). The application, if any, of the Act to the South Carolina Agreement between plaintiff and BMFI is not before the Court. We emphasize that our answers are restricted to the narrow questions certified.

CONCLUSION

We answer both certified questions

'No.'

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

[4] Plaintiff cites numerous cases in brief for the proposition that a state statute regulating business practices applies where the state has a significant connection with the transaction. Here, South Carolina has **no** relationship with the BMI licensing agreement executed in Texas and wholly performed in that state and in the State of Washington.

The Supreme Court of South Carolina

In re: Amendment to Rule 404(c)(5), SCACR,
Admission Pro Hac Vice.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 404(c)(5), SCACR, regarding information required to be included in an application for admission *pro hac vice*, by deleting the word "other". This amendment will require an attorney seeking to be admitted *pro hac vice* to include in the application whether the attorney has been notified of a complaint pending before the Commission on Lawyer Conduct in this State as well as any other state. Rule 404(c)(5), as amended, states the following:

> **(c) Application for Admission.** An attorney desiring to appear *pro hac vice* shall file with the court in which the matter is pending, prior to making an appearance, an Application for Admission Pro Hac Vice which contains the following information:
>
> ...
>
> (5) whether the applicant has been formally notified of any complaints pending before a disciplinary agency in any jurisdiction and, if

so, provide a detailed description of the nature and status of any pending disciplinary complaints;

This amendment shall become 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

April 14, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Karl Wallace, Appellant.

Appeal From Greenville County
J. Michael Baxley, Circuit Court Judge

Opinion No. 3971
Heard November 17, 2004 – Filed March 28, 2005

REVERSED

C. Rauch Wise, of Greenwood, and Everett P. Godfrey, Jr., of Greenville, for Appellant

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

HEARN, C.J.: Karl Wallace was convicted of second-degree criminal sexual conduct (CSC) with a minor. He argues the trial court erred by admitting the testimony of the victim's sister regarding an alleged prior act of criminal sexual conduct with a minor under the common scheme or plan exception to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE. We reverse and remand for a new trial.

FACTS

Wallace was accused of criminal sexual conduct with his stepdaughter. At the time of trial, Wallace had been married to the victim's mother for approximately ten years. At trial, the victim testified she was about twelve years old when Wallace first told her to come to his room and go into the bathroom to take off all of her clothes. She said he would look at her and then touch her on her chest. After he touched her, he would tell her "don't tell anyone 'cause they're not going to believe you anyway." When asked how many times this happened, the victim answered "once, like every other month or so one time." This pattern continued through the seventh and eighth grades.

Although the incidents allegedly continued over a number of years, this charge involved an act on May 8, 2001, when the victim was in the ninth grade. According to the victim, Wallace called the victim into his bedroom to talk after her mother had been taken into police custody on an unrelated matter. After asking the victim why she was sitting with her legs closed and whether she thought he was going to do something to her, Wallace pushed her back on the bed. The victim stated that Wallace "sat on top of me and like between my legs and we were just sitting there." Wallace asked her, "do you want me to be myself or be like a dog," to which she responded, "to be hisself [sic]." Wallace then removed her pajama bottoms and her underwear, forced open her legs, and started "to push his hands up [her] privates." As he continued, the victim started to scream. Wallace put a pillow over her face and told her to be quiet or he would hit her. She testified that when Wallace heard her little brother coming down the hall, he told her to go into the bathroom and get dressed. After her brother left the room,

Wallace forced her back on the bed, got on top of her, and took her pants off again. After sitting and looking at her, he told her to go get her things and leave.

A few days later, the victim's older sister came to the school to see the victim and to find out what was going on at home. The victim told her sister that Wallace had been "messing with" her. As a result of that conversation, someone from the Department of Social Services visited the victim at school. The victim subsequently filed a police report.

At trial, the State attempted to present evidence of an alleged sexual assault against the sister as proof of Wallace's guilt. Prior to the start of trial, the State moved to allow the testimony of the sister, proffering the following argument:

> It's the State's position that her testimony would be that she was also sexually abused by this defendant that [sic] the abuse started at approximately the same age with both of the victims, that being the seventh grade, roughly, for both of them, between twelve and thirteen years old; that they were both the defendant's stepdaughters; that they were both living in the home with the defendant, as opposed to visiting on weekends and the abuse happening then; that the method of the abuse essentially started the same way, it started with fondling of the breasts, is [sic] where it began; and that it would occur in the home, . . . it occurred in the bedroom; and it occurred when the mother was not home, ...

The State concluded by stating that the sister suffered more extensive abuse. Specifically, she was subjected to sexual intercourse and oral sex. The State asserted it "would be willing to offer to limit testimony, if you see fit, as to just the particulars that were similar." When questioned by the trial court, the State said the sister specifically did not want to bring charges against Wallace. Defense counsel argued the testimony of the sister, as to the alleged

prior bad act, did not fit any exception to Lyle and would be grossly prejudicial to Wallace.

The trial court ordered an in camera examination of the sister. She testified that when she was in the sixth or seventh grade Wallace would come into her room to rub her back because he was trying to get her to lose weight. He then would touch her breasts, kiss her, and perform oral sex. When she was in the eighth grade, the family moved from Louisiana to South Carolina. The sister testified Wallace would call her into his bedroom and perform oral sex, digital penetration, and sexual intercourse. She testified she told her mother about the incidents on two separate occasions. The sister testified the sexual assaults continued until she moved out of the family home during her second semester in college.

After hearing the testimony and arguments, the trial court found the testimony to be clear and convincing and ruled this evidence was admissible under the common scheme or plan exception to Lyle. Concluding the probative value outweighed the prejudicial effect, the trial court allowed the evidence to be presented to the jury but limited the testimony of the sister "only to the extent and only to the acts which occurred to the victim in this prosecution, and not to go beyond that, which will limit the prejudicial effect of this testimony coming in." A jury found Wallace guilty of second-degree CSC with a minor, and he was sentenced to eight years confinement.

STANDARD OF REVIEW

On review of criminal cases, an appellate court is limited to determining whether the trial judge abused his discretion. See State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law. State v. Bryant, 356 S.C. 485, 489-90, 589 S.E.2d 775, 777 (Ct. App. 2003). "Concerning the admission of evidence, the trial judge's determination will be sustained absent error and resulting prejudice." State v. Robinson, 360 S.C. 187, 192, 600 S.E.2d 100, 102 (Ct. App. 2004) (citation omitted).

LAW/ANALYSIS

Wallace argues the trial court improperly admitted the testimony of the victim's sister as to alleged criminal sexual assaults under the common scheme or plan exception of Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). We agree.

Evidence of prior bad acts is inadmissible to prove the specific crime charged unless the evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish proof of the other; or (5) identity of the person charged with the present crime. Lyle, 125 S.C. at 416, 118 S.E. at 807; Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

A prior bad act must first be established by clear and convincing evidence to be admissible. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). This court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). When considering whether there is clear and convincing evidence, this court is bound by the trial court's findings unless they are clearly erroneous. Tutton, 354 S.C. at 325, 580 S.E.2d at 189; State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999) (stating if a prior bad act is not the subject of a conviction, proof must be by clear and convincing evidence).

Here, Wallace does not argue the quantum of proof did not rise to the clear and convincing level. Instead, he argues the trial judge misapprehended the nature of the common scheme or plan exception as articulated in Lyle. Wallace urges us to review the underlying facts of Lyle in order to fully understand the common scheme or plan exception.

In Lyle, the defendant was charged with issuing a forged check in Aiken, South Carolina on January 12, 1922. 125 S.C. at 411, 118 S.E. at 805. The State introduced evidence that the defendant had committed similar crimes in Aiken on that same date, as well as similar crimes in Griffin, Georgia on January 3, 1922; Athens, Georgia on December 30, 1921; and LaGrange, Georgia on November 23, 1921. Id. at 413-14, 118 S.E. at 806. The allegation was the same in all the crimes: the defendant entered the bank, opened an account with a forged check using a false name, and received cash back from his deposit. The South Carolina Supreme Court held that the evidence regarding the similar crime committed in Aiken on the same date as the crime charged was admissible to establish identity because the evidence helped to refute the alibi defense of the defendant. Id. at 418, 118 S.E. at 808. As to the similar crimes committed on other dates in other locations, however, the Supreme Court found the evidence inadmissible. The court stated:

> Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged. *If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system.*

Id. at 427, 118 S.E. at 811 (emphasis added) (citations omitted). This notion of the *connection* which must be established between similar crimes in order to allow admission of evidence of one of the crimes in the trial of the other had been previously articulated in two New York cases, People v. Molineux, 61 N.E. 286 (N.Y. 1901) and People v. Romano, 82 N.Y.S. 749 (N.Y. App. Div. 1903), relied on by the court in Lyle.

In Molineux, the defendant was accused of murder by sending poison contained in a bottle of Bromo Seltzer[1] through the mail to the director of the Knickerbocker Athletic Club. 61 N.E. at 287. The director, Harry Cornish, believing the silver "Tiffany's" bottle holder containing the bottle of Bromo Seltzer to be a Christmas gift, took it to his home. Thereafter, a member of his household, Katharine Adams, took some of the bottle's contents to relieve a headache and died. At trial, the State sought to introduce into evidence that the defendant was responsible for the previous death of Henry Barnet, who died at the Knickerbocker Athletic Club after taking a dose of a powder he had received in the mail the month before Cornish received his bottle. Id. at 289. Both powders were in fact cyanide of mercury, a rare and deadly poison. The evidence of the prior crime was admitted in the trial court. The Court of Appeals of New York reversed, and in a very thorough-going opinion, clearly articulated the limited nature of the common scheme or plan exception to the general rule which proscribes the admission of evidence of other crimes to prove the crime charged. The New York Court stated:

> It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there

[1] Bromo Seltzer is a brand of drug used to treat stomach upset and headache. See http://www.drugs.com/cons/Bromo_Seltzer.html (last visited Feb. 11, 2005).

> must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.

Id. at 299.

In Romano, the defendant was charged with robbing his victim by throwing snuff into his face. 82 N.Y.S. at 749. At trial, the State sought to introduce evidence that the defendant had committed another robbery at the same location upon another person by using the same method. Although the trial court admitted the evidence finding the two crimes remarkably similar, the appellate court reversed. The New York Court of Appeals stated:

> There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other.

Id. at 750.

Wallace argues that in admitting the sister's testimony, the trial judge impermissibly broadened the meaning of the common scheme or plan exception enunciated in Lyle, to include mere similar acts. According to Wallace, the trial judge erroneously assumed that a broader application of the exception was warranted because this case involved criminal sexual conduct with a minor. However, the appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases. See State v. Nelson, 331 S.C. 1, 14 n.16,

501 S.E.2d 716, 723 n.16 (1998) (ruling that evidence of defendant's general pedophile characteristics was inadmissible, and noting that "[i]n spite of the ban on character or propensity evidence, some states have nonetheless admitted evidence of collateral sexual crimes or sexual bad acts in sex offense cases, carving out a specific exception they variously term 'lustful disposition,' 'depraved sexual instinct,' or the like. . . . South Carolina has not recognized such an exception, nor are we inclined to do so."); Tutton, 354 S.C. at 328, 580 S.E.2d at 191 (finding the bar for admissibility under Lyle is not lower simply because sexual crimes are involved; there must still be "evidence that the defendant employed a common scheme or plan in the commission of the crimes").[2]

---

[2] Wallace argues that numerous opinions from both this court and the South Carolina Supreme Court have focused exclusively on the close degree of similarity between the crime charged and the evidence of the other crime, without mentioning the "system" or relation between the two, which is the crux of the original exception. See, e.g., State v. Hallman, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) ("We find the evidence of prior bad acts bears such close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect."); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) ("Such evidence is inadmissible 'unless the close similarity of the charged offense and the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect.'"); State v. Patrick, 318 S.C. 352, 356 457 S.E.2d 632, 635 (Ct. App. 1995) ("There are sufficient similarities between the Georgia case and present case to apply the Lyle common scheme or plan exception."); State v. Blanton, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct. App. 1994) ("The prior acts were sufficiently similar to the charged offense to be admissible."); State v. Wingo, 304 S.C. 173, 176, 403 S.E.2d 322, 324 (Ct. App. 1991) (finding the evidence of prior bad acts tended to show common plan or scheme when the experiences of each victim paralleled that of the other victims).

According to Wallace, other decisions correctly reflect a more narrow interpretation of the common scheme or plan exception. See, e.g., State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) ("When the prior bad acts are similar to the one for which the appellant is being tried, the

danger of prejudice is enhanced."); State v. Parker, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993) ("[T]he connection between the prior bad act and the crime must be more than just a general similarity."); State v. Rogers, 293 S.C. 505, 507, 362 S.E.2d 7, 8 (1987) (stating that where the acts are ten years apart and the only connection between the testimony of the two daughters was that the defendant touched them both, the prior bad act evidence should have been excluded), *overruled on other grounds by* State v. Schumpert, 312 S.C. 502, 506 n.1, 435 S.E.2d 859, 862 n.1 (1993); State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (1986) (finding where the robbery could not have been committed without the get-away-car, the relevance of the car theft to the crimes charged was easily perceived); State v. Stokes, 279 S.C. 191, 192-93, 304 S.E.2d 814, 814-15 (1983) (concluding the trial judge erred in admitting testimony from a witness who speculated that the defendant intended to rape her because there was no connection made between that prior bad act and the act for which the defendant was charged); State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (allowing testimony of another sexual act perpetrated against the same victim some hours after the original offense because the crimes were so related to each other that proof of one tended to establish the other); State v. Hubner, Op. No. 3917 (Ct. App. filed Jan. 10, 2005) (Shearouse Adv. Sh. No. 2 at 89) (stating that the similarity between separate acts must not merely be a similarity in the results; "[r]ather, there must be such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations"); State v. Carter, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996) (reversing defendant's conviction where there was no legal connection between the prior bad act and the crime charged); State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994) (finding absent a connection between the two acts, the testimony of prior drug sales utilizing a similar sales technique precisely the type of evidence Lyle prohibits).

Wallace is correct that some of the appellate decisions appear to focus exclusively on the alleged close similarity between the other crime and the crime charged, while others look beyond mere close similarity to consider the system or connection between the two. Nevertheless, sorting out any

In this case, the trial court did not address any connection between the two crimes to establish if the allegations by the victim's sister were admissible. The court instead ruled, "it goes to a common scheme or plan because of the close degree of similarity between the conduct, with regards to the two victims." When the State was asked to explain why the testimony was essential to its case, the solicitor responded:

> This is technically a credibility case, that's what it is. It's one witness's word against potentially another witness's word. The evidence would be relevant and would be essential to the State's case because it is a piece of evidence, just like any other piece of evidence, that goes to prove or disprove the case. And this is strictly a credibility case: Therefore, this testimony is necessary to, again, prove the victim's allegations.

This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime. It falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception to Lyle. Accordingly, the trial court erred in admitting the evidence on this basis.

It was also error for the trial judge to attempt to limit the testimony of the sister so that there would be a close similarity between the prior bad act and the crime charged. The court noted that the testimony of the sister was more egregious than that of the victim and ordered the testimony redacted, stating, "I find it appropriate under State v. Tutton to

---

apparent inconsistencies in the appellate decisions of this state is not the province of this court. See M & T Chems., Inc. v. Barker Indus., Inc., 296 S.C. 103, 109, 370 S.E.2d 886, 890 (Ct. App. 1988) (stating that an intermediate appellate court has no authority to change existing law, but maintaining that the supreme court may want to grant certiorari and modify previous decisions).

limit the testimony of the Lyle witness only to the extent and only to the acts which occurred to the victim in this prosecution, and not to go beyond that, which will limit the prejudicial effect of this testimony coming in." This court in Tutton concluded the differences in the evidence proffered of the prior criminal sexual conduct was sufficiently different to render it inadmissible. Tutton, 354 S.C. at 333, 580 S.E.2d at 194. We did not, however, sanction the redaction of testimony in order to make similar that which is dissimilar.

Wallace correctly argues: "The law should not permit a trial judge to make similar that which is different by redacting a part of the testimony." This is precisely what Lyle rejected. Moreover, as noted in Lyle, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." 125 S.C. at 417, 118 S.E.2d at 807. Thus, the trial court erred in endeavoring to eliminate any differences between the sister's account and the victim's testimony in order to make the sister's testimony admissible. See Hubner, Op. No. 3917 (Ct. App. filed Jan. 10, 2005) (Shearouse Adv. Sh. No. 2 at 79) (concluding the trial court erred in limiting the testimony regarding prior bad acts to similar acts when the court recognized the differences between prior bad act and the act at issue but failed to balance the similarities and differences in determining whether the testimony was admissible at all). Rather, the trial judge should have given Wallace the benefit of the doubt and excluded the evidence. See Stokes, 279 S.C. at 193, 304 S.E.2d at 815 ("If there is any doubt as to the connection between the acts, the evidence should not be admitted."); State v. Davenport, 321 S.C. 134, 138, 467 S.E.2d 258, 260 (Ct. App. 1996) (finding that where there was no clear connection between the extraneous criminal transaction and the crime charged, the accused should have been given the benefit of the doubt, and the evidence should have been rejected).

In addition to finding the admission of the sister's testimony error, we find the admission was not harmless. As in Hubner, the outcome of this case rested on the credibility of the victim and Wallace. Op. No. 3917 (Ct. App. filed Jan. 10, 2005) (Shearouse Adv. Sh. No. 2 at 92). Here, the

admission of the sister's testimony enhanced the credibility of the victim and was provided as substantive prove of the victim's allegations. Without the sister's testimony, we cannot say that the evidence against Wallace was conclusively established such that a guilty verdict was the only rational result. See Tutton, 354 S.C. at 334, 580 S.E.2d at 194 (stating that in conducting an harmless analysis, the appellate court must review the other evidence admitted at trial in order to determine "whether the defendant's guilt is conclusively established by competent evidence such that no other rational conclusion could be reached by the jury").

CONCLUSION

Accordingly, we reverse Wallace's conviction and remand for a new trial.

REVERSED AND REMANDED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samuel K. Peoples, Respondent,

v.

Henry Company and Zurich American Insurance Co., Appellants.

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

Opinion No. 3972
Submitted February 1, 2005 – Filed March 28, 2005

AFFIRMED

Andrew D. Kaplan, Steven M. Rudisill, of Charlotte, for Appellants.

David Vance Benson, of Rock Hill, for Respondent.

HEARN, C.J.: This is a workers' compensation case. Henry Company and its insurer appeal an order of the circuit court finding its employee, Samuel K. Peoples, sustained an injury arising out of and in the

course of employment and awarding him compensation for sixty-eight percent permanent partial disability to his right lower extremity. We affirm.

FACTS

Peoples, a forty-three year old man with a high school education, worked for Henry Company for twenty-three years. An accident at work in 1999 resulted in a rupture of his Achilles tendon. He underwent two surgeries and a third one was recommended. Peoples elected not to have the third surgery because the chances of improvement did not appear to be good, and he would likely face a fusion of his ankle bones.

After the surgeries, Peoples returned to work at the same job but endured constant pain. On a scale of one to ten, his pain level was at a six in the morning and at a seven when he returned home at the end of the day. He takes medication, but his leg remains swollen and painful. He now has difficulty walking and standing for long periods of time. Peoples stated that he is unable to participate in sports, cannot lift heavy objects, and climbs stairs with difficulty. Additionally, his ability to rotate his ankle is impaired and his lateral movement has been reduced by seventy percent.

The pain in Peoples' right leg generally radiates to just below the knee. He has a scar on the back of his leg about eight inches long running from his heel toward his knee. He must wear protective shoes to work every day. Peoples further testified that he has pain from his heel to his lower back from time to time, and that he takes Ultracet to control the pain.

The single commissioner held that Peoples had undergone a sixty-eight percent permanent partial disability to his right lower extremity and awarded benefits accordingly. The commissioner also ordered Henry Company to provide orthopedic footwear for life and to continue to provide Peoples with Ultracet or some equivalent medication for the pain.

Henry Company appealed to the full commission. The commission affirmed, except that it reduced the level of disability to forty percent.

Both parties appealed to the circuit court. The circuit court found that the decision of the full commission to reduce the level of disability to forty percent was without evidentiary support. The circuit court therefore reinstated the award of sixty-eight percent disability by the single commissioner. Henry Company argued on appeal that Peoples' injury was to his foot only, not his leg. Finding the Achilles tendon to be a part of the leg, the circuit court affirmed the remainder of the commission's order.

Henry Company has appealed, arguing the circuit court erred in (1) sustaining the finding of partial disability to his leg instead of only his foot, and (2) finding that Peoples needed Ultracet to control the pain.

STANDARD OF REVIEW

Judicial review of a decision of an administrative agency is governed by the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 to -400 (Supp. 2004). Section 1-23-380(A)(6) establishes the substantial evidence rule as the standard of review. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law, but may only reverse or modify an agency's findings of fact if they are clearly erroneous. S.C. Code Ann. §1-23-380(A)(6)(d) and (e).

Accordingly, a reviewing court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. Stephens v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996). Instead, review of issues of fact is limited to determining whether the findings are supported by substantial evidence in the record. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "On appeal, this court must affirm an award of the Workers' Compensation Commission in which the circuit court concurred if substantial evidence supports its findings." Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520, 415 S.E.2d 841, 843 (Ct. App. 1992).

LAW/ANALYSIS

Henry Company first argues the circuit court erred in affirming the commission's award for disability to Peoples' right leg instead of only his right foot. We disagree.

"Workers' compensation statutes are to be construed in favor of coverage. . . ." Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). Any reasonable doubts as to construction should be resolved in favor of coverage. Id. at 561, 514 S.E.2d at 753.

Section 42-9-30 of the South Carolina Code (Supp. 2003) provides the schedule for compensation for various injuries under this state's workers' compensation system. Subsection (14) provides that for the loss of a foot a worker is to receive 66 2/3% of the average weekly wages during 140 weeks. Subsection (15) provides that the compensation for the loss of a leg is 66 2/3% of the average weekly wages during 195 weeks. In cases involving partial schedule member losses, the amount of the award is proportionate to the percentage of loss of use of the member. See S.C. Code Ann. § 42-9-30 (18) (1976).

Henry Company cites Dunmore v. Brooks Veneer Co., 248 S.C. 326, 149 S.E.2d 766 (1966), for the proposition that an injury to the lower extremity below the knee not causing damage to the knee, thigh, or hip joint is considered an injury to the foot and not the leg. In Dunmore, the worker's foot was crushed, necessitating amputation. Id. at 331, 149 S.E.2d at 768. His physician determined that the optimum site to make the amputation was approximately five to seven inches below the knee. The reason for this was that a stump of that length would heal more quickly and provide sufficient leverage for walking. Such procedures are called "site of election" amputations. Id. The court held that since a portion of the leg was amputated to assist the worker in accommodating for the loss of the foot, the injury would be considered a total loss of the foot only, and not a total or partial loss of the leg. Id. at 331-33, 149 S.E.2d at 768-69.

However, this case neither involves a site of election amputation nor a total loss of a body part.[1] The injury in the present case, rather, is similar to the injury in Durant v. Ancor Corp., 209 S.C. 509, 41 S.E.2d 96 (1947). In Durant, the worker was injured when acid splashed on his right leg just above the ankle. The commissioner awarded the worker compensation for seventy-five percent loss of use of his right leg. The South Carolina Supreme Court reversed, finding the only reasonable inference from the testimony is that the worker suffered, at most, a disability of the foot and not the leg. The court noted that the worker testified that his "leg pained him and was stiff in the morning," but discounted this testimony in light of his testimony as a whole that his loss of use was in his ankle joint or instep. Id. at 510-11, 41 S.E.2d at 96.

In the present case, contrary to the evidence presented in Durant, there is ample testimony that Peoples suffered a disability to his leg, not just his foot. Peoples testified that during a typical workday, "there is a lot of pain in [his] leg," and that the pain is "not in [his] foot, it's in [his] leg." Peoples stated that the pain sometimes runs all the way up to the small of his back, but at the time of the hearing, it was confined to his lower leg, "right to the back of [his] knee joint." The commissioner noted during the hearing that "it appears that the right lower leg particularly at the side of the ankle and extending above is about 30 percent larger than the left." The commissioner further stated that "there is a scar approximately eight inches in length, approximately a half inch in width that runs from the heel all the way up towards the knee joint and the right lower leg is – from the back, looks significantly more swollen than the – significantly larger and swollen as compared to the left." The commissioner's order found that Peoples walks with a limp, and this is supported by the medical records. The circuit court noted that the Achilles tendon is defined in Taber's Medical Dictionary as being a part of the leg.

[1] Similarly, the other cases relied upon by Henry Company, Burns v. Joyner, 264 S.C. 207, 213 S.E.2d 734 (1975) and Jewel v. R. B. Pond Co., 198 S.C. 86, 15 S.E.2d 684 (1941), also involve amputation injuries and compensation for the total loss of a body part. Moreover, neither of those cases addressed the question as to whether the claimant was entitled to recover for a loss of foot or loss of leg.

Additionally, while Dr. Davis found Peoples had reached maximum medical improvement on February 2, 2002 and found his permanent impairment rating to be thirty-five percent to the foot, Dr. Seastrunk's independent medical evaluation found a sixty-two percent impairment rating to Peoples' right lower extremity. Peoples' own testimony was that he felt he had lost seventy percent of the use of his leg. In fact, the medical records are replete with references to a leg injury. Therefore, we find no error and affirm the circuit court's order as to the award for permanent disability to the leg, not just the foot.[2]

Henry Company next argues that the circuit court erred in finding that Peoples needed Ultracet to control his pain and lessen his disability. We find this issue not properly preserved for appeal.

The record contains no indication that Henry Company appealed from the single commissioner's finding that Peoples needed Ultracet to control his pain. At the full commission hearing, Peoples testified that he was taking Ultracet for pain, as prescribed by his physician. This testimony went unchallenged. The full commission concurred with the single commissioner and found that the Ultracet would tend to lessen Peoples' disability. When the case was heard before the circuit court, Henry Company did not take issue with the full commission's finding that Peoples needed Ultracet to control his pain.[3] The circuit court affirmed this portion of the award.

---

[2] Courts in other jurisdictions have held that injuries to the ankle involve the leg and not just the foot. See, e.g., Insulated Panel Co. v. Indus. Comm'n, 743 N.E.2d 1038, 1043 (Ill. App. Ct. 2001) ("[I]njury to the bones and ligaments of the ankle may be compensable as a percentage loss of the leg."); LaBrecque v. Fla. Vocational Rehab. & Div. of Risk Mgmt., 380 So.2d 482, 483 (Fla. Dist. Ct. App. 1980) (stating that an ankle injury could be either a leg injury or a foot injury and the interpretation most favorable to the claimant should be adopted).

[3] The written briefs submitted to the circuit court by Henry Company do not appear in the record on appeal. Henry Company bears the burden of providing the court with a record sufficient to allow for appellate review.

Therefore, we decline to address this argument on appeal. See, e.g., Ellie, Inc. v. Miccichi, 358 S.C. 78, 102, 594 S.E.2d 485, 498 (Ct. App. 2004) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

CONCLUSION

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

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 306-07, 529 S.E.2d 45, 57 (Ct. App. 2000).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brandi Michelle White, (AKA: Brandi Michelle Wade), Appellant.

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

Opinion No. 3973
Submitted March 1, 2005 – Filed April 11, 2005

AFFIRMED

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

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David A. Spencer, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

HUFF, J.: Appellant, Brandi M. White a/k/a Brandi Michelle Wade, pled guilty to six counts of threatening a public official. The

trial judge sentenced White to six five-year terms, three of them to run consecutively and three of them to run concurrently. White appeals, asserting error in the trial judge's failure to order a medical examination to determine her competency. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

White was indicted after she wrote a series of threatening letters to a probation officer and a detention center officer. On March 5, 2004, White appeared before the circuit court and pled guilty on six indictments charging her with threatening a public official. During the plea hearing, the trial court asked White if she had been treated for any mental or emotional disability, and White indicated that she had been treated for mental problems. White's attorney then explained White had been admitted to a psychiatric institution at least six times and that she had "a myriad of diagnoses which Dr. Morgan [would] elaborate on over the history of her life." Counsel further indicated White had a history of bipolar disorder, depression, and post-traumatic stress disorder, and that she was currently taking the medication "Tegretol." The court noted White had not been sent for an evaluation so they were not holding a Blair[2] hearing, but questioned whether the Tegretol would prevent White from being able to understand what they were doing at the plea hearing. The following colloquy then occurred:

> [Defense Counsel]: No, Sir, not from my impressions and discussing the facts with her regarding the case, she had no difficulty understanding what she is facing or relaying to me what she actually did with respect to these charges.
>
> [Court]: Well, as an attorney and having, you have very wisely gotten Dr. Morgan involved in this, but in your analysis of this matter have you ruled out any mental

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

[2] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

> defenses? Have you considered and/or . . . ruled out any mental defenses such as McNaughton or guilty but mentally ill?
>
> [Defense Counsel]: In my opinion, your honor, they do not apply in this situation.

After the solicitor placed the factual basis for White's plea on the record, White's attorney argued in mitigation that White was born with a condition that caused a shunt to be placed in her head and the shunt was "still there today." He again noted for the court that White had a history of mental health problems. Counsel then presented Dr. Morgan, who had examined White and was given White's mental health and neurological records.

Dr. Morgan stated that White was born with water on the brain and that she had a shunt put in at several months of age to shunt the water from the brain. She was followed by a neurosurgeon until July 1998, at which time it was discovered that part of the apparatus was embedded in the brain, but that it seemed to be working okay and "they decided not to do anything to it at that time." White failed to follow up with the neurosurgeon and Dr. Morgan was concerned because of the fact that White had begun to complain of headaches, which could be an indication of pressure building in the brain. He stated, "So I think there is some physical basis that may account for some of the behavior that we're observing here although it has not really been worked out very carefully." Dr. Morgan also noted White had been in the Department of Mental Health on six different occasions and had been diagnosed with depression, bipolar disorder, alcohol and drug problems and post traumatic stress disorder. He then concluded as follows:

> In a situation like this you naturally wonder about the question you raised guilty by mentally ill, whether she can control her behavior, that maybe she couldn't and that sounds like what I am saying, but if you look at the behavior here and the letters and the context in which she explains those, there is a deliberateness about them, a sort

> of calculated plan here, because she's basically happy where she is. Sadly she says it is the best home I've ever had, and so I think a lot of this is to perpetuate a situation she finds herself more comfortable in than she's ever had before from her observations. . . . So I don't think she fits the guilty but mentally ill even though in another circumstance I think that might be a logical assumption.

Thereafter, White's attorney informed the court that he had represented White on a previous charge of threatening a public official for which she was currently incarcerated, and at that time he sent her for a mental health evaluation.

LAW/ANALYSIS

White appeals asserting the trial court abused its discretion by failing to order a medical examination to determine her competency to stand trial because she had a documented history of congenital brain damage and severe mental illness. She argues, based on Dr. Morgan's statements that the embedded shunt possibly accounted for some of her behavior and that she had received in-patient psychiatric care on at least six occasions, the court's failure to order a mental examination for her was an abuse of discretion. We disagree.

South Carolina Code Ann § 44-23-410 (2002) provides in pertinent part:

> Whenever a judge of the Circuit Court or Family Court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:
>
> > (1) order examination of the person by two examiners designated by the Department of Mental Health if the person is suspected of having a mental

> illness or designated by the Department of Disabilities and Special Needs if the person is suspected of being mentally retarded or having a related disability or by both sets of examiners if the person is suspected of having both mental illness and mental retardation or a related disability . . . or
>
> (2) order the person committed for examination and observation to an appropriate facility of the Department of Mental Health or the Department of Disabilities and Special Needs for a period not to exceed fifteen days. . . .

"The statutory injunction, that an examination be ordered when the circuit judge 'has reason to believe' that a defendant is not mentally competent to stand trial, involves the exercise of the discretion of the trial judge in evaluating the facts presented on the question of competency." State v. Drayton, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978). Thus, despite the mandatory language contained in § 44-23-410, the decision of whether to order a competency examination is within the discretion of the trial judge, whose decision will not be overturned absent a clear showing of abuse of discretion. Id.; State v. Weik, 356 S.C. 76, 83, 587 S.E.2d 683, 686 (2002); State v. Singleton, 322 S.C. 480, 483, 472 S.E.2d 640, 642 (Ct. App. 1996). This is so, because the determination of whether there is "reason to believe" a defendant lacks a certain mental capacity necessarily requires the exercise of discretion. State v. Bradshaw, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977).

In the case at hand, it is clear White's counsel was aware of her previous mental health history, yet counsel informed the trial judge that White had no difficulty in either understanding what she was facing or in relaying to him what she actually did with respect to the charges. When asked by the trial judge if he had ruled out any mental defenses, White's counsel indicated that he had, because they did "not apply in this situation." Thereafter, White's attorney presented Dr. Morgan, who had examined White. Although Dr. Morgan expressed some concern that the embedded shunt might be a physical basis that may account for some of White's

behavior, he found White's actions to be a deliberate and calculated plan to perpetuate a situation she found comfortable. He then opined the guilty but mentally ill defense did not fit White's situation. White's attorney then informed the court he had previously sent White for a mental health evaluation when he represented White on a prior charge of threatening a public official, for which she was incarcerated at the time of the plea hearing.

Based on the record before us, we cannot find a clear abuse of discretion in the trial judge's failure to order a competency examination for White. See State v. Burgess, 356 S.C. 572, 575-76, 590 S.E.2d 42, 44 (Ct. App. 2003) (holding appellate court would not second guess trial judge's denial of motion for psychiatric examination where defendant had not previously been adjudicated incompetent to stand trial, trial judge found defendant's demeanor during proceeding appeared appropriate, and the record showed defendant understood the proceedings, roles of participants and charges against her); State v. Bradley, 343 S.C. 461, 462-64, 539 S.E.2d 720, 721-22 (Ct. App. 2000) (finding, in light of evaluation of Department of Mental Health doctor concluding Bradley was not mentally retarded and functioned in a range of average intelligence, and that most of Bradley's answers were purposely vague, involving "some skill . . . to do . . . consistently," trial judge's failure to direct further examination to determine Bradley's competency did not constitute an abuse of discretion); State v. Drayton, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978) (wherein Supreme Court held trial judge's failure to sua sponte order examination of defendant to determine competency did not violate § 44-23-410 nor deprive defendant of due process where trial judge had before him the order of the previous presiding judge finding, about two and one-half months earlier, that defendant was at that time fit to stand trial, while contending that defendant was not competent to stand trial, his counsel clearly refused to demand a further competency hearing, and record failed to show additional facts warranting further examination of defendant).

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christine McCune, Appellant,

v.

Myrtle Beach Indoor Shooting Range, Inc., a/k/a Myrtle Beach Shooting Range, Inc. and Brass Eagle, Inc., Defendants,

of whom Myrtle Beach Indoor Shooting Range, Inc., a/k/a Myrtle Beach Shooting Range, Inc. is, Respondent.

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 3974
Heard March 8, 2005 – Filed April 11, 2005

AFFIRMED

Jill Wright Fennel, of Myrtle Beach, for Appellant.

John H. Tiller and Elizabeth Applegate Dieck, both of Charleston, for Respondent.

BEATTY, J.: Christine McCune brought an action for negligence and strict liability against the Myrtle Beach Indoor Shooting Range (the Range) for injuries sustained while she was participating in a paintball game.[1] McCune appeals from the trial court's grant of summary judgment to the Range. We affirm.

FACTS

The Range offers paintball games and allows participants to rent protective equipment, including face masks, provided by the Range. McCune participated in a paintball match with her husband and friends. She utilized a mask provided by the Range. Prior to being allowed to participate, McCune signed a general waiver. The waiver released the Range from liability from all known or unknown dangers for any reason with the exception of gross negligence on the part of the Range.

During her play, the mask was loose and ill fitting. She attempted to have the mask tightened or replaced on several occasions and an employee of the Range attempted to properly fit the mask for McCune. While playing in a match, McCune caught the mask on the branch of a tree. The tree was obscured from her field of vision by the top of the mask. The mask was raised off her face because it was loose, and provided no protection against an incoming paintball pellet. The pellet struck McCune in the eye, rendering her legally blind in the eye.

McCune brought suit, alleging causes of action for negligence and strict liability based on the failure of the mask to properly be fitted and protect her

[1] Brass Eagle, Inc., was also named in the action as the manufacturer of the mask McCune alleged was defective or in poor operating condition. McCune and Brass Eagle settled the suit and Brass Eagle is not a party to this appeal.

during play. The Range filed an answer asserting the waiver released them from all liability as a result of the paintball striking McCune. Additionally, it asserted McCune's comparative negligence barred recovery.

Subsequently, the Range filed a motion for summary judgment, again alleging the waiver and McCune's comparative negligence barred recovery. The court granted the Range's motion, finding the waiver was sufficient to show McCune expressly assumed the risks associated with playing paintball. Additionally, the court found her overwhelming comparative fault barred recovery. The trial court subsequently denied McCune's motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003) ("Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

DISCUSSION

McCune maintains the trial court erred in granting summary judgment to the Range on the basis of the exculpatory language in the release of liability signed by McCune. McCune asserts she did not anticipate the harm that was inflicted or the manner in which it occurred. Additionally, she contends the failure of the equipment was unexpected and she could not have voluntarily assumed such a risk. We disagree.

As an initial matter, we must determine whether this is a case involving express assumption or implied assumption of the risk. Express assumption of the risk sounds in contract and occurs when the parties agree beforehand, "either in writing or orally, that the plaintiff will relieve the defendant of his or her legal duty toward the plaintiff." Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 79-80, 508 S.E.2d 565, 569-70 (1998).

"Express assumption of risk is contrasted with implied assumption of risk which arises when the plaintiff implicitly, rather than expressly, assumes known risks. As noted above, implied assumption of risk is characterized as either primary or secondary." Id. at 80-81, 508 S.E.2d at 570. "[P]rimary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists." Id. at 81, 508 S.E.2d at 570 (quoting Perez v. McConkey, 872 S.W.2d 897, 902 (Tenn. 1994)). "Secondary implied assumption of risk, on the other hand, arises when the plaintiff knowingly encounters a risk created by the defendant's negligence." Id. at 82, 508 S.E.2d at 571.

In the instant case, we are confronted with a defense based upon McCune's express assumption of the risk. She signed a release from liability prior to participating in the paintball match. As acknowledged by Davenport, the courts of South Carolina have analyzed express assumption of the risk cases in terms of exculpatory contracts. Id. at 80, 508 S.E.2d at 570.

Exculpatory contracts, such as the one in this case, have previously been upheld by the courts of this state. See Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by "waiver and release" voluntarily signed by plaintiff prior to entering the race track); Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 619-22, 138 S.E.2d 155, 157-58 (1964) (holding it was not violative of public policy for telephone company to legally limit its liability by contract for negligence in the publication of a paid advertisement in the yellow pages of its telephone directory). "However, notwithstanding the general acceptance of exculpatory contracts, '[s]ince such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon.'" Fisher v. Stevens, 355 S.C. 290, 295, 584 S.E.2d 149, 152 (Ct. App. 2003) (quoting Pride, 244 S.C. at 619, 138 S.E.2d at 157). This court has explained:

> Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair and just, the latter construction will prevail.

Georgetown Mfg. & Warehouse Co. v. South Carolina Dep't of Agric., 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct. App. 1990) (citing C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)).

Contracts that seek to exculpate a party from liability for the party's own negligence are not favored by the law. Pride, 244 S.C. at 619, 138 S.E.2d at 157. An exculpatory clause, our supreme court has held, is to be strictly construed against the party relying thereon. Id. An exculpatory clause will never be construed to exempt a party from liability for his own negligence "'in the absence of explicit language clearly indicating that such

was the intent of the parties.'" South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984) (quoting Hill v. Carolina Freight Carriers Corp., 71 S.E.2d 133, 137 (N.C. 1952)).

The release in the instant case explicitly and unambiguously limited the Range's liability. Specifically, McCune signed the release, thereby acknowledging the following pertinent clauses:

> 1. The risk of injury from the activity and weaponry involved in paintball is significant, including the potential for permanent disability and death, and while particular protective equipment and personal discipline will minimize this risk, the risk of serious injury does exist;
>
> 2. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING FROM THE NEGLIGENCE of those persons released from liability below, and assume full responsibility for my participation; and,
>
> . . .
>
> 4. I, for myself and on behalf of my heirs . . . HEREBY RELEASE AND HOLD HARMLESS THE AMERICAN PAINTBALL LEAGUE (APL), THE APL CERTIFIED MEMBER FIELD, the owners and lessors of premises used to conduct the paintball activities, their officers, officials, agents, and/or employees ("Releasees"), WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, or loss or damage to person or property, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, except that

> which is the result of gross negligence and/or wanton misconduct.
>
> . . .
>
> I HAVE READ THIS RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT, FULLY UNDERSTANDING ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

The agreement is then signed by McCune and dated the date of the incident.

The above agreement is sufficient to limit the liability of the Range to McCune. The agreement was voluntarily signed and specifically stated: (1) she assumed the risks, whether known or unknown; and (2) she released the Range from liability, even from injuries sustained because of the Range's own negligence. It is clear McCune voluntarily entered into the release in exchange for being allowed to participate in the paintball match.

Additionally, she expressly assumed the risk for all known and unknown risks while participating and cannot now complain because she did not fully appreciate the exact risk she faced. "Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character." Restatement (Second) of Torts § 496D (1965) (emphasis added).

We find the release entered into by the parties does not contravene public policy. In Huckaby, the plaintiff signed a waiver similar to the one above, which was required before he could participate in a sanctioned automobile race. He maintained his injuries were caused by the speedway's faulty installation and maintenance of a guardrail. Huckaby, 276 S.C. at 630, 281 S.E.2d at 223. As was found in Huckaby, participation in a paintball

match is voluntary. "'If these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, this would not be in the public interest.'" Huckaby, 276 S.C. at 631, 281 S.E.2d at 224 (quoting Gore v. Tri-County Raceway, Inc., 407 F. Supp. 489, 492 (M.D. Ala. 1974)).

Furthermore, we find the instant case to be distinguishable from this court's decision in Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). In Fisher, the plaintiff worked on a wrecker crew at the Speedway of South Carolina. In order to work at the Speedway, Fisher was required to sign a release and waiver of liability. During a race, the wrecker on which Fisher was working responded to a crash. While the wrecker was moving towards one of the vehicles, Fisher, who was riding on the back of the wrecker, fell off and suffered severe head injuries. Through a guardian, Fisher brought suit alleging negligence, gross negligence, and recklessness against the driver and the owner of the wrecker as well as the Speedway. The defendants raised the Release as an affirmative defense. All parties filed cross-motions for summary judgment, alleging the Release acted as a complete bar to Fisher's claims. The circuit court judge granted partial summary judgment to Fisher against the driver and the owner of the wrecker on the ground the Release, as a matter of law, did not bar Fisher's claims. Additionally, the court denied summary judgment to the Speedway. The court found an issue of material fact existed as to whether Fisher was an employee of the Speedway.

On appeal, the driver and the owner of the wrecker argued the circuit court erred in finding the Release was inapplicable to them. Specifically, they contended they were released from liability given the Release encompassed "VEHICLE OWNERS, DRIVERS, [and] . . . ANY PERSONS IN ANY RESTRICTED AREA." Id. at 294, 584 S.E.2d at 151-52. In analyzing this issue, we found the Release, an exculpatory contract, was ambiguous because the terms, "driver" and "vehicle owner" were "terms of art [which were] not used to identify *any* owner or driver of *any* vehicle." Id. at 295, 584 S.E.2d at 152. Additionally, we agreed with the circuit court that the phrase "ANY PERSONS IN ANY RESTRICTED AREA" did not relieve

the driver and the owner of the wrecker of liability on the ground it was overly broad and, thus, in contravention of public policy. Because the contract "did not clearly inform Fisher he would be waiving all claims due to the [driver's and vehicle owner's negligence], we held the driver and the vehicle owner could not be released from liability "based on the broad 'catch-all' phrase." Id. at 298, 584 S.E.2d at 153.

In contrast, the release in the case at bar is neither ambiguous nor overbroad. In fact, McCune in her deposition characterized the release as a "standard waiver." Although our research reveals no South Carolina case that deals specifically with a release for paintball, other jurisdictions have found similarly worded releases to be unambiguous. See Taylor v. Hesser, 991 P.2d 35, 38 (Okla. Civ. App. 1998) (affirming grant of summary judgment to operators of paintball facility and shooter where plaintiff, who was injured during the paintball game, signed a release prior to participating); Kaltenbach v. Splatball, Inc., No. C7-99-235, 1999 WL 690191, at *2 (Minn. Ct. App. 1999) (finding paintball participant was precluded from recovering against owner of a paintball facility for injuries where participant signed a release of owner's liability).

We would also note that unlike the release in Fisher, the release signed by McCune did not preclude recovery for a cause of action involving gross negligence.[2] Thus, this opinion should not be construed as creating an indefensible position for all injuries sustained during inherently dangerous recreational activities. Cf. Adams v. Roark, 686 S.W.2d 73, 75-76 (Tenn.

[2] Neither in her brief nor at oral argument did McCune assert that the Range's actions constituted gross negligence. Instead, she acknowledged at oral argument that the Range operated with at least slight care by attempting to properly adjust the mask to McCune. See Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994)("Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."); Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002) (stating gross negligence "is the failure to exercise even the slightest care").

1985) (recognizing, in an action to recover for injuries sustained by a motorcyclist at a drag way, that an agreement to contract against liability for gross negligence is unenforceable); Murphy v. N. Am. River Runners, Inc., 412 S.E.2d 504, 510 (W.Va. 1991) (stating, in an action to recover for injuries sustained during a whitewater rafting accident, "a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention").

Accordingly, we hold the trial court properly determined the release signed by McCune was sufficient to release the Range from all liability in this incident. Therefore, the decision of the trial court is

AFFIRMED.[3]

ANDERSON and SHORT, JJ., concur.

[3] As we have affirmed the court's decision based upon its analysis of the exculpatory contract, we need not determine whether McCune's claim would also be barred because her negligence was greater than that of the Range.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

C. Dan Joyner, Appellant,

v.

Greenville Hotel Associates Limited Partnership, Respondent.

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 3975
Submitted March 1, 2005 – Filed April 11, 2005

AFFIRMED

Chris B. Roberts, of Greenville, for Appellant.

John A. Sowards, of Columbia, for Respondent.

BEATTY, J.: C. Dan Joyner appeals the master-in-equity's order granting summary judgment to Greenville Hotel Associates Limited Partnership ("GHALP"). We affirm.[1]

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

FACTS

The facts in the case are not disputed. Joyner owned property adjacent to a hotel in Greenville, South Carolina. He leased the property in 1971 to the Watkins, owners of the hotel, for use as an additional parking lot. The lease was for a period of forty years, limited rent to $750 per month, and provided that the lease was binding upon the Watkins' "respective heirs, executors, administrators, successors and assigns." The lease was amended in 1983, assigned to a subsequent owner of the hotel in 1995, and further assigned to a new owner, Stewart Mac Investments, LLC, in 1999. All of the assignments of the lease agreement were recorded with the deed to the hotel property. Stewart Mac Investments stopped paying rent in September 1999.

Stewart Mac Investments defaulted on the mortgage for the hotel with GHALP, and a foreclosure action was instituted in June 2000. The order granting the foreclosure noted that the property was "[t]ogether with all right, title and interest of the Mortgagor in and to that certain Lease executed by and between C. Dan Joyner, Lessor, and Robert L. Watkins and Tamara A. Watkins, Lessees . . . ." GHALP purchased the hotel property, and the description of the property in the master's deed included the above-quoted language that the property included the right to or interest in the lease with Joyner.[2] The master's deed also provided that the hotel property was purchased subject to a first mortgage with BB&T bank. GHALP, however, never signed a lease assignment or lease agreement with Joyner. GHALP never paid rent, or Stewart Mac Investments' arrears, to Joyner.

Joyner brought an action against GHALP for breach of the lease agreement, breach of the implied covenant of good faith and fair dealing, and for a declaratory judgment. Joyner sought the unpaid rent, the arrearages allegedly assumed when GHALP obtained the property from Stewart Mac Investments, punitive damages for bad faith, and costs and attorney's fees.

---

[2] The master later determined that this language meant that GHALP took the property "subject to" the lease agreement. This finding is unappealed.

GHALP answered, denying that it had assumed the lease when it obtained the property.

Both parties moved for summary judgment. Citing the dissent in the mortgage assignment case of Allgood v. Spearman, 125 S.C. 131, 118 S.E. 189 (1923) as valid law, GHALP argued that although it bought the property subject to the lease agreement: a separate assignment agreement with Joyner was never signed; the extra parking lot was never used; GHALP chose not to pay the rent; and GHALP could not be held personally responsible for a lease agreement to which it was not a party. The master-in-equity found that although the deed to GHALP indicated that it was taking the property subject to the lease with Joyner, the language "in no way personally obligated [GHALP] on the Lease." The master found that GHALP never signed anything or "exhibited any conduct such as occupying the premises, making lease payments, et cetera, that would indicate any basis for the Court's imposing liability on it." The master granted summary judgment to GHALP, denied summary judgment to Joyner, and Joyner's motion for reconsideration was denied. This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. If further inquiry into the facts is necessary to clarify application of the law, summary judgment is not appropriate. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Id. The evidence and the inferences therefrom must be viewed in a light most favorable to the non-moving party. Id.

LAW/ANALYSIS

Joyner argues the master erroneously relied upon the dissent in Allgood v. Spearman, 125 S.C. 131, 118 S.E. 189 (1923), and the "flawed arguments

of counsel" in granting summary judgment to GHALP. Joyner asserts that the lease agreement was binding upon GHALP because: (1) the lease agreement provided it was binding upon the successors at interest; and (2) the property description in the GHALP's deed described the property as subject to the lease agreement. Thus, Joyner argues, summary judgment should have been granted to Joyner, not GHALP.[3]

Although we can find no cases directly on point, GHALP cited Allgood as similar to the present case. In Allgood, W.D. Spearman signed five promissory notes to E.F. Allgood for $5,203.87 each and secured by a mortgage on four tracts of land owned by Spearman. Spearman later sold the land to R.B. Sheck, and then Spearman defaulted on the mortgage. When Allgood attempted to foreclose on the property, Spearman asserted that Sheck assumed the obligation for the mortgage when he purchased the property. The Allgood court affirmed the circuit court's holding that Sheck assumed the debt when he purchased the land:

> "There can be no doubt at this day that where the purchaser of land encumbered by a mortgage agrees to pay a particular sum as purchase money, and on the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to pay the mortgage debt, whether he agreed to do so by express words or not. This obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it."

Allgood, 125 S.C. at 134, 118 S.E. at 189 (quoting Dargan v. McSween, 33 S.C. 338, 11 S.E. 1081 (1890)). The dissenting judge in Allgood disagreed,

[3] It is well-settled that the denial of a motion for summary judgment is not appealable. Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). Thus we decline to address Joyner's argument that the master erred by failing to grant him summary judgment.

citing treatises to the effect that: "'In the absence of a special agreement to assume the mortgage or words in the grant importing in some form that he assumes the payment of it, the purchaser is not personally liable for it.'" Id. at 138, 118 S.E. at 191 (quoting 1 Jones Mtg. (6th Ed.), 750).

The fact that GHALP bought the property subject to the lease is not disputed. The only question is whether GHALP may be bound by that language in the lease and be held personally liable. Although the majority opinion in Allgood appears to have implied an assumption of the debt by the purchaser, the present situation is clearly different from the one in Allgood. In Allgood the mortgage encumbered the purchased property and the purchaser deducted the mortgage balance from the purchase price. The lease in question was not an encumbrance on the hotel property that GHALP purchased; the lease involved an adjacent parcel.

The lease was a contract between the Watkins and Joyner, and later, between Joyner and subsequent owners who agreed to accept assignment of the lease. The lease provided that it would be effective upon the lessee's heirs and assigns. However, GHALP did not expressly or impliedly assume the lease. GHALP did not assume the lease by merely accepting the property subject to the contract between Joyner and the Watkins' assignees. "One who accepts a conveyance subject to a lien or claim does not assume by such acceptance the obligation to discharge the lien or satisfy the claim." 77 Am.Jur.2d Vendor and Purchaser § 406 (1997); see County of Albany v. Albany County Indus. Dev. Agency, 218 A.D.2d 435, 437 (N.Y. App. Div. 1996) (noting the well-settled rule that one who accepts a conveyance "subject to" a lien or claim does not assume by such acceptance the obligation to discharge the lien or satisfy the claim). Absent an indication from GHALP that it agreed to be bound to the lease with Joyner, such as signing an assignment or exercising the duties and rights under the lease, GHALP has no legal obligation to Joyner. Without a contract between the parties, expressed or implied, the relationship of landlord and tenant cannot exist. Stewart-Jones Co. v. Shehan, 127 S.C. 451, 457, 121 S.E 374, 376 (1924).

Even viewing the evidence in the light most favorable to Joyner, nothing indicates GHALP separately agreed to be bound by the lease when it purchased the hotel property. Accordingly, the master-in-equity's order granting summary judgment to GHALP is

AFFIRMED.

ANDERSON, and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Don Mackela, Respondent,

v.

James Bentley d/b/a/ Lyman Auto Sales and Automotive Finance Corporation, Defendants,

Of Whom, Automotive Finance Corporation is, Appellant.

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

Opinion No. 3976
Submitted March 1, 2005 – Filed April 18, 2005

AFFIRMED

Jennifer L. Queen, of Summerville, for Appellant.

David Charles Alford, of Spartanburg, for Respondent.

STILWELL, J.: In this action for conversion, the jury returned a verdict in favor of Don Mackela in the amount of $13,320.23 plus interest in actual damages and $50,000 in punitive damages against Automotive Finance Corporation (AFC). AFC appeals. We affirm.[1]

FACTS

In September 2001, Mackela owned a 1999 Dodge Grand Caravan. Mackela sought to purchase a second vehicle from James Bentley, d/b/a Lyman Auto Sales. Bentley allowed Mackela to park the Dodge on Bentley's used car lot and agreed to assist Mackela in the sale of the vehicle. Mackela retained title to the Dodge.

Bentley unlocked and showed the Dodge to potential buyers, but was not authorized to negotiate its sale. Although Bentley assumed he would receive some compensation if he sold the Dodge, Mackela and Bentley had no agreement regarding a price or a commission for Bentley. Mackela periodically checked on the vehicle from September 2001 to January 2002 and never noticed any stickers or other papers indicating Bentley was advertising the car.

AFC financed Bentley's purchases of new vehicles as the floor planner of Lyman Auto Sales. As part of the note, guaranty, and security agreement between Bentley and AFC, Bentley granted AFC a security interest in "[a]ll now owned or hereafter acquired inventory." Bentley defaulted on the AFC note. AFC served a warrant of attachment on Bentley and attached forty-two vehicles from Bentley's lot, including Mackela's Dodge. Mackela filed this action against AFC and James Bentley, d/b/a Lyman Auto Sales, alleging conversion and seeking actual and punitive damages.

At trial, Mackela testified he called AFC to retrieve the Dodge after the attachment. When Mackela explained his ownership, the AFC representative said AFC took the Dodge because "it was there." The representative further

---

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

told Mackela that AFC would not return the Dodge unless Mackela "paid for it." Mackela explained: "I'm already paying for it." The representative replied: "Well, you're going to have to pay for it again if you want to take it. We won't give you a release." When the finance company that held Mackela's note on the Dodge learned of the attachment, it refused further payments by Mackela and ultimately a judgment was entered against Mackela for approximately $13,000.

Bentley testified at trial that only fifty percent of the vehicles taken by AFC were Lyman Auto Sales inventory. The remaining vehicles, like Mackela's Dodge, were not owned by Lyman Auto Sales. Bentley explained that he attempted "on several occasions" to retrieve the vehicles from AFC but AFC refused to return the vehicles and the owners were forced to "get them back through different court orders."

AFC moved for a directed verdict on the ground that AFC was acting within its legal rights as to its collateral when it took control of Mackela's vehicle. The trial court denied AFC's motion. The jury returned a verdict in favor of Bentley and against AFC. The jury awarded Mackela actual damages of $13,320.23 plus interest and $50,000 in punitive damages.[2] The trial court denied AFC's post-trial motion for new trial or judgment notwithstanding the verdict. AFC appeals.

LAW/ANALYSIS

On appeal from the denial of a motion for directed verdict, the appellate court may reverse only if no evidence supports the circuit court's ruling. Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). Credibility issues and conflicts in testimony are for the jury. Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992).

[2] On the Form 4 Order, the award is stated as $13,325.23. However, the trial court's written order calculating the total award including interest cites the award as $13,320.23.

I. Conversion

AFC argues the trial court erred in denying its motion for a directed verdict on Mackela's conversion claim and its post-trial motion for new trial or judgment notwithstanding the verdict. We disagree.

A plaintiff claiming conversion may prevail based upon a showing of unauthorized detention of property, after demand. The plaintiff must show either title or right to possession of the property at the time of conversion. Oxford Fin. Cos. v. Burgess, 303 S.C. 534, 539, 402 S.E.2d 480, 482 (1991). A plaintiff's claim for conversion fails where the defendant proves a legal right to the property. Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261-62 (Ct. App. 1988).

AFC asserts it had a legal right to Mackela's vehicle because of a valid security interest in Bentley's inventory. Specifically, AFC alleges Mackela's vehicle was collateral under the AFC-Bentley security agreement because the vehicle was on Bentley's lot as a consignment item. We disagree.

Under section 36-9-102 of the South Carolina Code, "collateral" includes "goods that are the subject of a consignment." S.C. Code Ann. § 36-9-102(12)(C) (2003). The Code defines "consignment" as "a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale." S.C. Code Ann. § 36-9-102(20) (2003). However, goods that are "consumer goods immediately before delivery" are specifically excluded from the statutory definition of consignment. S.C. Code Ann. § 36-9-102(20)(C) (2003). "Consumer goods" are defined as "goods that are used or bought for use primarily for personal, family, or household purposes." S.C. Code Ann. § 36-9-102(23) (2003).

Mackela testified he purchased the Dodge for his personal use, including the transportation of his wife to cancer treatments. We find the Dodge thus meets the statutory definition of a consumer good. Because the Dodge was a consumer good, it is excluded from the statutory definition of a consignment and AFC's argument that it was collateral as a consignment fails. See S.C. Code Ann. § 36-9-102(20) (2003). We find ample evidence

to support the trial court's denial of AFC's directed verdict motion and post-trial motion for new trial or judgment notwithstanding the verdict.

II. Punitive Damages

Relying exclusively on Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), AFC argues the trial court erred in affirming the jury's award of punitive damages. We disagree.

Punitive damages are recoverable in conversion cases if the defendant's acts have been willful, reckless, and/or committed with conscious indifference to the rights of others. Oxford, 303 S.C. at 539, 402 S.E.2d at 482. The amount of damages, actual or punitive, remains largely within the discretion of the jury, as reviewed by the circuit court. Gamble, 305 S.C. at 112, 406 S.E.2d at 355. Only when the circuit court's discretion is abused, amounting to an error of law, does it become the duty of the appellate court to set aside the award. Id.[3]

The South Carolina Supreme Court enumerated eight factors to consider in determining whether a jury's award of punitive damages is proper: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and finally, (8) "other factors" deemed appropriate. Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354.

In its order, the trial court specifically addressed each of the Gamble factors, finding AFC's conduct in this matter warranted the award of punitive

[3] AFC neither requests us to nor suggests that we must conduct a de novo review of the award of punitive damages in this case pursuant to Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). We therefore limit our review to the trial court's Gamble review.

damages. AFC admitted at trial that at the time it executed the writ of attachment, none of the vehicles on Bentley's lot were listed in the floor plan agreement. AFC ultimately returned numerous of the vehicles seized. The actions of AFC deprived Mackela of the use of his vehicle for eighteen months. AFC had other suits filed against it alleging similar conduct. The punitive damages award is just over three times the actual damages and is less than the $80,000 AFC claimed due from its account with Bentley.

We find the trial court expressly considered the Gamble factors in its review of the punitive damages award and made appropriate findings of fact as to each factor.

CONCLUSION

Accordingly, the order on appeal is

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: United Services Automobile Association

Respondent,

In Re: Becky Todd Smith and Barry Smith, Appellants,

v.

Tracy Lee Moore and Ola A. Moore, Respondents.

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3977
Heard January 10, 2005 – Filed April 18, 2005

AFFIRMED

Steven M. Krause and Daniel L. Draisen, both of Anderson, for Appellants.

David L. Moore, Jr., of Greenville, for Respondents.

HEARN, C.J.: This appeal stems from a tort action Becky Todd Smith brought against Tracy Lee Moore pursuant to a car accident between the two parties. United Services Automobile Association (USAA), the insurance carrier for Becky Todd Smith and Barry Smith, moved to be dismissed from the case, arguing that Becky Todd Smith, who was listed as an "operator" on the declarations page but was not the named insured, could not stack underinsured motorist (UIM) coverage. The trial court granted USAA's motion. We affirm.

FACTS

The automobile accident that prompted this litigation occurred in September of 2000 in Oconee County. A vehicle owned by Ola A. Moore and operated by Tracey Lee Moore turned left in front of a vehicle operated by Becky Todd Smith. The Smiths brought an action against the Moores for injuries and damages resulting from the accident.

Tracey Lee Moore's liability is undisputed. Her vehicle was insured by Farm Bureau Mutual Insurance Company, which tendered the liability limits on its policy and is not a subject of this appeal.[1] The vehicle Becky Todd Smith was driving was insured by USAA under a policy issued to Betty Gillispie Washnok, who owned the vehicle. Smith was driving the vehicle with Washnok's permission.

Washnok treated Smith as if she were her daughter and served as her guardian, though it is unclear whether a legal adoption ever took place. At the time of the accident, however, Smith no longer resided with Washnok.

[1] Litigation remains pending on the issue of excess liability coverage available to the Moores in a separate declaratory judgment action.

Washnok owned two vehicles, both of which were insured through USAA. Although Washnok was the named insured, Smith was listed as an "operator." The term "operator" is not defined in the policy.

Because Smith was driving the vehicle with Washnok's permission, she was entitled to UIM coverage as a permissive user. USAA paid one level of UIM benefits under a covenant not to execute. Smith's injuries were extensive, however, and the damages she incurred exceeded the first level of UIM benefits. Thus, Smith sought to stack UIM coverage from Washnok's other vehicle.

USAA moved to be dismissed from the case, arguing that Smith was not a Class I insured, and therefore was not entitled to stack UIM coverage. After a hearing, the trial court granted USAA's motion. This appeal followed.

STANDARD OF REVIEW

Rule 41(b), SCRCP, allows a defendant to move for dismissal in cases tried without a jury on the ground that "upon the facts and the law the plaintiff has shown no right to relief." See Silvester v. Spring Valley Country Club, 344 S.C. 280, 284, 543 S.E.2d 563, 565 (Ct. App. 2001). Because a dismissal under these circumstances has the same effect as summary judgment, the standard for summary judgment applies. Id. at 284-85, 543 S.E.2d at 566.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Id. at 285, 543 S.E.2d at 566. In ruling on a motion for summary judgment, this court must view all evidence in the light most favorable to the non-moving party. Id.

LAW/ANALYSIS

At issue in this case is whether an insured who is listed on the policy as an "operator" can stack UIM coverage. In South Carolina, only Class I insureds can stack coverage. Concrete Servs., Inc. v. U.S. Fid. & Guar. Co., 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998). Class I insureds include the named insured and his or her spouse and relatives residing in the same household. Id. Class II insureds are those using the insured vehicle with permission of the named insured and guests. Id.

Smith was not the named insured or the named insured's spouse; nor does she does qualify as a resident relative. Although the pleadings refer to Smith as Washnok's adopted daughter, it is undisputed that Smith did not reside in the same household as Washnok at the time of the accident.

The Smiths' argument is essentially that USAA's inclusion of Smith as an "operator" on the declarations page of the policy created an ambiguity as to whether she was a named insured and such an ambiguity should be resolved in favor of coverage. No cases in South Carolina have addressed this question to date.

Courts in some states have found in favor of coverage in similar situations. The leading case is Lehrhoff v. Aetna Cas. & Sur. Co., 638 A.2d 889 (N.J. Super. Ct. App. Div. 1994). In Lehrhoff, the court found that the insured was entitled to uninsured motorist coverage because of his inclusion on the declarations page as a driver of the insured vehicle. Id. at 892. Rhode Island followed suit, concluding that "the listing of drivers' names on the declarations page, without more, gives rise to an ambiguity in respect to whether such drivers are in fact covered under the terms of a policy." Mallane v. Holyoke Mut. Ins. Co., 658 A.2d 18, 20 (R.I. 1995).

These cases, however, relied on the doctrine of reasonable expectations. See Lehrhoff, 638 A.2d at 892 ("[W]e are . . . convinced that reasonable expectations of coverage raised by the declaration page cannot be contradicted by the policy's boilerplate . . . ."); Mallane, 658 A.2d at 21 (quoting the above language from Lehrhoff in reliance). The doctrine of

reasonable expectations, which is essentially that the objectively reasonable expectations of insureds as to coverage will be honored even though a careful review of the terms of the policy would have shown otherwise, has been rejected in South Carolina. Allstate Ins. Co. v. Mangum, 299 S.C. 226, 231-32, 383 S.E.2d 464, 466-67 (Ct. App. 1989). Moreover, the Mallane court recognized that its holding was a minority position. Mallane, 658 A.2d at 21.

Additionally, neither Lehrhoff nor Mallane dealt with stacking. The issue in both cases was whether boilerplate provisions in the policy could be used to defeat uninsured motorist coverage provided under the policy. Lehrhoff, 638 A.2d at 889, 892; Mallane, 658 A.2d at 20. In the case sub judice, USAA has already paid the UIM coverage for the car involved in the accident, and the issue is whether Smith is entitled to additional UIM coverage from Washnok's second car.

The majority view is that listing a driver on the declarations page of an insurance policy does not make that person a named insured. In Georgia Farm Bureau Mut. Ins. Co. v. Wilkerson, 549 S.E.2d 740 (Ga. Ct. App. 2001), the Georgia Court of Appeals held that although neither "named insured" nor "driver" were defined in the insurance policy, the policy was not ambiguous. Id. at 742. Therefore, the person listed as a driver in the insurance policy was not allowed to stack coverage. Likewise, the North Carolina Court of Appeals has held that "driver" and "named insured" are not synonymous because such a construction would expand the term "named insured" beyond its common sense meaning. Nationwide Mut. Ins. Co. v. Williams, 472 S.E.2d 220, 222 (N.C. App. 1996). The court went on to hold that a "driver" was not a Class I insured. Id. Other courts have agreed. See Millspaugh v. Ross, 645 N.E.2d 14 (Ind. Ct. App. 1994) (holding that being named a "principal driver" does not create an ambiguity and does not transform one into a named insured); Kitmirides v. Middlesex Mut. Assurance Co., 783 A.2d 1079 (Conn. App. Ct. 2001) (rejecting Lehrhoff and Mallane and finding no ambiguity, and ultimately holding that a listed driver is not a named insured); Fed. Kemper Ins. Co. v. Schneider, 474 A.2d 224 (Md. Ct. Spec. App. 1984) (holding that adding a driver to a policy does not make him a named insured); see also 7 Couch on Insurance § 110:1 ("[O]ne listed in the policy, but only in the status of a driver of a vehicle, is not a

named insured despite the fact that such person's name was physically in the policy.").

Furthermore, even though "operator" is not defined in the policy, the policy is not ambiguous. Where a term is not defined in a policy, it is to be "defined according to the usual understanding of the term's significance to the ordinary person." Mfrs. and Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 158, 498 S.E.2d 222, 225 (Ct. App. 1998). The term "operator" has been construed somewhat more expansively than "driver" in this state, but has not been contemplated to extend beyond mere use of the vehicle. State v. Graves, 269 S.C. 356, 237 S.E.2d 584 (1977) (explaining that the term "operator" is broader than the term "driver" because it includes acts such as starting the engine or "manipulating the mechanical or electrical agencies of a vehicle"). In addition, the policy defines "you" and "your" as "the 'named insured' shown in the declarations." The only person listed in the "Named Insured" box on the declarations page was Washnok. Thus, we see no ambiguity.

We therefore adopt the majority view and hold that listing an individual as an operator on the declarations page of an insurance policy does not make that individual a named insured. Because Smith was not the named insured (or the named insured's spouse or resident relative), but was only using the vehicle with Washnok's permission, she is a Class II insured, and as such, she is not entitled to stack coverage.

Based on the foregoing, the order of the trial judge is hereby

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kenneth Roach, Appellant.

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

Opinion No. 3978
Heard March 9, 2005 – Filed April 18, 2005

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

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

HEARN, C.J.: Kenneth Roach appeals from his convictions for multiple drug offenses, arguing the trial court erred (1) by admitting hearsay in violation of the Confrontation Clause and (2) by admitting an in-court identification, which was based on a single photograph lineup, without making a determination as to the reliability of the identification. We affirm.

FACTS

On May 17, 2001, police were involved in a narcotics investigation and went to Roach's home to execute a search warrant for possession and distribution of crack cocaine. Prior to executing the warrant, a confidential informant, who had prior drug charges himself, agreed to assist the police. He testified that with twenty dollars the police had given him, he went to Roach's home and purchased drugs directly from Roach.

Officers had Roach's home under surveillance at the time of the confidential informant's purchase. When the officers approached the door of Roach's home to execute the warrant, they found it had been barricaded. The officers knocked, and after receiving no response, they removed the door and entered the home. The officers observed several people inside, including Roach, who ran into the bathroom and flushed the toilet. Officers recovered crack cocaine from a plastic bag in the bathroom sink.

In March 2002, Roach was indicted by the York County grand jury for one count of possession of crack cocaine with intent to distribute, one count of possession of crack cocaine with intent to distribute within the proximity of a public school, two counts of distribution of crack cocaine, and one count of distribution within the proximity of a public school. Roach was convicted on all charges and sentenced to an aggregate term of thirty years in prison. This appeal followed.

LAW/ANALYSIS

I. Violation of Confrontation Clause

Roach alleges his right to confront witnesses was violated when the trial court permitted an officer to testify about third parties going to Roach's home to purchase crack. We agree, but find this error was harmless.

According to *in camera* testimony proffered by the State, several people came to the door of Roach's home while officers executed the search warrant, and one of the executing officers sold imitation crack to the visitors. Defense counsel objected on the basis of relevance and also argued the testimony violated Roach's rights pursuant to the Confrontation Clause because he was unable to cross-examine the individuals who purchased the imitation crack. The State argued that there was a logical inference that Roach was holding drugs for delivery and that this was probative of the intent of what he was doing at the house. The trial court overruled the objection, and the State's witness testified before the jury as follows:

Q. You said you were stationed by the door?
A. Yes, sir, I was.
Q. While you were by the door what happened?
A. Several people came to the door and presented me with some money, two particular cases, one presented with a $10 [sic] with an intent to buy crack.
Q. Don't tell us what they were thinking because we don't know. People offered you money?
A. Yes, sir.
Q. And you were in plain clothes?
A. Yes, sir.
Q. And what did you offer them in exchange for the money?
A. Imitation crack.

"The Sixth Amendment guarantees a criminal defendant the right 'to be confronted with the witnesses against him.'" State v. Dinkins, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (quoting U.S. Const. amend. VI). The right of confrontation is essential to a fair trial because it promotes reliability and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. Id. Although the confrontation clause is not identical to the hearsay rule, when the State offers hearsay evidence in a criminal case, the accused's Sixth Amendment right to confront accusers is directly implicated. See Idaho v. Wright, 497 U.S. 805 (1990); Charleston County Dep't of Soc. Servs. v. Father et al., 317 S.C. 283, 454 S.E.2d 307 (1995).

While the law requires confrontation with adverse witnesses, several exceptions have been recognized. See Danny R. Collins, South Carolina Evidence § 16.11 (2d ed. 2000). Traditionally, "[c]onfrontation [was] not always required in particular proceedings that serve[d] limited functions, for well-recognized hearsay exceptions, or for evidence that [had] other significant indicia of reliability." Id. In its most recent analysis of the Confrontation Clause, the United States Supreme Court modified the long-standing exemption for evidence bearing adequate "indicia of reliability." Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). In Crawford, the Supreme Court established a new rule which bars out-of-court statements by a witness *that are testimonial in nature* unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Id. at ___, 124 S.Ct. at 1374. However, where the out-of-court statement is not testimonial in nature, the "indicia of reliability" test remains. Id.[1]

[1] The Supreme Court declined to "spell out a comprehensive definition of 'testimonial,'" but noted that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. ___, 124 S.Ct. at 1367. For a comprehensive review of testimonial and non-testimonial hearsay, see State v. Staten, Op. No. 3955 (S.C. Ct. App. filed March 7, 2005 Shearouse Adv. Sh. No. 12 at 22).

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996). A "statement" as defined by Rule 801(a), SCRE, includes "nonverbal conduct of a person, if it is intended by the person as an assertion." See also id., 321 S.C. at 59, 467 S.E.2d at 141 (finding the gesture of pointing to be an assertion).

In this case, the officer testified about individuals "offering" him money in exchange for drugs. While the officer did not specifically testify as to what these individuals said to him, if anything, he did testify that the individuals communicated to him, in some way, their desire to purchase drugs. The State offered this evidence to prove that Roach was running a "crack house" that people visited with the intent to purchase drugs. Thus, the officer's testimony regarding the transaction, even if it was communicated nonverbally, falls under the definition of hearsay as it was an out-of-court statement, offered in court to prove the truth of the matter asserted. The out-of-court statements were not testimonial in nature because they were made by individuals who had no idea they were actually attempting to buy drugs from a police officer. See State v. Staten, Op. No. 3955 (S.C. Ct. App. filed March 7, 2005 Shearouse Adv. Sh. No. 12 at 31) (explaining that in other jurisdictions, statements made to acquaintances without an intention for use at trial have consistently been labeled as non-testimonial). As non-testimonial hearsay statements, they would be admissible if they fell within a well-recognized hearsay exception or bore other significant indicia of reliability, which they do not. Accordingly, the trial court erred in allowing the testimony into evidence.

However, "violation of the confrontation clause is not *per se* reversible but is subject to a harmless error analysis." State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994). "An error is harmless when it 'could not reasonably have affected the result of the trial.'" State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

In this case, a confidential informant testified that he had purchased drugs from Roach immediately prior to the officers' execution of their search

warrant. Another witness also testified that she cut crack cocaine with Roach just moments before the officers burst into Roach's home. Numerous people were in the home, all of whom fled when the officers came into the home. Furthermore, Roach ran to the bathroom and flushed the toilet when officers entered his home, and crack cocaine was found in the sink of that bathroom. In light of this overwhelming evidence against Roach, we do not believe the hearsay testimony regarding an officer's sale of imitation crack could have reasonably affected the result of the trial.

II. Admission of Identification

Roach next argues the trial court erred by allowing an in-court identification, which was based on a single person lineup, without making a determination as to the reliability of the identification. We disagree.

At Roach's trial, a confidential informant testified *in camera* that he told police he could purchase crack from 523 East White Street, the address of Roach's home. The informant, however, did not know the name of the seller. Police showed him a photograph of Roach, and the informant identified him as the person from whom he had purchased crack many times during a four-month period.

Defense counsel argued the informant should not be allowed to identify Roach in court because the one photograph lineup was unduly suggestive. Counsel further argued the informant's identification was unreliable because he was smoking crack and was going to various other places to purchase crack. The trial judge agreed the lineup was suggestive, but ultimately allowed the identification to be admitted, explaining:

> Even though [a one photograph lineup] would be suggestive on its face . . . I find that the identification is not to be excluded because I don't believe there is a substantial risk of misidentification. The witness testified that he viewed this person, perhaps, he didn't know his name, maybe the photograph connected the name, and I don't find any problem

> with that, but he certainly has the ability based on his previous purchases and contact with [Roach] or the person he identified as [Roach] and the person he identified as the person from whom he purchased. I find that his in court identification will be allowed.

After making that finding, the trial judge went on to explain:

> I'll certainly charge the jury that they are to take into consideration whatever factors they need to in regard to determining whether or not that is a reliable [identification]. [T]hat's not what the court is deciding, I'm not deciding whether it's reliable, I'm deciding whether it's admissible.

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 198-99 (1972). First, the trial judge must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). Next, the trial judge must decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. "Single person show-ups are disfavored because they are suggestive by their nature." State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). "However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000).

Roach argues the trial judge's ruling should be reversed because the judge explicitly refused to evaluate the reliability of the identification. We disagree. As is clear from the trial judge's ruling excerpted above, he considered the reliability of the identification and found there was no substantial risk for misidentification. Although he went on to say, "I'm not deciding whether it's reliable, I'm deciding whether it's admissible," this statement must be taken in context. This statement was made as the trial judge explained how he would charge the jury. Ultimately, it was the jury's

responsibility, as the sole arbiter of the facts, to determine whether the in-court identification was credible. Thus, the trial judge was merely explaining that despite the identification's admissibility, it would be in the jury's hands to determine whether to rely on the identification when determining Roach's guilt. We thus find no error.

Accordingly, Roach's convictions are

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nataliya Holler, **Respondent,**

v.

William Holler, **Appellant.**

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

Opinion No. 3979
Heard April 4, 2005 – Filed April 18, 2005

AFFIRMED

William Holler, of Rock Hill, Pro Se, for Appellant.

David Bradley Jordan, of Rock Hill and Harold A. Oberman, of Charleston, for Respondent.

ANDERSON, J.: William Holler (Husband) appeals from the family court's determination that a premarital agreement signed by Nataliya[1] Holler (Wife) is not enforceable. We affirm.

[1] Wife is referred to in the record as both Nataliya and Natasha.

FACTUAL/PROCEDURAL BACKGROUND

Wife is originally from Ukraine. She was educated in Ukraine and taught college students in that country. English is not Wife's first language. After seeing Husband's picture in "a feminine magazine," Wife wrote a letter to him in English and included her phone number. Thereafter, Husband and Wife talked on the phone for "[a]bout a year." Their conversations were in English. During this time, Husband visited Wife in Ukraine.

On September 5, 1997, Wife traveled to the United States to marry Husband. At the time of her arrival, Wife's English was "really poor." Husband disputed Wife's inability to speak English, claiming she spoke "[v]ery well." Upon completing an English course, Wife received a certificate from Central Piedmont College in May of 1998.

In October or early November 1997, Wife became pregnant with Husband's child. Wife's visa was scheduled to expire on December 4, 1997, and she would have to return to Ukraine unless she married Husband. Wife came to the United States without money and relied upon Husband to provide support.

Wife admitted that, while she was still in Ukraine, Husband told her about the premarital agreement. However, Wife believed she "needed to sign some papers under the law of South Carolina before we g[o]t married." Wife claimed: "[Husband] faxed me some documents for American Embassy, and one page was he told me that we need—when you get to United States we have to sign that agreement before we get married because this is under [the] law of South Carolina." Husband delivered the premarital agreement to Wife sometime before the marriage. Husband first stated he faxed it to her five or six months before she arrived in the United States. Husband maintained he handed her a copy to sign within a week after she arrived. Yet, Wife declared Husband gave her a copy of the premarital agreement only two weeks before she signed it.

Prior to signing the premarital agreement, Wife attempted to translate a portion of the agreement from English into Russian, but was unable to

complete the translation. "Because it was too hard," Wife became frustrated with the translation and quit. Wife had eleven pages of translation before she determined the effort was futile. Wife professed the agreement "had specific language which [she did not] understand even in Russian." Wife never retained counsel because she had no money to pay someone to review the agreement.

Wife signed the agreement on November 25, 1997. The parties were married on December 1, 1997, merely three days before Wife's visa was set to expire.

Husband and Wife separated on February 13, 2000. Wife brought this action seeking a divorce, custody of the parties' child, child support, equitable distribution of marital property, and alimony. Husband answered and counterclaimed. Subsequently, he filed a motion to dismiss the claims for alimony and equitable distribution asserting the premarital agreement controlled. After a hearing, the family court denied the motion to dismiss. The court ruled the premarital agreement was invalid and unenforceable because it was signed under duress and was unconscionable.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Dearybury v. Dearybury, 351 S.C. 278, 569 S.E.2d 367 (2002); Lanier v. Lanier, Op. No. 3966 (S.C. Ct. App. filed March 21, 2005) (Shearouse Adv. Sh. No. 14 at 74); Moghaddassi v. Moghaddassi, Op. No. 3932 (S.C. Ct. App. filed January 31, 2005) (Shearouse Adv. Sh. No. 6 at 48). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lacke v. Lacke, 362 S.C. 302, 608 S.E.2d 147 (Ct. App. 2005); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999);

see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (noting that because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the family court's findings where matters of credibility are involved).

LAW/ANALYSIS

Husband raises numerous issues regarding the findings of fact made by the family court. In essence, the attack by Husband on the order of the family court involves two issues: (1) whether the court erred in finding the premarital agreement invalid and unenforceable; and (2) whether the family court had jurisdiction to determine the validity of the premarital agreement.

I. JURISDICTION OF FAMILY COURT

Husband argues the family court was without jurisdiction to determine the validity of the premarital agreement. He maintains Wife should have brought her action in the circuit court because the premarital agreement barred Wife from receiving alimony and designated the parties' respective property as nonmarital. We disagree.

The jurisdiction of the family court is determined by section 20-7-420 of the South Carolina Code (Supp. 2004). Section 20-7-420(2) provides:

> The family court shall have exclusive jurisdiction:
>
> . . . .
>
> (2) To hear and determine actions:
>
> For divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the

> parties in the actions in and to the real and personal property of the marriage and attorney's fees, if requested by either party in the pleadings.

S.C. Code Ann. § 20-7-420(2) (Supp. 2004) (emphasis added). South Carolina Code section 20-3-130(G) states:

> (G) The Family Court may review and approve all agreements which bear on the issue of alimony or separate maintenance and support, whether brought before the court in actions for divorce from the bonds of matrimony, separate maintenance and support actions, or in actions to approve agreement where the parties are living separate and apart. The failure to seek a divorce, separate maintenance, or a legal separation does not deprive the court of its authority and jurisdiction to approve and enforce the agreements.

S.C. Code Ann. § 20-3-130(G) (Supp. 2004).

This court and the South Carolina Supreme Court have allowed appeals from the family court involving a premarital agreement without raising an issue of jurisdiction. See, e.g., Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003); Bowen v. Bowen, 352 S.C. 494, 575 S.E.2d 553 (2003); Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001). In Gilley v. Gilley, 327 S.C. 8, 488 S.E.2d 310 (1997), the validity of the prenuptial agreement of the parties was not challenged. The Gilley court analyzed the status of the property, i.e., marital or nonmarital in the context of the prenuptial agreement. The court expounded:

> [H]usband asked the family court for an order of separate maintenance requiring the parties to live separate and apart, equitable distribution of the marital home and other personal property, and attorney's fees. The family court dismissed husband's action finding it did not belong in family court since the prenuptial agreement provides that neither party can claim alimony or separate maintenance. Further, the family court

> dismissed the action because the prenuptial agreement provided that property acquired by the parties during the marriage or owned at the time of the marriage would not be the subject of any claims for equitable apportionment. The family court ruled that any claims arising from property or investments must be asserted in circuit court. We agree.
>
> The family court has exclusive jurisdiction to hear and determine actions for separate support and maintenance, legal separation, other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions related to the real and personal property of the marriage. S.C. Code Ann. § 20-7-420(2) (Supp. 1995). Property excluded by written contract or antenuptial agreement of the parties is excluded from marital property and is considered nonmarital property. S.C. Code Ann. § 20-7-473 (Supp. 1995). The family court does not have authority to apportion nonmarital property. Id.

Gilley, 327 S.C. at 11, 488 S.E.2d at 312. Property excluded from the marital estate by written contract or premarital agreement of the parties is considered nonmarital property over which the family court has no jurisdiction. See S.C. Code Ann. § 20-7-473 (Supp. 2004) (noting that family court "does not have jurisdiction or authority to apportion nonmarital property"); S.C. Code Ann. § 20-7-473(4) (Supp. 2004) (stating that property excluded from the marital estate by written contract of the parties is considered nonmarital property).

In the instant case, the litigation between the parties was clearly marital in nature as the Wife sought a divorce, custody of the child, child support, alimony, and equitable distribution of the marital property. Husband asserted the premarital agreement as a defense to the causes of action for alimony and equitable distribution. The family court was then required to determine, pursuant to Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003), whether the premarital agreement was valid and enforceable.

The family court, in the case sub judice, did not attempt to distribute nonmarital property or provide support in contravention of the agreement, as was sought by the husband in Gilley. The determination of the enforceability of the agreement arose in the course of marital litigation and was within the family court's jurisdiction under section 20-7-420(2). Concomitantly, the family court was correct in applying the jurisdiction of the court.

II. PREMARITAL AGREEMENT

Husband contends the trial court erred in finding the premarital agreement was invalid and unenforceable as a result of being unconscionable and signed under duress.

Premarital agreements, also called antenuptial or prenuptial agreements, are agreements between prospective spouses made in contemplation of marriage. Black's Law Dictionary defines a prenuptial agreement as "[a]n agreement made before marriage usu[ally] to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse." Black's Law Dictionary 1220 (8th ed. 2004). Antenuptial settlements are contracts or agreements entered into between a man and woman before marriage, but in contemplation and generally in consideration of marriage, whereby the property rights and interests of either the prospective husband or wife, or of both of them, are determined, or where property is secured to either or to both of them, or to their children. 41 C.J.S. Husband and Wife § 61 (1991).

The consideration for a premarital agreement is the marriage itself. Because such agreements are executory, they become effective only upon marriage. See South Carolina Loan & Trust Co. v. Lawton, 69 S.C. 345, 48 S.E. 282 (1904). In South Carolina Loan & Trust Co. v. Lawton, the Supreme Court explained:

> There is not complete execution of such instruments until actual marriage, and it does not matter how many changes may be made, and how many different instruments may be signed, the

> settlement, in the last form it assumes before marriage, is the real contract supported by the consideration of marriage.

Id. at 349, 48 S.E. at 283.

In Stork v. First National Bank, 281 S.C. 515, 316 S.E.2d 400 (1984), the Supreme Court inculcated:

> Antenuptial agreements, which usually involve the wife-to-be giving up her right to dower in consideration of marriage, will be enforced if made voluntarily and in good faith and if fair and equitable. Rieger v. Schaible, 81 Neb. 33, 115 N.W. 560 (1908) (citing Pierce v. Pierce, 71 N.Y. 154, 27 Am. Rep. 22). Such contracts are not opposed to public policy but are highly beneficial to serving the best interest of the marriage relationship.

Id. at 516, 316 S.E.2d at 401. An antenuptial contract is valid and will be upheld when, and only when, it is entered into freely, fairly, and in good faith by parties legally competent to contract. 41 C.J.S. Husband and Wife § 62 (1991). An antenuptial agreement must be free from duress, fraud, deceit, misrepresentation, or overreaching. Id. Further, the agreement must not be unconscionable. Id.

The South Carolina Supreme Court, in Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003), explicated:

> Recent case law of this Court supports Husband's contention that parties are free to contractually alter the obligations which would otherwise attach to marriage. In Stork v. First Nat'l Bank of South Carolina, 281 S.C. 515, 516, 316 S.E.2d 400, 401 (1984), this Court held that antenuptial agreements "will be enforced if made voluntarily and in good faith and if fair and equitable. . . . Such contracts are not opposed to public policy but are highly beneficial to serving the best interest of the marriage relationship."

Id. at 387, 585 S.E.2d at 503. In determining whether a premarital agreement should be enforced, our supreme court professed:

> (1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

Id. at 389, 585 S.E.2d at 504 (internal quotations omitted).

A. Duress

Husband avers the family court improperly concluded Wife signed the premarital agreement while under duress. We disagree.

Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition. Cherry v. Shelby Mut. Plate Glass & Cas. Co., 191 S.C. 177, 4 S.E.2d 123 (1939); Cox & Floyd Grading, Inc. v. Kajima Constr. Servs., Inc., 356 S.C. 512, 589 S.E.2d 789 (Ct. App. 2003); Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994).

Corpus Juris Secundum defines duress:

> "Duress" may be defined as subjecting a person to a pressure which overcomes his or her will and coerces him or her to comply with demands to which he or she would not yield if acting as a free agent. Some definitions of "duress" contain not only the element of pressure overcoming the victim's will but also the element that the pressure or compulsion consists of improper, wrongful, or unlawful conduct, acts, or threats.
>
> Further, "duress" has been defined as the condition of mind produced by the wrongful conduct of another rendering a person

> incompetent to contract with the exercise of his or her free will power, or as the condition of mind produced by an improper external pressure destroying free agency so as to cause the victim to act or contract without use of his or her own volition, or as unlawful constraint whereby a person is forced to do some act against his or her will.

17A C.J.S. Contracts § 175 (1999) (footnotes omitted).

The central question with respect to whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will by threats or the wrongful conduct of another. 17A Am. Jur. 2d Contracts § 218 (2004). Freedom of will is essential to the validity of an agreement. Id. A party claiming "duress" can prevail if he shows that he has been the victim of a wrongful or unlawful act or threat of a kind that deprives the victim of unfettered will, with the result that he was compelled to make a disproportionate exchange of values. Id.

In order to establish that a contract was procured through duress, three things must be proved: (1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind. In re Nightingale's Estate, 182 S.C. 527, 189 S.E. 890 (1937). The fear which makes it impossible for a person to exercise his own free will is not so much to be tested by the means employed to accomplish the act, as by the state of mind produced by the means invoked. Id.; Willms Trucking Co., 314 S.C. at 179, 442 S.E.2d at 202. If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind. In re Nightingale's Estate, 182 S.C. at 547, 189 S.E at 898; Willms Trucking Co., 314 S.C. at 179, 442 S.E.2d at 202. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. Willms Trucking Co., 314 S.C. at 179, 442 S.E.2d at 202. Whether or not duress exists in a particular case is a

question of fact to be determined according to the circumstances of each case, such as the age, sex, and capacity of the party influenced. Id.; see also Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., 273 S.C. 784, 260 S.E.2d 178 (1979) (stating whether or not duress was present is a question ordinarily determined on a case by case basis).

Duress is viewed with a subjective test which looks at the individual characteristics of the person allegedly influenced, and duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of it. Blejski v. Blejski, 325 S.C. 491, 480 S.E.2d 462 (Ct. App. 1997) (citing Restatement (Second) of Contracts § 175 cmt. b & c (1981)). Duress is a defense to an otherwise valid contract. 17A Am. Jur. 2d Contracts § 218. Duress renders a contract voidable at the option of the oppressed party. Santee Portland Cement Corp., 273 S.C. at 784, 260 S.E.2d at 178.

Assumptively concluding Wife was allowed the opportunity to view the premarital agreement three months in advance, the evidence in the record indicates: (1) Wife did not understand the contents of the agreement; (2) she did not freely enter into the agreement; (3) she attempted to translate the agreement into Russian in order to better comprehend the document; (4) she became frustrated as she was unable to complete a satisfactory translation; and (5) her notes indicate there are several words for which she could not find a translation, including "undivided," "equitable," and "pro rata." Consequently, Wife could not understand the agreement.

Additionally, Husband was aware of the deadline with respect to Wife's visa. According to his own testimony, Husband made it perfectly clear to Wife that she must sign the agreement if she wanted to be married prior to the expiration of her visa. Wife was in the United States with no means to support herself. She relied solely and completely on Husband for support. Wife had no money of her own with which to retain and consult an attorney or a translator. Whether a party obtained independent legal advice is a significant consideration in evaluating whether an antenuptial agreement was voluntarily and understandingly made. See 41 C.J.S. Husband and Wife § 62 (1991). The family court found if Wife was not able to marry, then she

would be forced to return to Ukraine. Because she was pregnant with Husband's child, she sought to insure his continued support and to remain in the United States.

Wife did not enter into the agreement freely and voluntarily. Ample evidence exists to support the family court's determination that Wife, given the circumstances she faced, signed the agreement under duress and without a clear understanding of what she was signing. The family court did not err in finding Wife signed the agreement under duress.

B. Unconscionability

Husband asseverates the trial court erred in finding the agreement was unconscionable and, therefore, unenforceable. We disagree.

Unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 606 S.E.2d 752 (2004); Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003); Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996); see also 17 C.J.S. Contracts § 4 (1999) (noting some courts state that a party seeking to show an agreement is unconscionable must show that, at the time the agreement was formed, there was an absence of meaningful choice and the contract terms unreasonably favor one party).

"In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed." Hardee v. Hardee, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct. App. 2001) (citing Restatement (Second) of Contracts § 208 (1981)), aff'd as modified, 355 S.C. 382, 585 S.E.2d 501 (2003); see also Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998)("If the court finds that a contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result."). "A

determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." 17A Am. Jur. 2d Contracts § 279 (2004); see also 17 C.J.S. Contracts § 4 (1999) ("The determination of unconscionability is fact specific, and the totality of the circumstances must be assessed.").

In order to determine whether the agreement was unconscionable, we examine its terms and their application to the parties. The agreement provided in part that both parties would be responsible for paying rent as well as real estate taxes and utilities on a property owned by Husband's mother and leased to Husband. The agreement required Husband "shall have a proportionate interest in the increase in value during the marriage of the homestead real estate, proportionate to the percentage contribution of the household expenses, if any, and child care/household duties performed by William Holler during the course of the marriage." The agreement did not contain a similar provision regarding Wife's interest as a result of her contributions of childcare or household duties.

Profoundly, the agreement stated:

> **10. Support.** Each of the parties has income from property interest sufficient to provide for his or her respective support. Each has been self-supporting for a period of time prior to the contemplated marriage. Both parties feel that they are capable of future self-support and of maintaining themselves on a self-supporting basis.

However, at the time the agreement was signed, Husband was providing all of Wife's support and knew Wife had to return to Ukraine unless she obtained independent subsidy.

Significantly, the exhibit listing the parties' respective financial information reveals Husband had a net worth over $150,000 with $30,000 in annual income, while Wife had $0.00 listed beside each category of assets as well as $0.00 for her net worth. The declaration indicated she earned $1,400.00 per year as a music teacher in Ukraine. Apodictically, we find

ample evidence in the record demonstrating the premarital agreement was unconscionable and, therefore, unenforceable.

CONCLUSION

The family court possessed jurisdiction to determine whether the premarital agreement was valid and enforceable. Further, the family court did not err in finding: (1) Wife signed the agreement under duress; and (2) the agreement was unconscionable and unenforceable. Accordingly, the decision of the family court is

AFFIRMED.

BEATTY and SHORT, JJ., concur.