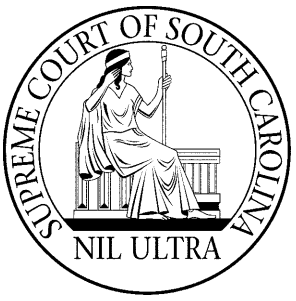

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 17, 2004

ADVANCE SHEET NO. 20

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Colleton County
Magistrate Norris O. Rearden, Respondent.

Opinion No. 25821
Submitted April 20, 2004 - Filed May 17, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Deborah S. McKeown, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Norris O. Rearden, of Walterboro, pro se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a six month suspension. The facts as set forth in the agreement are as follows.

FACTS

I.

Defendant A was incarcerated on October 24, 2003; he paid a $750 cash bond to respondent on that date. Respondent prepared a deposit ticket for his magistrate account dated October 26, 2003. The ticket listed the $750 bond money deposit, although respondent did not deposit the bond money into his magistrate account on that date.

On October 26, 2003, respondent issued a check from his magistrate account payable to Magistrate Cobb for $750 to transmit Defendant A's bond money. On October 31, 2003, the check was returned from the bank due to insufficient funds and an overdraft fee was assessed against respondent's magistrate account.

Respondent deposited Defendant A's bond money into his magistrate account on November 13, 2003. Respondent represents he inadvertently left the bond money in his deposit book until he learned the check had been returned from the bank for insufficient funds. Respondent acknowledges he failed to deposit Defendant A's bond money into his magistrate account in a timely manner.

Respondent failed to report the returned check to South Carolina Court Administration and ODC as required by the Order of the Chief Justice dated November 9, 1999.

II.

Defendant B was incarcerated on June 14, 2003, and, on that date, paid a $1,164 cash bond to respondent. After receiving Defendant B's bond money, respondent neglected to sign the "Authorization for Release on Bond" form for Defendant B and, as a result, Defendant B was not released from jail for six days. Respondent represents his failure to sign the form was an oversight and the jail staff did not bring Defendant B's continued incarceration to his attention.

Respondent prepared a deposit ticket for his magistrate account dated July 25, 2003, (forty-one days after Defendant B's original bond money was received) that listed Defendant B's bond money for deposit although this money was not deposited in the magistrate account until August 4, 2003 (fifty-one days after Defendant B's bond money was received). Respondent offers no explanation as to the location of these funds from June 14 until August 4; he offers no explanation why these funds were not deposited into his magistrate account in a timely manner.

On July 25, 2003, respondent issued a check from his magistrate account payable to Magistrate Campbell for $1,164 to transmit Defendant B's bond money, but there were insufficient funds in the account to honor the check.

During Defendant B's prolonged incarceration, Defendant B hired a bail bondsman who paid an additional $1,172 bond on his behalf on June 20, 2003. On September 5, 2003, respondent returned Defendant B's excess bond money which had been paid as a result of his failure to execute the appropriate release form (seventy-seven days after Defendant B paid the excess bond).

Respondent acknowledges he failed to deposit Defendant B's bond money into his magistrate account in a timely manner as required by the Order of the Chief Justice dated November 9, 1999.

III.

ODC's review of respondent's financial records reveals the majority of information entered by respondent in his receipt books and deposit tickets is illegible. Respondent acknowledges that, in the majority of cases, he cannot identify the defendants or the amount of bail received due to his inadequate recordkeeping. Additionally, the deposit tickets maintained by respondent do not specify receipt numbers, contrary to the Order of the Chief Justice dated November 9, 1999.

Respondent acknowledges that, as a result of his poor recordkeeping, as set forth in Parts I, II, and III, of this opinion, he has failed to comply with Sections II(A) (frequency of bank deposits), IIC(2) (information which must included on bank deposit slips), IIG (additional information which must be included on bank deposit slips), IIIB (procedure for handling bonds collected from other magistrates, municipal judges, and clerks of court), and VIII (requirement that magistrate immediately report in writing to Office of Court Administration and ODC when any shortage of magistrate funds are noted or reported) of the Order of the Chief Justice dated November 9, 1999.

Cooperation with ODC

ODC states that, under best information and belief, respondent has fully cooperated with its inquiries into these matters.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3B(2) (judge shall be faithful to the law and maintain professional competence in it); Canon 3B(8) (judge shall dispose of all judicial matters promptly, efficiently, and fairly); and Canon 3(C)(1) (judge shall diligently discharge his or her administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business).

By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. In addition, he violated Rule 7(a)(7), RJDE, by willfully violating a valid court order issued by a court of this state.

CONCLUSION

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent for six (6) months. Before he may resume his judicial duties, respondent shall attend and successfully complete the magistrate orientation seminar for newly appointed magistrates and municipal judges.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Jefferson McMillian, III, Respondent.

Opinion No. 25822
Submitted April 13, 2004 - Filed May 17, 2004

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

R. Davis Howser, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanction of disbarment. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

I.

Respondent was admitted to practice law in November 2000. Around March 2001, respondent entered into a business arrangement with Carolina Title Services, Inc., (CTS) through its principal officer and manager

Amy Cook (Cook). The purpose of the arrangement was to close large volumes of real estate loans. Neither Cook nor any other CTS employees were licensed to practice law.

Under respondent and CTS' arrangement, real estate loan transactions would be closed, for the most part, in the following fashion: the handling of the underlying transactions were solicited and obtained by CTS; the lenders sent the loan packages directly to CTS; CTS' non-lawyer staff would conduct or obtain a title search which was completed by a non-lawyer; the non-lawyer staff of CTS would prepare the closing documents; respondent attended closings, reviewed closing documents with parties and signed HUD-1 Settlement Statements as "settlement agent;" thereafter, CTS would see to the recordation of the documents, the disbursement of the proceeds of each transaction, the issuance of title insurance policies, and other actions necessary to consummate the transactions.

For attending the closings, respondent was usually paid a fee of $300 to $350 out of each transaction which was reflected on the Settlement Statements. CTS retained amounts collected for title examination, document preparation, title insurance commitment/binder fees, and commissions on title insurance premiums.

To implement the foregoing arrangement, respondent opened an IOLTA Trust Account at Bank A. This account was styled "The McMillian Law Firm Trust Account." Respondent gave Cook signatory authority over this trust account. The trust account checkbooks, bank statements, and cancelled checks were maintained by Cook at the offices of CTS. CTS' address was used for mailing monthly bank statements and cancelled checks. Deposits to and disbursements from this account were usually made by Cook and/or employees of CTS without respondent's supervision.

Cook was a licensed agent for Chicago Title Insurance Company (Chicago Title) which was the primary provider of title insurance for the transactions closed in furtherance of the foregoing arrangement and, in most cases, Chicago Title issued insured closing letters in connection with these transactions. Usually, loan packages were sent directly from lenders to CTS

and almost all negotiations and discussions with lenders related to these transactions were handled by the staff of CTS and not respondent.

Under this arrangement, approximately three hundred transactions were closed by CTS with respondent's assistance and/or using one of respondent's trust accounts between March or April 2001 and April 2002. Respondent estimates that he was present at 80% to 95% of the closings, however, because of the large volume of transactions, it was impossible for him to attend all the closings. When respondent did not attend, closings were conducted by CTS' non-lawyer staff without the presence of a licensed attorney. In those cases, someone at CTS would sign respondent's name to the HUD-1 Settlement Statements and any other documents requiring respondent's signature. While respondent never specifically authorized anyone else to sign his name on documents, on a few occasions, respondent had actual knowledge that Cook and/or one or more employees at CTS were signing his name to closing documents and had constructive knowledge that this was occurring on the other occasions when respondent was unable to be present at closings. Notwithstanding this knowledge, respondent did not prohibit Cook or other CTS employees from signing his name to closing documents and, by not doing so, gave his tacit approval to this practice.

During the entire period of the foregoing arrangement with CTS, respondent maintained no files concerning the real estate transactions (other than a list of closings for which he expected payment from CTS), failed to reconcile or even review monthly bank statements, and failed to comply with any of the money handling and record keeping requirements of Rule 417, SCACR, notwithstanding establishment of an IOLTA Trust Account styled "Law Offices of William J. McMillian, III, Trust Account." Contrary to Rule 417, SCACR, no one involved in these transactions maintained ledgers or placed identifying data on checks and deposit slips. Any files maintained on these closings were kept by CTS at its offices.

Under this arrangement, neither clients nor lenders (for the most part) were advised of respondent's limited role in the closing of these real estate transactions through CTS. Because respondent provided limited

services to clients in these closings, the fees charged for his services were excessive. By signing the HUD-1 Settlement Statements as "settlement agent," respondent gave the parties and lenders the incorrect impression that he had or was going to see to the proper disposition of the settlement proceeds when, in fact, he did not do so. Respondent's actions were contrary to the certification requirements imposed by the Federal Truth in Lending Act.

Beginning in September 2001, respondent became aware of non-sufficient fund (NSF) charges for checks written on the Bank A trust account. In November 2001, respondent became aware that there was a negative balance of approximately $119,000 in the Bank A trust account. In this time frame, respondent learned that one or more lenders would no longer accept checks written on this account because of the NSF problems.

As a result of checks on the Bank A trust account not being accepted and because of negative balances in the account, respondent opened a new trust account styled "McMillian Law Firm, P.A., IOLTA Trust Account" at Bank B in December 2001. Notwithstanding the difficulties experienced and the irregularities reported in the Bank A trust account managed by Cook, respondent allowed Cook to be a signatory on the Bank B trust account and continued to allow Cook to make deposits to and write checks from both his Bank A and Bank B trust accounts in furtherance of closing real estate transactions pursuant to his arrangement with CTS.

After opening the Bank B trust account, respondent became aware that Cook was "floating" funds between the Bank A and Bank B trust accounts. Presumably, the "float" was necessary in order for checks to clear in spite of shortages in the accounts.

In December 2001 and January 2002, respondent unsuccessfully attempted to work with Cook to identify the nature and amounts of the bank account shortages and then correct the shortages. On or about February 5, 2002, respondent had his last direct dealings with Cook. After that occasion, respondent appeared at the closing of one or two more loans for CTS. Respondent ceased attending closings for CTS in late March 2002.

After respondent ceased, for the most part, attending closings of transactions with CTS in January 2002, Cook made arrangements with several other attorneys to attend closings on behalf of CTS in place of respondent. Even after respondent terminated his working relationship with CTS, respondent continued to allow Cook to be a signatory on and have control and use of both the trust accounts until respondent was placed on interim suspension on May 1, 2002.

ODC's examination of the Bank A trust account revealed that this account was assessed charges for overdrafts and/or NSF checks on approximately 309 occasions, had a negative balance on approximately sixteen occasions, had a negative balance of $372.98 on April 30, 2002, and had shortages of approximately $188,000 when the attorney to protect clients' interests took charge of that account. ODC's examination of the Bank B trust account indicated overdrafts and/or NSF checks on thirty-four occasions and a shortage of $250,000 on April 30, 2002.

Respondent learned of the approximately $119,000 shortage in the Bank A trust account in November 2001, the approximately $188,000 shortage in the Bank A trust account in February 2002, and the approximately $250,000 shortage in the Bank B trust account in January 2002. Respondent took no action to either close the accounts or to remove Cook as signatory on the accounts. Cook continued to have the use of and control over both of the trust accounts until they were placed under control of an attorney to protect clients' interests by this Court.

Unbeknownst to respondent, Cook directed that Bank A place a "sweep" order on the Bank A trust account in March 2002. Pursuant to this order, funds in the account were "swept" out of that account on a daily basis and into Cook's personal account or into some other account under her control.

Chicago Title reported that, in compliance with the terms of its title insurance policies and/or its insured closing letters, it had paid out approximately $714,214 due to shortages in respondent's trust accounts and

had further paid out approximately $36,000 in negligence claims in connection with transactions closed by CTS. In addition, Chicago Title has, in the aggregate, spent approximately $868,000 due to claims and expenses related to CTS (not all of these claims relating to closings attended by respondent, but most being related to the use of respondent's trust account by CTS) and that approximately sixty claims are still pending against Chicago Title arising out of transactions which were closed or were supposed to have been closed by CTS.

On July 20, 2001, respondent used a counter check to withdraw $4,140 for his own personal use out of the Bank A trust account. Respondent represents that this check was reimbursement for a personal check he wrote to facilitate a closing where CTS had depleted the printed checks on the Bank A trust account. A personal check from respondent's personal checking account in the amount of $1,765 was deposited into the Bank A trust account in the relevant time frame. Respondent explains the balance of $2,375 was for unpaid fees and/or other amounts due respondent in connection with closings. Respondent cannot now document this representation.

On September 19, 2001, using a counter check, respondent wrote a check on his Bank A trust account for his own personal use in the amount of $46,666.87. Respondent represents this check was written to repay himself for an advance he had made from his personal checking account to conclude a transaction being handled by CTS. There was, in fact, a check written on respondent's personal account deposited to the Bank A trust account on that occasion in the amount of $45,916.87. Respondent represents the difference of $750 was for fees owed to him in connection with that transaction. Respondent cannot now document this representation.

In December 2001, respondent used a counter check to withdraw $1,504 from the Bank A trust account for his own personal use. Respondent represents that this withdrawal was made because CTS had depleted the escrow checks, that respondent had written a personal check to conclude a closing, and that the check was reimbursement for that advance on respondent's personal checking account. No check in that exact amount was located in respondent's personal checking account in the relevant time frame.

On January 7, 2002, respondent withdrew $2,000 from the Bank A trust account and on January 25, 2002, withdrew an additional $2,105 from that trust account using either counter checks or withdrawal slips. These withdrawals were for respondent's own personal use and benefit. Respondent represents these amounts were in payment of fees due him for attending closings for which CTS failed and refused to pay him. Respondent cannot now document this representation.

Respondent represents he maintained a list of fees due from CTS on which he relied in making these withdrawals to himself out of the Bank A trust account. Respondent advises that the list on which he relied cannot be located.

None of the above-mentioned checks or withdrawals by respondent from the Bank A trust account had any notations indicating the files or clients to which they related. Respondent now recognizes that, because of shortages in the Bank A trust account, the money he withdrew in January 2002 for fees due from CTS were, in all likelihood, taken from the proceeds of unrelated transactions.

Subsequent to respondent's interim suspension, it became apparent that there had been substantial misappropriations from both the Bank A and Bank B trust accounts. ODC does not contend respondent misappropriated any money from these accounts and does not contend respondent was directly responsible for the shortages in these accounts other than respondent allowing others to have control over the trust accounts, his failure to manage, supervise, and reconcile the trust accounts, and respondent's withdrawals for fees due in January 2002. ODC does not allege respondent misappropriated any of the missing money, except for concerns relative to payment of fees by respondent directly to himself which (assuming these fees were in fact due) were likely paid out of proceeds of unrelated transactions due to shortages in the trust accounts known to respondent on the occasion he paid himself the fees. While it appears the foregoing shortages were the result of misappropriation on the part of someone, ODC does not

allege respondent was involved in, had actual knowledge of, or condoned any intentional misappropriation out of the two trust accounts.

II.

In this matter, respondent served as the closing attorney for the buyer in an August 2001 real estate transaction. After the buyer failed to receive a deed to the land and the title to the mobile home as contemplated by the transaction, litigation ensued. The complainant in this matter is an attorney who defended the lender.

As the underlying litigation progressed, it was learned that the deed had not been witnessed, probated, or recorded, and that the loan proceeds from the lender had been received into and disbursed out of respondent's trust account, but the mortgage to the lender had never been prepared or signed by the borrower. When the lender inquired, the lender was furnished with a bogus mortgage containing a forged signature and a falsified date/time stamp indicating recordation of the mortgage. The borrower defaulted on the obligation, raising forgery of the alleged mortgage and failure to receive title to the real estate or mobile home as a defense to the lender's claim. As a result, the lender is now the holder of an unsecured note.

While respondent denies any involvement in the falsification of the mortgage, he acknowledges he failed to properly review the closing documents, failed to notice and/or take action to rectify the fact that there was no mortgage in the closing package and the deed was unsigned, and he allowed CTS to disburse the proceeds of that transaction using his trust account without his supervision. Although respondent's only involvement in the transaction was to be present and superintend the execution of the documents, in doing so he failed to supervise the CTS non-lawyer staff and failed to oversee the disbursements of the proceeds of the transaction in accordance with the closing documents, thereby assisting CTS and/or Cook in the unauthorized practice of law.

III.

In this matter, a bank branch manager filed complaints concerning two NSF checks drawn on respondent's trust account and bearing the signature "Amy Cook." Both of these checks are dated March 26, 2003; one is in the amount of $76,220.40 and the other is in the amount of $65,282.48. It is noted this bank branch had honored Cook's directions to "sweep" this account even though it was an IOLTA account in the name of the McMillian Law Firm.

IV.

In this matter, the complainant reports a loan was approved for its customer and closed by CTS in April 2002. Complainant received a check drawn on respondent's trust account and bearing the signature of "Amy Cook." Complainant was later notified by its bank that the "funds were uncollected." In connection with the same matter, the customer did not receive the mobile home she sought to purchase. Respondent was not involved in the underlying transaction, except that, by allowing CTS to use his trust account in the underlying closing, respondent assisted CTS' non-lawyer staff in the unauthorized practice of law.

V.

In this matter, the complainant reports a check drawn on respondent's trust account and bearing the signature "Amy Cook" was dishonored upon presentment. Respondent was not involved in the underlying transaction, except that, by allowing CTS to use his trust account in the underlying closing, respondent assisted CTS' non-lawyer staff in the unauthorized practice of law.

VI.

In this matter, the complainant is an attorney whose clients had either closed or had sought to close refinancing transactions with CTS in early 2002. Necessary transactions were not completed and it took one year

and the assistance of new counsel to close on the refinancings. Respondent was not involved in the underlying transactions except that, by allowing CTS to use his trust account in the underlying closing, respondent assisted CTS' non-lawyer staff in the unauthorized practice of law.

VII.

The complainant in this matter sought to purchase a lot and mobile home through a real estate transaction handled by CTS. The closing was attended by an attorney who was hired by CTS (not respondent). This attorney did not otherwise participate in this transaction. Various problems arose and the attorney refused to assist the complainant in rectifying the situation. After the complainant hired another attorney, the impediments to the closing were rectified. Respondent was not involved in the underlying transactions except that, by allowing CTS to use his trust account in the underlying closing, respondent assisted CTS' non-lawyer staff in the unauthorized practice of law.

VIII.

In this matter, the complainant closed a real estate transaction through CTS. The closing was attended by an attorney who was hired by CTS (not respondent). Subsequent to the closing, the complainant's homeowner's insurance policy was cancelled because the check for the premium had "bounced." The check had been written on respondent's trust account. Other discrepancies concerning the closing were later identified. Respondent was not involved in the underlying transactions except that, by allowing CTS to use his trust account in the underlying closing, respondent assisted CTS' non-lawyer staff in the unauthorized practice of law.

IX.

After he was placed on interim suspension, respondent applied for a position as a receptionist/legal secretary with a law firm. He deleted the fact that he had graduated from law school from his resume. Respondent did

not disclose that he was an attorney or that he was under interim suspension. After ODC advised him that employment with the law firm would violate Rule 34, RLDE, respondent withdrew his application.

Respondent states he now recognizes that the Rules for Lawyer Disciplinary Enforcement prohibit a lawyer from attempting to violate the professional rules. He further recognizes that Rule 34, RLDE, prohibits a suspended lawyer from being employed by a member of the South Carolina Bar as a paralegal or in any other capacity connected with the law.

Cooperation with Disciplinary Counsel

ODC states that, under best information and belief, respondent has fully cooperated with its inquires. ODC further states respondent has not been previously sanctioned nor found to have committed professional misconduct.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.2(c) (lawyer may limit the objectives of the representation if the client consents after consultation); Rule 1.5(a) (lawyer's fee shall be reasonable); Rule 1.15(a) (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 5.3(a) (a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer employee or associate's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(b) (lawyer having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(c) (lawyer shall be responsible for conduct of a non-lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if either the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct

involved or the lawyer is a partner in the law firm in which the non-lawyer is employed, or has direct supervisory authority over the non-lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action); Rule 5.4(a) (a lawyer or law firm shall not share legal fees with a non-lawyer); Rule 5.4(b) (lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits his misconduct constitutes a willful violation of Rule 417, SCACR. Finally, respondent admits he violated Rule 7 of Rule 413, RLDE, by attempting to gain employment as a paralegal during his interim suspension. See Rule 34, RLDE.

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent's request that the disbarment be made retroactive to the date he was placed on interim suspension is denied.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Angus, Appellant,

v.

Burroughs & Chapin Co., Myrtle Beach Herald, Doug Wendel, Pat Dowling, Deborah Johnson, Chandler C. Prosser, Marvin Heyd, Chandler Brigham, and Terry Cooper, Respondents.

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

Opinion No. 3744
Heard September 9, 2003 – Filed February 9, 2004
Withdrawn, Substituted and Refiled May 12, 2004

AFFIRMED IN PART, REVERSED IN PART

L. Sidney Connor, IV of Surfside Beach, for Appellant.

Jerry Jay Bender and Robert L. Widener, both of Columbia; L. Morgan Martin, Linda Weeks Gangi and Michael W. Battle, all of Conway; Scott B. Umstead, Thomas C. Brittain and William Edward Lawson, all of

Myrtle Beach; and William C. Barnes, of Florence, for Respondents.

BEATTY, J.: Linda Angus appeals the circuit court'order granting summary judgment on her cause of action for civil conspiracy. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Linda Angus began employment with Horry County as its county administrator and chief operating officer on June 3, 1996. Her employment contract stated that she was "employed at the will" of the Horry County Council. The contract stipulated that Angus was to be given 365 days notice or 365 days severance pay in the event of a termination. On June 22, 1999, Horry County terminated her employment. Pursuant to the terms of the agreement, Angus was paid for 365 days and was extended the appropriate benefits.

On January 14, 2000, Angus filed a complaint against Burroughs & Chapin Co., Doug Wendel, Pat Dowling, Myrtle Beach Herald, Deborah Johnson, Chandler Prosser, Marvin Heyd, Chandler Brigham, and Terry Cooper ("the respondents"). Wendel and Dowling were employees of Burroughs & Chapin; Johnson was an employee of the Myrtle Beach Herald; Prosser, Heyd, Brigham, and Cooper were all Horry County Council members. Angus alleged numerous causes of action, including tortious interference with contractual relations, defamation, civil conspiracy, and unfair trade practices, all arising from the termination of her employment by Horry County. Specifically, Angus alleged that the respondents "conspired with numerous persons . . . to see that Angus was terminated from her employment as Horry County Administrator." And she alleged that the respondents did this to gain financial advantage and to avoid regulatory requirements.

After orders dismissing the causes of action for intentional interference with contractual relations, defamation, and unfair trade practices, the only remaining cause of action was for civil conspiracy. In an order dated November 28, 2001, the circuit court granted

summary judgment to all Respondents as to the civil conspiracy claims. Angus appeals.

STANDARD OF REVIEW

"Summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Dawkins v. Fields, 345 S.C. 23, 27, 545 S.E.2d 515, 517 (Ct. App. 2001) (citing Rule 56(c), SCRCP; Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000)). "Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts." Id. at 28, 545 S.E.2d at 517 (citing Piedmont Engineers, Architects & Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982)). "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." Id. at 28, 545 S.E.2d at 518 (citing Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 85, 502 S.E.2d 78, 81 (1998)). "Summary judgment should be invoked cautiously to avoid improperly denying a party a trial on the disputed factual issues." Id. (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

ANALYSIS

Angus argues the trial court erred in granting the respondents' motion for summary judgment as to the claim for civil conspiracy. We agree in part.

In South Carolina, "[a] civil conspiracy exists when there is (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage." Robertson v. First Union Nat. Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002) (citing Island Car Wash, Inc. v. Norris, 292 S.C. 595, 600, 358 S.E.2d 150, 152 (Ct. App. 1987)). "A civil conspiracy may, of course, be furthered by an unlawful act. … [but] an unlawful act is not

a necessary element of the tort. An action for conspiracy may lie even though no unlawful means are used and no independently unlawful acts are committed." Lee v. Chesterfield Gen. Hosp., 289 S.C. 6, 11, 344 S.E.2d 379, 382 (Ct. App. 1986). "A conspiracy is actionable only if overt acts pursuant to the common design proximately cause damage to the party bringing the action." Future Group, II v. Nationsbank, 324 S.C. 89, 100, 478 S.E.2d 45, 51 (1996) (citing Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981)).[1]

In granting summary judgment, the trial court relied exclusively on Ross v. Life Ins. Co. of Va., 273 S.C. 764, 259 S.E.2d 814 (1979). There, plaintiff brought a wrongful termination action naming only his former employer. The plaintiff alleged that the former employer had conspired with others to terminate his employment. Our supreme court sustained the summary judgment for the former employer. The court reasoned that an "[at-will] employment contract [is] terminable at the will of *either party* . . . at any time for any reason or for no reason at all." Id. at 765, 259 S.E.2d at 815 (emphasis added).

Ross clearly holds that employers can fire at-will employees for any reason. Moody v. McLellan, 295 S.C. 157, 162, 367 S.E.2d 449 (1988). It also holds that an at-will employee cannot maintain an action against a former employer for civil conspiracy that resulted in the employee's termination. Mills v. Leath, 709 F. Supp. 671, 675 (D.S.C. 1988). The trial court was therefore correct to dismiss the action as to the four council members.

Angus claims that she was suing them not as council members, but in their capacity as individuals. That argument is unpersuasive. The employment agreement stated on its face that Angus served "at the will" of the Council. Clearly, the council members acted within their authority when they fired Angus and they cannot be sued for doing

[1] In Gynecology Clinic, Inc. v. Cloer, 334 S.C. 555, 556, 514 S.E.2d 592, 593 (1999), our supreme court clarified that "[i]n a conspiracy action, what is required is proof of the fact of damages, not certainty of amount."

what they had a right to do. See Antley v. Shepherd, 340 S.C. 541, 550, 532 S.E.2d 294, 298 (Ct. App. 2000) (holding that a county official was immune from liability in his individual capacity since that official acted within his authority in firing an employee who was serving at the will of the official), *aff'd as modified*, Antley v. Shepherd, 349 S.C. 600, 564 S.E.2d 116 (2002).

Angus's claim against Burroughs & Chapin, Wendel, Dowling, the Myrtle Beach Herald, and Johnson ("the remaining respondents") presents a different issue than the one addressed in Ross.[2] As demonstrated earlier, Ross, by its very language, applies only to the two parties involved in the at-will employment relationship. But the remaining respondents are neither. They are not Angus's former employers. As to them, the appropriate inquiry is whether an at-will employee can maintain an action for civil conspiracy against a third-party (other than the former employer) on the theory that the third-party's conspiracy caused the former employer to fire the employee. We believe that an at will-employee can maintain such an action. The at-will employment doctrine does not extend its protection to third parties.

Lee is instructive in this regard. In that detailed opinion, the Court sustained an action by a plaintiff physician assistant whose staff privileges had been curtailed by the hospital.[3] The plaintiff claimed that the hospital had conspired with others to limit the number of

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[2] The Myrtle Beach Herald and Deborah Johnson assert that the First Amendment protects them against an action for civil conspiracy since Angus was a civil servant. However, our supreme court has already rejected a similar argument. See Gynecology Clinic, 334 S.C. at 556, 514 S.E.2d at 592.

[3] That plaintiff was applying for "reappointment to the Hospital staff" but was not an employee of the hospital. See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 52, 533 S.E.2d 312, 323 (2000) (clarifying that medical staff "whose only connection to a particular hospital is that he or she has staff privileges" is not necessarily a hospital employee).

procedures he could perform "'to restrain and eliminate, for their own financial advantage and professional enhancement, the element of fair competition,'" to the plaintiff's financial and professional detriment. The hospital argued that the physician assistant had failed to state a cause of action since "a private hospital [was] free . . . to decide the nature and extent of medical practice permitted to persons it grants staff privileges." Id. at 9, 344 S.E.2d at 381. The Court disagreed. It ruled that the key issue was not the authority of a hospital to curtail staff privileges, but whether the decision was made "in furtherance of a conspiracy, the primary purpose of which was to injure the plaintiff." Id. The Court adopted the broad principle that a "combination of two or more persons willfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable." Id. at 13, 344 S.E.2d at 383. The Court made clear that a party can face liability even for an act "he was free to do," if that act was "done in furtherance of a conspiracy." Id. at 12, 344 S.E.2d at 383.

That analysis undercuts the interpretation of Ross offered by the remaining respondents. While Ross does foreclose actions against former employers, the remaining respondents go further. They insist that no action for conspiracy can lie against a third party if the employment is at-will. The underpinning of that argument, as Ross makes clear, is that parties cannot face liability for doing something they had a right to do. But as Lee explains, "'a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.'" (citation omitted). Id. Lee's holding is unambiguous: even a person or party who had the right to take a certain action can be liable if that action was taken as part of a conspiracy.[4] Here, there is not even an allegation that the remaining defendants had the legal right to conspire with the Horry County Council in an effort to harm Angus. Therefore, both Ross, which broadly protects former employers, and

[4] That holding would seem to be contrary to Ross, but we make no such determination.

Lee, which arguably weakens that protection, are unavailing to the remaining defendants.

Other jurisdictions have adopted similar principles. The Georgia Court of Appeals ruled in favor of an attorney who had sued a railroad company because the railroad company had "induced the [attorney's] client, and conspired with him" to fire the attorney. Studdard v. Evans, 135 S.E.2d 60, 64 (Ga. Ct. App. 1964). As a result, the attorney was forced to withdraw from the case. The railroad company argued that the attorney did not state a cause of action because the client was free to fire him at any time. The court rejected the argument. The court held that "the fact that employment is at the will of the employer, [does] not give immunity to a third person who, without justification, interferes with the relation between the parties to the contract." Id.

North Carolina reached a similar conclusion in Smith v. Ford Motor Co., 221 S.E.2d 282 (N.C. 1976). There, the court first defined an "outsider" as "one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof." Smith, 221 S.E.2d at 292. Then the court explained:

> The question presented to us by this appeal is: If A, knowing B is employed by C under a contract terminable at will by C, maliciously causes C to discharge B, which C would not otherwise have done . . . can B maintain in the courts of this State an action against A for damages? Our conclusion is that he can.

Id. at 290.

These facts are similar if not identical to those alleged by Angus. If the remaining respondents maliciously caused Horry County to discharge Angus, assuming that Angus was able to continue performing

her job well – then the answer is yes, Angus can bring an action against them.[5]

As stated earlier, the trial court in the current case relied on Ross in reaching its conclusion. Ross in turn cites Kirby v. Gulf Oil, 230 S.C. 11, 94 S.E.2d 21 (1956) as its authority for the principle that "a conspiracy may not be based upon an act done in the exercise of a legal right." Ross, 273 S.C. at 765, 259 S.E.2d at 815. Kirby cites McMaster v. Ford Motor Co., 122 S.C. 244, 115 S.E. 244 (1921) and Howle v. Mountain Ice Co., 167 S.C. 41, 165 S.E. 724 (1932). But any reliance on Ross and those cases is misplaced. Kirby, McMaster and Howle are all easily distinguishable from Angus's claim, for there is no third party involvement in those cases.

Kirby involved real estate. Kirby had a month-to-month lease on a gas station, but Kirby's landlord, Whitlock, terminated the lease, causing Kirby to lose the business. Kirby sued, alleging Whitlock, Gulf Oil, and Whitlock's son conspired to take his gas station. The supreme court dismissed the case, holding that "a conspiracy may not be based upon an act done in the exercise of a legal right." Kirby, 230 S.C. at 27, 94 S.E.2d at 27. The court found that Whitlock, Sr., had terminated the lease for his own reasons, without any prompting from anyone. Neither Whitlock's son nor Gulf Oil had played an active role in Kirby's ruin. In other words, there was "no evidence showing a conspiracy between Whitlock, Sr., and Gulf." Id.

McMaster, too, is easily distinguished from this case. In McMaster, the issue revolved around a party's right to determine with whom to conduct business. McMaster sued Ford and Ford's dealers because Ford would not use and would not allow its dealers to use McMaster's products on Ford-manufactured automobiles. Since the dealers were Ford's agents, no independent third party was involved. See Todd v. S.C. Farm Bureau, 283 S.C. 155, 164, 321 S.E.2d 602, 607 (Ct. App. 1984) (citing Muller v. Stromberg, 427 So.2d 266 (Fla. Dist. App.

[5] Angus had been employed for about three years at the time and had received excellent evaluations.

1983) (ruling that an officer or agent of a corporation acting for or on behalf of the corporation is not a third party)). In dismissing the action, the McMaster court explained that "[w]hile there is some difference of opinion, the weight of authority is in favor of the general proposition that an act done in the exercise of a legal right cannot be treated as wrongful and actionable merely because a malicious motive prompted the exercise of the right." McMaster, 122 S.C. at 246, 115 S.E.2d at 246. But that general principle protects only a person directly involved in the underlying relationship, *not* a third party.[6]

Moreover, the McMaster court relied secondarily on the absence of an unlawful act and of an unlawful means. The court reasoned that the allegation of conspiracy was of no import "in the legal consequences, because…[the] defendants did nothing unlawful and resorted to no unlawful means to accomplish their purpose." Id. at 247, 115 S.E.2d at 247. However, as indicated earlier, an unlawful means and unlawful act are required elements of a criminal, not civil, conspiracy. An action for civil conspiracy may exist even though no unlawful means were used. See LaMotte v. Punch Line, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988); Lee, 289 S.C. at 11, 344 S.E.2d at 382.

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[6] Even in cases involving the former employer, South Carolina courts and others have placed some limitations on the power to terminate at-will employees. See, e.g., Ludwick v. Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) (recognizing a public policy exception to the doctrine of at-will employment, reasoning that "[w]here the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises); Bd. of County Commrs. v. Umbehr, 518 U.S. 668, 685 (1996) (holding that the First Amendment protects independent contractors from termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of freedom of speech); Haddle v. Garrison, 525 U.S. 121, 126 (1998) (holding that a fired at-will employee did suffer an "injury in his person or property" within the meaning of § 1985(2), reasoning that common law had long offered a remedy for such losses).

Finally, in Howle, the plaintiff sued the defendants, alleging they conspired to eliminate competition in the ice business. Even while sustaining a dismissal of the action, the supreme court clarified its position:

> [A]s to conspiracy, [the principle] that two or more may lawfully do, under agreement and regardless of purpose or motive whatever one may lawfully do singly … *is not* the majority view or that of this court. We *should not* be understood as holding that under no circumstances can an act resulting in damage, when done by two or more pursuant to an agreement, be actionable if a like act, when done by one alone, would not be actionable. The decision here is based solely … upon the insufficiency of the evidence to show an agreement between the defendants … the gravamen of the charge.

Id. at 47, 165 S.E. at 729, *aff'd on reh'g*, (emphasis added).

In the current case, the remaining respondents argued, and the trial court accepted, that "[s]ince Mrs. Angus' employment was terminable at will, she has no cause of action for civil conspiracy." That conclusion is excessively broad. In Lee, the Court pointedly rejected the notion that "liability for the tort of conspiracy cannot be grounded on a lawful act." 289 S.C. at 12, 344 S.E.2d at 382.

The United States Supreme Court had reached a similar conclusion much earlier in Truax v. Raich, 36 S.Ct. 7, 9 (1915):

> It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. *The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of*

> *others.* The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, *the unjustified interference of third persons is actionable although the employment is at will*.

(emphasis added).

CONCLUSION

Its ruling notwithstanding, Ross does not control the current case. The facts as alleged here place the remaining respondents squarely at the heart of the conspiracy. The theory of the case is not that Horry County decided to fire Angus, but rather that *the remaining respondents* decided to "get rid of" Angus and induced Horry County to fire her. The trial court erred in concluding that, as a matter of law, a cause of action for civil conspiracy against a third party cannot lie in a case involving the termination of an at-will employee.

Based on the foregoing, the trial court's order is **AFFIRMED** as to the council members and **REVERSED** as to the remaining respondents.[7]

HUFF, J., and CURETON, A.J., concur.

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[7] The respondents raise numerous additional sustaining grounds. "[A] respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 226 S.E.2d 716, 723 (2000). However, "[i]t is within the appellate court's discretion whether to address any additional sustaining grounds." Id. The Court chooses not to address them as they have become largely moot.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael M. Pirayesh, Respondent/Appellant,

v.

Mary Alice Pirayesh, Appellant/Respondent.

Appeal From Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 3793
Heard March 10, 2004 – Filed May 11, 2004

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

J. Falkner Wilkes, of Greenville, for Appellant-Respondent.

Bobby H. Mann, of Greenville, for Respondent-Appellant.

HEARN, C.J.: Michael M. Pirayesh (Husband) and Mary Alice Pirayesh (Wife) were granted a divorce on the ground of one year's continuous separation without cohabitation. Husband was granted custody of

the parties' two children, but was prohibited from traveling with the children outside the United States. Wife was granted visitation rights and was ordered to pay child support. The parties were ordered to split the guardian ad litem fees and pay their own attorney's fees. Both parties appeal this order. We affirm in part, reverse in part, and remand.

FACTS

Husband, who was born in Iran, moved to the United States in 1978 and has since become a United States citizen. On June 11, 1984, he and Wife married. The parties had two children during their marriage, a son, now fifteen years old, and a daughter, now thirteen years old. Although Wife and children have always lived together in Greenville, South Carolina, Husband worked for six months in Portland, Oregon in 1996 and thereafter in Atlanta, Georgia until 1998. At the time of the divorce hearing in March 2001, Husband had obtained a job in Charlotte, North Carolina, and had been living there for approximately one year. The children resided with Wife during the couple's one year's separation as well as during the pendency of this litigation.

Husband claims the marital breakdown was a result of Wife's inability to handle the family finances and the accrual of a large amount of credit card debt. When asked if he and Wife tried to budget their money, Husband testified:

> Yes, we did. . . . Like for example, we said we don't have . . . certain money to spend on certain things. . . . [W]e said, if you are going to make a long distance phone call let's just keep it under a hundred dollars. . . . She did not follow that. As a matter of fact, I have one conversation that she had with her mom for a hundred and twenty minutes. My ear get[s] hurt after fifteen (15) minutes. . . . Grocer[ies] for example, you know. We bought grocer[ies]; that's fine. Half of the grocery throw away (sic). Either she burned it cooking or she didn't like to eat left over food.

Husband also testified that Wife had been un- or under-employed for much of the marriage despite the fact that she has always been in good health.

Wife contended that the failure of the marriage was largely a consequence of Husband's emotional and physical distance from her and the children, due namely to his out of town employment and his preoccupation with playing tennis. According to Wife, the couple's problems began when, on the day of their daughter's birth, Wife called Husband to inform him that their newborn had to be monitored because she had stopped breathing. Wife testified as follows:

> [T]hat evening I had fed Debra, she stopped breathing. And I tried to wake her up. And nothing was happening. . . . And I rang the nurse's station from the bed. . . . They came and they got her to start breathing again. I called [Husband and] told him what had happened. . . . It was probably 10 o'clock when I called back. And his response was, "[Wife], I was asleep." And he hung up.

Wife testified that Husband's response to their daughter's health problems made her "wonder[] what kind of man [she] had married" and that their marital problems only increased from then on.

Both parties sought custody of their two minor children. During the presentation of Husband's case, Husband and three witnesses testified on his behalf. The witnesses, all of whom knew Husband through his tennis hobby, testified that *both* Husband and Wife were loving parents. Husband testified that his primary reason for seeking custody was because, during the pendency of the litigation, the water in the Wife's home was cut off twice, the phone was disconnected five times, and the electricity was also turned off. He also complained that Wife was late dropping the children off to visit with him a number of times and that Wife did not effectively discipline the children while they were in her care. Husband felt he was the better parent because he

had a flexible job that paid $60,000 a year, he knew how to budget his money, and he could control the children.

During the presentation of Wife's case, seven witnesses testified that Wife was a good parent.[1] One of those witnesses was a neighbor who has lived next door to the couple for six years. The neighbor testified that he and his wife had to care for Wife after she had a hysterectomy because Husband was in Atlanta during the week and playing tennis on the weekend.[2] The neighbor also testified that Husband seemed volatile with the children. Another witness testified that she helped Wife with her daughter's birthday party, and at the party, Husband complained to the witness about Wife. The witness testified that Husband seemed "very alienated and angry."

Wife testified that, in addition to having primary custody of the children during the couple's separation, she had been the primary caretaker for the children during the marriage. In addition to Husband working out of state for two-and-a-half years, she claimed Husband played tennis five days a week, no matter what was going on in their children's lives.[3] She also testified that Husband gets agitated easily and that he was always critical of her and the children.

Wife testified that she has worked during most of the marriage and that the periods during which she was unemployed occurred when the children were newborns or when they were ill.[4] While she admitted that she had

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[1] Two of Wife's witnesses testified that Husband was a fine parent as well.

[2] After Husband testified on direct that Wife had no health problems, he was specifically asked on cross-examination about Wife's hysterectomy. Husband claimed he did not know she had one. Wife testified she had a hysterectomy in December of 1997, before the parties separated. Husband then returned to the stand on reply, recalled the hysterectomy, and claimed he took nine days off from work in order to care for her and the children.

[3] During Husband's cross-examination, he admitted playing tennis every other day during the marriage.

[4] The parties' son had ear problems when he was little and now cannot hear out of his right ear. Their daughter was born with three kidneys.

trouble paying the utilities during the parties' separation, she pointed out that she and Husband were having trouble paying their bills while they were a two-income family and that those problems were amplified during the separation. She further explained that she missed several days of work during the parties' separation when she severely burned her leg from her knee to her hip, which put a further strain on her finances.

On cross-examination, Wife was asked about counseling appointments the children had missed.[5] Wife explained that the December visit was rescheduled because the counselor was on vacation. Wife testified that she rescheduled the next visit because she was working with a woman who was nine-and-a-half months pregnant, and Wife felt she could not leave the woman alone. On the third attempted visit, Wife and children went to the office, but when they arrived, they found out that the fee had increased from ten to fifteen dollars; when Wife did not have the extra money, she was told she would have to reschedule. On the fourth attempt at rescheduling, the brakes on Wife's car went out on the way to the appointment.

Wife was also asked about why the parties' daughter had not had a psychological evaluation, as previously ordered by the family court, and why the daughter had missed three dentist appointments. Wife explained that she could not afford the psychological evaluation and Husband would not help her pay for it because he did not agree that the daughter needed to be evaluated. As for the missed dentist appointments, Wife claimed daughter had been ill.

In addition to custody of the children, another major issue was whether or not Husband would be allowed to travel with the children to Iran. When questioned about his desire to bring the children to Iran, Husband explained he wanted his children to visit his parents and other Iranian relatives. [6]

[5] The children had seen the counselor regularly from June 2000 to November 2000; however, at the time of the divorce hearing, they had not been to a session in four months.

[6] Husband's father is ninety-one years old; thus, travel by him to America is not feasible.

However, he stressed that he had no desire to relocate to Iran and said he wanted Wife to remain a major part of their children's lives.

According to Wife, Husband threatened on more than one occasion to move back to Iran and take the children with him. Wife offered the testimony of Christine Uhlman to show the inherent risks to children in travel to Iran, the specific risks of parent/child abduction in similar situations, and the lack of any legal remedy should this occur. Due to her extensive experience in this area, Uhlman was qualified by the court as an expert witness on child abduction in the Middle East and the remedies that might be available for people who find themselves in that predicament. The court found, however, that she did not have an adequate education or background to be qualified as an expert on the law of Iran, and limited her qualification to the topics listed above.

The family court also heard the guardian ad litem's final report concerning Husband's travel outside of the United States and custody of the two children. The guardian testified that she believed Wife's fears that Husband would abduct and relocate the children were baseless, but acknowledged that travel restrictions may nevertheless be warranted. She also testified to some psychological, social, and physical problems of both the children and her perception that these problems were not being adequately addressed. The guardian was also troubled by Wife's apparent inability to meet the basic health and day-to-day living needs of the children. In her opinion, Husband appeared to be in a better position to meet these needs and it was therefore in the best interests of the children to grant him custody. The guardian made this recommendation to the court.

The family court followed the guardian's custody recommendation, granting Husband custody of both children and granting Wife standard visitation rights. The family court also prohibited Husband from taking the children out of the United States. The parties were ordered to pay for their own attorney's fees, and the cost of the guardian was split between them. Both parties appeal this order.

ISSUES ON APPEAL

I. Was the guardian's recommendation the product of an independent, balanced, and impartial investigation?

II. Did the family court err in its reliance on the guardian's recommendation in determining custody of the children?

III. Did the family court err by requiring each party to pay half of the guardian ad litem's fees?

IV. Did the family court err by ordering the parties to pay their own attorney's fees and costs?

V. Did the family court err by restricting Husband from traveling outside of the United States with the children?

VI. Did the family court err in the apportionment of the marital debt?

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App. 1999). This court, however, is not required to disregard the family court's findings; nor should we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999); Smith v. Smith, 327 S.C. 448, 453, 486 S.E.2d 516, 519 (Ct. App. 1997). Because the appellate court lacks the opportunity for direct observation of witnesses, it should give great deference to the family court's findings where matters of credibility are involved. Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001); Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). This is especially true in cases involving the welfare and best interests of children. Id.; see also Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978)

(stating that the welfare and best interests of children are the primary, paramount, and controlling considerations of the court in all child custody controversies).

LAW / ANALYSIS

Wife challenges the custody order by arguing: (1) that the guardian's recommendation to the court was a product of an incomplete and biased investigation; and (2) that the family court improperly relied on the guardian's recommendation. We agree.

I. Was the guardian's recommendation the product of an independent, balanced, and impartial investigation?

In Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001), the Supreme Court of South Carolina set the base line standards for the responsibilities and duties of a guardian ad litem. Foremost in the court's list of duties, the guardian shall:

> …conduct an **independent, balanced, and impartial** investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case.

Id. at 288, 555 S.E.2d at 390 (emphasis in original); see also South Carolina Private Guardian Ad Litem Reform Act, S.C. Code Ann. § 20-7-1549 (Supp. 2003) (codifying the Patel guidelines with more specificity, but only directly applicable to guardians ad litem appointed after January 15, 2003).

In Patel, the guardian's investigation reflected overwhelmingly favorable treatment toward the husband and negligible consideration of the wife's capacity to competently parent the children. For example, the

guardian contacted the husband's attorney nineteen times, but failed to contact the wife's counsel once. The guardian had frequent contact with the husband but minimal contact with the wife, and the guardian only met with the children when they were with the husband. The guardian even secretly listened in on phone conversations between husband and wife while visiting with the husband. Id. at 286, 555 S.E.2d at 388-89. The Patel court held that the actions and inactions of the guardian so tainted the decision of the family court that the wife was not afforded due process, and the court remanded the issue of custody to the family court. Id. at 286-87, 291, 555 S.E.2d at 389, 391.

We recognize that the case at hand is different from Patel in that Wife's argument stems, not from the guardian's incomplete investigation of her, but rather from the guardian's allegedly superficial investigation of Husband's parenting abilities. However, we believe the requirements set forth in Patel were meant not only to protect the parents who are the subjects of the guardian's investigation but also to ensure that the fate of a child's living arrangements does not rest in the hands of a guardian whose investigation is biased or otherwise incomplete. Thus, a parent, whether the focus of the guardian's investigation or largely ignored by the investigation, may appeal a custody decision if that parent believes the family court's order was tainted by the guardian's improper investigation.

Here, the guardian visited Wife's home several times to interview her and the children. However, there is no indication that she ever interviewed Husband and the children while they visited his home in Charlotte. Instead, she testified she met with him and the children at a McDonald's restaurant one time. She further testified that she went to Charlotte to view Husband's residence and the schools the children would attend if custody was changed and talked on one occasion to a college student who babysat the children during their two-week summer visitation with Husband.

The guardian testified that her recommendation was largely based upon the concerns of the children's counselor regarding counseling appointments they had missed and a psychological evaluation that had still not been scheduled for the parties' daughter. Apparently, the guardian blamed Wife

for the missed appointments and did not believe Husband had any responsibility to make sure these appointments were made. However, the record indicates that the counselor had sent a letter to both Husband and Wife about the missed counseling sessions. Furthermore, where Wife at least attempted to schedule a psychological evaluation, there was no evidence that Husband did anything to ensure that the evaluation was completed. On cross-examination, the guardian was asked:

> Q: [Y]ou have concerns too about the father . . . as far as your investigations?
> A: Right
> Q: But your concerns aren't listed necessarily on your report because you didn't mention them in your report that you had concerns that the father had not complied with the psychological evaluation for [the daughter], and not attended counseling, and not attended co-parenting counseling, and has also exposed the children as far as to more – that both parents have exposed the children to the divorce related issues. So those aren't reflected on your report on the second page that I was able to see?
> A: Right

When asked whether she wanted to explain why she had not mentioned Husband's shortcomings in her report, the guardian merely stated that she did not omit them for any particular reason and again pointed out that the children spent more time with Wife.

Additionally, the record indicates that the guardian was mistaken about some of the facts she reported to the family court. For instance, the guardian testified that the parties' daughter had nine absences from school, which contradicted Wife's testimony. However, at the hearing for reconsideration, the school verified Wife's assertion that daughter had five absences. While this mistake by the guardian appeared to be inadvertent, the guardian was adamant during her testimony that the daughter had four additional

unexcused absences.[7] Thus, the guardian's recommendation was at least partially biased because of her mistaken belief that the daughter had several unexcused absences while in Wife's care.

Based on the guardian's superficial investigation of Husband, her failure to hold Husband partially responsible for the children not attending counseling, and her over-reporting the number of absences daughter has had at school, we agree with Wife that the guardian's recommendation did not result from a fair and impartial investigation.

II. Did the family court err in its reliance on the guardian's recommendation in determining custody of the children?

In determining the best interest of the child in a custody dispute, the family court should consider several factors, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including the guardian, expert witnesses, and the children); and the age, health, and sex of the children. Patel, 347 S.C. at 285, 555 S.E.2d at 388. Rather than merely adopting the recommendation of the guardian, the court, by its own review of all the evidence, should consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child as well as all psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life. See Woodall v. Woodall, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996); Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994); Wheeler v. Gill, 307 S.C. 94, 99, 413 S.E.2d 860, 863 (Ct. App. 1992). When determining to whom custody shall be awarded, the court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration. Woodall, 322 S.C. at 11, 471

[7] In fact, the daughter did not have any unexcused absences. When questioning the guardian, Wife's attorney attempted to explain that the lower case "u's" on the daughter's attendance record denoted a tardy; however, the guardian stated: "Your eyes might be better than mine. I can't – I just see it as a U."

S.E.2d at 157 (1996); Ford v. Ford, 242 S.C. 344, 351, 130 S.E.2d 916, 921 (1963).

A key component of the supreme court's decision to remand the custody order in Patel was the fact that "the custody question was hotly contested, with no clear choice for custodial parent apparent from the testimony in the record." 347 S.C. at 286-87, 555 S.E.2d at 389. Since there were no substantial considerations made on record as to the issue of custody apart from the guardian's recommendation, the court refused to declare harmless the judge's reliance on a biased guardian's report. Id. Here, a total of ten witnesses (not counting the Husband, Wife, and the guardian) testified about each party's parenting abilities. All ten, three of whom were called by Husband, described Wife as a loving and caring mother. Five witnesses testified that Husband was a capable parent, but two specifically questioned his parenting ability.[8] Thus, aside from Husband, the guardian was the only witness who believed Husband was the better parent.

Because the family court obviously gave a great deal of weight to the guardian's recommendation, which we have found was based on a biased and incomplete investigation, we reverse the award of custody and remand the case for a new custody hearing.[9]

III. Did the trial court err by requiring Wife to pay half of the guardian's fees?

Wife next argues that the family court erred by requiring her to pay half of the guardian's fees because the guardian failed to conduct an independent, balanced, and impartial investigation. We reverse and remand this issue to the family court.

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[8] The parties' next-door neighbor testified that Husband seemed volatile with the children. Another witness described Husband as "very alienated and angry."

[9] Because we remand the issue of custody, we also remand the issue of attorney's fees and costs.

Section 20-7-1553(B) of the South Carolina Code (Supp. 2003) provides that a court-appointed guardian "is entitled to reasonable compensation, subject to the review and approval of the court." That subsection goes on to list the following factors to guide family courts when awarding guardian fees:

> (1) the complexity of the issues before the court;
> (2) the contentiousness of the litigation;
> (3) the time expended by the guardian;
> (4) the expenses reasonably incurred by the guardian;
> (5) the financial ability of each party to pay fees and costs; and
> (6) any other factors the court considers necessary.

While the ultimate work product of the guardian is not specifically listed under section 20-7-1553, it certainly qualifies as another factor "the court considers necessary." Thus, we remand this issue along with the issue of custody. Upon remand, the family court should consider the guardian's incomplete investigation, along with the other factors listed in section 20-7-1553, in determining the amount of fees owed to the guardian.

IV. Did the trial court err by restricting Husband from traveling outside of the United States with the children?

Husband first contends that the family court erred in restricting his travel with the children because the court wrongfully relied on testimony from Wife's expert that went beyond her qualification as an expert witness. We disagree.

Wife's expert witness was qualified by the court as an expert on child abduction in the Middle East and the remedies that might be available for people who find themselves in that predicament. The court went on, however, to limit that qualification to those precise topics and expressly held that she was not qualified as an expert on the law of Iran. Husband contends that her subsequent testimony on legal remedies for the recovery of abducted

children and the recognition of American passports in Iran was admitted in error as it overstepped the limitations of her qualification as an expert.

Permitting an expert witness to testify beyond the scope of his or her expertise can constitute reversible error. See Nelson v. Taylor, 347 S.C. 210, 218, 553 S.E.2d 488, 492 (Ct. App. 2001). We find, however, that the specific testimony at issue here fell within the expert's qualification. While the family court expressly found that the expert witness was not an expert in the law of Iran, certain issues relating to that law are so intertwined with the parameters of the expert's qualification as to be manifestly compounded. One would be hard pressed to discuss the remedies for child abduction in Iran without at least tangentially touching on the law of Iran. Therefore, we find that Wife's expert witness's testimony fell within that narrow area of Iranian law applicable to her qualification as an expert.

Second, Husband asserts error by the family court on the merits of the restriction itself. Citing cases from other jurisdictions which held that fear of abduction and lack of foreign remedy, without more, are an insufficient showing to reverse a family court on a custodial parent's right to travel with his children, Husband argues that the family court erred in limiting his right to leave the United States with his children. See Long v. Ardestani, 624 N.W.2d 405 (Wis. Ct. App. 2001) (finding that difficulty of obtaining the return of the child in the event of abduction is but one factor for a court to consider in imposing restrictions and deferring to the family court); Al-Zouhayli v. Al-Zouhayli, 486 N.W.2d 10 (Minn. Ct. App. 1992) (deferring to the family court's decision not to restrict travel despite threats of abduction and lack of Saudi remedies). We disagree with this argument as well.

The prevailing rule gleaned from the cases to which Husband cites is that appellate courts generally defer to a family court's decision regarding a parent's ability to travel with his or her children. We agree with the Wisconsin Court of Appeals that:

> We are satisfied that the standard of the best interests of the child, comprehensive as it is, permits a full consideration of concerns both about a parent's

> intention in abducting a child and about the lack of a remedy should that occur. We are also satisfied that there is no need to alter the deference appellate courts give to trial courts' decisions on a child's best interests in order to insure a full consideration of those concerns.

Long, 624 N.W.2d at 417-18.

At trial, Wife presented evidence of both specific threats by Husband to relocate the children to Iran as well as testimony concerning the inherent dangers in these types of situations. Testimony was also presented regarding the generalized dangers in travel with children born of Iranian descent to that country and the possibility that Husband could easily fly from another country into Iran if he was allowed to travel with the children outside the United States. Furthermore, even if Husband had every intention to return the children after their visit to Iran, if he were to become incapacitated while he and the children were there, Wife could do very little to retrieve the children. Based on the evidence regarding Husband's threats, the risks of abduction, and the lack of legal recourse in a country which is not a signatory to the Hague Convention, we affirm the family court order banning Husband from travel with the children outside the United States.

V. Did the family court err in the apportionment of the marital debt?

Husband argues the family court erred in not equally splitting the parties' debts between them. He contends that since all the debt was accrued during the marriage, the entirety of the debt should be split between the parties regardless of whose name it is in. We disagree.

Marital debt should be divided in accord with the same principles used in the division of marital property and must be factored into the totality of equitable apportionment. See S.C. Code Ann. § 20-7-472 (Supp. 2003); Jenkins v. Jenkins, 345 S.C. 88, 103, 545 S.E.2d 531, 539 (Ct. App. 2001); Thomas v. Thomas, 346 S.C. 20, 27, 550 S.E.2d 580, 584 (Ct. App. 2001). The apportionment of marital property is within the discretion of the family

court and will not be disturbed on appeal absent an abuse of discretion. Thomas v. Thomas, 346 S.C. 20, 27, 550 S.E.2d 580, 584 (Ct. App. 2001).

There are many factors which the family court may consider in the apportionment of marital property. On review, the appellate court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact that the appellate court may have weighed specific factors differently than the family court is irrelevant. Johnson v. Johnson, 296 S.C. 289, 300-301, 372 S.E.2d 107, 113 (Ct. App. 1988). In this review, our focus is on whether the family court addressed the statutory factors governing apportionment with sufficiency for us to conclude that the court was cognizant of these factors. Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996).

In its final order, the family court noted the income of each party, the absence of an alimony grant to Wife and her duty to pay child support, the sale of the marital residence, the tax benefits of the apportionment to each party, and the child custody arrangements. Because these specific findings of the family court comport with those considerations mandated by section 20-7-472, we are satisfied that the court was, in fact, cognizant of the statutory factors of marital apportionment when allocating the marital debt between the parties. Therefore, the family court acted within its discretion in ordering Husband to pay all debts held in his name.

CONCLUSION

For the foregoing reasons, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Shawn Pipkin, Appellant.

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

Opinion No. 3794
Submitted March 8, 2004 – Filed May 11, 2004

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

BEATTY, J.: Richard Shawn Pipkin was convicted of attempted first-degree burglary and sentenced to twenty years imprisonment, suspended on service of ten years confinement and five years probation. He appeals this conviction, claiming error by the trial court in disallowing testimony regarding the victim's alleged bias and denying his motion for a directed verdict. We affirm.

FACTS

Patsy Cribb and Pipkin began dating in November 1998. In March 1999, Pipkin moved into Cribb's apartment. By July, their relationship had become unstable and there were instances of physical abuse. Cribb moved out of the shared apartment in August.

In January 2000, Cribb moved into an apartment in the home of her sister and brother-in-law (Richardsons). After moving in with the Richardsons, Cribb began seeing Pipkin "occasionally."

According to Pipkin, he and Cribb began seeing each other four to five times a week and renewed the sexual aspect of their relationship after Cribb moved in with her sister.[1] Pipkin alleges he and Cribb arranged a method of entry whereby Pipkin would use one of two metal wires stashed on the porch to knock away the inside boards holding the doors in a locked position and let himself in. Pipkin stated that he utilized this method of entry about "twenty or thirty" times. Cribb denied any arrangement for Pipkin to visit her at this apartment.

Months after Cribb moved to the Richardsons' apartment, her relationship with Pipkin once again grew volatile. On September 13, 2000, there was an episode of physical abuse. Cribb obtained a restraining order against Pipkin barring him from any contact with her.

On October 27, 2000, Cribb went to a local bar and was talking with another man when Pipkin entered. Pipkin approached the two of them, threw

[1] Cribb's sister and Richardson forbade her to see Pipkin. Accordingly, he would sneak into the apartment to avoid being seen by them.

a drink in Cribb's face, and was escorted off the premises by the bar's bouncers.

Later that night, Pipkin drove to Cribb's apartment and parked down the street away from the apartment. According to Pipkin, he approached the apartment, knocked, and, because he could not tell if Cribb was home, attempted to enter using the wire method for entry as discussed above. While attempting to enter, Pipkin heard Richardson exiting the home. Richardson was aroused out of sleep by "scratching noises" under his bedroom window. Once Pipkin saw Richardson, Pipkin "eased off" and walked away from the doors. Pipkin fled to his truck and waited. Richardson inspected the home and found severe damage to both a downstairs window and a steel door (neither a part of the sliding glass doors). Richardson woke Cribb and the police were called. The police remained at the home for about two hours.

Cribb returned to her bed shortly after the police left. Soon thereafter, she heard metal wire beating against the sliding glass doors. She entered her sister's apartment through an internal stairwell and woke Richardson. The two of them inspected the home and found a metal rod stuck in the sliding glass door. Once again the police were called. This time they arrived with Pipkin, whom they had detained a few blocks from the home. One of Pipkin's shoes was found near the home. Metal rods were found in his truck which matched the type found lodged in the sliding glass door. Richardson positively identified Pipkin and claimed that Pipkin admitted to him his attempted entry into the house and offered to pay for the damages. Pipkin was arrested.

While being detained at the Georgetown Detention Center, Pipkin was transported to a dental clinic. Also on board was inmate Joseph Allen ("Allen"). Allen testified that he and Pipkin discussed Pipkin's case on the way to the dentist. He stated that Pipkin admitted to attempting the break-in for the purpose of killing Cribb if she was with another man. His testimony included several corroborating details of the events of October 27, 2000. He claimed that, prior to trial, he had discussed the facts of the case with no one but Pipkin.

Pipkin was released on bond pending trial with strict orders not to contact Cribb. Cribb, nevertheless, visited Pipkin's apartment to talk with him the Friday after his release. After this meeting, they again began having a secret love affair, meeting four to five times a week. During this rekindled relationship, there was another incident of severe physical abuse.

At some point, Cribb allegedly broke into Pipkin's trailer home and damaged some items. Cribb denied these allegations, but admitted at Pipkin's trial that she was jailed for the incident. The judge also allowed testimony from Pipkin's two brothers regarding this damage and Cribb's presence at the trailer at the time of the damage. During the examination of Pipkin's father, however, the judge sustained objections to similar testimony on the ground of relevance.

Pipkin was convicted on one count of attempted first-degree burglary. This appeal follows.

LAW / ANALYSIS

I. Did the trial court err in disallowing Pipkin to present evidence of the victim's bias?

Pipkin contends that the trial court erred in excluding the testimony of Pipkin's father in relation to the alleged break-in and resulting property damage caused by Cribb. He argues that, since this testimony would attack the credibility of a witness and show bias, it was relevant evidence and should have been admitted. We disagree.

Generally, the admission of trial testimony is within the discretion of the trial judge and, absent an abuse of this discretion and resulting prejudice, will not be reversed by a reviewing court. See State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995); State v. Hamilton, 344 S.C. 344, 355, 543 S.E.2d 586, 592 (Ct. App. 2001).

The initial determination a trial judge makes in deciding whether to admit testimony is its relevance to the case before the court. Relevant

evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469 (1984).

Even relevant evidence may be excluded on the grounds of its competency. See Hamilton, 344 S.C. at 355, 543 S.E.2d at 592. For instance, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. A trial judge's decision regarding the competency of testimony under this rule should be reversed only in exceptional circumstances and this court is obligated to give great deference to the trial court's judgment. Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-94. This decision to exclude evidence under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise. Id.

Regardless of whether the trial judge abused his broad discretion in excluding Pipkin's father's testimony, the error was harmless as the evidence was cumulative. See State v. Beckham, 334 S.C. 302, 319, 513 S.E.2d 606, 614 (1999) (opining erroneous exclusion of cumulative evidence is harmless). Pipkin sought to show Cribb's bias through his father's testimony that his father acquired an arrest warrant for Cribb's allegedly burglarizing and damaging his mobile home.

The jury heard testimony from multiple witnesses as to Cribb's alleged break-in and property damage to Pipkin's trailer. Although Cribb denied having damaged the trailer, she admitted that Pipkin's father had her arrested for this damage. Not only did Cribb testify regarding the damage to the mobile home, Pipkin's brothers testified to seeing Cribb attempting to break into the trailer, and seeing the resulting damage. Since allegations of Cribb's wrongdoing were previously presented to the jury, it was within the trial

judge's discretion to exclude Pipkin's father's testimony as cumulative. See Rule 403, SCRE. Even if excluded in error, the exclusion of evidence which would be merely cumulative to other evidence presented to the jury is harmless. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); State v. White, 353 S.C. 566, 575, 578 S.E.2d 728, 733 (Ct. App. 2003).

II. Did the trial court err in the denial of Appellant's motion for a directed verdict?

Because evidence was presented at trial showing that Cribb consented to his presence in her home, Pipkin claims that the elements of attempted burglary were not proven by the State and, therefore, his motion for a directed verdict should have been granted. We disagree.

In a motion for directed verdict, the trial court is concerned with the existence of evidence rather than its weight. State v. Spann, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983). This evidence is "viewed in the light most favorable to the State to determine whether there is *any* evidence, either direct or circumstantial which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced." State v. Creech, 314 S.C. 76, 83-83, 441 S.E.2d 635, 638 (Ct. App. 1994) (emphasis added).

In the case at bar, testimony was presented by both sides on the issue of consent. Pipkin testified to an agreement with Cribb whereby he could "break-in" to Cribb's apartment whenever he so desired. Cribb testified that there was no such agreement and that she had taken out a restraining order against Pipkin at the time of the attempted burglary. Nowhere in the record is evidence reflecting any specific consent to enter the apartment on the evening in question.

It is the duty of the trial judge, when ruling on a motion for a directed verdict, to submit the case to the jury when there is any substantial evidence, either direct or circumstantial, which reasonably tends to prove the defendant's guilt. State v. Brazell, 325 S.C. 65, 77, 480 S.E.2d 64, 71 (1997).

Since there was conflicting evidence presented on the issue of consent, the trial judge acted properly in denying Pipkin's motion and submitting the case to the jury.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

HEARN, C.J., and ANDERSON, J., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

The State of South Carolina, Respondent,

v.

Gary Thomas Hill, Appellant.

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

Opinion No. 3795
Heard January 14, 2004 – Filed May 11, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. Stephen Welch, of Greenwood, for Appellant.

Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, all of South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for Respondent.

CURETON, A.J.: Gary Thomas Hill appeals the circuit court's decision revoking his probation and sentencing him to seven years imprisonment. We affirm in part, reverse in part, and remand.

FACTS

On November 4, 1991, Hill was convicted of second-degree arson, second-degree burglary, malicious injury to personal property, driving under the influence (fourth offense), and criminal domestic violence (third offense). The judge sentenced Hill to twenty years imprisonment, suspended upon the service of ten years and five years probation. Hill was granted parole on July 28, 1996. His parole ended on February 25, 1997, and his probation began immediately thereafter. When the events that are the subject of this appeal took place, Hill had completed approximately four years and eight months of his probation.

On October 24, 2001, Hill's probation officer, Marshall Evans, received a call from the Department of Social Services ("DSS"). DSS informed Evans that it had reason to believe Hill possessed firearms and had been pointing them at his son. To further investigate this information, Evans called Hill and asked him to come to his office. Hill went to see Evans as requested on October 25, 2001.

Evans confronted Hill with the information received by DSS and asked whether he did in fact possess any weapons. Hill admitted that his son owned a .22 caliber rifle, which he had received for his birthday. Hill agreed to let Evans and other probation officers search his house for weapons, but the agreed upon search never took place.

While in Evans's office, Hill asked if he could get a drink of water. Evans agreed and accompanied Hill as he went into the hallway. After getting some water, Hill turned and headed down the hall towards the exit. Although Evans asked Hill to stop, he did not respond and instead proceeded out of the building where he locked himself in his car. Evans testified that at least three other probation officers were involved in trying to "chase" Hill down.

The officers surrounded Hill's car and attempted to gain entry. Despite the officers' commands to stop, Hill began to drive out of the parking lot notwithstanding the proximity of the officers to his car. At

this point, two of the officers opened fire on Hill's car. Hill's car was hit several times in numerous places including the rear window, the side window, the trunk, and the rear quarter panel. Hill received three gunshot wounds, one in the head and two in the back. Although the officers shot Hill three times, he never stopped his car. He was arrested some time later while seeking treatment at a hospital.

Hill hired attorney James Brislane to represent him at the probation revocation hearing. On November 1, 2001, Brislane filed motions under Rule 5, SCRCrimP, and Brady v. Maryland.[1] Hill asserts on appeal these motions were filed to determine exactly what happened on the day of the incident. Hill believed he was entitled to the following: (1) the names of witnesses that supported his version of the incident; (2) written statements of the probation agents; (3) Anderson City Police Department investigative materials; and (4) the South Carolina Law Enforcement Division ("SLED") report.

On November 11, 2001, Brislane moved for a continuance of the probation revocation hearing. At the hearing on the motion, the court informed Brislane that because the probation and parole department's records were confidential,[2] neither a Rule 5 motion nor a Brady motion were appropriate for obtaining the requested information. The court

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[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] Although the judge did not reference the specific statute, he was apparently relying on section 24-21-290, which provides:

> All information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director.

S.C. Code Ann. § 24-21-290 (Supp. 2003).

instructed Brislane to find the statute applicable to the parole department's records and to serve the appropriate motion on counsel. The court also informed Brislane it would hear the motion once correctly made.

The record does not disclose any motions made according to the court's instructions prior to the probation revocation hearing, which was held on December 21, 2001. Neither the SLED report outlining the investigation of the incident nor the Anderson Police Department's report was furnished to Hill or his counsel prior to the hearing.

At the revocation hearing, the circuit court and Brislane agreed the key issue was not whether Hill violated his probation, but whether he violated his probation willfully.[3] All of the officers involved in the incident testified at the hearing. The majority of the testimony presented consisted of the officers' assertions that Hill intentionally tried to run them over during his escape. On cross-examination of each witness, Brislane tried to discredit the idea that Hill intentionally attempted to harm the officers. However, at the conclusion of the hearing, the court revoked Hill's probation and sentenced him to seven years imprisonment.

Following the revocation hearing, Hill hired Beattie Ashmore to represent him. Ashmore filed a motion to reconsider on December 28, 2001. In the motion, Ashmore asked the court to reconsider the ruling based on the fact that the SLED report investigating the incident was not complete and the report contained mitigating information.

After filing the motion to reconsider, Ashmore made several additional motions in an attempt to obtain the SLED report. These

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[3] Because the Department did not attempt to revoke Hill's probation on a failure to pay fees, a finding of willfulness was not necessary for the court to determine whether to revoke Hill's probation. See State v. Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999) ("It is only when probation is revoked *solely* for failure to pay fines or restitution that a finding of willfulness is mandatory.").

motions included a motion to produce, another motion pursuant to Rule 5, SCRCrimP, and another Brady motion. Ashmore also served subpoenas on SLED and the Anderson County Solicitor's Office. Due to these efforts, Hill received the SLED report prior to the hearing on the motion to reconsider.

At the hearing, the circuit court asked Ashmore whether he was proceeding under Rule 28 or Rule 29, SCRCrimP.[4] After a brief colloquy, the court informed counsel that he could not proceed under both so he would have to elect. Ashmore chose to proceed under Rule 29. Relying on the information in the SLED report, Ashmore presented evidence that countered the probation officers' assertions that Hill intentionally tried to hit them with his vehicle.

In an order dated July 3, 2002, the court denied Hill's motion on the ground that he failed to meet the five elements required to support the award of a new trial based on after-discovered evidence. Specifically, the court ruled that even considering the additional evidence presented, the outcome would not change if a new hearing were permitted. As such, the court upheld its previously imposed sentence of seven years. Hill appeals.

STANDARD OF REVIEW

The determination of whether or not to revoke probation is within the trial court's discretion. State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct. App. 2001). "[B]efore revoking probation, the circuit judge must determine if there is sufficient evidence to establish the probationer has violated his probation conditions." State v. Lee, 350 S.C. 125, 131, 564 S.E.2d 372, 375 (Ct. App. 2002). "This court's

[4] Rule 28 provides that a defendant "shall not be permitted to submit any affidavit to the court which goes to deny matters of fact, but he may submit affidavits as to matters in extenuation and mitigation." Rule 28, SCRCrimP. Rule 29(b) provides for a new trial based on after-discovered evidence. Rule 29(b), SCRCrimP.

authority to review such a decision is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious." State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999); see State v. Brown, 284 S.C. 407, 410, 326 S.E.2d 410, 411 (1985) (holding judges are "allowed a wide, but not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy").

DISCUSSION

I. Brady and Rule 5 Motions

Hill argues the circuit court erred by not requiring the State to produce the information requested through the Rule 5 and Brady motions prior to the probation revocation hearing.

"The rules encompassed in Brady, and its progeny, and Rule 5 are separate and impose different duties. Therefore, separate analysis must be used to determine if either has been violated." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999).

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). "This rule applies to impeachment evidence as well as exculpatory evidence." Id.

"The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings." State v. Proctor, 348 S.C. 322, 330, 559 S.E.2d 318, 322 (Ct. App. 2001), rev'd on other grounds, Op. No. 25810 (S.C. Sup. Ct. filed Apr. 19, 2004)(Shearouse Adv. Sh. No. 16 at

34). Although Hill's counsel proceeded under several provisions of Rule 5, the primary subsection was Rule 5(a)(1)(C). This subsection provides:

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Rule 5(a)(1)(C), SCRCrimP.

"The definition of 'material' for purposes of Rule 5 is the same as the definition used in the Brady context." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220. "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

The application of the discovery rules in the context of a probation revocation hearing is a novel issue in this state. Although our appellate courts have found the rules to be applicable in "criminal proceedings," the specific types of criminal proceedings have not been defined. See Kennerly, 331 S.C. at 453, 503 S.E.2d at 220 ("The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings."); see also Rule 5, SCRCrimP (titled "Disclosure in Criminal Cases"). The text of Rule 5 and the theoretical underpinnings of Brady appear to suggest that these disclosure rules are only applicable in criminal trials. In this state, however, these rules have not been so limited.

Aside from trial proceedings, our research reveals these rules have been extended to apply to guilty plea and sentencing proceedings. See Gibson, 334 S.C. at 525, 514 S.E.2d at 325 ("The standard for deciding the materiality of a Brady violation in the context of a guilty plea is a novel issue in South Carolina. We adopt the standard applied by other courts, which essentially is the same standard that is applied in the context of a trial: A Brady violation is material when there is a reasonable probability that, but for the government's failure to disclose Brady evidence, the defendant would have refused to plead guilty and gone to trial."); State v. Gulledge, 321 S.C. 399, 402, 468 S.E.2d 665, 667 (Ct. App. 1996) (discussing and implicitly recognizing the application of Rule 5 and Brady in the context of sentencing proceedings), aff'd as modified, 326 S.C. 220, 487 S.E.2d 590 (1997). The application of these two rules is not, however, without limitation. See State v. McCoy, 285 S.C. 115, 116, 328 S.E.2d 620, 621 (1985) (declining to apply Brady in the context of a family court transfer hearing given the hearing was not a trial and was not a preliminary determination of guilt).

In order to determine whether these disclosure rules apply to a probationer, we find it instructive to consider two United States Supreme Court decisions analyzing the due process requirements for parole and probation revocation. See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

In Morrissey, the United States Supreme Court considered whether the Due Process Clause of the Fourteenth Amendment required the State to afford an individual some opportunity to be heard prior to the revocation of his parole. Id. at 472. In answering this question, the Court first considered the "function of parole in the correctional process." Id. at 477. Because "the revocation of parole is not part of a criminal prosecution," the Court concluded, "the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." Id. at 480. The Court did, however, find that a parolee is entitled to due process to a limited extent.

Specifically, the Court held that after arrest a parolee is entitled to a preliminary hearing "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." Morrissey, 408 U.S. at 485. Additionally, the Court found the parolee was also entitled to a revocation hearing during which he would have "an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." Id. at 488. In terms of the specific procedural requirements for due process, the Court listed several, including: disclosure to the parolee of evidence against him; the right to confront and cross-examine adverse witnesses; a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole. Id. at 489.

The next year, the United States Supreme Court extended the analysis in Morrissey to hold that a probationer is also guaranteed due process. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Court concluded, "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." Id. at 782. The Court explained, "a probationer can no longer be denied due process" on the ground that "probation is an 'act of grace.'" Gagnon, 411 U.S. at 782 n.4.

In light of this precedent, we must determine whether a probationer facing revocation is entitled to discovery based on these due process rights. State courts are divided on this issue.[5] See Bobbi J.

[5] Although there also appears to be a division among federal courts as to whether Brady is applicable to probation revocation hearings, we focus our analysis on state court decisions given Rule 32.1(b)(2) of the Federal Rules of Criminal Procedure specifically outlines the procedure governing revocation hearings. See United States v. Dixon, 187 F. Supp. 2d 601, 602-03 (S.D.W.Va. 2002) (discussing federal courts which have questioned whether Brady is applicable in the revocation context); Fed. R. Crim. P. 32.1(b)(2) ("Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within

Anello, Annotation, Availability of Discovery At Probation Revocation Hearings, 52 A.L.R. 5th 559 (1997 & Supp. 2003) (analyzing cases in which the courts have considered the availability of discovery to probationers at their revocation hearings). As discussed in the above-referenced article, there are primarily two grounds for which discovery is permitted in probation revocation cases.

Some jurisdictions have adopted the view that discovery in revocation proceedings is permissible based on a constitutional due process right. The courts in these cases have followed the reasoning outlined in Morrissey and Gagnon. See, e.g., Kanuck v. Meehan, 798 P.2d 420 (Ariz. Ct. App. 1990); People v. Boykin, 631 P.2d 1149 (Colo. Ct. App. 1981); Hines v. State, 358 So. 2d 183 (Fla. 1978); Piper v. State, 770 N.E.2d 880 (Ind. Ct. App. 2002); Reiter v. Camp, 518 S.W.2d 82 (Mo. Ct. App. 1974); People v. Adams, 367 N.Y.S.2d 67 (N.Y. App. Div. 1975). The jurisdictions that have rejected this concept do so on the theory that if a criminal defendant does not have a constitutional right to discovery, then a probationer should not be entitled to greater rights than a defendant at trial. See, e.g., Irby v. State, 455 So. 2d 271 (Ala. Crim. App. 1984); People v. King, 152 Cal. Rptr. 566 (Cal. Dist. Ct. App. 1979); State v. Hass, 758 P.2d 713 (Idaho Ct. App. 1988); People v. DeWitt, 397 N.E.2d 1385 (Ill. 1979); Commonwealth v. Quinlan, 380 A.2d 854 (Pa. Super. Ct. 1977), aff'd, 412 A.2d 494 (Pa. 1980).

Taking a different approach, some jurisdictions have held that state criminal discovery rules, comparable to our Rule 5, are applicable in probation revocation hearings. See, e.g., State v. Quelnan, 767 P.2d 243 (Haw. 1989); State v. Barton, 803 P.2d 1020 (Idaho Ct. App.

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a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; and (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.").

1991). In contrast, a number of jurisdictions have rejected this view on the ground that a probation revocation hearing is not a "criminal trial" and, thus, the criminal rules of discovery are inapplicable. See, e.g., Poole v. State, 306 S.E.2d 394 (Ga. Ct. App. 1983); People v. DeWitt, 397 N.E.2d 1385 (Ill. 1979); People v. Mitchell, 607 N.Y.S.2d 417 (N.Y. App. Div. 1994); State v. Gedutis, 653 A.2d 761 (Vt. 1994).

Given our appellate courts have extended the application of Brady and Rule 5 beyond criminal trial proceedings, we are persuaded by those jurisdictions that have applied Brady and state criminal discovery rules in probation revocation proceedings. As previously discussed, these disclosure rules have been applied in sentencing proceedings and guilty plea proceedings. Thus, the fact that a probation revocation hearing is not the equivalent of a "criminal trial" is not dispositive. See State v. Franks, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981) (A "probation revocation proceeding is not a criminal trial . . . but a more informal proceeding with respect to notice and proof of the alleged violations."). Similar to a sentencing or guilty plea proceeding, a probation revocation hearing involves a determination of "guilt," i.e., whether a probation violation has occurred, as well as an imposition of a sentence. As such, we discern no reason to restrict the application of the due process requirements of Brady in this setting. See Huckaby v. State, 305 S.C. 331, 335 n.1, 408 S.E.2d 242, 244 n.1 (1991) (recognizing constitutional rights are available to probationer). Moreover, even though the text of Rule 5 refers to trials, the heading of the rule includes "criminal cases" and provides for disclosure of information that is "material to the preparation" of the defense. Furthermore, there is no apparent statutory restriction placed on disclosure. In fact, the statute that the circuit court relied on in this case to restrict discovery permits the court to order disclosure of material obtained by a probation agent. S.C. Code Ann. § 24-21-290 (Supp. 2003).

Our decision should not, however, be translated into unlimited discovery for a probationer. See State v. Mixon, 275 S.C. 575, 582-83, 274 S.E.2d 406, 409 (1981) ("Brady does not speak in terms of creating rights to discover, but rather determined that suppression by the

prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment."). Instead, we agree with those jurisdictions that permit "reasonable" discovery. See Bobbi J. Anello, Annotation, Availability of Discovery At Probation Revocation Hearings, 52 A.L.R. 5th 559, 587 (1997 & Supp. 2003); see, e.g., Kanuck v. Meehan, 798 P.2d 420 (Ariz. Ct. App. 1990); Cuciak v. State, 410 So. 2d 916 (Fla. 1982); State v. DeBorde, 915 P.2d 906 (N.M. Ct. App. 1996). Although the parameters of "reasonable" discovery are difficult to outline, at least one jurisdiction has explained "[t]he trial court has the inherent power to decide what is reasonable discovery in a probation revocation proceeding. . . . At the very least a probationer is entitled to the name and identification of his accusers and other basic information that is reasonably necessary to the preparation of his defense." Cuciak, 410 So. 2d at 918.

Applying the foregoing analysis to the instant case, we find the trial court erred as matter of law in ruling that Brady and Rule 5 did not apply to Hill's probation revocation proceeding. Moreover, we reject the Department's position that it was unable to comply with these rules because it is a separate entity from SLED and the Anderson County Solicitor's Office, the departments that had direct access to the requested documents. Even if the information was not in the possession of the Department, Brady and Rule 5 still required disclosure to Hill. See Kennerly, 331 S.C. at 452, 503 S.E.2d at 220 (The Brady disclosure rule "extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf."); Id. at 453, 503 S.E.2d at 220 (Rule 5 "clearly applies to evidence within the actual possession of the prosecution and seems to also apply to evidence within the possession of other government agencies."); see also S.C. Code Ann. § 24-21-280(B) (Supp. 2003) ("A probation agent has the power and authority to enforce the criminal laws of the State. In the performance of his duties of probation, parole, community supervision, and investigation, he is regarded as the official representative of the court, the department, and the board."); cf. Morrissey, 408 U.S. at 480 ("Supervision [in a parole

case] is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive.").

Finally, the failure to disclose this evidence to Hill prior to the revocation hearing was not harmless. See Proctor, 348 S.C. at 334-35, 559 S.E.2d at 324-25 (applying harmless error analysis to State's failure to comply with Rule 5 and Brady). "For Brady purposes, in determining the materiality of nondisclosed evidence, an appellate court must consider the evidence in the context of the entire record. However, the court should not consider the sufficiency of the evidence. The court's function is to determine whether the appellant's right to a fair trial has been impaired." State v. Taylor, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998) (citations omitted).

Here, the requested documents were produced just prior to the hearing on Hill's motion for reconsideration. At that point in the procedure, the circuit court had ruled on the merits of the revocation without the benefit of all of the evidence. The fact that Hill was able to use the information at the reconsideration hearing did not remove the prejudice. Having already found Hill violated his probation and having imposed a sentence, we believe it would have been difficult for the court to be completely objective during the subsequent proceeding. Thus, we find the information was material and the failure to disclose it deprived Hill of a fair hearing. See People v. Mitchell, 607 N.Y.S.2d 417, 418 (N.Y. App. Div. 1994) (holding probationer was entitled access to prior statements of hearing witnesses regarding the subject of their testimony in order to afford him "a meaningful opportunity to conduct cross-examination" at his probation revocation hearing); see also State v. Cheeseboro, 346 S.C. 526, 553, 552 S.E.2d 300, 314 (2001), cert. denied, 535 U.S. 933 (2002) ("Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."); State v. Goodson, 276 S.C. 243, 247, 277 S.E.2d 602, 604-05 (1981) (stating, in discussing a Brady violation, "[w]hile we are not persuaded that this evidence necessarily exculpates appellant, we find that sufficient question has been cast upon conclusions reached in the

trial below to justify a reconsideration of the matter by a jury appraised [sic] of these new factors").

Because the definition of "material" is the same for analysis under Brady and Rule 5, we also find the failure to disclose the requested documents constituted a Rule 5 violation. "Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation." Proctor, 348 S.C. at 330-31, 559 S.E.2d at 322. Again, we find Hill was prejudiced by the late disclosure given he was unable to present this evidence and thoroughly cross-examine the witnesses. Accordingly, we remand for a de novo revocation hearing.

II. 42 U.S.C. § 1983

Hill argues the circuit court erred in offering to reduce his sentence if he would release any claims he may have pursuant to 42 U.S.C. § 1983. Hill asserts this suggestion came up during a discussion between the parties.

We, however, find the issue is not preserved for our review because the conversation is not included in the record on appeal. See York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (stating objection made in off-the-record conference not placed on record does not preserve the issue for review); see also Hundley v. Rite Aid of South Carolina Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct. App. 2000) (finding motions must be made on the record to be preserved for review by an appellate court).

III. Rules 28 and 29, SCRCrimP

Hill contends the circuit court erred by not allowing defense counsel to proceed simultaneously under both Rules 28 and 29, SCRCrimP.

At the beginning of the hearing on Hill's motion to reconsider, the court informed counsel he would have to choose between Rule 28 and Rule 29, as he could not proceed under both simultaneously. Defense counsel agreed and decided to proceed under Rule 29 for a new trial based on after-discovered evidence. Because counsel conceded this issue during the proceedings below, it is not preserved for our review. State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000), cert. denied, 530 U.S. 1209 (2000) (holding issue not preserved for appellate consideration where appellant conceded the issue at trial); TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) (issue conceded to the trial court cannot be raised on appeal).

IV. Burden of Proof under Rule 29, SCRCrimP

Hill further argues the circuit court erred in finding he did not meet the burden of proof under Rule 29(b), SCRCrimP for the grant of a new trial.

The denial of a new trial will not be reversed absent an abuse of discretion. State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993). To prevail on a motion for a new trial based on after-discovered evidence, it is necessary to show that the evidence: "(1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Id. at 507, 427 S.E.2d at 668-69.

Because we reverse and remand on Hill's issue involving Rule 5 and Brady, we need not address this issue. See Mixon, 275 S.C. at 582, 274 S.E.2d at 409 (comparing relief sought in Brady motion to motion for new trial on the ground of after-discovered evidence); see also State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999) (wherein the Supreme Court, because it reversed and granted a new trial on one issue, did not address other issues raised by appellant).

CONCLUSION

Based on the foregoing analysis, we find the disclosure rules of Brady and Rule 5 are applicable in probation revocation cases. As such, we reverse the circuit court's decision denying Hill access to this information prior to the revocation hearing and remand for a de novo revocation hearing. Finally, we affirm Hill's issues regarding 42 U.S.C. § 1983 and Rules 28 and 29 of the South Carolina Rules of Criminal Procedure.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Settlemeyer, Appellant,

v.

Katherine McCluney, Respondent.

Appeal From York County
John Buford Grier, Circuit Court Judge

Opinion No. 3796
Submitted December 8, 2003 – Filed May 11, 2004

AFFIRMED

Daniel J. Ballou, of Rock Hill; John Pressly Gettys, Jr., of Rock Hill; for Appellant.

George W. Speedy, of Camden; for Respondent.

HOWARD, J.: William Settlemeyer sued his daughter, Katherine McCluney, claiming ownership of four tracts of land in York County ("the properties") by an express, constructive, or resulting trust. The circuit court concluded no trust existed and McCluney was the legal and equitable owner of the properties. Settlemeyer appeals, arguing the circuit court erred by denying relief on his claim for: 1) an express trust; 2) a

constructive trust; and 3) a resulting trust. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Between March 1982 and January 1991, Settlemeyer purchased the properties. In each instance, he had the title issued in McCluney's name.

Subsequently, Settlemeyer filed a lawsuit, alleging the properties were held in an express, constructive or resulting trust, with McCluney as the trustee and Settlemeyer as the beneficiary.

At trial, Settlemeyer testified he voluntarily placed title of the properties in McCluney's name, admitting McCluney had not induced him to have the properties conveyed to her. Settlemeyer further testified he believed he and McCluney had an oral agreement in which he would purchase property and title it in McCluney's name, with the understanding that McCluney would later convey it to him. However, when specifically asked if there was "ever an agreement between [Settlemeyer] and [McCluney] that she would reconvey the property back to [Settlemeyer]," Settlemeyer stated, "It wasn't brought up. I trusted her to think she would deed it back to me." Additionally, Settlemeyer admitted he denied ownership of the properties during one of his divorce proceedings and during a Department of Health and Environmental Control investigation of one of the properties.

McCluney denied she and her father had an agreement in which she was to convey the properties to him but confirmed she did not pay the purchase price or property taxes for the properties. McCluney stated she believed the properties were gifts from Settlemeyer.

The circuit court found the Statute of Frauds barred finding an express trust existed. Additionally, the circuit court found the claim of a constructive trust failed because Settlemeyer did not prove McCluney acted fraudulently in the transaction. Furthermore, the circuit court found the claim for a resulting trust failed because Settlemeyer failed to rebut the presumption that the properties were given to McCluney as gifts.

Subsequently, in Settlemeyer's motion for reconsideration, Settlemeyer argued the circuit court erred by failing to address his part-performance argument concerning the express trust. Thereafter, the circuit court denied Settlemeyer's motion for reconsideration without addressing part performance. Settlemeyer appeals.

STANDARD OF REVIEW

"In an action in equity, tried by the judge alone, . . . this Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Stackhouse v. Cook, 271 S.C. 518, 521, 248 S.E.2d 482, 484 (1978).

LAW/ANALYSIS

I. Express Trust

Settlemeyer argues the circuit court erred by denying relief on his claim of an express trust. We disagree.

The statute of frauds requires that a declaration of an express trust of land must be in writing. S.C. Code Ann. § 62-7-101 (1987). However, "sufficient part performance of a parol contract for the conveyance of land will remove the contract from the statute of frauds." Stackhouse, 271 S.C. at 521, 248 S.E.2d at 483.

To compel specific performance of an oral agreement where part performance is alleged to remove the contract from the statute of frauds, a court of equity must find: 1) clear evidence of an oral agreement; 2) the agreement had been partially executed; and 3) the party who requested performance had completed or was willing to complete his part of the oral agreement. Gibson v. Hrysikos, 293 S.C. 8, 13-14, 358 S.E.2d 173, 176 (Ct. App. 1987).

Because both Settlemeyer and McCluney testified no written document existed governing conveyance of the properties between the parties, we only

address the issue of part performance.

At trial, McCluney denied an oral agreement existed between the parties in which she was to convey the properties to Settlemeyer. Furthermore, although Settlemeyer testified he thought such an agreement existed between the parties, he stated the parties did not orally express this agreement. Rather, he testified he trusted McCluney to act as he desired.

Based on our review of the evidence contained in the record, we hold Settlemeyer did not present clear evidence of an oral agreement between the parties. See Gibson, 293 S.C. at 13, 358 S.E.2d at 176 (holding a court must find, among other things, clear evidence of the existence of an oral agreement for part performance to remove the contract from the statute of frauds).

Without the existence of an oral agreement, Settlemeyer cannot establish part performance of the alleged agreement. See Stackhouse, 271 S.C. at 521, 248 S.E.2d at 483 (holding sufficient part performance of an oral trust agreement is required to remove it from the statute of frauds). Thus, the circuit court did not err by denying Settlemeyer relief on his claim of an express trust.

The remaining issues are affirmed pursuant to Rule 220, SCACR and the following authorities: **As to Issue II:** Smith v. South Carolina Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct. App. 1999) ("In general, a constructive trust may be imposed when a party obtains a benefit 'which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.'" (quoting SSI Med. Servs. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990))); see All v. Prillaman, 200 S.C. 279, 308, 20 S.E.2d 741, 753 (1942) ("'The law will not permit a party to deliberately put his property out of his control for a fraudulent purpose, and then, through intervention of a court of equity, regain the same after his fraudulent purpose has been accomplished.'" (quoting Jolly v. Graham, 78 N.E. 919, 920 (Ill. 1906))).

As to Issue III: Bowen v. Bowen, 352 S.C. 494, 499, 575 S.E.2d 553, 556 (2003) (holding when real estate is conveyed to a child and consideration is paid by the parent, the presumption is that the purchase was a gift to the child, and thus, no resulting trust arises); Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 249, 489 S.E.2d 472, 476 (1997) (holding when real estate is conveyed to a child and consideration is paid by the parent, the parent has the burden of proving a gift was not intended); see also id. at 250, 489 S.E.2d 476 (holding when a parent purchases real property and titles it in the name of his child for the purpose of defrauding a third party, the parent cannot enforce a resulting trust).

CONCLUSION

For the foregoing reasons, the decisions of the circuit court are

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.