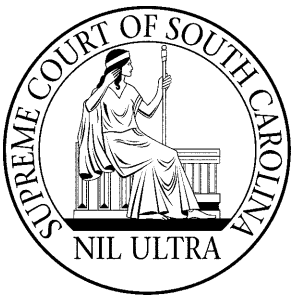

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

June 2, 2003

ADVANCE SHEET NO. 21

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carl B. Tucker and Eleanor Tucker, Plaintiffs,

v.

Honda of South Carolina Manufacturing, Inc., Pee Dee Electric Cooperative, Inc., Defendants,

of whom Pee Dee Electric Cooperative, Inc. is Petitioner,

and Carl B. Tucker, Eleanor Tucker, and Honda of South Carolina Manufacturing, Inc. are, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25657
Heard April 3, 2003 - Filed June 2, 2003

AFFIRMED

Pope D. Johnson, III, of McCutchen, Blanton, Rhodes & Johnson, of Columbia, for Petitioner.
Susan P. McWilliams, of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for Respondent Honda of South Carolina Manufacturing, Inc.

J. Lewis Cromer, of Cromer & Mabry, of Columbia, for Respondents Carl B. Tucker and Eleanor Tucker.

JUSTICE BURNETT: The Court of Appeals dismissed Pee Dee Electric Cooperative's ("Pee Dee") appeal as interlocutory. See Tucker v. Honda of South Carolina Mfg., Inc., S.C. Ct. App. Order dated January 22, 2002. We granted a writ of certiorari and affirm.

FACTS

Carl and Eleanor Tucker (the "Tuckers") deposed a former trustee of Pee Dee for a lawsuit against Pee Dee. Pee Dee objected to several questions based on attorney client privilege. The parties adjourned the deposition pursuant to Rule 30(d), SCRCP.

At a subsequent hearing, the trial court noted Pee Dee raised legitimate privilege concerns regarding communications between Pee Dee's board of trustees and legal counsel. To determine the exact nature of the representation and the applicability of the privilege, the court ordered the deposition of the former trustee under the following conditions: 1) the court would not limit the scope of questions; 2) Pee Dee could object on the record to any question; 3) the former trustee would answer all questions; 4) the court reporter would seal the deposition record and submit it to the trial court; and 5) the trial court would rule upon any objections and exclude any privileged information from the trial record. The trial judge, to protect the confidentiality of the proceeding, limited the attendance of the deposition to

the deponent, the deponent's counsel, the counsels of record, and the court reporter.

Pee Dee appealed. The Court of Appeals dismissed the appeal as interlocutory.

ISSUE

Did the Court of Appeals err by dismissing Pee Dee's appeal as interlocutory?

DISCUSSION

Pee Dee asserts the Court of Appeals erred in dismissing its appeal because the trial court's order determined a substantial matter involving the merits of the case. We disagree.

"Any intermediate judgment, order or decree in a law case involving the merits" may be appealed. S.C. Code Ann. § 14-3-330 (1976). The phrase "involving the merits" means the order "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993).

Pee Dee advances three arguments for its contention that the order involved the merits of the case. First, Pee Dee argues any order affecting attorney client privilege should be found to automatically touch upon the merits of the case. Second, Pee Dee asserts the unique facts of the case make it necessary for an appellate court to review the order. Third, Pee Dee believes the order impermissibly requires counsel to violate the Rules of Professional Conduct.

In addressing the Tuckers' first contention, we note an order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. See Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). Since a contempt order is final in nature, an order compelling

discovery may be appealed only after the trial court holds a party in contempt. See Hooper v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999). Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal. See Ex parte Whetstone, supra.

Pee Dee has not refused to comply with the order but appeals the mere issuance of the order. Pee Dee's appeal is interlocutory.

Second, Pee Dee expresses concern because the individual being deposed is a former trustee over whom Pee Dee has no formal control and who may disclose confidential communications without fear of reprisal.

The attorney client privilege belongs to the client and may only be waived by him. State v. Doster, 276 S.C. 647, 650-51, 284 S.E.2d 218, 219 (1981). The privilege belongs to the corporation, not a trustee of the corporation. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985). The current corporation's management must decide whether to assert the privilege or relinquish it. See id. If Pee Dee asserts the privilege, the former trustee may not ignore such assertions. More importantly, Pee Dee's concern is not a particularly unique situation leading this Court to abandon its policy of denying interlocutory appeals.

Finally, Pee Dee argues the trial court's order may be appealed because it requires counsel to violate the Rule 1.2 (a), (d) and Rule 1.4 of the Rules Professional Conduct, Rule 407 SCACR. We disagree.

Pee Dee believes barring the attendance of a company representative from and prohibiting counsel from divulging the contents of the deposition to anyone not attending the deposition requires the attorney to violate ethical duties to keep the client informed. The rules cited by Pee Dee, however, are intended to aid the attorney and client in understanding the scope of representation in terms of the objectives each party desires from the relationship. The requirement to keep a client informed does not supersede the lawyer's responsibility to comply with a specific court order to maintain

the confidentiality of a deposition pending court review. The trial court's order does not impermissibly bar the lawyer from consulting with his client.

Although Pee Dee's appeal is interlocutory in nature, we believe it is to the benefit of the Bench and the Bar that we clarify the procedure for review of claims of attorney client privilege. In such situations a trial judge shall be guided by the procedure established in State v. Doster, supra.

In Doster, this Court found a trial court should not require the disclosure of attorney client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication. Id. Further, if necessary to determine the application of the privilege, the trial judge may consider, in camera, the questions sought to be asked and the responses which are contended to be subject to the privilege.

In the event such in camera hearing is necessary, the trial judge shall limit attendance as required to ensure protection of the communication in the event it is found to be entitled to the protection of the privilege.

AFFIRMED.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Willie Cohen, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Beaufort County
Daniel E. Martin, Sr., Circuit Court Judge

Opinion No. 25658
Submitted April 23, 2003 - Filed June 2, 2003

AFFIRMED

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

Assistant Appellate Defender Eleanor Duffy Cleary, South Carolina Office of Appellate Defense, of Columbia, for respondent.

JUSTICE MOORE: We granted certiorari to determine whether the post-conviction relief (PCR) court erred by finding the plea court did not have subject matter jurisdiction to accept respondent's guilty plea to second degree criminal sexual conduct (CSC) with a minor. We affirm.

ISSUE

Did the plea court have subject matter jurisdiction to accept respondent's guilty plea to second degree CSC with a minor?

DISCUSSION

Respondent pled guilty to second degree CSC with a minor and was sentenced to imprisonment for six years. Respondent did not appeal. After a hearing on respondent's PCR application, the court found the plea court did not have subject matter jurisdiction to accept respondent's plea.[1]

The indictment alleges respondent "did in Beaufort County on or about November 11, 1998, wilfully and unlawfully engage in criminal sexual conduct with a minor in the first degree in that [respondent] engaged in a sexual battery, with [victim] and that the said [victim] was of the age of 11 years old." The caption of the indictment and the title in the body of the indictment state, "Criminal sexual conduct with minor first degree (16-3-655)."

A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

[1]At the hearing, the State informed the PCR court that the plea court lacked subject matter jurisdiction to accept respondent's plea. The State now argues it was mistaken in its presentation of the subject matter jurisdiction issue to the PCR court.

While the indictment indicated respondent was charged with first degree CSC with a minor, the indictment was insufficient to charge him with that crime because the victim was eleven years old, not "less than eleven years" old. *See* S.C. Code Ann. § 16-3-655(1) (2003) (first degree CSC with a minor requires sexual battery of victim who is less than eleven years old). Even if the indictment had sufficiently stated the crime of first degree CSC with a minor, the court would not have had jurisdiction to accept a plea to second degree CSC with a minor as if it were a lesser offense of first degree CSC with a minor.[2] *See* State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000) (test for determining when offense is lesser-included of another is whether greater of two offenses includes all elements of lesser offense). Second degree CSC with a minor is not a lesser-included offense of the first degree charge because it includes an age requirement element that is different from the age requirement element in the crime of first degree CSC with a minor.[3] The first degree charge requires proof the victim is "less than eleven years old," while the second degree charge requires proof the victim is "fourteen years of age or less but . . . at least eleven years of age." §§ 16-3-655(1) and (2).

The question then becomes whether the indictment otherwise sufficiently states the offense of second degree CSC with a minor. The indictment appears to sufficiently allege second degree CSC with a minor because it charges that respondent engaged in a sexual battery with a victim of eleven years of age. However, the body of the indictment includes the language "criminal sexual conduct with a minor in the *first degree*." (Emphasis added). The inclusion of the "first degree" language is not a scrivener's error given that the title and caption of the indictment both indicate the indictment is for first degree CSC with a minor. *See* Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001) (if body of indictment

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[2]The sentencing sheet indicated respondent was pleading guilty to a lesser-included offense.

[3]*See* State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) (victim's age is element of second degree CSC with a minor); State v. Norton, 286 S.C. 95, 332 S.E.2d 531 (1985) (age is element of first degree CSC with a minor).

specifically states essential elements of crime and is otherwise free from defect, defect in caption will not cause it to be invalid). Here, there is a defect in the body, title, and caption of the indictment.

Further, the indictment does not sufficiently inform the court as to what judgment to pronounce. *See* Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995). As written, respondent is subject to being sentenced to first degree CSC with a minor, a Class A felony carrying an imprisonment term of not more than thirty years, rather than second degree CSC with a minor, a Class C felony carrying an imprisonment term of not more than twenty years. *See* S.C. Code Ann. §§ 16-1-20(A)(1) and (3); §§ 16-1-90(A) and (C). Therefore, the plea court was without subject matter jurisdiction to accept respondent's plea to second degree CSC with a minor.

Given that second degree CSC with a minor is not a lesser-included offense of first degree CSC with a minor and that the indictment improperly indicated respondent was charged with first degree CSC with a minor, we affirm the finding that the plea court did not have subject matter jurisdiction to accept respondent's guilty plea.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William
O. Key, Jr., Respondent.

Opinion No. 25659
Submitted April 29, 2003 - Filed June 2, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for The Office of Disciplinary Counsel.

Desa A. Ballard, of Columbia, for Respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand.

Facts

I. Commercial property matter.

According to the facts stated in the agreement, the seller and purchasers of certain commercial property sought respondent's assistance in

transferring title of the property from seller to purchasers. The parties had been referred to respondent by a person associated with respondent's brother, a certified public accountant. Respondent agreed to discuss the matter with the parties if terms of purchase were agreed upon. The parties negotiated between themselves regarding the terms of the transaction and, after reaching agreement, contacted respondent to complete the transaction. Respondent was retained to represent all parties to the transaction. Respondent acknowledges that he did not make proper disclosure to the parties of the risks of joint representation and did not obtain informed waivers from the parties for joint representation.

One of the reasons for the delay in agreement regarding the terms of the transaction was that purchasers had been unable to obtain independent financing. The parties had agreed that seller would finance the sale, with an assumption, via wrap-around mortgage, by the purchasers of the existing Small Business Administration (SBA) mortgage.

Respondent maintains he had only a short period of time in which to complete the transaction because seller was subject to a family court order which required her to have her former spouse released from the SBA mortgage by a certain date or face financial consequences in family court.

Respondent wrote a letter to the SBA advising of the contemplated transaction and requesting relevant information to complete the wrap-around mortgage. Three days later, on the final date the transaction could be completed without violating the family court order, the parties gathered at respondent's office to complete the transaction. During that meeting, respondent received a telephone call from the SBA informing him that a wrap-around mortgage would not be permitted, and that the sale of the property, as agreed upon by the parties, would result in the mortgage being accelerated against seller and her husband. Respondent advised the parties of the position taken by the SBA and proposed restructuring the transaction as a Lease Agreement and Option to Purchase (LAOP). Seller agreed with the proposal but insisted that the transaction be completed that day. The parties returned to respondent's office that afternoon and executed the documents

necessary to finalize the transaction. After the closing of the transaction, respondent completed the release of seller's husband from the SBA loan.

Some of the funds paid by purchasers at the time of the closing were paid in cash. Respondent properly accounted for the cash as part of the transaction; however, respondent acknowledges that he failed to file the required reporting forms with the Internal Revenue Service.

Shortly after the transaction was completed, disputes arose between seller and purchasers regarding the transaction. The parties resolved most of the disputes between themselves without respondent's assistance. Respondent initially tried to work with the parties as an intermediary to resolve a dispute that arose when purchasers failed to make timely payments to seller. Respondent acknowledges that he was prohibited from representing either party when the disputes arose, and that he should not have become involved in the parties' disputes in any way. Respondent also acknowledges that he had a conflict of interest in representing both parties in connection with the disputes that arose and that he did not obtain informed waivers from the clients before proceeding.

As a result of the disputes between the parties, purchasers refused to make payments directly to seller and established a practice of delivering payments to respondent's office for transmission to seller. Respondent allowed this practice to continue and became a de facto escrow agent for some payments. Most payments delivered to respondent were checks made out to seller, but purchasers did, on occasion, deliver cash to respondent's office for payments to seller. Respondent did not maintain records in sufficient detail to provide an accounting of the payments delivered by purchasers to respondent's office for payment to seller. When initially asked to do so, respondent was unable to provide an accurate accounting of funds received by him on seller's behalf. However, respondent was later able to reconstruct an accurate accounting of funds received and disbursed by him.

The parties later retained separate counsel and litigation proceeded between them. The civil action was resolved in favor of seller.[1] It

[1] Seller then brought a legal malpractice action against respondent, which was settled.

was discovered during this litigation that one purchaser had signed the name of the other purchaser to certain documents related to the LAOP, although the purchaser whose name was forged was present at the time the documents were signed, and respondent had notarized the signature.[2] Respondent believed at the time he notarized the document that the signature was authentic. However, respondent acknowledges that he failed to exercise due care to insure that the signature was actually that of the purchaser whose name was signed.

Following the transaction, respondent paid a broker's fee to the person who brokered the transaction between seller and purchaser. Respondent maintains payment of the fee was verbally authorized by seller. Seller, however, asserted she had not approved the payment. Respondent's file contains no documentation authorizing the disbursement.

II. Foreclosure matter.

Client retained respondent to represent him in a foreclosure matter. Client had previously sold a piece of real estate to a buyer and had agreed to finance the purchase. The buyer died intestate. An attorney for the buyer's estate advised client that the estate would remain current on the debt; however, shortly thereafter, the estate changed its position.

Probate records indicated the buyer was survived by four children, three of whom were adults. Respondent initially attempted to execute a deed in lieu of foreclosure; however, the adult beneficiaries would not agree to that arrangement. Accordingly, respondent filed a formal foreclosure action. Respondent retained a process server who effected personal service on three of the four beneficiaries. Respondent was unable to locate any information as to the whereabouts of the minor beneficiary or the identity of any guardians for the child and was therefore unable to effect service

Seven months after respondent was retained, client wrote respondent a letter expressing frustration over the fact that the matter

[2] Purchasers were husband and wife.

remained pending. Because respondent had not been able to effect service on the fourth beneficiary, he advised client that he would withdraw from representation to enable client to retain new counsel to assist with the matter in a more timely fashion. Respondent refunded his entire fee and returned all original papers, as well as copies of the work he had done to date, to client. However, respondent did not file a motion to be relieved as counsel.

At some point within the next six months, the secretary for the Chief Judge for Administrative Purposes telephoned respondent regarding the status of the foreclosure action. The secretary advised respondent that he would either have to try the case or dismiss it. In response to the telephone call, respondent prepared documentation to dismiss the action without prejudice and forwarded it to the judge's office. He did not discuss this course of action with client, nor did he provide client with a copy of the documentation. Client had retained successor counsel but respondent had not been provided with that information. When client learned about the dismissal without prejudice, he contacted respondent. Respondent advised client of the circumstances which led to his sending the dismissal without prejudice to the presiding judge. Respondent offered to assist client or successor counsel with reinstating the action or otherwise bringing the matter to a conclusion. Respondent did not hear back from client or anyone on his behalf.

Respondent admits he should have communicated with client regarding the dismissal of the action without prejudice, and that he should have filed a motion to be relieved as counsel when he ceased acting on client's behalf.

Law

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client

reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.5(b) (when the lawyer has not regularly represented a client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation); Rule 1.7(a) (except in certain circumstances, a lawyer shall not represent a client if the representation of that client will be directly adverse to another client or if the representation may be materially limited by the lawyer's responsibilities to another client); Rule 1.15(a) (a lawyer shall hold client funds in a separate account and complete records of such funds shall be kept by the lawyer); Rule 1.16(a) (a lawyer shall not represent a client or, where representation has commenced, shall withdraw from representation of a client if the representation will result in violation of the Rules of Professional Conduct or if the lawyer is discharged); Rule 2.1 (in representing a client, a lawyer shall exercise independent professional judgment and render candid advice); Rule 2.2(a)(1) (a lawyer may act as intermediary between clients if the lawyer consults with each client concerning the implications of the common representation and obtains each client's consent to the common representation); Rule 2.2(a)(2) (a lawyer may act as intermediary between clients if the lawyer reasonably believes the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful); Rule 2.2(a)(3) (a lawyer may act as intermediary between clients if the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients); Rule 2.2(b) (while acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions); Rule 2.2(c) (a lawyer shall withdraw as intermediary if any of the conditions stated in Rule 2.2(a) is no longer satisfied); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is

professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

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

Conclusion

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Francis A. Humphries, Jr., Respondent.

Opinion No. 25660
Submitted May 5, 2003 - Filed June 2, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for The Office of Disciplinary Counsel.

A. Peter Shahid, Jr. and Coming B. Gibbs, Jr., both of Charleston, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a dismissal, the issuance of a letter of caution or the imposition of any of the sanctions set forth in Rule 7(b), RLDE. We accept the agreement and find a one year suspension from the practice of law is the appropriate sanction. The facts, as set forth in the agreement, are as follows.

Facts

Respondent was employed as an Assistant Solicitor in the Eleventh Judicial Circuit. On May 29, 1995, respondent was on call in connection with his duties as an Assistant Solicitor and was summoned to the offices of the Lexington County Sheriff's Department.

Upon his arrival at the Sheriff's Department, respondent was advised that a suspect, Robert Joseph Quattlebaum, was being held in connection with an apparent murder, a burglary or robbery of the victim's house, and the shooting of another victim. Respondent was also informed that Quattlebaum's attorney, John E. Duncan, was with Quattlebaum at the Sheriff's Department.

Sometime later, respondent was advised that Quattlebaum had consented to a polygraph examination. Respondent was not initially in the vicinity of the room where the polygraph examination was to take place, but was waiting in or near a conference room in another part of the building where respondent had, from time to time, been consulted by Sheriff's Department personnel concerning their investigation of Quattlebaum.

However, respondent was later summoned by Sheriff's Department personnel to the polygraph examiner's office, which was close to the polygraph room itself. Respondent discovered Sheriff's Department personnel watching a video monitor in the polygraph examiner's office. He surmised that he had been summoned to the office to observe what was being shown on the video monitor.

Respondent then realized that the video monitor was playing video and audio portions of a conversation between Quattlebaum and Duncan in the polygraph room. It was readily apparent to respondent that the conversation was intended by Quattlebaum and Duncan to be a confidential, attorney-client privileged communication. Respondent told the Sheriff's Department personnel present to turn off the video monitor.

Respondent then went down the hall to the office of Lieutenant Phillips, the senior law enforcement officer in the vicinity. Although respondent believed the monitor was turned off, he did not verify that such action had been taken, nor did he ask Lieutenant Phillips to ensure that the monitor had been turned off. Respondent had no advance knowledge that the conversation was going to be observed or listened to by Sheriff's Department personnel and had no reason to believe Sheriff's Department personnel had planned in advance to monitor the conversation.

Respondent did not advise Duncan that the conversation between Duncan and Quattlebaum had been overheard by Sheriff's Department personnel. Quattlebaum was arrested when he emerged from the polygraph room.

Within a day or so, respondent notified Solicitor Donald V. Meyers, of the events which took place at the Sheriff's Department. Respondent did not notify Duncan or the judge of the Court of General Sessions that the conversation between Duncan and Quattlebaum had been overheard by Sheriff's Department personnel.

Duncan withdrew as counsel soon after Quattlebaum's arrest. Joseph M. McCulloch, Jr. and Katherine E. Evatt were appointed to represent Quattlebaum. On May 30, 1995, respondent and Evatt discussed Quattlebaum's case, but respondent made no mention of the conversation between Duncan and Quattlebaum being overheard by Sheriff's Department personnel.

In March 1996, respondent heard a rumor from Edward V. Hite, the principal investigator on Quattlebaum's case, that a videotape of the conversation between Duncan and Quattlebaum might exist. Respondent immediately advised Solicitor Myers of the rumor and discussed with the Solicitor whether that information was subject to discovery. Respondent maintains it was determined by respondent and the Solicitor that the information would be disclosed to opposing counsel during the normal course of discovery and upon proper requests. In In re Myers, Op. No. 25647 (S.C.

Sup. Ct. filed May 5, 2003), this Court found respondent and the Solicitor discussed whether the tape was discoverable, and the Solicitor stated that if there was a tape, respondent should give it to the defense. We are not otherwise persuaded by respondent's rendition of these facts. Respondent took no action at that time to substantiate the rumor nor was opposing counsel notified of the rumor until much later.

On May 28, 1996, opposing counsel served discovery motions, pursuant to Rule 5, SCRCrimP, and Brady v. Maryland[1], on the State. These motions were received and handled exclusively by respondent on behalf of the State. The Brady motion included a request for "all evidence or information within the possession, custody or control of the prosecution, the existence of which is known or by the exercise of due diligence may become known to the attorney for the prosecution . . . which could tend to show that the Defendant was not guilty . . . or tend to mediate punishment" and specifically requested "all statements . . . of . . . the defendant concerning the case . . ., any and all . . . photographs . . . and any and all transcripts or tapes from any wire taps." The Rule 5 motion included a request for "all information available to the defendant under the Rules of Criminal Procedure," specifically citing Rules (5)(a)(1)(A), (B), (C), and (D). Respondent understood these motions were continuing in nature and, as such, would be applicable to any subsequent information available to respondent. Respondent's response to the Brady and Rule 5 motions made no mention of the conversation between Duncan and Quattlebaum and made no mention of the rumored existence of a videotape of that conversation.

On June 30, 1997, counsel for Quattlebaum served an additional discovery motion on the Solicitor's Office. By this time, it was contemplated by the parties that Quattlebaum's case would be heard during the November 10, 1997 term of General Sessions Court in Lexington County. The new discovery motion specifically requested "[c]opies of all videotape or audiotape of any interviews with the defendant." After receiving the motion, respondent immediately contacted the Sheriff's Department for any additional information subject to discovery, including any and all videotapes of interviews with Quattlebaum. Edward Hite confirmed that a videotape,

[1] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

containing both audio and video recordings, existed of the conversation between Duncan and Quattlebaum.

On August 1, 1997, respondent wrote Evatt a letter stating "copies of all . . . video tapes made in connection with this case will be provided at cost to you by Friday, August 8, 1997, at noon." On August 7, 1997, respondent met with Evatt and advised her that the conversation between Duncan and Quattlebaum had been overheard, that respondent was present and knew of this occurrence on the occasion that it happened, that a videotape was reported to have been made of that conversation, and if a videotape of that conversation existed it would be made available to her. This was the first time respondent advised Evatt, or any other counsel for Quattlebaum, that the conversation between Duncan and Quattlebaum had been overheard or that a videotape of the conversation existed or was rumored to exist. Respondent maintained he had not seen the videotape until it was delivered by an investigator for the Sheriff's Department, on August 7, 1997, after respondent had spoken with Evatt. A copy of the videotape was provided to Evatt the following day.

Respondent either knew or should have known of the existence of the videotape as early as March 1996. Respondent acknowledges that the existence of the tape could have, in all likelihood, been easily confirmed in March 1996 had he vigorously pursued the rumor of the existence of the videotape and demanded that the Sheriff's Department address the rumor and report back immediately as to whether the rumored videotape existed.

Respondent acknowledges that he now knows that Rule 5(a)(1)(A), SCRCrimP, provides for disclosure of ". . . any relevant . . . recorded statement made by the defendant within the possession, custody or control of the prosecution, the existence of which is known or by the exercise of due diligence may become known to the attorney for the prosecution." Respondent also recognizes, but did not previously, that this provision of Rule 5 applies to any recorded statements of a defendant, not just to those made to law enforcement.

Respondent acknowledges that he knew that Rule 5(a)(1)(C), SCRCrimP, requires disclosure of "photographs." He also recognizes, but did not previously, that videotapes are included in the definition of "photographs" found in Rule 1001(2), SCRE.

Respondent acknowledges that, in retrospect, he may have, under Rule 5, been obligated in March 1996 and thereafter to advise counsel for Quattlebaum of the rumored existence of the videotape. He acknowledges he was further obligated to have aggressively sought to have determined whether the rumored existence of the videotape was correct and, if so, to have promptly notified counsel for Quattlebaum and to have promptly provided them with a copy of the tape.

Respondent acknowledges that, in retrospect, as an officer of the court, he had an obligation to take affirmative action to ensure the monitoring of the conversation immediately ceased and a further obligation to notify both counsel for Quattlebaum and the Court of General Sessions of the occurrence, even prior to discovery motions being filed and more so after the initial discovery motions had been served. Finally, respondent acknowledges that he should have withdrawn from participation in the Quattlebaum case on the basis set forth in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.4(c)(a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists); Rule 3.4(d)(a lawyer shall not, in pretrial procedure, fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

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

Conclusion

In our opinion, respondent's misconduct warrants a one year suspension from the practice of law. Respondent shall receive credit for the time he was on interim suspension from May 2, 2000 until August 3, 2000, and from September 20, 2000 until November 22, 2000. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., not participating.

The Supreme Court of South Carolina

RE: Rule 403, SCACR

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the following amendments are made to Rule 403, SCACR:

(1) Sections (i) and (j) are renumbered as (j) and (k).

(2) The following is added:

> **(i) Federal Bankruptcy Law Clerks.** A person employed full time for nine (9) months as a law clerk for a Federal Bankruptcy Judge in South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) civil trials which meet the requirements of (c)(1) above, three (3) criminal trials which meet the requirements of (c)(2) above, and two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the trials.

These amendments shall become effective on September 1, 2003.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

May 30, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Hancock, Appellant,

v.

Wal-Mart Stores, Inc., Respondent.

Appeal From Florence County
Paul M. Burch, Circuit Court Judge

Opinion No. 3645
Submitted March 10, 2003 - Filed June 2, 2003

AFFIRMED

Robert E. Lee, Matthew N. Tyler, Amy Anderson Wise, of Florence; for Appellant.

Ronald B. Diegel, of Columbia; for Respondent.

MOREHEAD, A.J.: Richard Hancock was injured while working for his employer on Wal-Mart's premises. Hancock filed suit in the circuit court, alleging his injuries were the result of Wal-Mart's negligence. The trial judge granted Wal-Mart's motion for summary judgment, finding workers' compensation was Hancock's exclusive remedy. Hancock appeals. We affirm.

FACTS

Tru-Wheels, Inc., one of Wal-Mart's vendors, employed Hancock. Tru-Wheels provided Wal-Mart with individuals to assemble and set up Wal-Mart merchandise in the store. Hancock assembled merchandise exclusively for Wal-Mart. On a typical day, Hancock would report to the Wal-Mart manager and receive instructions about which items to assemble. Hancock assembled the items on the Wal-Mart premises and would report any problems to the applicable Wal-Mart department manager. Hancock was injured when, in the course of assembling riding lawnmowers, a Wal-Mart employee ran over his foot with a forklift.

Hancock filed suit in the circuit court, alleging his injuries were the result of Wal-Mart's negligence. Wal-Mart filed a motion for summary judgment, arguing Hancock was a statutory employee and thus had workers' compensation as his exclusive remedy. The trial judge granted the motion, finding Hancock was limited to a workers' compensation claim because he was Wal-Mart's statutory employee.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. However, summary judgment is not appropriate where there is no dispute as to the facts but the parties dispute the inferences to be drawn from the undisputed facts. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

"In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

DISCUSSION

I. Agreement

Hancock argues the trial judge erred in granting summary judgment without first reviewing the agreement between Tru-Wheels and Wal-Mart.

While Hancock raised this argument before the trial judge, it was not addressed in the final order. Despite this omission, Hancock did not file a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Accordingly, this issue is not preserved for review by this Court. See Fraternal Order of Police v. South Carolina Dep't of Revenue, 332 S.C. 496, 501, 506 S.E.2d 495, 497 (1998) (holding argument on appeal not preserved even where raised to the circuit court because "that court failed to rule on the issue and [appellants] failed to call this omission to the circuit court's attention in a Rule 59(e), SCRCP, motion"); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding issue was not preserved for appellate review where the trial judge did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment). Regardless, Hancock does not succeed on the merits of this argument.

Hancock submitted an affidavit from the manager of the Wal-Mart store where the accident occurred. The affidavit states "Wal-Mart has an agreement with Tru-Wheels, Inc. wherein Tru-Wheels, Inc. provides workers to set up and assemble various items of merchandise which are sold by Wal-Mart." Hancock argued at the summary judgment hearing that he had never received a copy of the aforementioned agreement, and asked the court to order Wal-Mart to produce the agreement. Wal-Mart countered there was only an oral agreement between Wal-Mart and Tru-Wheels.

There is no evidence in the record that a written agreement existed between Wal-Mart and Tru-Wheels. Hancock is merely arguing that the Wal-Mart manager's use of the word "agreement" implied there was a

written formalization of the labor arrangement between Wal-Mart and Tru-Wheels. However, there are no exhibits, testimony, affidavits, or evidence to support this contention. Accordingly, even viewing this argument in the light most favorable to Hancock, we find the trial judge did not err in granting Wal-Mart's motion for summary judgment.

II. Statutory Employee

Hancock argues the trial judge erred in finding he was Wal-Mart's statutory employee. Specifically, he contends the product that Tru-Wheels delivered to Wal-Mart was Hancock's labor, and the "mere delivery of this fungible commodity does not mean Tru Wheels was involved in part of Wal-Mart's business." Instead, the relationship was between a vendor of labor and its customer. As such, Hancock asserts he was not Wal-Mart's statutory employee.

Coverage under the Workers' Compensation Act depends on the existence of an employer-employee relationship. McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947). "South Carolina courts have repeatedly held that determination of the employer-employee relationship for workers' compensation purposes is jurisdictional. Consequently, this Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997).

The Workers' Compensation Act sets forth the circumstances that can give rise to a statutory employment relationship.

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution

> or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (1985). "If a worker is properly classified as a statutory employee, his sole remedy for work-related injuries is to seek relief under the Workers' Compensation Act; he may not maintain a negligence cause of action against his direct employer or his statutory employer." Neese v. Michelin Tire Corp., 324 S.C. 465, 472, 478 S.E.2d 91, 94 (Ct. App. 1996), overruled on other grounds by Abbott v. The Limited, Inc., 338 S.C. 161, 164 n.1, 526 S.E.2d 513, 514 n.1 (2000).

To determine whether an employee is engaged in an activity that is part of the owner's trade, business, or occupation as required under section 42-1-400, this Court has applied the following three tests: "(1) is the activity an important part of the owner's business or trade; (2) is the activity a necessary, essential, and integral part of the owner's business; or (3) has the activity previously been performed by the owner's employees?" Meyer v. Piggly Wiggly No. 24, Inc., 338 S.C. 471, 473, 527 S.E.2d 761, 763 (2000). "Only one of these three tests need be met but there is no easily applied formula and each case must be decided on its own facts." Id. "[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner." Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946).

In Meyer, the claimant was employed by a wholesale bakery that was, in turn, a vendor for a grocery store. Claimant's duties were to stock the shelves with the vendor's products and clean the display. When claimant slipped and fell in the grocery store, he filed an action in tort. The Supreme Court concluded claimant was not the grocery store's statutory employee because his activities on the store's premises were "related only to the sale of

[v]endor's goods and were insubstantial in the context of [the grocery store's] general business." Meyer, 338 S.C. at 474, 527 S.E.2d at 763.

We find the facts of the instant case do not point to such a vendor/vendee relationship. Although Hancock characterized the relationship as vendor/vendee, that alone is not controlling in the statutory employment analysis. See Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 322, 523 S.E.2d 766, 770 (1999) ("Whatever the parties contract to call their relationship is not controlling in a statutory employment analysis."). Rather, Hancock's relationship with Wal-Mart satisfies all three of the Meyer tests and thus fits the description of a statutory employee.

In terms of the first test, the Wal-Mart manager, in his affidavit, stated Hancock's duties were a "vital and important part of Wal-Mart's business in that items always display and sell better once they have been assembled." As to the second test, the manager also stated Hancock's duties were "a vital and integral part of [Wal-Mart's] regular operations." Hancock's deposition testimony supports this statement. On a regular basis, Hancock assembled merchandise exclusively for Wal-Mart at the store. When he arrived at the store, Hancock reported to a Wal-Mart department manager who, in turn, identified the merchandise that was to be assembled. Hancock then went to the assembly area where he waited for the department employees to bring him the boxes. Upon completion of his assigned merchandise, Hancock informed the department manager and turned in his itemized work order. Regarding the third test, both the Wal-Mart manager and Hancock stated that Wal-Mart employees often performed the same assembly duties as Hancock. Therefore, under the Meyer analysis, Hancock was Wal-Mart's statutory employee, and workers' compensation is the sole remedy for his injuries. See Sabb v. South Carolina State Univ., 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002) (holding the Workers' Compensation Act provides the exclusive remedy for employees who sustain a work-related injury). Accordingly, the trial judge did not err in finding Hancock was Wal-Mart's statutory employee.

CONCLUSION

Based on the foregoing, the trial judge's decision to grant Wal-Mart's motion for summary judgment is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Betty P. O'Neal, Respondent,

v.

Intermedical Hospital of South Carolina, Appellant.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3646
Heard March 12, 2003 - Filed June 2, 2003

AFFIRMED IN PART AND REVERSED IN PART

Richard J. Morgan, Robyn K. Wietecha, of Columbia; for Appellant.

Laura Puccia Valtorta, of Columbia; for Respondent.

HUFF, J.: In this wage payment dispute, the trial court trebled the jury's $1,350 award of damages to plaintiff Betty P. O'Neal and

ordered defendant Intermedical Hospital of South Carolina (Intermedical) to pay O'Neal $8,100 in attorney's fees. We affirm in part, and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

O'Neal became employed as a registered nurse for Intermedical on September 21, 1998. O'Neal understood that her base pay was to be $18.36 per hour with "shift differential" pay of an additional $1.50 per hour for night shifts beginning after 11 p.m., and an additional $5.00 per hour for weekend shifts. She further understood that she was required to work every other weekend.

At some point in her employment, O'Neal began complaining to Teri Hooper, who was in charge of Intermedical's payroll, that she was not receiving the proper pay. On March 31, 1999, O'Neal filed a claim against Intermedical with the Department of Labor for approximately $681.61 in wages owed. Specifically, O'Neal asserted that between January 9, 1999 and March 20, 1999, Intermedical improperly withheld wages for 28.18 regular hours at $18.36 per hour, shift differential pay for 17 weekend hours at $5.00 per hour, and shift differential pay for 52.82 night hours at $1.50 per hour.

After an investigation, the South Carolina Department of Labor determined Intermedical failed to comply with the provisions of South Carolina Code Ann. § 41-10-40(D) in that it failed to pay O'Neal $376.09 in wages in accordance with her regular pay schedule.[1] Nonetheless, the Department of Labor ultimately found that as of

[1]South Carolina Code Ann. § 41-10-40(D) (Supp. 2002) provides: "Every employer in the State shall pay all wages due at the time and place designated as required by subsection (A) of § 41-10-30." Subsection (A) of § 41-10-30 provides, inter alia, that "[e]very employer shall notify each employee in writing at the time of hiring . . . the time and place of payment. . . ." S.C. Code Ann. § 41-10-30 (Supp. 2002).

March 25, 1999, O'Neal had been paid all wages due to her and had in fact been overpaid by $110.77. In August of 1999, the Department of Labor assessed a $375.00 penalty against the hospital for the late payment of wages.

In April 1999, Virginia Herring, Intermedical's nurse manager, created, posted, and distributed copies of the nurses' working schedule for April 11 through May 9, 1999. Herring scheduled O'Neal to work a number of shifts, including a shift beginning at 11:00 p.m. on Friday, April 23, 1999. By letter dated April 13, 1999, O'Neal complained to Herring that her regular working schedule of two eight hours shifts and two twelve hour shifts had been changed to five eight hour shifts without prior notice. O'Neal also complained that in creating the schedule, Herring failed to consider a prior request for vacation and also improperly "split [her] weekend again" by scheduling her to work on Friday, April 23.

On April 14, Herring and O'Neal met to discuss the concerns O'Neal expressed in her April 13 letter; however, Herring and O'Neal dispute the content of the discussion. According to Herring, the parties did not discuss the 11:00 p.m. April 23 shift during their meeting and Herring did not say or do anything during the discussion to give O'Neal the impression she would remove her from the schedule for April 23. Herring further stated she informed O'Neal she could not guarantee the schedule O'Neal requested in her April 13 letter. O'Neal, on the other hand, asserted, although she remained on the master schedule for April 23, Herring removed her from Herring's personal copy of the schedule and assured her she would "fix" it.

O'Neal told a number of her co-workers that, although her name still appeared on the posted work schedule for the 11:00 shift on April 23, she would not be working that night because she had discussed the matter with Herring and had arranged to have the night off. Based on information the other employees relayed to Herring about these comments, Herring approached O'Neal on the morning of April 23 and informed her she was still on the schedule and was expected to report to work that night. O'Neal responded that she would not report to work

because Herring had already given her the night off and because Friday was a weekend night. According to Herring, she explained to O'Neal that the hospital's shift/differential pay policy did not apply to scheduling and Saturday and Sunday were weekend days for scheduling purposes. O'Neal argued that Friday night shifts constituted weekend work according to the hospital's policy. Herring reiterated that she expected O'Neal to report to work that night and inquired whether O'Neal was refusing to do so. O'Neal confirmed that she would not report to work that night. Herring again told O'Neal she expected her to report to work that night. O'Neal replied, "You do what you gotta do and I'll do what I gotta do."

O'Neal did not, in fact, work on April 23. On April 28, 1999, Herring called O'Neal in for a conference, at which time she informed O'Neal her employment with Intermedical was being terminated for insubordination, refusal to work a scheduled shift, and unexcused absence from work.

O'Neal instituted the instant action against Intermedical on June 1, 1999, alleging (1) wrongful discharge in retaliation for filing a claim with the Department of Labor; (2) nonpayment of wages earned during the employment relationship including weekend shift differentials, overtime work, night hours, and regular hours; (3) and nonpayment of 138.42 hours of accrued time off pay due upon her discharge from employment. O'Neal also sought an award of attorney's fees and costs. Intermedical answered, denying O'Neal was entitled to any of the relief requested in her complaint. Intermedical also affirmatively asserted that it acted at all times in good faith and that O'Neal's own conduct caused all adverse employment action taken against her.

Prior to trial, Intermedical sought and was granted leave to amend its pleading to include, as an additional affirmative defense, the assertion that O'Neal breached her duty of loyalty to the hospital.[2]

[2]Intermedical also sought leave to amend its pleadings to include breach of duty of loyalty as a counterclaim. The trial court declined to allow the amendment for purposes of asserting a counterclaim.

Intermedical also moved for summary judgment on O'Neal's claim for wrongful discharge. The trial court granted the motion and the trial proceeded on the actions for (1) nonpayment of wages due during the employment relationship and (2) nonpayment of wages due at the time of termination.

At trial, O'Neal asserted the hospital shorted her 28.18 hours of regular pay at $18.36 an hour, 17 hours of weekend pay at $5.00 an hour, and 52.82 hours of night pay at $1.50 an hour, for a total due of $681.61. She also sought 138.42 hours of accrued time off at $18.36 an hour, for a total of $2,541.39. Intermedical took the position that although it failed to pay O'Neal all of her wages in a timely manner, the hospital had, by the time of her discharge, paid O'Neal all of the wages she was due during her employment at the hospital, including shift differential pay. Intermedical did not dispute that O'Neal had accrued 138.42 hours of time off for which she was not paid at the time of her discharge. The hospital sought to establish, however, that O'Neal was terminated for misconduct, in which case the hospital's policy prohibits payment for accrued time off. In attempting to establish that O'Neal's misconduct warranted her termination, Intermedical introduced evidence relating to her failure to work her scheduled shift on April 23, 1999, as well as other incidents such as "nodding off" at work and being unfriendly to co-workers.

At the close of evidence, Intermedical requested that the trial court give the following charge to the jury (Defendant's Request to charge No. 10):

> It is not for you to judge the wisdom or reasonableness of any of [Intermedical's] business decisions. You cannot require an employer to use business practices or policies you prefer or like, nor is it your role to second-guess or substitute your judgment for [Intermedical's] judgment.
>
> Likewise, it was [Intermedical's] prerogative and right, not [O'Neal's], to establish relevant criteria and

> expectations regarding performance for any work that [O'Neal] might have performed, if any, for [Intermedical].

The trial court's charge to the jury did not include the requested language; however, the court charged the jury as follows:

> Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer and willful or intentional disobedience as a general rule justifies dismissal of the employee.
>
> The employee is bound to obey all of the employer's lawful and reasonable commands even though such commands may under the circumstances seem harsh and severe, but the employer has a right to manage his own affairs and to establish and enforce any lawful and reasonable policies and instructions and it must be a very extreme case in which an employee would be justified in refusing to obey those orders.

Intermedical objected to the trial court's failure to include the requested charge. The trial court noted the exception, but declined to recharge the jury, reasoning that the court's original charge sufficiently encompassed the requested language.

The jury returned a $1,350 verdict in favor of O'Neal for wages owed after discharge, but found in favor of Intermedical on the action for wages due during the period of employment.

After the jury returned its verdict, O'Neal moved for attorney's fees and treble damages. By order dated March 9, 2001, the trial court granted both motions, trebling the damage award to $4,050 and ordering Intermedical to contribute $8,100 toward O'Neal's $9,112.50 attorney's fees bill. This appeal followed.

LAW/ANALYSIS

I. Jury Charge

Intermedical asserts the trial court erred in failing to instruct the jury in accordance with Defendant's Request to Charge No. 10. Specifically, Intermedical argues the trial court's charge to the jury did not adequately instruct the jury as to its obligation to apply and enforce Intermedical's policies regardless of personal preferences or opinions, thereby creating the opportunity for the jury to judge the hospital's policy on nonpayment for accrued time off to employees terminated for misconduct. We disagree.

"The trial judge is required to charge only the current and correct law of South Carolina." McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995). Further, "[r]efusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved." Id.

Intermedical cites two federal cases involving employment discrimination in support of its requested jury charge. In Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978), the Supreme Court, in discussing the Seventh Circuit Court of Appeals' decision regarding employer hiring procedures, stated, "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." In Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir.1989), the Court of Appeals, citing Furnco, stated, "We have no authority simply to require employers to use the 'best' standards and procedures available to them." Neither of these cases embrace the specific law as proposed in Intermedical's request to charge. Intermedical cites no South Carolina law supporting such a charge.

Further, even if we were to assume the proposed charge was the correct and current law of South Carolina, we find no error. Although the trial court refused to instruct the jury in exact accordance with

Intermedical's request to charge, the court explicitly instructed the jury that an employee is "bound to obey all of the employer's lawful and reasonable commands even though such commands may under the circumstances seem harsh and severe." The court further instructed the jury that "the employer has a right to manage his own affairs and to establish and enforce any lawful and reasonable policies and instructions . . ." In our view, the court's instructions to the jury sufficiently conveyed the concepts that an employer has the right to establish and enforce any lawful and reasonable business policies, and an employee is obligated to obey the employer, even if an employer's commands or policies seem harsh or severe. Accordingly, we find the instructions were sufficiently broad to enable the jury to understand the law and the issues involved.

II. Treble Damages

Intermedical also argues the trial court erred in awarding O'Neal treble damages. We agree.

Section 41-10-80(C) of the South Carolina Wage Payment Act provides in part:

> In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow.

S.C. Code Ann. § 41-10-80(C) (Supp. 2002).

In interpreting this section, our Supreme Court has held that the statute's explicit provision that the employee "may" recover treble damages signifies permission, which generally means that the action spoken of is optional or discretionary. The court went on to state as follows:

> Thus, by using "may", rather than "shall", the legislature has provided that the penalty is discretionary with the judge. This interpretation accords with the purpose of the Wage Payment Act, to wit: to protect employees from the unjustified and wilful retention of wages by the employer. The imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh.

Rice v. Multimedia, Inc., 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) (emphasis added) (citations omitted).

Subsequent to Rice, our Supreme Court considered the wage withholding case of Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Futch was employed by McAllister Towing (Employer) as a tugboat captain and local manager of its operations in Georgetown. After Employer informed Futch his job would terminate at the end of 1993, Futch, who knew Employer considered ceasing operations in the area, began making plans with a co-worker to start their own tugboat business. After learning of Futch's plans, Employer fired Futch and refused to pay him $4,200 in monthly commissions Futch had earned. Futch brought an action against Employer seeking $4,200, as well as treble damages and attorney's fees, under the Wage Payment Act. The jury awarded Futch the full $4,200 sought, and the trial judge trebled the damages and awarded Futch attorney's fees. On appeal, this court reversed, holding the trial judge should have granted Employer's directed verdict motion. The Supreme Court granted certiorari and reversed this court, reinstating the jury verdict. The court, however, declined to reinstate the award of treble damages and attorney's fees finding there was a bona fide dispute about whether Employer owed Futch any wages. In support of its decision, the court cited Rice for the proposition that the "imposition of treble damages in cases where there is a bona fide dispute would be unjust and harsh, and [the] Legislature did not intend to deter litigation of reasonable good faith wage disputes." Futch, 335 S.C. at 612, 518 S.E.2d at 598.

In determining the imposition of treble damages was proper in the instant case, the trial court reasoned:

> The Court finds the issue of whether [Intermedical] acted in good faith and terminated [O'Neal] for cause was submitted to the jury. The jury determined that [O'Neal] was entitled to recover accrued time off and awarded her a verdict. The jury therefore determined [Intermedical] did not terminate [O'Neal] for cause and thus no good faith basis for refusal to pay benefits was established. Accordingly, the Court hereby trebles the jury verdict to $4,050.00.

The jury's verdict in favor of O'Neal does not lend itself to the interpretation espoused by the trial court. As evidenced by the decisions in Futch and Rice, a finding that an employee is entitled to recover unpaid wages is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages. Further, Intermedical did not dispute the number of time off hours O'Neal had accrued at the time she was terminated. Nonetheless, the jury awarded her damages equal to payment for only a portion of those hours, indicating the jury determined that Intermedical properly withheld payment for the remaining portion of accrued hours. The jury's finding in this regard belies the trial court's determination that, based on the award of damages, the jury necessarily determined that Intermedical failed to establish a good faith basis for refusal to pay the wages at the time of O'Neal's discharge from employment. Therefore, to the extent the trial court found the jury's verdict was equivalent to a finding that no bona fide dispute existed, such finding was erroneous.

At any rate, our reading of the record convinces us a bona fide dispute existed as to whether and to what extent O'Neal was entitled to payment for accrued time off. See The Father v. South Carolina Dep't of Soc. Servs., Op. No. 25603 (S.C. Sup.Ct. filed March 10, 2003) (Shearouse Adv. Sh. No. 9 at 30-31) (holding, where the decision to impose sanctions is to be decided by a judge and not a jury, it sounds in equity rather than law such that the South Carolina Constitution

mandates the appellate court take its own view of the facts). It is undisputed Intermedical's policy was to refuse payment for accrued time off to employees terminated for misconduct, and O'Neal does not contest the validity of the policy itself. The parties offered contradictory testimony as to whether Herring ever agreed to remove O'Neal from the schedule for April 23, 1999. It is undisputed, however, that prior to the scheduled shift, Herring made clear to O'Neal that she was expected to report to work at the scheduled time and O'Neal made a conscious decision not to do so. Further, the parties expressed conflicting interpretations of the definition of "weekend hours" for purposes of determining whether the terms and conditions of O'Neal's employment obligated her to work on the disputed date. Thus, we find there existed at least a bona fide dispute as to whether O'Neal was terminated for misconduct and, concomitantly, a bona fide disagreement as to whether she was entitled to payment for accrued time off. Again, the propriety of treble damages under the Wage Payment Act turns not on whether an employer is successful in defending against a suit for nonpayment of wages, but whether there existed a bona fide dispute concerning payment of the wages.

Accordingly, the trial court's award of treble damages is reversed and the jury's original award of damages reinstated.

III. Attorney's Fees

Finally, Intermedical asserts error in the award of attorney's fees to O'Neal. It argues there was a good faith dispute as to the wages due O'Neal and therefore O'Neal was not entitled to attorney's fees. Intermedical further argues, even if O'Neal was entitled to collect some attorney's fees, the lower court awarded her an excessive amount based on the various factors for awarding attorney's fees.

We agree with Intermedical that there was a bona fide dispute as to whether Intermedical owed O'Neal any wages such that the imposition of the award of attorney's fees was also improper pursuant to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518

S.E.2d 591 (1999) and Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995).

CONCLUSION

For the foregoing reasons, the decision of the trial court is affirmed as to the jury charge, and reversed as to the award of treble damages and attorney's fees.

AFFIRMED IN PART AND REVERSED IN PART.

ANDERSON, J., and MOREHEAD, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Andre Tufts, Appellant.

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

Opinion No. 3647
Heard April 16, 2003 – Filed June 2, 2003

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Barbara R. Morgan, of Aiken; for Respondent.

HEARN, C.J.: Andre D. Tufts appeals his conviction for criminal sexual conduct in the third degree, asserting the trial judge erred in admitting improper evidence of his character. We affirm.

I. FACTS/PROCEDURAL HISTORY

Tufts was charged with CSC third as a result of an incident that allegedly occurred at Aiken Region Medical Center, where Tufts was employed as an orthopedic technician. The victim injured her back and was permanently disabled as a result of a fall in 1991. In March of 1997, she became incapacitated after performing exercises to build up her strength. When she telephoned her physician, he requested that she go to the hospital. The victim went to the Emergency Room at Aiken Regional Medical Center and was seen by a doctor. After the doctor examined the victim, a nurse gave her a shot. When the nurse came back to check on her, Tufts came with her. Thereafter, the nurse left, and Tufts remained in the room. According to the victim, Tufts represented himself to be an orthopedic doctor and began to examine her. While examining the victim, Tufts slipped his hands beneath her panties and digitally penetrated her. The victim told several nurses what had happened and requested that they check Tufts's hands for a "specimen." When the victim returned to her home, she called the police.

The next day, Detective Dwayne Courtney requested that Tufts come to the Aiken Public Safety Department for an interview. During the interview, Tufts denied the victim's allegations. At the conclusion of the interview, Tufts exited the public safety building. However, he returned to Courtney's office a few minutes later and requested to talk to him again. During that second interview, Tufts told Courtney that he had been arrested and charged in a sexual matter in Augusta, Georgia in 1995 while he worked at the University Hospital. When Courtney told Tufts that it sounded like he may have a problem, Tufts stated that he knew he had a problem with his sexual desires. Tufts then requested that he be allowed to go home and discuss the matter with his girlfriend. When Courtney ran a check on Tufts the next day, he discovered he had been charged in a similar incident in Georgia that had been nolle prossed.

At trial, the State sought to introduce Courtney's testimony regarding the two conversations he had had with Tufts.[1] Following in camera testimony from both Courtney and Tufts, the trial judge found that the second statement had been voluntarily made. After an extensive colloquy with counsel, the trial judge ruled that the alleged statement concerning the prior charge in Georgia was inadmissible. However, he found that the portion of the conversation concerning Tufts's knowledge that he had a problem with his sexual desires could be construed as a confession and was therefore admissible. Immediately after this ruling, Detective Courtney testified before the jury. His testimony regarding Tufts's second statement to him was as follows:

> Well, Mr. Tufts put his hands into his pockets. He was standing up, and I was standing near my desk. He put both hands into his pockets and started to sway from side to side, and hung his head down. At that time, he said, that he knew he had a problem with his sexual desires, but that he wanted to go home and talk with his girlfriend that night, and after he talked to his girlfriend, he would come back to see me on the next day, which would have been Friday, and tell me what really happened to [the victim] in the emergency room.

The jury convicted Tufts of CSC third, and the trial judge sentenced him to six years. This appeal follows.

II. DISCUSSION

Tufts contends Detective Courtney's testimony constituted improper character evidence against him. In support of his argument, Tufts relies primarily on State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). In Nelson, the supreme court reversed this court's decision to affirm Nelson's

[1] Tufts did not dispute the first conversation but denied that the second conversation had ever taken place.

conviction. Nelson, who was convicted at trial of four counts of first degree CSC with a minor and four counts of lewd act on a child, made post-arrest statements to police that he was uncomfortable around adult women and that he had fantasies about children. At trial, the judge overruled Nelson's objection to testimony concerning his fantasies or likes or dislikes of females. The South Carolina Supreme Court reversed, holding that Nelson's general sexual attitudes were not relevant or material to the crime charged because they were admitted to show character. Id. at 16, 501 S.E.2d at 724.

The State argues initially that this issue is not preserved for appellate review because the trial judge's in camera ruling was not a final ruling, citing State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Shumpert involved an objection to testimony lodged at an in limine ruling that was not repeated when the offending testimony was actually offered. It is well settled that a ruling on an in limine motion is usually not final and the losing party must renew his or her objection when the evidence is presented. Id.; State v. Gagum, 328 S.C. 105, 495 S.E.2d 231 (Ct. App. 1997). However, where the motion is ruled on immediately prior to the introduction of the evidence in question, no further objection is necessary. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 231 (Ct. App. 1998); State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995). Here, it is clear that the trial judge's decision, reached after in camera testimony, lengthy discussion with counsel, and an overnight recess, was a final ruling. Moreover, immediately after the trial judge ruled, the State called Detective Courtney to the stand, and he testified in front of the jury. Because there was no opportunity for the trial judge to change his ruling, we find that Tufts's objections prior to the ruling preserved the issue for appellate review.

On the merits, we find the statement was properly admitted. Although the trial judge disallowed most of the statements allegedly made by Tufts in his second interview with Courtney, he did permit Courtney to testify that Tufts told him he had a problem with his sexual desires. This statement is similar to the type of evidence presented in Nelson, which the supreme court disallowed. There the court stated: "Generally, only those parts of a confession or statement made to police which are relevant and material to the crime charged should be received into evidence . . . . [W]e find [Nelson's]

general sexual attitudes were not relevant or material to the crime charged because they were admitted to show character." Nelson, 331 S.C. at 15-16, 501 S.E.2d at 723-24.

We believe the circumstances of this case are distinguishable from Nelson. In Nelson, the State sought to admit a number of toys, tapes of children's shows, storybooks, and photographs of young children. Initially, the trial judge thought the offer of evidence was ludicrous. However, after the State's expert on sexual trauma testified that pedophiles often maintain a large stash of childlike items, the trial judge admitted the evidence. Over the defendant's objection, the trial judge ruled the evidence was probative "not of a 'character issue' but of a 'personality characteristic,'" i.e., that the defendant was a pedophile. Id. at 5, 501 S.E.2d at 718.

In addition, the State admitted statements made by the defendant to the police. The defendant stated that he was uncomfortable around adult women and that he had fantasies about children. The supreme court held that the defendant's general sexual attitudes were admitted only to show character. In rejecting the evidence and the defendant's statements, the court stated: "'A necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is.'" Id. at 15, 501 S.E.2d 723 (quoting State v. Melcher, 678 A.2d 146, 151 (1996)).

In Nelson, the offered evidence and the defendant's statements were relevant only to prove that the defendant was a pedophile. The fact that the defendant was a pedophile spoke only to his propensity to commit the charged offense, and evidence thereof was thus inadmissible. In the present case, however, Tufts's statements were not admitted to show his character; instead, they were admitted as a confession to the specific crime charged.

The trial judge gave much consideration to the arguments of counsel and ultimately ruled the statement was admissible because he believed the jury could view Tufts's statement as a confession. The trial judge found that Tufts's comment regarding his sexual desires was sufficiently related to the officer's questioning about the specific crime to support the inference that Tufts simply chose to convey his confession in that

manner. The trial judge believed this fact distinguished the statement from mere character evidence. As an illustration, the trial judge stated, "So in this context or if someone were to say, well I realize that I'm a murderer and I shouldn't have done it. That's an admission of murder rather than a statement that I have a bad character, in this situation." The trial judge further stated, "It is his way of explaining or justifying to the officer what he is admitting to having done . . . ." Furthermore, Tufts's final statement, that he would return the next morning to explain what really happened to the victim, definitively links his statement to the specific crime charged.

We agree with the trial judge that Tufts's statement was not introduced to show his bad character; rather, we believe his statement was intended to convey to the officer that he had committed the sexual assault on the victim and that he would return the next morning to give the complete details of the incident. Certainly, there are many ways in which a suspect may choose to implicate himself in a crime. When asked of his guilt, he might simply nod affirmatively, or he might offer a complete recounting of the entire crime. Here, Tufts returned of his own free will to Courtney's office and voluntarily offered his statement that he knew he had a problem and that he would return the next day to describe what really happened to the victim. In our view, this statement was properly admissible as a confession to the charged crime.

For the foregoing reasons, Tufts's conviction is hereby

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances Walsh as Personal Representative of the Estate of Jerome Walsh, Deceased, and in her individual capacity, Appellant,

v.

Joyce K. Woods, f/k/a Joyce K. Walsh, Respondent.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

REVERSED AND REMANDED

Opinion No. 3648
Heard March 11, 2003 – Filed June 2, 2003

Russell H. Putnam, Jr., of Hinesville; for Appellant

John S. Nichols, of Columbia; Kelli Lister Sullivan, of Columbia; for Respondent.

CURETON, J.: Frances Dudley Walsh (Frances), individually and in her capacity as personal representative of the estate of her deceased husband, Jerome J. Walsh (Walsh), brought this action against Walsh's former wife, Joyce K. Woods (Joyce). In her complaint, Frances seeks relief pertaining to the disposition of surviving spouse benefits made available through Walsh's retirement plan. Frances appeals from the trial court's order granting Joyce's motion for summary judgment. We reverse and remand.

FACTS

Walsh married his first wife, Joyce, in 1957, and the two separated in 1970. Although they continued to live apart, Walsh and Joyce remained married for twenty years after their separation. In 1989, Walsh retired from E.I. Du Pont De Numours And Company (DuPont) after approximately forty years of employment. During his tenure at DuPont, Walsh participated in a DuPont sponsored pension benefits plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et. seq. ("ERISA"). Contemporaneously with his retirement, Walsh signed a Post Retirement Company-Paid Survivor Benefits and Spouse Benefit Option designating Joyce, to whom he was still married, as the sole beneficiary of his surviving spouse benefits plan in the event he predeceased her. Walsh's monthly benefit was therefore reduced by the amount necessary to cover the cost of the survivor benefit plan.

Walsh and Joyce were divorced by order of the family court dated August 24, 1990. Incident to the divorce, Walsh and Joyce entered into an agreement which the family court approved, adopted, and incorporated into the divorce decree. The decree provided, in relevant part:

> [T]he parties shall sign whatever documents or other paperwork that is necessary to enforce this Agreement. I find that the parties have further agreed that each shall retain what . . . retirement plans, pension plans . . . etc., that he or she has in his or her possession. If the wife is required to sign any papers concerning

the husband's retirement or benefit options from DuPont of Westinghouse, then she shall sign those.

It is undisputed Walsh never presented Joyce with any documents to sign regarding his retirement benefits, and that neither party attempted to obtain a Qualified Domestic Relations Order (QDRO) reassigning the surviving spouse benefits during Walsh's lifetime.

On May 31, 1991, Walsh advised DuPont he was divorced from Joyce and desired to change the beneficiary of his pension plan to his wife Frances and requested the paperwork to accomplish this[1]. In 1994, Walsh married Frances, with whom he had been involved since 1980. On November 30, 1994, Walsh wrote to DuPont again advising the company that he was married to Frances and wished to designate her as beneficiary under his retirement plan, and that the company should send him any documentation necessary to effectuate the change in beneficiary. Despite the May 31, 1991 letter and other subsequent communications with DuPont wherein Walsh referred to Frances as his designated beneficiary, the change Walsh requested was never made legally effective.

Walsh died testate on January 27, 1996. Pursuant to the terms of Walsh's will, Frances became the sole beneficiary and the Personal Representative of his estate.

In 1997, Frances instituted an action against DuPont, which was removed to federal court, seeking a judicial finding that Walsh's surviving spouse benefits should be paid to her and not Joyce. DuPont moved for and was granted summary judgment on the grounds that no QDRO existed terminating Joyce's right to receive the benefits at the time of Walsh's retirement.

Thereafter, Frances contacted John W. Harte, the attorney who represented Walsh in his divorce from Joyce, and requested that he prepare and submit a QDRO to DuPont. Harte prepared the QDRO, then contacted Vickie Johnson, the attorney who represented Joyce in the divorce action, and

[1] Apparently, Walsh thought he had a common law marriage with Frances.

requested that she obtain Joyce's signature on the document. Joyce did not sign the QDRO but authorized Johnson to sign it on her behalf. Joyce noted on the document, however, that she authorized her signature under protest and out of concern she would be held in contempt of court if she refused to sign.

In August of 1998, Harte submitted the QDRO to DuPont. In a letter dated September 16, 1998, DuPont advised Harte that the document was unenforceable as a QDRO inasmuch as "[a] QDRO cannot be entered after the death of the participant. A participant must be a living person. There was no QDRO in effect at the participant's death that awarded any benefits to an alternate payee. Therefore, there are no benefits payable pursuant to a QDRO." In addition, the letter from DuPont advised that even if the document had been prepared at some point prior to Walsh's death, it would nonetheless be ineffective to divest Joyce of her surviving spouse benefits inasmuch as ERISA requires that married participants be offered qualified joint and survivor annuities and their spouses must be offered the option to accept or waive the benefit. Once this election is made it is irrevocable.

Frances filed the instant action against Joyce on December 18, 2000, seeking recovery under seven theories of relief: 1) unjust enrichment; 2) "law of the case"; 3) res judicata; 4) collateral estoppel; 5) breach of contract; 6) bad faith breach of contract; and 7) conversion. Joyce answered, denying Frances was entitled to the relief sought in her complaint, and asserted as defenses: 1) expiration of the statute of limitations; 2) failure to state a claim upon which relief can be granted; 3) laches; and 4) res judicata.

The parties filed cross motions for summary judgment. Joyce argued, inter alia, that all of Frances's causes of actions failed because the surviving spouse benefits vested in Joyce in 1989, at the time of Walsh's retirement, and she could not now be divested of her right to the benefits. Joyce further asserted the applicable statute of limitations bars the claims. In support of her cross motion, Frances asserted generally that no genuine issues of material fact existed and specifically that Joyce had waived her rights to the benefits in the divorce decree. In addition, Frances asserted that the court could enforce the property settlement agreement by requiring Joyce to

disgorge herself of all surviving spouse benefit payments she had received in the past and will receive in the future by transferring the payments to Frances.

By order dated January 28, 2001, the trial court granted Joyce's motion for summary judgment. Specifically, the court cited Hopkins v. AT&T, 105 F.3d 153, 157 (4th Cir. 1997), for the propositions that 1) surviving spouse benefits vest in a plan participant's current spouse on the date the participant retires, whether or not spouses are married at the time the participant dies, and 2) surviving spouse benefits may not be paid to a spouse who marries a participant after the participant's retirement. The trial court expressly determined the holding in Hopkins was determinative of the entire case and, therefore, declined to address Joyce's other grounds for summary judgment and further declined to reach Frances's cross motion for summary judgment. This appeal followed.

LAW/ANALYSIS

I. Error Preservation

We turn our attention first to Joyce's assertion Frances failed to properly preserve the issue of whether the trial court properly found that all of Frances's claims were barred by ERISA provisions inasmuch as the court expressly declined to rule on the issues and Frances did not request, by a Rule 59(e), SCRCP motion or otherwise, that the court address such claims. We hold the trial court's express finding that it was "unnecessary to reach Frances's cross motion for summary judgment" rendered Frances's remaining issues moot and/or amounted to an effective denial of the cross motion. As such, any motion under Rule 59(e) requesting a specific ruling on the cross motion for summary judgment would have been futile, and was in any event, not necessary to discern the trial court's decision as to the issues. Under such circumstances, a litigant is not required to move for relief pursuant to Rule 59(e) in order to properly preserve issues for review before this court. See Wilder Corp v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of 59(e) motion is to preserve issues raised to but not ruled upon by the trial court); State v. Pace, 316 S.C. 71, 74, 447

S.E.2d 186, 187 (1994) (excusing the failure to make a contemporaneous objection where the judge's comments are such that any objection would be futile); Jean Hoefer Toal et. al. Appellate Practice in South Carolina 65-68 (1999).

II. Summary Judgment

Frances argues the trial court erred in granting Joyce summary judgment based on the court's reasoning that ERISA provisions governing vesting and non-alienability of surviving spouse benefit rights are controlling as to the disposition of all of Frances's legal and equitable claims. We agree.

Summary judgment is appropriate only when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001). Summary judgment is inappropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

Here, the trial court determined that ERISA provisions, as interpreted and applied by a single Fourth Circuit case, were determinative of every issue involved in this case. Specifically, citing and relying exclusively upon the holding in Hopkins, the trial court concluded that Frances could not recover on any of her claims because the surviving spouse benefits vested in Joyce on the date Walsh retired, and, further, the benefits could not be paid to Frances because she married Walsh after the date of his retirement.

In arriving at its ruling, the trial court failed to specifically explore the applicability of federal case and statutory law pertaining to the more narrowly drawn issue of whether the former spouse of an ERISA plan participant may,

incident to a separation agreement and in exchange for a comparable waiver on the part of the other spouse, voluntarily waive his or her interest in vested ERISA benefits. In Estate of Altobelli v. Int'l Bus. Machs. Corp., 77 F.3d 78 (4th Cir. 1996), a divorced spouse, who was designated beneficiary under her ex-husband's ERISA plan, waived her benefits through a marital settlement agreement that was incorporated into a divorce decree. The court found that ERISA's anti-alienation clause did not apply to a voluntary waiver by a beneficiary, since the purpose of the anti-alienation clause is to safeguard a stream of income for the pensioner and his beneficiaries, and to bar a waiver in favor of pensioner himself would not advance such a purpose. The court held that it was clear that each party intended to relinquish all interests in the other's pension plan and therefore the former wife's waiver was to be given full effect. Under the holding in Altobelli, we find it was error for the trial court not to examine the language of the settlement agreement, which was incorporated into the divorce decree, in order to determine if there was a clear intent by Joyce to relinquish all of her interests in Walsh's retirement plan and any benefits emanating therefrom.

Further, we are compelled to agree with Frances that although Joyce may have established an unassailable right to receive the surviving spouse benefit payments directly from DuPont, Frances's claim to the benefits are not, as found by the trial court, necessarily rendered untenable. By way of example, neither the anti-alienation provisions of ERISA nor the court's holding in Hopkins are in any way determinative of whether Joyce's retention of those benefits would constitute unjust enrichment in light of a voluntary agreement to waive her rights to the benefits. The mere fact that Joyce, and not Frances, is entitled to receive surviving spouse benefit payments from DuPont does not negate Frances's right to establish, under some legal or equitable theory of recovery, that Joyce is not entitled to retain the payments. See Succession of Netterville, 579 So.2d 1046 (La. Ct. App. 1991) (Although the surviving spouse should be recognized as the beneficiary of the pension plans, she was made accountable to the first wife and heirs, who under Louisiana law had certain vested rights under the state's community property laws.)

We find the issue of whether a former spouse's right to retain benefits under her ex-husband's ERISA plan may be voluntarily relinquished is a question of first impression in South Carolina. Important questions of novel impression should not be decided on summary judgment if further inquiry into the facts is necessary to clarify the application of the law. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 320 S.C. 143, 153, 463 S.E.2d 618, 624 (1997), rev'd in part on other grounds, 327 S.C. 238, 489 S.E.2d 470 (1997). As such, the grant of summary judgment was improper. The case is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

STILWELL J., concurs. HOWARD, J., concurs in part and dissents in part in a separate opinion.

HOWARD, J. (concurring in part and dissenting in part): Although I agree with my brethren that the issues raised in this case are preserved for appeal, I do not agree the circuit court erred in granting summary judgment.

The pertinent facts may be succinctly stated as follows. Jerome Walsh married his first wife in 1957. He worked for E.I. du Pont de Nemours and Company ("Dupont") for forty years, contributing to a pension benefits plan controlled by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2003) ("ERISA"). He retired in 1989, while still married to his first wife.

Walsh and his first wife divorced in 1990, entering into an agreement incorporated into the final decree, which stated as follows:

> [T]he parties shall sign whatever documents or other paperwork that is necessary to enforce this Agreement. I find that the parties have further agreed that each shall retain what . . . retirement plans, pension plans . . . etc., that he or she has in his or her possession. If the wife is required to sign any papers concerning the husband's retirement or benefit

> options from Dupont of Westinghouse, then she shall sign those.

Walsh married his second wife in 1994 and died in 1996. No changes were made to the spousal survivor benefits in his pension plan. After the second wife was notified the first wife was the beneficiary of the spousal retirement benefits, the second wife unsuccessfully tried to block payment to the first wife by bringing an action in federal court. However, having no Qualified Domestic Relations Order ("QDRO") to support her position, she was unsuccessful. She then brought this action, asserting the following legal theories for recovery: (1) unjust enrichment; (2) breach of contract; (3) conversion; and (4) bad faith breach of contract.[2]

Citing Hopkins v. AT&T, 105 F.3d 153 (4th Cir. 1997), the circuit court granted summary judgment to the first wife, concluding under any view of the facts she was vested with the survivor spouse benefits before the divorce, and they were not affected by the decree or any other event occurring thereafter. After careful consideration of the pertinent facts, I agree with this disposition of the case.

In Hopkins, the husband retired after marrying his second wife. He then attempted to transfer spousal benefits to his first wife in a QDRO to satisfy his overdue alimony obligations. The court ruled the Domestic Relations Order was not qualified, and was ineffective. Writing for the court, Judge Karen Williams noted the spousal benefits vested in the second wife when the husband retired. From that point on, those future benefits were a separate, beneficial interest belonging to the second spouse as a beneficiary. Under ERISA, a Domestic Relations Order is only "Qualified" if it assigns a "benefit payable with respect to a participant." Because the order attempted to assign a vested beneficiary interest and not a benefit payable with respect

[2] The complaint delineates "law of the case"; "res judicata"; "collateral estoppel"; and "bad faith" as additional causes of action. Assuming, without deciding, they represent separate causes of action, these issues fail for the same reasons discussed below.

to a participant, the court concluded the order was not "Qualified." Id. at 157.

Hopkins stands as clear authority for the proposition that the survivor spouse benefit vests in the spouse at the time of the participant's retirement. In this case, Walsh retired while still married to his first wife. Therefore, the survivor spouse benefit vested in the first wife at that time, and it was her property.

As the majority points out, ERISA does not preclude the nonparticipating beneficiary from waiving the surviving spouse benefit through specific language in a divorce settlement before the participant's retirement. See Altobelli v. I.B.M., 77 F.3d 78, 81 (4th Cir. 1996) (Wilkinson, J., dissenting); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 280-281 (7th Cir. 1990) (en banc), cert. denied, 498 U.S. 820 (1990). For example, in Altobelli, the wife executed a Voluntary Separation and Property Settlement Agreement, incorporated into a divorce decree, which stated:

> All of the following property is hereafter the sole and exclusive property of the Husband, *and the wife hereby waives and transfers to the Husband any interest that she may have in the property* . . .
>
> (g) Husband's IBM pension and other deferred compensation plans, if any.

77 F.3d at 80.

However, in this case, no such language appears in any agreement between Walsh and his first wife. The only language is that previously noted in the divorce decree. This language states only that each party "*retains* what retirement plans, pension plans . . . etc., that he or she has in his or her possession . . . ." Unlike Altobelli, Walsh had retired at the point this agreement was entered. Thus, the beneficial interest had vested in the first wife, and she was in possession of it. Furthermore, the language does not

contain a transfer, assignment, or waiver of any interest in the retirement plan. Taking the evidence in a light most favorable to the second wife, the decree of divorce does not contain specific language waiving the surviving spouse's interest.

The post-death attempt to modify the circumstances through a family court order purporting to be a *nunc pro tunc* QDRO has no efficacy for two reasons. First, describing the action as *nunc pro tunc* does not make it so. Our supreme court has noted, a *nunc pro tunc* order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, not to correct an error, or supply an omission, of judicial action. See Ex Parte Strom, 343 S.C. 257, 265, 539 S.E.2d 699, 703 (2000). Second, the nonparticipating beneficial interest had vested in the first wife at retirement. Therefore, the order did not relate to a benefit payable with respect to a participant. See Hopkins, 105 F.3d at 156. Thus, it was not qualified. Consequently, I would affirm the trial court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher M. Chisolm, Appellant.

Appeal From York County
Howard P. King, Circuit Court Judge

Opinion No. 3649
Heard March12, 2003 – Filed June 2, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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

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

MOREHEAD, A.J.: Christopher M. Chisolm appeals his convictions for distribution of crack cocaine and distribution of crack cocaine within the proximity of a school. Chisolm argues the trial court erred: (1) in failing to suppress drug evidence; and (2) in denying his motion for a directed verdict on the proximity charge. We affirm in part, reverse in part, and remand.

FACTS

Rosie Jones purchased crack cocaine from Chisolm while acting as a confidential informant for the York County Multi-Jurisdictional Drug Enforcement Unit (DEU), a division of the Rock Hill Police Department.

On May 9, 2000, Jones paged Chisolm from the Rock Hill Police Department to arrange the drug buy. Chisolm called back and agreed to meet Jones in a motel parking lot. An officer searched Jones prior to the drug transaction and fitted her with a wire. Jones purchased drugs from Chisolm at the motel and returned to the police department.

Jones handed seven small plastic baggies containing a rock-like substance over to Officer Dalton. Dalton placed the baggies into a York County Sheriff's Office evidence bag and sealed it. Dalton placed his initials and date over the seal before placing the evidence bag into a locked metal drop box in the police station.

Dates and signatures on the evidence bag's "Chain of Possession of Evidence" indicate Gary Rollins, a York County Sheriff's Office evidence technician, retrieved the bag from the Rock Hill Police Department drop locker on May 10, 2000. The next notation on the bag indicates the evidence bag was transferred from Rene Sealy, also an evidence technician, to Cynthia Taylor on June 15, 2000. There is nothing on the bag or in the record to indicate how long Rollins possessed the bag, in what condition he received it, or where it was stored. Likewise, there is no indication of when or how Sealy

came into possession of the evidence or in what condition she received it. Neither Rollins nor Sealy testified at trial.

Cynthia Taylor is an employee of the Sheriff's Office Drug Analysis Laboratory. Taylor did not begin working for the laboratory until May 29, 2000. Taylor testified that the evidence "stayed down in the evidence vault [in the Sheriff's Office]" until June 15, 2000. Taylor tested the substance inside the evidence bag and it tested positive for crack cocaine. Before testing the substance, Taylor inspected the bag for evidence of tampering, making sure it was sealed and had no openings.

At trial, Chisolm objected to the introduction of the evidence bag containing the crack cocaine. Chisolm argued the chain of custody had not been established. The trial court overruled the objection and admitted the drugs into evidence.

To prove the proximity charge Officer Dalton testified the sale of crack cocaine took place within one-half mile of the York County Adult Education Center. Dalton identified the Center as a public school. The State introduced a map depicting the Center within one-half mile of the motel where Chisolm sold the crack cocaine. Dalton generated the map by using a mapping program in the City Hall's Planning Division office that highlights any schools or parks within the Rock Hill city limits.

At the close of the State's case, Chisolm moved for a directed verdict on the proximity charge, arguing the State failed to present evidence of a transaction that occurred within one-half mile of a school. The trial court denied the motion, finding there was evidence in the record by which the jury could conclude the transaction occurred within one-half mile of a school.

The jury found Chisolm guilty on both charges. The trial court sentenced Chisolm to twelve-year concurrent sentences on each count. This appeal follows.

ISSUES

I. Did the trial court err in admitting the crack cocaine into evidence?

II. Did the trial court err in denying Chisolm's motion for a directed verdict concerning whether the distribution of crack cocaine occurred within one-half mile of a school?

LAW/ANALYSIS

I. Chain of Custody

Chisolm argues the trial judge erred in admitting the crack cocaine into evidence because the State failed to prove a sufficient chain of custody. Chisolm contends the chain of custody is incomplete and has not been established pursuant to Rule 6(b), SCRCrimP.

A complete chain of evidence, tracing possession from the evidence's initial control to its final analysis, must be established as far as practicable. State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001). A missing link in a chain of custody creates an issue of admissibility. Id. If a substance has passed through multiple custodians, it must not be left to conjecture concerning who had the evidence and what was done with it between the taking and the analysis. State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997).

The State presented the testimony of the first (Dalton) and last (Taylor) links in the chain of custody. However, the State did not provide testimony from either of the intervening links (Rollins and Sealy) in the chain. Rollins received the evidence on May 10, 2000, from the Rock Hill drop locker but the record does not indicate when or how Sealy came into possession of the evidence. Taylor's testimony, while it explained her receipt of the evidence from Sealy, did not provide for the whereabouts of the evidence for the interval Rollins or Sealy possessed it. Moreover, Taylor had not started her

employment with the laboratory at the time Rollins received the evidence and could not explain what Rollins had done with the evidence.

As an alternative to presenting the testimony of the intervening custodians, the State could have utilized Rule 6(b), SCRCrimP, to establish the chain of custody. See Joseph, 328 S.C. at 364, 491 S.E.2d at 281 (stating Rule 6 does not supplant the general law governing chain of custody requirements but provides an alternate means of establishing a chain of custody). This rule allows for the admission of sworn statements in lieu of the appearance of chain of custody witnesses and provides that:

> a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the person stated is evidence that the person had custody and made delivery as stated without the necessity of the person who signed the statement being present in court provided: (1) the statement contains a sufficient description of the substance or its container to distinguish it; and (2) the statement says the substance was delivered in substantially the same condition as when received.

Rule 6(b), SCRCrimP.

There is no dispute that the State did not submit the testimony of each individual who handled the evidence nor did the State comply with Rule 6(b). The trial court, however, allowed the introduction of the evidence despite the missing links in the chain because the State demonstrated that the evidence had not been tampered with by the time Taylor received it for analysis. This was error. The only insight into the handling of the evidence by Rollins and Sealy is their possession of the bag at some point in time as witnessed by their signatures. The evidence's whereabouts is unaccounted for between May 10 and June 15. While the chain of custody "need not negate all possibility of tampering," the State is required to show that the chain is complete. Carter, 344 S.C. at 424, 544 S.E.2d at 837. Moreover, it would

not have been impracticable for the State to have called each custodian to testify or for the State to have submitted sworn statements from the custodians under the procedures of Rule 6(b), SCRCrimP. See State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992) (stating the party offering evidence is required to establish, at least as far as practicable, a complete chain of evidence). Custodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce sworn statements pursuant to Rule 6(b), SCRCrimP. Thus, the trial court erred in admitting the crack cocaine into evidence.

II. Directed Verdict

Chisolm argues the trial court erred in denying his motion for a directed verdict based on the lack of competent evidence showing he distributed crack cocaine within one-half mile of a school.[1]

In reviewing an appeal from the denial of a motion for directed verdict, this Court must view the evidence in a light most favorable to the State. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001). A defendant is entitled to a directed verdict when

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[1] Chisolm also argues the trial judge should have granted his motion for a new trial. However, Chisolm did not move for a new trial but rather improperly moved for JNOV. JNOV is a civil trial motion. In a criminal trial, a motion for a new trial is the only available post-trial motion for addressing the sufficiency of the evidence. See State v. Miller, 287 S.C. 280, 282 n.2, 337 S.E.2d 883, 884 n.2 (1985) (discussing the confusion among members of the bench and bar in inaccurately describing post-trial motions in criminal cases). Therefore, Chisolm was not entitled to JNOV.

the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001).

Initially, the State argues Chisolm failed to preserve this issue for appeal. The State contends Chisolm moved for a directed verdict on different grounds from the one now raised on appeal. See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (stating a party cannot argue one ground at trial and a different ground on appeal). The record clearly shows Chisolm based his motion for directed verdict on the lack of any competent evidence showing the drug deal occurred within one-half mile of a school.

To prove Chisolm sold drugs within one-half mile of a school under section 44-53-445, the State must show the distribution occurred "within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university." S.C. Code Ann. § 44-53-445 (2002); see Brown v. State, 343 S.C. 342, 348, 540 S.E.2d 846, 849 (2001) (stating "the distribution [must occur] within a one-half mile radius of the grounds of an elementary, middle, secondary or vocational school; public playground or park; or college or university").

To carry its burden of proof, the State introduced a map depicting an "Adult Education Center" within a one-half mile radius of the location where the sale of drugs took place. Further, Officer Dalton stated that the York County Adult Education Center, a public school, was within one-half mile of the motel.

Chisolm argues that under Brown the State must present evidence that the Center fits within one of the categories covered by section 44-53-445. In Brown, our Supreme Court found the trial court lacked subject matter jurisdiction on charges under section 44-53-445 where the indictment alleged distribution of crack cocaine within one-half mile of a day care center. Brown, 343 S.C. at 346, 540 S.E.2d at 848. The Court held that a day care

center was not intended to be included as an elementary school under the statute. Id. at 349, 540 S.E.2d at 850.

This Court is not faced in the present case with an issue of whether an adult education center is intended to fall under the statute's parameters. Here, the State presented sufficient evidence for the jury to determine whether the sale of drugs occurred within one-half mile of one of the types of schools listed in section 44-53-445.

The trial court did not err in denying Chisolm's motion for directed verdict on the charge of distribution of crack cocaine within one-half mile of a school.

CONCLUSION

We affirm the trial court's denial of Chisolm's directed verdict motion on the proximity of a school charge. We reverse the trial court's admission of the drug evidence and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ANDERSON and HUFF, JJ., concur.