OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21

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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

4111-LandBank VII v. Dickerson	Pending
2006-UP-191-State v. N. Boan	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-218-Luther Smith v. State	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex Parte: Van Osdell In re: Babb v. Graham	Pending
2006-UP-235-We Do Alterations v. Powell	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3787-State v. Horton	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending

3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3982-LoPresti v. Burry	Pending
3983-State v. D. Young	Pending
3984-Martasin v. Hilton Head	Pending

3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4006-State v. B. Pinkard	Pending
4011-State v. W. Nicholson	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4028-Armstrong v. Collins	Pending

4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending
4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4065-Levine v. Spartanburg Regional	Pending
4068-McDill v. Mark’s Auto Sales	Pending

4070-Tomlinson v. Mixon	Pending
4074-Schnellmann v. Roettger	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4092-Cedar Cove v. DiPietro	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-487-State v. Burnett	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending

2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm'n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-165-Long v. Long	Pending
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending

2005-UP-195-Babb v. Floyd	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-222-State v. E. Rieb	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-365-Maxwell v. SCDOT	Pending

2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-506-Dabbs v. Davis et al.	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-556-Russell Corp. v. Gregg	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending

2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-592-Biser v. MUSC	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-065-SCDSS v. Ferguson	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending

2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Silas Smith, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Greenville County
Henry F. Floyd, Circuit Court Judge
John C. Few, Post Conviction Relief Judge

Opinion No. 26161
Submitted April 19, 2006 – Filed June 5, 2006

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, for Petitioner.

Deputy Chief Attorney Wanda H. Carter, Office of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This Court granted certiorari to review the Post Conviction Relief (PCR) Judge's decision to grant relief to Silas Smith (Respondent). We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Respondent pled guilty to felony DUI. The trial court sentenced Respondent to twelve years imprisonment. Because of the nature of the offense, Respondent had to serve eighty-five percent of the sentence without the possibility of parole.

Respondent filed this action for PCR claiming that but for the erroneous advice of trial counsel, he would not have pled guilty. Respondent maintains that trial counsel informed him that by pleading guilty to the charge, Respondent would be sentenced to twelve years but only have to serve half of that sentence because he would be eligible for parole in six years. At the PCR hearing, Respondent testified that trial counsel informed him that he would receive credit for time served prior to the guilty plea. Although Respondent stated in his PCR application that but for counsel's advice, he would not have pled guilty, Respondent made no such statement at his PCR hearing. Instead, as a matter of strategy, Respondent declined to testify whether he would choose not to plead guilty and face another trial in light of the plea bargain he received.

The PCR court found that because the only evidence before the court was Respondent's undisputed testimony and the averment in the PCR application, Respondent was entitled to relief. The State sought certiorari from this Court. This Court granted certiorari to review the decision of the PCR court. The following issue is before this Court:

Did the PCR court err in granting relief to Respondent?

LAW / ANALYSIS

The State argues that the PCR court erred in granting relief to Respondent. We agree.

In reviewing the PCR court's decision, this Court is concerned only with whether there is any evidence of probative value to support that decision. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases – i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 56-58 (1985). The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty. *Jackson v. State*, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); *Alexander v. State*, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991).

During his testimony at the PCR hearing, Respondent did not indicate whether he would have pled guilty absent counsel's erroneous advice. However, Respondent did make such a claim in his PCR application. The State did not offer any evidence to the contrary, and the State failed to provide the testimony of trial counsel at the PCR hearing. Further, the PCR court did not have an opportunity to review the plea transcript because neither party presented it to the court. Accordingly, the *only* evidence before the PCR court was Respondent's sworn statement in his PCR application that if he knew that he would have to serve eighty-five percent of the sentence he would not have pled guilty.

This Court, in *Jackson* and *Alexander*, held that the undisputed testimony of a PCR applicant is sufficient to warrant relief. In *Jackson* and *Alexander*, the PCR applicants testified at the PCR hearing that they would not have pled guilty absent the errors made by trial counsel. We find that the present scenario is distinguishable from *Jackson* and *Alexander*. In the present case, Respondent did not testify at the PCR hearing that he would have not pled guilty absent trial counsel's erroneous advice. As a result, we hold that the averment in a PCR application that the applicant would not have pled guilty is insufficient to warrant relief. Respondent's failure to take the stand resulted in a failure of proof – i.e. the allegation in the complaint that he would not have pled guilty was not proven because of Respondent's

reluctance to testify to that assertion. An applicant seeking relief from a guilty plea must present probative evidence to support the allegations in the PCR application that but for trial counsel's erroneous advice, the applicant would not have pled guilty.

CONCLUSION

Based on the above, we reverse the PCR court's decision.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

Nancy S. Layman, David M. Fitzgerald, Vicki K. Zelenko, Wyman M. Looney and Nancy Ahrens, on behalf of themselves and all others similarly situated, Petitioners,

v.

The State of South Carolina and The South Carolina Retirement System, Respondents.

ORDER

On May 4, 2006, this Court issued an opinion holding that respondents breached their contract with TERI participants who joined the TERI program, originally enacted in 2001, prior to July 1, 2005 (old TERI participants), by forcing them to make retirement system contributions. Layman v. State of South Carolina, Op. No. 26146 (S.C. Sup. Ct. filed May 4, 2006). We further ordered that all retirement system contributions withheld from those TERI participants be returned to them with interest and that no further contributions from them shall be required. Id. Finally, we remanded the issue of breach of contract as it relates to working retirees to

the trial court because the record before us does not allow us to make the factual or legal inquiry necessary to determine if a binding contract existed between the State and the working retirees regarding the making of further retirement system contributions. Id.

The parties have now filed several motions. We will address respondents' petition for rehearing first. We deny the petition with regard to Arguments I and II.

We also deny the petition as to Argument III, but will analyze the arguments made therein. Respondents contend this Court impugned the integrity of counsel by labeling as a complete misrepresentation the assertion that the growing number of TERI participants was part of the reason for requiring contributions from previously enrolled TERI participants. At page 26 of their brief respondents state, "Act 153 was adopted in the face of increasing liabilities in the Retirement System." The sentence is accompanied by a reference to pages 754 and 755 of the record. Those pages in the record contain a portion of the Milliman study describing the increase in the number of participants corresponding to the increase in the liabilities of the retirement system. The numbers are reflected in chart form, depicting the

liabilities increasing significantly, almost off the charts. We did not intend to impugn the character of counsel, but we did find fault in the analysis used with respect to the entire Milliman report. Respondent's reliance on the report was inaccurate because by the time respondents prepared the briefs for presentation before this Court, we had previously certified the plaintiff class to include *only* those retirees enrolled *prior* to July 1, 2005. The Milliman report included both current and future TERI participants.

Further, this Court pointed to flawed analysis by stating that 100 percent of eligible retirees were used in arriving at the figures in the report. This sentence, when taken out of context, is incorrect. To clarify, the Milliman report did assume that only 80 percent of *all* eligible retirees (as opposed to 100 percent of eligible retirees) would participate in TERI.[1]

[1] Respondents contend in their Introduction, that "[t]his case represents a dramatic departure from ordinary procedural and substantive standards" and that [i]t is doubtful that there is another case in the history of South Carolina jurisprudence with such a procedural history." Many cases this Court has elected to entertain in its original jurisdiction, which by their very nature involve issues of public interest or special emergency, see Rule 229(a), SCACR, have taken the same efficient and expeditious path as the case at hand, and have not included an opportunity for the parties to engage in discovery. See e.g. South Carolina State Ports Authority v. Jasper County, Op. No. 26132 (S.C. Sup. Ct. filed April 3, 2006)(order accepting matter in Court's original jurisdiction filed March 2, 2005; opinion issued April 3, 2006); Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005)(order accepting matter in Court's original jurisdiction filed May 14, 2004; opinion issued January 28, 2005); Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004)(order accepting matter in Court's original jurisdiction filed May 30, 2003; opinion issued February 9, 2004). The case at hand was certified to this Court by order dated August 4, 2005. The opinion was issued on May 4, 2006, nine months later. Accordingly, this case does not

In Arguments IVA and IVB, respondents maintain the Court should amend the class definition to exclude working retirees or, in the alternative, decertify the entire class. Respondents state that class treatment is not necessary because "if the Court lets its decision stand, respondents will comply with the law as declared and provide appropriate relief to all persons entitled to it." Respondents also point out that if the class is not decertified, class notice will be required.[2] We are persuaded by this argument. Accordingly, we grant respondents' request to decertify the classes in this matter. Thus, petitioners' Motion for Approval of Notice to Class is denied as moot.

In Argument IVC, respondents maintain the Court failed to prescribe the procedures for making refunds pursuant to the opinion, specifically, how or when such refunds will be made.[3] Respondents state,

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mark a dramatic departure from procedures and time periods in other similar cases before this Court.

[2] By order dated November 3, 2005, this Court deferred the issue of class notice until after a decision was rendered in the case.

[3] Respondents take issue with this Court's statements in its opinion that the amounts contributed by old TERI participants have been escrowed in a separate interest-bearing account. By order dated August 31, 2005, this Court granted respondents' request for the escrowed funds to be held within the Retirement Trust Fund, but subject to separate accounting for individual contributions, and also ordered that the escrowed funds bear interest at the current rate established by the State Budget and Control Board pursuant to S.C. Code Ann. § 9-1-280 (1986). Further, we note that

"This is one of the reasons that the class definition must be amended to prevent confusion regarding who is entitled to relief, should the Court maintain the same result in this case." Finally, respondents maintain, as they have in the past, that there is a delay in collecting the contributions and in allocating them to specific persons who are members of the class.

We find there should be no confusion as to who is entitled to relief in this matter – all TERI participants who joined the TERI program, originally enacted in 2001, prior to July 1, 2005, from whom retirement system contributions have been collected since the effective date of Act 153. As to when such refunds are to be made, we hereby order that all retirement system contributions withheld from the old TERI participants shall be returned to them, with interest at the rate of 6%, within thirty (30) days of the date of this order. Specifically how this refund will be effectuated is to be decided by respondents, not this Court. The post judgment interest on the amounts to be returned shall begin to accrue at the rate of 11.25%, set forth by order of this Court dated January 4, 2006, for post-judgment interest, if not returned within this thirty (30) day period.

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the description of the interest bearing escrow account was borrowed in large part from pages 2-3 of respondents' brief.

In Argument IVD, respondents maintain the Court must clarify its ruling as to the working retirees and provide for appropriate procedures on remand to deal with whatever claims are permitted. Our opinion orders that the issue of breach of contract as it relates to the working retirees is remanded to the trial court. Because we have now decertified the class, only petitioner Ahrens' case is remanded to the circuit court, specifically, to the Honorable John L. Breeden. Judge Breeden shall have full authority to decide whether to certify a class or deal with the cases individually. Judge Breeden has the authority to fully explore the issue of whether the working retirees entered into a binding contract and all other issues involved in the working retiree action(s).

Finally, respondents assert in Argument IVE that this Court must prescribe procedures for determining petitioners' request for fees and costs. We consider petitioners' Petition for Costs to Include S.C. Code § 15-77-300 Attorney's Fees and Motion for Attorney's Fees (Common Fund Doctrine) in conjunction with Argument IVE of respondents' petition for rehearing. We deny petitioners' Motion for Attorney's Fees (Common Fund Doctrine), as we find attorney's fees in this matter should not come from the retirement

contributions made by the old TERI participants, or the interest accumulated thereon. However, we remand petitioners' request for costs, to include attorneys' fees pursuant to section 15-77-300, to Judge Breeden to determine if petitioners are entitled to recover reasonable attorneys' fees to be taxed as court costs against the State of South Carolina and the South Carolina Retirement System, and if so, the amount of attorneys' fees they are entitled to based on the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/Perry M. Buckner A.J.

s/Deadra L. Jefferson A.J.

Columbia, South Carolina

June 1, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Willie Cochran and Reggie James, Appellants.

Appeal From Hampton County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 4116
Heard May 8, 2006 – Filed May 30, 2006

REVERSED

Tara Dawn Shurling, of Columbia, for Appellants.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for Respondent.

KITTREDGE, J.: Willie Cochran and Reggie James were convicted by a jury of first-degree burglary and sentenced. Reggie James was also convicted and sentenced for assault and battery of a high and aggravated nature.[1] They appeal from the trial court's granting of the State's Batson motion and quashing the first jury selected. Batson v. Kentucky, 476 U.S. 79 (1986). We reverse because the trial court failed to adhere to the mandated process for the handling of a Batson motion, and the jury that convicted Appellants was comprised of jurors whom the trial court erroneously prohibited Appellants from striking.

STANDARD OF REVIEW

In the typical appeal from the granting or denial of a Batson motion, the appellate courts give deference to the findings of the trial court and apply a clearly erroneous standard. State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing. Here, where the assignment of error is the failure to follow the Batson hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary. See S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330 (Supp. 2005); S.C. Code Ann. § 14-8-200 (Supp. 2005) (Supreme Court and Court of Appeals have jurisdiction to correct errors of law).

[1] Appellant Reggie James was also found guilty of malicious injury to personal property; however, after the verdict, and despite appropriate motions made during the course of the trial, the trial court decided to revisit this issue and found "no testimony" of vandalism. Accordingly, the court directed a verdict of acquittal as to this charge.

DISCUSSION

I.

We begin our discussion mindful of the difficult task our trial judges encounter in evaluating the propriety of the wide-ranging reasons given for the exercise of peremptory challenges. At the appellate level, we view issues like a Batson challenge through the lens of hindsight, and from that perspective, we must remain sensitive to the vagaries and burdens facing trial judges. Accordingly, we are not easily persuaded to second-guess a trial court's discretionary calls. By design, the clearly erroneous standard of review (applicable in the typical Batson appellate setting) follows suit by placing constraints on the appellate court. The reversal here comes not from second-guessing, but as a result of a legal error in not adhering to the mandated Batson procedure, specifically the failure to require the opponent of the strike to prove purposeful discrimination. Even so, we recognize the experienced and able trial judge was presented with a problematic Batson motion. We now proceed to the case at hand.

II.

During jury selection, Appellants, who are black, exercised ten of their twenty peremptory challenges, striking two black women, three white men, and five white women.[2] The State opposed Appellants' strikes and requested a Batson hearing.

In Batson, the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prevents the prosecution from striking potential jurors on the basis of race. 476 U.S. at

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[2] A defendant charged with burglary is entitled to ten peremptory challenges and the State is entitled to five. S.C. Code Ann. § 14-7-1110 (Supp. 2005). Codefendants, tried jointly, are entitled to twenty peremptory challenges. Id.

89. In Georgia v. McCollum, 505 U.S. 42, 59 (1992), the Supreme Court expanded Batson, holding "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." Thus, during jury selection, either the defendant or the State may oppose the peremptory challenge of a juror who is a member of a cognizable racial group.[3] Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing and adhere to the procedures set forth in Purkett v. Elem, 514 U.S. 765, 767 (1995), and adopted by our supreme court in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996).

In Purkett, the Supreme Court announced:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

514 U.S. at 767. The Supreme Court observed "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible." Id. at 767-68. At step two, therefore, the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes." Adams, 322 S.C. at 123, 470 S.E.2d at 371. Therefore, "[u]nless a discriminatory intent is inherent" in the explanation provided by the proponent of the strike, "the reason offered will be deemed

[3] See also J.E.B. v. Alabama ex rel. T. B., 511 U.S. 127, 146 (1994) (recognizing the Fourteenth Amendment to the United States Constitution prohibits the striking of a juror on the basis of gender).

race neutral" and the trial court must proceed to the third step of the Batson process. Purkett, 514 U.S. at 768; see e.g., Payton v. Kearse, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998) (striking a juror because she was a "redneck" evinces a discriminatory intent and is therefore not facially race-neutral).

At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination. Adams, 322 S.C. at 124, 470 S.E.2d at 372. The opponent of the strike carries "the ultimate burden of showing purposeful discrimination" and must demonstrate the pretextual nature of the stated reason for the strike. Id. This burden is generally established by showing similarly situated members of another race were seated on the jury. Id. at 123, 470 S.E.2d at 371.

As our case law illustrates, unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext. When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo. See State v. Jones, 293 S.C. 54, 58, 358 S.E.2d 701, 704 (1987), abrogated on other grounds by State v. Chapman, 317 S.C. 302, 306, 454 S.E.2d 317, 320 (1995); see also State v. Heyward, 357 S.C. 577, 580, 594 S.E.2d 168, 169 (Ct. App. 2004).

III.

We now turn to the first jury selection and ensuing Batson motion. Initially, we note the first jury was diverse. It was comprised of one white woman, three black men, four white men, and four black women. Thus, the composition of the first jury does not indicate Appellants engaged in purposeful racial discrimination. See State v. Shuler, 344 S.C. 604, 621, 545 S.E.2d 805, 813 (2001) ("[T]he composition of the jury panel is a factor that may be considered when determining whether a party engaged in purposeful discrimination pursuant to a Batson challenge.").

Additionally, we disagree with the State's argument that Appellants embarked on a "pattern" of striking jurors because of their race. Appellants did not use their peremptory challenges solely on jurors from a single racial group. They selected a white male as their first juror, and first struck a black female. Further, although Appellants ultimately struck five white women, they also struck two black women, and seated one white woman and four white men. See State v. Ford, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999) ("Although appellant exercised most of his strikes against white jurors, he did not strike every white juror. . . . [T]he fact that appellant used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination."). Appellants used only ten of their twenty allotted peremptory challenges. If they intended to discriminate against white jurors, they certainly would have exercised their peremptory challenges more liberally. Instead, Appellants seated five white jurors.

Despite the diversity of the first jury and the fact that Appellants did not appear to engage in a pattern of purposeful racial discrimination, the State opposed Appellants' strikes and requested a Batson hearing. We now examine the first Batson hearing, which in our view demonstrates the trial court's failure to follow the mandated Batson procedure.

Appellants' counsel first explained that he struck Juror 87, a black woman, because she gave an indignant and outraged expression. The record reveals that the State had no interest in challenging the striking of black jurors, and the matter was not pursued.

Appellants' counsel next explained that he struck Juror 63, a white woman, because she shared the last name of a local Deputy Sheriff. Because this reason was facially race-neutral, Appellants satisfied step two, and the State was required to prove Appellants engaged in purposeful racial discrimination to satisfy step three. Purkett, 514 U.S. at 767-68 (holding that at the second step of the Batson process the proponent of the strike does not have to present a persuasive or even a plausible reason, only a race-neutral one). The State merely countered that neither Appellants nor their counsel knew for sure whether Juror 63 was related to the Deputy Sheriff with the same last name. The trial court was persuaded by the State's argument and

found pretext. This was error. The reason for striking Juror 63 was race-neutral, and the State failed to carry its burden of proving purposeful discrimination.

Appellants' counsel next explained that he struck Juror 52, a white woman, because she gave an "indignant" and "shocked" look. The trial judge preempted the State's response, noting that he did not observe any such indignant or shocked expression from Juror 52. The trial court pronounced Appellants' reason as pretextual. The demeanor of a prospective juror is generally a race-neutral reason for employing a peremptory challenge. State v. Tucker, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999) ("[C]ounsel may strike venire persons based on their demeanor and disposition."). We hold, however, that where a strike is based solely on a purported specific demeanor and disposition, and the trial judge makes an express and contrary finding, the deferential clearly erroneous standard of review applies.

An express finding by the trial court will, unless clearly erroneous, trump counsel's stated perception of a prospective juror's demeanor and disposition. In this situation, the trial court determines counsel's credibility. See Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) ("Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations."); Hernandez v. New York, 500 U.S. 352, 364-66 (1991) (holding that evaluation of a prosecutor's credibility "lies 'peculiarly within a trial judge's province'"); State v. Shuler, 344 S.C. 604, 615-16, 545 S.E.2d 805, 810-11 (2001) ("Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and 'evaluation of the prosecutor's mind lies peculiarly within a trial judge's province.'") (quoting Hernandez, 500 U.S. at 364-66); State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) ("The trial court must often base its decision on credibility determinations, and its rulings on discrimination are accorded great deference on appeal."); State v. Guess, 318 S.C. 269, 272-73, 457 S.E.2d 6, 8 (Ct. App. 1995) ("Typically, the decisive question becomes whether [counsel's] race-neutral explanation for a peremptory challenge should be believed. . . . [T]here is seldom much evidence in the record bearing on that issue, and the trial court's findings regarding purposeful

discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Therefore, those findings are given great deference and will not be set aside unless clearly erroneous.") (citations omitted).

The rule—extending considerable deference to a trial judge's credibility determinations—could not be otherwise without undermining the remaining remnants of Batson. For example, if a party were able to overcome every Batson challenge by merely claiming that a prospective juror's demeanor and disposition were somehow inappropriate, the equal protection principles underlying Batson would be weakened. The trial court serves an important gatekeeping role in this regard. Our decision today in no manner diminishes the continuing critical role of counsel's (or a party's) perception of a prospective juror's demeanor and disposition in the exercise of peremptory challenges. In the absence of an express and contrary finding by the trial court, a party's striking of a juror based on demeanor and disposition should be upheld by the trial court. As for Juror 52, because of the express findings of the trial court, the finding of pretext is not clearly erroneous.

Appellants' counsel then explained he struck Juror 78, a white woman, because she is the wife and office manager of a prominent dentist in the community. The employment status of a prospective juror is a race-neutral reason for using a peremptory challenge. State v. Haigler, 334 S.C. 623, 632, 515 S.E.2d 88, 92 (1999) (unemployment is a race-neutral reason for strike); Ford, 334 S.C. at 65, 512 S.E.2d at 504 (place of employment is a race-neutral reason for strike); see Adams, 322 S.C. at 125, 470 S.E.2d at 372 (type of employment is a race-neutral reason for strike); State v. Flynn, Op. No. 4087 (S.C. Ct. App. Filed February 27, 2006) (Shearouse Adv. Sh. No. 9 at 51) (State's categorization of a Head Start director as "a very liberal job" was a race-neutral reason for striking the juror). Because Appellants offered a race-neutral reason for striking Juror 78, the burden shifted to the State to show purposeful racial discrimination. Before the State had an opportunity to carry its burden, the trial court asked Appellants' counsel if he knew Juror 78.

Counsel responded that he did not know Juror 78 but that he knew her husband. The court responded:

> The Court: Well, . . . my thinking is if you try to prejudice somebody by their position, I mean as long as it's not law enforcement or something like that, I think that you don't know what her thinking is if you don't know her.

The trial court then found the striking of Juror 78 violated Batson. As noted, unless discriminatory intent is inherent in the explanation provided by the proponent of the strike, the standard announced in Purkett and Adams does not require the proponent of the strike to carry any burden once a race-neutral reason is offered for the strike. The burden is on the opponent of the strike to show purposeful racial discrimination. The trial court erred when it, in effect, placed the burden on Appellants to disprove racial discrimination.

Counsel for Appellants next explained that he struck Juror 90, a white man, because he was a retired farmer. The employment status of a prospective juror is a race-neutral reason for using a peremptory challenge. Ford, 334 S.C. at 65, 512 S.E.2d at 504. Here again, the trial court found Appellants' counsel's reason for striking Juror 90 pretextual without requiring the State to say a word, much less prove purposeful racial discrimination.

Appellants' counsel next explained he struck Juror 15, a black woman. No reason for the strike was sought, as neither the court nor the State was concerned with the Appellants' striking of black jurors.

Appellants' counsel then stated he struck Juror 25, a white woman, because she worked as a magistrate judge's secretary. The trial court found this reason was not pretextual, presumably because her employment was law-related.

Appellants' counsel then explained he struck Juror 41, a white man, because he gave "a more outraged look than the others." The trial court, without hearing from the State and without making a finding on the juror's demeanor, simply declared the reason pretextual:

> The Court: Okay. I find that that's pretextual. The next one.

The trial court failed to follow the proper Batson procedure, and this was error.

Appellants' counsel next explained that Juror 7, a white man, was struck, because "[h]e's an insurance agent and his wife is a bank teller." Counsel also informed the court that the juror "said something about working for the sheriff's department." The trial court found the strike proper and not pretextual because counsel "thought that [Juror 7] was doing work for the sheriff's department."

Appellants' counsel shared with the court his concern and experience with jurors (or spouses of jurors) employed in certain jobs, such as insurance agents:

> Counsel for Appellants: Your Honor, I never put the relatives [sic] bank tellers and insurance agents[] [o]n my juries[.] . . . If you're an insurance agent. Or if you're married to an insurance agent. Or if they're a bank teller or married to a bank teller. These are the most straight-laced, conservation [sic] people that, that you could find, in my opinion. And they will . . . always convict your client.

Finally, Appellants's counsel explained he struck Juror 93, a white woman, for two reasons. First, according to counsel, Juror 93 taught at a school that used to segregate students on the basis of race. Second, the juror's husband is an insurance agent. As the following exchange reveals, the trial court did not consult the State before finding Appellants' reason was pretextual:

> Counsel for Appellants: [Juror 93 is] a teacher at Patrick Henry [School], Your Honor, which was

> predominately – I think they allow black people to go there now but it was started as a racist response to desegregation, Patrick Henry was. It was an all white school which has recently – [t]hey allow black students there now. But it's generally not something – somebody I want. And on top of that, they have –
>
> The Court: That's pretextual. Go ahead and put your record on, though. Go ahead.
>
> Counsel for Appellants: Your Honor, I just don't think that somebody that works for a racist institution that's white should be judging my client. I think that's just fraught with problems, Judge. And her husband's an insurance agent, one, one of the most conservative class of people that I – that I could think of, Judge.
>
> The Court: Okay. Well, every one of those reasons is a stereotype. And I think if it's a stereotype it's pretextual. . . . I find that that was [] pretextual.

The reason Appellants' counsel offered to strike Juror 93 was in part race-neutral. Moreover, it would seem plausible for a black defendant to strike a potential juror who worked at a school that was perceived to be founded in response to desegregation. Although the juror's race is tangentially at issue, it is important to realize that the juror was struck, not because of her race, but because of her association with an organization which counsel perceived as having a history of practicing racial discrimination.

Racial prejudice has long been held to be a valid basis for striking a juror for cause. See S.C. Code Ann. § 14-7-1020 (Supp. 2005) (requiring the trial judge to ask jurors whether they are related to either party, have any interest in the cause, have expressed or formed an opinion, or know of any bias or prejudice to either party). Beyond a challenge for cause, this court

has held that "[t]he principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause." State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct. App. 1997), aff'd, 333 S.C. 473, 511 S.E.2d 358 (1999). It follows, then, that perceived prejudice may serve as a basis for exercising a peremptory challenge. Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution.

In our judgment, neither of Appellants' explanations here was pretextual. Moreover, after counsel offered seemingly valid reasons for striking Juror 93, the trial court did not require the State to prove purposeful racial discrimination. Rather, the trial court required Appellants' counsel to prove that he did not purposefully discriminate on the basis of race. This was error.[4] Furthermore, just because the reason given for striking a juror may fit a stereotype does not necessarily mean the reason is pretextual.

In granting the State's Batson motion and quashing the first jury, the trial court erred.

IV.

Early on, the trial court abandoned the Purkett-Adams procedure for a Batson motion. The trial court failed to require the State to carry its burden of establishing purposeful racial discrimination in the third step of the Batson

[4] We do not suggest that counsel's perception of the Patrick Henry School has any validity. Perceptions and perceived biases—whether true or not—are at the heart of virtually every peremptory challenge. The striking of a juror based on perceptions of bias will generally be upheld unless it is established that the reason for the strike is impermissibly based on race or gender. The Batson burden of proof framework as set forth in Pukett-Adams seeks to achieve a proper balance between a party's ability to peremptorily strike a potential juror while allowing the opponent of the strike to prove purposeful racial or gender discrimination.

procedure. The State urges us to excuse noncompliance with the third step of the Batson procedure because of Appellants' "pattern" of striking white jurors. As noted, we find no such pattern, and the trial court made no such finding.

Appellants exercised only half of their allotted strikes. Appellants' first and sixth strikes were exercised against black women. In any event, the mere presence of a pattern would not justify a departure from the Purkett-Adams procedure. See State v. Ford, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999) ("Although appellant exercised most of his strikes against white jurors, he did not strike every white juror. . . . [T]he fact that appellant used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination."). Even the trial court acknowledged as much midway through the process. When the State argued that a strike by defense counsel was "in that same class of white persons who have been struck," the trial court correctly observed that a juror "can be in that class . . . and [Appellants can] still have a valid reason for striking [that juror]." Nevertheless, the trial court found many race-neutral reasons advanced by Appellants pretextual without resorting to the third and final step where the ultimate burden of persuasion would have been imposed on the State.

To be sure, a trial court's finding of a suspect pattern of peremptory challenges may carry weight in the ultimate disposition of a Batson motion. But the mere claim or appearance that peremptory challenges fit into a pattern does not excuse the failure to follow the mandated three-step Purkett-Adams procedure.

This is illustrated by the State's use of peremptory challenges in the selection of the second jury. The State used four strikes, all against blacks. Appellants moved under Batson to quash the jury. Under the State's "pattern" theory, the trial court presumably would have been justified in dispensing with the third and final step (requiring Appellants to prove purposeful discrimination) and allowing the mere pattern of striking blacks to establish pretext and carry the motion in Appellants' favor. The State, however, provided specific race-neutral reasons for its strikes, and the trial

court proceeded to the final step, requiring Appellants to prove purposeful discrimination.

For a Batson motion, the trial court must follow the procedure outlined in Purkett and Adams. We find our opinion in State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999) instructive. In Smalls, the defendant used nine of his ten peremptory challenges on white jurors. The State opposed these strikes and requested a Batson hearing. At the Batson hearing, the defendant argued he struck the white jurors because they looked at him in a mean, stern, and accusatory manner. Although the trial court admitted these reasons might be reasonable, it nevertheless determined they were pretextual. Importantly, it made this determination without requiring the State to prove the defendant engaged in purposeful racial discrimination. This court reversed the trial court's finding because it failed "to require the State to carry its burden to present evidence of pretext as prescribed by step three of the Adams/Purkett analysis." Id. at 309, 519 S.E.2d at 797. We similarly conclude the trial court erred when it abandoned the process mandated by Purkett and Adams and effectively placed a burden of *disproving* pretext and purposeful discrimination on Appellants.

V.

The second jury was comprised of two black men, two white men, three black women, and five white women. Appellants did not use any of their peremptory challenges, and the court forbade Appellants from striking those jurors it determined were improperly struck during the first jury selection. Conversely, the State used four peremptory challenges, all on black jurors. Appellants opposed the State's strikes and requested a Batson hearing. At the second Batson hearing, the trial court scrupulously adhered to the mandated Batson process and required Appellants to show purposeful racial discrimination after the State offered race-neutral explanations.

For example, the State stated it struck Juror 76, a black woman, because she has a brother who served time in prison. After hearing this explanation, which was race-neutral, the trial court followed the Batson process and required Appellants to show purposeful racial discrimination.

Yet the strike was nothing more than a stereotype that those with family members who have served prison sentences are also unsavory—a guilt-by-association stereotype. Had the trial court held to the approach it took during the first Batson hearing, the State's strike would have been decreed "pretextual" and that would have been the end of it.

VI.

We now address whether the error is reversible. Our case law dictates that even if the trial court commits error in granting the State's Batson motion, the error is reversible only if the second jury is comprised of jurors whom the trial court erroneously prohibited the defendant from striking based on Batson. Adams, 322 S.C. at 126, 470 S.E.2d at 373; State v. Rayfield, 357 S.C. 497, 504, 593 S.E.2d 486, 490 (Ct. App. 2004), cert. granted (Mar. 3, 2005). A defendant has no right to a particular jury. Adams, 322 S.C. at 126, 470 S.E.2d at 373.

In State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999), our supreme court held that no actual prejudice need be shown to establish reversible error for the deprivation of a peremptory strike where properly struck jurors are seated on the second jury. See also Ford, 334 S.C. at 66, 512 S.E.2d at 504 (holding that reversal and granting of a new trial is a proper remedy where the trial court erred in finding defendant violated Batson in striking certain jurors and any challenged juror was seated on the second jury).

Three of the six jurors Appellants properly struck from the first jury were seated on the second jury. Appellants should have been permitted to strike all three of these jurors. One of these three served as an alternate and did not participate in the deliberations. Any error with regard to this juror was harmless. State v. Ford, 334 S.C. 444, 449, 513 S.E.2d 385, 387 (Ct. App. 1999) ("Any Batson violation in regards to a possible alternate juror is harmless where an alternate was not needed for deliberations."). The remaining jurors, Jurors 78 and 93, were seated as regular members on the second jury. Because both jurors were seated on the second jury and

participated in the deliberations that determined Appellants' guilt, the error is reversible.[5]

CONCLUSION

We hold the trial court committed legal error. The trial court's handling of the first Batson hearing in effect placed the burden on Appellants to prove the absence of purposeful discrimination even after Appellants articulated race-neutral reasons for their strikes. Because jurors properly struck were seated on the second jury, which found Appellants guilty, the error is reversible.

REVERSED.

HEARN, C.J., concurs.

ANDERSON, J., concurring in result only in a separate opinion.

ANDERSON, J. (concurring in result only in a separate opinion): I **VOTE** to **REVERSE** the convictions and sentences of Willie Cochran and Reggie James (collectively, Appellants) because of the error committed by the circuit judge in violating Batson v. Kentucky, 476 U.S. 79 (1986).

The Appellants were convicted of first degree burglary. Additionally, Appellant James was convicted of assault and battery of a high and aggravated nature. Appellants appeal from the trial court's finding that six of their ten peremptory challenges violated Batson v. Kentucky. Although Appellants offered race-neutral reasons for their peremptory challenges, the

[5] Although we need not find prejudice to reverse this error, prejudice may be found in jury's guilty verdict against Appellant James for the offense of malicious injury to personal property. The trial court set aside the guilty verdict, finding "no testimony" of vandalism.

trial judge found their reasons were mere pretext to engage in purposeful racial discrimination. Appellants claim the trial judge erred in granting the State's Batson motion.

The conduct of a Batson hearing by a circuit judge is an intricate and labyrinthine trial procedure. Ofttimes, the circuit judge is presented with evidentiary conundrums emanating from the analysis of the factual and legal posture of the prospective juror. The body of law extant in regard to rulings made by a trial judge in a Batson hearing reveals luculently that the appellate court must give deferential treatment to the trial judge on review. The appellate court has the luxury of lengthy cogitation and rumination whereas the circuit judge rules in a trial setting not allowing for lengthy deliberation and delay.

FACTUAL/PROCEDURAL BACKGROUND

During jury selection, Appellants, African-American men, used ten of their twenty peremptory challenges on two black women, three white men, and five white women. The State opposed Appellants' strikes and requested a Batson hearing. At the Batson hearing, the trial judge found the race-neutral reasons offered by Appellants for their peremptory challenges were mere pretext to exclude jurors on the basis of race. The judge granted the State's Batson motion, quashed the first jury, and drew a second one.

During the second jury selection, the State used four of its five peremptory challenges on a black man and three black women. Appellants opposed all four of the State's strikes and requested a Batson hearing. At this Batson hearing, the State offered race-neutral reasons for its peremptory challenges and the trial judge found the State's reasons were not pretextual. The trial judge denied Appellants' Batson motion and impaneled the jury. The second jury was comprised of two of the six jurors Appellants struck from the first jury, which the trial judge found violated Batson. These two jurors participated in the deliberations and verdict.

STANDARD OF REVIEW

In determining whether a party exercised strikes in violation of Batson v. Kentucky, 476 U.S. 79 (1986), the appellate court must examine the totality of the facts and circumstances in the record surrounding the strikes. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). The trial judge's findings regarding purposeful discrimination in the exercise of peremptory strikes rest largely on evaluation of demeanor and credibility. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination. Hernandez v. New York, 500 U.S. 352 (1991); Shuler, 344 S.C. at 615-16, 545 S.E.2d at 810. Furthermore, a strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. Shuler, 344 S.C. at 616, 545 S.E.2d at 810-11.

The judge's findings as to purposeful discrimination are entitled to great deference and will be set aside on appeal only if clearly erroneous. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). A finding is clearly erroneous if it is not supported by the record. Shuler, 344 S.C. at 619, 545 S.E.2d at 813. Where the record does not support the trial court's findings, the findings must be overturned. State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999).

LAW/ANALYSIS

Appellants contend the trial judge erred in finding their peremptory challenges violated Batson v. Kentucky, 476 U.S. 79 (1986).

BATSON HEARING

The purposes of Batson v. Kentucky and its progeny are to protect the defendant's right to a fair trial by a jury of his peers, protect each venireperson's right not to be excluded from jury service for discriminatory

reasons, and preserve public confidence in the fairness of the justice system by seeking to eradicate discrimination in the jury selection process. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); State v. Flynn, Op. No. 4087 (S.C. Ct. App. filed February 27, 2006) (Shearouse Adv. Sh. No. 9 at 48). It is unconstitutional to strike a juror on the basis of race or gender. See J.E.B. v. Alabama, 511 U.S. 127 (1994). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venireperson on the basis of race. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Haigler, 334 S.C. at 628, 515 S.E.2d at 90. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson, 476 U.S. at 86. A criminal defendant may object to race-based peremptory challenges on equal protection grounds regardless of whether the defendant and potential juror share the same race. Powers v. Ohio, 499 U.S. 400 (1991); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. Georgia v. McCollum, 505 U.S. 42 (1992).

A hearing held pursuant to Batson v. Kentucky is trifurcated. First, when one party strikes a member of a cognizable racial group, the circuit court must hold a Batson hearing if the opposing party requests one. Shuler, 344 S.C. at 615, 545 S.E.2d at 810; Haigler, 334 S.C. at 629, 515 S.E.2d at 90. In order to raise and preserve a Batson issue, the opposing party must move for the hearing after the jury is selected but before it is sworn. State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). This hearing must be held out of the presence of the jury panel and the jury venire. Id. Second, the proponent of the strike, to successfully rebut the presumption of a Batson violation, must then offer a facially race-neutral explanation for the strike. Haigler, 334 S.C. at 629, 515 S.E.2d at 90-91. Third, the opponent of the strike must show that the race-neutral explanation given was mere pretext. Id. at 629, 515 S.E.2d at 91; State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996).

I. The Strike & Batson Request

The trial judge must hold a Batson hearing when members of a cognizable racial group are struck and the opposing party requests a hearing. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). Any person, regardless of race, may set forth a Batson claim. State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995). Both the defendant and the State can make a Batson motion. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998).

Batson requires a hearing to allow a party the opportunity to make a prima facie showing of purposeful discrimination by challenging the other party's use of a peremptory strike, and if such discrimination is found, the proponent of the strike has the opportunity to present a neutral explanation for the strike. Jones, 293 S.C. at 56-57, 358 S.E.2d at 702-03.

II. Explanation for the Strike

The proponent of the strike must offer a facially race-neutral explanation for the strike. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); Adams, 322 S.C. at 124, 470 S.E.2d at 372; State v. Smalls, 336 S.C. 301, 519 S.E.2d 793 (Ct. App. 1999). The explanation need not be clear, reasonably specific, or legitimate; it only needs to be race-neutral. State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997). The reason is not required to be persuasive or plausible and may even be silly or superstitious. Purkett v. Elem, 514 U.S. 765 (1995); State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997). While merely denying a discriminatory motive is insufficient, the proponent of the strike need only present race-neutral reasons. Casey, 325 S.C. at 451-52, 481 S.E.2d at 171-72. At this stage of the inquiry, the issue is the facial validity of the explanation. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), our supreme court adopted the procedure for the second step of the Batson analysis delineated in Purkett v. Elem:

> "The second step of this process does not demand an explanation that is persuasive, or even plausible. . . . It is not until the third

> step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step 3 is quite different from saying that a trial judge must terminate the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."

Adams, 322 S.C. at 123-24, 470 S.E.2d at 371-72. Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race-neutral. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

South Carolina rejected the dual motivation doctrine in the Batson context. Payton, 329 S.C. at 59-60, 495 S.E.2d at 210. We adopted the "tainted" approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike. Id.

A. Examples—Valid Reasons for Strike

1. Demeanor. Demeanor can be considered a racially neutral explanation. Counsel may strike venirepersons based on their demeanor and disposition. See Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997) (holding the State is allowed to consider tone, demeanor, facial expression, and any other race-neutral factors when striking jurors); State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (two black males struck because they were late); State v. Wright, 304 S.C. 529, 405 S.E.2d 825 (1991) (stricken juror had disinterested attitude and demeanor); State v. Smalls, 336 S.C. 301, 309, 519 S.E.2d 793, 797 (Ct. App. 1999) (finding no discriminatory intent inherent in defense counsel's explanation for striking jurors who appeared to counsel as

"looking in a 'mean,' 'stern' or 'accusatory' manner"); State v. Guess, 318 S.C. 269, 457 S.E.2d 6 (Ct. App. 1995) (declaring solicitor could strike venireperson because of demeanor observed during qualification; juror appeared to be "slow").

2. Recipient of prior strike. See Sumpter v. State, 312 S.C. 221, 439 S.E.2d 842 (1994) ("we find the solicitor's additional explanation that he struck Mr. Wright because he had struck him earlier in the week is also race neutral"); Feddiman v. State, 558 A.2d 278 (Del. 1989) (determining solicitor's explanation was race-neutral where she struck a male juror and later struck a female juror with the same last name who lived at the same address because she was concerned that there would be some feeling against the State for striking the male juror).

3. Prior jury service. Recent prior jury service is a facially neutral reason for exercising a peremptory strike. State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997).

4. Prior criminal conviction. A prior criminal conviction is a neutral reason to strike. Casey, 325 S.C. at 453 n.2, 481 S.E.2d at 172 n.2; see also Sumpter, 312 S.C. at 223-24, 439 S.E.2d at 844 (ruling solicitor's explanation for striking a black venireperson was racially neutral where prospective juror had a prior DUI involvement).

5. Possible criminal record. State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987).

6. Prior prosecution by that particular Solicitor's office. State v. Dyar, 317 S.C. 77, 452 S.E.2d 603 (1994); Sumpter, 312 S.C. at 223-24, 439 S.E.2d at 844.

7. Acquaintance with the trial judge. See State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (noting a potential juror's acquaintance with the trial judge is a valid reason for exercising a peremptory strike).

8. Relationship with attorney. An attorney's personal knowledge of and relationship with a prospective juror is a race-neutral reason for exercising a peremptory strike. State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999).

9. Relationship with law enforcement or pro-law enforcement attitude. A potential juror's relationship with a law enforcement official, or a potential juror's pro-law enforcement attitude, is a race-neutral reason for exercising a peremptory strike. Ford, 334 S.C. at 65, 512 S.E.2d at 504; cf. State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991) (noting State's explanation that juror was anti-law enforcement was race-neutral).

10. Knowledge of and association with defendant. State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990).

11. Unemployment. Unemployment is a race-neutral reason for a strike. State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991).

12. Place or type of employment. It is legitimate to strike potential jurors because of their employment. Ford, 334 S.C. at 65, 512 S.E.2d at 504; see also Adams, 322 S.C. at 125, 470 S.E.2d at 372 (finding potential juror's employment as a court reporter is a valid reason for exercising a peremptory strike).

13. "General instability". See State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991)(indicating that Solicitor's reasons for striking black juror were racially neutral and were not pretext for discrimination where Solicitor stated he struck juror because of her "general instability," in that she had changed employment several times after relatively short periods of employment, was unmarried mother of two-year-old, and was still living at her parents' home, and juror admitted on voir dire that she had seen outspoken advocate of defendant discussing his case on television).

B. Examples—Invalid Reasons for Strike

1. Desire to seat other venirepersons who have not yet been presented. See State v. Hicks, 330 S.C. 207, 210, 499 S.E.2d 209, 211 (1998) (stating black murder defendant who exercised nine of his peremptory strikes to remove white prospective jurors and one peremptory strike to remove black prospective juror from panel failed to satisfy requirement of Batson that he offer race-neutral explanation for his exercise of strikes against two of those white prospective jurors; defendant explained he struck those jurors "to reach some jurors further down the list," but he offered no explanation as to which jurors he was attempting to seat or why other jurors were more desirable than the two in question); State v. Grandy, 306 S.C. 224, 411 S.E.2d 207 (1991) (emphasizing that solicitor failed to articulate racially neutral explanation in his assertion he excluded prospective black juror because he wanted to seat other venirepersons; solicitor gave no reason why it was desirable to have other venirepersons seated, as opposed to the black juror; effect was same as if no reason was given for striking black juror).

2. Generalization about an entire group. See Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) (ruling that striking white juror because she was a "redneck" was not valid race-neutral reason on its face; thus, strike was facially discriminatory and violated Batson; term "redneck" was racially derogatory term applied exclusively to members of white race, and term stereotyped subgroup of white race without any evidence that each member of group was actually possessed of bias or prejudice).

3. Potential juror who "shucked and jived" to the microphone. See State v. Tomlin, 299 S.C. 294, 299, 384 S.E.2d 707, 710 (1989) ("The trial court failed to inquire into or comment on the prosecutor's explanation that the juror was struck because he 'shucked and jived.' The use of this racial stereotype is evidence of the prosecutor's subjective intent to discriminate and clearly violates the mandates of Batson.").

4. Racial stereotypes. See Tomlin, 299 S.C. at 298-99, 384 S.E.2d at 710 (noting prosecutor stated he struck Juror, a forty-three-year-old black woman, because she walked slow, talked low and might not be able to

withstand trial; rather than inquiring into legitimacy of this explanation, trial court suggested juror had lack of education, was extremely sluggish and would be a "filler" if seated on the jury; supreme court concluded use of such racial stereotypes violates Batson).

III. Argument of Mere Pretext

Once a race-neutral explanation is given, the opponent of the strike must show the explanation was mere pretext to engage in purposeful racial discrimination. State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Pretext generally will be established by demonstrating that a similarly situated member of another race was seated on the jury. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); Adams, 322 S.C. at 123, 470 S.E.2d at 371. Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at this third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment. Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

The uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race-neutral explanation for the inconsistency. See State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (finding State provided a racially neutral explanation for why Solicitor did not strike juror with similar characteristics to one previously stricken). Under this prong, persuasiveness of the justification becomes relevant. Purkett v. Elem, 514 U.S. 765 (1995). The opponent of the strike carries the burden of persuading the circuit court the challenged party exercised strikes in a discriminatory manner. Adams, 322 S.C. at 124, 470 S.E.2d at 372; see also Haigler, 334 S.C. at 629, 515 S.E.2d at 91 (stating burden of persuading court a Batson violation has occurred remains at all times on opponent of strike);); State v. Smalls, 336 S.C. 301, 308, 519 S.E.2d 793, 796 (Ct. App. 1999) ("At this third step, the burden returns to the party challenging the strike to establish that the explanation is mere pretext."). The ultimate question the trial court resolves under this prong is whether the movant has met his burden in demonstrating

purposeful discrimination. State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997).

A racially neutral reason can be negated by showing that the party created a pretext for purposeful discrimination by applying his allegedly racially neutral standard in a discriminatory manner. State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997). In State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989), the supreme court found a Batson violation when the State struck three black women because they were patients of a doctor who was a defense witness, but seated a white woman who was a patient of the same doctor. The court held the State's race-neutral reason for striking the three black women was mere pretext in light of the fact that it seated a similarly situated white woman. Id.

The determination of whether the minimum quantum of evidence has been produced under this prong is flexible, for the trial court's ruling turns on an examination of the totality of the facts and circumstances in the record, including the credibility and demeanor of the strike's proponent, and the plausibility of a neutral, but otherwise unpersuasive, reason. Casey, 325 S.C. at 452, 481 S.E.2d at 172.

In deciding whether the opponent of a strike has carried the burden of persuasion, a court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent. Haigler, 334 S.C. at 629, 515 S.E.2d at 91. A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. Id.

IV. After Batson Motion is Granted

If the trial judge finds the opposing party has established a prima facie case of purposeful discrimination and that the proponent of the strike has failed to give race-neutral reasons for the contested strikes, the process of selecting a jury shall start over. See State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). Thus, "if the circuit court finds a juror has been struck in

violation of Batson, our supreme court has mandated that the circuit court strike the entire jury and begin the jury selection process de novo." State v. Heyward, 357 S.C. 577, 580, 594 S.E.2d 168, 169 (Ct. App. 2004). Members of the tainted jury and all persons who were struck may be placed back in the jury venire. Jones, 293 S.C. at 58, 358 S.E.2d at 704.

Once a juror has been unconstitutionally stricken, the jury selection process relative to that juror is tainted. State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005). If the trial court chooses to reseat the improperly stricken juror, the striking party may not use a peremptory strike to remove that juror from the panel a second time. Id. Therefore, during the subsequent jury selection, the trial judge may prohibit the party who violated Batson from striking a juror who was improperly struck during the previous jury selection. Id.; State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995).

V. State v. Adams and its Progeny

In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), during voir dire, the defense exercised its peremptory challenges upon seven Caucasians. The prosecution requested a Batson hearing. The trial judge found a Batson violation based on his conclusion that defense counsel's explanations for two of the strikes—that one of the prospective jurors was a court reporter, knew too much about the process, and looked "too intelligent," and that another prospective juror knew the trial judge—were not racially neutral. On appeal, our supreme court ruled the trial judge erred in finding a Batson violation. The court concluded:

> These explanations are racially neutral, legitimate reasons for exercising peremptory strikes. A potential juror's acquaintance with the trial judge is a perfectly valid explanation for the exercise of a peremptory strike. The explanation that one juror looked "too intelligent" could be viewed as suspect but for the fact that the primary explanation given for the strike was that the potential juror was employed as a court reporter and may have known "too much" about the judicial process. Under our past precedents, the judge should have found these reasons racially

> neutral and legitimate and allowed the prosecution an opportunity to show that the explanations were pretextual. Under the new Purkett standard, the judge also should have allowed the inquiry to proceed to the third step, because the explanations given were facially race-neutral.
>
> The Record contains very little information that would allow this Court to determine whether defense counsel allowed to be seated black jurors who were similarly situated to the white jurors who were struck. The Record lacks this information because the trial judge did not allow the Batson hearing to proceed to the third stage. Without more information in the Record, we conclude that the trial court erred in finding a Batson violation and in quashing the original jury.

Id. at 125, 470 S.E.2d at 372.

The court of appeals, in State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997), found a Batson violation when the defendant struck a black man because of his age, but seated a white man within the same age bracket. This court held the defendant's race-neutral reason for striking the black man was negated by the fact he seated several white venirepersons in the same age bracket. Id.

In Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998), respondent exercised all of his peremptory strikes to remove prospective white jurors. Petitioner requested a Batson hearing. Respondent's counsel offered the following reason for striking Juror 18:

> "The juror number 18, she is known as [a] very opinionated person, your Honor, who expresses herself. We knew if she got on that jury she was not gone [sic] budge one way or the other, that she was gone [sic] get her way or no way. That was our opinion from what we had learned. Her family has--Mr. Lanier has talked about the number of people in trouble. She herself has not had any problems but she comes from a family that's had

> some problems with the law and she's kind of what we refer to as a redneck variety, so to speak, and that was the reason we struck her and, as you know, your Honor, I was concerned with her family, whether she had any problems with me or the law because some members of her family might have problems with the law."

Id. at 55, 495 S.E.2d at 208. After hearing respondent's reason for striking the juror, the trial court declared the reason race-neutral and found respondent had not violated Batson. On appeal, the supreme court ruled the trial court erred in finding the reason offered to strike Juror 18 to be race-neutral on its face. The court explicated: "The term 'redneck' is a racially derogatory term applied exclusively to members of the white race. The use of the term 'redneck' is not a valid race-neutral reason to strike a potential juror, and therefore, the strike is facially discriminatory and violates Batson." Id. at 55-56, 495 S.E.2d 208 (footnote omitted).

In State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998), appellant, who is black, was tried with two co-defendants, Roger Dewitt (Bill) Prince and Charlie Dorn Smith, who are white. Appellant argued his co-defendants violated Batson by excluding black jurors from the venire because of their race. The judge denied appellant's Batson motion. The supreme court remanded the matter to the trial court for the purpose of conducting a Batson hearing. On remand, co-defendant Prince candidly stated, due to the passage of time, he did not remember exactly why he had struck the black jurors at issue but, referring to his notes, thought he struck Juror #112 because she had two cousins who were sheriffs in New York and Juror #26 because he had a friend who worked for the sheriff's department. Co-defendant Smith stated he did not want anyone with connection to law enforcement on the jury. Consequently, he struck Juror #9, whose friend worked for SLED, and Juror #61, whose cousin worked for the sheriff's department.

Appellant argued the stated reasons for striking the four black jurors were pretextual because the co-defendants did not strike three white jurors who had similar connections to law enforcement. The trial judge concluded the stated reasons for striking the four black jurors were not pretextual. The

supreme court agreed finding the record from the jury voir dire indicated the three white jurors who were seated on the jury were not similarly situated to the four black jurors who were struck from the jury. While the black jurors had relatives or friends who, at the time of trial, were employed in law enforcement, the relatives or friends of the white jurors were no longer employed in law enforcement. The white jurors did not have the same relationship to law enforcement as the black jurors. The court determined appellant failed to meet his burden of establishing the co-defendants' stated reasons for striking the black jurors were pretextual. Thus, the court ruled the trial judge's findings were supported by the evidence and should be affirmed.

In State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999), all of the six peremptory strikes used by the State were used against blacks. Appellant contended that similarly situated white jurors were not struck. Specifically, appellant questioned the striking of Juror Bonaparte. On appeal, the supreme court articulated:

> The solicitor stated he struck Juror Bonaparte because he was argumentative and his answers were "dogmatic." Further, Juror Bonaparte had referred to his brother's murder and the former solicitor's refusal to prosecute. The solicitor stated he was afraid this juror harbored some resentment against the solicitor's office which might affect his deliberations. The trial court agreed that Juror Bonaparte was argumentative. The trial judge even pointed out how the juror had been argumentative with him. Appellant has failed to point out a white juror similarly situated to Juror Bonaparte who was not struck. Furthermore, counsel may strike venirepersons based on their demeanor and disposition. State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991).

Id. at 8, 512 S.E.2d at 102.

In State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999), the defense, during jury selection, used eight peremptory challenges, all against white venirepersons. On the State's motion, the trial judge conducted a Batson

hearing. The judge ruled two of Short's challenges were racially motivated and, thus, violative of Batson. The two contested strikes were exercised against Jurors #39 and #13. Defense counsel explained he challenged #39 because her husband was an assistant manager at "Carl's" and "just about every term of court, Carl's has a case in court, either somebody shooting in the parking lot, bad checks, one thing and another." Id. at 476, 511 S.E.2d at 359. As to #13, counsel explained the juror was employed at the same business where counsel's brother was the manager and "maybe because he's a manager, he's made somebody mad and they would hold it against my client." Id. at 476, 511 S.E.2d at 359-60. The trial court found the defense's explanations for its exercise of peremptory strikes were not racially neutral absent a showing of actual bias or prejudice on the part of Jurors 39 and 13. The trial court set aside the jury panel. The judge then directed that the jury be re-struck and that Short would not be permitted to challenge the two venirepersons previously stricken in violation of Batson. During the second jury selection, both Jurors 39 and 13 were seated. Short requested a bench conference immediately after the jury selection and thereafter objected to the seating of the two jurors. On appeal, the supreme court concluded Short's explanations were facially race-neutral and the State failed to show mere pretext. Thus, the trial judge erred in ruling the strikes violated Batson.

In State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999), during jury selection, appellant exercised thirteen peremptory challenges when selecting the jury and the two alternates. Twelve of the thirteen jurors struck were white. On the State's motion, the trial court conducted a Batson hearing. The trial judge noted he was most concerned with the strikes exercised against Jurors #95 and #126. Defense counsel claimed he struck Juror #95 "because she works at a local hardware store which is owned by a former longtime Dillon County Magistrate and his employees are exposed to pro-prosecution ideas since many law enforcement personnel regularly visit the store." Id. at 62, 512 S.E.2d at 502. He struck Juror #126 for the following reason:

> "[W]e did not feel comfortable. . . . He's assistant manager of Tomlinsons on Main Street. My wife helped me select the juror and as a teenager she worked there and he worked there at the

> time. And we feel that he would feel uncomfortable. And, in fact, last September, when I had a death penalty case, he sold me a pair of shoes to wear in court for that trial. So we thought he would be uncomfortable sitting on the jury. We didn't know which way he might go. But it could certainly have a bearing on that. And whenever I go into Tomlinsons we all joke and talk. Of course, we have not talked about this particular trial, but every time I go in there he's asking me about court, different cases going on. And I, certainly, would not want him to be on one of my juries because I wouldn't feel comfortable."

Id. at 62-63, 512 S.E.2d at 502. The trial judge ruled appellant had violated Batson. According to the judge, because appellant exercised all but one of his strikes against prospective white jurors, "'[t]he cumulative effect is a lot worse picture than looking at it on an individual basis.'" Id. at 63, 512 S.E.2d at 503. The trial judge quashed the jury and ordered selection of a new jury. Further, the judge ruled appellant could not strike Juror #126 during the second jury selection. Both Jurors #95 and #126 were seated on the second jury.

On appeal, appellant alleged the judge erred in finding his strikes violated Batson. The supreme court illuminated:

> In this case, appellant's explanations were facially race-neutral. In particular, with regard to Juror #126, an attorney's personal knowledge of and relationship with a prospective juror is a race-neutral reason. See State v. Adams, [322 S.C. 114, 470 S.E.2d 366 (1996)] (a potential juror's acquaintance with the trial judge is a valid reason for exercising a peremptory strike). With regard to Juror #95, a prospective juror's employment in a hardware store owned by a longtime magistrate where local law enforcement officials gather is a race-neutral reason. State v. Adams, supra (a potential juror's employment as a court reporter is a valid reason for exercising a peremptory strike); State v. Green, [306 S.C. 94, 409 S.E.2d 785 (1991)] (unemployment is a race-neutral reason). Further, it is legitimate to strike potential

> jurors because of their employment. State v. Adams, supra; State v. Green, supra. Also, it is legitimate to strike a potential juror because she or he has a relationship with a law enforcement official or because she or he is pro-law enforcement. Compare with State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991) (State's explanation that juror was anti-law enforcement was race-neutral).
>
> Further, these explanations are not so fundamentally implausible as to constitute mere pretext without some showing of disparate treatment. The State offered no evidence of pretext, as required by step three of the Adams/Purkett analysis. Although appellant exercised most of his strikes against white jurors, he did not strike every white juror. Instead, some white jurors were accepted by appellant and were placed on the first jury. Further, the fact that appellant used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination. See State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1998) (no Batson violation where the State exercised all six of its peremptory strikes against blacks because the explanations were race-neutral); State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997) (no Batson violation where solicitor had neutral reasons for all five strikes used against males). Thus, this record fails to support the trial judge's finding of a Batson violation. Accordingly, the trial judge erred in ruling these strikes violated Batson, and appellant was denied his right to exercise his peremptory challenges.

Id. at 65-66, 512 S.E.2d at 503-04.

In State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999), the jurors seated in appellant's case included three white men, five white women, one black man, and three black women. The two alternate jurors, who did not participate in deliberations, were black men. The prosecutor exercised peremptory challenges against four black women and one white man. Appellant is a black man. Appellant raised a Batson challenge to the

prosecutor's decision to strike the black women as prospective jurors. The prosecutor stated he struck the first black woman because she was very young and had gone to school with appellant. He struck the second black woman because she had a shoplifting conviction. He struck the fourth black woman because she was unemployed, which meant she had an insufficient stake in the community. The trial judge ruled all those were race-neutral reasons for the strikes. The prosecutor declared he struck the third black woman, Tammy Berry, for two reasons: "One reason is that she had prior jury service on a criminal sexual conduct and came back with a not guilty verdict. That wasn't the main reason. The main reason was that Larry Smith who is a key witness here knows this person, says she is a good person but she is very high strung, a critical type person, opinionated and he didn't feel like she could deliberate well with the other jurors, would be a polarizing individual." Id. at 627, 515 S.E.2d at 90 (footnote omitted).

Appellant argued the first reason given by the prosecutor was pretextual because the prosecutor had accepted Gerald Smith, a white man, who also had returned a not guilty verdict in a criminal case. Smith had sat on a criminal jury eighteen to twenty years earlier, and he thought he remembered that the verdict in the domestic shooting case was not guilty. Berry had sat on a criminal jury five years earlier, and definitely remembered that the verdict in the rape case was not guilty. Appellant argued the second reason given by the prosecutor was pretextual because Berry did not stand up during voir dire to say she knew Larry Williams when venire members were asked whether they knew law enforcement officers involved in the case. The trial judge denied the Batson motion, ruling both the prosecutor's reasons were racially neutral and not pretextual.

On appeal, the supreme court concluded appellant did not carry his burden in proving the prosecutor engaged in purposeful discrimination during the jury selection process. The court found:

> [T]he prosecutor's primary reason for striking Berry was because the lead detective in appellant's case knew her to be a high-strung, critical person who would be a polarizing force on the jury. That was a race-neutral reason for the strike. Cf. State v.

Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991) (officer's apparent knowledge that venireperson had anti-law enforcement bias may be race-neutral reason for strike); State v. Smith, 321 S.C. 471, 469 S.E.2d 57 (Ct. App. 1996) (trooper's personal contact with venirepersons and belief they may hold anti-law enforcement bias may be race-neutral reason for strike). Berry's failure to reveal during voir dire that she was acquainted with the lead detective is irrelevant to the Batson analysis, which focuses upon a party's knowledge of a potential juror and reason for exercising a peremptory challenge.

. . . .

. . . [W]e do not believe the prosecutor's second reason was fundamentally implausible or pretextual. First, Berry and Smith were not similarly situated in that Berry had served on a criminal jury five years earlier and definitely remembered the verdict, while Smith had served on a criminal jury some twenty years earlier and was unsure of the verdict. Second, and more importantly, the circumstances of the jury selection process indicate the prosecutor did not strike potential jurors for racially motivated reasons. While the prosecutor struck four black prospective jurors, he seated four black people on the regular jury and two black alternate jurors. See State v. Dyar, [317 S.C. 77, 452 S.E.2d 603 (1994)] (composition of jury panel is one factor to consider in Batson analysis); State v. Guess, 318 S.C. 269, 457 S.E.2d 6 (Ct. App. 1995) (finding no purposeful discrimination, in part because jury included six members of the minority allegedly offended); State v. Watts, 320 S.C. 377, 465 S.E.2d 359 (Ct. App. 1995) (finding no purposeful discrimination, in part because jury was composed of eight white people and four black people, and prosecutor had struck two white people).

Similarly, the record contains no indication the prosecutor's stated reasons for striking the other three black women—that one was too young and knew appellant, one had a criminal

> conviction, and one was unemployed—were motivated by purposeful discrimination. See State v. Ford, [334 S.C. 59, 512 S.E.2d 500 (1999)] (lack of employment or place or type of employment may be race-neutral reason for strike); State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990) (potential juror's knowledge of and association with defendant may be race-neutral reason for strike); State v. Dyar, supra (past prosecution of potential juror by particular solicitor's office may be race-neutral reason for strike); State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991) (unemployment may be race-neutral reason for a strike); State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987) (unemployment and possible criminal records may be race-neutral reasons for a strike).

Id. at 630-32, 515 S.E.2d at 91.

In State v. Smalls, 336 S.C. 301, 519 S.E.2d 793 (Ct. App. 1999), the appellant used nine of ten peremptory strikes to remove white jurors from the venire. The State posited a Batson objection, alleging the defense utilized the strikes in an intentionally discriminatory manner. The trial court then asked defense counsel to give race-neutral reasons for the strikes, to which she responded, "A lot of this was just looking at the potential jurors and seeing—if they don't look at me or if they look with a mean, stern look." Id. at 304, 519 S.E.2d at 794. She further explained that she believed those persons who tended to look away or glare were not open-minded, and stated that such veniremen "have already made their minds up, and I don't want them on the jury." Id. While the trial judge admitted counsel's stated explanation "possibly could be reasonable," he determined it was not sufficiently race-neutral. Id. As a result, the court returned the jury panel to the pool, and a new jury was drawn and sworn. The new panel contained four members originally struck by the defense.

On appeal, the court of appeals determined:

> We discern no discriminatory intent inherent in the defendant's explanation. We therefore find the reason asserted

> by Smalls for his peremptory strikes, that the jurors were either refusing to look or looking in a "mean," "stern" or "accusatory" manner, was facially race-neutral, even if perhaps suspect. See State v. Tucker, [334 S.C. 1, 512 S.E.2d 99 (1999)]; State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (counsel may strike venire persons based on their demeanor and disposition). The trial court erred, therefore, in failing to require the State to carry its burden to present evidence of pretext as prescribed by step three of the Adams/Purkett analysis. See Ford at 66, 512 S.E.2d at 504 (finding opponent of strikes failed to offer evidence of pretext as required by step three of the analysis); Adams, 322 S.C. at 124, 470 S.E.2d at 372 (stating that "[u]nder some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext") (emphasis added); Purkett, 514 U.S. at 768, 115 S.Ct. at 1771 (opponent of strike bears ultimate burden of persuasion regarding racial motivation); cf. Payton v. Kearse, 329 S.C. at 55-56, 495 S.E.2d at 208 ("redneck" is not race-neutral on its face so there is no need to reach the third step of the analysis).

Id. at 309, 519 S.E.2d at 797.

In State v. Wright, 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the State exercised peremptory challenges to strike three black jurors. Wright objected and requested a Batson hearing. Specifically, as to Juror 29, the State explained that although she was a bilingual translator, she had a heavy accent, and the State was unsure as to her command of the English language. Wright then responded the State did not strike Juror 123, a white German woman who had a "huge accent." Id. at 51, 579 S.E.2d at 540. The State countered that it was under the impression Juror 123 worked in communications at the fire department and would thus have a better grasp of the English language. Based on this dialogue, the circuit court found the

State's peremptory strike did not violate Batson, and the jury was seated and sworn.

On appeal, Wright claimed the circuit court erred by allowing the State to exercise peremptory challenges in a racially discriminatory manner in violation of Batson. The court of appeals held:

> Viewing the record in light of our standard of review, the circuit court's conclusion was not clearly erroneous. Although we recognize Juror 29 and Juror 123 are similarly situated in that they both have foreign accents, the State distinguished them by their observable command of the English language, as well as what the State perceived their occupations to be. These were proper race-neutral considerations. See Matthews v. Evatt, 105 F.3d 907, 918 (4th Cir. 1997) (holding the State is allowed to consider tone, demeanor, facial expression, and any other race-neutral factors when striking jurors). Thus, the circuit court did not err.

Id. at 56, 579 S.E.2d at 542.

In State v. Flynn, Op. No. 4087 (S.C. Ct. App. filed February 27, 2006) (Shearouse Adv. Sh. No. 9 at 48), after the jury was qualified, defense counsel raised a Batson challenge based on the fact that the State used all its strikes to remove black females from the jury. The State presented its explanations for the strikes. As to Juror 21, the State asserted: "'[She] is a Head Start director. I view that as a very liberal job and that's the reason why I struck her.'" Id. at 49. Defense counsel took exception to the State's reasons for striking Juror 21. The State then expounded on its reasons for striking her: "'Your Honor, I believe that is a social welfare kind of program, and as director she is liberal in nature. It's a liberal type of attitude and job, and that is why I struck her.'" Id. at 50. The trial court ruled that, given the nature of the case and progress of the trial to that point, it would be possible to consider a Head Start director as an improper juror. The court stated: "'I'm going to conclude that it's race neutral, particularly in view of the fact

that the Defendant is a young white Caucasian. That particular juror is female, African-American. I conclude that's race-neutral.'" Id. at 50.

On appeal, Flynn argued the trial court erred in not finding the State violated Batson in regard to its treatment of Juror 21. He asserts the State advanced a racial stereotype to justify striking Juror 21. The court of appeals determined: "[T]he State asserted that due to her employment, it believed Juror 21 was 'liberal.' As Flynn has offered no evidence other than a conclusory assertion of racial motivation, we find the trial court did not err in failing to find a Batson violation." Id. at 51.

VI. Batson Violation/Remedy

Any deviation from the mandated and recognized Batson procedure is **NOT** a mere peccadillo, but is an egregious judicial corrigendum. Notwithstanding error, the more pertinent query is whether reversal is obligatory.

State v. Adams edifies in regard to the remedy for a Batson violation:

> Nevertheless, we do not reverse based on this error. We have not yet ruled on the proper remedy for a trial judge's error in *finding* a Batson violation and quashing the jury. This situation is fundamentally different from one in which the trial judge improperly upholds racially discriminatory peremptory challenges. When the trial court improperly upholds such challenges, there has been a violation of the stricken jurors' Fourteenth Amendment equal protection rights. Additionally, if the prosecution is the party improperly exercising peremptory challenges that the trial judge upholds, the defendant has been denied a right to a fair and impartial jury of his peers. However, where, as here, the trial judge *improperly* quashes a jury panel, no juror's equal protection rights have been violated. An appellate determination that a judge erred in finding a Batson violation means the obvious: No Batson violation occurred, and there was, therefore, no denial of anyone's equal protection

> rights. Moreover, we see no way in which the defendant's fair trial rights were violated. A defendant has no right to trial by any particular jury. E.g., State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). When the trial judge quashed the first jury panel, the parties selected a new jury. Adams has voiced no complaints about the new jury. We find that no prejudice resulted from the judge's error.

Id. at 125-26, 470 S.E.2d at 372-73.

Unlike in Adams, the Appellants in the instant case have complained about the new jury.

In State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999), after ruling the trial court erred in finding a Batson violation and quashing the first jury, the supreme court inculcated:

> After finding error in the trial judge's Batson ruling, the Court of Appeals went on to find reversible error because Short's right to exercise peremptory challenges against the two jurors was denied him. The Court of Appeals found no showing of prejudice was required because there was no way to determine with any degree of certainty whether Short's right to a fair trial by an impartial jury was abridged. 327 S.C. at 335, 489 S.E.2d at 212.
>
> In finding reversible error, the Court of Appeals adopted the analysis of United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996), requiring no showing of actual prejudice to reverse for infringement of the federal statutory right to exercise a peremptory challenge. This rule is consistent with that of a clear majority of state courts as well. See, e.g., Mason v. State, 536 So. 2d 127 (Ala. Crim. App. 1988); State v. Huerta, 175 Ariz. 262, 855 P.2d 776 (1993); Hagerman v. State, 613 So. 2d 552 (Fla. Dist. Ct. App. 1993); People v. Bennett, 282 Ill.App.3d 975, 218 Ill.Dec. 574, 669 N.E.2d 717 (1996); State v. Kauhi, 86

Hawai'i 195, 948 P.2d 1036 (1997); Spencer v. State, 20 Md.App. 201, 314 A.2d 727 (1974); Commonwealth v. Roche, 44 Mass.App. 372, 691 N.E.2d 946 (1998); People v. Schmitz, 231 Mich.App. 521, 586 N.W.2d 766 (1998); Arenas v. Gari, 309 N.J.Super. 1, 706 A.2d 736 (1998); Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987); City of Dickinson v. Lindstrom, 575 N.W.2d 440 (N.D. 1998); Baker v. English, 324 Or. 585, 932 P.2d 57 (1997); Commonwealth v. Ingber, 516 Pa. 2, 531 A.2d 1101 (1987); Nunfio v. State, 808 S.W.2d 482 (Tex. Crim. App. 1991); State v. Ramos, 211 Wis.2d 12, 564 N.W.2d 328 (1997); Westcom v. Meunier, 164 Vt. 536, 674 A.2d 1267 (1996); Wardell v. McMillan, 844 P.2d 1052 (Wyo. 1992).

To the contrary, however, there is precedent of this Court indicating a showing of actual prejudice is required to find reversible error in the denial of the right to exercise a peremptory challenge. In State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981), overruled on other grounds, State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998), we concluded the defendant failed to show prejudice from the denial of a peremptory challenge where there was ample opportunity to examine the juror on voir dire and there was no showing of any bias or lack of impartiality on the part of the juror. Accordingly, we found no reversible error.

We now overrule Plath and adopt the majority rule that no showing of actual prejudice is required to find reversible error for the denial or impairment of the right to a peremptory challenge. We note that Plath is distinguishable from our other decisions discussing "prejudice" in the denial of a peremptory challenge where the issue actually turned on whether the complaining party had established he was denied the right to exercise a peremptory challenge. Where such a denial was established, we implicitly applied the majority rule discussed above and reversed without a showing of actual prejudice. See State v. Anderson, 276 S.C. 578, 281 S.E.2d 111 (1981) (prejudice in wrongfully limiting number of peremptory challenges where defendant exercised all

> permitted); Moore v. Jenkins, 304 S.C. 544, 405 S.E.2d 833 (1991) (failure to use side-to-side procedure in allowing peremptory challenges in a case with multiple defendants prejudiced the plaintiff as a matter of law). In cases finding no prejudice, on the other hand, we actually determined the complaining party had not established the denial of a peremptory challenge. See Laury v. Hamilton, 317 S.C. 503, 455 S.E.2d 173 (1995) (no prejudice where party received greater number of strikes than that to which he was entitled under side-to-side method); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973) (no prejudice in limiting number of peremptory challenges where defendants used fewer than allowed). Before reversible error can be found, the complaining party must of course establish the denial of his right to exercise a peremptory challenge.

Short, 333 S.C. at 476-78, 511 S.E.2d at 360-61 (footnote omitted).

Thereafter, in State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999), the supreme court explicated:

> The State argues, even if the trial judge erred in finding a Batson violation, the error was harmless because appellant failed to show the second jury was not impartial. This Court recently addressed this precise issue. See State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999) (announcing the appropriate remedy for the denial of the right to exercise a peremptory challenge). Where such a denial is established, no showing of actual prejudice is required to find reversible error. Id. Therefore, because appellant established he was wrongfully denied the right to exercise a peremptory challenge, we reverse his conviction.

Id. at 66, 512 S.E.2d at 504; see also State v. Smalls, 336 S.C. 301, 309, 519 S.E.2d 793, 797 (Ct. App. 1999) ("no showing of actual prejudice is required to find reversible error for the denial or impairment of the right to a peremptory challenge."); cf. State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct.

App. 1999) (noting that any Batson violation in regards to a possible alternate juror is harmless where an alternate was not needed for deliberations).

State v. Rayfield, 357 S.C. 497, 593 S.E.2d 486 (Ct. App. 2004), cert. granted (March 3, 2005), is instructive. After the initial jury selection, the State moved for a Batson hearing. The trial court found a Batson violation. The first jury was quashed and a redraw of the jury followed. The ensuing redraw resulted in no Batson challenge, and significantly, none of the jurors struck by defense counsel during the initial jury selection were seated on the second jury. On appeal, Rayfield argued the trial court erred in granting the State's Batson motion. The court of appeals held:

> We agree, but we are constrained to conclude that Rayfield ultimately was not legally prejudiced by the trial court's error.
>
> . . . .
>
> . . . It was error for the trial court to grant the State's Batson motion.
>
> We nevertheless find no reversible error pursuant to the supreme court precedent of State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). In Adams, the trial court erred in granting the State's Batson motion and quashing the jury. Because the jury ultimately selected had none of the persons defense counsel struck from the first jury panel, the supreme court found "no prejudice resulted from the judge's error" and affirmed Adams' convictions. Id. at 126, 470 S.E.2d at 373. In so holding, the court in Adams recognized that no juror's equal protection rights are violated where the trial court improperly quashes a jury panel. In addition, the court in Adams referenced the settled principle that "[a] defendant has no right to trial by any particular jury." Id. But cf. Ford, 334 S.C. at 66, 512 S.E.2d at 504 (holding that reversal and granting of a new trial is a proper remedy where the trial court erred in finding defendant violated Batson in striking certain jurors and any challenged juror was seated on the second jury).

Id. at 500-04, 593 S.E.2d at 488-90.

VII. The Extant Record

Analyzing the first jury and the composition and pattern of strikes, I come to the ineluctable conclusion that the trial judge did not properly conduct the Batson hearing. The erroneous procedure utilized in the first Batson hearing was exacerbated in the selection of the second jury, thereby mandating a reversal.

The record is devoid of any palliative factor mitigating against reversal.

I **VOTE** to **REVERSE**.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 2002-CP-29-211

Philip H. Williams, Appellant,

v.

Lancaster County School District, James W. Jordan and John Taylor, Respondents.

Case No. 2002-CP-29-212

Barbara Williams, Appellant,

v.

Lancaster County School District, James W. Jordan and John Taylor, Respondents.

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

Opinion No. 4117
Submitted April 1, 2006 – Filed May 30, 2006

AFFIRMED

Melvin D. Bannister, of Columbia, for Appellants.

Andrew F. Lindemann, David L. Morrision, of Columbia, for Respondents.

HUFF, J.: In this tort action, Philip and Barbara Williams appeal from the trial court's order granting summary judgment to the Lancaster County School District, James W. Jordan and John Taylor (Respondents) on their claims for slander, intentional infliction of emotional distress, intentional interference with contractual relations, and loss of consortium. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

This matter revolves around three incidents at Buford High School involving Philip Williams and his wife, Barbara, and their children, LeAnn and Clark. Both Philip and Barbara were employed by the Lancaster County School District during the 2000-2001 school year. Philip was employed as the head football coach and athletic director, as well as a teacher at Buford High School (Buford). Barbara was a teacher at Buford. LeAnn and Clark attended Buford. Dr. James Jordan was the principal of Buford, Mr. John Hardin was an assistant principal at Buford, and Mr. John Taylor was the Superintendent of the Lancaster County School District (District) The incidents involve LeAnn's class ranking, a situation involving rumors that circulated after Philip was discovered in a locked bathroom with a school secretary, and a test grade initially given to Clark.

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

During the 2000-2001 school year, the State Department of Education (Department) implemented a uniform grading system. So that no student in that year's senior class would be damaged by the implementation of the new system, principals were given flexibility and allowed to use a dual system with that class in ranking them. Apparently, the staff at Buford had been working to insure that both LeAnn and another student remained tied for the number one spot, which would result in significant scholarship monies. However, with the implementation of the new uniform system, LeAnn was not ranked number one. Further, although LeAnn had been ranked number one along with the other student under the old system, LeAnn dropped a course during the school year and was no longer tied with the other student under the old system. LeAnn had dropped one of her courses because she was enrolled in two different weightlifting classes during the same semester, which was a violation of Department regulations that prohibited students from receiving dual credit.

Around February 2001, the Williamses learned LeAnn slipped to number two in her class. Philip went to LeAnn's guidance counselor, who told him he would have to speak with the principal, Dr. Jordan. Because Philip was not getting along with Dr. Jordan at that time, Barbara approached Dr. Jordan about the matter, which resulted in some heated words between the two. Thereafter, LeAnn's guidance counselor, Mr. Hudson, was instructed by Assistant Principal Hardin or Dr. Jordan to not discuss LeAnn's situation with the Williamses unless Mr. Hardin or Dr. Jordan was present. Subsequently, the Williamses made three trips to the Superintendent's office to look into the matter and called multiple times. According to the Assistant Superintendent for Instruction, Dr. Burns, she told the Williamses they would work with them to insure LeAnn would have every opportunity to earn credit and have a full schedule. Dr. Jordan contacted Dr. Burns and asked that LeAnn be allowed to take a course in service learning that would grant her credit and place her back in a tie with the other student. He also contacted the middle school principal to arrange for LeAnn to perform community service and obtain the necessary credit. While the Williamses were still not sure of LeAnn's standing up to the week of graduation, LeAnn was afforded the opportunity to do the extra work, received the necessary credit, and

ultimately graduated number one and was co-valedictorian of her senior class.

Prior to May 16, 2001, Mr. Hardin had warned Philip that that there were rumors circulating around the school about Philip and Cheryl Blackwell, a secretary at Buford, spending an inordinate amount of time together behind closed doors. Mr. Hardin told Philip the women in the office thought "there was something going on between" him and Cheryl, and instructed both Philip and Cheryl to avoid this apparently compromising situation. Around May 15 or 16, 2001, the Williamses were informed by one of LeAnn's teacher's that her permanent record showed she was ranked as number two in her class. Barbara suggested to Philip that he go see Cheryl to see if they could obtain transcripts or grade printouts to verify where LeAnn stood.

According to Philip, when he went to see Cheryl in her office, he found her distraught after a phone argument she had with her soon to be ex-husband. Philip asked Cheryl to go with him to the health room, where he could speak with her in private. He suggested Cheryl go into the bathroom to gain her composure, as he needed her help. While he was standing in the doorway to the bathroom, he heard keys rattling. Because he held documents in his hand that Cheryl had printed out concerning LeAnn's grade points and he did not want anyone to discover him with the documents, he panicked, stepped inside the bathroom, and shut the door. This occurred around 3:30 or 3:45 in the afternoon when school was out. When Mr. Hardin shook the door, Philip told him he would be out in a minute. Philip walked out into the hall, Mr. Hardin looked up and down the hall, and Cheryl came walking out about two or three minutes later. Mr. Hardin then escorted Cheryl to his office. When Mr. Hardin later asked Philip what was going on in the bathroom, Philip told him he was there going to the bathroom, and may have told Mr. Hardin he had diarrhea. Philip admitted that this was a lie. Philip conceded he did not want to be discovered in the bathroom with Cheryl, or any other female, because he was a married man and it did not look appropriate.

Mr. Hardin testified he was looking for some supplies when he went to the health room and, as he got out his keys and opened the door, he heard a lot of noise. After entering the room, he noticed the bathroom door was closed. He reached for the handle and discovered the door was locked. He knocked on the door, and Philip indicated he was in the bathroom. Mr. Hardin walked out into the hallway and Philip then came out saying he did not feel good that day. After Philip began walking away, Mr. Hardin motioned for Dr. Jordan to come to him. He believed there was more than one person in the bathroom because of all the noise he had heard. Mr. Hardin then opened the door to the health room and knocked on the bathroom door, at which time Cheryl walked out.

Philip met with Dr. Jordan and Mr. Hardin later that afternoon in Dr. Jordan's office. Philip stated the two men "were screaming and hollering" at him saying they knew about him and Cheryl all along. Mr. Hardin testified that when confronted about what he was doing in the bathroom with Cheryl, Philip stated Cheryl had emotional problems and was upset and that he was trying to console her. Based on this incident, as well as Philip's previous record at the school, Dr. Jordan informed Philip he would "probably recommend that [Philip] be terminated." Dr. Jordan testified that after his meetings with Mr. Hardin and Cheryl and Mr. Hardin and Philip that afternoon, he discussed the matter with Superintendent Taylor.

Shortly after this incident, while Cheryl was away from work, a school secretary was looking for something relating to Cheryl's job responsibilities when she found a letter in Cheryl's desk that alluded to a romantic relationship with a co-employee. Although the letter was not signed, there were references in the letter that led Dr. Jordan to believe that it was authored by Philip. Dr. Jordan delivered a copy of the letter to Superintendent Taylor and discussed it with him and Mr. Hardin**.**

On June 22, 2001, before any action was taken by the school district on Philip's employment, Philip submitted a letter of resignation. Philip informed the district he had accepted a teaching and coaching position at a high school in Charlotte, North Carolina. He started his job with that high school in mid-August of that year.

During the next school year, the Williamses' son, Clark, experienced a problem at Buford. One day, Clark became ill during school. He was given some medicine and went to the health room. During this time, Clark missed a Spanish test. That day was a pep rally day. Clark went to see about retrieving his book bag, and as he was returning to the health room, one of the office staff instructed him to go to the gym. While in the gym, Clark was asked to participate in a slam-dunk contest by standing on the court while another attempted to dunk the ball. After doing this, he was confronted by his Spanish teacher about missing the test but participating in the rally. Clark was initially given a zero on the test. Philip maintained that Dr. Jordan and Mr. Hardin instructed the teacher to give Clark a zero. However, Clark subsequently was able to convince his teacher he was ill that day and he was allowed to take the test, ultimately making a one hundred on it.

Philip and Barbara individually filed suit against the school district, Dr. Jordan, and Mr. Taylor, and their actions were subsequently consolidated. The Williamses' complaints loosely allege causes of action for slander, intentional infliction of emotional distress, breach of contract, intentional interference with contractual relations, and loss of consortium.

Respondents moved for summary judgment as to all of the claims. After a hearing, the trial court granted Respondents' motion, finding, among other things, (1) there was no evidence of any publication by any of the respondents alleging Philip committed adultery, (2) the Williamses offered insufficient evidentiary support for their allegation that the respondents acted intentionally or recklessly to inflict severe emotional distress upon them, the record was devoid of any evidence the Respondents' actions were so extreme and outrageous as to exceed all possible bounds of decency and regarded as atrocious and utterly intolerable in a civilized society, and there was no evidence of record the Williamses suffered emotional distress so severe that no reasonable person could be expected to endure it, (3) the claims for breach of contract and intentional interference with contractual relations failed as a matter of law as the record demonstrates Philip voluntarily resigned and he

failed to pursue and exhaust his administrative remedies,[2] (4) Barbara's loss of consortium claim was derivative and failed since Philip had no claim against Respondents, and (5) Barbara's claim for slander was similarly barred as she offered no evidence of the publication of a slanderous statement about her by the Respondents.

The only issue raised on appeal is whether the trial court erred in granting summary judgment as to the Williamses' causes of action for slander, outrage, and loss of consortium against Dr. Jordan. Thus, the Williamses do not appeal from the granting of summary judgment to Superintendent John Taylor and the Lancaster County School District as to any of their claims. Nor do they appeal the dismissal of all the contract-related claims. Accordingly, the only issues remaining on appeal involve the Williamses' claims for slander, intentional infliction of emotional distress, and loss of consortium against Dr. Jordan alone.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Rule 56(c), SCRCP). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

[2]Barbara Williams withdrew her contract claims at the summary judgment hearing.

LAW/ANALYSIS

I. Slander

The Williamses contend the trial court erroneously granted summary judgment on their claim of slander against Dr. Jordan. They contend there is evidence in the record that Dr. Jordan and John Hardin accused Philip of committing adultery with Cheryl in separate meetings they had with Philip and Cheryl on the afternoon of the incident. They contend the meetings occurred after school had ended for the day, no other persons were present at the meetings, and no other persons were in the area of the meetings. They further maintain the record shows rumors of adultery on the part of Philip were immediately spread throughout the community. Accordingly, they argue the only individuals who had knowledge of the bathroom incident were Dr. Jordan and Mr. Hardin, and this is indirect evidence of publication of a slanderous statement. They further assert that the unsigned letter found in Cheryl's desk was "published to person or persons known and unknown to [the Williamses]," the "[p]ublication was accomplished by transmitting the 'letter' by tele-facsimile," and the letter was discussed between John Taylor and Dr. Jordan. The Williamses thus contend there is evidence of record to show Dr. Jordan published defamatory and slanderous communications about them. We disagree.

The tort of defamation allows a complaining party to recover for injury to his reputation as the result of a false communication to others about him, made by the defendant. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). "Slander is a spoken defamation, while libel is a written defamation or one accomplished through actions or conduct." Id. In order to prove defamation, a party must show: (1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

We agree with the trial court that the record is devoid of any evidence of any publication of a slanderous statement made by Dr. Jordan as to either Philip or Barbara Williams.[3] When asked if he knew whether Dr. Jordan had ever discussed a purported affair between him and Cheryl, other than with Philip in Dr. Jordan's office, Philip responded, "I have no knowledge of that." Further, in referring to the rumors concerning him and Cheryl, Philip stated, "I don't know how it got on the street, but it's out there." When asked if he could name any person that would testify to any employee of the District telling them that he was having an affair with Cheryl, Philip indicated he knew of a Board member who referenced the alleged affair in a poem, but other than that, he could not say any employee of the District had said he was having an affair with Cheryl.

Also, there is evidence of record that numerous other employees, as well as possibly a parent and some students, were in the office area right after Philip and Cheryl were discovered locked in the bathroom and Cheryl was escorted to the office. These individuals at least had an opportunity to gain knowledge of the incident at that time. Further, at least two other office personnel became aware of the bathroom incident when one of the employees came back into the school looking for Cheryl and saw Cheryl walking down the hall with Mr. Hardin and Dr. Jordan, and the next day told the other employee that Cheryl and Philip had been found in the health room bathroom together. There is also evidence Superintendent Taylor was informed of the bathroom incident that afternoon. Finally, Philip acknowledged that Mr. Hardin informed him at some time prior to the bathroom incident that others in the school office thought there was something going on between Cheryl and Philip and these employees had been talking about it. Deposition testimony from other school employees confirmed that rumors had circulated

[3]The Williamses have failed to allege any slanderous statement concerning Mrs. Williams and the record is devoid of any such statement. See Burns v. Gardner, 328 S.C. 608, 615, 493 S.E.2d 356, 359-60 (Ct. App. 1997) (finding defamatory statement must be shown to be about the plaintiff or be such that the person hearing it will be able to understand the statement refers to the plaintiff).

among staff as well as students at the high school about a possible romantic relationship between Philip and Cheryl prior to the bathroom incident.

As noted, the Williamses only challenge the granting of summary judgment to Dr. Jordan. Based on the evidence of record, there were numerous individuals who were aware of the bathroom incident besides Dr. Jordan. Any one of those people could have been responsible for the rumor of an illicit relationship between Philip and Cheryl. The record simply does not support the Williamses' assertion that the only individuals who had knowledge of the incident were Dr. Jordan and John Hardin. Further, the Williamses have conceded that John Hardin had knowledge of the incident. Thus, the rumors cannot be said to have only been possibly attributable to Dr. Jordan, and the Williamses' argument concerning indirect evidence fails.

The Williamses also appear to argue Dr. Jordan was responsible for the publication of the letter found in Cheryl's desk because the evidence shows this letter was faxed "to person or persons known and unknown," and publication was thus accomplished by tele-facsimile. However, the Williamses failed to point to any evidence establishing that Dr. Jordan was responsible for faxing the letter. The Williamses also fail to name anyone to whom the letter was faxed. Without an unprivileged publication to a third party, the Williamses' claim for slander fails.

Accordingly, we find the Williamses' claim for slander fails as a matter of law, as they cannot establish a defamatory statement published by Dr. Jordan to a third party. See Moody v. McLellan, 295 S.C. 157, 163-64, 367 S.E.2d 449, 453 (Ct. App. 1988) (affirming the trial court's grant of summary judgment for defamation claim due to appellant's failure to come forward with evidence respondent actually made the alleged statements). Because the Williamses cannot show the publication of a defamatory statement by Dr. Jordan, we decline to address the rest of the elements for defamation, including whether Philip Williams, as athletic director, teacher, and head football coach, is a public figure required to establish constitutional malice.

II. Intentional Infliction of Emotional Distress

Next, the Williamses maintain the trial court erred in granting summary judgment on their claim for intentional infliction of emotional distress. They point to the incidents involving LeAnn and Clark in contending Dr. Jordan's conduct amounted to intentional infliction of emotional distress. We disagree.

South Carolina recognizes that "one's wilful, malicious conduct proximately causing another's emotional distress may be actionable" as intentional infliction of emotional distress or the tort of outrage. Ford v. Hutson, 276 S.C. 157, 161, 276 S.E.2d 776, 778 (1981). In order to state a claim for intentional infliction of emotional distress, a party must establish (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 401, 596 S.E.2d 42, 48 (2004). Initially, it is for the trial court to determine whether the defendant's conduct may be considered so extreme and outrageous as to permit recovery, and only where reasonable minds might differ should the issue be submitted to the jury. Hainer v. Am. Med. Int'l, Inc., 320 S.C. 316, 324, 465 S.E.2d 112, 117 (Ct. App. 1995), aff'd as modified, 328 S.C. 128, 492 S.E.2d 103 (1997).

We find the Williamses have failed to present any factual allegations to support a cause of action for intentional infliction of emotional distress. As far as the situation with LeAnn's class ranking, we find no merit to the Williamses' claim. While both Philip and Barbara testified to problems in dealing with Dr. Jordan on the matter, Dr. Jordan testified, and there is no evidence to the contrary, that he contacted the District office requesting LeAnn be allowed to take the service-learning course that would grant her credit and place her back in a tie with the other student. He also contacted the middle school principal to arrange for LeAnn to perform work to obtain the necessary credit for the service-learning course. Additionally, it is

undisputed that when LeAnn graduated she was ranked first in her class and was co-valedictorian. As to the incident involving Clark, the record shows, once Clark explained the matter to his teacher, he was allowed to take the test and ultimately made a one hundred on it. We agree with the trial judge that (1) there is insufficient evidence of an intentional or reckless act by Dr. Jordan which inflicted severe emotional distress, (2) the record is devoid of evidence of extreme or outrageous conduct by Dr. Jordan exceeding all possible bounds of decency and atrocious and utterly intolerable in a civilized community, and (3) there is no evidence the Williamses suffered emotional distress so severe that no reasonable man could be expected to endure it. There is simply nothing in Dr. Jordan's actions that could be characterized as extreme and outrageous; as exceeding possible bounds of decency; or which might be regarded as atrocious and utterly intolerable in a civilized community.

III. Loss of Consortium

Finally, the Williamses maintain the trial court erred in granting summary judgment as to their respective claims for loss of consortium. They allege Dr. Jordan's actions caused them emotional strain and disrupted their marital life. We find no error.

Although Philip brought a claim for loss of consortium in his complaint, the trial court did not rule on the issue and Philip failed to make a motion pursuant to Rule 59(e), SCRCP to alter or amend the judgment on that ground. Therefore, the issue is not preserved for our review. See Harkins v. Greenville County, 340 S.C. 606, 620, 533 S.E.2d 886, 893 (2000) (stating an issue must have been ruled upon by the trial court to be preserved for appellate review); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding an issue is not preserved where the trial court does not explicitly rule on a question and the appellant fails to make a Rule 59(e), SCRCP motion to alter or amend the judgment on that ground).

As to Barbara's claim, while her action for loss of consortium is not derivative, we find the trial court properly granted summary judgment on this

claim as well. Our supreme court has recognized that a loss of consortium claim is not derivative, but is a distinct, independent cause of action. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 595 n.4, 586 S.E.2d 572, 576 n.4 (2003) (citing Preer v. Mims, 323 S.C. 516, 521, 476 S.E.2d 472, 474 (1996). However, there must be some intentional or tortious conduct for a loss of consortium claim to stand. See S.C. Code Ann. § 15-75-20 (2005) (providing "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to companionship, aid, society, and services of his or her spouse"). Barbara's claim for loss of consortium fails for the same reason the claims for slander and outrage fail, namely, her inability to establish evidence to support the elements required under the claim. First, Barbara fails to delineate any specific actions by Dr. Jordan amounting to an intentional or tortious violation of her rights. Even if we were to assume she is relying on the acts complained of in the Williamses' slander and outrage claims, we have already determined there is insufficient evidence of any slanderous or outrageous conduct by Dr. Jordan in these matters. We simply find no evidence of record to support Barbara's assertion that Dr. Jordan committed an intentional or tortious injury to her right to the companionship, aid, society, and services of her husband.

CONCLUSION

Viewing the evidence and all factual inferences that can be drawn therefrom in the light most favorable to the Williamses, we find there is no genuine issue as to any material fact and Dr. Jordan is entitled to a judgment as a matter of law on the slander, intentional infliction of emotional distress, and loss of consortium claims. Accordingly, the decision of the trial court is

AFFIRMED.

GOOLSBY, and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James S. Richardson and
Karolina M. Richardson, Respondents,

v.

Donald Hawkins Construction, Inc., Donald Hawkins, Sharon Preu, as Personal Representative for the Estate of Joseph Taylor, and James Hodge, Defendants,

Of Whom Donald Hawkins Construction, Inc. and Donald Hawkins are Appellants.

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

Opinion No. 4118
Heard April 6, 2006 – Filed May 30, 2006

REVERSED AND REMANDED

Kenneth R. Young, Jr., of Sumter, for Appellants.

Steven Smith McKenzie, of Manning, for Respondents.

WILLIAMS, J.: Donald Hawkins Construction, Inc., and Donald Hawkins (Appellants) appeal a jury verdict, arguing the trial court erred in excluding statements by a deceased co-defendant as hearsay after admitting other statements, unfavorable to their case, by the same co-defendant. We reverse and remand for a new trial.

FACTS

James and Karolina Richardson purchased a home from Appellants in 1999. After moving in, the Richardsons noticed several cosmetic and structural problems with the home, especially regarding some tile flooring that was continually cracking. Initially, Appellants responded to the Richardsons' complaints by sending someone to repair the problems. As the problems continued, however, Appellants ceased responding to the Richardsons' service requests. In early 2001, the Richardsons retained legal counsel who contacted Appellants by letter asking that the home repairs be completed. Appellants did not respond.

On March 12, 2001, the Richardsons' residence was severely damaged by fire. Investigators concluded the fire was caused by arson. After a year of investigation, a break in the case led the police to Joseph Taylor, an employee of Appellants. On May 21, 2002, the police questioned Taylor about the arson. Following questioning, Taylor gave the police a written statement (Statement One) in which he claimed to have overheard his employer, Donald Hawkins, offer a coworker, James Hodge, $2000 to burn down the Richardsons' home. According to Statement One, subsequent conversations between Taylor and Hodge confirmed that Hodge carried out the plan to some degree of success.

Due to investigators' suspicions that Taylor was more involved in the arson than he revealed in Statement One, he was interviewed again later that afternoon. Following this interview, Taylor submitted another written statement to the police (Statement Two). In Statement Two, Taylor admitted Hawkins approached both him and Hodge and offered them $2,000 to burn down the Richardsons' home. Together, they decided the best time to commit the arson. While Taylor acted as lookout, Hodge entered the crawl space of the home and ignited a jug filled with flammable liquid. The following day, Hodge told Taylor that, because the house was not completely destroyed, Hawkins gave him only half of the promised $2000. Taylor claimed he never received compensation from Hodge or Hawkins for his help in committing the arson.

Two days after giving the police the written statements, Taylor wrote and signed the following statement (Statement Three) before two witnesses and a notary:

> I Joseph Taylor has [sic] never been paid by Donnie Hawkins for doing anything illeagle [sic]. Donnie paided [sic] me for subcontracting carpentry work only. I have never heard or seen him pay anyone to do anything illeagle [sic]!

According to Taylor's mother, Sharon Preu, Taylor visited her shortly after being questioned by the police. Preu claims Taylor told her the police "had him in Sumter all day long and . . . cussed at him." Preu contends that Taylor stated he was promised leniency and no jail time if he confessed to the arson, so he "stated that him and Mr. Hodge had done it . . . [but] that it was all a lie, [he stated] they had offered him two years probation if he was to go along with it" (Statement Four). After discussing the events with Preu, Taylor spoke to an attorney, turned himself in to the police, and was released on a personal recognizance bond.

The Richardsons consented to having all criminal charges regarding the arson dropped in order to pursue civil charges against those allegedly involved. A civil suit was filed against Taylor, Hodge, Hawkins, and Donald Hawkins Construction, Inc. Taylor was served a summons and complaint,

but failed to file an answer. In May 2003, the Richardsons filed an affidavit of default as to defendant Taylor. In January 2004, before the Richardsons' case went to trial, Taylor died in an automobile accident.

In September 2004, the circuit court ruled on several pre-trial matters, including the admissibility of Statements One, Two, and Three. The court first ruled on the status of the Richardsons' case against Taylor's estate, represented after his death by Preu. The court found that Taylor's failure to answer the Richardsons' complaint prior to his death put his estate in the procedural posture of having admitted all of the allegations contained in the complaint. As to Statements One and Two, the court found them admissible against the remaining defendants under the statements against interest exception to hearsay described in Rule 804 (b)(3), SCRE. The circuit court, however, excluded Statement Three under a Rule 403, SCRE, analysis, concluding that its probative value was substantially outweighed by the danger of unfair prejudice because, due to his default, Taylor was deemed to have admitted all allegations in the complaint.

Upon a contemporaneous objection by the defense at trial, the circuit revised its basis for the admission of Statement One. The circuit court found Statement One admissible as a statement by a co-conspirator of a party during the course and furtherance of a conspiracy pursuant to Rule 801(d)(2)(E), SCRE. The circuit court upheld its ruling in limine on Statement Two, admitting the statement under the statement against interest exception to hearsay. During the course of trial, the defense also sought to present the testimony of Preu concerning Taylor's Statement Four. The circuit court found that Statement Four was classic hearsay and did not fall within an established exception to the hearsay rule; thus, it was inadmissible.

At the conclusion of trial, the jury found the defendants liable and awarded the Richardsons $84,758 in actual damages and $150,000 in punitive damages against Hawkins Construction; $5,500 in actual damages and $5,000 in punitive damages against Hodge; and $5,500 in actual damages and $250,000 in punitive damages against Hawkins. The jury did not award the Richardsons any damages against Taylor's estate. Hawkins Construction and Hawkins appeal the verdict.

STANDARD OF REVIEW

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." Peterson v. National R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005).

DISCUSSION

Appellants argue the circuit court erred in excluding Taylor's arguable recantations of his confession, while admitting those statements which address the defendants' culpability. We agree.

Although the rule is rarely addressed in South Carolina case law, we conclude these statements fall soundly within Rule 806, SCRE, which reads as follows:

> **RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT**
>
> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

We believe Taylor's Statements Three and Four fit squarely within the mandates of Rule 806. Statements One and Two were first admitted into

evidence under Rule 801(d)(2)(E) and as an exception to the hearsay rule under Rule 804(b)(3). Pursuant to Rule 806 and basic concepts of fairness, the defense should have then been allowed to impeach the unavailable declarant with evidence of his statements that were inconsistent with Statements One and Two (evidence which would have certainly been explored for impeachment purposes had Taylor testified as a witness).

Furthermore, we do not believe Taylor's status as a defaulting party should bear so heavily on his co-defendants as to warrant the exclusion of all evidence favorable to their defense. Generally, an admission by a party, procedurally or otherwise, applies only to the admitting party. See, e.g., Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) ("Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim . . . ."). Although Taylor defaulted in failing to timely answer the Richardsons' complaint and was thus procedurally deemed to have admitted its allegations, defendants Hawkins Construction, Hawkins, and Hodge have not had an opportunity to present their evidence inconsistent with Taylor's admissions. The circuit court's ruling excluding Taylor's inconsistent statements on the basis of his default essentially bars Taylor's co-defendants from rebutting the case against them which relied so heavily on Taylor's inculpatory statements.

For the foregoing reasons, the jury verdict in favor of the Richardsons is **REVERSED** and the case is **REMANDED** for a new trial.

BEATTY and SHORT, JJ., concur.