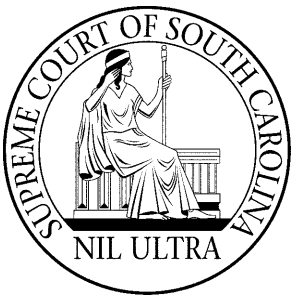

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
May 15, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Town of Hollywood, Appellant/Respondent,

v.

William Floyd, a/k/a Jeff Floyd, Troy Readen and Edward McCracken, a/k/a Eddie McCracken, Respondents/Appellants.

Appellate Case No. 2010-174946

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge
Roger M. Young, Circuit Court Judge

Opinion No. 27252
Heard February 5, 2013- Filed May 15, 2013

AFFIRMED IN PART AND REVERSED IN PART

Andrew F. Lindemann, of Davidson and Lindemann, P.A., of Columbia, Hugh Willcox Buyck, of Buyck and Sanders, L.L.C., of Mount Pleasant and Kathleen Fowler Monoc, of Pratt-Thomas Walker, of Charleston, for Appellant/Respondent.

Thomas R. Goldstein, of Belk Cobb Infinger and Goldstein, P.A., of Charleston, for Respondents/Appellants.

CHIEF JUSTICE TOAL: The Town of Hollywood (the Town) filed this action against William Floyd, Troy Readen, and Edward McCracken (collectively, the developers) seeking a declaration that the developers may not subdivide their property without approval from the Town's Planning Commission and an injunction prohibiting subdivision of the property until such approval is obtained. The developers filed counterclaims under 42 U.S.C. § 1983 (2006), alleging equal protection and due process violations as well as various state law claims. The circuit court granted summary judgment in favor of the Town on its claims for equitable and declaratory relief, and also granted the Town's motion for a directed verdict on the developers' state law claims. The jury returned a verdict in favor of the Town on the developers' due process claim, but awarded the developers $450,000 in actual damages on their equal protection claim. Both parties appealed. The Town argues the circuit court erred in denying its motions for a directed verdict and judgment notwithstanding the verdict (JNOV) on the developers' equal protection claim, and in granting the developers' motion for attorney's fees and costs. The developers argue the circuit court erred in granting summary judgment in favor of the Town on its claims for equitable and declaratory relief. This Court certified this case for review pursuant to Rule 204(b), SCACR. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL HISTORY

In February 2007, the developers entered into a contract to purchase a thirteen-acre tract located on Bryan Road in the Town of Hollywood. Thereafter, the developers filed an application with the Town's Planning Commission to rezone the property for residential use. The Planning Commission heard the matter on June 14, 2007, at which time the developers presented a "preliminary lot sketch" and indicated their intent to subdivide and develop the property into seventeen residential lots. Commissioner Matthew Wolf informed the developers their plans did not require rezoning; instead, Wolf instructed the developers to file for approval with the Planning Commission to subdivide their property. Wolf further stated that before the Planning Commission could hear a subdivision application, the developers needed to give notice to all landowners within a 300-foot radius of their property and gather information about roadways, drainage, and timber removal. Another Commissioner stated,

> Hopefully you can get all this information together and maybe present it at a later date, possibly, and we can act upon it. But as of tonight, based on what has been

> presented to this Commission, we would not be doing our job as Commissioners if we were to consider it.

The developers asked for clarification as to whether they needed to present the matter to the Planning Commission, and Commissioner Wolf restated that the developers should appear before the Commission again and present "a plat for approval." The Planning Commission ultimately tabled the issue based on "inadequate information and the fact that none of the ordinances of the Town [had] been followed."

The Planning Commission then opened the floor for public comments. Councilwoman Annette Sausser stated she did not support the developers' subdivision.[1] Sausser stated Bryan Road was too narrow to handle any additional traffic without improvement and noted the developers' property was located near a dangerous curve where multiple accidents had occurred.[2] Sausser also cited drainage and environmental concerns associated with a nearby marshland and stated the Town's constituents did not support the developers' subdivision.

Other constituents also expressed concern about drainage issues and Bryan Road's ability to withstand additional traffic. One constituent stated, "Bryan Road[] is a one-car road. You cannot get two large vehicles past each other. And the idea that there might be another 30 cars coming down through there is just so difficult to imagine." Another constituent stated ingress and egress for residents along Bryan Road would not be satisfactory with additional traffic, and also expressed concern about the ability of emergency vehicles to access the road.

Subsequent to the meeting, the developers met with Kenneth Edwards, the Town's zoning administrator, who indicated he would approve the subdivision himself if the developers applied for it in two phases. Edwards ultimately signed the developers' proposed plats, purporting to approve them, in two stages—half of

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[1] The developers assert that prior to their appearance before the Planning Commission, Sausser approached them, ran "her thumb across her neck to simulate cutting her throat," and told them their project would "never happen."

[2] Sausser stated she was familiar with Bryan Road because she formerly resided in Stono Plantation, a residential neighborhood adjacent to the developers' property which was initially approved for subdivision in 1985. Commissioner Wolf also resides in Stono Plantation.

the lots on June 22, 2007, and the remaining lots on June 27, 2007. Thereafter, the developers closed on the property and recorded the plats in the Charleston County RMC office.

When the developers began working on the subdivision, the Town issued a stop-work order. After the developers indicated they would not comply with the stop-work order, the Town filed this action seeking declaratory and injunctive relief. Specifically, the Town sought a declaration that the developers could not subdivide their property without approval from the Town's Planning Commission and an injunction prohibiting subdivision of the property until such approval was obtained. The developers filed equal protection, due process, and state law counterclaims. Thereafter, the parties struck the case with leave to restore in an effort to resolve the matter through another Planning Commission hearing.

On August 14, 2008, the developers appeared before the Planning Commission a second time to discuss the "preliminary subdivision" of their property. During the meeting, the Planning Commission informed the developers of multiple issues they needed to address before the Commission could approve the subdivision, including an acceptable septic system, a wetlands certification letter, and a traffic study of Bryan Road. Again, constituents expressed concern about Bryan Road's ability to handle a heightened level of traffic and the effect it would have on the dangerous curve adjacent to the developers' property.

In reference to the traffic study, Commissioner Wolf stated, "[N]o one's denying access to the [developers'] lot. No one has ever suggested that there be no access to that lot." Instead, Wolf stated, it is a matter of "commonsense and safety for the Town of Hollywood." Wolf stated Bryan Road is "one of the most dangerous roads in Hollywood" with a high density of traffic. Consequently, Wolf explained, the Planning Commission requested a traffic study to ensure Bryan Road could withstand a heightened level of traffic and that it would not hinder emergency vehicles' access to the properties along Bryan Road. The Planning Commission ultimately tabled the subdivision request until the developers addressed all necessary issues.

On March 29, 2010, the parties restored their case in the circuit court. Thereafter, the Town moved for summary judgment on its claims for declaratory and injunctive relief as well as the developers' counterclaims. In response, the developers submitted an affidavit by William Floyd. Floyd stated that during their first meeting, the Planning Commission instructed the developers they were in the

wrong place and directed them to Edwards, the Town's zoning administrator, who subsequently approved their plats. Floyd claimed the Town then took the position that Edwards did not have authority under the Town's ordinances to approve the subdivision, but could not cite to a specific ordinance or produce the ordinances for review. Floyd claimed he made multiple demands for the ordinances, but the Town claimed it could not produce them because it "was in the process of 'recodifying' them and the [o]rdinances were not in any one place where they could be retrieved." Floyd stated, "The Town has never adopted a consistent policy with us. Rather, it evolves as is necessary to stop us." Floyd further stated, "It is shocking that the Town now cites [o]rdinances which did not exist when this controversy began, and if the [o]rdinances did exist, which I doubt, the Town was unable to produce them."

The circuit court granted the Town's motion for summary judgment as to its claims for equitable and declaratory relief, but denied the motion as to the developers' counterclaims. The circuit court found the Town's ordinances did not vest Edwards with the "authority to approve a final subdivision plat of this kind" or to waive compliance with the subdivision-approval process set forth in the Town's ordinances; rather, because the developers intended to subdivide their property into more than three lots, the circuit court found the Planning Commission must approve the subdivision plats. The circuit court further found that although the Town's ordinances were in the process of recodification during the developers' application process, they were effective during this time because the Town adopted them in 1998 and preserved the original language in the recodified version. Accordingly, the circuit court ruled the developers may not subdivide their property without the Planning Commission's approval, and that the plats Edwards signed were "null, void and of no effect."

At trial, Edward Horton, the Town's current zoning administrator, testified he informed the developers, by way of letter and orally before the Planning Commission, of the requirements they needed to meet before the Commission would approve their subdivision. These requirements included approval of a septic system, alternate access routes, and a tree survey, which are required of all developers. Commissioner Wolf testified the Planning Commission also informed the developers they needed to conduct a traffic study along Bryan Road, noting "traffic is one of the key issues for any development [the Commission] review[s]." Wolf further testified that although the Town's ordinances did not require traffic studies, the Planning Commission requires them as a matter of discretion "where

there is a . . . critical juncture like this particular case where you have a dangerous intersection with a . . . road that doesn't conform to any county or state standards."

Mayor Jacqueline Heyward testified the Planning Commission did not require a traffic study for Wide Awake Park, a seven-acre park located on Trexler Avenue, because the park was already developed when the Town acquired it. Mayor Heyward further noted lots were consolidated, rather than subdivided, to make Wide Awake Park possible. Mayor Heyward also briefly testified about Holly Grove, a low-income housing project located on Baptist Hill Road.

Mayor Heyward testified Holly Grove was initiated prior to her tenure as mayor and that she did not think the Planning Commission required a traffic study, but stated Holly Grove was a "planned development, which is different from a subdivision." Mayor Heyward explained that although a planned development is subject to the zoning process, including a wetland study, that process is different from the process of subdividing a piece of property. Mayor Heyward further testified that neither Baptist Hill Road nor Trexler Avenue were dangerous roads.

After the developers rested, the Town moved for a directed verdict on all of the developers' counterclaims, arguing they failed to meet their burden of proof. Regarding the equal protection claim, the developers responded,

> The obvious disparity is in the adjoining subdivision, which is Stono Plantation. No one has required Stono Plantation to provide a traffic study or to prove that they have access, and, in fact, the two subdivisions sit side by side and utilize the same access, so it is abundantly clear in this record that the two similarly situated property owners are being held to different standards.

Conversely, the Town argued the developers failed to present any evidence concerning the process Stono Plantation, or any other development, underwent to obtain subdivision approval. The developers responded, "Your Honor, I think it's unnecessarily complicated. Bryan Road is either open to the public or it's not." The circuit court granted the Town's motion for a directed verdict on the developers' state law claims, but denied the motion as to the developers' equal protection and due process claims.

After an initial deadlock, the jury returned a verdict for the Town on the developers' due process claim, but awarded the developers $450,000 in actual damages on their equal protection claim. The Town filed a post-trial motion for a JNOV, which the circuit court denied. The developers filed a motion for reconsideration of the circuit court's grant of summary judgment on the Town's claims, and for attorney's fees and costs. The circuit court denied the motion for reconsideration but granted the motion for attorney's fees and costs, finding the developers were entitled to fees under Section 15-77-300 of the South Carolina Code because they were the "prevailing party."

ISSUES PRESENTED

I. Whether the circuit court erred in granting the Town's motion for summary judgment on its claims for equitable and declaratory relief.[3]

II. Whether the circuit court erred in denying the Town's motions for a directed verdict and JNOV on the developers' equal protection claim, and in awarding attorney's fees and costs.

STANDARD OF REVIEW

By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 173, 656 S.E.2d 346, 351 (2008) (citing S.C. Code Ann. § 6-29-840 (2005)). This Court will uphold the trial judge's decision unless it was based on an error of law or is not supported by the evidence. *Id.* at 174, 656 S.E.2d at 351.

LAW/ANALYSIS

I. Equitable and Declaratory Relief

The developers argue the circuit court erred in granting the Town's motion for summary judgment on its claims for equitable and declaratory relief. The developers contend the circuit court "erred by not giving any weight" to Floyd's

[3] This issue addresses both of the questions the developers present to this Court.

affidavit and refusing to "accept that the Town operates without published ordinances even though the affidavit . . . creates a genuine issue of material fact on this point." The developers assert they presented evidence that the ordinances did not exist at the time they applied for the subdivision of their property, and that "the ordinances came into existence after the fact to bolster the Town's position." The developers argue that because the existence of the ordinances is in doubt, it is impossible for this Court to conclude Edwards' approval of the plats was *ultra vires*. The developers further contend that if the Town's ordinances did exist, summary judgment was nevertheless improper because, under section 30-12 of the Town's Code, their "subdivision application" was automatically approved after the Planning Commission failed to take action on it within sixty days. We disagree.

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2010). Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* (citing Rule 56(c), SCRCP). However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006).

Section 30-7 of the Town's Code states no subdivision plat may be filed or recorded in the RMC Office and no building permits may be issued "until the plat . . . has been submitted to and approved by the town planning commission according to the procedures set forth in this chapter." HOLLYWOOD, S.C., CODE § 30-17 (2008). Section 30-34 provides the Planning Commission's procedure for review and approval of subdivision plats shall consist of two separate steps: (1) review and approval of a preliminary plat, and (2) review and approval of a final plat. HOLLYWOOD, S.C., CODE § 30-34(a) (2008). That section further provides that "the developer may submit a sketch plan for the planning commission's informal review prior to step one." HOLLYWOOD, S.C., CODE § 30-34(b). However, as an exception to the general rule that subdivision plats must be approved by the Planning Commission, section 30-12 states the Town's zoning administrator may approve and sign plats without referring them to the Planning Commission upon a finding that all requirements have been met and the property is being subdivided into "three or fewer lots." HOLLYWOOD, S.C., CODE § 30-12(1) (2008).

We find the circuit court properly granted summary judgment in favor of the Town with respect to its claims for declaratory and injunctive relief. The Town's ordinances clearly state the Planning Commission, rather than the zoning administrator, must approve subdivision plats if the property is subdivided into more than three lots. *See* HOLLYWOOD, S.C., CODE §§ 30-12, 34. Because the developers intended to subdivide their property into seventeen lots, Edwards did not have authority to approve their plats. *See id.*; *see also Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 166–68, 714 S.E.2d 869, 874–76 (2011) (stating misrepresentations of law made by a zoning administrator are generally not actionable even if made in good faith); *Quail Hill*, 387 S.C. at 236–38, 692 S.E.2d at 506–07 (finding a governmental entity is not estopped from enforcing its ordinances where its employee gives erroneous information or acts in contradiction to an ordinance); *Carolina Nat'l Bank v. State*, 60 S.C. 465, 473, 38 S.E. 629, 632 (1901) (stating a "public officer derives his authority from statutory enactment" and all persons dealing with an officer outside his scope of authority do so at their own peril).

Although the developers claim the Town enacted its ordinances after the developers' subdivision application in an effort to thwart their project, the preface of the Town's Code states it was adopted in 1998 and simply recodified in 2008. HOLLYWOOD, S.C., CODE, Preface (2008), *available at* http://library.municode.com /index.aspx?clientId=14414 (last visited Jan. 30, 2013). Additionally, the 2008 version of the Code lists the section number each ordinance held in the 1998 version. *See, e.g.*, HOLLYWOOD, S.C., CODE §§ 30-12, 34, 37-38. Thus, the Town's ordinances requiring that the Planning Commission approve subdivision plats existed long before the developers sought to subdivide their property in 2007. Although we are troubled by the Town's inability to produce a copy of its Code on at least one occasion, we find the developers were on notice that their intended subdivision would require approval from the Planning Commission. During their first meeting, the Planning Commission instructed the developers that rezoning was unnecessary, and that the developers would instead need to gather additional information and appear before the Commission at a later date to present a plat for approval. We take this opportunity, however, to remind the Town that its ordinances must be made "available for public inspection at reasonable times" as required by Section 5-7-290 of the South Carolina Code.

We also reject the developers' argument that their subdivision application was automatically approved due to the Planning Commission's alleged failure to

approve or deny the application within sixty days. This argument is not preserved for this Court's review because the circuit court did not rule on it and the developers did not include it in their Rule 59(e), SCRCP, motion for reconsideration. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004) (stating an issue must be raised to and ruled upon by the trial court in order to be preserved for appellate review, and that a party must file a Rule 59(e), SCRCP, motion to preserve an issue the trial court fails to rule on).

Accordingly, we find the circuit court properly granted summary judgment in favor of the Town on its claims for declaratory and injunctive relief.

II. Equal Protection and Attorney's Fees

The Town argues the circuit court erred in denying its motions for a directed verdict and JNOV on the developers' equal protection claim because they failed to demonstrate that the Planning Commission treated them differently than other similarly situated developers. The Town asserts that neither Wide Awake Park nor Holly Grove is similarly situated to the developers' property because one is a park and the other is a low-income planned development. The Town further contends the circuit court erred in granting the developers' motion for attorney's fees and costs because the Town was entitled to a directed verdict or JNOV on the equal protection claim or, at the very least, acted with "substantial justification" in defending that claim. We agree.

When reviewing the trial court's ruling on a motion for a directed verdict or JNOV, this Court applies the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *RFT Mgmt. Co. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Id.* Moreover, a JNOV motion may be granted only if no reasonable juror could have reached the challenged verdict. *Id.* This Court will reverse the trial judge's ruling only when there is no evidence to support the ruling or it is controlled by an error of law. *Carolina Chloride*, 394 S.C. at 163, 714 S.E.2d at 873.

No person shall be denied equal protection of the law. U.S. CONST. AMEND. XIV, § 1; S.C. CONST. ART. I, § 3; *Sunset Cay, L.L.C. v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004). "The *sine qua non* of an equal

protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013); *Sunset Cay*, 357 S.C. at 428–29, 593 S.E.2d at 469. To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose. *Dunes W.*, 401 S.C. at 293–94, 737 S.E.2d at 608; *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 53, 504 S.E.2d 112, 116 (1998).

In *Dunes West*, the Court clarified that the equal protection clause does not prohibit different treatment of people in different circumstances under the law. *Dunes W.*, 401 S.C. at 294–95, 737 S.E.2d at 608–09 (quoting *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 782–83 (Ct. App. 2009)). In that case, the Dunes West Golf Club (Dunes West) brought an equal protection claim against the Town of Mount Pleasant after it denied Dunes West's petition to rezone a portion of the golf course property for residential use. *Id.* at 286–87, 737 S.E.2d at 604–05. The circuit court granted summary judgment in favor of Mount Pleasant. *Id.* Dunes West appealed, arguing summary judgment was improper because it presented evidence that Mount Pleasant granted another substantially similar rezoning petition and there was no rational basis for the disparate treatment. *Id.* at 293, 737 S.E.2d at 608. This Court affirmed, finding there were material differences between the two rezoning petitions which demonstrated a rational basis for treating them differently. *Id.* at 294–95, 737 S.E.2d at 608–09. Specifically, the Court noted that unlike Dunes West's rezoning petition, the comparator's petition, Snee Farm Country Club, was accompanied by a comprehensive development proposal and a detailed impact assessment, involved virtually no alteration to golf course areas of play, received general support from the community, and stipulated that monies generated from the rezoning were to be applied to specific recreational improvements. *Id.* Dunes West's petition, on the other hand, did not contain an impact assessment, was opposed by the community, and required alterations to wetlands, existing easements, and numerous areas of the golf course. *Id.*

We find the circuit court erred in denying the Town's motions for a directed verdict and JNOV because the developers failed to show the Planning Commission

treated them differently than other similarly situated developers in the subdivision application process. Instead, the developers claim "this case is not the traditional equal protection case" and cite arguments in support of their due process claim. Specifically, the developers argue Councilwoman Sausser acted improperly by making a throat-cutting gesture and stating their development would "never happen." The developers further contend Commissioner Wolf should not have participated in the Planning Commission hearings because he lives in the adjoining subdivision. However, while the developers assert these actions alone demonstrate a denial of equal protection, the alleged misconduct relates only to the developers' due process claim, which the jury rejected and the developers did not appeal. The developers' confusion is further highlighted by the fact that they quote *due process* law in support of their equal protection argument, including *A Helping Hand, L.L.C. v. Baltimore*, 515 F.3d 356 (4th Cir. 2008) (discussing the factors to be considered for a substantive due process claim).

The pertinent issue before this Court is whether the developers presented evidence that the Planning Commission treated them differently than other similarly situated developers. *See Dunes W.*, 401 S.C. at 293–94, 737 S.E.2d at 608; *Bibco Corp.*, 332 S.C. at 53, 504 S.E.2d 116; *Grant*, 319 S.C. at 354, 461 S.E.2d at 391. We find that, like the plaintiff in *Dunes West*, the developers failed to meet their burden of proof.

In response to the Town's motion for a directed verdict during trial, the developers argued the Planning Commission treated the developers of Stono Plantation differently because it did not require a traffic study despite the fact that Stono Plantation is adjacent to the developers' property. However, Stono Plantation is not a "similarly situated" comparator because it was approved for subdivision in 1985, long before the Town adopted its ordinances and created the Planning Commission in 1998.

The developers also argued the Planning Commission treated them differently than the developers of Wide Awake Park and Holly Grove because the Commission did not require traffic studies for those projects. However, there are material differences between those projects and the developers' subdivision. *See Dunes W.*, 401 S.C. at 294–95, 737 S.E.2d at 609. Wide Awake Park is a public park rather than a residential subdivision, was already developed when the Town acquired it, and required consolidation rather than subdivision of lots. Holly Grove is a low-income, "planned development" subject to a different approval process than residential subdivisions. Moreover, unlike the developers' subdivision, the

community did not oppose either of those projects. *See id.* (stating public opposition furnishes a rational basis for disparate treatment in zoning decisions).

Additionally, neither Wide Awake Park nor Holly Grove is located on Bryan Road and the developers failed to present evidence suggesting the projects posed the same traffic and safety concerns as the developers' proposed subdivision. The Town presented evidence that Bryan Road is "one of the most dangerous roads in Hollywood" and that the developers' property is located along a dangerous curve where multiple accidents have occurred. Commissioner Wolf testified the Planning Commission's purpose behind requiring a traffic study was to ensure Bryan Road could safely support additional travelers. Because the addition of a new residential subdivision on Bryan Road would create a heightened level of traffic, we find the Planning Commission's decision to require a traffic study was rationally related to the legitimate goal of maintaining the safety of its citizens living and traveling along Bryan Road. *See Strickland v. State*, 276 S.C. 17, 21, 274 S.E.2d 430, 432 (1981) (stating the government has a legitimate interest in the safety of those using public roadways). We further find there are material differences between the developers' subdivision and its alleged comparators—Wide Awake Park and Holly Grove—which demonstrate a rational basis for treating them differently. *See Dunes W.*, 401 S.C. at 295, 737 S.E.2d at 609; *Harbit*, 382 S.C. at 396, 675 S.E.2d at 782–83.

Accordingly, we find the circuit court erred in denying the Town's motions for a directed verdict and JNOV on the developers' equal protection claim. Because the developers are no longer the "prevailing party," we also find the circuit court erred in awarding attorney's fees and costs to the developers. *See* S.C. Code Ann. § 15-77-300(A) (stating the "prevailing party" may recover reasonable attorney's fees).

CONCLUSION

We affirm the circuit court's grant of summary judgment in favor of the Town on its claims for declaratory and injunctive relief, reverse the circuit court's denial of the Town's motions for a directed verdict and JNOV on the developers' equal protection claim, and reverse the circuit court's award of attorney's fees and costs to the developers.

AFFIRMED IN PART AND REVERSED IN PART.

PLEICONES, BEATTY, KITTREDGE, and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clarence Gibbs, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-137347

ON WRIT OF CERTIORARI

Appeal from Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27253
Submitted June 1, 2012 – Filed May 15, 2013

AFFIRMED

Appellate Defender Katherine H. Hudgins, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Christina J. Catoe, all of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the denial of Clarence Gibbs's (Petitioner) second application for post-conviction relief (PCR). We hear this matter pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), for PCR counsel failed to seek certiorari review following the denial of Petitioner's first PCR application. After being convicted by a jury of kidnapping, armed robbery, and possession of a deadly weapon during the commission of a violent crime, and unsuccessfully pursuing a direct appeal, Petitioner sought PCR on two grounds: (1) trial counsel was ineffective for failing to contemporaneously object to the introduction of a lineup, a show-up, and in-court identifications; and (2) trial counsel was ineffective in failing to request a jury instruction on the law of alibi as part of the defense strategy. We affirm.

I.

On the evening of April 10, 2005, a robbery occurred at a grocery store in Georgetown, South Carolina. The police arrived to the scene shortly after the robber fled. Three different witnesses were interviewed about the incident. One witness, John Fowlkes, described the robber as a middle-aged or older black man with a "scruffy beard with distinct gray colorings in it." He also noted the robber wore a black hat and blue jacket. Another witness, Greg Morton, indicated the robber was wearing a black hat and a blue or black jacket. Eric Sessions, the third witness, informed police the robber was wearing a blue hat and a blue jacket. Officers also reviewed a surveillance tape that captured the robbery, and a black jacket found at Petitioner's home was positively identified by all three witnesses as the jacket worn by the robber.

Approximately ten days after the robbery, police officers presented two photographic lineups, each containing six pictures of people generally matching the description given by the witnesses, to each witness individually.[1] The first photographic lineup contained a picture of Petitioner. Upon viewing the lineups, Fowlkes and Morton identified Petitioner as the robber. Sessions, however, was unable to identify the perpetrator via the lineups.

[1] At the time of trial, the second lineup had been lost. However, two police officers and two of the witnesses testified that the photographs in the second lineup were similar to the photographs contained in the first.

Nearly one week later, Petitioner was transported to the police station for questioning. The three witnesses were brought to the station to view Petitioner. According to Fowlkes, he was taken to a one-way mirror to determine whether Petitioner had any involvement in the robbery. Fowlkes testified he saw a white male and Petitioner behind the glass and that he instantly recognized Petitioner as the robber. Likewise, Morton testified Petitioner was in the room with two police officers and was able to identify Petitioner as the robber. When Sessions viewed Petitioner, however, he informed police he was sure Petitioner was *not* the perpetrator.[2]

Petitioner was subsequently charged with kidnapping, armed robbery, and possession of a deadly weapon during the commission of a violent crime.

Petitioner moved to suppress the evidence related to the photographic lineup, show-up, and any potential in-court identifications. Following a pretrial *in camera* hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972), the trial court denied Petitioner's motion to suppress. The trial court found the photographic lineup and show-up identifications were not unduly suggestive and permitted the witnesses to make in-court identifications at trial.

At trial, both Fowlkes and Morton identified Petitioner as the robber.[3] Fowlkes's photographic lineup identification, show-up identification, and in-court identification were admitted into evidence without contemporaneous objection by the defense.[4] When the State sought to introduce Morton's photographic lineup

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[2] All three witnesses were also permitted to hear Petitioner's voice during the show-up. Again, Fowlkes and Morton stated they recognized Petitioner's voice from the robbery, while Sessions stated it was not the robber's voice.

[3] Sessions, however, testified Petitioner was not the robber.

[4] Defense counsel later objected to the introduction of the photographic identifications after the State requested the store surveillance footage be admitted into evidence, stating, "I mean, Your Honor, for clarification when the lineup was introduced into evidence previously I think I did not voice an objection. I would like the record to reflect that the lineup that was introduced was subject to a previous objection. The court has ruled and admitted that lineup but I'd like the record to reflect that that is subject to our previous objection."

identification into evidence, defense counsel raised a contemporaneous objection.[5] However, defense counsel did not object to the introduction of Morton's show-up or in-court identifications.[6]

Following the State's case-in-chief, Petitioner presented an alibi defense. Specifically, Petitioner testified he was at home with his mother and girlfriend watching television at the time the robbery occurred. Petitioner's mother and girlfriend corroborated his story. Both testified they were home with Petitioner on the night of the robbery watching the television show *JAG* between 9:00 and 10:00 p.m. The State presented two rebuttal witnesses who testified that the only two stations available to Petitioner did not air *JAG* on the night of the robbery.[7]

During closing arguments, both defense counsel and the State presented arguments to the jury regarding Petitioner's alibi. The trial court held a charge conference outside the presence of the jury. Defense counsel did not request a jury instruction on the law of alibi testimony. In its charge, the trial court provided instructions to the jury on the burden of proof in criminal cases and reasonable doubt and informed the jury they should consider only competent evidence and determine the credibility of the witnesses. Additionally, the trial court instructed the jury on identification and that the State had the burden of proving identity beyond a reasonable doubt.[8]

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[5] Specifically, defense counsel stated that his objection was "[s]ubject to [his] previous objection."

[6] Defense counsel did object to the introduction of the lineup itself into evidence.

[7] Petitioner's mother and girlfriend testified that the only channels available on Petitioner's television were ABC and FOX. Petitioner, however, testified that his television also received two other channels, including the local CBS channel, which could have aired the CBS affiliated show.

[8] The court explained that identification testimony is "an expression of belief or impression by a witness," and the accuracy of the identification must be determined by considering the believability of each identification witness.

Petitioner was convicted by the jury on all three counts and sentenced to concurrent terms of twenty years' imprisonment for the armed robbery and the kidnapping, and five years' imprisonment to run consecutively for the possession of a firearm during commission of a violent crime. On direct appeal, the court of appeals affirmed Petitioner's conviction and sentence. *State v. Gibbs*, Mem. Op. No. 2007-UP-333 (S.C. Ct. App. filed June 27, 2007).

Subsequently, Petitioner filed two applications for PCR, which were consolidated into one action. In seeking relief, Petitioner alleged defense counsel was ineffective for failing to contemporaneously object to the introduction of the photographic lineup, show-up, and in-court identifications and for failing to request an alibi charge.

At the PCR hearing, defense counsel testified he believed Petitioner's best defense was to challenge the witnesses' inconsistent identifications but admitted he should have objected to the introduction of the identification evidence and preserved the issue for appellate review. However, he assumed the identifications would be admitted, and he was solely concerned with rebutting the identifications. Counsel also testified that he did not request the jury instruction on the law of alibi because he believed the identification issues was the stronger defense strategy. He nonetheless acknowledged that he should have requested an alibi charge.

The PCR court found defense counsel was deficient for failing to contemporaneously object to the introduction of the photographic lineup, show-up, and in-court identifications because counsel's mistake foreclosed review of the issues on appeal. However, the PCR court found Petitioner was not prejudiced by counsel's deficiency because the trial court admitted the identifications after conducting a thorough *Neil v. Biggers* hearing.

Regarding the alibi charge, the PCR court found defense counsel's performance was deficient because he failed to ensure that an alibi instruction was given to the jury. However, the PCR court found that Petitioner had not proven prejudice because the jury charge given "was sufficient to inform the jury that the State had to prove beyond a reasonable doubt that [Petitioner] was not at home at the time of

the of the crime, and that he was, in fact, at the scene of the crime."[9] Thus, the PCR court denied Petitioner relief. No appeal was taken.

Following his initial PCR application and hearing, Petitioner filed a subsequent PCR application. Petitioner alleged his PCR counsel failed to file a notice of intent to appeal the denial of relief in his first PCR. The State filed an amended return requesting a hearing pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). After an evidentiary hearing, the PCR court found Petitioner was entitled to belated review of the denial of his first PCR application. Thereafter, Petitioner filed an *Austin* petition for writ of certiorari from the first PCR court's order denying him relief. This Court granted the petition for writ of certiorari as to the order granting a belated appeal and from the order denying Petitioner PCR pursuant to Rule 243, SCACR.

II.

To establish a claim for ineffective assistance of counsel, "the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). An applicant may demonstrate prejudice by establishing, by a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (citation omitted).

In reviewing the findings of the PCR court, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The "PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 (citing *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626).

[9] The PCR court also noted that the critical issue in the case was credibility, and not alibi "because the jurors could believe *either* the State's identification witness, *or* they could believe the alibi witnesses, *but not both*." (emphasis in original).

III.

With respect to both issues on appeal, the PCR court found trial counsel was deficient, but that Petitioner was not prejudiced by his counsel's deficient performance. We hold these findings are amply supported by the evidence. We address each in turn.

A.

Petitioner contends the PCR court erred in finding he was not prejudiced by counsel's failure to contemporaneously object to the introduction of the photographic lineup, show-up, and in-court identifications. We disagree.[10]

The purpose of an *in camera* hearing when the State offers identification witnesses is for the trial court to decide "whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." *Id.* (citing *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001)). When analyzing the admissibility of an out-of-court identification, courts utilize a two-pronged analysis. *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). First, a court must determine "whether the identification process was unduly suggestive." *Id.* (quoting *Curtis v. Commonwealth*, 396 S.E.2d 386, 388 (Va. Ct. App. 1990)). Second, a court must determine "whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Id.*

After conducting a thorough *in camera Neil v. Biggers* hearing, the trial court determined the identification procedures utilized by the police, specifically the photographic lineup and the suggestive show-up, were not unduly suggestive.

We find support for the PCR court's determination that the trial court did not abuse its discretion in finding the photographic lineup identifications were reliable, as there was not a substantial likelihood of misidentification. *See Moore*, 343 S.C. at

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[10] The PCR court correctly held that defense counsel's failure to make a contemporaneous objection constituted deficient performance. *See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (reiterating that "[a] contemporaneous objection is required to properly preserve an error for appellate review").

286, 540 S.E.2d at 447. Moreover, we concur with the assessment that the failure of one witness to positively identify Petitioner as the robber does not require a contrary result, as the credibility of the witnesses was thoroughly vetted and put to the jury. *See, e.g.*, *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614–15 (Ct. App. 1984) (citations omitted) ("Assessment of the credibility of witnesses is a question for the jury, not the court, and it is the jury that decides the weight to be afforded the testimony.").

As to the show-up identifications, Petitioner argues that the trial court erroneously admitted these identifications and trial counsel's failure to object was prejudicial. In general, "one-on-one show-ups have been sharply criticized, and are inherently suggestive." *Moore*, 343 S.C. at 287, 540 S.E.2d at 448 (quoting *Jefferson v. State*, 425 S.E.2d 915, 918 (Ga. Ct. App. 1992)). Nevertheless, there is no bright line rule concerning show-ups, as the ultimate decision is controlled by the particular facts and circumstances. For example, courts have deemed a show-up procedure proper "where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching." *State v. Mansfield*, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000) (quoting 22A C.J.S. *Criminal Law* § 803). "The closer in time and place to the scene of the crime, the less objectionable is a show-up." *Id.*

Thus, the inquiry turns upon "whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." *State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 448 (quoting *Jefferson v. State*, 425 S.E.2d at 918). In other words, "[s]uggestiveness alone does not mandate the exclusion of evidence." *Mansfield*, 343 S.C. at 78, 538 S.E.2d at 263 (citations omitted). Instead, "[r]eliability is the linchpin in determining the admissibility of identification testimony." *Id.* (citations omitted); *see also State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 448 ("[T]he identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure." (quoting *Jefferson v. State*, 425 S.E.2d at 918)).

While the show-up procedures used here were unduly suggestive, the finding of the PCR court that the identifications were reliable under the circumstances is supported by the evidence. Because the two witnesses previously identified Petitioner as the robber from the photographic lineup, the subsequent show-up may

be characterized as merely confirmatory and therefore reliable, despite the suggestive procedure. *See Moore*, 343 S.C. at 287, 540 S.E.2d at 448–49 ("Although one-on-one show-ups have been sharply criticized, and are inherently suggestive, the identification need not be excluded as long as under the [the totality of the] circumstances the identification was reliable notwithstanding any suggestive procedure.").

In sum, the failure of trial counsel to contemporaneously object to the identification testimony did not result in any prejudice to Petitioner. The probative evidence in the record supports the PCR court's finding that the trial court did not abuse its discretion in admitting the evidence because the identifications were not so unduly suggestive as to create a likelihood of misidentification. Thus, a contemporaneous objection by trial counsel would not have changed the outcome of Petitioner's case on appeal.

B.

Petitioner also contends the PCR court erred in finding Petitioner was not prejudiced by his counsel's deficient performance in failing to request a jury charge on alibi. We disagree.

In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed "in its entirety and not in isolation." *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

At trial, Petitioner asserted an alibi defense, but defense counsel failed to request an alibi instruction. The PCR court determined that trial counsel's failure to request an alibi instruction constituted deficient representation, but Petitioner "has not proven that he suffered prejudice from the lack of an alibi charge." The PCR court relied on the jury charge as a whole to support its finding of no prejudice.

The relevant portion of the jury charge was:

> Now, at issue in this case is the identification of the Defendant as the person who committed the crimes charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant. . . . You must determine the accuracy of the identification of the Defendant. You

> must consider the believability of each identification witness in the same way as you do any other witness. . . . Once, again, I instruct you the burden of proof is on—the burden of proof is on the State and extends to every element of the crime and this specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the person who committed the crimes. If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the Defendant not guilty.

Given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the PCR court's finding of no prejudice must be sustained under the any evidence standard of review.

AFFIRMED.

HEARN, J., concurs. PLEICONES, J., concurring in result only. TOAL, C.J., dissenting in a separate opinion in which BEATTY, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. While I agree that the PCR judge correctly found defense counsel ineffective for failing to request a jury charge on alibi, I would find the PCR court erred in finding Petitioner was not prejudiced by counsel's deficient performance because (1) the evidence presented at trial warranted an alibi charge and (2) the State did not present overwhelming evidence of Petitioner's guilt.

An alibi charge is required where the defendant claims to be elsewhere at the time the crime was committed. *State v. Robbins*, 275 S.C. 373, 374–75, 271 S.E.2d 319, 319–20 (1980). Generally, the failure to give an alibi charge under these circumstances constitutes reversible error. *Id*. However, if the State presents overwhelming evidence of a defendant's guilt at trial, then there is no reasonable probability that the result of the trial would have been different had trial counsel requested an alibi charge, and reversible error is not present. *Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). "An alibi charge places no burden on the defendant, but emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime." *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (citing *State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943)).

It is the settled law of this State that to avoid a finding of ineffectiveness for failing to request an alibi charge, defense counsel "must articulate a valid reason for employing a certain strategy" and therefore, not requesting the charge. *Roseboro*, 317 S.C. at 293–94, 454 S.E.2d at 313 (citation omitted). While our prior cases may have suggested a *per se* rule of prejudice based on the mere failure of defense counsel to request an alibi charge, *see Commonwealth v. W. Hawkins*, 894 A.2d 716, 732 n.21 (Pa. 2006) (noting that this Court's ruling in *Roseboro* "approaches a rule of *per se* prejudice under the circumstances" but "did not rule out that a reasonable basis for declining the instruction might occur"), it is my opinion that claims of ineffectiveness based on the failure to request an alibi instruction have been and should continue to be evaluated on a case-by-case basis under an objective standard of reasonableness, *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313. In *Roseboro*, this Court reiterated that "[a]n alibi charge is considered especially crucial when the evidence is entirely circumstantial," and "[t]he Solicitor's disparagement of [the] petitioner's alibi further renders counsel's strategy unreasonable since an alibi charge would have corrected any impression [the] petitioner bore any burden of proof at trial." *Id.* at 294, 454 S.E.2d at 313. In another instance, this Court found that the failure to request an alibi charge is not

prejudicial where the State has presented "overwhelming evidence of the petitioner's guilt." *See Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). All of these circumstances are contributive factors towards a determination that "counsel's professed strategy" in a given case is either valid or "invalid under an objective standard of reasonableness." *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313.

In the present case, Petitioner argues that the evidence of guilt was not overwhelming because Sessions testified that Petitioner was not the robber; there was conflicting evidence concerning the color of the jacket found in Petitioner's home; and there was no other evidence connecting Petitioner to the robbery and that the State's reference to Petitioner's alibi testimony meant that the jury was not properly instructed that alibi "was not an affirmative defense imposing upon the defendant the burden of proof." On the other hand, the State argues that defense counsel and the State both referenced the alibi testimony in their closing arguments, and the State acknowledged that it had the burden of proving its case. In addition, the State argues that the trial judge gave a jury charge which included instructions on the burden of proof and the credibility of witnesses. Therefore, the State contends, the jurors would have understood that, if they found the testimony of Petitioner, his mother, and his girlfriend credible, a verdict of not guilty would be required.

The PCR court adopted a position consistent with the State's view that the jury charge on the whole, including standard instructions on the burden of proof and the credibility of witnesses, prohibited a finding that Petitioner suffered prejudice in this case.[11]

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[11] Likewise, the majority relies on this portion of the jury charge to support its conclusion that the PCR court's finding of no prejudice is supported by evidence in the Record. However, the legal concepts of alibi and credibility are not the same. While credibility deals with the believability of the witnesses, alibi testimony is presented for the purpose of proving that it was impossible for the defendant to commit the crime charged. *Compare, e.g.*, *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission."), *with Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997) ("The fact finder is imbued with broad discretion in determining credibility or

However, in my view, the State did not present overwhelming evidence of Petitioner's guilt. The police did not find a gun, money, a black fishing hat, or any other physical evidence linking Petitioner to the robbery, with the exception of the jacket. While all three witnesses identified the jacket found in Petitioner's home as the one worn by the robber at trial, this evidence contradicted the witnesses' statements concerning the jacket's appearance. Finally, the identity evidence was conflicting.

Moreover, as in *Roseboro,* an alibi charge here was necessary to correct any indication the Solicitor may have given in his closing remarks that Petitioner "bore *any* burden of proof at trial." *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313 (emphasis added); *see also Riddle v. State*, 308 S.C. 361, 364, 418 S.E.2d 308, 310 (1992) (finding that the defense counsel's error in failing to request an alibi charge, coupled with the remarks made by the solicitor during closing arguments, were prejudicial to the defendant because "the absence of a charge on alibi gave rise to a conclusion by the jury that it was impermissible for them to consider the alibi defense."). In this case, there is no doubt the State's closing argument gave the impression that Petitioner bore some burden of proof on the issue of alibi, as the Solicitor referenced whether Petitioner could *prove* that he was at another place during the crime. Moreover, the Solicitor went out of his way to disparage the alibi witnesses, referring to them as liars and suggesting that Petitioner's girlfriend was high on drugs during her testimony.

During the PCR hearing, defense counsel stated he made a tactical decision to focus on the identification issues instead of the alibi evidence but that the law on alibi "certainly should have been charged to the jury." In light of the circumstantial nature of the State's case, the lack of overwhelming evidence proving Petitioner's guilt, and the State's disparagement of Petitioner's alibi testimony, in my view defense counsel's rationale for failing to request the alibi

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believability of witnesses."). As discussed *infra*, I disagree with the majority that the instruction provided, absent an explicit instruction on the law of alibi, was sufficient to overcome the concerns outlined in *Roseboro* and present in this case.

instruction was not reasonable under the circumstances. Therefore, I would find the PCR court erred in finding Petitioner suffered no prejudice by his counsel's failure to request an alibi instruction.

BEATTY, J., concurs.

The Supreme Court of South Carolina

In the Matter of Ivan James Toney, Petitioner.

Appellate Case No. 2012-212055

ORDER

On January 17, 2012, the Court suspended petitioner from the practice of law for nine (9) months and ordered he pay the costs of the disciplinary proceedings within sixty (60) days. In the Matter of Toney, 396 S.C. 303, 721 S.E.2d 437 (2012). In addition to other requirements, the Court ordered petitioner to complete twelve (12) months of mentoring "in accordance with the Panel's recommendations" after reinstatement.[1]

Pursuant to Rule 33, RLDE, of Rule 413, SCACR, petitioner filed a Petition for Reinstatement seeking reinstatement to the practice of law. The matter was referred to the Committee on Character and Fitness (the Committee). After a hearing, the Committee issued a Report and Recommendation recommending the Court deny the Petition for Reinstatement. Petitioner filed exceptions to the recommendation.

After consideration of the entire record, including petitioner's testimony during oral argument before the Court, the Court grants the Petition for Reinstatement on the following conditions:

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[1] The Hearing Panel recommended the mentor and petitioner address the following issues: 1) communication with clients; 2) organizational skills; 3) stress management; 4) concentration and focus; 5) recognition of professional limitations; and 6) management of clients' and others' expectations.

1. for the next twelve (12) months, petitioner shall be mentored by a member of the South Carolina Bar who has been approved by the Office of Disciplinary Counsel;
2. the mentor and petitioner shall, at minimum, address the issues recommended by the Hearing Panel; and

3. the mentor shall file quarterly reports with the Commission on Lawyer Conduct (the Commission) addressing petitioner's compliance and progress with the mentoring requirement.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

May 8, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lauren Proctor and Trans-Union National Title Insurance Company f/k/a Atlantic Title Insurance Company, Respondents,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, Forrest Whitlark, Paul Whitlark, Charlie E. Bishop, and Brett Blanks, Appellants.

Appellate Case No. 2012-205510

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5131
Heard March 7, 2013 – Filed May 15, 2013

AFFIRMED

Ariail Elizabeth King and James Mixon Griffin, both of Lewis Babcock & Griffin, LLP, of Columbia, for Appellants.

Louis H. Lang, of Callison Tighe & Robinson, LLC, of Columbia, and Mario Anthony Pacella, of Strom Law Firm, LLC, of Columbia, for Respondents.

WILLIAMS, J.: Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, Forrest Whitlark, Paul Whitlark, Charlie E. Bishop, and Brett Blanks (collectively, Appellants) appeal the circuit court's order granting Lauren Proctor's motion for summary judgment,[1] arguing the circuit court erred in finding that the South Carolina legislature has abrogated the doctrine of *in pari delicto* with regard to losses sustained by illegal gambling. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1995, Proctor began gambling on video gaming machines located in restaurants and bars in Columbia, South Carolina. From 1999 until 2005, Proctor frequently gambled on video poker machines located in the Pizza Man and Rockaways Athletic Club (Rockaways) restaurants.[2] During that time, Proctor lost between $1,000 and $5,000 per week from gambling on video poker machines at the two restaurants. According to Proctor, Pizza Man and Rockaways would provide her cash advances on her credit cards to enable her to fund her gambling as well as free food and alcohol.

Proctor was employed by State Title, which her mother owned. State Title provided real estate closing services to attorney Walter Smith. Proctor began forging her mother's name on checks and stealing money from Smith's trust account to use video poker machines. Because of Proctor's activities, Smith's trust account contained insufficient funds to satisfy the mortgages on several properties at closing. Accordingly, Trans-Union National Title Insurance Company[3] (Trans-Union), which acted as State Title's title insurance company, paid approximately $550,000 in claims arising from the shortages in Smith's trust account.

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[1] To the extent Appellants appeal the circuit court's denial of their motion for summary judgment, we decline to address this issue because orders denying summary judgment are not appealable. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) ("[T]he denial of a motion for summary judgment is not appealable, even after final judgment.").

[2] Appellants Forrest Whitlark and Paul Whitlark are part owners of Whitlark & Whitlark, Inc. d/b/a Pizza Man and Rockaways (collectively, Whitlarks). Appellants Charlie E. Bishop and Brett Blanks co-owned Zodiac Distributing, LLC, which owned one of the video poker machines in Pizza Man.

[3] At the time, Trans-Union was named Atlantic Title Insurance Company.

In July 2000, the operation of video poker machines became illegal in South Carolina. Proctor admitted she was aware her use of the video poker machines was illegal. Pizza Man and Rockaways continued to operate video poker machines in their establishments until a Federal Bureau of Investigation sting operation in 2005.

On September 10, 2007, Proctor entered into a plea agreement with federal prosecutors and pled guilty to mail fraud under 18 U.S.C. § 1341. In addition, Proctor agreed to pay restitution in the amount of $565,475.25 to Trans-Union and $195,000 to Smith.

Proctor and Trans-Union brought the instant action against Appellants to recover the losses they incurred as the result of Proctor's gambling. Specifically, Proctor and Trans-Union asserted claims for unjust enrichment, violations of the South Carolina Unfair Trade Practices Act (SCUTPA), and civil conspiracy. Appellants filed a motion for summary judgment, arguing the doctrine of *in pari delicto* barred Proctor's claims and challenging Trans-Union's standing. In addition, Proctor moved for partial summary judgment against the Whitlarks on the issue of liability. The circuit court found Trans-Union lacked standing to bring the action and granted Appellants' motion for summary judgment on Proctor's unjust enrichment claim based on their unclean hands defense. However, the circuit court found that the doctrine of *in pari delicto* has been abrogated in South Carolina with regard to gambling losses. Accordingly, the circuit court granted Proctor's motion for partial summary judgment on the issue of liability against the Whitlarks and denied Appellants' motion for summary judgment based on the *in pari delicto* defense. This appeal followed.

LAW/ANALYSIS

Appellants argue the circuit court erred in granting Proctor's partial motion for summary judgment. Specifically, Appellants contend the circuit court erred in finding that the doctrine of *in pari delicto* has been abrogated in South Carolina with regard to losses sustained in illegal gambling. We disagree.

"The common-law defense at issue in this case derives from the Latin, *in pari delicto potior est conditio defendentis*: 'In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (alterations in original); *see also Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App.

2006) ("The doctrine of *in pari delicto* is the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." (internal quotation marks and alterations omitted)). South Carolina courts have previously applied the *in pari delicto* doctrine in certain cases involving illegal gambling. *See, e.g.*, *Rice v. Gist*, 32 S.C.L. (1 Strob.) 82, 85 (1846) ("[A]ll wagers are unlawful, and not to be recovered in courts of justice." (internal quotation marks omitted)). However, section 32-1-10 of the South Carolina Code (2007), which was originally adopted in 1712 as a part of the Statutes of Anne, explicitly allows the recovery of gambling losses in excess of fifty dollars. Specifically, section 32-1-10 provides as follows:

> Any person who shall at any time or sitting, by playing at cards, dice table or any other game whatsoever or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any person or persons . . . in the whole, the sum or value of fifty dollars and shall pay or deliver such sum or value or any part thereof shall be at liberty, within three months . . . to sue for and recover the money . . . from the respective winner or winners thereof, with costs of suit, by action to be prosecuted in any court of competent jurisdiction.

Similarly, if a person who lost money gambling does not bring suit pursuant to section 32-1-10 within three months of the gambling loss, section 32-1-20 allows any person to bring suit against the winner for treble damages within one year of the date of the loss. *See* S.C. Code Ann. § 32-1-20 (2007) ("In case any person who shall lose such money . . . shall not, within the time aforesaid, . . . sue and with effect prosecute for the money or other things so by him or them lost and paid and delivered as aforesaid, it shall be lawful for any other person . . . to sue for and recover the same and treble the value thereof, with costs of suit, against such winner or winners as aforesaid . . . .").

This court and our supreme court have recognized in more recent cases that sections 32-1-10 and -20 "promote a policy which prevents a gambler from allowing his vice to overcome his ability to pay" and "protect a citizen and his family from the gambler's uncontrollable impulses." *Johnson v. Collins Entm't Co.*, 349 S.C. 613, 635, 564 S.E.2d 653, 664-65 (2002) (internal quotation marks omitted); *see also McCurry v. Keith*, 325 S.C. 441, 444, 481 S.E.2d 166, 168 (Ct. App. 1997) ("The purpose of [section 32-1-10] is to punish excessive gaming and

to prevent a gambler from allowing his vice to overcome his ability to pay."). In *Johnson*, the plaintiffs, a group of habitual gamblers, brought suit to recover losses they sustained on video poker machines owned or operated by the defendants. 349 S.C. at 621 & n.1, 564 S.E.2d at 657 & n.1. Specifically, the plaintiffs asserted causes of action under the Racketeer Influenced Corrupt Organizations Act, SCUTPA, and sections 32-1-10 and -20 of the South Carolina Code. *Id.* at 621, 564 S.E.2d at 657. When the *Johnson* plaintiffs filed their suit in 1997, the operation and use of video poker machines were generally legal in South Carolina. *Id.* at 633, 564 S.E.2d at 664. However, the *Johnson* plaintiffs alleged that the defendants operated their machines in a manner that violated state law, such as offering the possibility of payouts in excess of $125. *Id.* at 621-31, 564 S.E.2d at 657-63.

In *Johnson*, the supreme court rejected the argument that section 32-1-10 provides the exclusive remedy to recover gambling losses and explicitly recognized that a plaintiff may also seek to recover gambling losses pursuant to SCUTPA. *Id.* at 634-35, 564 S.E.2d at 664-65. In addition, the court declined to apply the defendants' *in pari delicto* defense to the plaintiffs' SCUTPA claim. *Id.* at 639 n.13, 564 S.E.2d at 639 n.13. The court reasoned, in part, that because the operators of the video poker machines were operating in a regulated area of the law, they should "be held to a greater knowledge and understanding of the laws than their customers, particularly where the laws are designed to protect the player from his or her own bad judgment." *Id.*

Based upon the supreme court's holding in *Johnson*, we find the circuit court did not err in rejecting Appellants' *in pari delicto* defense. We acknowledge the facts of the instant case are distinguishable from those in *Johnson* because video poker gambling was illegal when Proctor suffered her losses. Nevertheless, three tenets recognized by the supreme court in *Johnson* are instructive to our analysis and lead to the same conclusion that the *in pari delicto* defense does not bar Proctor's claims. First, statutory and case law in South Carolina support the policy of allowing plaintiffs to recover gambling losses as a way of both discouraging illegal gambling and of protecting gamblers and their family members from imprudent gambling activities. *See Johnson*, 349 S.C. at 635, 564 S.C. at 664-65 (noting that sections 32-1-10 and -20 promote a policy of limiting excessive and/or unlawful gambling); S.C. Code Ann. §§ 32-1-10, -20. Second, the owners and operators of video poker machines are not truly *in pari delicto* with the persons who use the machines for gambling because in many cases, a habitual gambler is acting under

the sway of "uncontrollable impulses" and, thus, requires protection from his or her bad judgment. *See Johnson*, 349 S.C. at 635, 564 S.C. at 664-65. Finally, sections 32-1-10 and -20 are not the exclusive avenues for plaintiffs to recover gambling losses and do not preclude plaintiffs from seeking recovery under other state law theories, including SCUTPA. *See Johnson*, 349 S.C. at 635, 564 S.E.2d at 665 (noting that sections 32-1-10 & and -20 do not preclude plaintiffs from recovering gambling losses under other remedies provided by law, including SCUTPA). We find these tenets espoused by the supreme court in *Johnson* support the circuit court's holding that the defense of *in pari delicto* does not bar Proctor's claims.[4]

Courts in other jurisdictions have similarly found that the *in pari delicto* defense does not bar the recovery of illegal gambling losses. For example, in *O'Neil v. Crampton*, 140 P.2d 308 (Wash. 1943), the Washington Supreme Court employed a similar approach and explained the policy reasons for declining to apply the doctrine to gambling losses. The court acknowledged the general rule that "one cannot establish a right and invoke a remedy if he himself is a wrongdoer . . . ." *Id.* at 310. Nevertheless, the court found that a Washington statute providing for a civil remedy to recover money lost while engaged in gambling

> was a declaration of public policy based upon the idea that, if gambling is to be discouraged, one way in which it might be done would be to permit recovery by the loser and at the same time protect those inclined to gamble against their weakness and improvidence, notwithstanding that the loser was [*in pari delicto*] with the winner.

Id. The court noted that the fact that the gambler was engaged in an illegal activity should not preclude recovery because the statute criminalizing gambling was "but another attempt to discourage gambling." *Id.* at 311. The basis of allowing the recovery of losses sustained by illegal gambling "is that not only is the individual protected, but it is also a protection to the public, which is even more important, and this would be made more effective by allowing a recovery." *Id.* at 310; *see also Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46, 53

[4] Moreover, we are not persuaded by the cases cited by Appellants in support of their claim that *in pari delicto* applies based on the factual dissimilarities and more recent pronouncements of the supreme court.

(E.D.N.Y. 2000) (noting that the New York legislature passed a law allowing the recovery of gambling losses because the common law rule applying the doctrine of *in pari delicto* to such losses "did little to help effectuate the purposes of the gambling prohibitions, which were adopted with a view toward protecting the family man of meager resources from his own imprudence at the gambling tables" (internal quotation marks omitted)); *cf. Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 306-07 (noting that "[i]n its classic formulation, the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury, because in cases where both parties are [*in delicto*], concurring in an illegal act, it does not always follow that they stand [*in pari delicto*]; for there may be, and often are, very different degrees in their guilt" (internal quotation marks omitted)).

Based on this case and statutory law and for the reasons set forth above, we find the circuit court did not err in granting Proctor's motion for summary judgment on the issue of liability against the Whitlarks. As noted by the supreme court in *Johnson*, statutory and case law in South Carolina support a policy of allowing plaintiffs to recover gambling losses as a way of both discouraging illegal gambling and of protecting gamblers and their family members from imprudent gambling activities. 349 S.C. at 635, 564 S.E.2d at 664-65. We hold that with respect to gambling losses under the circumstances of the instant case, the doctrine of *in pari delicto* has been abrogated for reasons of public policy and does not bar the recovery of such losses. Accordingly, we affirm the circuit court's order granting Proctor's motion for summary judgment.

CONCLUSION

Based on the foregoing, the circuit court's order granting Proctor's motion for summary judgment on the issue of liability against the Whitlarks is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Brandon Lewis, Appellant.

Appellate Case No. 2011-187128

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5132
Heard February 5, 2013 – Filed May 15, 2013

REVERSED

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Jerry W. Peace of Greenwood, for Respondent.

LOCKEMY, J.: Richard Brandon Lewis appeals his conviction of aiding and abetting homicide by child abuse (aiding and abetting). He argues the trial court erred in: (1) failing to direct a verdict in his favor on the charge of aiding and abetting; (2) failing to charge the jury that the State had to prove Lewis had a legal

duty to protect Audrina Hepburn (Victim) before he could be convicted of aiding and abetting; (3) not granting a mistrial after a witness testified a statement by Lewis had "the possibility of guilt behind it"; and (4) not requiring the State to open fully on the law and the facts. We reverse.

FACTS

Lewis began dating Ashley Hepburn, mother of Victim, in early 2009. Hepburn was separated from her husband, with whom she had two children, Victim and Owen.[1] Hepburn and her children lived with her mother, Doris Davis, and Davis's boyfriend, David Crumley.

Around 3:30 p.m. on October 12, 2009, Lewis stopped at Hepburn's home on his way back from class at Piedmont Technical College. Lewis stated Hepburn was upset about a withdrawn job offer, and they had an argument that was initially playful, but resulted in her slapping Lewis. Lewis left Hepburn's home after their fight and went to his grandmother's home, where he lived. However, he returned to Hepburn's home around 8:30 p.m. Davis and Crumley had retired to bed for the night when he returned. Hepburn told Lewis she was extremely tired and would not be good company, but he did not leave.

At some point in the evening, Owen accidentally hit Lewis while they were playing and then refused to apologize to Lewis. Lewis told Hepburn if Owen did not listen to her now, he was never going to listen to her, and a fight ensued about her parenting skills. Subsequently, Hepburn and Lewis began putting the children to bed. It took two attempts to put Victim to sleep because she was fussy. Then Owen refused to brush his teeth, and Hepburn spanked him, causing him to cry. Lewis said he felt responsible and guilty for the spanking because of his comments to Hepburn earlier, and so he went to the living room by himself to watch football. Hepburn went to her room with Owen where they laid in bed.

Later in the evening, Lewis checked on Victim and did not see anything out of the ordinary. He then went to Hepburn's room and asked if she wanted to watch a movie, but she declined. While watching the movie alone in the living room, Lewis heard Victim cry and thereafter heard Hepburn stomp down the hall to

[1] On the date of the incident, Victim was sixteen months old, and Owen was almost three years old.

Victim's room. Victim continued crying for a few minutes before stopping. Lewis described the crying as being broken up with short pauses, "like she could have been shaken," but in that moment he did not think anything had happened to Victim. After Hepburn returned to her room, Lewis went to her and asked if she wanted any food, but she did not, so he ate by himself and prepared for bed. He checked on Victim once more, but this time he noticed she was in an unusual position, facedown with her head against the bars of the crib. When he picked her up, he noticed she was not breathing properly and had blood around her mouth. He carried Victim into Hepburn's room and Hepburn took her from him. Davis and Crumley awoke to Lewis's and Hepburn's cries, and Crumley called 911. When questioned by Crumley, Lewis explained he had found Victim unresponsive and believed she had a seizure. His opinion stemmed from his personal experience with a seizure condition that resulted in his discharge from the navy.

Paramedics arrived at Hepburn's home around 1:40 a.m. and transported Victim to Self Regional Hospital (Self Regional). Dr. Michelle Curry suspected a brain injury, which was confirmed by a CAT scan. She also suspected the brain injury was caused by shaking, and the Laurens County Sheriff's Office (Sheriff's Office) and the Department of Social Services (DSS) were notified. Lewis told Dr. Curry he found Victim unresponsive but did not tell her Hepburn had stomped into Victim's room shortly before his discovery. Hepburn was present during his explanation to Dr. Curry, but she also stated Victim was simply found limp and unresponsive in her crib. Victim was transferred to Greenville Memorial Hospital where a pediatrician, Robert Seigler, determined the symptoms from her severe injury would have been immediately noticeable. Victim survived for three more days before being removed from life support and passing away.

Around 6:20 a.m. the morning of the incident, Lewis accepted law enforcement's request to come by the Sheriff's Office, and he gave a statement to Officer Ben Blackmon and other officers. In his initial statement, he did not mention hearing Hepburn's loud footsteps down the hall prior to discovering Victim's condition; he simply said he found Victim unresponsive. Additionally, he did not tell the officers about his argument with Hepburn earlier in the night that resulted in her slapping him. Lewis testified that at the time of the initial statement, he did not want to get Hepburn in trouble and did not believe Hepburn would do anything to hurt Victim. After his initial statement, he spoke with his grandmother, who urged him to tell the officers anything he knew about the case. Lewis then gave officers a second statement and explained he had heard Victim crying followed by

Hepburn's loud footsteps and then louder crying from Victim, "as if she was being shaken."

Hepburn also spoke with law enforcement within approximately twelve hours of Victim entering the Greenville Hospital, and in her initial interview with South Carolina Law Enforcement Division (SLED) agent, Casey Kirkland, she did not indicate Lewis was involved in Victim's injuries. Hepburn stated Lewis was "watching TV during all of this," and she was asleep, except for the two times she was awakened by Lewis, first asking about food and then with Victim in his arms. At trial, Hepburn implicated Lewis, asserting Lewis was the only person who could have harmed Victim. However, she conceded she never heard a sound, and she did not know Victim was hurt until Lewis brought Victim to her.

Officer Robert Plaxico, from the Sheriff's Office, also spoke with Hepburn and showed her Lewis's second statement. Officer Plaxico stated that when shown the statement, she said, "[O]h my god all of this is true but I don't remember hurting my baby." However, she explained her exclamation pertained to putting Owen to bed and the difficulty she had brushing his teeth because Lewis's statement was accurate in that respect. Officer Plaxico stated Hepburn never implicated Lewis during her interview with him.

Officer Plaxico visited Lewis's grandmother's home a couple of days after the incident, and when he arrived, Lewis ran out the back door. However, Lewis returned a couple of minutes later and told Plaxico he ran because he thought he was going to be arrested. Lewis was unable to give Plaxico any further information, and Plaxico left the home. A few days later, Lewis was admitted to the Laurens County Hospital for a suicide attempt. Lewis was not arrested until September 18, 2010, when he was charged with homicide by child abuse and aiding and abetting.

Lewis and Hepburn were tried jointly on February 22, 2011. The State introduced Alexander Brown, Self Regional's chaplain, as a witness, and he testified his position required him to serve as a caretaker, "emotionally, spiritually, and mentally," for patients and their families. Brown testified that during his time with Victim's family, Lewis stated Victim "didn't like him but he loved her." Brown thought Lewis's statement was odd, and it caused him concern. Hepburn's counsel asked Brown why he thought the comment was odd, and Lewis's counsel objected on the basis that Brown was not qualified as an expert, and it was speculative. The

trial court asked for a foundation to explain "how long [Brown] worked [at Self Regional] or something like that." Brown testified he had two years of seminary education, which included activities such as analyzing conversations he had with patients to see "why we ask what we ask and what flags might have been drawn by things that [the patients] have said." When Hepburn's counsel asked Brown again why Lewis's comment caused him concern, Lewis's counsel objected to it as speculative. The trial court overruled the objection, stating the answer was being received for the purpose of showing Brown's reaction to that moment and stated Lewis's counsel was welcome to cross-examine Brown on the issue. Brown answered that Lewis's comment "appeared to be a statement that had the possibility of having guilt behind it." Lewis's counsel objected once again, and the objection was sustained. Lewis moved for a mistrial, arguing Brown had testified as to his opinion that Lewis was guilty, which he maintained was far beyond anything admissible in court. The trial court gave the jury a curative instruction instead of granting a mistrial.

At the end of the State's case, Lewis asked for a directed verdict on both charges, which was denied by the trial court. Lewis renewed his directed verdict motion on the charge of aiding and abetting at the close of the trial, and the trial court again denied it. On March 3, 2011, the jury found Lewis guilty of aiding and abetting homicide by child abuse, but acquitted him on the charge of homicide by child abuse. The jury found Hepburn guilty of homicide by child abuse. The trial court sentenced Lewis to ten years, suspended upon service of seven years, and sentenced Hepburn to forty-five years.

LAW/ANALYSIS

Directed Verdict on the Charge of Aiding and Abetting

Lewis contends the trial court erred in denying his directed verdict motion because the State presented no evidence to support the charge of aiding and abetting. We agree.

"In reviewing the denial of a motion for a directed verdict, this court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the case was properly submitted to the jury." *State v. Smith*, 359 S.C. 481, 490, 597 S.E.2d 888, 893 (Ct. App. 2004) (citing *State v.*

Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). "In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight." *Id.* (citing *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69). "If the State presents any evidence which reasonably tends to prove the defendant's guilt or from which his guilt could be fairly and logically deduced, the trial court must send the case to the jury." *Id.* (citing *State v. Jarrell*, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002)).

"The trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005) (citing *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984)). "'Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.'" *Id.* (quoting *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)). "'However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.'" *Id.* at 102-03, 610 S.E.2d at 863 (quoting *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478; *State v. Ballenger*, 322 S.C. 196, 470 S.E.2d 851 (1996)). This court may reverse the trial court's denial of a motion for a directed verdict only if there is no evidence to support the trial court's ruling. *Id.* at 103, 610 S.E.2d at 863 (citing *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92-93 (2002)).

"A person is guilty of homicide by child abuse if the person . . . knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven." S.C. Ann. Code § 16-3-85(A)(2) (2003). "Child abuse or neglect" is defined under the statute as "an act or omission by any person which causes harm to the child's physical health or welfare." § 16-3-85(B)(1). Further, the statute provides that one causes harm to a child's physical health or welfare when one "inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment." § 16-3-85(B)(2)(a). "Aid and abet" is defined as "assist[ing] or facilitat[ing] the commission of a crime or . . . promot[ing] its accomplishment." Black's Law Dictionary 81 (9th ed. 2009).

"'Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" *State*

v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (quoting *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). "'In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct.'" *Id.* at 480, 697 S.E.2d at 584 (quoting *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)); *see Wilson v. Wilson*, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime."). "'Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.'" *Mattison*, 388 S.C. at 480, 697 S.E.2d at 584 (quoting *Leonard*, 292 S.C. at 137, 355 S.E.2d at 272). "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" *Id.* (quoting *State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977)).

In *State v. Smith*, the victim passed away from severe injuries sustained by abuse. 359 S.C. 481, 486-87, 597 S.E.2d 888, 891-92 (Ct. App. 2004). The two defendants, the victim's mother and the mother's boyfriend, were tried together on charges of homicide by child abuse and aiding and abetting. *Id.* at 488, 597 S.E.2d at 892. The jury found each defendant guilty of both charges. *Id.* The mother's boyfriend appealed his conviction, arguing the trial court should have granted his directed verdict motion on his charge of aiding and abetting. *Id.* at 490, 597 S.E.2d at 893. On appeal, this court noted that in their statements to investigators both defendants indicated they were never separated from each other or the victim during the time when her injuries occurred. *Id.* at 491, 597 S.E.2d at 894. Medical testimony established the injury was unquestionably the result of child abuse. *Id.* at 492, 597 S.E.2d at 894. We found the statute made it clear "child abuse may be committed by either an act or an omission which causes harm to a child's physical health." *Id.* (citing S.C. Code Ann. § 16-3-85(B)(1) (2003)) (emphasis omitted). This court then determined

> [g]iven the evidence on the severity and number of injuries to [the victim], the fact that both [the mother and the mother's boyfriend] were the only adults with [the victim] during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have been obvious to these two adults, along with the evidence of possible cover-up, . . .

> there was sufficient evidence of an act or omission by [the mother's boyfriend] wherein he inflicted or allowed to be inflicted physical harm to [the victim] resulting in [the victim's] death.

Id.

In the present case, both Lewis and Hepburn assert they were in separate rooms during the time of the incident and not within eyesight of each other. Hepburn claimed she was asleep during the incident, and Lewis claimed he was in the living room watching the television. We believe this is an important distinction from *Smith*. Hepburn's and Lewis's statements to investigators and testimony implicate one or the other as having committed homicide by child abuse. Lewis stated he was in the living room and simply heard Hepburn walk loudly into Victim's room, at which point he heard Victim's crying eventually stop. He testified he subsequently discovered the Victim's abnormal condition when checking on her. Hepburn claimed she never went into Victim's room after placing her in the crib for the second time, and she asserted Lewis was the only person who could have harmed Victim that night.

The record does not contain any evidence to support this conviction. The State argues because Lewis instigated, abetted, and witnessed Hepburn's spanking of Owen, and then "witnessed Hepburn's disciplinary outburst against her infant daughter," he "knew then what he knew later." First, there is no evidence to support the claim that Lewis witnessed Hepburn discipline her infant daughter. Second, we disagree with the State's contention that because he witnessed Hepburn spank Owen earlier in the night, he knew Hepburn was going to abuse Victim. Even if Lewis did have prior knowledge Hepburn was going to commit a crime, without more, that was insufficient to constitute guilt. *See Wilson v. Wilson*, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995).

Next, the State argues Lewis can be held liable as an aider or abettor for his failure to act—specifically, his failure to enter Victim's room and stop any abuse after hearing her crying. However, an overt act is required to be held liable for aiding and abetting, which necessarily excludes the possibility of being held liable for a failure to act. *See State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). Thus, his failure to act, assuming he knew a crime was occurring, cannot suffice as evidence of aiding and abetting. In the present case, any other finding

would nullify the mere presence charge. *See* 21 Am. Jur. 2d *Criminal Law* § 172 (2008) (explaining "there normally must be some evidence that the reason that the accused is present is to further the criminal intent of the perpetrator").

Moreover, the State must also present evidence of the requisite mental state for the charge of aiding and abetting, which the statute provides is "knowingly." *See* 21 Am. Jur. 2d *Criminal Law* § 131 (2008) (stating the term knowingly, as used in criminal statutes, "imports that an accused person knew what he or she was doing"). In *Smith*, the defendants indicated they were never apart during the weekend, and the mother's boyfriend further admitted witnessing the victim's resulting side effects from the abuse, yet did not tell medical personnel. 359 S.C. at 491-92, 597 S.E.2d at 894. Thus, the court found the evidence was sufficient to establish to a jury that he knowingly aided and abetted in the crime. *Id.* at 492, 597 S.E.2d at 894. As we previously stated, the parties here assert they were apart during the incident, and Lewis testified the moment he found Victim's condition to be odd, he brought her to Hepburn and medical personnel were immediately called. Lewis stated it was only after he was told about the implications of Victim's injuries did he realize Victim's sounds that night could have been the result of someone shaking her. Initially, he thought Victim had suffered a seizure. We find the State did not present evidence to prove the requisite mental state for aiding and abetting.

The State also asserts Lewis's flight and suicide attempt are sufficient evidence to withstand a directed verdict. We disagree with the State's contention under these facts. The State did not present any evidence of an overt act or the requisite state of mind for aiding and abetting, and thus, evidence of flight and a suicide attempt alone will not suffice to withstand a motion for a directed verdict. *See State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (declining to hold "that flight alone is substantial circumstantial evidence of a defendant's guilt"). Accordingly, we reverse the trial court.

Because we find a directed verdict should have been granted in Lewis's favor, we need not address his remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find there was no evidence to support the charge of aiding and abetting against Lewis, and a directed verdict should have been granted in Lewis's favor. For the foregoing reasons, the trial court is

REVERSED.

GEATHERS, J., concurs.

FEW, C.J., concurring: I join in the majority opinion except for one sentence: "We find the State did not present evidence to prove the requisite mental state for aiding and abetting." For two reasons, I would not make that statement. First, the statement is unnecessary to the resolution of the appeal, and is therefore dicta, because we found the State presented no evidence that Lewis knew or had reason to know Hepburn had abused or neglected the victim in time to save the child's life. Thus, there is no evidence that Lewis committed any act to aid or abet Hepburn with homicide. Second, the State will almost never have direct evidence of a defendant's mental state. Therefore, the law expects that the State will rely on circumstantial evidence to meet its burden of proof on this issue. "[I]ntent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred. Circumstantial evidence alone is often sufficient to show criminal intent because the element of intent, being a state of mind or mental purpose, is usually incapable of direct proof." *State v. Cherry*, 348 S.C. 281, 288, 559 S.E.2d 297, 300 (Ct. App. 2001) (Goolsby, J., concurring) (internal citations and quotations omitted), *aff'd but criticized*, 361 S.C. 588, 606 S.E.2d 475 (2004). In this case, there is ample circumstantial evidence that would require the trial court to deny a directed verdict as to Lewis's mental state if the State had proven Lewis acted to aid or abet.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Boykin Contracting, Inc., Respondent,

v.

K. Wayne Kirby d/b/a Carolina Gold Bingo, Appellant.

Appellate Case No. 2012-209067

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5133
Heard March 14, 2013 – Filed May 15, 2013

AFFIRMED

Edward Wade Mullins, III, and Benjamin C. Bruner, both of Bruner Powell Wall & Mullins, LLC, of Columbia, for Appellant.

Charles Harry McDonald, of Robinson McFadden & Moore, PC, of Columbia, for Respondent.

WILLIAMS, J.: K. Wayne Kirby d/b/a Carolina Gold Bingo (Kirby) appeals the circuit court's order awarding Boykin Contracting, Inc. (BCI) $59,494.31 plus prejudgment interest for electrical work performed by BCI on a bingo establishment in Columbia, South Carolina. Kirby contends BCI failed to prove the requisite elements of quantum meruit, requiring this court to reverse the circuit court's order and remand for entry of judgment in Kirby's favor. We affirm.

FACTS/PROCEDURAL HISTORY

BCI is a licensed general and mechanical contracting firm located in West Columbia, South Carolina. BCI performs work both as a general contractor and as a subcontractor. Kirby is the sole shareholder and president of Kirby Enterprises of South Carolina, Inc. (Kirby Enterprises). At times, Kirby Enterprises acted as a promoter for certain bingo operations in South Carolina. As promoter, Kirby Enterprises managed, operated, and conducted bingo sessions for non-profit organizations.[1] In exchange for these services, Kirby Enterprises received a portion of the admission fee and a percentage of the bingo operation's net proceeds.

In 2007, New Covenant Church entered into negotiations with Kirby Enterprises for the operation of a bingo parlor (Carolina Gold Bingo). As a result, Kirby executed a lease in 2008 with LN Dentsville Square, LLC, for two suites in a former Winn-Dixie building in Columbia, South Carolina. The 2008 lease listed "Wayne Kirby, d.b.a. Carolina Gold Bingo" as "Tenant."

To conduct the bingo operation, certain upfits and renovations needed to be undertaken. Initially, Hemphill & Associates, Inc. (Hemphill) was the general contractor on the project. Kirby testified he entered into a contract with Hemphill to upfit the space for $316,400. According to Kirby, $25,000 was allotted for electrical work in the contract. After executing the contract, Hemphill applied for a building permit in the amount of $100,000 and listed "Wayne K. Kirby" as the owner on the building permit application. However, Kirby maintained that after beginning the necessary renovations, the funds needed to accomplish the project were insufficient. As a result, Hemphill ceased work on the project in November 2007.

The project lay dormant until April 2008. At that time, Tom Brock (Brock), the vice-president of BCI and project manager for the renovation at issue, contacted Kirby after hearing Kirby needed help to complete the electrical work at the bingo parlor. Kirby and Brock met at the work site on April 8, 2008. During this initial meeting, Brock testified that he informed Kirby significant electrical work needed

[1] Pursuant to section 12-21-3920(4) of the South Carolina Code (Supp. 2012), a promoter is "an individual, corporation, partnership, or organization licensed as a professional solicitor by the Secretary of State who is hired by a nonprofit organization to manage, operate, or conduct the licensee's bingo game."

to be completed, and Kirby had likely overpaid the current electrical contractor, Larry Palmer (Palmer). Kirby requested BCI perform the remaining electrical work under Palmer's direction. Brock testified he emphatically opposed this arrangement and stated he and Kirby agreed BCI would complete the requisite work without Palmer's supervision and would send the bill directly to Kirby. Kirby, on the other hand, testified he thought BCI would be working for Palmer and would be paid from the proceeds of approximately $5,000 that remained due to Palmer for the completion of the electrical work. After their meeting, BCI commenced work on the bingo parlor the next day.

During the next month, BCI repaired the wiring in the main panel room located in the rear of the building, installed lighting in the back areas not associated with the main bingo floor, connected twenty rooftop HVAC units, repaired exterior lights on the building and in the parking lot, and repaired some lighting in the Comedy Club, which was adjacent to Carolina Gold Bingo. Upon completion of BCI's work, Kirby secured a certificate of occupancy on June 4, 2008, which listed "Wayne K. Kirby" as the owner. BCI subsequently hand-delivered an invoice on July 31, 2008, to Kirby's place of business, which was addressed to Carolina Gold Bingo[2] in the amount of $73,925.40. Of the amount due, $55,509.46 was allotted to labor and materials.

After receiving no payment for its work, BCI filed a mechanic's lien in the amount of $73,925.40 on October 27, 2008. BCI then filed suit on January 12, 2009, seeking to foreclose on the mechanic's lien. After a one-day bench trial, the circuit court issued an order on December 30, 2011, in which it ruled the parties had no meeting of the minds and, therefore, had no enforceable contract. However, the circuit court held that BCI was entitled to recover the reasonable value of its labor and materials under its quantum meruit claim. Accordingly, the circuit court awarded Boykin $59,494.31[3] plus prejudgment interest and costs in the amount of $160. Kirby filed a Rule 59(e), SCRCP motion to reconsider, which the circuit court denied. This appeal followed.

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[2] The circuit court found BCI addressed the invoice to Carolina Gold Bingo because this was the trade name Kirby used for the bingo operation and it was also the trade name Kirby used on the lease for the bingo space.

[3] The circuit court deducted the 15% profit BCI built into the project as well as $2,760.29 in credit card charges after finding BCI failed to demonstrate these charges were all incurred for purposes of work on Carolina Gold Bingo.

ISSUES ON APPEAL

(1) Did the circuit court err in finding BCI could recover from Kirby on its quantum meruit cause of action?

(2) Did the circuit court err in awarding BCI $59,494.31 in damages plus prejudgment interest?

STANDARD OF REVIEW

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (internal quotation marks omitted). As such, an action based on a theory of quantum meruit sounds in equity. *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

LAW/ANALYSIS

I. Quantum Meruit

Kirby first contends the circuit court erred in finding BCI conferred a benefit to Kirby in his individual capacity. Specifically, Kirby claims it was reversible error for the circuit court to conclude that Kirby, as opposed to Carolina Gold Bingo or Kirby Enterprises, realized value from any work performed by BCI. We disagree.

The elements of a quantum meruit claim are as follows: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617-18, 703 S.E.2d 221, 225 (2010).

In the circuit court's order, it found quantum meruit was an appropriate remedy because, although there was no meeting of the minds as required for an express contract, BCI was still entitled to recover the reasonable value of its labor and materials. We agree and find the circuit court's reasoning persuasive in resolving this issue.

First, BCI conferred a benefit on Kirby individually, and Kirby realized this benefit. Although Kirby did not sign the lease on the bingo space until after the work was completed, the court held "it [wa]s clear that Wayne Kirby exercised dominion and control over the area designated for his bingo operations well before this time."[4] In support of this conclusion, the circuit court noted Kirby was listed as the "owner" on the building permit application, which was issued *before* BCI started work, and as "owner" on the certificate of occupancy, which was issued *after* BCI completed its work. Although Kirby claims the circuit court improperly relied on these documents because he did not complete these documents or own Carolina Gold Bingo, we find these designations lend support to the court's conclusion he was in fact the intended beneficiary of BCI's work. Moreover, the circuit court acknowledged that Kirby was the point person for all the work. In this capacity, Kirby represented to Brock, BCI's vice-president, that the project was behind schedule and that renovations needed to be completed as soon as possible to prevent substantial financial loss.

On appeal, Kirby attempts to skirt responsibility by claiming that Kirby Enterprises, as opposed to Kirby, retained any benefits from BCI's electrical work. We disagree and find Kirby benefitted in his individual capacity from BCI's work. We find Kirby's argument unpersuasive, particularly when Kirby directed the project, maintained control over the premises, spent significant time on-site, and had a direct personal stake in the success of the venture. Moreover, the circuit court did not need to pierce Kirby Enterprises' corporate veil to hold Kirby individually liable. BCI never argued that Kirby Enterprises was the recipient of its services or attempted to recover against Kirby Enterprises under a corporate veil

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[4] Based on our review of the record, it appears Kirby signed both the 2007 and 2008 leases. The 2007 lease applied to the entire building (Comedy Club and Carolina Gold Bingo), whereas, the 2008 lease only applied to the bingo parlor. Kirby's name, social security number, driver's license number, and signature appear in the 2007 lease underneath the caption "tenant." When questioned, Kirby affirmed that his name was listed as a tenant in the 2007 lease.

theory. Rather, it was Kirby who raised the corporate veil theory as a defense to his individual liability.

Kirby further argues that because he did not own Carolina Gold Bingo, any work that enabled Carolina Gold Bingo to open did not directly benefit him. We disagree and find the language of the 2008 leasehold agreement compelling. Specifically, the 2008 lease between LN Dentsville and Kirby, which Kirby signed, lists the tenant as "Wayne Kirby d.b.a. Carolina Gold Bingo."[5] In contemplation of this tenancy, Kirby took the initiative to hire Hemphill as general contractor over a year prior to the execution of the 2008 lease. Kirby also possessed keys to the facility and electrical plans for the installation of lighting and power, which he gave to BCI in order to start work on the bingo parlor.

Based on our review of this evidence, we find Kirby personally benefitted from BCI's successful completion of the electrical work. Because Kirby never paid BCI for the work it undertook to upfit the bingo parlor, we find Kirby was unjustly enriched at BCI's expense. Accordingly, the circuit court properly found BCI could recover under quantum meruit from Kirby.

II. Damages

Next, Kirby claims the circuit court erred in calculating the damages award and in permitting BCI to recover prejudgment interest. We disagree.

The general law is that when, as here, an express contract fails because there is no meeting of the minds as to the essential terms, the laborer or contractor may still recover the reasonable value of the labor and materials furnished under an implied in law or quasi-contractual theory. *See Costa & Sons Constr. Co. v. Long*, 306 S.C. 465, 468 & n.1, 412 S.E.2d 450, 452 & n.1 (Ct. App. 1991) (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* §§ 7 and 21 (1973)) (stating implied in

[5] Kirby claims the circuit court erred in finding Carolina Gold Bingo was the trade name he used for the bingo operation. We find this argument disingenuous, particularly when the 2008 lease agreement, which Kirby signed, lists the tenant as "Wayne Kirby d.b.a. Carolina Gold Bingo" and further lists "tenant's trade name" as "Carolina Gold Bingo." Kirby presents no evidence that another individual entered into the lease on his behalf or that he attempted to correct this portion of the lease, despite this alleged inaccuracy.

law or quasi-contracts are not considered contracts at all, but are akin to restitution, which permits recovery of the amount the defendant has benefitted at the expense of the plaintiff in order to preclude unjust enrichment); *Braswell v. Heart of Spartanburg Motel*, 251 S.C. 14, 18, 159 S.E.2d 848, 850 (1968) (finding under the theory of implied contract, when there is no agreement as to the price to be paid for services, one is entitled to recover the fair or reasonable value of the services rendered); *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 8, 8, 532 S.E.2d 868, 872 (2000) ("[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy.").

Our courts have also held that in "an action in quasi-contract, the measure of recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff." *Stringer Oil Co. v. Bobo*, 320 S.C. 369, 372, 465 S.E.2d 366, 369 (Ct. App. 1995); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part) (citing *Stringer*, 320 S.C. at 372-73, 465 S.E.2d at 368-69) (stating "[t]he proper measure of damages for an unjust enrichment claim is the amount of increase in the fair market value of the subject property due to the improvements made by the plaintiff").

As to damages, Kirby contends the circuit court improperly calculated BCI's damages based on the reasonable value of BCI's labor and materials. Instead, Kirby contends the court should have measured BCI's damages by determining, from Kirby's perspective, the value he received from BCI's work. We disagree.

Initially, we note Kirby fails to highlight any evidence in the record that the value of the subject property increased as a result of BCI's improvements. After BCI presented evidence on its losses, it was then incumbent upon Kirby to provide concrete evidence that he did not benefit as much as BCI lost. Without any competent evidence to the contrary, we find it proper to defer to the circuit court's calculation of damages. As reflected in BCI's invoice, BCI sought $73,925.40[6] from Kirby for the electrical work. The circuit court reviewed BCI's job cost analysis, which calculated the costs for the project at $62,254.60, as well as BCI's

[6] This figure included material, labor, taxes, insurance, overhead, and profit.

invoice to Kirby.[7] From the amount owed, the circuit court deducted the 15% profit BCI built into the project as well as $2,760.29 in credit card charges that BCI failed to prove were directly attributable to work on the bingo parlor. After accounting for these deductions, the circuit court awarded $59,494.31 to BCI. The circuit court acknowledged Kirby's belief that BCI would only be paid from the remaining proceeds due to Palmer, which totaled approximately $5,000. However, the circuit court discredited this testimony based on the evidence presented to the court, which demonstrated BCI performed significant electrical work. We find this amount to be fair and reasonable and within the circuit court's discretion based on the evidence presented by the parties. *See Braswell*, 251 S.C. at 18, 159 S.E.2d at 850 (1968) (finding that under the theory of implied contract, when there is no agreement as to the price to be paid for services, one is entitled to recover the fair or reasonable value of the services rendered).

Kirby also claims the circuit court improperly awarded BCI prejudgment interest. We disagree.

The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and the sum is certain or capable of being reduced to certainty. *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). The fact that the sum due is disputed does not render the claim unliquidated for purposes of an award of prejudgment interest. *Id*. Further, the circuit court has the discretion to award prejudgment interest in an action to recover under the theory of quantum meruit. *See McCutcheon*, 360 S.C. at 206, 600 S.E.2d at 110 (finding the entitlement to prejudgment interest proper in a quantum meruit claim). The proper test for

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[7] Kirby contends that if we conclude the proper measure of damages is BCI's labor and materials, the circuit court improperly calculated BCI's labor and material costs. We disagree and note that although the invoice denotes the labor and materials as $55,509.46, whereas the job cost analysis denotes BCI's labor and materials as $62,254.60, both of these documents were in evidence and considered by the circuit court. The circuit court specifically held in its order that it based its calculation on the "job cost total" as opposed to the invoice. Because the damages award was within the range of evidence presented to the court, we defer to the circuit court's calculation. *See Hawkins v. Greenwood Develop. Corp.*, 328 S.C. 585, 601, 493 S.E.2d 875, 883 (Ct. App. 1997) (finding damages award was proper because it was within range of evidence presented during trial).

determining whether prejudgment interest may be awarded in a quantum meruit claim is whether the measure of recovery is fixed by conditions existing at the time the claim arose. *Id.*

We find the circuit court properly awarded prejudgment interest because the amount owed to BCI was "capable of being reduced to a sum certain." In addition, the measure of recovery was fixed by conditions existing at the time BCI's claim arose against Kirby as the costs incurred by BCI at the time of the work were established by BCI's invoices. Kirby's disagreement with BCI over the amount due for the work does not preclude an award of prejudgment interest. *See Smith-Hunger Constr. Co. v. Hopson*, 365 S.C. 125, 128-29, 616 S.E.2d 419, 421 (2005) (finding builder was entitled to prejudgment interest in action against homeowners for breach of contract, quantum meruit, and foreclosure of a mechanic's lien because the builder's costs were established by the builder's invoices at the time the homeowners breached the contract and were thus "fixed by conditions existing at the time the claim arose"). Accordingly, we affirm the circuit court on this issue.

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

HUFF AND KONDUROS, JJ., concur.