The Supreme Court of South Carolina

In re: Amendments to Regulations for Mandatory Legal Education for Judges and Active Members of the South Carolina Bar, Appendix C to Part IV, SCACR, and Regulations for Legal Specialization, Appendix D to Part IV, SCACR.

O R D E R

The Commission on Continuing Legal Education and Specialization has proposed amending the Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the Bar, contained in Appendix C of Part IV of the South Carolina Appellate Court Rules, to authorize accreditation of various alternatively delivered programming, including on-line and telephone seminars. The Commission also seeks to amend the Regulations for Legal Specialization, contained in Appendix D of Part IV of the South Carolina Appellate Court Rules, to eliminate the authority of specialization advisory boards to waive written examination when an applicant has an advanced degree in the legal field concerned. The proposed amendments are approved.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend the Regulations for Mandatory Legal Education for Judges and Active Members of the South Carolina Bar, Appendix C to Part IV, SCACR, and the Regulations for Legal Specialization, Appendix D to Part IV, SCACR, to reflect the changes set forth above. These amendments shall be effective September 1, 2003. The amended provisions are attached.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 12, 2003

APPENDIX C
REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION FOR JUDGES AND ACTIVE MEMBERS OF THE SOUTH CAROLINA BAR

V. Accreditation Standards

H. Audio-visual and Media Presentations.

1. Audio-visual or media presentations, including telephone and on-line seminars, are acceptable provided:

(a) A faculty member is in attendance or available by telephone hook-up to comment and answer questions; or

(b) Other appropriate mechanisms, as determined by the Commission, are present to enable the attendee to participate or react with the presenters and other attendees. Appropriate mechanisms include quizzes or examinations, response tracking, user prompts, and instant messaging.

2. In addition to meeting the standards of A through G, above, audio-visual or media presentations must:

(a) Utilize some mechanism to monitor course participation and completion in such a manner that certification of attendance is controlled by the provider. Courses must not be susceptible to a "fast forward" finish by attendees;

(b) High quality written materials must be available to be downloaded or otherwise furnished so that the attendees will have the ability to refer to such materials during and subsequent to the presentation;

(c) Telephone and on-line educational activities must be pre-approved by the Commission;

(d) Telephone and on-line educational activities will be accredited for the actual time spent to a maximum of 1 hour per activity; and

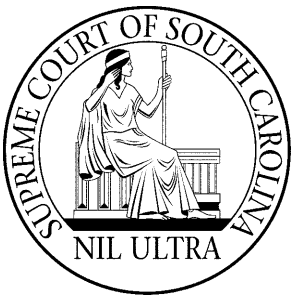
(e) Providers shall furnish to the Commission password and/or log-in capabilities for accredited programs. Access will allow for review of course mechanisms, such as interactive functionality. Any such activity may be audited by 1 or more representatives of the Commission without charge.

3. CLE credit earned through audio-visual or media presentations and applied to the annual 14 hour minimum requirement shall not exceed 4 hours of credit per calendar year.

APPENDIX D
REGULATIONS FOR LEGAL SPECIALIZATION

VIII. WRITTEN EXAMINATION

A. Requirement. Advisory Boards will require applicants to pass a written examination as a prerequisite to initial certification. An applicant who has not taken a specialty field's written examination within two (2) years of the date his or her application was received in the Commission's offices shall be required to reapply for certification.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

June 16, 2003

ADVANCE SHEET NO. 23

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Therl Avery Taylor, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25637
Heard November 6, 2003 - Refiled June 12, 2003

REVERSED

Katherine Carruth Link and South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Thomas E. Pope, of the Sixteenth Judicial Circuit; for respondent.

CHIEF JUSTICE TOAL: Petitioner, Theryl Avery Taylor ("Petitioner"), petitioned this Court to review the Court of Appeals' decision affirming his conviction for murder on grounds that the trial court erred in charging mutual combat to the jury. This Court granted certiorari and issued an opinion reversing Petitioner's murder conviction. Subsequently, Petitioner filed a Petition for Rehearing, arguing that this Court must also reverse his conviction for Possession of a Firearm or Knife during Commission of a Violent Crime pursuant to S.C. Code Ann. § 16-23-490 (2003). This Court granted the Petition for Rehearing and issues the following opinion reversing both of Petitioner's convictions.

FACTUAL / PROCEDURAL BACKGROUND

On December 16, 1998, Petitioner hired Robert Murphy ("Murphy"), fourteen year-old Shane Wallace, and Shane's teenaged friend Dean, to help him in his tree service business. After working that day, Petitioner and Murphy drove the two young men to the home of Shane's mother, Angela Wallace, an acquaintance of both Murphy and Petitioner. When they arrived at Angela's house, Petitioner and Murphy went inside and joined Angela, Myranda Stillinger, and Kevin Carter who had been drinking heavily all day. Shane, Dean, and Shane's sister, Chrystal, played outside.

While the testimony varied widely regarding many of the relevant facts, all witnesses agreed that, at some point in the evening, Kevin and Myranda began arguing. Petitioner testified that Kevin forcefully pushed Myranda into a counter. All parties agreed that Petitioner intervened, either physically or verbally, to stop the apparently escalating argument between Kevin and Myranda. Kevin and Petitioner then engaged in a violent, physical confrontation; however, the witnesses disagree about who started the fight and about its intensity at various points.

At trial, Murphy testified that the fight began when Petitioner "sucker-punched" Kevin. Murphy reported, "[a]nd that's when [Petitioner] said, you know, I'm not afraid of you, big man. And [Kevin] said, I'm not afraid of you either. And that's when [Petitioner] said, we're going to hell or jail.

And all of sudden, he just hauled off and punched [Kevin] in the head while [Kevin] was sitting down."[1]

Petitioner, on the other hand, testified that Kevin threw the first punch, and that he tried to withdraw from the fight, but that Kevin would not release him and continued to beat him. Other witnesses asserted that Kevin, not Petitioner, attempted to quit fighting. All witnesses agree that Angela insisted the two take the fight outside, and that they continued their struggle on the porch of the trailer and into the front yard.

At some point thereafter, Petitioner drew a buck knife from his pocket, and began stabbing Kevin. The autopsy report disclosed that Kevin was stabbed fifteen times and died of a stab wound to the heart. The autopsy reported Kevin was six feet two inches tall and weighed approximately 270 pounds at the time of his death. A physical examination of Petitioner a few days after the fight revealed Petitioner had undergone abdominal surgery in the weeks preceding this incident after a car accident, but indicated no new cuts or bruises. Petitioner was substantially smaller than Kevin.

At trial, Petitioner admitted he stabbed Kevin, but alleged he did so in self-defense. The trial judge charged the jury on self-defense and, over Petitioner's objection, on mutual combat, as follows:

> We also have the law in this state regarding what is sometimes referred to as mutual combat. This premise is in the law where two persons are mutually engaged in combat and one kills the other. And at the time of the killing it being maliciously done as murder.
>
> If it be done in the sudden heat of passion upon sufficient provocation or without premeditation, it would be manslaughter.

[1] Murphy neglected to report any of these facts in the signed statement he gave to the police on the night Kevin was killed, including his later contention that Petitioner had started the fight.

> One who provokes or initiates an assault and not [sic] escape from the liability may find in self-defense a defense to a prosecution arising with respect to injury or death of their adversary.
>
> And where a person voluntarily participates in mutual combat for purposes other than protection you cannot justify or excuse the killing of the adversary in the course of such conduct on the ground of self-defense, regardless of what extremity or even peril he may be introduced to in the process of the combat. Unless in either event before the homicide is committed the person withdraws and does in good faith decline from the conflict and either by word or by act makes that known to their adversary.
>
> Then if the adversary pursues them the aggressor may upon the belief that they are in danger injure or kill the adversary. Communication by one to an adversary or attempt to withdraw may be explicit or verbal by use of words or may be implicit by conduct, such as retiring or attempting to retire from the scene and abandoning conflict.

The jury convicted Petitioner of murder and possession of a weapon during commission of a violent crime. The trial judge sentenced Petitioner to thirty-six years for murder and five years, concurrent, for the weapons charge. The Court of Appeals affirmed Petitioner's convictions. *The State v. Therl Avery Taylor,* Op. No. 2000-UP-484 (S.C. Ct. App., filed June 26, 2000). This Court granted certiorari to review the following issue:

> Did the trial court err in delivering a charge on mutual combat to the jury, and, if so, was Petitioner prejudiced by the charge?

LAW/ANALYSIS

Petitioner argues that the Court of Appeals erred in affirming the trial court's jury charge on mutual combat. We agree.

In general, the trial judge is required to charge only the current and correct law of South Carolina, *Cohens v. Atkins,* 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), and the law to be charged to the jury is determined by the evidence at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. *Ellison v. Parts Distributors, Inc.,* 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years. The case law does establish that there must be "mutual intent and willingness to fight" to constitute mutual combat. *State v. Graham,* 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." *Id.* Whether or not mutual combat exists is significant because "the plea of self-defense is not available to one who kills another in mutual combat." *Id.* (citing *State v. Jones,* 113 S.C. 134, 101 S.E. 647 (1919)). In order to claim self-defense, the defendant "must be without fault in bringing on the difficulty." *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the "no fault" element of self-defense cannot be established.

If the defendant is engaged in mutual combat, self-defense is unavailable unless the defendant withdraws from the conflict before the killing occurs.[2] A finding that a defendant was engaged in mutual combat

[2] In *State v. Graham,* the Court quoted 40 C.J.S. Homicide § 122 for an explanation of the basic principles of mutual combat: " 'Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he endeavors in good faith to decline further conflict, and either by word or act, makes that fact known to his adversary, . . .' " 260 S.C. at 451, 196 S.E.2d at 495-96.

does not preclude the jury from convicting the defendant of manslaughter as opposed to murder. "Where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice, it would be manslaughter." *State v. Andrews*, 73 S.C. 257, 53 S.E.423 (1906).

The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs. *State v. Porter,* 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where Appellant returned to injured party's property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots); *Graham,* 260 S.C. at 451, 196 S.E.2d at 496 (finding mutual combat charge proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); *State v. Mathis,* 174 S.C. 344, 177 S.E. 318 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other).[3]

Although South Carolina has not explicitly required that the fight arise out of a pre-existing dispute, other states have made this prerequisite to mutual combat explicit. Texas and Colorado adhere to the rule that an "antecedent agreement to fight" must exist for the court to charge mutual combat. *Eckhardt v. People,* 247 P.2d 673 (Colo. 1952); *People v. Cuevas,* 740 P.2d 25 (Colo. App. 1987); *Lujan v. State,* 430 S.W.2d 513, 514 (Tex. Crim. App. 1968); *Carson v. State*, 230 S.W. 997 (Tex. Crim. App. 1921).

[3] In the only modern South Carolina case to refer to mutual combat in a fist-fight setting, this Court apparently assumed it could apply, but held there was no evidence to support it. *Nauful v. Milligan*, 258 S.C. 139, 187 S.E.2d 511 (1972) (verbal fighting precipitated by injured party's insult to the defendant's children, but injured party never made any accompanying threat of physical violence and never fought back when defendant became physical).

Georgia has limited the application of mutual combat in another way by holding that mutual combat arises only when the parties are armed with deadly weapons, and that mutual combat does not arise from "a mere fist fight or scuffle." *Flowers v. State,* 247 S.E.2d 217, 218 (Ga. App. 1978); *Grant v. State,* 170 S.E.2d 55, 56 (Ga. App. 1969). In both *Flowers* and *Grant*, the defendant admitted to killing the decedent, but claimed self-defense. In both cases, the disputes that ended in death began as fist fights, and so the court found the mutual combat charge erroneous. Significantly, the court found that commingling charges on mutual combat and justification was "ipso facto harmful" because "it placed upon the defendant a heavier burden than required" for self-defense. *Grant*, 170 S.E.2d at 56. The court in *Flowers* explained, "[t]o charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." 247 S.E.2d at 218.

We believe the restrictions placed on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas are warranted. These limitations are consistent with the South Carolina cases in which the mutual combat charges given were deemed to be proper: *Porter, Graham, and Mathis*. As mentioned, mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the "no fault" finding necessary to establish self-defense. As such, it is only logical that the evidence of agreement to fight be plain, like the evidence of mutual combat present in the *Porter, Graham*, and *Mathis* cases. In holding that mutual combat was properly charged in *Graham*, this Court reasoned as follows:

> *[t]here was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point.* Under these circumstances, the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing, and required that the issue be submitted to the jury for determination.

260 S.C. at 452, 196 S.E.2d at 496. (emphasis added).

In this case, the evidence of events leading up to and during the fight between Petitioner and Kevin is sketchy at best. The witnesses, with the exception of the child witnesses, were extremely intoxicated, and arguably exhibited bias toward the decedent. There is no evidence, and the State does not contend, that there was any pre-existing ill-will or dispute between Kevin and the Petitioner, and there is no evidence that Kevin was willing to engage in an *armed* encounter with Petitioner. In their determination of mutual willingness to fight, the South Carolina cases discussed emphasize that *each party knew* the other was armed. Here, there is no indication that Kevin knew Petitioner was armed with a knife, and there was no pre-existing ill-will between the parties. Under these circumstances, there is insufficient evidence of mutual willingness to fight to submit the issue of mutual combat to the jury.

As noted, to warrant reversal, a jury charge must be both erroneous and prejudicial. In our opinion, the mutual combat charge was prejudicial to Petitioner as well as erroneous. *Ellison,* 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

The mutual combat doctrine is triggered when both parties contribute to the resulting fight. Self-defense, on the other hand, is available only when the defendant is without fault in bringing on the difficulty. *Davis.* Despite this fundamental difference between the doctrines of mutual conflict and self-defense, the Court of Appeals found that charging mutual combat to the jury did not destroy Petitioner's self-defense theory because *Petitioner* still could have proven that he withdrew from the fight in good faith. *Graham,* 260 S.C. at 451, 196 S.E.2d at 496. This finding, however, fails to recognize that requiring Petitioner to prove he withdrew from the fight removes the burden to disprove self-defense from the State, and improperly places it on the Petitioner.

Petitioner admitted to killing Kevin and relied entirely on self-defense at trial. Recently, in *State v. Burkhart*, a majority of this Court found the trial

judge's failure to properly charge the jury on self-defense was prejudicial because self-defense versus murder was the sole issue in the case. 350 S.C. 252, 565 S.E.2d 298 (2002). Through *Burkhart* and the line of cases preceding it, this Court has placed great emphasis on the importance of a defendant's right to assert self-defense when there is "any evidence" to support it, and has taken pains to make sure the burden to disprove self-defense remains on the State. *See State v. Addison*, 343 S.C. 290, 540 S.E.2d 449 (2000)*; State v. Wiggins,* 330 S.C. 538, 500 S.E.2d 489 (1998).

Although the court charged self-defense properly in Petitioner's case, that charge was negated by the court's unwarranted charge on mutual combat. We find that the court's mutual combat charge acted as a limitation on the Petitioner's ability to claim self-defense, and prejudiced him by transferring the *State's burden* to disprove self-defense onto the Petitioner, forcing him to prove self-defense in violation of *Burkhart, Addison, and Wiggins*.

CONCLUSION

For the foregoing reasons, we **REVERSE** Petitioner's convictions and **REMAND** for a new trial.[4]

MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in a separate opinion in which BURNETT, J., concurs.

[4] We reverse Petitioner's conviction for Possession of a Firearm or Knife during Commission of a Violent Crime in addition to his murder conviction because Petitioner's murder conviction served as the prerequisite violent crime for his weapons charge conviction. S.C. Code Ann. § 16-23-490 (2003) (stating that the penalties of § 16-23-490 "may not be imposed unless the person convicted was at the same time indicted and convicted of a violent crime"). Therefore, without the murder conviction, Petitioner's conviction for violation of § 16-23-490 cannot stand.

JUSTICE PLEICONES: I agree with the majority that petitioner is entitled to a new trial because the evidence did not warrant a charge on the doctrine of mutual combat. I write separately, however, because while I concur in the result reached here, and in most of the majority's reasoning, I continue to believe that we should not place the burden on the State to disprove a claim of self-defense. See State v. Burkhart, 350 S.C. 252, 265, 565 S.E.2d 298, 305 (2002).

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In Re: Anant A. Vora, M.D.

Anant A. Vora, M.D., Respondent,

v.

Lexington Medical Center, Appellant.

Appeal From Lexington County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 25664
Heard April 3, 2003 - Filed June 12, 2003

REVERSED

Andrew F. Lindemann, of Davidson, Morrison and Lindemann, P.A., and Ernest J. Nauful, Jr., of Columbia, for Appellant.

Deborah R.J. Shupe, of Columbia, for Respondent.

JUSTICE WALLER: Lexington County Medical Center (Hospital) appeals an order of the circuit court requiring it to reinstate the privileges of Anant A. Vora, M.D., to practice pediatric medicine at its facility. We reverse.

FACTS

In September 1997, Hospital's Chief of staff, Dr. Givens, advised Dr. Vora that its Medical Executive Committee (MEC) had received a recommendation from the Quality Assessment Committee (QAC) to initiate corrective action in regard to Dr. Vora's clinical privileges. An *ad hoc* committee was appointed to investigate Dr. Vora's clinical practice and report to the MEC. In January 1998, the *ad hoc* committee found, after reviewing a number of his cases, that Dr. Vora had 1) a pattern of inappropriate hospitalization, stays which could have either been shortened or which could have utilized outpatient treatment, 2) use of set protocols inappropriately in cases of like diseases, regardless of the degree of impairment, 3) inappropriate use of antibiotics and outdated modalities, 4) a pattern of overstating the severity of illness, and 5) a missed diagnosis which resulted in unnecessary hospitalization and surgical intervention. Based on these findings, the ad hoc Committee recommended Dr. Vora's clinical privileges be terminated indefinitely, and corrective action be taken.

The matter was reviewed by the MEC, which concluded there had been "a continual pattern of clinical deficiencies since 1988." Pursuant to Hospital's Medical Staff By-Laws, Dr. Vora requested and was given a hearing by the Fair Hearing Committee, which took place over six separate days with witnesses and evidence. The Hearing Committee found as follows:

1. Practitioner utilized set protocols inappropriately in the management of all cases involving like diseases or illnesses, regardless of the degree of severity of the individual patient's condition or the patient's response to early therapy.
2. Practitioner frequently demonstrated the inappropriate use of antibiotics and outdated treatment modalities.
3. Practitioner demonstrated a pattern of overstating the severity of illness not confirmed by laboratory tests or other objective data in the medical record.

4. In case number 13, the Practitioner demonstrated a departure from generally accepted standards of care which created the potential for significant risk to the patient.
5. The Practitioner has demonstrated unprofessional interaction with colleagues and staff on a recurring basis.[1]

Based on these findings, the Fair Hearing Committee recommended Dr. Vora's staff privileges be temporarily suspended until completion of certain corrective measures. The MEC upheld the findings of the Fair Hearing Committee, and imposed a temporary suspension while corrective measures were undertaken, to be accomplished within 18 months. Dr. Vora sought an appellate review of the MEC's findings, which was conducted by a committee (the Appellate Review Board) of the Board of Directors of Lexington Medical Center on April 19, 1999. On May 27, 1999, the Appellate Review Committee issued its report, recommending the action taken by the MEC be affirmed. The Board of Directors thereafter issued its final decision unanimously adopting the Report of the Appellate Committee. Dr. Vora appealed the final decision of the Board to the circuit court, which reversed the Board's decision, finding certain procedures employed by Hospital's various panels, boards and committees deprived Dr. Vora of due process; the court ordered Dr. Vora's privileges be reinstated. Hospital appeals.

ISSUES

1) Did the circuit court err in ruling Dr. Vora's due process rights had been violated?

1) Should the circuit court have reversed on the ground that the disciplinary action taken by the Hospital was not supported by the evidence?

[1] The appellate review committee found no evidence of unprofessional interaction on a **recurring** basis.

1. DUE PROCESS

A physician's interest in being reappointed to a hospital staff is a property interest which may not be denied without compliance with the procedural and substantive due process requirements of the Fourteenth Amendment. Huellmantel v. Greenville Hosp. System, 303 S.C. 549, 402 S.E.2d 489 (Ct. App. 1991), *citing* In Re: Zaman, 285 S.C. 345, 329 S.E.2d 436 (1985). Procedural due process requirements are not technical; no particular form of procedure is necessary. Id. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. We find these criteria were amply met in this case.

The circuit court found a violation of Dr. Vora's due process rights for several reasons. It found a) Hospital had imposed an unreasonable burden of proof on Dr. Vora, b) Dr. Vora was denied the right to *voir dire* members of the Fair Hearing Panel, and c) he was denied the right to meaningfully cross-examine one of the Hospital's witnesses. We hold these deprivations do not rise to the level of a due process violation.[2]

a. Burden of Proof

The burden of proof set forth in Hospital's Fair Hearing Plan states:

> When a hearing relates to Section 2.1(a), (e), (h) or (i),[3] the practitioner who requested the hearing shall have the burden of proving, by clear and convincing evidence, that the adverse recommendation or action lacks any factual basis, or that such basis or the conclusions therefrom are either arbitrary, unreasonable, or capricious. Otherwise, **the body whose adverse recommendation or action occasioned the hearing**

[2] Although the circuit court also enumerated several "procedural irregularities" in the background section of its order, those irregularities did not form the basis of its finding of a due process violation. Accordingly, we do not address them here.

[3] These sections do not apply to this case.

> **shall**[4] **thereafter be responsible for supporting his challenge to the adverse recommendation for action by clear and convincing evidence** that such basis or conclusions drawn therefrom are either arbitrary, unreasonable, or capricious.

(emphasis supplied). The circuit court found the burden of proof set forth in the Fair Hearing Plan "plainly ambiguous, unintelligible, arbitrary, capricious, and therefore violated due process requirements of notice and a reasonable opportunity to be heard." It then found it "manifestly clear that [Hospital] has imposed an unreasonable burden of proof on [Dr. Vora], such that the decision of the Board of Directors must be reversed." Contrary to the circuit court's finding, the evidence simply does not demonstrate that the Hospital placed an unreasonable burden of proof on Dr. Vora.

The Appellate Review Committee, in reviewing the MEC's imposition of sanctions against Vora, stated that "In all fairness to the Practitioner, this committee has **reviewed the record before the hearing committee by imposing the same standard of proof, i.e., by clear and convincing evidence, upon the MEC**, even though this is not strictly required by . . . the Fair Hearing Plan." (Emphasis supplied). Given the complete and independent review by the Appellate Review Committee, we find any alleged inappropriate burden at earlier stages was harmless. Cf. Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997) (procedural errors in review process of terminated faculty rendered harmless in light of subsequent independent review). See also Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir.1987) (alleged conspiracy at pretermination procedure did not violate due process rights where employee had right to appeal termination); Davis v. Mann, 721 F.Supp. 796 (S.D.Miss.1988) (where there is an adequate appeal process, bias on part of initial decision maker is not denial of procedural due process). The circuit court erred in finding the burden imposed upon Dr. Vora resulted in a due process violation. [5]

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[4] The 1998 version of the Fair Hearing Plan inserted the following 14 words after shall: "have the initial obligation to present evidence in support therefore, but the practitioner shall. . ."

[5] Although we find no due process violation in the instant case, for the benefit of bench and bar, we address the issue of the appropriate burden of proof in medical privilege cases. In Anonymous v. State Board of Medical Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998), we held the correct standard of proof in medical disciplinary proceedings under the Administrative

b. *Voir Dire* of Panel Members

The circuit court also held Dr. Vora was denied due process by the trial court's refusal to ask members of the Fair Hearing Panel whether they had been represented by the prosecuting attorney. We do not find this deprived Dr. Vora of due process.

Dr. Vora was advised in advance as to the names of the physicians who had been appointed to the Hearing Committee. Dr. Vora object and had one panel member, Dr. Mubarek, removed from the panel.[6]

At the hearing, Dr. Vora sought to inquire as to whether any panel member had any relationship with Hospital's attorney, Attorney Nauful. Although the Hearing Officer would not allow Dr. Vora's counsel to pose this specific question, the officer did ask at the outset whether "any member of the five member panel know[s] of any reason why they would be biased or prejudiced in any way so as to be unable to render a fair hearing to the physician in this matter?" No member of the panel responded.

The parties liken the situation to *voir dire* of a jury panel. As noted by the Court in Thompson v. O'Rourke, 288 S.C. 13, 14, 339 S.E.2d 505, 506 (1986), a party seeking a new trial based upon the disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict. We recognized in Thompson, that "there is no absolute rule of disqualification based on a juror's relationship to an attorney in the case." 288 S.C. at 15, 339 S.E.2d at 506.

Dr. Vora has presented no evidence that any of the jurors had **any** relationship with Hospital's attorney, let alone that any possible relationship

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Procedures Act was not "clear and convincing" but, rather, "a preponderance of the evidence." Although this is not an APA case, we nonetheless find this standard appropriate in suspension or revocation of medical privileges cases. As the ARC applied the higher standard upon the MEC in this case, there is no need for a remand for application of the lesser standard.

[6] The Hospital's Fair Hearing Plan provides that direct competition with the charged party will serve to disqualify committee members.

would have disqualified them. There is simply no evidence in the record any of the panel members had any relationship with Hospital's attorney, or that, even if they did, they were somehow prejudiced against Dr. Vora. We find the trial court erred in finding a due process violation in the hearing officer's refusal to further query the panel members. See Gray v. Maynard, 349 S.C. 535, 564 S.E.2d 83 (2002)(recognizing that this Court has repeatedly acknowledged that peremptory strikes implicate no constitutional right).

Moreover, under this Court's opinion in Ross, supra, even if there were a due process problem with the panel at the Fair Hearing Panel level, any error was harmless in light of the subsequent independent review by the Appellate Review Committee and the Board of Directors, the composition of which has not been challenged by Dr. Vora.

c. Denial of Cross-Examination

At the circuit court hearing, Dr. Vora asserted he was denied the right to effective cross-examination of a witness, Nurse Melinda Cassell, at her deposition. We disagree. Contrary to the trial court's ruling, we do not believe the fairness of Dr. Vora's hearings was undermined by the examination of Nurse Cassell.

Case # 13 involved a two-month old infant brought to the emergency room. Nurses felt the infant needed to be transferred to a pediatric intensive care unit, which was not available at Lexington Medical Center;[7] Dr. Vora did not come to the hospital to see the infant for almost 12 hours after being advised of the baby's condition and abnormal lab tests. When nurses advised the Chief of Pediatrics, Dr. Reynolds, of their concerns, Dr. Reynolds ordered Dr. Vora relieved from the patient's care. Dr. Vora continued ordering lab work for the infant, delaying the infant's transfer to the pediatric ICU at Palmetto Richland Hospital.

[7] Nurse Cassell was the nursing supervisor on duty when case # 13 arose. She testified at her deposition she had gotten a phone call from the nurse on duty, Peggy Craven, that the infant was "sick, lethargic, difficult to arouse and that it was in the best interest of the child to be transferred to Richland." Nurse Cassell went to see the infant and concurred with Nurse Craven.

During Nurse Cassell's deposition on June 19, 1998, counsel for Dr. Vora, Attorney Henshaw, questioned her as to whether or not she had gone back and reviewed the medical records of the incident, to which she replied affirmatively. He then asked her if she had written a note to herself after the incident, to which she responded, "No." Henshaw then asked whether **at any time** after the incident she had written a note, to which she responded that she had, but did not know where it had gone. Thereafter, Cassell refused to disclose the substance of the notes she had written after reviewing the record or where they had gone. Hospital's attorney, Nauful, stated he wanted to put it on the record that Nurse Cassell "reviewed the chart, **made notes in preparation for two meetings with me**. She is not using them presently to refresh her recollection; she's not using them for any other purpose. I don't believe you're entitled to them, and I'm not going to let you ask her any more questions about it." (Emphasis supplied). Attorney Nauful then instructed Cassell not to answer any questions about the matter. However, Nurse Cassell did ultimately reply that she had not written any more notes other than the notes she was referring to in regard to her meeting with Mr. Nauful.

Subsequent to the above exchange, the record reflects that there was a recess in order for the witness to take a phone call. Thereafter, it was revealed that Cassell had consulted with her personal attorney during the recess. Dr. Vora asserts that Nurse Cassell's refusal to testify concerning the substance of the notes made in preparation for her meeting with attorney Nauful, and her consultation with her attorney during the recess, deprived him of due process. We disagree.

We recently recognized,

> Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses. Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) citing Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.E.2d 287 (1970); see South Carolina Dep't of Social Serv. v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995) (right to confrontation applies in civil context). Confrontation includes the right to be physically

> present during the presentation of testimony. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). **Due process is not violated where a party is not given the opportunity to confront witnesses so long as there has been a meaningful opportunity to be heard**.

South Carolina Dep't of Social Services v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002) (emphasis supplied).

Here, Dr. Vora was allowed to confront and cross examine Cassell and was given a meaningful opportunity to be heard. The fact that he was unable to ascertain the substance of the notes she made in preparation for her consultation with Attorney Nauful, or the nature of her conversation with her attorney,[8] is simply not such a deprivation as to amount to a due process violation.

2. EVIDENCE IN THE RECORD

As an additional sustaining ground, Dr. Vora asserts that the Hospital's suspension of his privileges was not supported by the evidence such that this Court should therefore affirm the circuit court's order under I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)(court can affirm for any reason appearing in the record). We disagree.

Hospital presented the testimony of an independent expert, Dr. Derrick, as to the deviations from the standard of care in each of the cases. Given this evidence supporting Hospital's decision, we simply cannot say that it's decision to impose corrective actions and clinical suspension of his privileges were arbitrary and unreasonable. Huellmantel, supra, (Substantive due process requires only that a public hospital not exclude a physician from practice therein by rules or acts which are unreasonable, arbitrary, capricious

[8] These matters would, in any event, be protected by the attorney/client privilege. See State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980) (attorney-client privilege protects against disclosure of confidential communications by client to attorney).

or discriminatory). Contrary to Dr. Vora's assertions, we find evidence supporting Hospital's decision.

CONCLUSION

After a thorough review of the record, we are convinced that Dr. Vora was not deprived of due process. Dr. Vora's conduct was first assessed by a Quality Assurance Committee, which referred the matter to an Ad Hoc Committee appointed by Hospital's Chief of Staff. After the Ad Hoc Committee found deviations from the standard of care, the matter was reviewed by the Medical Executive Committee which concurred in the recommended corrective actions. Dr. Vora was then afforded a Fair Hearing, at which, over six occasions, he was allowed to present testimony and examine witnesses. The Fair Hearing Committee found numerous problems and recommended corrective action, and these findings were reviewed and upheld by the Medical Executive Committee. Thereafter, Dr. Vora was afforded a hearing before the Appellate Review Committee), after which that committee upheld the action taken by the MEC. The Appellate Review Committee's action was reviewed by Hospital's Board of Directors, which adopted the findings therein.

Notwithstanding the numerous "procedural irregularities" asserted by Dr. Vora, we find he was accorded all the process to which he was entitled, and the Hospital's actions were not arbitrary or capricious. Huellmantel v. Greenville Hosp. System, supra (court will not review hospital's administrative decision if physician has been granted procedural due process and hospital has not acted in an arbitrary or capricious manner).

The circuit court's order is reversed, and the Hospital's decision is reinstated.

REVERSED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice Edward W. Miller, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, Respondent,

v.

Robin Headden, Robert Gandy and Tabitha Gandy, 06-20-88, Defendants,

and

John Doe and Mary Doe, Third Party Intervenors,

of whom Robin Headden is Appellant.

Appeal From Berkeley County
Clyde K. Laney, Jr., Family Court Judge

Opinion No. 25665
Heard March 19, 2003 - Filed June 12, 2003

AFFIRMED AS MODIFIED

Laree Anne Hensley, of North Charleston, for Appellant

Thomas P. Stoney, II, of Cordesville, for Respondent.

Wolfgang L. Kelly, of Summerville, for Guardian Ad Litem.

CHIEF JUSTICE TOAL: Robin Headden ("Mother") appeals from the family court's termination of her parental rights to her daughter, ("Child").[1]

FACTUAL / PROCEDURAL BACKGROUND

The Child was taken into emergency protective custody by law enforcement on June 23, 1996, when she was 8 years old. The police arrived at the Mother's trailer and observed the Mother intoxicated and throwing clothes and other items out of the house through a door and a broken window. Mother testified that she was throwing out her roommate's belongings because her roommate had failed to pay rent or bills for several months, and that she broke the window accidentally in the process. The Mother was also accused of destroying furniture with a knife, but she denied cutting the furniture and blamed this on her ex-boyfriend. When the police arrived, the Child returned home from a neighbor's house and was taken into protective custody based on threat of harm. Custody of the Child was transferred to Respondent, South Carolina Department of Social Services ("DSS").

The family court found probable cause existed for the Child's removal at the 10 day hearing on July 2, 1996, and ordered that she remain in DSS's custody. The family court held a merits hearing on September 18, 1996, and found that the Child was physically neglected as defined by S.C. Code Ann. § 20-7-490, ordered the Child remain in DSS's custody, and adopted a treatment plan for the Mother.[2] From June of 1996 through December 1996, the Mother coordinated visitation with the Child through DSS. A Judicial

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[1] The Child's father did not contest the termination of his parental rights.

[2] The treatment plan called for the Mother (1) to receive a mental health evaluation and to enroll in out-patient counseling, (2) to complete a Parent Effectiveness Training program, (3) to participate in anger management counseling, (4) to complete a psychological evaluation, (5) to receive an alcohol and drug assessment and follow recommendations made in that assessment, and, finally, (5) to secure and maintain appropriate housing.

Review hearing was held on December 19, 1996. In addition to holding that all previous orders remained in full force and effect, the court ordered the Mother to pay child support in the amount of $51.50 per month beginning January 1, 1997. In December, the Mother decided to move to Memphis, Tennessee, apparently after receiving a job offer there and after speaking with the Child's DSS case manager at the time, Susan Kellar.[3]

The Mother arrived in Memphis on a Greyhound bus on Christmas Day 1996, but did not begin working at her intended job until April of 1997, apparently due to delays in construction. From January to April, the Mother testified she held several temporary jobs. The Mother testified that she had difficulty locating the appropriate agencies in Tennessee that could assist her in completing her treatment plan, and went through a period of heavy drug and alcohol use beginning in late June 1997. She testified that she was spending as much as $600 per week on drugs (crack cocaine) in July 1997. On August 12, 1997, the Mother entered Grace House, an in-patient drug and alcohol rehabilitation center in Memphis. The Mother remained at Grace House until she successfully completed the program in February 1998.

Although the Mother was making child support payments through May 1997, she ceased making payments in June 1997 and did not resume payments until April 1998. The Mother claims she believed her parental rights were terminated in the Fall of 1997, and regardless that she could not pay support while living at Grace House because she was not allowed to work. She based her belief that her parental rights had been terminated on the Order for Permanency Planning she received in September 1997 and on a subsequent comment by her attorney's receptionist that her attorney was no longer involved in the case. All of this occurred while Mother was a patient

[3] The Mother testified that she was having difficulty holding a good job in Berkeley County while trying to complete her treatment plan, and was offered a construction job working on a project in Memphis being paid around $8.00/hour. When the Mother left for Memphis, she had not completed any of the requirements of her treatment plan, but Mother claims Ms. Kellar encouraged her to move to Memphis.

at Grace House and could not travel to South Carolina. The Mother claims she made numerous calls to DSS that were not returned during this time. However, the DSS case manager assigned to the Child, Romona Keitt, testified that the Mother called her from Grace House once in December 1997.[4]

Ms. Keitt stated that she and the Mother spoke about sending Christmas presents to the Child and that the Mother gave her a new mailing address on Candlelight Drive in Tennessee. The Mother did not give Ms. Keitt the address at Grace House, but she did tell Ms. Keitt that she was in a full-time treatment center. Ms. Keitt testified that the next call she received from the Mother was in September of 1999, 18 months later. In the intervening months, Ms. Keitt testified that she sent certified letters to the Mother at Candlelight Drive address the Mother gave her, but that the letters were returned to her.[5]

After completion of the program at Grace House, the Mother moved to Arkansas temporarily for work on a construction project and then returned to Memphis. The Mother made several child support payments beginning in April 1998, but ceased payments again in July 1998 until October 1999, 16 months later, when she was served with notice that DSS was pursuing termination of her parental rights ("TPR").

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[4] Ms. Keitt was appointed as the Child's case manager in October 1997, after the Mother's visitation was terminated for failure to complete her treatment plan in September 1997.

[5] When the Mother called Ms. Keitt in September 1999, Ms. Keitt asked her why she had not been in touch since December 1997. The Mother responded that she could not pick up the certified letters from the post office because her wallet and I.D. card had been stolen, and that she had tried calling Ms. Kellar, the former case manager. Ms. Keitt testified that any correspondence sent to Ms. Kellar would have been forwarded to her as the case manager of record since October 1997.

The Family Court appointed counsel to represent Mother in the TPR action upon Mother's request. DSS voluntarily non-suited its case due to defects in pleadings and service in June 2000. Before DSS re-filed, the Mother's motion for visitation, to be supervised by the Child's therapist, was granted. The Child's therapist, Dr. McClain, refused to participate and the Mother was forced to locate another professional to determine whether visitation would be in the best interest of the child. Dr. Geddes at MUSC performed an evaluation of the Mother and the Child and recommended that supervised visitation be allowed. DSS refused to allow Dr. Geddes to supervise. After filing a Rule to Show Cause, the Mother was permitted visitation with the Child supervised by Dr. McClain.[6]

The TPR hearing took place on November 28 and 29 of 2000. The family court granted TPR based on willful failure to support, willful failure to visit, and because the Child had been in foster care for 15 of the most recent 22 months, all pursuant to S.C. Code Ann. § 20-7-1572 (Supp. 2000). The Mother raises the following issues on appeal:

I. Did the Family Court err in finding that clear and convincing evidence supported the finding that the Mother willfully failed to visit and support the Child under S.C. Code Ann. § 20-7-1572(3) and (4) (Supp. 2000)?

II. Is TPR justified based solely on a finding that a child has been in foster care for 15 of the last 22 months under S.C. Code Ann. § 20-7-1572(8) (Supp. 2000)?

[6] At the time of the TPR hearing, the Mother had only had one supervised visit with the Child, and the Child (then 12 years old) expressed that she did not want to see the Mother again.

LAW /ANALYSIS

The Mother's parental rights were terminated pursuant to three different statutory grounds. S.C. Code Ann. § 20-7-1572(3), (4), and (8).[7]

The South Carolina Code mandates that the TPR statutes "must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship." S.C. Code Ann. § 20-7-1578 (Supp. 2000); *see Joiner v. Rivas,* 342 S.C. 102, 536 S.E.2d 372 (2000) (overruling prior cases calling for strict construction of the TPR statutes). In addition, "[t]he interests of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 20-7-1578. Grounds for termination of parental rights must be proven by clear and convincing evidence. *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct 1388, 71 L. Ed. 2d 599 (1982); *Richland County DSS v. Earles*, 330 S.C. 24, 496 S.E.2d 864 (1998).

Upon review, the appellate court may make its own finding from the record as to whether clear and convincing evidence supports the termination. *South Carolina DSS v. Brown,* 317 S.C. 332, 454 S.E.2d 335 (Ct. App. 1995). The reviewing court, however, is not required "to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." *Hooper v. Rockwell,* 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999).

I.

The Mother argues that the family court erred in finding that DSS had proven by clear and convincing evidence that she willfully failed to visit and support the Child as defined in S.C. Code Ann. § 20-7-1572(3) and (4). We

[7] DSS claims that the family court based TPR on the Mother's failure to remedy the conditions which caused the removal under S.C. Code Ann. § 20-7-1572(2). The Mother refutes that the court made this finding, and we cannot find any direct reference to it in the final TPR order.

disagree.

A. Failure to Visit

The family court may order TPR upon a finding of one of several statutory grounds *and* a finding that termination would be in the best interest of the child. S.C. Code Ann. § 20-7-1572 (Supp. 2000). Section 20-7-1572(3) provides that the family court may terminate if it is in the best interest of the child and if

> [t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has *wilfully* failed to visit the child. The Court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.

S.C. Code Ann. § 20-7-1572(3) (emphasis added).

It is undisputed that the Child has "lived outside the home of either parent" for much longer than six months as she has been in DSS's custody since June 1996.[8] The question before the family court then was whether the Mother's failure to visit the Child between 1996 and 2000 was wilful.

Whether a parent's failure to visit is "wilful" is a question of intent to be determined from the facts and circumstances of each individual case. *SCDSS v. Broome,* 307 S.C. 48, 413 S.E.2d 835 (1992). "Parental conduct which evinces a settled purpose to forego parental duties may be

[8] The Child had been in DSS' custody for four and a half years at the time of the TPR hearing. Currently, the Child has been living away from the Mother for almost seven years. She was 8 when she was taken into protective custody and will have her 15th birthday on June 20, 2003.

characterized as 'wilful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *Broome,* 307 S.C. at 53, 413 S.E.2d at 838. The trial judge is given wide discretion in making this determination. *Id.*

As discussed, the Child in this case was removed from the Mother's home in June 1996. The record indicates that Mother visited the Child from June until November or December 1996.[9] On Christmas Day 1996, the Mother moved to Memphis, Tennessee without making much, if any, progress on her treatment plan. The Mother lived in Memphis for seven full months before entering Grace House. The record reflects that the Mother sent only one letter, in February 1997, to the Child during this time. There is no indication that the Mother attempted to call the Child or otherwise stay in touch with her. The Mother did travel back to South Carolina for a hearing in June 1997. The hearing was continued and the Mother claims she was denied visitation when she returned for that hearing.

The Mother's visitation was officially terminated in the Order for Permanency Planning issued following a hearing in September 1997, which the Mother was unable to attend because she was living at Grace House. This Order states that Mother had failed to complete any of her treatment plan, had moved to Tennessee, and had not returned to visit the Child. When Mother was released from Grace House upon *successful* completion of the program in February 1998, she did not contact DSS or her Child.

Although the Mother did return to South Carolina and sought reinstatement of visitation rights after she received the notice of TPR in the Fall of 1999, her action came too late. The family court is not limited to considering the months immediately preceding TPR in determining whether a parent has wilfully failed to visit. *See Abercrombie v. LaBoon*, 290 S.C. 35, 248 S.E.2d 170 (1986). To the contrary, "[t]he family court may consider all relevant conduct by the parent." *Id.* at 37, 348 S.E.2d at 171.

[9] The Mother testified that Ms. Kellar advised her she could not visit her Child any more in November 1996. However, there is no record of such a statement in DSS's file and no order to that effect in the record.

Although the Mother frames her move to Memphis as "required" by her job, we find no support for this characterization of her decision to move. She did have a job opportunity in Memphis, but it is clear from the Mother's own testimony that she moved to get away from her old friends and family that she perceived to be a negative force in her life. Although the Mother may have had good intentions in moving, she made little effort to keep in touch with her daughter once she moved. The job she moved for did not materialize until April, and Mother admits she began using drugs in addition to drinking heavily after she moved to Memphis.

The family court is required to take the distance between mother and child into consideration. The distance between Mother and Child in this case was by the Mother's own making, and the Mother made little to no effort to maintain a relationship with the Child with letters or phone calls when physical visits were not possible. *See Leone v. Dilullo,* 294 S.C. 410, 365 S.E.2d 39 (Ct. App. 1988) (affirming TPR for failure to visit when mother lived in Connecticut and children lived in SC despite mother's poor financial circumstances in part because the mother made no effort to communicate by mail or phone). In our opinion, this amounts to "a settled purpose to forego parental duties" under *Broome* and *Leone.* Failure to follow a court-ordered treatment plan can result in termination of visitation rights, as it did in this case. As such, although the Mother eventually sought and successfully completed treatment, her failure to do so within a reasonable time is further evidence of her wilful failure to visit - of her intent to "forego parental duties."

B. Failure to Support

Pursuant to § 20-7-1572(4), the family court may order the termination of parental rights if

> the child has lived outside of the home of either parent for a period of six months, and during that time the parent has *wilfully* failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's

> care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide the support.

S.C. Code Ann. § 20-7-1572(4) (Supp. 2000) (emphasis added). Just as it does in determining wilful failure to visit, the family court has wide discretion in determining whether a failure to support is wilful. *Broome*, 307 S.C. 48, 413 S.E.2d 835.

In this case, Mother made some child support payments after she was initially ordered to pay child support beginning January 1, 1997. Mother stopped making payments in April 1997. She entered Grace House in August 1997, and resided there without working until February 1998. When Mother was released from Grace House, she resumed support payments until June 1998, after which Mother inexplicably quit making any support payments for the next 16 months. Mother claims that she believed her parental rights had been terminated, but this is inconsistent with her temporary resumption of payments in February 1998, and with her claims that she tried to reach DSS, specifically, Ms. Kellar, during this time. Further, Mother called the Child's current case manager, Ms. Keitt, in December 1997, and, presumably, could have found her number again to check on her Child's status.

Although Mother had caught up with her support payments by the time of the TPR hearing, the family court is able to look beyond the months immediately preceding the TPR action at the Mother's *overall* conduct. Based on the above facts, there was clear and convincing evidence to support the family court's finding of willful failure to support.

Additionally, the family court found that TPR was in the Child's best interest. We agree. As this Court noted in *Joiner,* the purpose of the TPR statute is

> to establish procedures for reasonable and compassionate termination of parental rights . . . to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

Joiner, 536 S.C. at 108, 536 S.E.2d at 375 (citing S.C. Code Ann. § 20-7-1560 (Supp. 2000)). To that end, "the interests of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 20-7-1578.

In this case, the Child has now been in custody since June 1996, for nearly seven years. The Child had emotional and behavioral problems which caused her placement to be difficult and which continue to pose placement challenges for her. At the time of the hearing in November 2000, the Child had lived with the same foster parents since March 1998. The Child expressed to her therapist, Dr. McClain, and to the family court judge that she wants her mother's rights to be terminated so she will be available for adoption. Additionally, Dr. McClain believes TPR is in the Child's best interest. Based on these facts, we find termination is in the Child's best interest.

II.

Mother claims that termination of parental rights is not justified based solely on a finding that the Child has been in foster care for 15 of the most recent 22 months under S.C. Code Ann. § 20-7-1572(8). As we have found clear and convincing evidence exists to affirm TPR based on willful failure to visit and support, we decline to address this issue.

CONCLUSION

For the foregoing reasons, we **AFFIRM AS MODIFIED** the family court's termination of Mother's parental rights based on S.C. Code Ann. § 20-7-1572(3) & (4), and decline to address termination under section 20-7-1572(8).

MOORE, WALLER, BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Randall Scott Foster, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Newberry County
William P. Keesley, Circuit Court Judge

Opinion No. 25666
Heard April 1, 2003 - Filed June 12, 2003

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor William Townes Jones, IV, of Greenwood for Petitioner.

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for Respondent.

JUSTICE WALLER: We granted the State's petition for a writ of certiorari to review the Court of Appeals' opinion in State v. Foster, Op. No. 2001-UP-321 (Ct. App. filed Feb. 6, 2001). We affirm.

FACTS / PROCEDURAL BACKGROUND

Respondent Randall Scott Foster was indicted for murder and possession of a weapon during the commission of a violent crime. The victim was his wife, Marilyn, who died from a single gunshot wound to her head. At trial, the jury was instructed on self-defense, accident, involuntary manslaughter, voluntary manslaughter and murder. The jury convicted Foster of voluntary manslaughter and the weapon charge, and the trial court sentenced him to twenty years and five years, concurrent. In an unpublished decision, the Court of Appeals reversed and remanded for a new trial. State v. Foster, supra.

Foster and Marilyn lived in their Prosperity home with Marilyn's three children and Foster's daughter. On Saturday night, April 25, 1998, Foster and Marilyn went out drinking and dancing. They returned home sometime after two a.m. on April 26. Very shortly thereafter, Marilyn was fatally shot.

The testimony at trial as to exactly what transpired was conflicting. Marilyn's son, Steven, and her daughter, Michelle, both testified for the State. Steven said he was sleeping on the couch when he was awakened by Foster and Marilyn arguing. He heard Marilyn say, "Are you going to shoot me?," Foster say "yes," and the gun go off. On cross-examination, Steven was questioned about a statement he made to police on the day of the shooting that he heard Foster ask Marilyn if she was going to shoot him. Steven responded he was in shock and unsure of what he said. On redirect, the State published Steven's entire statement. According to Steven's statement, Marilyn got her gun, told Foster "to get out," and Foster asked if she was going to shoot him. Then, Foster and Marilyn "started fighting over the gun," and after Michelle walked into the room, the gun went off.

Michelle, Marilyn's oldest child at age 14, testified that she witnessed the shooting. Michelle was also awakened by the couple's argument. She followed Foster into the bedroom where Marilyn was undressing. According to Michelle, Marilyn was by the dresser and "had the gun out."[1] Foster asked Marilyn if she was going to shoot him and then took the gun away from her. Marilyn asked "Are you going to shoot me now?" Foster replied yes, raised the gun to her head, and shot her. Michelle testified there was no scuffle over the gun.

According to Foster, who testified in his own defense, he and Marilyn enjoyed a normal evening out, drinking,[2] dancing, and socializing with friends. They began arguing during the car ride home because Marilyn was angry Foster had danced and flirted too much with their friend, Linda. After entering the house, Marilyn told him to get his daughter and leave. He said no and wanted to go to bed. Marilyn replied, "Well, I have something that will make you leave" and pulled the gun out of her drawer. Foster then said, "What are you going to do, shoot me?" Foster went over to Marilyn, grabbed the gun, and they struggled over the gun. Foster testified that he had one hand on the gun and Marilyn's hands were on his hand. He was trying to pull the gun away from her, he pulled it up, and the gun went off only inches from her head. Immediately after shooting Marilyn, Foster called 911.

The police showed up within minutes of the 911 call and apprehended Foster without incident. They bagged his hands to preserve any gunshot residue.

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[1] It was undisputed that the gun, a .357 Magnum revolver, belonged to Marilyn and that she kept it in her dresser drawer.

[2] They each drank quite a bit of alcohol that evening. Between 9 p.m. and 2 a.m., Marilyn consumed about six Crown and sevens and a couple of apple cider shooters; Foster drank five Crown and sevens, about nine beers, and two apple shooters. The pathologist testified Marilyn's blood alcohol level was .199 percent. At approximately 7 a.m., Foster's blood alcohol level was .042 percent.

Various aspects of the forensic evidence were discussed at trial. The fingerprints from the gun were analyzed, but the test was inconclusive. Therefore, the SLED investigator could not say who handled the weapon. The gunshot residue tests conducted on Foster and Marilyn, however, revealed that both had gunshot residue on their hands. Marilyn had gunshot residue on the **back** of **each** of her hands, while Foster had residue on his **left palm only**. When Foster cross-examined the pathologist, he testified that the results of the gunshot residue tests "strongly suggest" that Marilyn's hands completely covered Foster's. Moreover, the pathologist could not say who had control over the gun when it was discharged. Foster presented his own forensic expert who opined there was most probably a struggle over the weapon and that Marilyn's hands were over Foster's hand.

As the only eyewitness, the testimony of Michelle was pivotal to the State's murder case. In its opening statement, the State told the jury: "the crux of the case is what you are going to hear from Michelle." On cross-examination, Foster's counsel questioned Michelle about a statement she made to police on April 28:

> Q: Your statement which you gave them is more or less the version you have given us today; is that not right?
>
> A: Yes.

Counsel then proceeded on a line of questioning regarding Michelle's prior **inconsistent** statements to others on the day of the killing. Specifically, Michelle was asked whether she had told some family friends on the morning of the incident that she thought it was an accident. Michelle insisted she had simply said she could not believe Foster "could do anything like that." On redirect, the State presented Michelle with her police statement and she read it to herself. The State asked whether the statement differed from her testimony, and Michelle replied in the negative.

After Michelle and two other witnesses testified, the State sought to admit into evidence Michelle's written statement to police.[3] Foster objected. Initially, the objection was based on relevance. The State argued, *inter alia*, that Michelle's statement was admissible as a prior **consistent** statement. Foster's counsel further argued he did not "want to give more credibility to her statement than her verbal testimony." The trial court ruled the statement was not hearsay and allowed its admission.

During Foster's defense, he presented two witnesses who both stated Michelle had said her mother's shooting was an "accident." Additionally, one of these witnesses testified Michelle had said Foster and Marilyn were fighting over the gun, and the other testified Michelle had said "it wasn't [Foster's] fault."

The jury convicted Foster of voluntary manslaughter and the weapon charge. On appeal, the Court of Appeals found the trial court erred in allowing Michelle's prior consistent statement. Finding that the error was not harmless, the Court of Appeals reversed Foster's convictions and remanded for a new trial.

ISSUE

> Did the Court of Appeals correctly reverse Foster's convictions because of the improper admission of Michelle's prior consistent statement?

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[3] The statement provides, in pertinent part:

> At about 2:30 a.m. I heard what sounded like something breaking so I got up to see what was going on. When I got to Mom [Marilyn] and Scott's [Foster's] bedroom, Mom had a revolver type pistol pointed at Scott. Scott said Are you going to shoot me now?, and then took the gun from my mom. Mom asked Scott Are you going to shoot me now and Scott said yes and he shot my Mom.

DISCUSSION

The State maintains that Foster's cross-examination question to Michelle about her prior consistent statement "opened the door" to its admission. Alternatively, the State contends that the Court of Appeals erred in finding the statement inadmissible under Rule 801(d)(1)(B), SCRE. We disagree.[4]

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

The issue in the instant case is governed by South Carolina's Rules of Evidence, adopted in 1995. Pursuant to Rule 801, prior consistent statements of a witness are not inadmissible hearsay if:

> [1] the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement;
> [2] the statement is consistent with the declarant's testimony;
> [3] the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and

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[4] Initially, we note the State also contends this issue was not properly preserved for appellate review. The issue here is, as it was at the trial court, the admissibility of Michelle's prior consistent statement. Contemporaneous with the State's attempt to admit the statement, Foster objected. As part of his objection, he argued that the statement would add to Michelle's credibility. The danger of erroneously admitting a prior consistent statement is its bolstering effect. Therefore, we find the issue was sufficiently preserved. E.g., State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (to be preserved for appeal, an issue must be raised to and ruled on by the trial judge); see also Rule 103(a)(1), SCRE (ground of objection to the admission of evidence may be apparent from the context).

> [4] the statement was made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE; accord Saltz, supra.

In Saltz, this Court explained that Rule 801(d)(1)(B) changed the common law in South Carolina where proof of a prior consistent statement had been admissible to rehabilitate a witness who had been impeached with a prior inconsistent statement. Saltz, 346 S.C. at 124-25, 551 S.E.2d at 245-46; see also State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App. 1998) (providing extensive discussion regarding law on prior consistent statements, both before and after the adoption of the SCRE). In contrast to South Carolina's pre-rules common law, Rule 801(d)(1)(B) now "makes a prior consistent statement admissible as **substantive** evidence." Fulton, 333 S.C. at 369, 509 S.E.2d at 824 (emphasis added). Therefore, evidence of a prior consistent statement is **only** permitted when the elements of Rule 801(d)(1)(B) are met. Saltz, 346 S.C. at 124, 551 S.E.2d at 245. Put simply, "'a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all.'" Fulton, 333 S.C. at 374, 509 S.E.2d at 826 (citation omitted).

The situation here is very similar to the facts of Saltz. In that case, a State witness, Sydney Johnston, testified she had heard the defendant say he "killed" the victim. On cross-examination, defense counsel posed questions to Sydney about whether she had originally stated the defendant had said "I did it" and he had been saying that sarcastically. During the testimony of another witness, Jan Kopel, the State was permitted to admit testimony from Kopel of a prior consistent statement made by Sydney where Sydney stated the defendant had said he "killed" the victim. This Court held that the questioning of a witness about a prior **inconsistent** statement was insufficient to invoke Rule 801(d)(1)(B):

> The plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence. Although questioning a witness about a prior inconsistent

> statement does call the witness's credibility into question, that is not the same as charging the witness with "recent fabrication" or "improper influence or motive." … Appellant questioned the accuracy of the witness's memory; he did **not** charge her with recent fabrication or improper influence or motive.

Saltz, 346 S.C. at 124, 551 S.E.2d at 245 (emphasis in original, citation omitted).

Likewise, in the instant case, Michelle's statement was inadmissible because there was no express or implied charge against Michelle of recent fabrication or improper influence or motive. Foster's questions did not rise to the level of charging fabrication, but instead amounted to calling her credibility into question, i.e., simple impeachment.[5] Thus, because the requirements of Rule 801(d)(1)(B) were not met in the instant case, the written consistent statement was inadmissible hearsay, and the trial court erred in allowing the statement. Id. This error served only to **improperly** bolster Michelle's testimony. See Tome v. United States, 513 U.S. 150, 157-58 (1995) (discussing federal[6] Rule 801(d)(1)(B) and stating that the purpose

[5] Foster's brief cross-examination of Michelle focused primarily on her prior inconsistent statements. This is markedly different from what has been deemed sufficient to trigger Rule 801(d)(1)(B)'s requirement of "an express or implied charge against the declarant of recent fabrication or improper influence or motive." See Saltz, 346 S.C. at 124-27; 551 S.E.2d at 246-47 (finding that the State's questions of a defense witness regarding her coming forward 13 days before trial and her romantic relationship with the defendant charged the witness with both fabrication and improper motive); State v. Jeffcoat, 350 S.C. 392, 397, 565 S.E.2d 321, 324 (Ct. App. 2002) (finding that defense counsel raised the issue of improper influence by asking the victim whether she "practiced" before testifying and whether anyone had told her what to say).

[6] "Rule 801(d)(1)(B), SCRE is based upon its counterpart under the Federal Rules of Evidence." Fulton, 333 S.C. at 370, 509 S.E.2d at 824; see also Note to Rule 801, SCRE.

of the rule is to rebut an alleged fabrication or motive, not to "bolster[] the veracity of the story told.").

We reject the State's contention that Foster "opened the door" to the prior consistent statement. The State asserts that because Foster asked Michelle a single, non-substantive question about her prior consistent statement, and then questioned Michelle's veracity by asking about her prior inconsistent statements, the State was allowed to admit the statement in its entirety as substantive evidence. However, this so-called "fairness" argument amounts to an argument that may have been proper under pre-SCRE law, but is simply not tenable under Rule 801(d)(1)(B). See Saltz, supra (evidence of a prior consistent statement is **only** permitted when Rule 801(d)(1)(B) is satisfied); Fulton, supra (same).

Furthermore, the instant case is distinguishable from other cases where we have found that defense counsel contributed to the error by opening the door to otherwise arguably impermissible evidence. See, e.g., State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981). "[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999); see also State v. Dunlap, Op. No. 25616 (S.C. Sup. Ct. filed Apr. 7, 2003) (Shearouse Adv. Sh. No. 12 at 35) (finding that evidence of prior drug convictions was properly allowed to rebut false impression made by counsel in opening statement). However, counsel here merely asked whether Michelle had given police a statement consistent with her testimony on direct examination. Allowing the State to then admit the written statement did not rebut or explain this testimony in any way. Instead, the **sole** purpose the State had for admitting Michelle's prior **consistent** statement was to rehabilitate its witness and bolster her credibility which was called into question by the cross-examination on her prior **inconsistent** statements. This is forbidden unless the requirements of Rule 801(d)(1)(B) are met.

Accordingly, we find the Court of Appeals' correctly held the trial court erred by admitting the prior consistent statement, and thus abused its discretion. Saltz, supra; McDonald, supra.

The State argues that any error was harmless beyond a reasonable doubt because it was merely cumulative. We disagree.

As we stated in Saltz: "[e]rroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" Saltz, 346 S.C. at 124, 551 S.E.2d at 246 (citation omitted).

In its harmless error analysis, the Court of Appeals stated the following:

> [Michelle's] credibility was of paramount importance; her testimony that Foster shot her mother at point blank range after he "snatched" the gun away was the crucial evidence offered by the State of an intentional shooting…. Moreover, far from being overwhelming, the evidence of guilt was highly equivocal.

We agree with the Court of Appeals. In its opening statement, the State acknowledged Michelle's testimony would be "the crux" of its case. Indeed, the evidence of an intentional shooting was based almost exclusively on Michelle's testimony, with some partial corroboration by her brother, Steven. The defense showed, however, that both Michelle and Steven had made prior statements inconsistent with their trial testimony **and** corroborative of Foster's version of the incident. Additionally, the forensic evidence certainly supported Foster's account. Thus, we hold the admission of Michelle's prior consistent statement, which clearly bolstered her crucial trial testimony, could not be considered harmless error. Saltz, supra.

CONCLUSION

For the foregoing reasons, the Court of Appeals' opinion is

AFFIRMED.

BURNETT and PLEICONES, JJ., concur. MOORE, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE MOORE: I agree with the majority that counsel's cross-examination of Michelle regarding allegedly inconsistent statements did not rise to the level of charging recent fabrication or improper motive, and therefore her prior consistent statement was not admissible under Rule 801(d)(1)(B). State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). I part company with the majority, however, in its rejection of the State's argument that counsel "opened the door" to the admission of Michelle's statement.

In context, counsel questioned Michelle as follows:

Q: What day did you talk with Tammy Shealy and Todd Johnson, do you remember?

A: Not at all.

Q: Was it several days later?

A: I think it was the 28th.

Q: So that would be Tuesday.

A: Yeah.

Q: Your statement which you gave them is more or less the version you have given us today; is that not correct?

A: Yes.

Q: Michelle, this is quite important. I have got a question to ask you now. Did you ever give anybody any other statements regarding this incident that differ from the version you gave Mr. Johnson and Mrs. Shealy?

A: No.

Counsel then questioned Michelle regarding "conversations with anybody on Sunday morning or Sunday afternoon" wherein she stated her mother's killing was an accident.

In asking Michelle whether her statement to police was "more or less the version you have given us today" and whether her statement to police differed from her earlier conversations, counsel raised the issue of the statement's content. Since the defense raised the issue of Michelle's statement to police, it was only fair to allow the State to put the statement into evidence so the jury could evaluate the statement's content for itself. *See* State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (one who opens the door to evidence cannot complain of its admission).

I disagree that Saltz prohibits the admission of Michelle's statement under an "opening the door" analysis. As stated in Saltz, the precise issue in that case was "whether questioning the witness concerning a prior *in*consistent statement invokes Rule 801(d)(1)(B)." 346 S.C. at 123, 551 S.E.2d at 245 (emphasis in original). Saltz holds examination regarding inconsistent statements does not amount to a charge of fabrication to justify admission of a consistent statement under that rule. Here, counsel directly questioned the witness about the consistent statement itself, an issue not before the Court in Saltz.

Because counsel opened the door to the admission of Michelle's statement, I would reverse the Court of Appeals and reinstate Foster's conviction. Accordingly, I respectfully dissent.

TOAL, C.J., concurs.

The Supreme Court of South Carolina

RE: Amendment to Rule 420, SCACR, The Chief Justice's Commission on the Profession.

O R D E R

Pursuant to art. V, § 4, of the South Carolina Constitution, the second clause of Rule 420(b) (1) is amended to read:

> additional judges from either the state or appellate or trial bench as the Chief Justice may deem necessary.

This amendment shall become effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 12, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ruby Flateau and Herbert S. Fielding,

Appellants,

v.

Robert M. Harrelson, Oliver H. Willis, Stella G. Williams, E. Lynn W. Smith, and Earlene S. Gardner,

Respondents.

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

Opinion No. 3652
Heard May 13, 2003 – Filed June 16, 2003

AFFIRMED

Coming B. Gibbs, Jr., and Jeffrey A. Barnwell, both of Charleston, for Appellants.

Kathryn Thomas and Christopher W. Johnson, both of Columbia, for Respondents.

ANDERSON, J.: Ruby Flateau and Herbert S. Fielding, employees of the South Carolina Commission for the Blind (Commission), appeal the circuit court's dismissal of their tort actions against the following members of the Commission's governing board: Robert M. Harrelson, Oliver H. Willis, Stella G. Williams, E. Lynn W. Smith, and Earlene S. Gardner (collectively, "the Board"). On appeal, Flateau and Fielding argue the court erred in finding: (1) the South Carolina Tort Claims Act (Act) provided the exclusive remedy for Flateau and Fielding; (2) the Act's two-year statute of limitations barred the actions; and (3) the Board's failure to substitute the Commission as a party precludes a finding that the causes of action of Flateau and Fielding fall within the Act's auspices. We affirm.

FACTS/PROCEDURAL BACKGROUND

In May 1998, the Board called Flateau and Fielding to a hearing in the Commission's Board Room. Flateau and Fielding entered the room at 10:00 a.m. Flateau left at 2:30 p.m. to attend a scheduled medical appointment. Fielding remained in the room until 4:30 p.m. During the interim, they were not allowed to leave the room without a security escort, nor were they permitted unaccompanied access to their offices. Members of the media were present.

Flateau and Fielding filed separate complaints in April 2001. Their respective complaints identified each of them as "an employee of the South Carolina Commission for the Blind" at all relevant times. The pleadings further stated that "[a]t the time of the incident . . ., the Defendants were members of the Board of the South Carolina Commission for the Blind." In their complaints, Flateau and Fielding averred they "were commanded by Defendants to remain in the Board Room for the purposes of awaiting an interview by Defendants, who had entered upon an executive session." Flateau and Fielding alleged causes of action for outrage, invasion of privacy, and civil conspiracy.

The Board filed motions to dismiss the actions pursuant to Rule 12(b)(6), SCRCP. The Board argued: (1) Flateau and Fielding failed to assert in their pleadings that the Board's members acted outside the scope of their

duties; (2) the Act provided the exclusive remedy for Flateau and Fielding; (3) the causes of action were barred by the Act's two-year statute of limitations; (4) the two-year statute of limitations applied "even if the complaint had alleged that the defendants acted outside the scope of their duties"; and (5) neither Flateau nor Fielding filed a verified claim that would extend the statute of limitations to three years. The court granted the motions to dismiss.

ISSUES

I. Did the circuit court err in finding the Act applied to the case at bar?

II. Did the circuit court err in finding the Act's two-year statute of limitations barred the causes of action brought by Flateau and Fielding?

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); Bergstrom, 352 S.C. at 233, 573 S.E.2d at 811; see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); Stiles, 318 S.C. at 300, 457 S.E.2d at 602-03; see also Baird, 333 S.C. at 527, 511 S.E.2d at 73 (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001); see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

"Dismissal of an action pursuant to Rule 12(b)(6) is appealable." Williams, 347 at 233, 553 S.E.2d at 500. Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Id.

LAW/ANALYSIS

I. TORT CLAIMS ACT

Flateau and Fielding contend that because they stated a valid claim of relief, the trial court's decision to dismiss their causes of action under the Act was erroneous. We disagree.

The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. See Murphy v. Richland Mem'l Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995); Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). "The remedy provided by [the Tort Claims Act] is the exclusive civil remedy available **for any tort** committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." S.C. Code Ann. § 15-78-20(b) (Supp. 2002) (emphasis added). "[The Tort Claims Act] constitutes the exclusive remedy **for any tort** committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a) (Supp. 2002) (emphasis added). According to the Act, "[n]otwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act,' is the exclusive and sole remedy **for any tort** committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15-78-200 (Supp. 2002) (emphasis added).

Section 15-78-70(a) provides in part that "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b)." S.C. Code Ann. § 15-78-70(a) (Supp. 2002). Subsection (b) declares: "Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (Supp. 2002).

The Act defines a "[g]overnmental entity" as "the State and its political subdivisions." S.C. Code Ann. § 15-78-30(d) (Supp. 2002). The State

"means the State of South Carolina" and includes its commissions. S.C. Code Ann. § 15-78-30(e) (Supp. 2002). In the present case, the Act's definition of an "employee" refers to "any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty." S.C. Code Ann. § 15-78-30(c) (Supp. 2002). "'Scope of official duty' or 'scope of state employment' means (1) acting in and about the official business of a governmental entity and (2) performing official duties." S.C. Code Ann. § 15-78-30(i) (Supp. 2002).

The Act is intended to cover those actions committed by an employee within the scope of the employee's official duty. "The provisions of [the Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f) (Supp. 2002); see also Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998) (noting that § 15-78-20(f) limits coverage to employees acting within the scope of official duty).

Here, it is undisputed that the Commission is a "governmental entity" within the meaning of the Act. Furthermore, despite the contention in the brief of Flateau and Fielding, nowhere in their complaints do Flateau and Fielding allege that the Board members' actions were outside the scope of their official duty. On the contrary, the complaints specifically aver: (1) "[a]t the time of the incident . . ., the Defendants were members of the Board of the South Carolina Commission for the Blind"; (2) Flateau and Fielding were, "at the time of the incident set forth [in the complaint,] . . . employee[s] of the South Carolina Commission for the Blind"; (3) "[a]t 10:00 o'clock a.m. on or about May 1, 1998 the Defendants did command [Flateau and Fielding] and other employees to attend a hearing in the Board Room of the offices of the South Carolina Commission for the Blind"; (4) "[u]pon arriving at the Board Room, [Flateau and Fielding] and other employees were commanded by Defendants to remain in the Board Room for the purposes of awaiting an interview by Defendants, who had entered upon an executive session in an ante-room in the building"; (5) the incident occurred during

regular business hours and in the Commission's boardroom; (6) the Board "commanded" Flateau and Fielding to behave in a certain manner, and they complied with the Board's requests; and (7) the "Defendants' command that [Flateau and Fielding] be restrained in the Board Room of the [Commission] without leave to depart was made by the combination of them voting for those restrictions upon [Flateau's and Fielding's] personal freedom and access to movement."

The complaints assert tort claims against Commission board members who acted on behalf of the Commission in commanding Commission employees, including Flateau and Fielding, to attend a hearing for the purpose of being interviewed by the Board. The pleadings clearly and unequivocally allege that the Board members were meeting and acting together as the South Carolina Commission for the Blind, discussing matters in executive session, and voting in their capacity as Commissioners to take the actions in question—all official duties and actions that are about the official business of the Commission, which is a public body established by the General Assembly. See S.C. Code Ann. § 43-25-10 (1985) (creating the South Carolina Commission for the Blind; stating that chairman of Commission may call meeting whenever he deems it necessary); S.C. Code Ann. § 30-4-20 (1991) (defining "public body" to include state commissions). Requiring Flateau and Fielding to attend a hearing and holding them there, as Flateau and Fielding maintain in their complaints, may be argued to go beyond the authority of the Commission, but it does not bring the Commissioners' actions outside the scope of their official duty. See Crittenden v. Thompson-Walker Co., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986) (distinguishing scope of servant's employment from scope of servant's authority and holding acts outside servant's authority are still within his scope of duty if done in furtherance of master's business).

The complaints of Flateau and Fielding allege torts committed by the Board members while acting within the scope of their official duty. The Tort Claims Act explicitly provides the sole and exclusive remedy for torts committed by employees of a governmental entity. We find the claims of Flateau and Fielding are subject to the Tort Claims Act.

Because we have concluded that the causes of action alleged by Flateau and Fielding against the Board members constituted conduct within the scope of the Board members' official duty, there can be no liability of individual members of the South Carolina Commission for the Blind. The statutory dialectic reveals that a governmental employee acting within the scope of official duty is exempt from personal liability.

The contentions of Flateau and Fielding fly in the face of logical argumentation in that the efficacy of the Tort Claims Act is protection of governmental employees acting in the scope of official duties. The remedy mandated in the Act is legal action initiated against the governmental entity rather than the individual governmental employee.

Flateau and Fielding maintain that the failure by the Board members to substitute the Commission's name for their names as a party defendant pursuant to S.C. Code Ann. § 15-78-70(c) removes their litigation from the auspices of the Tort Claims Act. We find this argument unavailing.

Section 15-78-70(c) provides in pertinent part:

> [A] person, when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event that the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant.

S.C. Code Ann. § 15-78-70(c) (Supp. 2002). "When a plaintiff claims an employee of a state agency acted negligently in the performance of his job, the South Carolina Tort Claims Act requires a plaintiff to sue the agency for which an employee works, rather than suing the employee directly." Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 321 n.1, 566 S.E.2d 536, 539 n.1 (2002) (citing S.C. Code Ann. § 15-78-70(c)). This language

places no burden on the employee to substitute as a party defendant the state agency for which he or she is employed.

Concomitantly, in viewing these facts in the light most favorable to each plaintiff, and resolving all doubts in their behalf, we find that the Act provided the exclusive remedy for the conduct alleged by Flateau and Fielding.

II. STATUTE OF LIMITATIONS

Flateau and Fielding argue that the Act's two-year statute of limitations should not bar their causes of action because they did not bring the actions pursuant to the Act. Flateau and Fielding claim the gravamen of their position is that the actions were not brought pursuant to the Tort Claims Act; instead, the suits allege common law causes of action for outrage, invasion of privacy, and civil conspiracy against individual defendants.

Section 15-78-110 of the Act provides a two-year statute of limitations for most actions:

> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

S.C. Code Ann. § 15-78-110 (Supp. 2002). A three-year statute of limitations is available to a party who files a "verified claim." See S.C. Code Ann. § 15-78-80 (Supp. 2002); see also Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000) (if plaintiff files statutorily-defined claim within one year of loss or injury, statute of limitations is extended to three years). Section 15-78-80 expressly requires the party to file a verified claim in order to benefit from the three-year limitations period.

Joubert, 341 S.C. at 186, 534 S.E.2d at 6. In order to trigger the three-year statute of limitations under § 15-78-110, a party must follow the procedure outlined in § 15-78-80. Id. at 187, 534 S.E.2d at 6.

The Tort Claims Act controls the instant case. The record contains no evidence that Flateau or Fielding filed a verified claim. Accordingly, the three-year statute of limitations does not apply. Rather, the two-year statute of limitations is applicable.

South Carolina Code Ann. § 15-78-70(b) articulates: "Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (Supp. 2002). This statutory provision lifts the immunity normally enjoyed by governmental employees if they act outside the scope of their employment or their actions constitute fraud, malice, an intent to harm, or a crime of moral turpitude. Absolutely nothing in subsection (b) references a limitations period and, as part of the general Tort Claims Act statutory scheme, it is subject to the Act's statute of limitations as prescribed in S.C. Code Ann. § 15-78-110.

The incident occurred in May 1998. Flateau and Fielding filed their actions in April 2001, nearly three years later. Thus, the circuit court did not err in finding the Act's two-year statute of limitations barred the causes of action asserted by Flateau and Fielding.

CONCLUSION

We hold the complaints of Flateau and Fielding allege torts committed by the Board members while acting within the scope of their official duty. The Tort Claims Act provides the exclusive remedy for torts committed by an employee of a governmental entity while acting within the scope of the employee's official duty. See S.C. Code Ann. § 15-78-200 (Supp. 2002). Thus, the claims of Flateau and Fielding are governed by the Tort Claims

Act. Further, § 15-78-70(c) placed no burden on the Board members to substitute the Commission's name for their names as a party defendant.

We rule the two-year statute of limitations applies even if the Board members acted outside the scope of their official duties or if their actions constituted fraud, actual malice, intent to cause harm, or a crime involving moral turpitude.

The order of the circuit court dismissing the actions filed by Flateau and Fielding is

AFFIRMED.

CURETON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Uuno Mattias Baum, Appellant.

Appeal From Pickens County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3653
Submitted April 7, 2003 – Filed June 16, 2003

AFFIRMED

Deputy Chief Attorney of S. C. Office of Appellate Defense Joseph L. Savitz, III , of Columbia; for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Donald J. Zelenka; Assistant Attorney General Melody J. Brown; Assistant Deputy Attorney General Edward

G. McDonnel, of Columbia; Robert M. Ariail, of Greenville; for Respondent.

HUFF, J.: Uuno Mattias "Matt" Baum was convicted of the murder of his stepfather, Randall Pinion, and sentenced to life imprisonment. Baum appeals his conviction contending that his prosecution was barred by the Double Jeopardy Clause of the United States and South Carolina Constitutions. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On October 26, 1999, Randall Pinion went to his bank and filled out an affidavit of forgery concerning two checks in the amount of $450.00 apiece and made out to Matt Baum. The bank employee who assisted Pinion gave him the original affidavit of forgery and instructed him to take it to the police if he desired to prosecute. On October 27, 1999, two days prior to Pinion's disappearance, he arrived at work upset and told a co-worker that Matt Baum, Pinion's stepson, had stolen some money from him. Pinion told the co-worker he would give Baum two days to repay the money or he was going to turn Baum in to the police. On the morning of his disappearance, Pinion stated to the co-worker that he was giving Baum until that evening to give him his money. Pinion never filed a police report in regard to the alleged forgeries. Two weeks earlier, Baum threatened to kill Pinion after Pinion had physically abused Baum's mother.

On Friday, October 29, 1999, Pinion disappeared after leaving work. His black pickup truck was not at his home on Friday night or Saturday morning, but appeared at his house between 3:00 and 11:00 p.m. on Saturday, October 30. Between 4:00 and 7:00 p.m. on Sunday October 31, the truck again disappeared from the house. Pinion's truck was subsequently found in a church parking lot a few days later.

On November 1, 1999, Baum sold a set of Taylor Made golf clubs to a sporting goods store, explaining they belonged to his stepfather, who had passed away and left him the clubs. Pinion owned several sets of golf clubs, including a Taylor Made set.

Police investigated Pinion's home and pickup truck and found Pinion's blood in various places throughout his home, as well as in the bed of his pickup truck. The police also found a bloody shoe print inside Pinion's home. The police concluded that Pinion had been beaten to death inside of his home and someone thereafter attempted to clean up the crime scene.

Based on their investigation, the authorities developed Baum as a suspect in Pinion's disappearance. On November 7, 1999, after receiving a tip on his possible location, police attempted to apprehend Baum as he fled in a white pickup truck. The chase reached speeds of more than 100 miles per hour, and ended when the white truck became disabled following a traffic accident. When the police searched the disabled truck they discovered the keys to Pinion's truck, a couple of Pinion's checks, Baum's driver's license, and a pair of tennis shoes whose tread was consistent with the bloody shoe print found inside Pinion's home.

On November 11, 1999, the grand jury returned a true bill against Baum for Pinion's murder, even though the police had not found Pinion's body. Baum's trial began on October 9, 2000, and the jury was sworn on that day. After Court recessed for the evening, the Easley Police Department was notified of the discovery of an unidentified, decomposed body found on October 7, 2000 in McDowell County, North Carolina. The following day, the solicitor informed defense counsel and the court that the State had evidence it was, in fact, the body of Randall Pinion. The State moved for a mistrial or a continuance based upon the discovery of Pinion's body. Baum's counsel did not agree with the State and asserted they were ready to proceed to trial.

The circuit court granted the State's motion for a mistrial finding it was imperative the jury charged with deciding the case be given all relevant evidence upon which to base its decision. The court concluded there was a

possibility that exculpatory evidence would be revealed and that the discovery of Pinion's body constituted manifest necessity to grant a mistrial. Baum's second trial began on January 22, 2001, at which time Baum objected to the new trial and moved the State be barred from proceeding to trial on the ground that it violated the Double Jeopardy Clause. The circuit court denied Baum's motion and Baum was subsequently convicted for Pinion's murder. This appeal followed.

LAW/ANALYSIS

Baum argues the circuit court erred when it allowed the second trial to proceed because the discovery of Pinion's body did not constitute manifest necessity to justify a mistrial, and therefore, the second trial was barred by the Double Jeopardy Clause. We disagree.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions prevent all citizens from being placed twice in jeopardy of life and liberty. See U.S. Const. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . "); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . "). The Fifth Amendment of the United States Constitution is made applicable to the states through the Fourteenth Amendment due process clause. See Benton v. Maryland, 395 U.S. 784, 794 (1969) ("[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . should apply to the States through the Fourteenth Amendment"). Pursuant to the Double Jeopardy Clause, a defendant is protected from (1) prosecution for the same offense after acquittal, (2) prosecution for the same offense after conviction, and (3) multiple prosecution for the same offense after an improvidently granted mistrial. State v. Kirby, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977).

Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury's discharge before it reaches a

verdict or legal necessity mandates the jury's discharge. State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 718 (Ct. App. 2000).

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Arizona v. Washington, 434 U.S. 497, 505 (1978). The test to determine whether sound grounds exist for declaring a mistrial after the jury is sworn is "whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

"Manifest necessity" is not a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Further, the word "necessity" is not to be interpreted literally. Arizona, 434 U.S. at 505-06. Rather, there need only be a "high degree" of necessity in order to conclude that a mistrial is appropriate under the circumstances. Id. at 506. Whether a mistrial is mandated by manifest necessity is a fact specific inquiry. Rowlands, 343 S.C. at 457, 539 S.E.2d at 719. Given the "varying and often unique situations arising during the course of a criminal trial," the United States Supreme Court has recognized a broad discretion reserved to a trial judge in declaring a mistrial. Kirby, 269 S.C. at 29, 236 S.E.2d at 35 (quoting Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973)). A trial judge's decision to grant a mistrial will not be overturned absent an abuse of discretion amounting to an error of law. Rowlands, 343 S.C. at 458, 539 S.E.2d at 719.

Baum asserts, however, that the State sought a mistrial to simply marshal evidence to strengthen its case against him, and that the grant of a mistrial on such basis is clearly prohibited by the Double Jeopardy Clause. We agree that, as it has evolved in this country, the prohibition against double jeopardy is intended to condemn the practice of the prosecution requesting a mistrial for the sole purpose of buttressing weakness in its evidence, and the strictest of scrutiny is appropriate when the basis for a mistrial is the unavailability of critical prosecution evidence. Arizona, 434 U.S. at 507-08. However, we do not believe the facts of this case warrant the conclusion that this was the reason behind the granting of the mistrial.

First, we cannot say the body of the victim in this case was **critical** evidence in the prosecution of Baum such that its unavailability triggers the strict scrutiny announced in Arizona. As noted by Baum, the fact that Randall Pinion had been murdered was not in issue. At any rate, we conclude the discovery of the body of a victim during a murder trial, is an extremely important piece of evidence which has just as much potential to exonerate as to inculpate an accused. The judge recognized as much, and found that the public's interest in a fair adjudication was implicated by the possibility of discovering exculpatory evidence and giving the jury the benefit of the fully developed facts when deciding the matter. Consequently, we believe manifest necessity was clearly established, and find no abuse of discretion in the trial judge's determination that a mistrial was dictated by such.

For the foregoing reasons, Baum's conviction is

AFFIRMED.

CONNOR and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John E. Miles, Appellant,

v.

Rachel M. Miles, Respondent.

Appeal From Sumter County
Jamie Lee Murdock, Jr., Family Court Judge

Opinion No. 3654
Heard April 7, 2003 - Filed June 16, 2003

AFFIRMED

J. Leeds Barroll, IV, of Columbia, John O. McDougall, of Sumter, John S. Nichols, of Columbia, for Appellant.

J. Mark Taylor, of West Columbia, for Respondent.

STILWELL, J.: John E. Miles ("Husband") brought this action seeking termination or, alternatively, reduction in his alimony obligation to Rachel M. Miles ("Wife"). The family court refused to terminate, but did reduce Husband's alimony obligation from $4,583 per month to $2,500 per month. Husband appeals. We affirm.

BACKGROUND

The parties married in 1962 and divorced in 1995. As part of the divorce decree, the family court adopted a written agreement between the parties in which Husband agreed to pay Wife $4,583 in monthly alimony. The agreement further provided:

> [T]he terms and conditions of this Agreement, and any Order approving the same, shall not be modifiable by the parties or any Court without the written consent of Husband and Wife. The parties specifically agree that the Family Court . . . shall not have any jurisdiction to modify, supplement, terminate or amend this Agreement, or the rights and obligations of the parties. Nothing in this paragraph shall be construed to in any way prohibit the Family Court from the modification and/or termination of the alimony provisions of this Agreement as permitted pursuant to the law of the State of South Carolina.

On June 21, 2000, Husband brought this action against Wife seeking termination or reduction in his alimony due to a substantial change of circumstances. Husband alleged that Wife orally agreed to modify the parties' prior alimony agreement, and that Wife had entered into a relationship that was tantamount to marriage or was a common law marriage, such that alimony should be terminated.

Wife testified she had been involved in a relationship with Anthony Shepard since her divorce from Husband. Wife testified she and Shepard spend three to four nights a week together. Wife and Shepard often travel together and they maintain a joint traveling fund to which each contributes $150 per month. Wife described her relationship with Shepard as "close,

personal, and emotional." Wife testified she did not consider herself married to Shepard, and denied she and Shepard had schemed to remain unmarried to avoid losing her alimony. Additionally, Wife testified she and Shepard maintain separate residences and checking accounts and do not have any joint investment or charge accounts. Wife did, however, make a one-time loan to Shepard for $9,000, which Shepard repaid within a few days.

Wife testified Husband approached her in April of 1997 and discussed his intent to file an action to discontinue alimony based on her relationship with Shepard. Husband, who is an attorney, provided Wife copies of a published opinion from this court that involved termination of alimony based on the supported spouse's relationship with another party that was tantamount to marriage. According to Husband, Wife agreed at another meeting in January of 1998 that Husband could terminate alimony after a two-year period. Wife testified similarly regarding the oral agreement, but the parties never reduced any modification to writing.

The family court ruled that circumstances did not warrant termination of alimony because Wife was not involved in a relationship with Shepard that was tantamount to marriage. The family court found the oral agreement regarding the termination of alimony was never reduced to writing and was not approved by the court, and therefore was not enforceable. The family court further found Husband's monthly income had dropped from $18,600 to $13,925 while his monthly expenses had increased. Citing this change, the family court reduced Husband's alimony obligation to $2,500 per month. The family court found neither party was entitled to an award of attorney fees. Husband appeals.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992); Owens v. Owens, 320 S.C. 543, 546, 466 S.E.2d 373, 375 (Ct. App. 1996). However, this broad scope of review does not require us to disregard the family court's findings. Stevenson v. Stevenson, 276 S.C. 475, 477, 279

S.E.2d 616, 617 (1981). Nor do we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

DISCUSSION

I. Wife's Relationship with Shepard

Husband argues the family court erred in failing to terminate alimony based on Wife's relationship with Shepard because the relationship is tantamount to marriage. We disagree.

Changed conditions may warrant a modification or termination of alimony. S.C. Code Ann. § 20-3-170 (1985). "The purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Croom v. Croom, 305 S.C. 158, 160, 406 S.E.2d 381, 382 (Ct. App. 1991). Alimony "is not awarded to support a live-in partnership between the supported ex-spouse and a third party." Id. Thus, "[a] rule requiring alimony to continue in these circumstances invidiously discriminates because it penalizes a divorced spouse for remarrying, but rewards one for cohabitating without benefit of marriage." Id. Alimony may therefore be terminated when a supported ex-spouse is involved in a relationship tantamount to marriage. Bryson v. Bryson, 347 S.C. 221, 226, 553 S.E.2d 493, 496 (Ct. App. 2001). Living with another, whether it is with a "live-in-lover, a relative, or a platonic housemate," changes the supported ex-spouse's circumstances and alters the need for financial support. Vance v. Vance, 287 S.C. 615, 618, 340 S.E.2d 554, 555 (Ct. App. 1986).

Although Wife's open and notorious illicit relationship with Shepard may be viewed as immoral or at least contrary to generally accepted social mores, the question this court must answer does not concern morality but rather whether the relationship constituted a change of circumstance under the law warranting termination of alimony. We find it did not. In cases where our courts have found a change in circumstances based on a relationship tantamount to marriage, the supported ex-spouse has been

involved in a relationship with another in which the parties have economically relied upon one another. See Bryson, 347 S.C. at 225, 553 S.C. at 496 (finding relationship was tantamount to marriage and thus constituted a substantial change in circumstance where supported ex-spouse and her live-in companion resided in the same home for twelve years, and purchased a home together); Vance, 287 S.C. at 617-18, 340 S.E.2d at 555 (finding relationship tantamount to marriage where ex-spouse had taken up residence with her companion, the parties had twice moved to accommodate one another's careers, and shared expenses).

Here, it is undisputed Wife and Shepard maintain separate residences. Wife and Shepard maintain separate banking and investment accounts. With the exception of the travel fund, there is no evidence Wife and Shepard have commingled any funds. Furthermore, neither Wife nor Shepard provides financial support to the other. Under these circumstances, we find the family court correctly ruled that Wife's relationship with Shepard was not tantamount to marriage.

II. Oral Modification

Additionally, Husband argues the trial court erred in concluding the parties did not validly agree to terminate Husband's alimony obligation after December 1999. We disagree.

The family court concluded the divorce decree and the parties' initial alimony agreement, which was incorporated in the decree, could not be orally modified by the parties. Husband contends the parties could orally modify the agreement without a written agreement or the family court's approval. The agreement reached between the parties and adopted by the family court in the final divorce decree, however, specifically provided that the agreement and any order approving the agreement "shall not be modified by the parties or any court without written consent of husband and wife."

"Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." Ebert v. Ebert,

320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). "Unambiguous marital agreements will be enforced according to their terms." Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001). Here, the agreement unambiguously provided the parties could not modify the agreement without written consent of both parties. However, Husband cites Sanchez v. Tilley, 285 S.C. 449, 452, 330 S.E.2d 319, 320 (Ct. App. 1985), for the proposition that a written contract may be orally modified despite a prohibition in the contract against oral modification.

In Sanchez, a party sought to have an oral agreement to reduce child support declared invalid because the parties' original written support agreement provided any modification had to be in writing. Id. Nothing in the Sanchez decision indicates the original support order was approved and adopted by the family court. By contrast, the Miles' original support agreement was approved by the family court and made a part of the divorce decree. In essence, Husband is not just seeking to modify the parties' written agreement. Rather, he is trying to modify a written court order by oral agreement of the parties. It is axiomatic that parties cannot modify a court order. Accordingly, the family court properly rejected Husband's reliance on Sanchez and properly concluded that any oral agreement by the parties regarding the termination of alimony was not enforceable.

III. Further Alimony Reduction

In the alternative, Husband argues the family court abused its discretion in failing to grant Husband a greater reduction in his support obligation. We disagree.

> Whenever [a spouse] . . . has been required to make his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments . . . .

S.C. Code Ann. § 20-3-170 (1985). To justify modification or termination of an alimony award, the changes in circumstances must be substantial or material. Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997). Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse. Kelley v. Kelley, 324 S.C. 481, 486, 477 S.E.2d 727, 729 (Ct. App. 1996).

The court carefully reviewed and contrasted the income, expenses and assets of the parties at the time of the divorce in 1995 and at the time of the hearing. In 1995, Husband's gross monthly income was $18,100, with monthly expenses of $7,900. In 1999 and 2000, Husband's gross monthly income was less than $14,000 and his monthly expenses had increased to $11,648. In the original agreement incorporated into the court order, it was contemplated that Wife would be unemployed and therefore have no earned income. She has remained unemployed, but the court noted that the testimony of an expert revealed that Wife's estate was valued in 1995 at $594,746, but had increased to the value of $648,624 at the time of the hearing. The court noted Wife showed monthly expenses of $4,310, but specifically found those expenses included $1,500 per month payments on a bank loan for which there were no records to verify that the payments were made on a monthly basis and that she had the financial resources to fully satisfy that loan. In light of Husband's income and Wife's monthly expenses, we find no error in the family court declining to reduce Husband's alimony obligation by a greater amount.

IV. Attorney's Fees

Lastly, Husband contends the family court abused its discretion in failing to award him attorney fees and costs. We disagree.

The decision whether to award attorney fees is a matter within the family court's sound discretion and will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903

(1988). In determining whether to award attorney fees, the court should consider the parties' ability to pay their own fees, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

In the instant case, the family court properly considered the appropriate factors and concluded neither party was entitled to recover attorney fees. Although Husband successfully received a reduction in his alimony obligation, Husband was primarily seeking to terminate his alimony obligation based on either Wife's cohabitation with Shepard or the parties' oral agreement. Husband was not successful on either of these claims. Furthermore, Husband's substantial income is sufficient to enable him to compensate his attorney. We find no error in the family court's refusal to grant attorney fees to either party.

AFFIRMED.

HOWARD, J., and STROM, Acting Judge, concur.