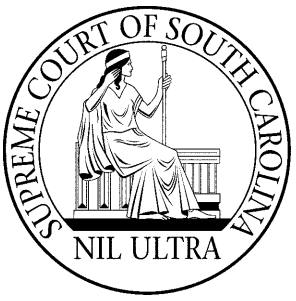

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

June 23, 2003

ADVANCE SHEET NO. 24

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

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner

v.

Harold D. Knuckles, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Cherokee County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 25667
Heard May 15, 2003 - Filed June 23, 2003

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General David Spencer, all of Columbia, and Harold W. Gowdy, III, of Spartanburg, for Petitioner.

Katherine Carruth Link and the South Carolina Office of Appellate Defense, both of Columbia, for Respondent.

JUSTICE BURNETT: We granted certiorari to review the Court of Appeals' decision in State v. Knuckles, 348 S.C. 593, 560 S.E.2d 426 (Ct. App. 2002). We reverse.

FACTS

The relevant facts are uncontested. Harold D. Knuckles ("Knuckles") pled guilty to a 1998 indictment for driving under the influence, second offense, in violation of S.C. Code Ann. § 56-5-2930. The Court of Appeals held the indictment insufficient to confer subject matter jurisdiction and vacated Knuckles' conviction.

ISSUE

Did the Court of Appeals err in ruling the indictment did not confer subject matter jurisdiction?

DISCUSSION

Knuckles argues the indictment is insufficient because it fails to allege his faculties were "materially and appreciably impaired" by the use of alcohol or drugs, as required by the statute. We disagree.

A circuit court lacks subject matter jurisdiction where an indictment is insufficient to charge an offense. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003). An indictment is sufficient if it contains the necessary elements of the offense to be charged and apprises the defendant what he must be prepared to meet. Id. Whether an indictment could be more definite or certain is irrelevant. Id.

Knuckles' indictment alleges:

> That Harold D. Knuckles, Sr. did in Cherokee County on or about July 17, 1998, drive a vehicle under the influence of intoxicating

> liquors, and/or narcotic drugs, barbiturates, paraldehydes[,] drugs and herbs; such not being the first offense within a period of ten years including and immediately preceding the foregoing date.

Section 56-5-2930 prohibits the operation of a motor vehicle while under the:

> (1) influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired;
>
> (2) influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or
>
> (3) combined influence of alcohol and any other drug or drugs, or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

S.C. Code Ann. § 56-5-2930 (Supp. 1998).

The corpus delicti of DUI is defined as (1) driving a vehicle; (2) within this state; (3) while under the influence of intoxicating liquors or drugs. Knuckles, 348 S.C. at 600, 560 S.E.2d at 430 (Shuler dissenting); see State v. Osborne, 335 S.C. 172, 516 S.E.2d 201 (1999); State v. Salisbury, 343 S.C. 520, 524, 541 S.E.2d 247, 248-49 (2001); State v. McCombs, 335 S.C. 123, 515 S.E.2d 547 (Ct. App. 1999); Kerr, supra; but see State v. Russell, 345 S.C. 128, 134, 546 S.E.2d 202, 205 (Ct. App. 2001).

The term "materially and appreciably impaired" as it relates to DUI may be traced to State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998). In Kerr the court addressed the level of proof required of the State to prove the defendant was "under the influence of alcohol." Id. at 144, 498 S.E.2d at 218.

Subsequently, the Legislature amended § 56-5-2930 to include the "materially and appreciably impaired" language. The statutory inclusion

of the level or standard of proof required does not change the corpus delicti of this crime.

The indictment in this case is sufficient to confer jurisdiction on the circuit court.

We **REVERSE**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John H. Williams, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 25668
Submitted May 29, 2003 - Filed June 23, 2003

VACATED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia; for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital & Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General W. Bryan Dukes, of Columbia, for Respondent.

JUSTICE WALLER: In this post-conviction relief (PCR) action, petitioner John H. Williams' appellate counsel filed a Johnson[1] petition for a writ of certiorari. We denied counsel's request to be relieved and directed the parties to address the following question:

> Did the PCR judge err in directing, pursuant to In re Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996), the Georgetown County Clerk of Court not to accept any further applications for PCR from petitioner unless he pays the $70 filing fee generally required for the filing of a summons and complaint?

We subsequently granted the petition for a writ of certiorari to review this issue, and we now vacate the trial court's order.

FACTS

Petitioner was indicted for murder. A jury convicted him of voluntary manslaughter in 1985. He was sentenced to thirty years imprisonment. This Court affirmed his conviction in an unpublished decision. State v. Williams, Op. No. 86-MO-077 (S.C. Sup. Ct. filed Feb. 27, 1986).

Petitioner filed his PCR application in 1986. The PCR action was dismissed. He filed a second PCR application in 1989 which was dismissed after a hearing. This Court denied certiorari in 1991. Petitioner filed a third PCR action in 1994, and again relief was denied after a hearing. This Court granted certiorari and reversed. Williams v. State, Op. No. 2000-MO-029 (S.C. Sup. Ct. filed Mar. 13, 2000).[2]

---

[1] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

[2] The Court reversed citing Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000) (where the Court held that retroactive application of amended statute that reduced the frequency of parole reconsideration hearings for violent offenders from one year to two years constituted an *ex post facto* violation).

The instant case arises out of petitioner's fourth PCR application filed in 2000. The State filed a return and motion to dismiss based in part on the ground that the application was successive. On June 23, 2000, the trial court issued a conditional order of dismissal.

On the same day, the trial court issued another order ("the Order"). Citing In re Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996), the Order directed the Georgetown County Clerk of Court to not accept any further PCR applications from petitioner unless he pays the filing fee generally required for a civil action. In addition, the Order stated that any future PCR applications must be accompanied by a notarized affidavit from petitioner certifying his good faith belief that the PCR action is "nonfrivolous and proper" for the court to consider. Finally, the Order warned petitioner that "should he continue to file frivolous PCR applications," he could be held in contempt or sanctioned, and sanctions "include but are not limited to the forfeiture of all [his] earned work, education and good time credits."[3]

DISCUSSION

Petitioner argues the trial court erred in placing restrictions on his future filings of PCR actions because his past filings do not constitute abusive filings. We agree.

In the Maxton case, this Court ordered Maxton, a prison inmate, to stop filing frivolous *pro se* petitions in the original jurisdiction of the Court. Maxton had filed **64** *pro se* petitions in a three-year span all of which had been dismissed pursuant to Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991). The Court characterized Maxton's numerous filings as "repetitive and frivolous" and ordered the following remedy for the "abusive" filings: the Clerk of Court was directed to refuse any further petitions from Maxton unless the filing was accompanied by (1) the $25 filing fee generally required for motions; and (2) a properly notarized affidavit certifying that he in good

[3] The Order, however, did not apply to petitioner's fourth PCR application. Ultimately, that PCR action was dismissed by form order for the reasons stated in the conditional order of dismissal.

faith believes the matter raised in the petition is nonfrivolous and proper for the Court's original jurisdiction. The Court warned Maxton that if he continued to file frivolous petitions, he would be sanctioned under Rule 240, SCACR. Maxton, supra.

The Court of Appeals faced a similar issue in Lakes v. State, 333 S.C. 382, 510 S.E.2d 228 (Ct. App. 1998). There, an inmate at Allendale Correctional Institution filed for a writ of habeas corpus and sought to proceed *in forma pauperis*. The trial court denied Lakes' request, and he appealed. Prior to his state habeas corpus action, Lakes had made several filings, including one direct appeal, three PCR applications, two petitions for a writ of certiorari, a federal habeas corpus petition, and numerous other petitions for writs of mandamus, attorney grievances, and proposed orders for release. Nevertheless, the Court of Appeals found the trial court erred in not allowing Lakes to proceed *in forma pauperis*. The Lakes court distinguished Maxton and stated "the trial judge failed to make factual findings to show the requests rise to the level of repetitive and abusive filings as in Maxton or those cases cited in Maxton." Lakes, 333 S.C. at 382, 510 S.E.2d at 230.

Turning to the instant case, the State argues that because the Order included a factual finding that petitioner's filings were abusive, the Lakes decision is distinguishable. Given that the facts upon which the trial court relied in its order are inaccurate, we disagree. The Order stated that petitioner's second and third PCR applications were "summarily dismissed as successive applications." The conditional order, however, stated there were evidentiary hearings held on the second and third applications. Therefore, they were not "summarily dismissed." Moreover, this Court reversed the denial of petitioner's third PCR application. Accordingly, we question the trial court's conclusion that petitioner's filings have been completely frivolous.

In addition, we disagree that petitioner's filings were repetitive and numerous. Clearly, petitioner's four applications for PCR are **much** fewer than Maxton's filings, and even significantly fewer than those of Lakes. Viewing petitioner's relatively low number of filings, we find insufficient factual basis to determine petitioner is an abusive litigant.

In sum, because petitioner has filed merely four PCR actions, and has gotten relief in one, his filings are neither repetitive, numerous, nor totally frivolous. This is clearly a situation distinguishable from that in Maxton.

CONCLUSION

We hold the trial court erred in sanctioning petitioner with a Maxton order. Accordingly, we **VACATE** the Order.

ORDER VACATED.

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

The Supreme Court of South Carolina

RE: Rule 608, SCACR

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 608(d)(1)(M) is amended to read as follows:

> **(M)** Members who are serving as members or associate members of the Board of Law Examiners.

This amendment is effective September 1, 2003.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
June 18, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kibby Daves and Jane Daves, Plaintiffs,

v.

Jim R. Cleary, M.D.; Mary Black Memorial Hospital; Jack M. Cole, M.D., both individually and as Agent for Piedmont Internal Medicine Associates, P.A.; and Piedmont Internal Medicine Associates, P.A.; Defendants,

Of whom Kibby Daves is Respondent,

and

Jim R. Cleary, M.D. is Appellant.

Opinion No. 3655
Heard April 8, 2003 – Filed June 16, 2003

AFFIRMED

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

William S. Brown, of Greenville, for Appellant.

David W. Goldman, Diane M. Rodriguez, and Kristi F. Curtis, all of Sumter; for Respondent.

CURETON, J.: In this medical malpractice case, the physician appeals from a jury verdict in favor of the patient. The physician alleges the circuit court judge erred in (1) failing to give requested instructions regarding the standard of care; (2) allowing the patient's medical expert to testify regarding the standard of care; (3) failing to grant a motion for a directed verdict or new trial; and (4) failing to grant a new trial where there were inconsistent verdicts. We affirm.

FACTS

On March 23, 1996, Kibby Daves and his wife, Jane, visited with his parents and ate fried fish. On their way back from his parents' house, Daves and Jane stopped at her parents' house to visit, where Daves began to suffer from chest pains, nausea, and vomiting. The pain radiated to his shoulder, but the pain was later relieved after Daves burped several times. Daves had suffered a heart attack in 1986, so the pain alarmed him enough to go to the hospital. By the time he arrived at the hospital, however, his pain was gone. Daves informed Dr. Cole, his primary physician, that the pain was different from the pain he suffered with his 1986 heart attack because it was not as severe and the pain went away. After an EKG was performed, it was determined that Daves's pain was gastrointestinal in origin and he was sent home.

On March 25, 1996, Daves awoke at 8:30 a.m. suffering from severe pain that was similar to the pain he suffered with his 1986 heart attack. He believed he was having another heart attack. The pain radiated down his arms and back and he was sweating, restless, anxious, and clutching his chest. When he arrived at the emergency room, Dr. Jim R. Cleary began treating Daves. Daves repeatedly told Cleary that he was having a heart attack, but Cleary believed Daves was either suffering from gallbladder pain or some other gastrointestinal disorder. Daves informed Cleary that his gallbladder had been removed years before and that he was positive he was having a heart attack. Cleary continued to insist that Daves was not having a heart attack, and he thumped on Daves's chest and remarked "its not your ticker." An EKG performed on Daves failed to show any acute changes to his condition. A test performed at 10:30 a.m. showed normal levels of cardiac enzymes.

As the morning progressed, Cleary treated Daves for a gastrointestinal irritation and ran tests to determine if Daves had gallstones in his common bile duct. When nitroglycerin failed to relieve Daves's pain, Cleary administered an anti-anxiety drug which made Daves lose consciousness. Daves does not recall what happened during that time, but remembers that every time he woke up he was in severe pain.

Daves remained in the emergency room and was not admitted into the hospital until 2:30 that afternoon. Dr. Cole, his primary physician, did not see him until 6:00 p.m., at which point a cardiac enzyme test indicated that Daves had suffered from a massive heart attack. Daves began to receive treatment for the heart attack, but by this point severe damage to his heart muscles had already occurred, resulting in congestive heart failure. As a result of his condition, Daves underwent two heart catheterizations, three thoracentesis procedures in order to drain fluid from his lungs, and also a triple bypass operation. Daves has been disabled since his March 25, 1996 heart attack. His medical bills total $139,967.91.

Daves sued Cleary, the hospital, and his primary physician for medical negligence and personal injury. Jane sued the same defendants for loss of consortium.[1]

Dr. David Maron testified as an expert witness for Daves. He stated that because cardiac enzymes showing heart damage may take up to two hours to manifest, Cleary violated the standard of care for emergency room physicians treating a patient with chest pains when he failed to order repeated EKG's and repeated cardiac enzyme tests to monitor a developing heart attack in time to appropriately treat it. According to Maron, Cleary's failure to adequately check Daves's vital signs, failure to adequately check Daves's medical history regarding gallbladder surgery, failure to request a cardiac consult, and failure to administer any clot-dissolving medication fell below the standard of care for an emergency room doctor.

The jury found for Daves and against Cleary on the medical malpractice claim and awarded him $500,000 in actual damages, but it also found for the primary physician and the hospital on the negligence claim. The jury initially found for Jane on the loss of consortium claim against Cleary, but it awarded her $0 in damages. The circuit court refused to accept the loss of consortium verdict, instructing the jury that it either had to find for Jane and award her at least a nominal amount of damages or find in favor of Cleary. The jury returned with a verdict in favor of Cleary, the hospital, and the primary physician as to Jane's loss of consortium claim. This appeal follows.

LAW/ANALYSIS

I. JURY CHARGE

Cleary argues the circuit court erred in improperly charging the jury on the standard of care for physicians. We disagree.

[1] Neither the hospital nor the primary physician is a party to this appeal.

Cleary submitted several requests to charge to the circuit court regarding the standard of care. In four of the requests to charge, Cleary asked the court to charge that Daves was required to show the recognized practices and procedures which would be exercised by a competent practitioner "in the defendant doctor's field of medicine," "in the same specialty," "in the particular branch of healing art in which" the defendant doctor is trained, or of a "particular school of thought," under the same or similar circumstances. Cleary requested that the circuit court charge the jury the specific language that a physician is held to the standard of care of a competent physician in his field of medicine or area of medical specialty. The trial judge denied Cleary's request, stating that he believed the charge he intended to give the jury addressed the "field of medicine" issue, although not as specifically as Cleary would have liked. The judge then read the following charges to the jury regarding the standard of care:

> Malpractice, by definition, is the failure to diagnose, treat, or care for a patient in accordance with good proper accepted medical practice resulting in harm to the patient.
>
> . . .
>
> What the law requires is that in the practice of his vocation he will exercise that degree of knowledge, care and skill ordinarily possessed by members of his profession in good standing under the same or similar circumstances.
>
> . . .
>
> He would also be liable, if having the requisite skill, he negligently fails to use it or he is not as careful and diligent in the diagnosis, treatment or care to the extent that he should be, which is to say as a careful and diligent physician of ordinary prudence would have been under the same circumstance.
>
> . . .

> In a case such as this, negligence is the failure to do that which an ordinary careful and prudent physician would do under the same circumstances, or it is the doing of that which an ordinary - ordinarily prudent physician would not have done under the existing circumstances.
>
> . . .
>
> The standard, which I have already told you - the standard is that which I have already told you. Did the physician exercise that degree of knowledge, care and skill possessed by the members of his profession in good standing similarly situated under the same or similar circumstances.
>
> . . .
>
> What are the generally recognized and accepted practices and procedures which would be followed by the average competent practitioners in the defendant's profession under the same or similar circumstances; two, in what manner, if any, he departed from such practices or procedures; and, three, was the defendant's departure from such generally recognized practices and procedures, if any, a proximate cause of the plaintiff's alleged injuries or damages?

After the trial judge gave the jury instructions, Cleary restated his objection that the charges did not include the medical specialty language.

The circuit court must charge the current and correct law to the jury. McCourt by and through McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995); Cohens v. Atkins, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct. App. 1998). "When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). If the charge is reasonably free from error, isolated portions

which might be misleading do not constitute reversible error. Id. A jury charge is correct if it contains the correct definition and adequately charges the law. Keaton, 334 S.C. at 495-96, 514 S.E.2d at 574. The substance of the law is what must be charged, not any particular verbiage. Id. at 496, 514 S.E.2d at 574. A circuit court's refusal to give a properly requested charge is reversible error only where the requesting party can demonstrate prejudice from the refusal. Cohens, 333 S.C. at 349, 509 S.E.2d at 289.

Several cases have addressed jury charges regarding the applicable standard of care in medical malpractice cases. In Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985), our state supreme court reviewed whether the standard of care charge given by the circuit court met the requirements of medical malpractice cases. The two prong test requires that the plaintiff:

> (1) Present evidence of the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, AND
>
> (2) Present evidence that the defendant doctor departed from the recognized and generally accepted standards, practices and procedures in the manner alleged by the plaintiff.

Cox, 286 S.C. at 414, 334 S.E.2d at 118. The circuit court charged the jury that they could only find the physician guilty of malpractice if they found he "did not possess the degree of skill common to other doctors, or that he failed or was negligent in so exercising such skills in the treatment of a patient." Cox, 286 S.C. at 415, 334 S.E.2d at 119. The court further instructed the jury as follows:

> In a case of this nature negligence is the failure to do that which an ordinary, careful and prudent physician or surgeon would do under the circumstances shown by the evidence to have existed at the time of the transaction in question, or, it is the doing of that which an

ordinary, careful and prudent physician or surgeon would not have done under the same circumstances.

Id. at 415-16, 334 S.E.2d at 119. Reviewing these charges, our state supreme court found that the circuit court did not err because the charges "fully and correctly instructed the law of medical malpractice on burden of proof and on all other matters." Id.

In Durr v. McElrath, 299 S.C. 30, 382 S.E.2d 20 (Ct. App. 1989), this Court addressed the circuit court's refusal to give requested charges that the standard of care for physicians is that "employed by the profession generally." Finding that the circuit court correctly refused to give the requested charge, we noted that the degree of skill and care a physician must use in diagnosing a condition is that "which would be exercised by competent practitioners in [the] defendant doctor's field of medicine and not that which would be exercised by the profession generally." Durr, 299 S.C. at 32, 382 S.E.2d at 22. However, we went on to state that the applicable standard of care is determined by "what an ordinary, careful, and prudent physician would have done under the same or similar circumstances." Id. at 33, 382 S.E.2d at 22.

Our appellate courts that have more recently addressed the appropriate charge on the standard of care have upheld charges where the jury was asked to consider whether the physician exercised the degree of care and skill ordinarily required by the profession "under similar conditions and in like circumstances." Keaton, 334 S.C. at 496, 514 S.E.2d at 574 (reviewing propriety of "hindsight" charge); cf. Burroughs v. Worsham, 352 S.C. 382, 403, 574 S.E.2d 215, 225 (Ct. App. 2002) (holding there was no prejudicial error where clarifying charge failed to state that the standard of care was that of physicians in the same field of medicine because prior charges addressed the "same field of medicine" language).

Dr. Cleary argues he was clearly prejudiced by the charge because Daves "presented no testimony specifically addressing the standard of care owed by an emergency room physician" and that Daves's only expert witness, Dr. Maron,

"acknowledged that he would not hold a doctor in the emergency room to the same standard as a cardiologist in regard to reading EKGs, one of the evaluation tools used in assessing whether pain is cardiac in origin." Our review of the record confirms that Cleary is mistaken as to the standard of care claim. Dr. Maron testified that he was familiar with the standard of care "for a physician evaluating a patient with chest pain in the emergency room setting." He further testified that the standard of care for "initial evaluation and management of a patient in the emergency room" is the same regardless of the specialty of the physician. The reference to the EKG reading is taken out of context. On cross-examination, Dr. Cleary's attorney suggested to Maron that he would not expect an emergency room doctor to "notice half a millimeter change" in an EKG reading. Maron agreed and followed up stating that was something a cardiologist would be expected to recognize, but not an emergency room doctor. This statement in no way conflicts with his earlier testimony regarding the standard of care required of Dr. Cleary.

The charge given by the circuit court in the present case conveyed to the jurors that they must compare Cleary's actions to that of a prudent physician similarly situated under the same or similar circumstances. Admittedly, the charge could have been fuller[2] and specified that the jury should compare Cleary's actions to the standard of a physician in his same field of medicine. Nevertheless, when reviewing the charge as a whole, we find it correctly states the law and was generally free from error. Accordingly, we find no reversible error in the charge.

II. EXPERT TESTIMONY

Dr. Cleary next argues the circuit court erred in allowing Dr. Maron, a cardiologist, to testify regarding the standard of care for an emergency room physician. We disagree.

[2] We think that the better practice is to charge juries in malpractice cases such as this, that in evaluating the conduct of a physician the jury should compare "[the physician's actions] to those of a doctor in the same field of medicine." Burroughs, 352 S.C. at 403, 574 S.E. 2d at 225.

Cleary moved in limine to have Dr. Maron's testimony regarding the standard of care excluded. This motion was denied by the circuit court, and Daves called Dr. Maron to testify at trial. Dr. Maron testified that during his medical training, he had an internship and two years residency in internal medicine, spent two years doing research focused on heart disease, spent a few years at Stanford University teaching internal medicine, and spent the next few years training in cardiology. Although not board certified in emergency room medicine, Dr. Maron is board certified in internal medicine and cardiology. He is an assistant professor at Vanderbilt University's medical school, where he teaches and oversees some medical students who are in the emergency medicine rotation. He periodically sees patients himself in the emergency room. Dr. Maron testified that he was familiar with the standard of care for a physician evaluating a patient in the emergency room complaining of chest pains, and that the standard is the same, regardless of the specialty of the physician.

The qualification of an expert and the admissibility of an expert's testimony are matters within the discretion of the trial judge. Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995). To be considered competent to testify as an expert, "a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). "A medical practitioner's experience teaching and interacting with persons in the applicable specialty are sufficient to support his qualification as an expert." Id. at 253, 487 S.E.2d at 598. "A physician is not incompetent to testify merely because he is not a specialist in the particular branch of his profession involved." Creed v. City of Columbia, 310 S.C. 342, 345, 426 S.E.2d 785, 786 (1993). Once an expert is qualified, the adequacy of his knowledge goes to the weight of his testimony, not the admissibility. Id.

After hearing testimony regarding Dr. Maron's training, teaching credentials, and experiences within the emergency room, the circuit court found that he was qualified to give an expert opinion as to the standard of care for

emergency room physicians when a patient presents with a complaint of chest pains. Despite the fact that Dr. Maron is a cardiologist and is not board certified in the field of emergency medicine, we find there was ample evidence to support the circuit court judge's decision to admit his testimony as an expert. Dr. Maron's lack of emergency room expertise went to the weight of his testimony, not to its admissibility. Accordingly, we find no abuse of discretion.

III. DIRECTED VERDICT/JNOV

Dr. Cleary argues the circuit court erred in failing to grant his motions for directed verdict and a new trial because Daves did not present proper evidence regarding the standard of care and damages proximately caused by Dr. Cleary. We disagree.

Dr. Maron testified that Daves suffered permanent, irreversible damage to his heart due to the heart attack, and that the damage could have been substantially limited had he received the appropriate treatment when he first appeared in the emergency room complaining of chest pains. Dr. Maron opined that had Daves been given timely intervention to restore blood flow through the blocked artery, "the vast majority of the time those procedures are successful in restoring blood flow and stopping the heart attack." Dr. Maron acknowledged that his testimony did not mean that Daves would have suffered no damage had he had timely intervention, and Maron did not want to speculate on the percentage of difference in damage. He also testified to a reasonable degree of medical certainty that if Daves had received appropriate treatment at the time he first complained of chest pains, Daves would not have developed congestive heart failure.

At the end of the presentation of evidence, Cleary moved for a directed verdict, arguing that Daves failed to establish the standard of care for emergency room physicians and the causal link between Daves's injuries and Cleary's actions. The circuit court denied the motion. After the jury rendered its verdict, Cleary moved for judgment as a matter of law, arguing Daves failed to establish the standard of care for emergency room physicians and that there was no causal

link between Cleary's actions and Daves's damages. The court denied that motion also.

In reviewing the denial of motions for directed verdict and JNOV, the evidence and the reasonable inferences that can be drawn therefrom must be viewed in the light most favorable to the non-moving party. Brady Dev. Co. v. Town of Hilton Head Island, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993); Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 99, 522 S.E.2d 350, 352 (Ct. App. 1999). The motion should not be granted where the "evidence yields more than one inference or its inference is in doubt." Evans, 337 S.C. at 99, 522 S.E.2d at 352. When considering the motion, neither the appellate court nor the circuit court has authority to "decide credibility issues or to resolve conflicts in the testimony and evidence." Reiland v. Southland Equip. Serv., Inc., 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998).

In medical malpractice cases, the plaintiff must show through expert testimony that, "in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence . . . [and] when it is the only evidence of proximate cause relied upon, it must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." James v. Lister, 331 S.C. 277, 286, 500 S.E.2d 198, 203 (Ct. App. 1998).

As previously discussed, the circuit court found Dr. Maron was qualified as an expert to testify regarding the standard of care for an emergency room physician. Based on Dr. Maron's training and experience, we agree with the circuit court. Because Daves presented Dr. Maron's testimony regarding the standard in this case, we find no error with the circuit court's denial of Cleary's motions for directed verdict and JNOV based on lack of expert testimony.

As to the causation argument, Daves presented expert testimony that he suffered irreparable heart damage leading to congestive heart failure which could have been prevented had he received timely and appropriate treatment. The circuit court found this evidence sufficient to overcome directed verdict and

JNOV motions as to causation. Evidence existed to support the circuit court's determination, and we find no abuse of discretion.

IV. INCONSISTENT VERDICTS

Dr. Cleary argues the circuit court erred in failing to grant his motion for a new trial based on the inconsistency of the verdicts. We disagree.

Jane Daves testified at trial that after her husband's heart attack, he was unable to perform many of the activities he used to be able to perform, to include cutting the grass, raking leaves, tending the garden, washing their cars and taking trips together. She further testified that many of these tasks now fall on her to perform. She also testified that her relationship with Daves changed drastically, and that they no longer had a close, intimate relationship because Daves was afraid of having another heart attack.

The jury returned a verdict in favor of Daves for $500,000 in actual damages. The jury also initially returned a verdict in favor of Jane Daves on the loss of consortium claim, but awarded damages of zero dollars. The circuit court declined to accept the verdict on the loss of consortium claim, informing the jury that it was an unacceptable verdict. The judge requested the jury clarify whether they intended a verdict for Cleary by giving a zero damages amount or to award some monetary amount to Jane Daves if they intended a verdict in her favor. After further deliberations, the jury returned a verdict in favor of Cleary. Dr. Cleary moved for a new trial based on the inconsistency between the verdict for Daves and the verdict against his wife Jane. The circuit court denied the motion.

Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999). Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge "should not be required to guess as to what the

jury sought to render." Prego v. Hobart, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985). However, it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found. Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E. 2d 308, 310 (1967). Nevertheless, it is well settled in South Carolina that claims for personal injuries and for loss of consortium are separate and distinct. Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984). Thus, a judgment for the defendant in one action does not automatically bar recovery in the other action. Id.; Priester v. Southern Ry. Co., 151 S.C. 433, 149 S.E. 226 (1929); Ryder v. Jefferson Hotel Co., 121 S.C. 72, 113 S.E. 474 (1922)); see also Burroughs, 352 S.C. at 405, 574 S.E.2d at 227 (claims for personal injury and loss of consortium are separate and distinct, not derivative of each other, and each litigant is entitled to a verdict based on the law and the evidence). "Although loss of consortium is an independent action, case law has held the right of action does not accrue until the loss of the services, society and companionship of the spouse has actually occurred, which has been defined as the point when the spouse sustained the injuries." Stewart v. State Farm Mut. Auto Ins. Co., 341 S.C. 143, 156, 533 S.E.2d 597, 604 (Ct. App. 2000).

The case of Craven v. Cunningham , 292 S.C. 441, 357 S.E.2d 23 (1987) presents facts similar to the instant case. Mr. Craven was injured in an automobile accident caused by Cunningham. Mr. Craven sued to recover for his personal injuries while Mrs. Craven sued to recover for loss of consortium "based on Mr. Craven's inability to perform certain household chores, and for assistance she provided in carrying her husband to the chiropractic sessions." The jury awarded Mr. Craven $6,100 actual damages, but "denied Mrs. Craven damages in her suit." On appeal the supreme court held that the "extent of Mr. Craven's accident-related injuries and post-accident deterioration of the marriage relationship were contested throughout the trial." Thus, the court concluded it was not inconsistent for the jury to award damages to Mr. Craven but not to Mrs. Craven. Id. at 442-43, 357 S.E.2d at 24-25.

In the case of Haskins v. Fairfield Electric Cooperative, 283 S.C. 229, 321 S.E. 2d 185 (Ct. App. 1984), overruled on other grounds by O'Neal v. Bowles,

314 S.C. 525, 431 S.E.2d 555 (1993), the jury awarded the husband $30,000 for injuries he sustained in an electrical burn accident, but found the wife "was due no money" on her loss of consortium claim. This court reversed the circuit court's denial of the wife's motion for a new trial on damages only, holding "[i]n Mrs. Haskins' lawsuit, the jury did not find for [the cooperative] , and against Mrs. Haskins; rather, the jury merely found she was due no money. By not specifically finding against the cooperative, it is apparent the jury found for Mrs. Haskins on the issue of liability but awarded no damages." This court further held that inasmuch as both lawsuits arose out of the same factual situation "and the record supports the claim the wife had suffered damages, it is error for the trial judge to refuse to grant a new trial [to the wife] on the issue of the wife's damages." Id. at 237, 321 S.E.2d at 190-91.

Also instructive is the case of Guinn v. Millard Truck Lines, Inc., 134 N.W.2d 549, 555-558 (Iowa 1965). There the wife and the minor child were involved in an automobile accident. The wife, minor child and husband each brought a claim against the truck company and driver. The wife and minor child sought damages for personal injuries, the husband sued for property damages and medical expenses. The jury returned a verdict in favor of the wife and minor child on their claims, and against the husband on his claim. The trucking company and driver appealed arguing the verdicts were inconsistent and therefore the verdict in favor of the wife should be reversed. The Iowa supreme court held that the verdicts in this case were not irreconcilable. The court found that the primary issues in this case were the negligence of the truck driver, and the contributory negligence of the wife. The court found that the jury's verdict for the wife indicted that the jury determined that the truck driver and company were negligent. The court determined that the denial of recovery to the husband was based on his damage claim, and not on the liability issue. The court found that the jury had settled the question of liability fairly and upon sufficient evidence, and therefore, the obvious error in the case was the failure of the jury to award the husband damages. The court rationalized:

> [T]hat the issue of the [husband's] damages was so disassociated from other questions that in the interest of justice [the jury's]

> determination of the [wife's and daughter's] causes should stand. [T]o decide that the jury was not aware the issues because it refused to grant [husband's] damages seems unjust and needless and penalizes the truly innocent parties.

In this case, the jury decided the question of Cleary's liability to both Daves and Jane fairly and upon sufficient facts. The jury's verdict for Daves clearly implies that it found Cleary negligent and there is abundant evidence to support that finding. The error Cleary claims the trial judge made was in not affording him a new trial on the jury's award to Daves because a verdict for Daves is inconsistent with the jury's finding that Cleary is not liable for Jane's loss of consortium claim. Under the facts of this case, the jury could have found sufficient evidence to have awarded Jane damages, if they had believed her testimony. The jury obviously rejected her testimony, as was theur prerogative. See Craven, 292 S.C. at 443, 357 S.E.2d at 25 ("The credibility of witnesses is for the triers of fact"). Unlike the jury in the Haskins v. Fairfield Electric case, it is clear in this matter that when the issue of Jane's entitlement to an award was resubmitted to the jury, the jury understood that it could not find Cleary was liable to Jane and not award Jane damages.[3]

Therefore, we hold the verdicts in this case are not irreconcilably inconsistent such that Cleary is entitled to a new trial. Courts must sustain verdicts when a logical reason for reconciling them can be found. Rhodes v. Winn-Dixie Greenville, Inc., supra. A jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention. New York Carpet World v. Houston, 292 S.C. 101, 103, 354 S.E.2d 924, 925 (Ct. App. 1987).

[3] We hasten to observe that this case should be distinguished from the case where the jury awards loss of consortium damages to a spouse, but denies damages to the allegedly injured party. In such a case, a new trial is required. See 41 Am. Jur. 2d Husband and Wife § 258 (1995) citing Smith v. Ridgeway Chemicals, Inc., 302 S.C. 303, 395 S.E.2d 742 (1990) ("Generally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature.")

CONCLUSION

Based on the foregoing, the rulings by the circuit court and jury's verdicts are

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Carlos Miguel Gill, Appellant.

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

Opinion No. 3656
Heard April 10, 2003 – Filed June 23, 2003

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

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

PER CURIAM: Carlos M. Gill appeals his convictions for distribution of crack cocaine, distribution of crack cocaine within proximity of a school, and conspiracy to distribute crack cocaine. He argues the trial court (1) lacked subject matter jurisdiction on two of the charges because the indictments failed to allege that he "knowingly" committed the offenses and (2) erred in finding he waived his right to have an attorney represent him at trial. We affirm.

BACKGROUND

Undercover police officer William Graham, accompanied by Cora Lee Neil, an acquaintance of Gill's, made a controlled purchase of $40 worth of crack cocaine from Gill. The purchase was video and audio taped and occurred approximately 670 feet from an elementary school. Gill was not represented by counsel at trial. He was convicted as charged, sentenced to twenty-five years imprisonment and a $50,000 fine for distribution of crack cocaine; fifteen years and a $10,000 fine for distribution within proximity of a school; and five years for conspiracy, with all sentences to run concurrently.

LAW/ANALYSIS

I. SUBJECT MATTER JURISDICTION

Gill argues the trial court lacked subject matter jurisdiction to try him on the charges of distribution and distribution within the proximity of a school because the indictments failed to allege he "knowingly" committed the acts. We disagree.

Gill's indictment for distribution of crack cocaine alleged that he "did distribute, dispense, or deliver a quantity of crack cocaine . . . or did otherwise aid, abet, attempt, or conspire to distribute, dispense, or deliver crack cocaine, all in violation of Section 44-53-375. . . ." Section 44-53-375

of the South Carolina Code provides that "[a] person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver ice, crank, or crack cocaine, in violation of the provisions of Section 44-53-370, is guilty of a felony." S.C. Code Ann. § 44-53-375(B) (2002).

The indictment for distribution within proximity of a school provided that Gill "did unlawfully distribute a controlled substance, . . . to wit: crack cocaine, within a one-half mile radius of the grounds of York One Academy, a public school located in the city of York, South Carolina, . . . all in violation of Section 44-53-445. . . ." Section 44-53-445 of the South Carolina Code provides it is a separate criminal offense to "distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school. . . ." S.C. Code Ann. § 44-53-445(A) (2002).

Questions regarding subject matter jurisdiction may be raised at any time. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998); State v. Williams, 346 S.C. 424, 431, 552 S.E.2d 54, 58 (Ct. App. 2001). A trial court acquires subject matter jurisdiction over a criminal matter where "there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser included offense of the crime charged in the indictment." State v. Primus, 349 S.C. 576, 579, 564 S.E.2d 103, 105 (2002); State v. Lynch, 344 S.C. 635, 639, 545 S.E.2d 511, 513 (2001); Carter, 329 S.C. at 362, 495 S.E.2d at 777.

> An indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the

> necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.

Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) (citations omitted); Williams, 346 S.C. at 431-32, 552 S.E.2d at 58; S.C. Code Ann § 17-19-20 (2003).

The key question in the underlying case is whether the mens rea element of the crime of distribution of crack cocaine must be alleged in the indictment to confer subject matter jurisdiction. In State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990), our supreme court considered whether a trial court erred in charging the jury regarding the mental state necessary to be proved for conviction of certain crimes. The Ferguson court noted that the required mental state to be proven by the State on a certain offense may include purpose or knowledge. Id. at 271, 395 S.E.2d at 183. The court then noted the legislature could make an act or omission a crime "regardless of fault," or could make a particular crime a strict liability crime. Id. at 271-72, 395 S.E.2d at 183. Reviewing the trial court's jury instructions regarding the mental element of distribution of cocaine and the legislative intent behind section 44-53-370, the court held distribution was not a strict liability crime and the State was required to prove the defendant was at least criminally negligent. Id. at 272-73, 395 S.E.2d at 184.

Two recent cases have also discussed the elements of distribution of crack cocaine. In State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996), this court reviewed whether a variance in the proof and the allegations in an indictment for distribution of crack cocaine warranted a directed verdict in favor of the defendant. We noted as follows:

> The essential elements of the offense of distribution of crack cocaine which the court charged the jury the State was required to prove were: (1) Watts had actual control, or the right to exercise control over the crack cocaine; (2) he knowingly distributed or delivered the crack cocaine; (3) the substance upon analysis was, in fact, crack cocaine; and (4) the offense occurred

> in Greenwood County. See S.C. Code Ann. § 44-53-375 (Supp. 1994). The charge of distribution of crack cocaine within one-half mile of a school required the same proof with an additional element that the distribution occurred within a one-half mile radius of the grounds of an elementary, middle, or secondary school. See S.C. Code Ann. § 44-53-445 (Supp. 1994).

Id. at 168, 467 S.E.2d at 278. Because the indictment in Watts listed the wrong accomplice, but the State submitted proof regarding the correct accomplice and all elements of the crime, we held there was no material variance, the listed co-defendant was mere surplusage, and the defendant was not entitled to a directed verdict. Id.

More recently in Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), our state supreme court addressed whether the trial court lacked subject matter jurisdiction over a charge of distribution within proximity of a school where the indictment alleged the distribution occurred near a daycare center. The court noted:

> To prove distribution of crack cocaine under [S.C. Code Ann. § 44-53-445 (Supp. 1992)], the State must establish the following elements: (1) the defendant had actual control, or the right to exercise control over the crack cocaine; (2) he knowingly distributed or delivered the crack cocaine; (3) the substance upon analysis was, in fact, crack cocaine; and (4) the distribution occurred within a one-half mile radius of the grounds of an elementary, middle, secondary or vocational school; public playground or park; or college or university. See id.; State v. Watts, 321 S.C. 158, 168, 467 S.E.2d 272, 278 (Ct. App. 1996).

Id. at 347-48, 540 S.E.2d at 849. Because daycare centers were not listed in the statute by the legislature, our supreme court held the indictment failed to include a necessary element of the offense and the trial court did not have jurisdiction over the matter. Id. at 349-50, 540 S.E.2d at 850.

In the underlying case, Gill's indictment for distribution alleged that on February 1, 2000, he distributed crack cocaine or aided, abetted, attempted or conspired to distribute crack cocaine in violation of Section 44-53-375. His indictment for the proximity charge alleged Gill distributed crack cocaine within a one-half mile radius of York One Academy, a South Carolina public school, in violation of Section 44-53-445 on the same date. Both indictments listed the elements of the crime found in the respective statutes. The indictments sufficiently informed Gill he had to defend against charges of distribution of crack cocaine and distribution near York One Academy on February 1, 2000. Clearly, the indictments were sufficient to inform Gill about the charges he faced and what he must defend against.

With regard to Gill's allegations that the indictments must allege that he "knowingly" distributed the drugs, we note neither Section 44-53-375 nor Section 44-53-445 includes "knowingly" as an element of the crime. Although Ferguson, Watts, and Brown list "knowingly" as an element the State must prove for the crime of distribution, none of these cases addressed whether the "knowingly" element must be alleged in the indictment in order to convey subject matter jurisdiction. Upon closer scrutiny, we find they can be read to mean that "knowingly" is merely an element the State must prove to obtain a conviction. If the General Assembly intended a mens rea element in the crimes of distribution and distribution within proximity of a school to be necessary to convey jurisdiction, the requirement would have been listed in the statute. Accordingly, reading the indictments and statutes as a whole, we find the indictments contained the elements necessary to convey jurisdiction, and Gill was sufficiently apprised of the crimes against him.

II. WAIVER OF ATTORNEY

Gill argues the trial court erred in finding he waived his right to an attorney and in failing to inquire whether he qualified for a public defender. We disagree.

Gill applied for appointment of a public defender on April 17, 2000, while he was free on bond for the underlying charges. Because Gill was gainfully employed at the time, he was rejected as non-indigent. Gill

repeatedly assured the assistant solicitor that he intended to hire a private attorney, but failed to do so. Gill also failed to appear for a court date and was incarcerated pursuant to a bench warrant on July 26, 2000.

On August 11, 2000, a hearing was held before the trial court concerning Gill's lack of representation. The assistant solicitor stated she wanted an attorney on the other side of the case and informed the court that she had encouraged Gill to fill out another application for a public defender. The trial judge informed Gill that his trial date was August 21, 2000, and inquired whether Gill would like to apply for a public defender. The following exchange then occurred:

> Mr. Gill: My girlfriend, I had a visit yesterday. Hopefully, everything going all right. She was supposed to meet with him today. I told [Assistant Solicitor] I would get back with her sometime and let her know. I supposed to be getting Stacy Lewis, so when I call her today, I'll know something for sure.
>
> The Court: All right. You're up for trial with or without an attorney the week of the twenty-first of this month. We're not going to put off the trial for you to get a lawyer. You've either got to get one or – you haven't applied for a public defender, so, we can't appoint you one. But we can't keep rocking along without a trial being disposed of. Do you understand that?
>
> Mr. Gill: Yes sir.
>
> The Court: Do you have any questions?
>
> Mr. Gill: No sir.

Because the State was trying other cases, Gill's case was not called the week of August 21, 2000. Gill requested a hearing before the trial judge on August 24, 2000, to discuss whether the bench warrant against him should have been issued. During the hearing, the assistant solicitor expressed her

concern that Gill still did not have representation. Gill told the trial judge he had $800 of the $1,000 needed to retain Stacy Lewis as an attorney, but he could not earn the remaining money if the trial judge did not allow him out on bond so he could return to work. The trial court refused to withdraw the bench warrant and free Gill.

Gill's trial began September 12, 2000. Before the trial began, Gill informed the trial judge that the assistant solicitor prevented him from getting an attorney, even though Gill's family had the money to pay Lewis. The trial judge called attorney Lewis on the speaker telephone to determine whether Gill had actually retained his services. Lewis denied that he represented Gill. He explained that Gill's girlfriend was supposed to bring a retainer fee by 3:00 the previous afternoon, but she failed to do so until after 3:30, when Lewis had left the office. Lewis stated he had "had it with them," and admitted the assistant solicitor informed him the trial judge would not likely grant a continuance in the case because Gill had been informed to be prepared for trial with or without an attorney. Noting that Gill had "plenty of time" in which to retain counsel, the trial judge informed Gill that his trial would proceed without an attorney, finding as follows:

> I find that the Court and the solicitor's office both ha[ve] done all possible to assist and urge Mr. Gill to obtain counsel and he has not so done. I find no showing why he has not retained counsel other than he just hadn't chose[n] to pay him according to what Mr. Lewis' comments were, so I find that he has waived his right to counsel and he is to proceed to trial without an attorney.

During the trial, the court further noted that:

> The court has after due deliberation prior to commencing the trial made a conscious decision not to appoint the public defender or anyone else to assist Mr. Gill as is sometimes done in cases of this type. The court did not want to put counsel in that position and the court finds there is no way any counsel could be prepared to do, to appoint counsel under these circumstances is somewhat

> inconsistent with finding that Mr. Gill has waived his right to counsel.

Gill complained that he was being denied his rights, that he needed an attorney, and that his family had the money to hire one for him.

The court proceeded with the trial. Gill continued to protest his lack of representation and refused to participate in jury selection or opening statements. After Gill questioned the judge regarding his rights, the judge informed the jury that Gill was given the right to get an attorney. Gill continued to object that his rights had been violated and he had not been given an attorney throughout the trial. At one point, Gill interrupted Neil's testimony to state that she smokes crack. He then complained the court was "railroading" him because the court failed to appoint a public defender to defend him, and he requested to be taken out of the courtroom into the holding cell. The judge allowed Gill to be taken to the holding cell, and he admonished the jury not to consider his absence against him in any manner. The trial continued with the State calling three more witnesses while Gill was in the holding cell. After the State rested, Gill was brought back into the courtroom and chose not to present any evidence. During his closing argument, Gill continued to complain that the court had "taken" all his rights away by preventing him from getting an attorney, despite the fact that his family had the money to hire one.

The Sixth Amendment guarantees criminal defendants a right to counsel. U.S. Const. amend. VI.; Stevenson v. State, 337 S.C. 23, 26, 522 S.E.2d 343, 344 (1999). This right may be waived. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). A waiver may be inferred from the defendant's actions. State v. Cain, 277 S.C. 210, 210-11, 284 S.E.2d 779 (1981).

In State v. Jacobs, our supreme court considered whether a criminal defendant waived his right to counsel through his conduct rather than by express waiver. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978). In that case, Ray Jacobs surrendered himself on May 23, 1977, pursuant to an arrest warrant for possession and sale of marijuana. The trial court found him non-

indigent and advised him to hire an attorney. On several occasions, the court urged Jacobs to retain counsel and continued the case at least once because Jacobs had not yet done so. At one point prior to trial, Jacobs informed the court he had counsel, but the record did not reveal the accuracy of this claim. Jacobs' trial was held on June 2. Jacobs appeared without counsel, but informed the court that his brother was supposed to bring counsel and that he had been waiting on him to make the arrangements. The court offered to get the attorney into court, but Jacobs did not provide a name or a time when he expected to have retained counsel. The court then ruled Jacobs had waived his right to counsel and asked a public defender to sit with him to offer advice and assistance. Id. at 127, 245 S.E.2d at 607. On appeal, our supreme court held Jacobs had been granted "a reasonable time in which to retain counsel and . . . did not make a sufficient showing of reasons for his failure to have counsel present." Id. at 128, 245 S.E.2d at 608. Thus, the court reasoned, Jacobs had, "by his conduct" waived his right to counsel. Id. Therefore, the court refused to consider the adequacy of the assistance provided him by the public defender who sat with him during the trial. Id.

In State v. Cain, Larry Cain was tried in absentia and without counsel for driving under the influence, third offense. Cain, 277 S.C. 210, 284 S.E.2d 779 (1981). On appeal from his conviction, Cain argued the trial court could not infer a valid waiver of his right to counsel by his failure to appear at trial. Our supreme court disagreed, noting Cain was released on a general appearance bond and was represented by counsel at a preliminary hearing and that both Cain and his counsel knew about the upcoming trial, but failed to appear. Id. at 210-11, 284 S.E.2d at 779. The court held Cain's waiver of counsel was inferable by his failure to fulfill his appearance bond conditions and his failure to keep in contact with his counsel. Id.

In the present case, Gill repeatedly assured the trial judge that either he or his family had the money to retain counsel. Even when the trial judge inquired whether he wanted to apply for a public defender, Gill continued to claim that he intended to hire private counsel. At two pre-trial hearings, the State and the trial court discussed their concerns regarding Gill's lack of counsel. However, between Gill's April 17, 2000 arrest and his September 2000 trial, Gill failed to obtain counsel. Although Gill never

expressly waived his right to counsel, the trial court found it did all it could to urge Gill to obtain counsel. Gill was allowed a reasonable time in which to hire counsel. Based on Gill's actions, we find a waiver of counsel may be inferred. Id.; Jacobs, 271 S.C. at 128, 245 S.E.2d at 608.

AFFIRMED.

STILWELL and HOWARD, JJ. and STROM, Acting Judge, concur.