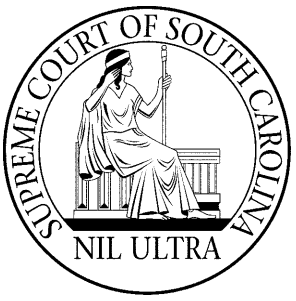

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 14, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of R. Ryan Breckenridge, Respondent.

Opinion No. 26515
Submitted June 16, 2008 – Filed July 14, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of Law Offices of Desa Ballard, P.A., of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or a definite suspension not to exceed thirty (30) days. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a thirty (30) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent admits that, as a result of his failure to properly maintain his trust account and to safeguard client property, several non-sufficient fund (NSF) reports were filed with ODC during a six month period of time. During ODC's investigation of the NSF reports, respondent admits that he failed to insure that funds were properly credited to his trust account and, as a consequence, a check was issued which resulted in an additional NSF report to ODC. Respondent represents the account is presently reconciled and that no clients were harmed. ODC does not dispute these assertions.

Respondent asserts that he is aware of the "good funds rule." Further, he is aware of the importance of verifying the availability of funds prior to disbursement.

Respondent admits that, as a result of his failure to fully supervise his staff, a staff member was able to take funds from the firm. Respondent has filed criminal charges against the staff member and has replaced the missing funds.

Finally, respondent admits that he failed to insure that a mobile home title was properly transferred to his client (the buyer) at closing and that he failed to communicate with his client for an extended period of time. Respondent represents the title to the mobile home has been transferred to his client.

Respondent has not been previously cautioned or sanctioned for misconduct by the Commission on Lawyer Conduct or its predecessor, the Board of Commissioners on Grievances and Discipline.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent

representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall promptly comply with reasonable requests for information); Rule 5.3(b) (lawyer having direct supervisory authority over non-lawyer employee shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); and Rule 1.15 (lawyer shall safeguard client property). In addition, respondent admits he violated the recordkeeping provisions of Rule 417, SCACR. Finally, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We accept the Agreement and definitely suspend respondent from the practice of law for a thirty (30) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James T. Feldman, Respondent.

Opinion No. 26516
Submitted June 17, 2008 – Filed July 14, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Stephanie Nichole Weissenstein, of Law Offices of Desa Ballard, P.A., of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or a definite suspension not to exceed sixty (60) days. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a thirty (30) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent admits that, on or about January 12, 2006, a check was presented against his trust account at First Citizens Bank and Trust. At the time of presentment, the trust account lacked sufficient funds to honor the check because respondent had failed to insure that deposits associated with closings had been properly credited to the account. Respondent admits that his reconciliation of the account was not current when the check was reported for non-sufficient funds.

Further, respondent admits that, on or about November 5, 2007, a check was presented against his Horry County State Bank trust account. Respondent asserts that, at the time of presentment, the trust account lacked sufficient funds to honor the check because he had failed to insure that a correlating deposit had been properly credited to the account.

Respondent represents he is now compliant with Rule 417, SCACR, and that his reconciliations are current.

In 2003, respondent was issued a letter of caution citing Rule 1.15, RPC, Rule 407, SCACR.

LAW

Respondent admits that by his misconduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall safeguard client property; lawyer shall not disburse funds from an account containing funds of more than one client unless the funds to be disbursed have been deposited in the account and are collected). In addition, respondent admits he violated the recordkeeping provisions of Rule 417, SCACR. Finally, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We accept the Agreement and definitely suspend respondent from the practice of law for a thirty (30) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

MRI at Belfair, LLC, Appellant,

v.

South Carolina Department of Health and Environmental Control and Coastal Carolina Medical Center, Respondents.

Appeal from the State of South Carolina
Board of Health and Environmental Control

Opinion No. 26517
Heard February 7, 2008 – Filed July 14, 2008

REVERSED AND REMANDED

M. Elizabeth Crum, A. Victor Rawl, Jr., and Ariail B. Kirk, all of McNair Law Firm, of Columbia, for Appellant.

Nancy S. Layman and Ashley C. Biggers, both of S.C. Department of Health and Environmental Control, of Columbia; Stuart M. Andrews, Jr., Travis Dayhuff, and Jennifer I. Cooke, all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Respondents.

JUSTICE PLEICONES: This appeal arises from an application for a certificate of need ("CON") for a fixed magnetic resonance imaging ("MRI") unit to be located at Coastal Carolina Medical Center ("CCMC" or "Hospital") in Jasper County. DHEC granted a CON to CCMC, and MRI at Belfair ("appellant") requested a contested case hearing before the Administrative Law Court ("ALC"). The ALC upheld the decision to grant the CON, and the South Carolina Board of Health and Environmental Control ("Board") affirmed the ALC order. Appellant appealed the Board's order to the Court of Appeals, and we certified the appeal pursuant to Rule 204, SCACR. We reverse and remand.

FACTS

In 2004, CCMC submitted an application for a CON to DHEC pursuant to the 2003 State Health Plan ("Plan").[1] CCMC sought to provide MRI services at the Hospital's forty-one bed acute care facility in Hardeeville. CCMC opened in 2004 and provides medical care, including an emergency room, twenty-four hours a day, seven days a week. The Hospital is located near Interstate 95, and its primary service area encompasses Jasper and Beaufort Counties.

Appellant is a limited liability company owned and operated by Dr. Joseph Borelli, Jr., and it is a free-standing, mobile MRI facility. Appellant provides MRI services in Bluffton, which is in Beaufort County, located approximately 13.8 miles from CCMC. Dr. Borelli is the sole physician who reads the MRI scans, and appellant is open for business from 7:00 a.m. to 6:00 p.m., Monday through Friday.

[1] The State Health Plan is required by the South Carolina Certificate of Need and Health Facilities Licensure Act, S.C. Code Ann. §§ 44-7-110, *et seq.* (2002) ("CON Act"). The Plan contains specific standards and information for health care facilities and health care equipment, and it must be prepared and presented for approval to the Board at least once every two years. The 2003 State Health Plan governed CCMC's CON application.

After CCMC filed its application and DHEC began its review, appellant opposed the grant of a CON to CCMC. DHEC approved CCMC's CON application to provide MRI services to its inpatients, outpatients, and emergency patients.

Thereafter, appellant requested a contested case hearing before the ALC, naming DHEC and CCMC as respondents. Appellant argued that the purposes of the CON Act would be best served by CCMC providing MRI services through a shared arrangement of either mobile MRI services, an ownership sharing arrangement, or a transfer agreement, none of which had to be with appellant. CCMC contended that because it was a hospital, it needed MRI accessibility twenty-four hours a day, seven days a week.

Prior to the ALC hearing, CCMC and appellant filed motions for summary judgment. CCMC argued that because the Plan standards provided that hospitals, whenever possible, should have at least one MRI unit available for the diagnosis of inpatients, outpatients, and emergency patients, CCMC should be granted the CON as a matter of law. Appellant's motion for summary judgment was based on the assertion that Plan standards for MRI services and equipment did not comply with § 44-7-180(B) and that the DHEC exceeded its statutory authority by relying on the MRI Plan standards. The ALC denied appellant's motion but granted partial summary judgment to CCMC, ruling that the MRI standards under the Plan did not require CCMC to establish compliance with project review criteria.[2] The case proceeded to trial to determine what constituted "available" under the MRI Plan standard.

After a hearing on the merits, the ALC affirmed DHEC's decision to grant the CON. The ALC ruled that for MRI services to be sufficiently available to CCMC, the Hospital would need a fixed, in-house MRI unit that

[2] Section 44-7-180(B)(4) requires the State Health Plan to include a general statement as to the project review criteria considered most important in evaluating CON applications for each type of facility, service, and equipment. The four project review criteria identified in the 2003 Plan for MRI facilities were: (a) community need documentation; (b) distribution (accessibility); (c) acceptability; and (d) cost containment.

would be accessible twenty-four hours a day, seven days a week. Appellant appealed to the Board, and the Board affirmed and incorporated the ALC decision in its order.

ISSUES

I. Do the MRI standards found in the Plan violate the CON Act, thereby causing the Board to exceed its statutory authority in approving the CON awarded to CCMC?

II. Is the Board's determination that an "available" MRI for CCMC could only be achieved by an onsite MRI facility arbitrary and capricious or otherwise affected by an abuse of discretion?

III. Is the finding that the Plan standards did not require CCMC to establish the project review criteria violative of § 44-7-210?

ANALYSIS

This appeal is governed by the Adminstrative Procedures Act ("APA"), S.C. Code Ann §§ 1-23-310, *et seq.* (Supp. 2005). We may reverse or modify the Board's order if appellant's substantial rights have been prejudiced because the administrative decisions are: a) in violation of constitutional or statutory provisions; b) in excess of the statutory authority of the agency; c) made upon unlawful procedure; d) affected by other error of law; e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(5). As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence. Roper Hosp. v. Bd. of S.C. DHEC, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991).

I. State Health Plan

Appellant challenges the validity of the standards for MRI services set forth in the Plan. First, appellant argues that the CON award violates § 44-7-180(B)(2) and (3) because the Plan's standards for MRI services do not contain projections of need or standards of distribution. We disagree.[3]

Section 44-7-180(B)(2) and (3) of the CON Act requires the State Health Plan, at a minimum, to include:

> (2) projections of need for additional health care facilities, beds, health services, and equipment;
> (3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper planning of health care facilities;

S.C. Code Ann. § 44-7-180(B).

The 2003 State Health Plan sets forth three standards for MRI distribution:

> 1) Each hospital should have at least one MRI unit available for diagnosis of emergency patients, inpatients and outpatients.
> 2) In order to promote cost-effectiveness, the use of shared mobile MRI units should be considered.
> 3) The applicant agrees in writing to provide the Department utilization data on the operation of the MRI service.

[3] Appellant's first argument is not specific to CCMC's CON application. Appellant essentially asserts that because the 2003 Plan violated the CON Act, no CON for an MRI could have been lawfully awarded to any applicant.

Although the Plan does not give specific projections of need or standards of distribution in terms that track the exact statutory language, the Plan does not violate § 44-7-180. Clearly, the first MRI standard that *each* hospital should have at least one MRI unit available satisfies the statute's directive for projections of need when a hospital applies for a CON of an MRI. The second MRI standard also provides guidance for distribution and utilization of existing MRI resources. The Plan satisfies the requirements of § 44-7-180(B)(2) and (3) by unmistakably stating the need and guiding distribution for MRI units in hospitals. *See* Bursey v. S.C. DHEC, 369 S.C. 176, 631 S.E.2d 899(2006) (cardinal rule of statutory construction is to ascertain and effectuate legislative intent). Accordingly, the Plan is not violative of the CON Act, and the Board did not exceed its statutory authority in granting the CON in light of the Plan standards.[4]

Appellant also argues that the Board's order should be reversed because there is no statutory basis to treat hospitals differently from other health care facilities. We disagree.

Even though there is no specific provision in the CON Act that authorizes hospitals to be treated differently vis-à-vis standards of need for MRI services, the ability of the Plan to differentiate between different types of medical providers is essential to the CON process. *See* S.C. Code Ann. § 44-7-150 (department may adopt substantive and procedural regulations considered necessary by the department and approved by the board to carry out the department's licensure and CON duties). Furthermore, appellant's contention that first Plan standard results in hospitals being treated differently from other health care facilities is misguided. The first Plan standard only satisfies the showing of need for hospitals, while other health care facilities will have to document need separately. Nothing in the CON Act prevents

[4] Appellant also claims that the Board should have made factual findings regarding whether the MRI standards contained in the Plan comply with § 44-7-180(B)(2) and (3). The issue whether the Plan standards satisfy the statutory requirements is a legal conclusion based on statutory interpretation principles. Thus, no factual findings are necessary to determine compliance with § 44-7-180(B).

such a distinction. *See* S.C. Code Ann. § 44-7-130 (containing separate definitions for "hospital" and "health care facility"); S.C. Code Ann. § 44-7-150.

II. Determination of "Available"

The issue addressed at trial was whether CCMC had access to an "available" mobile MRI facility so that a CON for an onsite MRI would not be warranted under the Plan standards. Appellant argues that the finding of the Board that "available," in the context of MRI service for a hospital, meant an onsite MRI unit was arbitrary, capricious, and clearly erroneous. We disagree.

CCMC presented testimony from Dr. Tricia Etheridge, CCMC's chief of staff, concerning the difficulties of transporting patients to an off-site MRI or other diagnostic facilities. In addition, Dr. Etheridge testified as to her concerns over the adequacy of the technology found in mobile MRI units. Dr. Dean Mesh, a radiologist at CCMC, also testified as to the necessity for an onsite MRI facility to handle patients from the Hospital's emergency room. The president and CEO of CCMC, Eric Deaton, also testified at length concerning the needs for around-the-clock MRI availability, especially in light of CCMC's proximity to I-95. Finally, CCMC presented an expert witness, Mark Richardson, who testified that a MRI facility open twenty-four hours a day, seven days a week, was in the best interests of CCMC's patients. Accordingly, substantial evidence exists to support the finding that an "available" MRI facility for CCMC's needs would require an onsite MRI facility that was accessible twenty-four hours a day, seven days a week.

III. Project Review Criteria

Appellant's final argument claiming that the Board exceeded its statutory authority in granting the CON involves S.C. Code Ann. § 44-7-210. Appellant argues the Board's finding that the Plan standards did not require

CCMC to establish the project review criteria[5] is violative of § 44-7-210. We agree.

> Section 44-7-210(C) provides, in relevant part:
>
> The department may not issue a Certificate of Need [CON] unless an application complies with the State Health Plan, Project Review Criteria, and other regulations. Based on project review criteria and other regulations, which must be identified by the department, the department may refuse to issue a Certificate of Need even if an application complies with the State Health Plan.

See also 24A S.C. Code Ann. Reg. 61-15 § 307.1 (Supp. 2005) (department may refuse to issue a CON even if an application is in compliance with the State Health Plan but is inconsistent with project review criteria or departmental regulations).

The Board determined that the first Plan standard for MRI services stating every hospital should have an available MRI unit meant that CCMC did not have to establish the project review criteria. This was error. Section 44-7-210(C) and the governing regulations are clear in establishing Plan standards and project review criteria as separate and distinct requirements that must be met as part of the CON application process. Because the Board held that CCMC did not have to prove compliance with the project review criteria by virtue of the first Plan standard, appellant was prohibited from presenting its case to challenge CCMC's compliance with the project review criteria. Again, CCMC's compliance with the project review criteria is an essential step in the CON process, and this prerequisite is independent of compliance with the State Health Plan. Accordingly, we remand this case to the ALC to determine whether CCMC's application for a fixed, in-house MRI unit satisfies the project review criteria identified in the Plan.

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[5] The Plan ranks the relative importance of project review criteria, as required by § 44-7-180(4), for MRI service as: (a) community need documentation; (b) distribution (accessibility); (c) acceptability; and (d) cost containment.

CONCLUSION

We hold that the Plan standards for MRI services are not violative of § 44-7-180. Additionally, the Board's conclusion that CCMC's need for an "available" MRI unit could only be met by a fixed, onsite MRI is supported by substantial evidence. However, the Board erred by finding compliance with the project review criteria did not have to be met in light of the Plan standards for MRI services. We reverse the CON award and remand for a determination on the sole issue whether CCMC's application complies with the project review criteria set forth in the Plan.

REVERSED AND REMANDED.
TOAL, C.J., MOORE, WALLER and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brendalee Ables, Petitioner,

v.

Michael Gladden, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Darlington County
Roger E. Henderson, Family Court Judge

Opinion No. 26518
Submitted April 1, 2008 – Refiled July 14, 2008

AFFIRMED IN PART AS MODIFIED;
REVERSED IN PART AND REMANDED

Holly Palmer Beeson, of Baker, Ravenel & Bender, of Columbia, for Petitioner.

Newton I. Howle, Jr., of Darlington, for Respondent.

JUSTICE WALLER: In 2005, petitioner Brendalee Ables filed the instant action against her former husband, respondent Michael Gladden, seeking reimbursement of medical expenses, health insurance premiums, educational expenses, work-related child care expenses, and a retroactive increase in child support. The family court awarded petitioner $305.69 in medical expenses, and a $300 reimbursement for a health insurance credit given to respondent between 2003 and 2005 when he had not actually maintained insurance coverage for the child. However, the family court denied petitioner's remaining requests primarily on the basis on untimeliness. The Court of Appeals affirmed, finding that the family court properly denied petitioner's claims based on laches. Ables v. Gladden, Op. No. 2006-UP-420 (S.C. Ct. App. filed Dec. 19, 2006). This Court granted petitioner's request for a writ of certiorari to review the Court of Appeals' decision.[1]

FACTS

In 1992, petitioner and respondent were divorced in Tokyo, Japan. The Japanese divorce decree awarded petitioner sole custody of the couple's daughter, who was born on March 29, 1987. Respondent was ordered to pay child support in the amount of $842 per month from June 1992 until August 1992; $667 per month from September 1992 until respondent separated from the military; and $378 per month thereafter. By 1993, respondent and petitioner had both returned to the United States. Respondent moved to North Carolina, and petitioner moved to South Carolina. Petitioner enrolled the child in private school in South Carolina.[2]

In 1994, a North Carolina court issued an order[3] which provided that respondent pay $46 per week in child support and provide health insurance

[1] Respondent has not filed a brief with the Court, and also did not file a brief at the Court of Appeals. He was, however, represented by private counsel at the family court level.

[2] Petitioner testified that she initially enrolled her daughter in private school because her daughter was used to a small student-teacher ratio from her Department of Defense schools in Japan, and the public schools had "much larger" classrooms.

[3] The order is entitled "Voluntary Support Agreement and Approval by Court." Petitioner is listed as the "Person Enforcing Support Obligation."

coverage for the child when "available at a reasonable cost." The order stated that health insurance "is defined to be reasonable in cost if it is employment related or other group insurance." In addition, the order provided that if respondent failed to obtain health insurance coverage, he would be liable for any medical expenses incurred.

In 1997, petitioner sent a certified letter to respondent (who at that time lived in South Carolina) requesting payment for child support, out-of-pocket medical costs, daycare expenses, and educational expenses. Respondent signed for the letter but did not respond.

In 1998, the South Carolina Department of Social Services (DSS), on behalf of petitioner, filed a Notice of Registration of the Japanese Divorce Decree in the South Carolina family court. The family court, however, ruled the 1994 North Carolina Order was the proper order to register in South Carolina. The court ordered respondent to pay the $46 per week, plus another $10 per week for arrears.

Several other orders relating to the enforcement of child support were thereafter issued by the family court, including orders which increased and decreased the amount of support, set a weekly amount for arrearages, readjusted the method of payment for medical expenses, and garnished respondent's wages.

Specifically regarding medical expenses, the 2002 family court order stated the following:

> [Petitioner] provides health insurance at no cost. [Petitioner] will be responsible for the first $250.00 of non-covered medical expenses per calendar year. Additional expenses in excess of $250.00 will be prorated [between petitioner and respondent:] 73% by [respondent,] 27% by [petitioner]. [Petitioner] will provide proof of expenses within 10 days of being incurred. [Respondent] will have 30 days to pay the costs.

In 2005, respondent filed a motion to terminate ongoing support based upon the child reaching the age of majority. At all times between 1998 and

March 2005, petitioner had been represented by attorneys from DSS. At the March 30, 2005 hearing, petitioner raised issues regarding reimbursement for medical expenses, daycare expenses, and health insurance coverage. In its April 8, 2005 order, the family court found these issues were not properly raised because they were "not within the assignment or duties of" DSS. Nevertheless, the family court "reserved" the resolution of those issues "for a future hearing on her own," i.e., in a separate action brought by petitioner. The family court terminated ongoing child support as of March 29, 2005, because of the child turning 18, but ordered respondent to continue paying the $6,812.31 in arrears at a weekly rate of $101.79, until paid in full.

In June 2005, petitioner filed the instant action against respondent which specifically requested, *inter alia*: (1) a retroactive increase in child support for the period of time from 1998 until 2002 based on respondent's failure to report increases in salary; (2) reimbursement for various medical expenses, health insurance premiums, and work-related daycare expenses; and (3) increased child support from 2003 through 2005 based on an improper credit given to respondent for health care premiums.[4]

A hearing was held on October 18, 2005, at which petitioner claimed she was owed payments for various un-reimbursed medical, daycare and educational expenses incurred during the child's minority. With the exception of one medical expense for a root canal and an adjustment because of the health care credit improperly given to respondent, the family court denied as untimely petitioner's various requests for retroactive payments.

On appeal, the Court of Appeals held that "the record supports the family court's decision that laches" barred petitioner's claims. Specifically, the Court of Appeals noted petitioner "failed to bring any formal adjudicatory proceeding against [respondent] until 2005, despite believing [respondent] was responsible for expenses and support since 1994." The Court of Appeals

[4] We note that in petitioner's complaint, she asserted that she "consented to [respondent's] motion to file a new action to address the unresolved issues in the April 8, 2005 Order as well as other matters requested by [petitioner] in order to provide [respondent] with an opportunity to respond." Respondent admitted this allegation in his answer.

further found that petitioner's delay was unreasonable, in part because petitioner and respondent were "involved in multiple court proceedings between 1999 and 2005 regarding issues surrounding [respondent's] child support payments." Finally, the Court of Appeals found respondent would be prejudiced by petitioner's request for the "large amount" of $26,995.39.

ISSUES

1. In light of this Court's opinion in Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007), is laches no longer a viable defense when there is court order for child support?

2. Did the Court of Appeals err in finding petitioner's claims childcare and private school expenses were barred by the doctrine of laches?

3. Did the Court of Appeals err in not awarding petitioner $660 for the improper credit given to respondent for health insurance premiums?

DISCUSSION

Standard of Review

In appeals from the family court, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. E.g., Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). This broad scope of review does not, however, require the appellate court to disregard the findings of the family court. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

1. *Strickland v. Strickland*

In Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007), we held that laches is not a defense to a claim for the enforcement of an alimony

award. Petitioner argues that the ruling in Strickland logically extends to the enforcement of a child support order. We agree.[5]

Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Whether a claim is barred by laches is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." Id. at 198-99, 371 S.E.2d at 527-28.

In Hallums, this Court found that the doctrine of laches barred the mother's claim for retroactive child support. In that case, however, there had been no adjudicated divorce and no court-ordered child support. The mother first raised the issue of child support as a counterclaim, some 22 years after the father had first petitioned for a divorce, and at a time after the child had reached the age of majority.

In Strickland, however, the Court had before it a case which involved a family court order awarding alimony. The Court adopted the reasoning of Jefferson Pilot Life Ins. Co. v. Gum, 302 S.C. 8, 393 S.E.2d 180 (1990), which found where a court order fixed an obligation, the doctrine of laches could not be applied to undo the obligation. Exporting the Jefferson Pilot analysis to the alimony context, the Strickland Court stated the following:

> In our opinion, this Court's reasoning in Jefferson Pilot is equally applicable to a family court award of alimony. Although the equitable nature of laches generally comports with the family court's equitable jurisdiction in determining support and maintenance between former spouses, the concept of "inexcusable delay" in the laches defense is inconsistent with the judicial authority inherent in a court order. Because court orders awarding support and maintenance do not have an expiration

[5] We recognize the Court of Appeals was decided in December 2006, some eight months **before** this Court's decision in Strickland.

> date, allowing a party to avoid compliance based solely on the oblique notion of delay only serves to undermine the authority of the court. See also Stephens v. Hamrick, [358 S.E.2d 547, 549 (N.C. Ct. App. 1987)] (holding that the doctrine of laches does not bar the enforcement of a court order for child support because "the obligation to furnish support is continuous [and therefore] a lapse of time will not be a bar to commencement of an enforcement action."). Accordingly, we hold that laches is not a defense to a claim for the enforcement of an alimony award.

Strickland, 375 S.C. at 83-84, 650 S.E.2d at 469-70.

We agree with petitioner that the reasoning in Strickland and Jefferson Pilot should apply with equal force to cases involving a child support order. In Strickland, we cited a North Carolina case which involved a North Carolina mother trying to enforce a South Carolina child support order. See Stephens v. Hamrick, supra. The North Carolina Court of Appeals clearly held that because the child support obligation is continuous, the doctrine of laches does not apply to bar enforcement of a child support order. Id.; see also South Carolina Dep't of Soc. Servs. v. Lowman, 269 S.C. 41, 48, 236 S.E.2d 194, 196 (1977) (the duty of child support is a continuing obligation).

Accordingly, the doctrine of laches does not apply in the instant case to petitioner's claims for retroactive child support, health insurance premiums, and medical expenses.[6]

Although the Strickland Court disallowed laches in cases involving an alimony order, it nevertheless held that equitable estoppel could apply. The Court explained that equitable estoppel "appropriately balances principles of equity and judicial authority when the underlying facts of a case call into question the equity of enforcing a court order." Strickland, 375 S.C. at 84,

[6] Petitioner acknowledges that because her claims for daycare and educational expenses were never the subject of a prior court order, the Strickland analysis does not apply to those requests. She instead argues the Court of Appeals erred in applying the laches doctrine to those claims. See issue 2, *infra*.

650 S.E.2d at 470. The Court outlined the various elements of the estoppel claim as follows:

> The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Id. at 84-85, 650 S.E.2d at 470.

Petitioner asserts there is no evidence she should be equitably estopped from enforcing respondent's court-ordered obligations regarding health insurance premiums, medical expenses, and retroactive child support. We agree.

As evidenced by the numerous orders in the record, petitioner consistently pursued respondent for child support and medical expenses. Her claims go at least as far back as 1997 when she sent a certified letter to respondent demanding various expenses. The 1994 North Carolina order, which made respondent responsible for child support and health insurance/medical expenses, was registered in South Carolina in 1998. The record also reveals: (1) a 2002 order which set child support at $102 per week, plus $20 per week for arrears, and also set out the above-discussed formula for respondent's obligations regarding medical expenses; (2) a 2003 order which reduced the child support obligation to $62 per week, plus the $20 for arrears; and (3) a 2004 order which increased child support to $81.79 per week, plus $20 for arrears.

The evidence therefore is undeniable petitioner never made any assurances or representations to respondent that he was not responsible for the court-ordered obligations regarding child support and medical expenses. Thus, petitioner is not equitably estopped from asserting her claims regarding retroactive child support, health insurance, and medical expenses.

A. Retroactive Child Support

"The decision to order retroactive support rests within the sound discretion of the family court and should not be reversed absent an abuse of discretion by the family court." Thornton v. Thornton, 328 S.C. 96, 115, 492 S.E.2d 86, 96 (1997). Furthermore, the family court is "empowered to modify child support **upon a proper showing** of a change in either the child's needs or the supporting parent's financial ability." Henderson v. Henderson, 298 S.C. 190, 196, 379 S.E.2d 125, 129 (1989) (emphasis added). The party seeking the modification has the burden to show changed circumstances. Upchurch v. Upchurch, 367 S.C. 16, 26, 624 S.E.2d 643, 648 (2006).

Here, the family court relied on laches and therefore did not make a decision on the facts. In our opinion, the evidence presented by petitioner at the hearing simply does not support her claim for retroactive child support, and therefore, we affirm the denial of retroactive child support. Wooten v. Wooten, supra (in appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence).

Petitioner testified at the hearing that respondent was making at least ten percent more than his reported $910 per month between 1994 and 1998, and that when the child support was increased in 2002, his "income had significantly increased over the last time [she] received [a] child support increase." However, our review of the record reveals that these are assumptions made by petitioner which were not supported by any specific evidence.[7] Therefore, we find petitioner failed to carry her burden of proof

[7] Indeed, petitioner specifically stated the following at the hearing: "I'm asking the court to require [respondent] to provide the income information." She asserted she

for a retroactive increase in child support. Cf. Upchurch v. Upchurch, 367 S.C. at 26, 624 S.E.2d at 648 ("general testimony regarding increased expenses, without specific evidentiary support, is an insufficient showing of changed circumstances").

B. Health Insurance Premiums and Medical Expenses

Petitioner also claims she is entitled to $8,035.14 for un-reimbursed health insurance premiums and out-of-pocket medical expenses. It appears from the documentation provided by petitioner at the hearing that this sum primarily represents health care insurance premiums that were paid from 1994 though 2005. The only exception appears to be a dental expense related to a root canal for $668.75.

The family court ordered respondent to pay petitioner $305.69 of the root canal expense based on the formula set out in the 2002 order.[8] Curiously, petitioner has not, in any of the subsequent filings, even mentioned this award. Moreover, respondent has not submitted any filings at either appellate level, so this award is the law of the case. E.g., Ex parte Morris, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (an unappealed ruling is the law of the case).

Thus, the only remaining issue is whether petitioner is entitled to be reimbursed for monies spent for health insurance premiums. We find she is not. The 1994 North Carolina order specified that respondent was to provide health insurance coverage for the child when "available at a reasonable cost," and defined that to mean health insurance that "is employment related or other group insurance." Significantly, however, this order also provided that if respondent failed to obtain health insurance coverage, he would be liable for any medical expenses incurred. Given that there was never a court order in place that absolutely **required** respondent to pay for health insurance, petitioner cannot now claim she must be reimbursed for those costs.

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had "personal knowledge" regarding his income between March 2001 and May 2002, but presented no documentary proof of her claim.

[8] Petitioner was responsible for the first $250, and then respondent was responsible for 73% of the remainder.

In sum, we hold the doctrine of laches does not apply to petitioner's claims for retroactive child support and medical related expenses; therefore, it was error to bar these claims on that basis. Moreover, we find petitioner is not equitably estopped from pursuing these claims. However, on the merits, petitioner failed to carry her burden of proof that she was entitled to either a retroactive increase in child support or reimbursement for health care premiums paid between 1994 and 2005. Thus, the Court of Appeals' decision upholding the family court's denial of these particular claims is affirmed as modified.

2. Childcare and Private School Expenses

Petitioner next argues that as to her additional claims for childcare and private school expenses, the Court of Appeals erred in finding, on the merits, that laches bars these claims.[9]

Laches may be established if there is an unreasonable and unexplained delay in asserting a legal claim. Hallums v. Hallums, 296 S.C. at 198-99, 371 S.E.2d at 527-28. In order to prove the affirmative defense of laches, the burden is on respondent to establish (1) delay, (2) unreasonable delay, and (3) prejudice. Id. Additionally, "[t]he inquiry into the applicability of laches is highly fact-specific and each case must be judged by its own merits." Emery v. Smith, 361 S.C. 207, 216, 603 S.E.2d 598, 602 (Ct. App. 2004).

Petitioner asserts that her alleged delay in pursuing these claims was neither unreasonable nor unexplained. According to petitioner, she believed that DSS was seeking these expenses on her behalf throughout the time it was acting as her attorney for the child support enforcement actions. Upon learning from the family court at the March 30, 2005, hearing that she was unable to present these requests, petitioner retained private counsel and filed

[9] Unlike basic child support and medical expenses, the costs for childcare and private school were never the subject of a court order. Therefore, the Strickland analysis is not directly applicable, and a laches defense may apply.

the instant action on June 23, 2005.[10] Thus, petitioner maintains there was no delay, or at the very least, not an unexplained or unreasonable delay.

We agree. Although it appears these claims were not formally asserted in the family court prior to 2005, the record shows that at least as far back as 1997, petitioner was attempting to collect childcare and educational expenses. Cf. South Carolina Dep't of Soc. Servs. v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995) (where mother continually asked father to pay child support, no unreasonable delay established for laches). Moreover, the family court's April 2005 order reflects that petitioner believed DSS was in a capacity to pursue these claims for her, when it fact that agency was not. Thus, we reverse the Court of Appeals' holding that petitioner unreasonably delayed bringing a legal claim for the past childcare and educational expenses.

On the merits, the family court did not make any factual findings regarding petitioner's claims for expenses related to childcare and private school. See Rule 26(a), SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision."). As to the claim for private school expenses, the family court denied the request based on laches **and** the legal conclusion that "absent extremely unusual circumstances, this Court does not require non-custodial parents to pay for private school costs."

On the issue of private school tuition, we find our cases turn on the facts of each case, not necessarily "extremely unusual circumstances." See, e.g., Rabon v. Rabon, 288 S.C. 338, 342 S.E.2d 605 (1986) (where the Court ordered an increase in child support to cover private school costs after mother moved from Florence to Columbia and decided to enroll the four children at Heathwood Hall). Thus, the family court should evaluate this claim on the facts presented.

[10] As recounted in the Facts section, *supra*, the family court's April 18, 2005 order specifically stated that petitioner's other issues were "reserved" and would be addressed at a future hearing.

Accordingly, a remand is necessary on the issue of whether petitioner is entitled to be reimbursed for any portion of the childcare and private school expenses incurred during the child's minority.

3. Health Insurance Premium Credit

At the family court level, petitioner alleged respondent was credited for paying health insurance premiums between 2003 and 2005 when in fact he did not actually provide coverage for the child. The family court therefore found the following:

> According to the South Carolina Child Support Guidelines, if the credit for the insurance premium is removed for the period of time in question, [respondent] should have been paying $67.00 a week rather than the $62 he was actually paying. Sixty payments were made during this period, and [respondent] will therefore be required to reimburse [petitioner] $300.00.

Petitioner contends, however, that because respondent's child support obligation was adjusted by $44 per month, she should have received $11 back for the 60 weekly payments, for a total of $660.00.

We find the family court correctly calculated the amount. Although the child support worksheet shows that respondent was indeed credited with $44 for a health insurance premium, it does not necessarily follow that his total obligation was thereby reduced by the same amount. The Court of Appeals correctly noted that petitioner's claim did not at all reference the appropriate child support guidelines. See S.C. Ann. Regs. §§ 114-1710 & 114-4720 (Supp. 2007).

Because the family court correctly addressed this issue and the Court of Appeals affirmed, there is no error on this issue.

CONCLUSION

We affirm in part, as modified, the denial of petitioner's claims regarding retroactive child support, health insurance, and medical expenses. As to petitioner's claims for private school costs and childcare, we reverse

the decision that these claims are barred by laches and remand to the family court for a resolution on the merits. Finally, we affirm the Court of Appeals' holding that the family correctly calculated the award resulting from respondent being improperly credited with paying health insurance premiums between 2003 and 2005.

AFFIRMED IN PART AS MODIFIED; REVERSED IN PART AND REMANDED.

TOAL, C.J., MOORE, J., concur. PLEICONES, J., concurring in a separate opinion

JUSTICE PLEICONES: I concur in the result reached by the majority on the issue of child support, but I write separately because as I stated in Strickland, the defense of laches should not be precluded simply because of the existence of a continuing court order. Thus, I would affirm the family court's finding that laches bars petitioner's claims for health insurance premiums, medical expenses, and childcare/school expenses.

I agree with the majority's conclusion that petitioner did not meet her burden in proving she was entitled to retroactive child support. However, I would hold that laches and other equitable defenses may prevent a parent from collecting retroactive child support, even when interposed against an existing court order. I recognize that these equitable defenses should not apply, absent extraordinary circumstances, when enforcement of child support is sought on behalf of the minor child. *See* Garris v. Cook, 278 S.C. 622, 300 S.E.2d 483 (1983) (a parent's wrongful act should not prejudice the minor child's right to support).

I would affirm the Court of Appeals' opinion in its entirety.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael Light, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26519
Heard May 7, 2008 – Filed July 14, 2008

REVERSED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of the South Carolina Commission on Indigent Defense, of Columbia, for petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

JUSTICE MOORE: Petitioner was convicted of murder and grand larceny. He was sentenced to imprisonment terms of thirty years for murder and five years for grand larceny. The Court of Appeals affirmed. State v. Light, 363 S.C. 325, 610 S.E.2d 504 (Ct. App. 2005). We now reverse.

FACTS

Petitioner was arrested during a traffic stop in Texas. During the course of the arrest, Texas authorities discovered petitioner's girlfriend, Priscilla Davis (Davis), was missing, and questioned petitioner about her disappearance. Petitioner admitting killing Davis. In his statement, petitioner told Texas authorities that he emerged from the bathroom in his home to find Davis holding a long strand of brown hair and his .22 rifle.[1] Davis accused petitioner of having another woman in the house, which petitioner denied. He stated in a recorded statement:

> She went to acting a fool and called me a liar. And the only thing I could think of, I was – I tried to distract her. I remember swinging my left arm, I think it was, to get the rifle out of her hand. When I did, all I can tell you, it went off. Honestly, I didn't even think it hit her.
>
> Then she fell. I thought it might have just grazed her in the shoulder. So I ran out the back door to go get help because I don't have a telephone. I ran back to her and she wasn't breathing, and I just panicked. I didn't think nobody would believe me. So the only thing I did, I just put her in the trunk of the car; and I just took off. I just drove and kept driving.

[1]Petitioner always kept this rifle loaded.

The Texas Ranger who interviewed petitioner testified petitioner did not claim that Davis pointed the rifle at him or that she threatened to shoot him. He also testified petitioner later altered his story, admitting he took the rifle from Davis before it was fired. The Ranger testified petitioner told him "the rifle was in my hand when it went off, I will not deny that. I took it from her. It was either her or me. I could have run, like I told them; but I didn't really think about it." In his statement, petitioner stated they were standing face to face when the shooting occurred.

The State presented evidence from a firearms expert, who testified there was no gunshot residue around the entrance wound in Davis' chest.[2] The expert testified he believed the shot was consistent with a distant shot of about thirty to fifty inches. The State's pathologist testified the angle of the bullet wound through Davis' body made it likely Davis was sitting or kneeling when shot. He testified the wound was consistent with a purposeful shooting and inconsistent with an accidental shooting.

After the State finished its case in chief, the State argued petitioner was not entitled to a self-defense charge because there was no evidence petitioner was in danger of losing his life or of sustaining serious bodily injury. Petitioner argued that, at the time of the shooting, he was still "under the influence of the initial aggressive act he contends was committed by the victim." The trial judge delayed his ruling until after petitioner presented his case.

At trial, petitioner testified Davis had been acting jealous and following him for several weeks before the incident. Petitioner made this same claim in his earlier statement to police. He testified she told him that if she ever caught him with another woman, "it's going to be messy." Petitioner testified the morning of the incident[3] he left to get breakfast for Davis. After

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[2]Petitioner disposed of Davis' body in Alabama on his way to Texas. He led police to her body after he admitted his involvement in Davis' death.

[3]The night before, petitioner and Davis had been at a bar until approximately 3:30 a.m. There was testimony they were not arguing or

returning, he came out of the bathroom and found her holding a long brown hair[4] and his .22 rifle, stating she believed petitioner had another woman in the house. He testified:

> She was pointing [the gun] at me and screaming and hollering and accusing me as usual. I asked her, "What the heck is wrong with you, you know? There has . . . not been another woman in this house."
>
> She just kept on and on, screaming and screaming at me. I was afraid she was going to shoot me. So during the screaming -- and my living room is very small. Y'all have seen that. Between the two couches is where this happened.
>
> The only thing I remember, I did try -- I took my left hand to knock it away, try to push it away from me. Than [sic] after I jerked it away from her, I did stumble back several feet, you know, after jerking it. The weapon discharged but it was not intentionally [sic].
>
> Q. Was that in your hands?
>
> A. It was in my hands. I do not deny that.
>
> Q. And you pulled the trigger?

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fighting and were dancing to slow songs. There was also testimony that, when Davis and petitioner left, petitioner had Davis, who was crying, by the arm.

[4]The brown hair and the lubricant bottle that the hair was allegedly found on were not recovered when petitioner's house was processed for evidence.

A. Not intentionally but I had to.

[Solicitor] Swarat: I'm sorry, I couldn't hear that. "I did not intentionally but I had to." Was that what he said?

[Petitioner]: I said I didn't intentionally pull the trigger.

[Counsel for petitioner]: He had to have pulled the trigger, I think is what he said.

Q. No one else pulled the trigger?

A. There was nobody else holding the gun. I mean, let's be logical. It was just me and her there. But after I jerked the weapon out of her hand it [fired] . . . .

At trial, petitioner testified he and Davis were not standing face to face. He stated, "when you are arguing like that . . . There is a lot of movement going on. . . . she was crouched down."

Petitioner further stated, "After we fought over the rifle, jerked it away from her, still screaming and hollering at each other, I think she stopped – scooted down some, . . . The rifle did go off in our argument."

Following the conclusion of the trial, the trial judge denied petitioner's request to charge self-defense. Petitioner also requested a charge on involuntary manslaughter. Petitioner argued that if the jury believed petitioner wrestled the rifle away from Davis and subsequently wielded it in a reckless fashion, there would be a sufficient basis for charging involuntary manslaughter. The trial judge refused, stating he did not see any indication of recklessness in petitioner's actions. The trial judge charged the jury on murder, voluntary manslaughter, and accident. The jury found petitioner guilty of murder.

ISSUES

I. Did the trial court err by denying petitioner's request for a jury instruction on involuntary manslaughter?

II. Did the trial court err by finding petitioner was not entitled to a jury instruction on self-defense?

DISCUSSION

I. Involuntary manslaughter

The Court of Appeals found the trial court properly refused to charge involuntary manslaughter. The court stated there was no evidence petitioner handled the gun with reckless disregard for the safety of others.[5] *See* State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (involuntary manslaughter is the unintentional killing of another without malice and while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others).

Petitioner argues the Court of Appeals erred by finding he was not entitled to an involuntary manslaughter instruction. He relies on the cases of

[5]The Court of Appeals noted petitioner argued in his statement of issues that the gun discharged while petitioner and Davis were struggling over the gun and that, as a result, it was "a classic case of involuntary manslaughter." The court held an involuntary manslaughter charge would have been warranted if there was evidence the gun discharged while petitioner and Davis were struggling over it. However, the court noted petitioner failed to argue the gun discharged during the course of the struggle in his brief; therefore, it held petitioner abandoned the issue on appeal. We disagree that petitioner abandoned his argument. Throughout his brief, petitioner discussed the struggle for the gun.

State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), and State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003), for support.

In State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), Burriss was attacked by the victim and another man. After being pushed to the ground, Burriss drew a gun from his pocket and fired twice into the ground, causing both assailants to back away. As Burriss was attempting to get off the ground, one of the assailants advanced towards Burriss, who was separated from his gun. Burriss grabbed the gun and it accidentally fired, killing one of the assailants. We held Burriss was entitled to a charge on involuntary manslaughter because the evidence supported a finding that he was lawfully armed in self-defense at the time the fatal shot occurred and there was evidence he handled the loaded gun in a negligent manner.

In State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003), Crosby claimed he was trying to break up a fight between three women, one of whom was the victim's girlfriend. Crosby claimed the victim told him not to put his hands on his girlfriend and then charged at Crosby with his hands behind his back. Crosby then pulled a gun out of his pocket and closed his eyes and pulled the trigger. Crosby claimed he did not realize he had pulled the trigger. We held Crosby was entitled to an involuntary manslaughter charge because there was ample evidence from which the jury could have inferred Crosby did not intentionally discharge the weapon.

Although petitioner had inconsistent stories, we find he was entitled to a charge on involuntary manslaughter. The Court of Appeals distinguished Burriss and Crosby by finding that, although petitioner's statements support a finding he was lawfully armed in self-defense at the time of the shooting, there is no evidence of recklessness as required to warrant an involuntary manslaughter charge. The Court of Appeals correctly found petitioner was lawfully armed in self-defense[6] at the time of the shooting because, according

[6]The Burriss court noted that there is a difference between being lawfully *armed* in self-defense and *acting* in self-defense. Burriss, 334 S.C. at 265, n.10, 513 S.E.2d at 109, n.10. At this point in the analysis, we are concerned only with whether petitioner had a right to be armed for purposes

to his testimony, petitioner took the loaded gun from Davis who was threatening him with it. There was also evidence petitioner recklessly handled the gun because, according to his testimony, it fired almost immediately after he took possession of it. As specifically stated in Burriss, the negligent handling of a loaded gun will support a finding of involuntary manslaughter. *See also* State v. White, 253 S.C. 475, 171 S.E.2d 712, *cert. denied*, 396 U.S. 987 (1969) (same). Further, the fact petitioner and Davis were struggling over the weapon is sufficient evidence to support an involuntary manslaughter charge to the jury. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (evidence of a struggle between a defendant and a victim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury). Accordingly, there was evidence to support a charge of involuntary manslaughter and, therefore, the trial court should have so charged the jury. *See* State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (if there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given); State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993) (trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence).

II. Self-defense

The Court of Appeals noted that petitioner testified he had disarmed Davis and had taken possession of the rifle when the shot was fired. Under those facts, the court held Davis no longer posed any threat to petitioner and he could not have reasonably believed she did. The court held the evidence demonstrated petitioner did not have the right to use deadly force in self-defense and the trial judge correctly refused to charge the jury on self-defense.

A self-defense charge is not required unless it is supported by the evidence. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). To establish self-defense in South Carolina, four elements must be present: (1)

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of determining whether he was engaged in a lawful act, *i.e.* was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred.

the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007). If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error. *Id.*

We find petitioner was entitled to a self-defense charge. In a statement to police, petitioner indicated he took the gun from Davis and that it was "either her or me." This statement indicates he believed he was in imminent danger of losing his life. Also, petitioner testified that in the preceding weeks, Davis had been acting jealous, following him, and had told him that if she ever caught him with another woman it was "going to be messy." This evidence suggested that petitioner was reasonable in his belief that it was either Davis' or his life at stake when the struggle for the gun began. Accordingly, the trial court erred by failing to charge self-defense given there was evidence to support the charge. *See* State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002) (if there is any evidence in the record to support self-defense, the issue should be submitted to the jury).

A past holding of this Court seems to indicate that, where a defendant is claiming self-defense, as petitioner is here, involuntary manslaughter may not be charged. In State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996),[7] we held that where a defendant admits he intentionally shot his gun, but that

[7]In Pickens, Pickens and a co-defendant began shooting in self-defense when a group of ten to twelve people rushed them outside of a Waffle House.

he did so while acting lawfully but recklessly in defending himself, he is not entitled to a charge of involuntary manslaughter. However, a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges. *See* Crosby v. State, 355 S.C. 47, 584 S.E.2d 110 (2003) (improper to hold that any evidence of an intentional shooting negates evidence from which any other inference may be drawn); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (error by trial court in not charging involuntary manslaughter, even though the trial court charged murder, voluntary manslaughter, accident, and self-defense); State v. Turbeville, 275 S.C. 534, 273 S.E.2d 764 (1981) (defendant charged with involuntary manslaughter was not entitled to self-defense charge because there was no testimony concerning self-defense in the trial record; indicating the charge would be appropriate if there was testimony concerning self-defense). When there is a factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally, then the defendant is entitled to both charges as there is "any evidence" to support each charge. When there is evidence of both, as in this case, we find the jury is entitled to resolve the question of how the shooting actually occurred.

CONCLUSION

We find that, under the particular facts of this case, petitioner was entitled to the charges of self-defense and involuntary manslaughter. Accordingly, the decision of the Court of Appeals is

REVERSED.

WALLER, PLEICONES and BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. I would affirm the conviction and hold that the trial court properly refused to charge both involuntary manslaughter and self-defense.

The majority finds that Petitioner was entitled to an involuntary manslaughter charge because there was evidence that Petitioner recklessly handled the gun and that Petitioner and the victim struggled over the gun. In my opinion, the evidence does not support these findings. According to Petitioner's own testimony, the gun discharged after he retrieved it from the victim, while the gun was in his possession, and as he stumbled backwards. In my view, this testimony is not evidence that Petitioner recklessly handled the gun or that the gun fired during the struggle. *Compare State v. White*, 253 S.C. 475, 171 S.E.2d 712 (1969) (holding that the defendant's testimony regarding the shooting provided sufficient evidence to warrant an inference that the victim's death was caused by the negligent handling of a loaded pistol); *Tisdale v. State*, S.C. Sup. Ct. Op. No. 26495(filed May 27, 2008) (Shearouse Adv. Sh. No. 22 at 21) (finding that the defendant's testimony that the gun discharged while he and the victim struggled over the gun supported an involuntary manslaughter charge). Rather, I believe that this testimony presents a standard example of accident, on which the trial court properly instructed the jury. *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that a defendant is entitled to a charge on accident where there is evidence that he armed himself in self-defense but the shooting occurs accidentally); *State v. Goodson*, 312 S.C. 278, 280 440 S.E.2d 370, 372 (1994) (recognizing that for a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of the weapon).[8] Accordingly, I would hold that there is no evidence to support an involuntary manslaughter charge.

In my opinion, the majority also errs in holding that Petitioner was entitled to a self-defense charge. Even assuming that Petitioner reasonably believed that he was in imminent danger when the victim first confronted him

[8] I agree with the majority insofar as I believe that Petitioner had the right to take the weapon away from the victim.

with the gun due to the victim's previous threats, Petitioner testified that he "jerked" the gun away from the victim, the victim was "crouched down" when she was shot, and that he did not intentionally pull the trigger. Thus, in my view, Petitioner was neither in imminent danger nor did he believe he was in imminent danger at the time he shot the victim. I would therefore hold that the trial court properly refused to charge self-defense. *See State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) (holding that the defendant was not entitled to a self-defense charge where he presented no evidence that he believed that he was in imminent danger when he shot the victim).

While I agree with the majority that a self-defense charge and involuntary manslaughter charge are not necessarily mutually exclusive, there must be some evidence in the record to support the charges, and in my opinion, no evidence in the record supports either charge in this case. For these reasons, I would hold that the trial court properly refused to give an involuntary manslaughter charge and a self-defense charge.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26520
Heard June 12, 2008 – Filed July 14, 2008

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, and Robert Mills Ariail, of Greenville, for Respondent.

JUSTICE PLEICONES: Appellant appeals his death sentence following a second resentencing proceeding. This opinion consolidates his appeal and the mandatory proportionality review. We affirm.

Appellant was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery, and received a death sentence for murder, thirty years for armed robbery, and five years for each of the other two offenses. On his first appeal, the convictions were affirmed, but his death sentence reversed and his five year sentence for firearm possession vacated.[1] State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Following a bench resentencing proceeding, appellant again received a death sentence. This Court vacated that sentence, finding the trial judge's comments to appellant in regard to his right to a jury trial constituted reversible error. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004).

This second resentencing was tried to a jury which returned a death sentence, finding two aggravating circumstances: (1) the murder was committed in the commission of robbery while armed with a deadly weapon and (2) the murder was committed while in the commission of larceny with use of a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) and (e). Appellant raises three issues on appeal.

ISSUES

1) Whether the trial judge erred in disqualifying a juror?

2) Whether the solicitor's closing argument was improper?

[1] Under S.C. Code Ann. § 16-23-490(A), no firearm sentence may be imposed where the defendant receives a death sentence or life sentence without parole for the violent crime. The vacation of appellant's sentence was conditional: if appellant were ultimately to receive a life sentence for murder, then the five year sentence would be reimposed.

3) Whether the trial judge erred in admitting redacted prison disciplinary records?

ANALYSIS

Appellant conceded at oral argument that there was no objection at trial to the juror disqualification or to the closing argument. Without an objection, neither of these issues is properly preserved for appellate review. E.g., State v. Stone, 376 S.C. 32, 655 S.E.2d 487 fn. 1 (2007) ("South Carolina's strict error preservation rules are no less applicable in death penalty cases"). Under these circumstances, we do not reach the merits of either issue.

One issue is preserved for review: Appellant contends the trial court erred in admitting a list of disciplinary infractions allegedly committed by appellant while in the Department of Corrections because its admission violated the prohibition against hearsay, appellant's Confrontation Clause rights, and his due process rights. Neither the Confrontation Clause nor due process was raised to the trial court, and accordingly neither constitutional claim is preserved for our review. State v. Stone, *supra*. We address only the hearsay issue.

The trial judge permitted the State to introduce a redacted version of appellant's prison offenses pursuant to the business records exception to the rule against hearsay. In so doing, he required the State to omit from the list all details of the incidents, and all incidents not witnessed by a prison guard or staff member. These rulings reduced the number of incidents to 28, which were presented to the jury in this format[2]:

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had a six and a half inch shank made from fencing and toothbrush
4. June 14, 2001, spat on a correctional officer
5. February 8, 2002, a 14 inch solid brass shank

[2] We have made one minor alteration in choosing to omit the names of the victims from the list.

6. March 29, 2002, stabs correctional officer in the face with a shank
7. June 12, 2002, stabs an inmate in the shower
8. June 15, 2002, kicks an inmate who is restrained in a restraint chair
9. August 5, 2002, slaps a male nurse in the face
10. August 17, 2002, throws a food tray and hits an officer in the head
11. August 23, 2002, struck an officer in the face with his fist
12. October 22, 2002, hits an officer in the face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch shank made from a push rod of the sink
16. July 17, 2005, spits in the face of an officer
17. August 26, 2005, slaps an officer in the face
18. August 31, 2005, sets fire to cell
19. September 11, 2005, threatens an officer
20. January 1, 2006, a 12 inch homemade knife
21. January 3, 2006, breaks cell door window with broom stick
22. January 13, 2006, throws feces on an officer, hitting him in the face
23. February 3, 2006, spits in the face of another inmate
24. February 4, 2006, orally threatens an officer
25. February 28, 2006, a 12 inch weapon hidden between the mattresses
26. April 4, 2006, an eight and a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
27. May 1, 2006, sets fire to his mattress
28. May 20, 2006, throws coffee on an officer

Appellant contends the records are inadmissible hearsay because they are not trustworthy under Rule 803(6), SCRE. We find no abuse of discretion in the trial judge's decision finding trustworthy those incidents witnessed by prison staff. E.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (admission of evidence with trial judge's discretion); cf. Ohio v.

Roberts, 448 U.S. 56 (1980) *overruled on other grounds* Crawford v. Washington, 541 U.S. 36 (2004) (properly administered, Rule 803(6) exceptions are among the safest against a confrontation-clause challenges).

Moreover, appellant has not asked to argue against the precedent of State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) which held that these types of prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (the Act). Id. cited with approval in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004) *vacated and remanded on other grounds* Holmes v. South Carolina, 547 U.S. 319 (2006). Appellant contends that the continuing validity of Whipple is in doubt as that decision predates the adoption of the SCRE, and alleges that Rule 803(6) added a veracity requirement to the admissibility requirements for a business record. Contrary to appellant's position, trustworthiness is an issue under the Act, not a new condition created by Rule 803(6). Kershaw County Dep't of Soc. Servs. v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981); see also State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007).

Appellant failed to show an abuse of discretion in the trial judge's decision to admit the redacted prison disciplinary incidents. State v. Pittman, *supra*; State v. Whipple, *supra*.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(c) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that appellant's sentence was neither excessive nor disproportionate. See State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (murder of convenience store operator in the commission of attempted armed robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) (murder of convenience store operator in the commission of armed robbery).

CONCLUSION

Appellant's capital sentence is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Jacqueline Mekler, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 26521
Heard May 8, 2008 – Filed July 14, 2008

AFFIRMED

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, all of Columbia, and David Michael Pascoe, Jr., of Orangeburg, for Petitioners.

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondents.

JUSTICE PLEICONES: A jury convicted Jacqueline Mekler (Mekler) of murder, and she received a sentence of thirty years. The Court of Appeals affirmed in part, reversed in part, and remanded for a new trial. State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005). We granted the State's petition for certiorari and now affirm.

FACTS

Mekler and her neighbor, Robette Spires (Spires), were visiting on Mekler's front porch one evening when Spires' husband, Bubba, (Victim) drove his truck into Mekler's yard. Victim began screaming and yelling at Spires because Spires was not at home and because Spires had not called him. Mekler and Victim began yelling at each other, and Mekler asked Victim to leave. Victim left in his truck and drove to Spires' residence, which was one block away from Mekler's home.[1]

A few minutes later, Victim walked back to Mekler's house. According to Mekler, Victim approached the porch, yelling and screaming in the same manner as before he left. Mekler's dog was attached to a chain on the porch and began barking at Victim. The chained dog then ran out on the porch steps towards Victim, halting his progress. Mekler grabbed the dog and noticed a knife in Victim's hand. Victim told Mekler the knife was for the dog. After subduing the dog, Mekler stepped inside her house and grabbed her shotgun, which she had placed near the front door after Victim initially left.

Mekler testified that after she stepped on the porch with the shotgun, she continued to ask Victim to leave, but he continued to stand in the yard near the steps with the knife and threatened to come up on the porch and get Spires. Mekler testified that she pulled the hammer back on the shotgun and positioned the gun at her hip to do so. Mekler recounted that when she cocked the gun, the Victim leaned and the gun fired, but she did not remember pulling the trigger. In three separate statements to various law

[1] Although Spires and Victim were married, they lived in separate residences.

enforcement personnel and throughout her trial testimony, Mekler maintained that she did not intentionally pull the trigger.

At trial, defense counsel requested a jury charge on self-defense, accident, and involuntary manslaughter. The trial court refused to charge the jury on involuntary manslaughter and accident. The jury convicted Mekler of murder, and the judge sentenced her to thirty years imprisonment. The Court of Appeals reversed on the grounds that: (1) the trial court failed to charge involuntary manslaughter; and (2) the trial court failed to admit specific details of a prior act of violence by Victim.

ISSUES

I. Did the Court of Appeals err in reversing Mekler's conviction due to the failure to charge the jury on involuntary manslaughter?

II. Did the Court of Appeals err in reversing Mekler's conviction based on the trial judge's denial of Mekler's request to introduce specific details of a prior domestic violence incident between Spires and Victim?

ANALYSIS

I. Involuntary manslaughter charge

The State argues the Court of Appeals erred in reversing respondent's conviction based on the trial judge's failure to charge the jury on involuntary manslaughter. We disagree.

Involuntary manslaughter is defined as (1) the unintentional killing of another without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice but while engaged in a lawful activity with reckless disregard for the safety of others. State v. Burriss, 334 S.C. 256, 264-265, 513 S.E.2d 104, 109 (1999). The negligent handling of a loaded gun will support a charge of involuntary manslaughter. Id. (citing State v. White, 253 S.C. 475, 171 S.E.2d 712 (1969)). A trial court should refuse to

charge the lesser-included offense of involuntary manslaughter only where there is no evidence the defendant committed the lesser offense. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003).

We hold that the Court of Appeals correctly held that there was evidence to support a finding that Mekler was lawfully armed in self-defense and did not intentionally discharge the shotgun. Moreover, evidence exists to support a jury finding that Mekler's recklessness caused the gun to fire.

The following evidence adduced at trial supports the involuntary manslaughter charge: (1) the three statements given by Mekler and introduced at trial in which Mekler stated she did not remember pulling the trigger or the shotgun discharging; (2) Mekler's trial testimony in which she stated she did not remember pulling the trigger and had to be told by Spires that she shot Victim; (3) Mekler's trial testimony in which she stated the gun was positioned at her hip so she could cock the hammer back and that her finger must have slipped on the trigger, causing the gun to fire suddenly; (4) testimony by a neighbor who looked out of her window right before the shot was fired and saw one of Mekler's arms down at her side and the other waving when she talked;[2] and (5) Mekler's insistence at trial that she did not intend to shoot Victim and that she was shocked when the gun fired immediately after she cocked the hammer.

Accordingly, the evidence supports a finding that Mekler, lawfully armed in self-defense, unintentionally shot Victim while negligently handling the shotgun when her finger slipped on the trigger after resting the gun on her hip to cock it. *See* Burriss, *supra* (negligent handling of loaded gun will support a finding of involuntary manslaughter).

Finally, a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges. *See* Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (error by trial court in not charging involuntary manslaughter, even though the trial

[2] This supports Mekler's testimony that the gun was at her hip when it discharged.

court charged murder, voluntary manslaughter, accident, and self-defense); Crosby, *supra* (improper to hold that any evidence of an intentional shooting negates evidence from which any other inference may be drawn); State v. Light, Op. No. 26519 (S.C. Sup. Ct. filed July 14, 2008) (Shearouse Adv. Sh. 29 at p. 42).

In this case, there was evidence from which the inference could be drawn that Mekler intentionally shot Victim in self-defense, and there was evidence that Mekler unintentionally shot Victim while acting in reckless disregard of the safety of others by negligently handling a loaded shotgun. The jury should have been allowed to determine how the shooting occurred, and the Court of Appeals did not err by reversing and remanding for a new trial due to the trial court's failure to charge involuntary manslaughter.

II. Evidence of prior act of Victim

Because we affirm the Court of Appeals' decision to grant Mekler a new trial based on failure to charge involuntary manslaughter, it is unnecessary to address the second issue. Whether this issue will arise on retrial and its resolution will depend upon the evidence and testimony presented, and it will be for the trial judge's consideration.

CONCLUSION

We hold that Mekler was entitled to an involuntary manslaughter charge because evidence existed to support a finding that she was lawfully armed in self-defense and that her reckless handling of the shotgun resulted in the death of Victim. Moreover, a charge of self-defense and a charge of involuntary manslaughter are not mutually exclusive. The decision of the Court of Appeals is

AFFIRMED.

MOORE, Acting Chief Justice, WALLER, J., and Acting Justices James E. Lockemy and J. Michelle Childs, concur.

The Supreme Court of South Carolina

RE: Rules Advisory Committee

ORDER

In 1985, this Court promulgated the South Carolina Rules of Civil Procedure (SCRCP), and the South Carolina Rules of Criminal Procedure. In developing these rules, this Court was assisted by the Ad Hoc Civil Rules Committee. Since that time the Ad Hoc Civil Rules Committee has continued to assist this Court in its consideration of amendments to the SCRCP, and the advice and recommendations of the Committee has been invaluable.

This Court has decided that having an advisory committee available to study and make recommendations regarding all rules that relate to the trial courts of this State and not just the rules of civil procedure would be appropriate. Therefore, the Ad Hoc Civil Rules Committee is hereby disbanded and, pursuant to Article V, §4A, of the South Carolina Constitution, the South Carolina Appellate Court Rules (SCACR) is amended

to add Rule 609. This rule, which is attached to this order, creates a Rules Advisory Committee. This amendment to the SCACR shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

July 1, 2008

RULE 609
RULES ADVISORY COMMITTEE

(a) Members. The Rules Advisory Committee (Committee) shall consist of the following members who shall be appointed by the Supreme Court for four (4) year terms:

(1) a circuit court judge who shall serve as the chair of the Committee;

(2) a circuit court judge or a master-in-equity;

(3) a family court judge;

(4) a probate judge;

(5) a magistrate or municipal court judge;

(6) four active members of the South Carolina Bar; and,

(7) a non-voting reporter.

For the initial appointments, half of the members shall be appointed for two (2) year terms and half of the members shall be appointed for four (4) year terms. In case of a vacancy on the Committee, the Supreme Court shall appoint a member to serve the remainder of the unexpired term. A quorum shall consist of five members not counting the reporter.

(b) Duties. The Committee shall make recommendations regarding the adoption or amendment of rules governing the administration of or the practice and procedure before the trial courts of this State. This shall include, but is not limited to, the South Carolina Rules of Civil Procedure, the South Carolina Rules of Criminal Procedure, the South Carolina Rules of Family Court, the South Carolina Rules of Probate Court, the South Carolina Rules

of Magistrates Court and the South Carolina Rules of Evidence. Further, the Supreme Court may refer proposed rules or issues to the Committee for its consideration. The recommendations of the Committee shall be in writing and shall contain the language of any proposed rule or amendment along with an explanation and analysis of the recommendations made by the Committee. For any proposed rule or amendment which must be submitted to the South Carolina General Assembly under Article V, §4A, of the South Carolina Constitution, the recommendations of the Committee must be submitted to the Supreme Court by October 1st.

(c) Subcommittees. The Committee may divide itself into subcommittees to consider and make recommendations to the Committee. Additionally, the Supreme Court may appoint a Special Subcommittee when it determines that additional personnel are necessary to study and make recommendations regarding a particular rule or set of rules. If appointed, a Special Subcommittee shall make their recommendations to the Committee.

(d) Power of Supreme Court. Nothing in this Rule shall prevent the Supreme Court from promulgating a rule or rule amendment without submitting the matter to the Committee. Further, the Supreme Court may refer a proposed rule or amendment to other groups for their recommendations.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mauricio Leon, 277794, Respondent,

v.

State of South Carolina Appellant.

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4420
Submitted May 1, 2008 – Filed June 27, 2008

REVERSED

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

Symmes W. Culbertson, of Greenville, for Respondent.

HEARN, C.J.: Mauricio Leon filed a post-conviction relief (PCR) application on May 15, 2002, alleging his guilty plea was involuntary, ineffective assistance of counsel, and denial of due process of law. The PCR judge vacated Leon's conviction and ordered a new trial. We reverse.

FACTS

Leon pled guilty to following offenses: (1) trafficking more than 400 grams of cocaine; (2) two counts of trafficking 10 to 28 grams of methamphetamine; and (3) trafficking 10 to 28 grams of cocaine. Leon is a native of Mexico and speaks very little English. The interpreter present at the guilty plea hearing, while approved by the court, did not appear to be under oath. Leon was sentenced to twenty-five years and a $200,000 fine for trafficking more than 400 grams of cocaine, to run concurrent with sentences of ten years and a $25,000 fine for each of the remaining three charges. The sum of his sentence was twenty-five years of incarceration and fines amounting to $275,000.

Leon filed a PCR application, and a hearing was held. The PCR judge granted Leon's petition for PCR, finding Leon's counsel was ineffective for failing to object to the interpreter not being sworn at the guilty plea hearing. The PCR judge found "the trial counsel's failure to preserve the issue of the omission of the interpreter's oath [constitutes] ineffective assistance of counsel." As a result, the State petitioned this court for writ of certiorari.

LAW/ANALYSIS

The State contends the PCR judge erred in granting Leon's PCR application. Specifically the State argues Leon failed to meet both prongs of the Strickland test for ineffective assistance of counsel. We agree.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 300 S.C. 115, 117,

386 S.E.2d 624, 625 (1989). To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 687; Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. When a guilty plea has been entered, the applicant must prove counsel's representation was below the standard of reasonableness and but for counsel's unprofessional errors, there is a reasonable probability the applicant would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript, as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Even if we assume counsel's performance was deficient, Leon has the burden to establish prejudice under the two-prong Strickland test. "[I]n order to satisfy the 'prejudice' requirement [in the context of a guilty plea], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Alexander, 303 S.C. at 542, 402 S.E.2d at 485. Here, Leon testified he did not understand the interpreter provided by the court because he was nervous and the interpreter spoke too fast. However, when asked during direct-examination if he would have gone to trial instead of pleading guilty if someone would have further explained his rights or possible defenses, Leon's response was, "No." Thus, Leon fails to prove the deficient performance by his attorney prejudiced his case. Because Leon did not establish prejudice, the PCR court erred in granting PCR. Therefore, the order of the PCR court is

REVERSED.[1]

KITTREDGE, J., and GOOLSBY, A.J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dugan J. McLaughlin,	Appellant,
v.	
Sally W. Williams, Coldwell Banker Chicora Real Estate, Dunes Realty, Inc., Dan Laudone d/b/a U.S. Home Inspections, Inc., and Michael W. Alpaugh d/b/a Xtreme Termite & Pest Control,	Defendants,
of whom Sally W. Williams, Coldwell Banker Chicora Real Estate, and Dunes Realty, Inc. are	Respondents.

Appeal From Georgetown County
John L. Breeden, Circuit Court Judge

Opinion No. 4421
Submitted March 1, 2008 – Filed June 30, 2008

AFFIRMED

N. Ward Lambert, R. Patrick Smith, of Greenville, for Appellant.

Amanda A. Bailey, Mark McAdams, of Myrtle Beach, Kathryn M. Cook, of North Myrtle Beach, Phillip Ferderigos, Charleston, for Respondents.

Luther O. McCutchen, III, of Myrtle Beach, Nikole Setzler Mergo, of Columbia, for Defendants.

WILLIAMS, J.: Dugan J. McLaughlin (McLaughlin) appeals the circuit court's grant of summary judgment on his claims for fraud and negligent misrepresentation. We affirm.

FACTS

In 2003, McLaughlin was searching for a house to purchase in Myrtle Beach or Georgetown, South Carolina. McLaughlin utilized the services of Barbara Kingsmore (Kingsmore), a real estate agent with Coldwell Banker Chicora Real Estate (Chicora), to locate a suitable house.

Kingsmore showed various properties to McLaughlin's mother-in-law, who believed McLaughlin might be interested in the property located at 138 Tarpon Circle in Georgetown (the Subject Property). At the time, the Subject Property was owned by Sally W. Williams (Williams), and Dunes Realty, Inc. (Dunes Realty) was Williams' listing agent.

On May 3, 2003, Kingsmore contacted Dunes Realty and requested a Residential Property Disclosure Statement (the Disclosure Statement) for the Subject Property. On May 5, 2003, Williams and her husband prepared the Disclosure Statement, which was subsequently sent to Kingsmore. Upon receipt of the Disclosure Statement, Kingsmore noticed several of the items were left blank and there were no explanations for certain items, indicating possible problems with the Subject Property. Kingsmore requested a more

complete disclosure statement; however, neither Dunes nor Williams provided one.

On May 14, 2003, Kingsmore showed the Subject Property to McLaughlin. Ultimately, McLaughlin decided to submit an offer to purchase the Subject Property and executed contracts with Chicora to establish the representative relationship between the parties. On May 15, 2003, Kingsmore showed the Disclosure Statement to McLaughlin and advised him to obtain an inspection to ensure there were no major defects with the Subject Property. McLaughlin initialed each page of the Disclosure Statement, signifying he had reviewed it.

Following negotiations between McLaughlin and Williams, the parties entered into an Agreement of Sale and Purchase and scheduled the closing for June 18, 2003. Pursuant to the agreement, McLaughlin employed U.S. Home Inspections to perform a "whole house inspection" on the Subject Property. Following the inspection, McLaughlin received a written inspection report (the Home Inspection Report) indicating moisture damage to the exterior of the Subject Property.

In addition to the Home Inspection Report, a termite and moisture inspection (the CL-100) was performed on the Subject Property and included in the closing documents. The CL-100 indicated the presence of wood-destroying fungi and a wood moisture content of 28% or more below the first main floor.

On June 18, 2003, McLaughlin closed and took possession of the Subject Property. Approximately six weeks following the closing, McLaughlin learned of defects in the structure of the Subject Property due to prior water intrusion.

McLaughlin asserted claims for fraud and negligent misrepresentation against Williams, Chicora, and Dunes Realty. Separately, each defendant filed a motion for summary judgment. In separate orders, the circuit court granted summary judgment for all three defendants. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this Court applies the same standard of review as the circuit court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Id. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Id.

LAW/ANALYSIS

McLaughlin argues the trial court improperly granted summary judgment in favor of Williams and Chicora[1] because there was a genuine issue of material fact as to his ability to rely upon the Disclosure Statement. We disagree.

To survive a motion for summary judgment, McLaughlin must offer some evidence that a genuine issue of material fact existed as to each element of fraud and negligent misrepresentation. See Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992) (explaining the plaintiff has the burden to prove each element of the cause of action). To maintain a claim for fraud, a plaintiff must show by clear and convincing evidence:

> (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

[1] McLaughlin has since dropped his appeal against Dunes Realty.

Hendricks v. Hicks, 374 S.C. 616, 620, 649 S.E.2d 151, 152-53 (Ct. App. 2007). To maintain a claim for negligent misrepresentation, a plaintiff must show by a preponderance of the evidence:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003).

"The key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." Armstrong v. Collins, 366 S.C. 204, 219-20, 621 S.E.2d 368, 375-76 (Ct. App. 2005) (internal quotations and citations omitted). While the two causes of action differ, both fraud and negligent misrepresentation contain "the necessary element that the hearer had the right to rely upon the misrepresentation or fraud." Id.

Initially, we note McLaughlin's claims against each of the three defendants are based on his assertion that the Disclosure Statement completed by Williams was a misrepresentation. Specifically, McLaughlin's complaint asserted: 1) the Disclosure Statement was a misrepresentation, upon which he reasonably and detrimentally relied; and 2) all three Defendants had a statutory duty to ensure that the Disclosure Statement was in compliance with the applicable statutory law. Because McLaughlin's claims focused on the Disclosure Statement as a misrepresentation, we must

determine whether McLaughlin was entitled to rely on the Disclosure Statement itself.

In arguing summary judgment was inappropriate because there was an issue of fact as to whether he could rely upon the Disclosure Statement, McLaughlin points to the general premise that "issues of reliance and its reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of facts." Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991) (internal quotations and citations omitted). Additionally, McLaughlin notes "a buyer has the right in South Carolina to rely on a seller of a home to disclose latent defects or hidden conditions which are not discoverable on a reasonable examination of the property and of which the seller has knowledge." May v. Hopkinson, 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986).

However, while issues of reliance are ordinarily resolved by the finder of fact, "there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter." Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992). Thus, if the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact.

In the instant case, the circuit court determined McLaughlin failed to create an issue of fact regarding reliance on the Disclosure Statement in light of the information available to him prior to closing. The circuit court pointed to the information contained in the Home Inspection Report and the CL-100, which showed the existence of water damage to the Subject Property, as well as the testimony of McLaughlin and Kingsmore stating such information placed them on notice of potential moisture problems. Ultimately, the circuit court determined because of this information, no reasonable jury could conclude McLaughlin had a right to rely on the Disclosure Statement.

McLaughlin argues there is an issue of fact as to what level of knowledge could be gleaned from the information contained in the two reports. Specifically, he argues the Home Inspection Report does not indicate

water damage to locations within the interior portion of the house, and therefore, there is an issue of fact as to whether or not the Home Inspection Report precluded him from relying upon the Disclosure Statement. McLaughlin also argues the CL-100 only indicates the presence of active wood destroying fungi, which is not an issue in this case. We disagree.

Although the Disclosure Statement indicated Williams was not aware of a malfunction or defect due to "water seepage, leakage, dampness or standing water or water intrusion from any source **in any area of the structure**," the Home Inspection Report clearly informed McLaughlin there was "[s]ome moisture damage" in various locations on the exterior of Subject Property.[2] (emphasis added). The CL-100 reported "active wood destroying fungi" and a moisture content of at least 28% below the first main floor of the house. Furthermore, the CL-100 explicitly noted "fungi damage to wood" is "commonly called water damage." Both the Home Inspection Report and the CL-100 clearly show McLaughlin had information that directly contradicted the Disclosure Statement.

In addition to the information contained in the Home Inspection Report and CL-100, McLaughlin's testimony also supports the conclusion that he could not, as a matter of law, rely upon the Disclosure Statement. McLaughlin testified the documents reflect moisture damage at the home and should have "raised red flags."

In sum, the Home Inspection Report and CL-100 clearly illustrate McLaughlin had information indicating there was moisture damage to the Subject Property. McLaughlin had knowledge that directly contradicted the representations found in the Disclosure Statement, and therefore, as a matter of law, he failed to establish the necessary element of reliance for his claims of fraud and negligent misrepresentation. Accordingly, the circuit court did not err in its grant of summary judgment.

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[2] While McLaughlin claims he was not concerned with damage to the exterior of the property, the fact there was water damage directly contradicts the Disclosure Statement's language indicating there was no water damage whatsoever on the Subject Property.

We affirm the circuit court on the basis that McLaughlin could not rely on the Disclosure Statement because the Home Inspection Report and CL-100 gave him knowledge contradicting the Disclosure Statement. While this is clearly dispositive of McLaughlin's claims for fraud and negligent misrepresentation, the circuit court also noted several other grounds for granting summary judgment, and McLaughlin appeals on those grounds as well. For the sake of completeness, we address those grounds.

McLaughlin argues the circuit court erred in failing to apply the holding of MacFarlane v. Manly, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980), in which the South Carolina Supreme Court held an "as is" clause and a "right to inspect" provision contained in a contract for sale do not, as a matter of law, bar an action for fraud. It is important to note, however, the circuit court did not conclude the "as is" clause and the "right to inspect" provision contained in the sales contract between McLaughlin and Williams barred McLaughlin's fraud claims.

The order of the circuit court specifically states the "as is" clause and the "right to inspect" provision did not bar the cause of action for fraud. Rather, the circuit court determined the "as is" clause and the "right to inspect" provision barred the claim for negligent misrepresentation as a matter of law because he could not justifiably rely on the disclosure statement in light of those provisions in the contract. On appeal, McLaughlin challenges the circuit court's conclusion on the basis that he did in fact inspect the property and could rely on the Disclosure Statement in light of such inspection. However, having concluded McLaughlin could not rely on the Disclosure Statement due to the information contained in the Home Inspection Report and the CL-100, we cannot accept this argument.

McLaughlin also challenges the circuit court's determination that Kingsmore's knowledge is imputed to McLaughlin due to their agency relationship. The circuit court did not rely upon this determination for its conclusion, however, having already found McLaughlin could not rely upon the Disclosure Statement based on the information personally available to McLaughlin.

McLaughlin also argues he relied on Kingsmore's knowledge, pointing to his own testimony that she told him there was nothing to worry about after reviewing the Home Inspection Report. Kingsmore testified she informed McLaughlin the Home Inspection Report showed moisture damage and a potential for structural problems, and she advised him to have a contractor or electrician inspect the house. While this testimony may raise an issue of fact as to what Kingsmore told McLaughlin, it does not raise an issue of fact as to whether McLaughlin could rely on the Disclosure Statement. McLaughlin's complaint alleges he is entitled to recover based upon his reliance on the Disclosure Statement, as he did not allege any other misrepresentations. The information contained in the Home Inspection Report and the CL-100 indicated there was moisture damage within the Subject Property. Based upon this information, McLaughlin could not rely upon the Disclosure Statement.

In addition to finding McLaughlin could not rely upon the Disclosure Statement, the circuit court granted summary judgment to Chicora on the grounds it did not owe McLaughlin a duty to ensure the accuracy of the Disclosure Statement. Specifically, the circuit court found the South Carolina Residential Property Condition Disclosure Act (the Act) only imposes a duty on the owner of real property to make disclosures about the property to be sold. The circuit court also pointed out that South Carolina Code Section 27-50-70(B) (2007) provides:

> The real estate licensee, whether acting as the listing agent or selling agent, is not liable to a purchaser if:
>
> (1) the owner provides the purchaser with a disclosure form that contains false, incomplete, or misleading information; and
>
> (2) the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete, or misleading.

Using this language, the circuit court concluded the Act imposed no duty on Chicora.

McLaughlin contends the statute imposes a duty on Chicora in this instance because Chicora was aware the Disclosure Statement was incomplete or misleading. Under the language of section 27-50-70(B), if a real estate licensee knows the information is incomplete or misleading, the licensee may still be liable to the purchaser.

Here, the record supports a conclusion Chicora had knowledge the Disclosure Statement was incomplete. Specifically, the testimony from Kingsmore that she realized the Disclosure statement was incomplete upon reading it; therefore, the record supports the conclusion Chicora may be liable to McLaughlin based on the Disclosure Statement. However, such a conclusion is not adverse to our holding that the trial court properly granted summary judgment in favor of Chicora. The fact remains, McLaughlin was in possession of the Home Inspection Report and the CL-100, and therefore, he could not rely upon the Disclosure Statement.

CONCLUSION

For the foregoing reasons, the orders of the circuit court are

AFFIRMED.[3]

HUFF and KITTREDGE, JJ., concur.

[3] We decide this case without oral arguments pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eric U. Fowler and
Melissa W. Dawn Fowler, Appellants/Respondents,

v.

Sallie Hunter, Gynecologic
Oncology Associates,
Selective Insurance Company
of South Carolina, and
Insurance Associates, Inc., Defendants,

Of whom: Selective Insurance
Company of South Carolina, is, Respondent/Appellant,

and

Insurance Associates, Inc. is, Respondent.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4422
Heard June 4, 2008 – Filed July 8, 2008

REVERSED

Rodney M. Brown, of Fountain Inn, for Appellants/Respondents.

Andrew F. Lindemann, of Columbia, for Respondent/Appellant.

E. Matlock Elliott and Joshua L. Howard, of Greenville, for Respondent.

KONDUROS, J.: Eric and Melissa Fowler ("the Fowlers") appeal the dismissal of their assigned cause of action for professional negligence against Insurance Associates, Inc. ("Insurance Associates"). Selective Insurance Company of South Carolina, Inc. ("Selective") appeals the dismissal of its cross-claim for equitable indemnification against Insurance Associates. We reverse.

FACTS

The Fowlers were seriously injured when the motorcycle they were riding was struck by a car driven by Sallie Hunter. The car was owned by Gynecologic Oncology Associates ("GOA") for use by Mrs. Hunter's husband, Dr. James Hunter. Auto-Owners Insurance Company insured the car under a business automobile policy with limits of one million dollars. At least two other policies potentially provided coverage. One was a commercial umbrella policy for four million dollars procured by GOA through Insurance Associates and issued by Selective. The other policy at issue was a personal catastrophic liability policy for two million dollars carried by the Hunters and also issued by Selective.

The Fowlers filed suit against Mrs. Hunter, and it was discovered that due to an inadvertent computer error by Insurance Associates, GOA's umbrella policy did not provide automobile liability coverage. The Fowlers then filed a declaratory judgment action to see what coverage was available under the above-referenced policies. The Hunters and GOA answered and filed cross-claims against Selective for reformation and against Insurance

Associates for professional negligence. Additionally, Selective filed a cross-claim against Insurance Associates for indemnity.

Eventually, the parties settled many of the claims in the two lawsuits. The Fowlers received one million dollars from GOA's automobile policy, two million dollars from the Hunter's personal umbrella policy, and an additional one and one-half million dollars from Selective. Additionally, the Hunters and GOA assigned their professional negligence claim against Insurance Associates to the Fowlers, and the Fowlers signed a covenant not to execute against the Hunters and GOA. The Hunters and GOA agreed to cooperate with the Fowlers in the prosecution of the professional negligence claim, and the Fowlers and Selective agreed to split equally any recovery from either the professional negligence or indemnification claim.

Insurance Associates filed a summary judgment motion seeking dismissal of the only remaining claims: the professional negligence claim assigned to the Fowlers and Selective's claim for indemnification. The circuit court granted these motions finding that because neither the Hunters, GOA, nor Selective could prove they were damaged by Insurance Associate's negligence, the claims failed. These appeals followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrs., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). However, when a party has moved for summary judgment the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it. Rule 56(e), SCRCP. Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial. Id.

LAW/ANALYSIS

I. Professional Negligence

The Fowlers argue the circuit court erred in granting summary judgment to Insurance Associates as to their assigned claim for professional negligence. We agree.

The circuit court reasoned because the Hunters and GOA were insulated from execution of any judgment, the Fowlers, standing in the Hunter's shoes, could never prove damages flowing from the negligence of Insurance Associates. While this analysis is technically correct, the majority of courts having addressed this issue have elected to allow such an assigned claim to proceed. We are persuaded by the rationale set forth in those cases.

In Campione v. Wilson, 661 N.E.2d 658, 660-61 (Mass. 1996), an injured party settled with an insurer and insured for a stipulated amount of damages and a release of the insured. The Massachusetts Supreme Court determined that even though the settlement included a release, the injured party could proceed in prosecuting the insured's assigned negligence claim against the insurance brokers. Id. at 663. The court considered the competing policy considerations at play under these circumstances noting there is a risk of collusion between the settling parties even though there is benefit to allowing injured parties and tortfeasors to settle claims. Id. at 662-63. Nevertheless, the court rejected the "'somewhat metaphysical contention' that the legal basis for the claim against the insurer [and broker] disappeared when the insured became insulated from liability due to a release or a covenant not to execute." Id. at 662 (quoting Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128, 1132-33 (D.C. Cir. 1989)).

An examination of other jurisdictions reveals most courts are approving of settlement arrangements similar to the one in this case, so long as the risk of collusion is minimized. See Gray, 871 F.2d at 1133 (applying North Carolina law and allowing injured party to pursue assigned bad faith claim against insurer even though insured was insulated from liability by release); Damron v. Sledge, 460 P.2d 997, 999 (Ariz. 1969) (holding an assignment of the insured's bad faith claim plus a covenant not to execute was not ipso

facto collusive); United Servs. Auto. Ass'n v. Morris, 741 P.2d 246, 254 (Ariz. 1987) (holding settlement between insured and claimant in which insurer was to defend under reservation of rights did not violate policy's cooperation clause); Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524, 532-33 (Iowa 1995) (holding insured could still suffer damages from agent's negligence when settlement was coupled with a covenant not to execute that did not extinguish liability as would a release; therefore, assigned claim for agent's negligence would be valid); Glenn v. Fleming, 799 P.2d 79, 92-93 (Kan. 1990) (approving of a settlement between insured and injured party coupled with an assignment of a prejudgment claim and covenant not to execute when the settlement is entered into in good faith and the settlement amount is shown to be reasonable).

South Carolina has shown a willingness to depart from the common law in order to promote reasonable settlements between tortfeasors and injured parties. In Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971), our Supreme Court concluded the common-law rule regarding the release of one joint tortfeasor was not in the best interests of justice.

> Being untrammeled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.

Id. at 492, 179 S.E.3d at 914.

While acknowledging the inherent benefits of settlement, we also note South Carolina promotes the careful examination of settlement agreements to avoid the potential for complicity or wrongdoing.

> We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this

> Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.

Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007) (quoting Poston by Poston v. Barnes, 294 S.C. 261, 263-64, 363 S.E.2d 888, 889-90 (1987)).

In the instant case, there is little evidence of collusion between the settling parties. The injuries suffered in the case were extremely serious. Furthermore, the parties did not put a stipulated amount of damages in their agreement so as to reduce the appearance of collusion, and because they contemplated that the underlying tort claim would be tried to a conclusion.[1] The result of the settlement was the Fowlers were able to procure a three and one-half million dollar recovery under the other insurance policies in place while litigation against a negligent party, Insurance Associates, is not foreclosed. This was clearly the intent of the parties as shown by the express language of the settlement agreement and covenant not to execute. The catastrophic injuries suffered by the Fowlers begged a resolution that would give them the benefit of the uncontested proceeds promptly. In light of our State's willingness to place the interests of the injured party above such a technical application of the law, we believe it was inappropriate for the claim to be dismissed at the summary judgment stage. We therefore reverse the circuit court's grant of summary judgment in favor of Insurance Associates.

[1] The Fowlers and Selective argued to the circuit court if a judgment in excess of the policy limits was required prior to determining the summary judgment motions, the motion hearing should be stayed and the underlying tort claim tried. However, the circuit court elected to proceed with ruling on summary judgment motions.

II. Equitable Indemnification

Selective contends the circuit court erred in granting summary judgment in favor of Insurance Associates regarding Selective's cross-claim for equitable indemnification. We agree.

Under South Carolina law, a party seeking equitable indemnification must show three things: "(1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999).

Under the settlement, the Fowlers received one and one-half million dollars from Selective that was not directly traceable to any policy. The circuit court determined Selective admitted liability under the commercial umbrella policy by making this payment. If so, Selective actually benefitted from the negligence of Insurance Associates. Had the automobile liability not been inadvertently excluded under the policy, the defendants' potential exposure would have been the full amount of the policy limits amounting to four million dollars.

Selective offered an alternative explanation for the one and one-half million dollar payment. Selective contends the payment was made as part of a global settlement to avoid a professional negligence claim asserted by the Hunters and GOA. Insurance Associates admitted its negligence in failing to request automobile coverage on the umbrella policy. If Insurance Associates was acting as an agent for Selective, Selective could be vicariously liable for that negligence. Consequently, Selective argues it settled that claim for one and one-half million dollars, paid to the Fowlers, and decided to pursue indemnification from Insurance Associates. We find Selective's position raises a question regarding the indemnification claim, but only if we can conclude Selective would not have issued the policy had the application been correctly submitted. In other words, if Selective would have issued the policy anyway, it was not damaged by Insurance Associates' negligence as it would have been exposed for the full four million dollars.

As the moving party, Insurance Associates relied upon the deposition testimony of Roy Phillips indicating that Selective would have definitely issued the policy had it been submitted correctly to include automobile coverage. Insurance Associates also submitted a set of guidelines related to the "one and done" computer software program that allowed "agents" to automatically secure policies if certain criteria are met. In response, Selective submitted guidelines produced by Insurance Associates during discovery showing that a policy would not automatically be secured unless the underlying policy was also issued by Selective. In this case, the underlying policy was not issued by Selective, but by Auto-Owners.

We conclude the competing sets of guidelines raise a genuine issue of material fact precluding summary judgment. Further inquiry into the facts may show Selective would not have issued the policy without the automobile exclusion. If so, Selective's claim for indemnification as to the one and one-half million dollar settlement may prove viable. If Selective cannot produce such evidence, the claim will likely fail. However, we find the issue presented was too uncertain at this stage for the grant of summary judgment to be appropriate.

Finally, Insurance Associates contends Selective failed to mitigate its damages, barring its indemnification claim, by entering into the global settlement and not litigating coverage under the commercial umbrella policy. We disagree.

While Selective may have a viable coverage defense as to the Hunter's professional negligence claim, that defense was not a certainty. Had they not settled, Selective could have been found responsible for the full four million dollars contemplated under the policy. By settling, Selective made a calculated decision to minimize its own risk. Furthermore, this mitigated the potential damages Selective can seek via indemnification from Insurance Associates.

CONCLUSION

We are persuaded settlements like the one in this case are favorable, so long as the risk of collusion is minimized. Therefore, we conclude the grant of summary judgment in favor of Insurance Associates should be reversed. Furthermore, we believe the existence of the competing guidelines created a genuine issue of fact regarding Selective's claim for indemnification making the grant of summary judgment inappropriate. Consequently, the decision of the circuit court is

REVERSED.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Donnie Raymond Nelson, Appellant.

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 4423
Submitted June 2, 2008 – Filed July 8, 2008

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, all of Columbia; and Solicitor Robert Mills Ariail, of Greenville, for Respondent.

WILLIAMS, J.: In this criminal case, we affirm the trial court's decision to admit into evidence the statement of Jarvis Clement (Clement).

FACTS

Donnie Nelson (Nelson), along with two co-defendants,[1] proceeded to trial on charges arising from the robbery of Grady Blassingame's barbershop. Investigator Tammy Patton (Patton) learned Clement was involved in the robbery of another barbershop named the Distinguished Gentlemen. Patton interviewed Clement regarding the robbery of the Distinguished Gentleman. During this interview, Clement revealed the details of the Blassingame robbery.

According to Clement, the following occurred on the day of the Blassingame robbery. Shortly after arriving at Nanu's house, Nanu drove Nelson, Clovis, and Clement to a location across the street from the Blassingame barbershop. Nelson and Clovis exited the vehicle and entered the Blassingame barbershop while Nanu and Clement drove around the block multiple times. After the robbery, the four men returned to Clovis' house.

The State moved to introduce into evidence Clement's written statement obtained by Patton. Nelson, along with the other co-defendants, objected. The trial court allowed the statement into evidence. Nelson was found guilty of one count of armed robbery, two counts of possession of a weapon during the commission of a violent crime, and one count of conspiracy to commit armed robbery. Nelson was sentenced to seventeen years imprisonment for the armed robbery charge, five years imprisonment for the weapon charges, and five years imprisonment for the conspiracy charge, all sentences to run concurrently. This appeal follows.

[1] The names of the co-defendants are Lawrence Waller, also known as Nanu (Nanu), and Lawrence Clovis (Clovis).

STANDARD OF REVIEW

In criminal cases, this Court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The admission of evidence is within the sound discretion of the trial court. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. Id.

LAW/ANALYSIS

Nelson argues the trial court erroneously relied on Rule 801(d)(1)(B), SCRE, in admitting Clement's written statement.[2] We disagree.

Pursuant to Rule 801(d)(1)(B), SCRE, a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose . . . .

The South Carolina Supreme Court has explained the following elements must be satisfied before a prior consistent statement can be admitted into evidence based upon Rule 801(d)(1)(B):

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[2] The State argues this issue is not preserved for review. We disagree. An objection was raised regarding the admissibility of Clement's written statement, and the trial court allowed the statement into evidence based on Rule 801(d), SCRE. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding for an issue to be preserved for appeal it must have been raised to and ruled upon by the trial court).

> (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001).

Before we address these elements, we must first determine whether Clement is the declarant. We find Clement is the declarant because he made oral statements intended to be assertions. Rule 801(a), (b), SCRE (explaining that a statement is an oral or written assertion intended to be an assertion and an individual who makes a statement is a declarant). With this is mind, we now turn our attention to the elements set out in Saltz.

It is undisputed that Clement testified and was subject to cross-examination; thus, the first Saltz element is satisfied. With respect to the second element, opposing counsel implicitly accused Clement of acting under an improper motive or influence by accusing Clement of lying in order to gain favorable sentencing. Specifically, at the time of his interview, Clement was incarcerated for a forgery charge. As noted above, Clement was involved in the robbery of the Distinguished Gentlemen. Patton became aware of Clement through Clement's accomplice in the robbery of the Distinguished Gentlemen. Patton interviewed Clement regarding the Distinguished Gentlemen. During this interview, Clement revealed the details of the Blassingame robbery.

As a result of his involvement in the two robberies, Clement was at minimum facing the following charges: two armed robberies, two kidnappings, conspiracy, and possession of a weapon during the commission of a violent crime. At the time of the trial, Clement had been sentenced on the conspiracy charge and the possession charge, but he was still awaiting

sentencing on the remaining charges. Counsel for the defense repeatedly accused Clement of being untruthful in order to gain a more lenient sentence for the remaining charges. Thus, the second Saltz element is fulfilled.

The third element requires Clement's written statement be consistent with his trial testimony. This element is also met. In his written statement, Clement stated on the day of the Blassingame robbery he went to Nanu's house and saw Nelson there. Clement also stated Nanu drove the four-member party to a location across the street from the Blassingame barbershop, Nelson and Clovis were dropped off and entered the barbershop, and Nanu drove repeatedly around the block until Nelson and Clovis exited the barbershop and entered Nanu's car at the location where they originally exited the vehicle. Clement repeated this account during his testimony.

Although it is true during trial Clement did not remember a few of the statements he made to Patton, we recognize two years passed between Clement's statement to Patton and the trial. The trial occurred on January 18, 2006, and Clement gave his statement to Patton on January 3, 2004. We acknowledge it could be difficult for Clement to recollect every detail due to this two year time interval. Additionally, viewing Clement's statement and his testimony as a whole, we conclude his statement is consistent with his testimony.

The final element that must be met is the statement must have been made prior to the alleged fabrication or prior to the existence of the alleged improper influence or motive. Saltz, 346 S.C. at 121-22, 551 S.E.2d at 244. Nelson argues the statement to Patton was made after the existence of a motive to fabricate, namely in the hopes of receiving a lenient sentence. We disagree.

Even if we were to assume, without deciding, that Clement had an improper motive for fabricating the truth, this motive did not arise until after the statement was made. As explained above, at the time of his interview, Clement was incarcerated for a forgery charge. Clement volunteered the information concerning the robberies of the Distinguished Gentleman and the Blassingame barbershop during an interview with Patton. The record is

devoid of any evidence that Patton made any offers of leniency in order to induce Clement to make the statement. State v. Serrette, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007) (stating the burden is on the appellant to provide an appellate court with an adequate record for review); see Rule 210(h), SCACR (stating an appellate court need not consider any fact which does not appear in the record). Therefore, the final Saltz element is met, and the trial court properly admitted the evidence based on Rule 801(d)(1)(B).

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.[3]

THOMAS and PIEPER, JJ., concur.

[3] We decide this case without oral arguments pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Francis M. Semken, Respondent,

v.

Catherine A. Semken, Appellant.

Appeal From Charleston County
Wayne M. Creech, Family Court Judge

Opinion No. 4424
Heard June 3, 2008 – Filed July 8, 2008

REVERSED and REMANDED

J. Mark Taylor, of W. Columbia, Jane Nussbaum Douglas and Natalie P. Bluestein, of Charleston, for Appellant.

Gregory A. DeLuca, of Goose Creek, J. Michael Taylor, of Columbia, for Respondent.

WILLIAMS, J.: In this family law action, Catherine Semken (Wife) appeals the family court's order terminating Francis Semken's (Husband) obligation to pay Wife alimony, awarding Husband reimbursement alimony, and requiring Wife to pay Husband's attorney's fees and costs. We reverse and remand.

FACTS

Husband and Wife divorced in 1999. Pursuant to the final order, Husband was required to pay Wife permanent periodic alimony in the amount of $1,000 per month. In 2005, Husband brought an action to have his alimony obligation terminated pursuant to the continued cohabitation provision of section 20-3-130(B)(1) of the South Carolina Code (Supp. 2007), claiming Wife and Thomas McGill (Boyfriend) had engaged in a romantic relationship and resided together for a period of more than ninety consecutive days. Wife and Boyfriend did not deny the romantic relationship, but both disputed the claim of cohabitation.

In support of Husband's assertion, he presented evidence to show Wife rented a house owned by Boyfriend in Berkeley County, South Carolina from January 2002 through July 2005. During this period, Boyfriend lived in separate residences in other counties in the state. Wife and Boyfriend acknowledged they were involved in a romantic relationship during this time period, and it was likely that over the course of their three-year relationship the couple spent more than ninety non-consecutive days together in the Berkeley County residence.

Although Wife paid Boyfriend $500 per month in rent, Wife and Boyfriend never entered into a written lease agreement. Boyfriend's mortgage payment on the residence during this time period ranged from $550 to $625 per month, but in exchange for the lesser rent, Wife did not have full access to the house. Boyfriend stored some of his belongings in one of the bedrooms of the house and kept a car in the garage.

When Wife began renting the Berkeley County residence from Boyfriend, she transferred all the utility bills into her name and made all of the payments. Boyfriend did not pay any of Wife's expenses or help her financially, although he would occasionally allow Wife to pay rent late or in installments. Boyfriend continued to pay insurance on the Berkeley County residence and its contents while Wife resided there, and he never changed the status on his homeowner's insurance policy from owner-occupied to rental-property. Wife did not have any insurance on her belongings in the residence.

When Wife moved into the Berkeley County residence, Boyfriend moved to North Augusta due to his employment. Boyfriend obtained a new driver's license reflecting his North Augusta address, and he registered to vote in Aiken County, South Carolina. However, when Boyfriend later renewed his vehicle tag, he used the Berkeley County residence address and, pursuant to the "Motor Voter" system, his voter registration was automatically reinstated in Berkeley County.

After a year in North Augusta, Boyfriend moved to Newberry County and began operating a business out of this residence. Subsequently, Boyfriend moved to Lexington County, which is where Boyfriend was living at the time he and Wife ended their romantic relationship. Following their break-up, Boyfriend allowed Wife to stay in the Berkeley County residence rent-free for the three months prior to her moving out because she lost her job and could not afford to pay rent.

Upon hearing the evidence, the family court found Husband had carried his burden of proof to show Wife and Boyfriend engaged in continued cohabitation for more than ninety days pursuant to § 20-3-130(B)(1). The family court interpreted § 20-3-130(B)(1) by applying the ordinary meaning to the word "reside" and found during their romantic relationship, Boyfriend maintained two residences, one of which was the Berkeley County residence. The family court stated, "It is clear that [Boyfriend] has not spent every night and day for [more] than 90 consecutive days with [Wife] at the Berkeley County home address but that is not what the statute requires. The statute only requires that [Boyfriend] 'reside' there at the same time with [Wife]."

The family court further found despite Wife and Boyfriend not spending more than ninety consecutive days and nights under the same roof, "they both claimed the Berkeley County home as a residence at the same time, spent a considerable amount of time together, were romantically involved, and claimed the same home as a residence." The family court additionally stated, "It is critical to this decision to note that if [Wife] had moved into an apartment owned by someone else (or even an identified rental property owned by [Boyfriend]) rather than one of [Boyfriend's] 'residences,' there would have been a different outcome."

Based on these findings, the family court terminated Husband's obligation to pay Wife alimony. The family court further ordered Wife to reimburse Husband for the alimony payments made from November 2005 through July 2006. Additionally, the family court required Wife to pay $10,000 towards Husband's attorney's fees. This appeal follows.

STANDARD OF REVIEW

"On appeal from the family court, this [C]ourt has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence." Henggeler v. Hanson, 333 S.C. 598, 601-02, 510 S.E.2d 722, 724 (Ct. App. 1998). A preponderance of the evidence stated simply is that evidence which convinces as to its truth. Frazier v. Frazier, 228 S.C. 149, 168, 89 S.E.2d 225, 235 (1955). Despite this broad scope of review, this Court is not required to disregard the family court's findings. Doe v. Roe, 369 S.C. 351, 359, 631 S.E.2d 317, 321 (Ct. App. 2006). This Court remains mindful the family court saw and heard the witnesses, placing it in a better position to evaluate their credibility and assign comparative weight to their testimony. Id.

LAW/ANALYSIS

I. Termination of Alimony Pursuant to § 20-3-130(B)(1)

Wife begins by arguing the family court erred in finding Wife engaged in continued cohabitation with Boyfriend and, therefore, erred in terminating alimony. We agree.

Section 20-3-130(B)(1) allows for the termination of periodic alimony upon "the remarriage or continued cohabitation of the supported spouse . . . ." The statute states:

> For purposes of this subsection and unless otherwise agreed to in writing by the parties, "continued cohabitation" means the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days. The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.

§ 20-3-130(B).

The South Carolina Supreme Court recently addressed the issue of terminating a husband's alimony obligation due to the wife's continued cohabitation with another man pursuant to section 20-3-150 of the South Carolina Code (Supp. 2007). Section 20-3-150 calls for any award of alimony to the spouse retaining custody of the couple's children to cease upon the remarriage or continued cohabitation of the supported spouse. Section 20-3-150 further states:

> For purposes of this subsection and unless otherwise agreed to in writing by the parties, "continued cohabitation" means the supported spouse resides with another person in a romantic

> relationship for a period of ninety or more consecutive days. The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.

When interpreting this language, the South Carolina Supreme Court found "the phrase 'resides with' . . . sets forth a requirement that the supported spouse *live under the same roof* as the person with whom they are romantically involved for at least ninety consecutive days." Strickland v. Strickland, 375 S.C. 76, 89, 650 S.E.2d 465, 472 (2007) (emphasis added). The Supreme Court reasoned that "[a]ny other interpretation essentially takes the 'cohabitation' out of 'continued cohabitation.'" Id.

The statute in question in the current case, § 20-3-130(B)(1), contains the same language as § 20-3-150 defining "continued cohabitation." Thus, the Supreme Court's interpretation of that language controls this Court's determination of whether Wife and Boyfriend engaged in continued cohabitation for ninety or more consecutive days.

In the case at hand, the family court addressed the meaning of "continued cohabitation" prior to the Supreme Court's decision in Strickland, focusing on the definition of "residence." The family court stated it was applying the ordinary meaning of the word "reside" to the statute.

Applying this interpretation to Wife and Boyfriend's situation, the family court found Boyfriend "maintained two residences" during their relationship, one of which was the Berkeley County home where Wife resided. The family court stated, "It is clear that [Boyfriend] has not spent every night and day for [more] than 90 consecutive days with [Wife] at the Berkeley County home address but that is not what the statute requires. The statute only requires that [Boyfriend] 'reside' at the same time with [Wife]." The family court further emphasized this interpretation by stating,

> [E]ven though [Wife] and [Boyfriend] did not spend more than 90 consecutive days and nights under the same roof, it is clear that they both claimed the Berkeley County home as a residence at the same time . . . . It is critical to this decision to note that if [Wife] had moved into an apartment owned by someone else (or even an identified rental property owned by [Boyfriend]) rather than one of [Boyfriend's] "residences," there would have been a different outcome.

The Supreme Court applied a meaning to the phrase "continued cohabitation" that requires the spouse and the paramour to actually "live under the same roof" for ninety consecutive days, rather then merely claim the same residence for that time period. Strickland, 375 S.C. at 89, 650 S.E.2d at 472. The family court specifically found Wife and Boyfriend did not live under the same roof for ninety consecutive days. Further, the family court made no findings that Wife and Boyfriend periodically separated in order to circumvent the ninety-day requirement, and the facts do not warrant such a finding.

The evidence demonstrates Wife and Boyfriend were romantically involved but did not engage in continued cohabitation, as defined by Strickland, during their relationship. The evidence shows Boyfriend did not live in under the same roof as Wife for ninety consecutive days. Pursuant to Strickland, Husband has not proven that Wife's relationship with Boyfriend amounts to "continued cohabitation" under § 20-3-130(B)(1). We, therefore, reverse the family court's termination of alimony and reinstate Husband's alimony obligation.

Because we find Husband's alimony obligation was incorrectly terminated, Wife must be restored to the position she was in before the family court's judgment was rendered. See Brown v. Brown, 286 S.C. 56, 57, 331 S.E.2d 793, 793-94 (Ct. App. 1985) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."). "[W]hen a judgment reducing support payments is reversed on appeal, the parties are placed in the same position as if no reduction had been ordered and the supporting spouse is

liable for arrearages from the date of the reduction to the date of reversal." Id. at 57-58, 331 S.E.2d at 794. Husband is, therefore, liable for any amount of alimony he did not pay as a consequence of the family court's ruling. We remand the issue of arrearages to the family court for a determination of the monetary amount owed to Wife, as well as a determination of an appropriate payment schedule for Husband to follow.

II. Termination of Alimony Pursuant to Additional Sustaining Ground

Husband argues even if this Court finds the statutory requirements of § 20-3-130(B)(1) have not been satisfied, an alternate sustaining ground exists to terminate Husband's alimony obligation. Husband specifically argues Wife's relationship with Boyfriend was tantamount to marriage, warranting a termination of alimony due to a change in Wife's circumstances. We decline to address this issue.

As the prevailing party in the family court, a respondent may raise an additional sustaining ground for this Court to consider. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). This Court, however, may ignore any such arguments, especially if the additional ground was not presented to the family court. Id. at 421, 526 S.E.2d at 724. "[T]he current rules do not impose any presentation requirement. However, the failure to present an additional sustaining ground to the [family] court reduces the likelihood an appellate court will rely on it to affirm a judgment." Id. at 421 n.11, 526 S.E.2d at 724 n.11.

In the family court, Husband stated he sought to have his alimony obligation terminated based solely on the statutory ground found in § 20-3-130(B)(1). The parties never mentioned or discussed terminating alimony based on the common law argument of Wife's relationship with Boyfriend being tantamount to marriage. This argument is being raised for the first time in this appeal. Although South Carolina court rules allow Husband as the prevailing party to initially raise this additional sustaining ground in his appeal, we decline to rely on this ground as a means of affirming the family court's order, as we find it would be unfair to Wife because this argument was not presented to the family court.

III. Reimbursement of Alimony

Because we find alimony should not be terminated, Wife must be restored to the position she was in before the family court's judgment was rendered. See Brown, 286 S.C. at 57, 331 S.E.2d at 793-94 ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."). Consequently, Wife should not be ordered to reimburse Husband for any alimony payments made while the action was pending.[1] Therefore, consistent with this opinion, we reverse the family court's order for reimbursement.

IV. Attorney's Fees

Finally, Wife argues the family court erred in ordering her to contribute to Husband's attorney's fees. Wife also argues the family court erred in failing to order Husband to contribute towards her attorney's fees. In light of our decision to reverse the family court's termination of Husband's alimony obligation, we similarly reverse the award of attorney's fees and remand the issue for reconsideration. See Sexton v. Sexton, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney's fees for reconsideration when the substantive results achieved by trial counsel were reversed on appeal).

CONCLUSION

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

REVERSED and REMANDED.

THOMAS and PIEPER, JJ., concur.

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[1] After terminating Husband's alimony obligation, the family court ordered Wife to reimburse Husband for alimony payments made from November 15, 2005, through July 15, 2006, which totaled $9,450.