The Supreme Court of South Carolina

In re: Amendments to the Commission's Bankruptcy and Debtor-Creditor Law and Taxation Law Specialization Advisory Boards' Standards and Procedures for Certification, Recertification and Decertification

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O R D E R

The Commission on Continuing Legal Education and Specialization has proposed amendments to Appendix E of Part IV, SCACR, which concerns the standards and procedures for certification, recertification, and decertification of specialists. The proposed amendments were published in the February 2010 edition of the South Carolina Bar News, in accordance with Rule 408, SCACR.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby approve the amendments proposed by the Commission on Continuing Legal Education and Specialization. The amendments, which are attached, are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
July 22, 2010

APPENDIX E
REGULATIONS FOR SPECIALTY FIELDS

. . .

BANKRUPTCY AND DEBTOR-CREDITOR LAW SPECIALIZATION ADVISORY BOARD

STANDARDS AND PROCEDURES FOR CERTIFICATION, RECERTIFICATION AND DECERTIFICATION

. . .

II. MINIMUM STANDARDS FOR CERTIFICATION

. . .

C. Continuing Legal Education - Minimum Requirements

During the five (5) years preceding application for initial certification, applicants must have earned, in approved educational activities directed to the subject of bankruptcy law, not less than 60 hours of continuing legal education credit. Not more than 15 hours of the required 60 hours of continuing legal education credit may be in trial advocacy type courses.

For this purpose "approved educational activities" shall mean courses/programs accredited by the Board for the bankruptcy law specialty or courses/programs that would qualify for such accreditation.

. . .

IV. RECERTIFICATION

. . .

C. To qualify for recertification, applicants must demonstrate the completion of a minimum of seventy-five (75) hours of approved specialty continuing legal education in the five (5) years since their original or latest certification. Not more than 15 hours of the required 75 hours of approved specialty continuing legal education credit may be in trial advocacy type courses.

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TAXATION LAW SPECIALIZATION ADVISORY BOARD

STANDARDS AND PROCEDURES FOR CERTIFICATION, RECERTIFICATION AND DECERTIFICATION

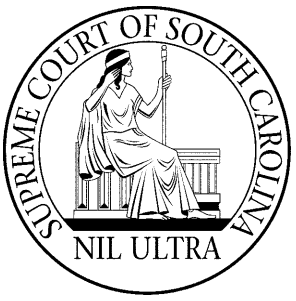
. . .

IV. RECERTIFICATION

. . .

C. To qualify for recertification, applicants must demonstrate the completion of a minimum of 120 hours of approved specialty continuing legal education in the five (5) years since their original or latest certification.

. . . .



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 26, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jon E. Hartfield, by and through his Conservator, Haskell L. Hartfield and Haskell L. Hartfield, Individually, Respondents,

v.

The Getaway Lounge & Grill, Inc., Shou Mei Morris, individually and as President of The Getaway Lounge & Grill, Inc., Appellants.

Appeal from Greenwood County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26836
Heard June 11, 2009 – Filed July 26, 2010

AFFIRMED

C. Rauch Wise, of Greenwood, for Appellants

Jon Eric Newlon, of McCravy Newlon & Sturkie Law Firm, of Greenwood, for Respondents.

CHIEF JUSTICE TOAL: After visiting a number of bars one night in July 2003, Hoyt Helton (Helton) drove his vehicle across the center line and struck a car in which John Erik Hartfield (Hartfield) was a passenger. Helton died at the scene and a South Carolina Law Enforcement Division (SLED) toxicologist recorded his blood alcohol content (BAC) at .212. Hartfield, who suffered serious injuries, and his father (Respondents) filed suit against three bars Helton visited that evening. Respondents were awarded a $10 million verdict against The Getaway Lounge & Grill (The Getaway).[1] The trial court also granted Respondents' motion to pierce the corporate veil of The Getaway. We certified this case for review pursuant to Rule 204(b), SCACR.

FACTS/PROCEDURAL HISTORY

At trial, Helton's wife testified that her husband would typically start drinking around noon and would usually leave home around 4:00 or 4:30 p.m. to go to his favorite bars. She had no recollection of her husband drinking at home on the day of the accident.

Other testimony established that Helton's first stop the day of the accident was Williams Package and South End Pub (South End Pub), one of his regular stops. Robert Cockrell (Cockrell), owner and operator of the South End Pub, testified that Helton arrived around 4:00 or 4:15 p.m. and stayed inside until 5:30 p.m., when he became angered by another person at the bar and walked out. Helton's friend, Brad Harrison (Harrison), found Helton sitting outside the entrance to the South End Pub when Harrison

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[1] The trial court granted a directed verdict motion for the defendant South End Pub which was affirmed by the court of appeals in *Hartfield ex rel. Hartfield v. McDonald*, 381 S.C. 1, 671 S.E.2d 380 (Ct. App. 2008). However, the jury could not reach a verdict as to Carolina Drive-In. The instant case concerns only the claim against The Getaway.

arrived around 6:00 or 6:15 p.m. Later, Cockrell saw Helton on the bench when he closed the establishment at 7:00 p.m. Cockrell testified that Helton was not served a beer that day, Helton did not show up with a beer, and Helton was not drinking a beer when Cockrell saw him on the bench as he was closing up. Cockrell also testified that when Helton arrived at the bar, he did not appear to be intoxicated, though he talked about being sick and was seen sitting at a table, leaning over, and holding his stomach.

Helton's second stop was The Getaway where he arrived between 7:15 and 7:30 p.m. Dianna Bice (Bice), one of the owners of The Getaway, testified she was at the bar that night, never saw Helton drinking, and he did not appear intoxicated. Harrison testified that when he arrived at The Getaway at approximately 8:00 p.m., Helton was sitting at the bar drinking a beer. He recalled that Helton had three beers while at The Getaway and did not appear intoxicated. Harrison and Helton left The Getaway at the same time, which Harrison testified was before 9:30 p.m. Trooper Tony Keller (Keller), who investigated the accident, testified that Harrison told him he left The Getaway between 9:30 and 10:00 p.m.

Helton's final stop the evening of the accident was the Carolina Drive-In. Billy McDonald (McDonald) was tending bar that evening and testified that Helton arrived around 10:00 p.m. According to McDonald's trial testimony, Helton stayed at the Carolina Drive-In only ten or fifteen minutes and did not have a beer. However, Keller testified that McDonald informed him that Helton had one beer at the Carolina Drive-In. McDonald stated that he did not recognize any problems in the way Helton walked into the bar. Helton departed Carolina Drive-In around 10:10 or 10:15 p.m. After leaving Carolina Drive-In, Helton placed a cell phone call to his wife and left a voice message. Keller testified that, after listening to the message, he had no doubt that Helton was intoxicated.

The crash occurred at approximately 10:51 p.m. Helton died at the scene and Hartfield was seriously injured. Keller arrived at the scene shortly after the accident and stated that he found no cups or alcohol containers. Fluid samples revealed Helton's BAC to be .212 at the time of the collision.

Keller testified that paramedics extracted Hartfield from the car and transported him from the scene by helicopter. Hartfield's father explained that his son spent approximately ten months in the hospital following the accident. For roughly six months, Hartfield was in a coma. Today, Hartfield still requires care, wears a leg brace, is unable to drive, and has problems with short term memory.

At trial, Respondents called Dr. William Brewer (Brewer), a chemistry instructor at the University of South Carolina, who teaches forensic chemistry. Brewer was previously a toxicologist at the Clemson Veterinary Diagnostic Center and with SLED. Beginning with Helton's BAC at the time of death, Brewer used a method called "retrograde extrapolation" to determine how many beers Helton would have to have consumed over the hours preceding the accident to reach a .212 BAC. Brewer testified that, based on his calculations, Helton must have consumed more than the amount of beer testimony had suggested in order to reach a .212 level. Brewer also stated that Helton's approximate BAC during the time he was at The Getaway would have been between .18 and .20, and that Helton would have been grossly intoxicated and exhibiting symptoms of intoxication.

The jury returned a verdict for Respondents in the amount of $8,000,000 for Hartfield and $2,000,000 for Hartfield's father. The court then conducted a hearing to determine whether the corporate veil of The Getaway could be pierced. The trial court issued an order piercing the corporate veil thereby making Shou Mei Morris and The Getaway (Appellants) liable in the amount awarded by the jury. This appeal followed.

ISSUES

I. Did the trial court err in admitting the testimony of Brewer?

II. Did the trial court err in failing to direct a verdict in favor of The Getaway?

III. Did the trial court err in charging the jury statutory inferences from the criminal statute on driving under the influence?

IV. Did the trial court err in failing to charge the jury that the plaintiff must prove Helton was visibly intoxicated at The Getaway?

V. Did the trial court err in instructing the jury that The Getaway is liable if employees should have known Helton was intoxicated?

VI. Did the trial judge err in piercing the corporate veil of The Getaway?

LAW/ANALYSIS

I. Brewer's Testimony

Appellants argue the trial court erred in admitting the testimony of Brewer. We disagree.

The admission of evidence is within the sound discretion of the trial judge and will not be reversed absent a clear abuse of discretion. *See Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). Where a party calls an expert, the expert may testify as to his opinion, but his opinion must be based upon facts proven at trial. *See Gathers By and Through Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 82-83, 427 S.E.2d 687, 688-89 (Ct. App. 1993). A party may ask a hypothetical question of an expert, but the hypothetical must be based on facts supported by the evidence. *Id.* at 82, 427 S.E.2d at 688.

At trial, Appellants objected to the introduction of Brewer's testimony as speculative. Appellants contend that Hartfield did not establish sufficient

facts for the expert to give an opinion as to Helton's sobriety when he was at The Getaway. The court of appeals addressed a similar argument in *Gathers*. In *Gathers*, the plaintiff was electrocuted when he touched a copper water pipe under his home, and plaintiff's counsel called an expert who, based on a hypothetical question, theorized that a defect in the defendant's service line caused the pipe to become electrified. *Id.* The defendant argued that the testimony should have been excluded because there was not a sufficient factual foundation upon which to base the opinion. *Id.* The court of appeals found no error in admitting the testimony stating:

> [C]ounsel may rely upon circumstantial evidence to prove an essential fact in framing a hypothetical question. Deciding whether a conclusion assumed in the hypothetical is at least reasonably supported by circumstantial evidence is a question of law for the court. If circumstantial evidence reasonably supports the assumptions, whether the evidence actually establishes the assumed facts becomes a question of fact for the trier of fact.

Id. at 83, 427 S.E.2d at 688-89.

In the present case, the circumstantial evidence presented by Respondents was sufficient to support Brewer's opinions. As outlined above, Respondents established a general timeline of Helton's activities on the day of the accident. Respondents introduced evidence showing Helton's BAC at the time of the accident and elicited testimony that Helton left a voice message just prior to the accident in which he sounded intoxicated. Respondents also called witnesses who testified concerning the approximate time Helton left The Getaway and the amount of alcohol he consumed between leaving The Getaway and the time of the wreck. We find that this evidence provided reasonable support for Brewer's testimony. Though Respondents' case was based on circumstantial evidence, Respondents sufficiently developed the facts to form the basis of Brewer's testimony. Hence, the trial court did not err in admitting Brewer's testimony.

II. Directed Verdict

Appellants argue Respondents did not meet their burden to establish that the employees of The Getaway "knowingly" sold beer to an intoxicated person. Consequently, Appellants contend the trial court erred in refusing to direct a verdict for Appellants. We disagree.

In ruling on a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the nonmoving party. *See Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (citation omitted). A motion for a directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. *See Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). This Court will reverse the trial court's rulings on directed verdict motions only where there is no evidence to support the rulings or where the rulings are controlled by an error of law. *See Hinkle v. National Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003) (citation omitted).

S.C. Code Ann. § 61-4-580 (2009) provides in part that "[n]o holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit: . . . (2) sell beer or wine to an intoxicated person . . . ."

In *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990), the court of appeals established that a third party injured by actions of an intoxicated person served in violation of the earlier version of section 61-4-580 may pursue a civil action against the vendor. *Daley*, 303 S.C. at 84, 399 S.E.2d at 14. The court further allowed that an injured third party may show that the alleged violators knowingly served alcohol to an intoxicated person or were confronted with such information, from the person's appearance or otherwise, as would lead a prudent man to believe that the person was intoxicated. *See id.* at 86, 399 S.E.2d at 15.

In *Daley*, the court of appeals considered whether or not a trial judge should have granted a motion for directed verdict. *Id.* at 84, 399 S.E.2d at 15. The evidence in Daley was that the driver had nine twelve-ounce cans of beer over the previous four or five hours, did not recall drinking beer at any other establishment that evening, and officers indicated they believed the driver was intoxicated immediately after the accident. *Id.* at 83, 399 S.E.2d at 14. The court of appeals held there was no error in denying the directed verdict motion, noting "[t]here was more than ample evidence that Ward was intoxicated at the time of the accident and the jury could have easily concluded he was just as intoxicated at the time he was served his last beer at the [bar]." *Id.* at 84-85, 399 S.E.2d at 15.

In the present case, Respondents established a timeline of Helton's actions and that Helton had a .212 BAC only fifty to ninety-five minutes after leaving The Getaway. Keller testified he had no doubt that Helton was under the influence of alcohol when he left a voice message for his wife minutes before the accident. Brewer testified that, using retrograde extrapolation, a man of Helton's approximate weight would have exhibited outward symptoms of intoxication. Given the deferential standard of review with regard to motions for directed verdict, we find that Respondents presented sufficient evidence for a jury question. The trial court therefore did not err in denying Appellants' motion.

III. Statutory Inference

Appellants contend the trial court erred in allowing a permissive inference from the driving under the influence (DUI) statute. Appellants argue that the trial judge's instruction on the inference for DUI was error for two reasons: (1) the charge was not relevant to a civil case and (2) there was no showing that the blood and urine samples were handled in accordance with procedures approved by SLED, per the requirements of the implied consent statute. We disagree.

At the close of the trial, the judge charged the jury in pertinent part:

> Now, in proving the violation of this statute the plaintiff must prove that the defendant or both defendants or their employees violated the statute, they sold alcoholic beverages to a person that they knew or should have known was intoxicated at the time they sold the alcoholic beverages to that person. If that is proven to you by the greater weight or preponderance of the evidence, then I would charge you that an intoxicated person is a person who has drunk a sufficient quantity of an intoxicating beverage to appreciably impair the normal control of their bodily or mental functions.
>
> Now, in this state at the time there was a permissive inference that a person was under the influence of alcohol when that person has a blood alcohol level of .10 percent or greater. Now, you have to determine if it's been established at the time that the alcohol was served and the person was intoxicated. Now, this inference is just an inference to be taken by you along with any other evidence of intoxication that you find in the case.

Because South Carolina does not have a Dram Shop Act, our civil remedy arises out of criminal statutes. *See Tobias v. Sports Club, Inc.*, 332 S.C. 90, 92, 504 S.E.2d 318, 319 (1998) (holding injured third parties may bring a negligence suit against the tavern owner based on a violation of the alcohol control statutes). Similarly, a trial judge in a civil action should be able to aid the jury in assessing whether a bartender knowingly sold alcohol to an intoxicated individual by charging the jury on permissible inferences regarding "being under the influence of alcohol" under our criminal laws. The civil remedy is predicated on criminal statutes, thus it should be permissible for a trial judge to charge on the permissive inference of intoxication under our criminal statutes. Hence, the charge as given was relevant in a civil case and the trial court committed no error in charging the permissible inference.

Also, Appellants' contention that S.C. Code Ann. § 56-5-2950 (Supp. 2009) forbids entrance of Helton's BAC is misplaced. Section 56-5-2950 is

designed to ensure procedural due process in a criminal trial. *See Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 37, 627 S.E.2d 751, 753 (Ct. App. 2006) ("The implied consent laws of this State attempt to balance the interest of the State in maintaining safe highways with the interest of the individual in maintaining personal autonomy free from arbitrary or overbearing State action."). Therefore, if someone's BAC was obtained in violation of this statute, it only affects admissibility in a criminal proceeding. Because the present matter is a civil case, the procedural due process concerns of a criminal case are not present and section 56-5-2950 is inapplicable. So long as a sufficient chain of custody exists to authenticate the evidence in a civil case, this type of evidence is admissible. Thus, the trial court committed no error in allowing evidence of Helton's BAC.

IV. Visibly Intoxicated

Appellants contend that the trial court erred in failing to adopt their requested instruction to the jury that "[b]efore you can find the defendant liable, the plaintiff must prove that Hoyt Helton was visibly intoxicated." We disagree.

As noted above, the court of appeals established in *Daley* that a third party injured by the actions of an intoxicated person served in violation of the earlier version of section 61-4-580 may pursue a civil action against the vendor. *Daley*, 303 S.C. at 84, 399 S.E.2d at 14. Section 61-4-580 prohibits the holder of a permit authorizing the sale of beer or wine from knowingly selling beer or wine to an intoxicated person. S.C. Code Ann. § 61-4-580 (2009). The statute does not contain a requirement that the intoxicated person be visibly intoxicated, only that a person "knowingly" sell beer or wine to an intoxicated person. Consequently, the trial court's refusal to adopt Appellants' proposed instruction was not error.

Appellants would have this Court adopt a new standard allowing for liability only where the intoxicated person is visibly intoxicated. We see no reason to adopt Appellants' proposal. Though the present case focused on the visible symptoms exhibited by Helton while at The Getaway, other cases

under section 61-4-580 might concern knowledge acquired through a different medium.[2]

V. "Should have known"

Appellants contend that the trial court erred in instructing the jury that Respondents may meet their burden of proof by showing that Appellants' employees served alcohol to a person they "should have known" was intoxicated. The trial court's instruction to the jury included, "The plaintiff has to prove under the statute . . . that businesses that sold the alcohol knew or should have known he was intoxicated." Appellants argue that this instruction lessened the proof required under the law and was rejected by the court of appeals in *Daley*. We disagree.

In *Daley*, the plaintiff in a suit under the predecessor to section 61-4-580 argued that the trial court erred in denying her requested charge that her burden was to prove that the defendants "knew or should have known that the patron was in an intoxicated condition at the time he or she was served." *Daley*, 303 S.C. at 85, 399 S.E.2d at 15. The court of appeals found no error in the trial court's decision denying the requested charge, but allowed that the plaintiff would have been entitled to an instruction as to a "reasonable person" standard. *Id.* at 86-87, 399 S.E.2d at 15-16. The proper standard, as stated by the court of appeals is "whether the bartenders negligently served alcoholic beverages to a person who, by his appearance or otherwise, would lead a prudent man to believe that person was intoxicated." *Id.* at 87, 399 S.E.2d at 16. In our view, "knew or should have known" is an articulation of an objective "reasonable person" standard. We see no difference between the "reasonable person" and "should have known" standards. Moreover, this instruction did not lessen the proof required under our law. Thus, the trial court did not err in instructing "knew or should have known."

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[2] The second part of Appellants' requested charge is that a high alcohol reading alone is not sufficient to establish liability. As noted above, we believe the trial court's instruction with regard to the requirement that the plaintiff prove the Appellants "knowingly" sold beer or wine to an intoxicated person obviates the need for this instruction.

VI. Piercing the Corporate Veil

Appellants argue that Respondents failed to prove the fundamental unfairness in recognizing the corporate entity. We disagree.

We affirm the trial court's decision allowing Respondents to pierce the corporate veil pursuant to Rule 220(b), SCACR, and the following authorities: *Sturkie v. Sifly*, 280 S.C. 453, 457-58, 313 S.E.2d 316, 318 (Ct. App. 1984) (The second part of the two-pronged test used to determine whether a corporate entity should be disregarded "requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals."); *Multimedia Pub. of S.C., Inc. v. Mullins*, 314 S.C. 551, 556, 431 S.E.2d 569, 573 (1993) (citation omitted) ("The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell.").

CONCLUSION

For the aforementioned reasons, the decision of the trial court is affirmed.

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

JUSTICE PLEICONES: I respectfully dissent. I believe the trial court erred in denying Appellants' motion for a directed verdict and, even assuming the motion was properly denied, erred in charging the jury. Consequently, I would reverse.

I. Directed Verdict

To meet his burden of proof, Respondent was required to show that the employees of The Getaway "knowingly" sold alcohol to an intoxicated person. In my view, Respondent's case was based, not on evidence, but on speculation, and was not sufficient to withstand Appellants' motion for a directed verdict.

Regarding a motion for directed verdict, this Court has held:

> The issue must be submitted to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation.

Hanrahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) (citations omitted).

During Respondent's case, Respondent presented the following evidence to demonstrate that employees of The Getaway "knowingly" sold alcohol to an intoxicated person: Helton had a .212 BAC 50-90 minutes after leaving The Getaway, Helton typically sipped his beer, Helton consumed one beer at the Carolina Drive-in, and Helton consumed three beers at The Getaway.

Respondent presented no direct evidence showing that Appellants' employees "knowingly" served alcohol to an intoxicated person, and instead relied on Dr. Brewer's testimony. In fact, the only direct evidence regarding Helton's visit to The Getaway presented during the trial was that Helton was not exhibiting symptoms of intoxication.

In place of direct evidence, Respondent presented the testimony of Dr. Brewer. Using retrograde extrapolation, Dr. Brewer opined that a hypothetical man of Helton's approximate weight would have been exhibiting outward symptoms of intoxication when he was served the third beer at The Getaway. Based on the assumption that the hypothetical man consumed three beers at The Getaway, one beer at the Carolina Drive-in, and no other alcohol from the time he entered the Getaway until the crash, Dr. Brewer concluded that the man would have had to have consumed alcohol prior to arriving at The Getaway. Dr. Brewer then opined that, based on these assumptions, the man arrived at The Getaway with a .10 or .12 BAC. Finally, Dr. Brewer concluded that, under these assumed facts, the hypothetical person may have been exhibiting visible symptoms of intoxication when he was served the third beer at the Getaway.

Dr. Brewer's testimony, based on a hypothetical person of Helton's approximate weight, was carefully worded:

> [B]ased on my calculations he would certainly have over a .10, a .12 just having that first beer, if we're making the assumption that's all he had, was those four beers. . . . As he is being given more beer he *should be* showing outward signs of great impairment because his alcohol concentration is going up. So, you know, *I think that's general*, but *maybe* at first his speech may not be that impaired after three or four beers, but with each beer he certainly would be becoming more and more impaired.

(emphasis supplied).

Given the evidence, in order for the jury to find in favor of Respondent, it must find (1) that Dr. Brewer's assumption that Helton did not consume any alcohol after leaving the Getaway other than one beer at the Carolina Drive-in, was true, though Respondent provided no evidence to account for the time between Helton leaving the Getaway and arriving at the Carolina Drive-in, which could have been more than a half an hour; (2) that the hypothetical man on which Dr. Brewer based his testimony accurately reflected how Helton would react to alcohol, despite the fact that Helton weighed more than the hypothetical man and was an alcoholic; and (3) that Helton did in fact exhibit the outward symptoms that Dr. Brewer opined the hypothetical man "should" have been exhibiting.

In my view, only by piling inference upon inference could the jury conclude that the employees of the Getaway "knowingly" served alcohol to an intoxicated person. A plaintiff is not required to present direct evidence in order to make a case, but verdicts may not rest on speculation. See Hanrahan, 326 S.C. at 149, 485 S.E.2d at 908.

In upholding the trial court's decision to deny a directed verdict, the majority cites to Daley v. Ward, 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990). In Daley, the Court of Appeals affirmed the denial of a directed verdict in a case in which no direct evidence was presented to show that the defendant knowingly served an intoxicated person. However, Daley presented a much stronger set of facts than the instant case. The plaintiff was injured when a driver struck his car. The plaintiff and the investigating officer testified that the driver was intoxicated immediately after the accident, and the driver agreed. The driver had left the bar 15-20 minutes before the accident and had spent the previous 4-5 hours at the bar drinking nine, twelve-ounce cans of beer. The driver did not recall drinking beer at any other bar that evening.

This, in my view, constitutes a much stronger set of facts than the instant case. Helton visited not one, but three different bars on the night of the accident. The Getaway was not his last stop and the accident occurred 50-90 minutes after Helton left The Getaway. Given these facts, I believe a

jury verdict for Respondent can only be based on speculation and the trial court erred in denying Appellants' motion for directed verdict.

II. Statutory Inference

Even assuming the judge properly submitted the case to the jury, I believe the trial judge erred in instructing the jury that it could consider the statutory inference from the driving under the influence (DUI) statute in deciding liability. In my view, the inference is not relevant to the question before the jury – whether the Appellants' employees knowingly sold alcohol to an intoxicated person.

In Suskey v. Loyal Order of Moose Lodge # 86, 325 Pa.Super. 94, 472 A.2d 663 (Pa. 1984), the Superior Court of Pennsylvania upheld a lower court's decision not to include the instruction regarding whether the driver was "under the influence" in a suit against a bar owner for knowingly serving an intoxicated person. The court noted that "being 'under the influence' and 'visibly intoxicated' relate to different characteristics of ability and control as opposed to appearance."[3] Id. at 99-100, 472 A.2d at 666. I agree with the reasoning of the Pennsylvania court. Whatever standard the General Assembly may have chosen to set with regard to a person's ability or inability to lawfully operate a motor vehicle, it is not relevant to the question whether a person is intoxicated such that the employees knowingly served an intoxicated person.

Moreover, in my view, to apply the criminal inference in a civil matter would run contrary to the intent of the General Assembly. The criminal statute, as it existed at the time of the accident, provided as follows:

> (b) *In the criminal prosecution* for a violation of [statutes] relating to driving a vehicle under the influence of alcohol, drugs, or a combination of them, the alcohol concentration at the time of

[3] Though Suskey concerned a mandatory inference, rather than the permissible inference in the instant case, there is no difference for purposes of my analysis.

> the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:
> . . .
> (3) If the alcohol concentration was at that time ten one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.

S.C. Code Ann. § 56-5-2950 (2003) (emphasis added).

The express language of the statute specifies that the inference applies in a criminal prosecution and to apply the inference in a civil case contradicts the statute. See Wood v. Brown, 201 S.E.2d 225 (N.C. App. 1973) ("By the express language of the statute . . . it applies '(i)n any criminal action' . . . . By no sound exercise of statutory construction can we take such specific language to authorize the application of the statutory presumption in civil actions."). I note that my position is in accord with that of the majority of other jurisdictions that have dealt with this issue. See 16 A.L.R.3d 748, § 9.

Furthermore, I believe the charge was prejudicial. The instruction as to whether Helton was "under the influence" followed on the heels of the trial court's discussion of intoxication. Additionally, the trial court failed to adequately distinguish between "intoxication" and "under the influence." Given that evidence established Helton's BAC at the time of the accident, and that Dr. Brewer opined as to Helton's presumed BAC during his time at The Getaway, both of which were in excess of the .10 BAC referenced in the charge, I find that the instruction prejudiced Appellants.

In my view, the trial court erred in instructing the jury with regard to a presumption that a driver is under the influence and Appellants were prejudiced by the error. I would therefore reverse.

For the reasons stated above, I would reverse the decision of the trial court.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jason Thomas Kellett, Respondent.

Opinion No. 26837
Submitted June 1, 2010 – Filed July 26, 2010

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Jason Thomas Kellett, of Greenville, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a definite suspension, indefinite suspension, or disbarment. Respondent requests that the sanction be imposed retroactively to July 17, 2009, the date of his interim suspension. In the Matter of Kellett, 383 S.C. 479, 681 S.E.2d 575 (2009). Respondent further agrees to enter into a restitution agreement within thirty (30) days of the issuance of the Court's sanction. In addition, prior to seeking reinstatement, respondent agrees to enter into a two year monitoring contract with Lawyers Helping Lawyers (LHL) and to complete the South Carolina Bar's Legal Ethics and Practice Program Trust Account School and Ethics School. We

accept the agreement and disbar respondent from the practice of law in this state with conditions as stated at the conclusion of this opinion. The disbarment shall be imposed retroactively to the date of respondent's interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was administratively suspended from the practice of law on April 2, 2009, for failing to comply with mandatory continuing legal education requirements. Respondent admits that, although he ceased practicing law because of his suspension, he failed to inform all of his clients of his suspension, did not notify courts or opposing counsel with pending litigation of his suspension, and did not take reasonable steps to protect each of his clients' interests upon his suspension.

With regard to his trust account, respondent admits he failed to comply with the recordkeeping provisions of Rule 417, SCACR, by not preparing and/or maintaining ledgers of client transactions, an accounting journal or check register, complete copies of canceled checks, or records of deposit. In addition, respondent admits he deposited personal funds into his trust account, failed to conduct monthly reconciliations of the trust account, processed some client transactions using his operating account, and failed to designate on his trust and operating account checks the purpose and client matter for which they were written.

Respondent was placed on interim suspension on July 17, 2009, after failing to comply with a disciplinary subpoena. Id. After his suspension, respondent allowed his malpractice insurance to lapse. As a result, coverage is not available to the complainants for the matters set forth below.

Following his interim suspension, respondent did not respond to the Notices of Full Investigation in eighteen matters. He did appear pursuant to Rule 19(c), RLDE, and gave a statement to ODC.

Since that time, respondent has cooperated in the disciplinary investigation.

Matter I

In 2005, Client A hired respondent to represent her in a civil case against the City of Greenville and the Greenville Police Department. Respondent admits he failed to competently and diligently pursue Client A's legal matter and failed to keep her adequately informed about the status of her case.

Further, although he did not expect to be repaid, respondent advanced money to Client A to provide her with financial assistance while the case was pending. In addition, respondent signed an acknowledgement of an irrevocable assignment of settlement proceeds to repay Client A's loan from a settlement funding company from which Client A had borrowed $2,500.00 (plus $800.00 in fees). In March 2009, respondent settled Client A's claims for $3,000.00 with her consent. Instead of processing the settlement check through his trust account, respondent cashed the check at the bank. Respondent kept approximately $100.00 from the settlement as his fee and gave the rest of the cash to Client A. Respondent acknowledges this method of processing a settlement was improper. According to the terms of Client A's agreement with the settlement funding company, at the time of her settlement, she owed $6,281.56 on the loan. Respondent admits that he did not pay any portion of the settlement proceeds to the settlement funding company on Client A's behalf.

Matter II

In December 2007, Client B retained respondent's law firm to represent him in an employment-related matter. At the time, respondent's partner accepted the case. Later, the partner informed Client B that the matter had been assigned to respondent and that respondent would be handling the matter from that point forward.

Respondent consulted with Client B and informed him that he would be filing a lawsuit on his behalf. Although he spoke with Client B a few times, respondent admits he failed to adequately communicate with Client B about his legal matter and failed to file the lawsuit or take any meaningful action on behalf of the client. As a result, respondent missed the statute of limitations on Client B's wrongful termination claims. Respondent's partner has now resumed representation of Client B and is pursuing his breach of contract claims against his former employer.

Matter III

In 2005, Client C retained respondent to represent him in an employment matter. Respondent admits he failed to adequately communicate with Client C, to keep him reasonably informed about the legal matter, and to diligently pursue Client's C's legal matter. Respondent missed the statute of limitations on Client C's wrongful termination claim by one day. However, when he subsequently filed a suit for breach of contract and other claims, respondent included a cause of action for wrongful termination.

A few weeks before respondent filed suit, Client C borrowed $2,600.00 (plus $510.00 in fees) from a settlement funding company. Respondent signed an acknowledgment of Client C's assignment of settlement proceeds to the settlement funding company.

Respondent settled Client C's claims for $2,000.00 in November 2007. Respondent represents the settlement was properly disbursed. Client C disputes this claim and states he was unaware of the settlement until after respondent was suspended and he hired another attorney to determine the status of his case. Respondent did not prepare a written settlement statement and did not process the settlement through his trust account. Respondent's operating and trust account records show no deposit of these funds and no payments on or on behalf of Client C. Respondent acknowledges that his failure to maintain adequate records of this transaction creates a presumption of misappropriation.

Respondent did not pay any portion of the settlement proceeds to the settlement funding company on Client C's behalf. Client C now owes approximately $9,000.00 to the settlement funding company.

Matter IV

In October 2008, Client D retained respondent to represent him in a civil matter against his former employer on a contingency basis. The EEOC had dismissed Client D's charge of discrimination and issued a Notice of Suit Rights on September 29, 2008, giving him ninety days to file suit. Respondent filed suit on behalf of Client D on December 30, 2008, but failed to serve the pleadings on Client D's employer. Respondent took no further action on Client D's behalf and admits he failed to adequately communicate with Client D. Respondent admits he falsely stated to Client D that he had served the defendant and/or defense counsel with the pleadings.

Matter V

In or around September 2006, Client E retained respondent to represent her in a Social Security disability matter and a domestic matter. Respondent failed to provide Client E with an explanation of the fees and costs for the representation and did not provide a written fee agreement.

Respondent pursued Client E's Social Security claim and obtained both monthly benefits and back payments. The back payments totaled approximately $18,000.00. Respondent charged Client E a 50% fee on the back benefits, even though by statute he was limited to 25%. Respondent did not process this settlement through his trust account.

With regard to the domestic matter, respondent filed a complaint on behalf of Client E in April 2007, however, it was administratively dismissed when no action was taken within one year

of the filing. In June 2008, respondent refiled the complaint. The case was continued once for lack of service. In February 2009, a hearing was held in which temporary custody was granted to Client E.

Matter VI

Respondent represented Client F in connection with claims arising from an automobile accident. Respondent filed a lawsuit within the statute of limitations, but failed to timely serve the summons and complaint on the defendant. Respondent admits he failed to promptly respond to Client F's telephone calls and to keep her adequately informed of the status of her case.

Matter VII

Respondent represented Client G, a minor, in connection with an employment case. Respondent admits he did not respond to Client G's parents' telephone messages and failed to keep them informed about Client G's case.

Matter VIII

Respondent represented Client H in connection with claims against her employer for retaliatory discharge for filing a worker's compensation claim. Respondent admits he failed to promptly respond to Client H's telephone messages, failed to keep her adequately informed about her case, and failed to file a lawsuit on her behalf prior to the expiration of the statute of limitations.

Matter IX

Respondent represented Client I in connection with his Social Security claim. He failed to promptly respond to Client I's telephone messages, failed to keep Client I adequately informed about his case, and failed to take any meaningful action on Client I's behalf.

Matter X

Respondent represented Client J in claims arising from an automobile accident. In October 2007, respondent settled with the at-fault party on behalf of Client J for the policy limits of $50,000.00. Respondent did not pursue additional coverage claims on behalf of his client. Respondent retained $16,784.88 as his fee and for reimbursement of costs. Between October 2007 and August 2008, respondent paid $9,500.00 to Client J from his trust and operating accounts. Respondent was to disburse the remaining amount (approximately $23,715.12) to Client J's medical providers, but respondent did not pay the medical providers as agreed. However, in April 2009, respondent paid Client J's chiropractor $1,800.00 from his operating account. Respondent admits he did not maintain the funds in trust for the benefit of Client J and that he misappropriated funds from Client J's settlement by using them for office and personal reasons.

Matter XI

Respondent agreed to represent Client K in a child support collection action in South Carolina. Client K lived in Idaho. Respondent's fee was contingent on recovery of back support payments, but the payment agreement was not set forth in writing. Respondent acknowledges he failed to adequately communicate with Client K regarding her legal matter. Further, when respondent was sanctioned $1,200.00 for not complying with discovery, he paid the fine with funds held in trust for Client J.

In February 2008, respondent received a settlement on behalf of Client K in the approximate amount of $4,500.00. Respondent did not obtain Client K's consent to accept the settlement amount in writing. Respondent failed to properly disburse the settlement funds obtained for Client K and failed to hold the settlement funds in trust for her benefit. Respondent admits he misappropriated Client K's settlement proceeds.

Matter XII

Respondent agreed to represent Client L in a civil case against his former employer on a contingency basis. Respondent failed to take any meaningful action on behalf of his client. Further, he misrepresented to Client L that a settlement was eminent.

Matter XIII

Respondent agreed to represent Client M in a wage claim against his former employer. Respondent failed to take any meaningful action on behalf of his client and misrepresented to his client that he was working on the matter.

Matter XIV

Respondent agreed to represent Client N, a minor, in connection with sexual harassment she allegedly experienced in the workplace. Respondent failed to take any meaningful action in the matter, failed to return Client N's father's telephone calls, and failed to keep him and his daughter adequately informed on the status of the matter. The statutes of limitation have expired on all potential claims.

Matter XV

Respondent agreed to represent Client O in connection with a child custody/adoption matter. Respondent admits he failed to take any meaningful action on behalf of Client O.

Matter XVI

Respondent agreed to represent Client P in connection with claims against her employer for retaliatory discharge. Respondent did not promptly respond to Client P's telephone messages, did not keep Client P adequately informed about the status of her case, and failed to file a lawsuit or to resolve Client P's claims prior to the expiration of the statute of limitations.

Matter XVII

Respondent agreed to represent Client Q in connection with claims against his employer for retaliatory discharge. Respondent did not promptly respond to Client Q's telephone messages, did not keep Client Q adequately informed about the status of his case, and failed to file a lawsuit or to resolve Client Q's claims prior to the expiration of the statute of limitations.

Matter XVIII

Respondent accepted representation of Client R in connection with an employment matter. Respondent admits he did not keep Client R reasonably informed about the progress of her legal matter. In particular, respondent filed a lawsuit on behalf of Client R, but it was dismissed on summary judgment in 2007. Respondent did not inform Client R of this development. Further, he failed to file an appeal or take any other action to protect Client R's interests following the dismissal of the lawsuit. Even after his administrative suspension, respondent continued to assure Client R that her case was moving forward.

Matter XIX

Respondent agreed to represent Client S in an age discrimination case. At the time Client S consulted with respondent, she had been offered a severance package. Respondent advised Client S to decline the offer and pursue litigation.

Respondent took no meaningful action on behalf of Client S. He failed to communicate with Client S. In addition, respondent failed to preserve Client S's claims prior to the expiration of the statute of limitations, and he misrepresented the status of the matter to Client S. Client S lost her opportunity to receive the severance package.

Matter XX

In October 2007, Client T paid respondent $500.00 to file a mechanic's lien in the amount of approximately $10,000.00. Respondent failed to file the lien or take other appropriate steps to protect Client T's interests prior to the expiration of the statute of limitations. Respondent admits he did not hold the fee received from Client T in trust until earned and did not refund the fee.

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 to a client); Rule 1.2 (lawyer shall abide by client's decision as to whether to accept settlement offer); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.5 (lawyer shall not charge unreasonable fee, lawyer shall communicate basis or rate of fee and expenses, preferably in writing, and contingency fee agreement shall be in writing signed by client); Rule 1.8(e) (lawyer shall not provide financial assistance to client in connection with representation); Rule 1.15 (lawyer shall hold property of clients in the lawyer’s possession in connection with a representation separate from the lawyer’s own property); Rule 1.16 (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect client's interests, such as giving reasonable notice to client, surrendering papers and property to which client entitled, and refunding any advance payment of fee or expense that has not been earned or incurred); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of client); Rule 4.1 (in course of representing a client a lawyer shall not knowingly make false statement of material fact or law to third person); Rule 8.1 (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is

professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits he violated the recordkeeping provisions of Rule 417, SCACR.

Further, respondent admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent, retroactive to the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall enter into a restitution agreement with the Commission on Lawyer Conduct (the Commission) in which he shall agree to repay the unearned and/or misappropriated fees to Client C, Client E, Client J, Client K, and Client T and to repay the Lawyers' Fund for Client Protection for all claims paid on his behalf. Further, prior to seeking reinstatement, respondent shall enter into a two year monitoring contract with Lawyers Helping Lawyers (LHL) and complete the South Carolina Bar's Legal Ethics and Practice Program Trust Account School and Ethics School. Finally, within thirty (30) days of the date of this opinion, respondent shall reimburse the Commission and ODC for costs incurred in this matter. Under no circumstances shall respondent be permitted to file a Petition for Reinstatement until full restitution and payment of costs have been made.

Within fifteen (15) 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 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Cullen Galmore, Respondent.

Opinion No. 26838
Submitted June 8, 2010 – Filed July 26, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James Cullen Galmore, of Conway, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent, a public defender, was representing Client A on criminal charges when the client was served with two murder

warrants. Respondent received discovery materials in late August 2007. Although the materials were voluminous, respondent failed to timely review the discovery materials and, as a result, failed to realize another of his current clients was a potential witness against Client A.

Respondent first recognized the conflict in early December 2007 when he received a letter from Client A and a copy of the complaint from ODC. In his December 14, 2007, response to ODC respondent advised he would move to be relieved from representing Client A.

In mid-January 2008, ODC wrote respondent and requested additional information and an update on the status of the representation. Respondent replied in writing, but did not provide the requested status update.

During a follow-up telephone call initiated by ODC on February 6, 2008, respondent advised that he had forgotten to move to be relieved as counsel as well as to respond to the status update inquiry. A conflict order was issued on February 20, 2008, but respondent did not advise ODC of the order as requested and promised. By letter dated March 3, 2008, ODC again inquired about the status of the representation, prompting respondent to advise ODC on March 6, 2008, by telephone, that the court had relieved him and appointed new counsel for Client A.

Matter II

During the investigation of a complaint made by Client B, respondent responded to ODC's request for additional information only after receiving a reminder letter. Respondent acknowledges his untimely response violated the Rules of Professional Conduct.

Matter III

Respondent was appointed to represent Client C on several counts of burglary as well as allegations that he spit on two detention

center officers. During a meeting more than a year after his appointment, Client C failed to adequately answer respondent's questions, causing respondent to believe that Client C needed a mental evaluation.

About three months later, respondent met with Client C again and delved into the question of Client C's mental health. Client C provided specific information which led respondent to conclude a competency evaluation was necessary.

A few weeks later, respondent forwarded a proposed evaluation order to the solicitor. Respondent did not follow up on the issue for nearly four months; when he did, he learned the proposed order was lost. Respondent forwarded another proposed order to the solicitor, but then, two weeks later, represented Client C at a guilty plea without the benefit of an evaluation. Respondent submits that, although he had concerns about Client C's mental health, he is certain Client C would have been found competent to stand trial.

During the course of ODC's investigation, respondent replied to a request for additional information only after receiving a reminder letter. Respondent acknowledges his untimely response violated the Rules of Professional Conduct.

Matter IV

Respondent was appointed to represent Client D on four counts of armed robbery. During a meeting at the jail, Client D asked respondent to pursue a bond reduction. Respondent sought the hearing as requested, but did not inform his client of his efforts and did not respond to his client's letter asking about a bond reduction hearing.

Approximately four months later, Client D telephoned respondent and inquired about a bond reduction hearing. At that time, respondent advised him that there were no grounds to seek a reduction of his bond.

During the course of its investigation, ODC requested respondent provide additional information. Respondent responded to this request only after receiving a reminder letter from ODC. Respondent acknowledges his untimely response violated the Rules of Professional Conduct.

Matter V

Respondent represented Client E on one count of murder. Client E was denied a bond. During the next six months period, Client E was transferred to a neighboring jail at his own request and he sent respondent three letters which went unanswered. Respondent's only communication with Client E after the bond hearing was when he sent an investigator to instruct Client E to stop contacting the media. Respondent was relieved on his own motion.

Respondent acknowledges his past office management practices contributed to the allegations admitted in the Agreement for Discipline by Consent. He asserts he has worked hard to improve the timeliness of his responses to ODC; ODC acknowledges that, during the course of its investigation, respondent's responses became timelier. Respondent also submits his office has adopted practices, procedures, and systems which he believes have improved his responsiveness to clients and his ability to manage his caseload.

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 to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4(a)(3) (lawyer shall keep client reasonably informed about status of matter); Rule 1.4(a)(4) (lawyer shall promptly comply with reasonable requests for information); and Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand from disciplinary authority). Respondent

acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully fail to respond to lawful demand from disciplinary authority).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Douglas Francis Gay, Respondent.

Opinion No. 26839
Submitted June 8, 2010 – July 26, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Douglas Francis Gay, of Rock Hill, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was hired by the complainants, husband and wife, to defend them in a civil lawsuit. An arbitration hearing was held; wife was unable to attend. The complainants erroneously believed wife's appearance before the arbitrator would be rescheduled.

Approximately two months after the arbitration, the arbitrator issued an award in favor of the plaintiff and notified counsel for both parties. Respondent failed to notify the complainants of the arbitrator's award as well as a letter he received from opposing counsel attempting to collect the award. Approximately three months after the arbitrator issued the award, judgment was entered on the award. The local clerk of court mailed a copy to respondent, but respondent did not notify the complainants of the judgment.

Opposing counsel later filed an execution against the complainants' property and forwarded it to the local sheriff with a copy to respondent. Respondent again failed to notify the complainants.

The complainants learned of the judgment approximately six months after its entry when they received notice from the sheriff. When the complainants contacted respondent, respondent told them he was not informed of the judgment. Respondent agrees he made this statement and explains that his file does not reflect receipt of the judgment or execution against the property, though he does not dispute both documents were mailed to him.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); and Rule 1.4(a)(3) (lawyer shall keep client reasonably informed about status of matter). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate the Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sherry Bingley Crummey, Respondent.

Opinion No. 26840
Submitted June 8, 2010 – Filed July 26, 2010

DISBARRED

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

Coming B. Gibbs, Jr., of Gibbs and Holmes, of Charleston, 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 pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to disbarment pursuant to Rule 7(b), RLDE, Rule 413, SCACR. In addition, respondent agrees to pay full restitution to clients, banks, and other persons and entities, including the Lawyers' Fund for Client Protection, who have incurred losses as a result of her misconduct and to reimburse the Commission on Lawyer Conduct (the Commission) and ODC for costs incurred in the investigation and prosecution of this matter. We accept the agreement and disbar respondent from the practice of law in this state. Further, respondent shall pay full restitution to all clients, banks, and other persons and entities, including the Lawyers' Fund, who have incurred losses as a result of her misconduct and reimburse the Commission and ODC for costs incurred in this matter. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent received checks and money orders from clients for payments to the clients' mortgage lender. Respondent accepted the checks and money orders payable to the lender and deposited some of the checks and money orders into her trust accounts and operating account.

Respondent admits she failed to make the mortgage payments for the clients, used the checks and money orders entrusted to her for purposes other than payment of the clients' mortgage, made material misrepresentations to the court at the foreclosure hearing regarding her clients' home, and that her failure to make her clients' mortgage payments resulted in the clients' home being sold at foreclosure.

Respondent acknowledges she failed to communicate with her clients regarding the foreclosure action. Respondent's clients only learned that their home was sold at the foreclosure sale when approached by the lender's real estate agent. Due to respondent's misconduct, her clients had to obtain new counsel in an effort to save their home.[1]

Respondent admits she failed to safeguard her clients' funds. Further, she admits she wrote checks from her trust accounts for expenses such as employee payroll, her children's school programs, parking tickets, and restaurant charges.

Respondent acknowledges her trust accounts have carried a negative balance and that she had trust account checks returned for insufficient funds. She admits she did not reconcile her trust accounts, did not keep individual client ledgers, and did not retain the bank statements for her trust accounts, all of which are required by Rule 417, SCACR. In addition, she admits her records are in such disarray that the trust accounts

[1] Fortunately, clients' new counsel was able to persuade the court to set aside the foreclosure sale.

cannot be reconciled. Respondent agrees she failed to cooperate with ODC as she failed to respond to the Notice of Full Investigation in this matter.[2]

Matter II

Respondent admits she failed to communicate with her client in this matter regarding a probate case. Respondent settled the probate matter and funds in the amount of $6,538.90 were to be refunded to the client. Respondent admits she failed to remit the funds to her client.

Respondent admits that her client filed an action against her in summary court and was awarded a judgment. The client filed a claim with the Lawyer's Fund and was awarded $5,788.90.

Respondent acknowledges the client's funds are not in her trust accounts. Respondent admits she failed to cooperate with ODC in that she did not respond to the Notice of Full Investigation in this matter.

Matter III

Clients retained respondent to represent them in a civil matter. Respondent admits she failed to diligently and competently represent the clients, failed to communicate adequately, failed to return telephone calls in a timely manner, failed to advise the clients regarding court appearances, and failed to give them timely notice of hearings. In addition, respondent did not make timely court appearances on behalf of clients and failed to produce discovery requests to opposing counsel. Respondent admits her misconduct in the civil action caused delays in the prosecution of the case. Respondent further admits that she did not cooperate with ODC as she failed to respond to the Supplemental Notice of Full Investigation in this matter.

Matter IV

Respondent admits that, as of July 2009, she had three fraudulent check charges which had been pending in Summary Court since

[2] By order dated July 8, 2009, the Court placed respondent on interim suspension. In the Matter of Crummey, 383 S.C. 359, 680 S.E.2d 276 (2009).

June 2003. Respondent agrees she failed to timely resolve these charges, but asserts the charges have now been dismissed and expunged.

Matter V

Respondent was appointed by the Charleston County Probate Court as Special Administrator to handle the Estate of Doe. Respondent admits she informed Doe's family that the estate would disburse funds to the family in October 2008 and that she informed the family in writing as to the amount of the disbursement. Respondent admits none of the family has received any disbursements from the estate and that she does not have the funds to disburse to the family. Further, respondent concedes she does not have records that would account for the funds of the estate. Respondent admits she failed to cooperate with ODC in that she did not respond to the Supplemental Notice of Full Investigation in this matter.

Matter VI

Respondent admits she drafted a will for Client A naming herself as Personal Representative and Trustee of his trust. Respondent admits she did not have Client A seek the advice of other counsel prior to naming herself Personal Representative and Trustee. Further, respondent admits she had her family members witness both the will and trust and a member of her family served as the notary for the execution of the will and trust.

Respondent agrees that, as Trustee, she was to make payments to maintain Client A's residence and for the benefit of his spouse. She admits she did not make the payments to maintain the residence or support the spouse.

Respondent admits she has taken funds belonging to the trust and converted those funds to her use. Respondent acknowledges the Probate Court ordered that she be replaced as Personal Representative and Trustee. Respondent agrees she failed to make an accounting to the new Personal Representative and to the Probate Court and has been held in contempt by the Probate Court for her failure to cooperate with the court. Respondent further admits she failed to cooperate with ODC as she did not respond to the Supplemental Notice of Full Investigation in this matter.

Matter VII

Respondent admits she failed to pay a court reporter for a deposition transcript that was originally invoiced on October 20, 2008, in the amount of $359.25. She failed to pay the same court reporter for a deposition transcript that was originally invoiced on June 4, 2009, in the amount of $265.50. Respondent failed to cooperate with ODC in that she failed to respond to the Supplemental Notice of Full Investigation in this matter.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of client); Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rule 4.1 (in representing client, lawyer shall not knowingly make false statement of fact to third person); Rule 4.4 (in representing client, lawyer shall not use means that have no substantial purpose other than to burden third party); Rule 8.1 (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary counsel); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, and misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits she violated the financial recordkeeping provisions of Rule 417, SCACR.

Further, respondent admits her misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice

or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Further, we order respondent to pay full restitution to all clients, banks, and other persons and entities, including the Lawyers' Fund, who have incurred losses as a result of her misconduct and to reimburse the Commission and ODC for costs incurred in this matter. Within thirty (30) days of the date of this opinion, the Commission and respondent shall enter into a restitution agreement which complies with the directives of this opinion. Under no circumstances shall respondent be permitted to file a Petition for Reinstatement until full restitution and payment of costs have been made.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Samuel Anthony Wilder, Petitioner,

v.

State of South Carolina, Respondent.

ORIGINAL JURISDICTION

Appeal from Charleston County
John C. Few, Circuit Court Judge

Opinion No. 26841
Submitted March 17, 2010 – Filed July 26, 2010

DISMISSED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Petitioner was convicted of murder and possession of a firearm during the commission of a violent crime and received consecutive sentences of life and five years. He had no direct appeal,[1] and following an evidentiary hearing on his post-conviction relief (PCR) application, the PCR judge found petitioner was entitled to a belated direct appeal. See White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). PCR counsel neglected to timely appeal this PCR order, and this Court issued a writ of certiorari in our original jurisdiction to review this PCR order. Since we find no merit to the direct appeal, we dismiss the writ of certiorari.

FACTS

Petitioner and the victim were married for less than a year when she left him. There was evidence that petitioner's wife was afraid of him. Two days after moving out of the home they shared, the victim was shot dead. She was inside a club when shots were fired, and then patrons, including the victim, ran into the street. Several witnesses testified they observed a man with a gun in the club, and then saw him shoot the victim in the back once they were outside the club. These witnesses were unable to identify petitioner as the armed shooter. Another witness, Terrance Smalls, was inside the club, and did identify petitioner as the shooter. A bartender, Harold Wigfall, also identified petitioner as the man shooting the gun in the club. Witness Smith observed petitioner with the gun in the club, then saw him shoot the victim in the street, stand over her where she fell, and shoot her again. Witness Campbell also identified petitioner as the shooter, as did witness Washington. Moreover, other witnesses were able to identify the automobile in which the shooter fled the scene. When this car was found, it contained fired cartridges matching those found at the scene. The automobile belonged to petitioner.

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[1] Although a direct appeal was filed, it was dismissed on counsel's motion because a post-trial motion was pending in the circuit court. Ultimately, a second direct appeal was begun but not perfected due to petitioner's appointed counsel's delicts.

The State also called as a witness Scennie Murdaugh, an employee of the club where the shooting occurred. Murdaugh, who was working that night, testified and identified petitioner as the person firing the gun. The trial judge refused to allow petitioner to attempt to impeach Murdaugh with nine alleged incidents of preparing false tax returns, holding these alleged prior bad acts were not probative of Murdaugh's credibility under Rule 608(b), SCRE.

ISSUE

Did the trial judge err in holding that allegations of preparing false tax returns are not probative of a witness's truthfulness?

ANALYSIS

Under Rule 608(b)(1), a trial judge may allow a witness to be cross-examined about "specific instances of [that witness's] conduct" if the trial judge, in his discretion, finds these instances probative of the witness's credibility. An abuse of discretion occurs when the trial court's ruling lacks evidentiary support or where it is controlled by an error of law. E.g., State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). Here, the trial judge committed such an error when he held that preparing false tax returns was not conduct probative of Murdaugh's credibility. Compare In re Hamer, 342 S.C. 437, 537 S.E.2d 552 (2000) (filing false tax returns is a "serious crime" adversely reflecting on a judge's honesty and trustworthiness).

In order for this Court to reverse petitioner's convictions and sentences, however, we must find that the trial court's error prejudiced petitioner. Since Murdaugh was merely one of six eye witnesses to identify petitioner as the shooter, there were other witnesses whose testimony was consistent with that of the identifying witnesses, and physical evidence linked petitioner in the murder, her testimony was merely cumulative to other overwhelming evidence of guilt. As such, reversal is not warranted here. E.g., State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2001).

CONCLUSION

The writ of certiorari is

DISMISSED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

James W. Bodenstedt, Jr., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26842
Heard June 23, 2010 – Filed July 26, 2010

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David Spencer, all of Columbia, and Solicitor Robert M. Ariail, of Greenville, for Petitioner.

Senior Appellate Defender Joseph L. Savitz, III, of Commission on Indigent Defense, of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals decision in State v. Bodenstedt, 381 S.C. 545, 674 S.E.2d 174 (Ct. App. 2009). On certiorari, we were presented with the question whether the Court of Appeals erred in reversing and remanding Respondent's sentence, which the trial court amended based on Respondent's disturbances in the courtroom. After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ron O. Finklea, Appellant.

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 26843
Heard February 4, 2010 - July 26, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE PLEICONES: This case stems from the death of Walter Sykes, a security guard at the Selectron plant in Lexington County. A jury

convicted Ron Finklea of murder with various aggravating circumstances, and recommended a sentence of death, which the trial court imposed. Finklea appeals, seeking a new sentencing. We consider the appeal in conjunction with mandatory proportionality review and, finding no error, we affirm.

FACTS

On August 1, 2003, Angel Peters, a security guard at Selectron, was on duty when Finklea came to the plant around 2:00 AM.[1] He was wearing a jacket with a stripe across it. Peters opened the doors and Finklea explained that he needed to use the ATM machine. She told him that it was not working, but let Finklea inside. After talking with Peters, Finklea left but then came back to the building. Finklea asked Peters questions about whether her company was hiring and at one point he followed her into the security room to get a phone number and flier. Finklea asked questions about security, such as how often Peters watches the cameras and who else was working security at night. When another security guard arrived, Finklea departed.

The following day, in the early morning hours of August 2, 2003, a man (Man #1) wearing a jacket with a stripe across it came to the door of the Selectron plant. The State argued at trial and the evidence suggests that Finklea was Man #1. Walter Sykes was the security guard on duty and, apparently thinking Man #1 wanted to use the ATM, opened the door. The events that followed were captured on the plant's video system. As Man #1 approached the ATM, Sykes entered the security office. Man #1 then followed Sykes into the office and moments later emerged and opened the front door to allow a second man (Man #2) to enter. Man #2 carried a gasoline can, which he handed to Man #1. Man #1 entered the office again, then exited and approached the ATM and doused it with gasoline. Moments later, Sykes, bleeding from the neck and engulfed in flames, ran from the building. Sykes died on the front lawn from burns and gunshot wounds to the

[1] Peters identified Finklea in a photographic lineup and in court.

face and neck. From the video it is apparent that Man #1 is both the person who shot Sykes and the person who set him on fire.

Finklea was arrested and, days later, attempted to hang himself in his cell. Though he survived the attempt, Finklea suffered a brain injury resulting in amnesia and claims that he cannot recall the events that occurred the day of the murder. Physicians who examined Finklea found evidence of brain damage and determined that he was likely not feigning memory loss.

Finklea was tried and found guilty of the murder of Sykes with the following aggravating circumstances: (1) the murder was committed while in the commission of a burglary while armed with a deadly weapon; (2) the murder was committed while in the commission of a robbery while armed with a deadly weapon; and (3) the murder was committed while in the commission of physical torture. See S.C. Code Ann. §§ 16-3-10; 16-3-20(C)(a)(1)(c), (d), and (h) (2003). The jury recommended a sentence of death which the trial court imposed. Finklea was also found guilty of first-degree arson in violation of S.C. Code Ann. § 16-11-110(A); attempted safecracking in violation of S.C. Code Ann. § 16-11-390; possession of a firearm during the commission of a violent crime in violation of S.C. Code Ann. § 16-23-490; and criminal conspiracy in violation of S.C. Code Ann. § 16-17-410. Finklea now raises two issues which he argues entitle him to a new capital sentencing proceeding.

ISSUES

I. Did the trial court err in finding Finklea competent to assist in his own defense during the sentencing portion of the trial?

II. Did the trial court err in allowing the Solicitor to ignite an incendiary device during his closing argument in the sentencing portion of the trial?

III. Proportionality review

DISCUSSION

I. Competency

During pre-trial hearings, Finklea's counsel noted that her client's memory loss would impact the trial in both the guilt and sentencing phase. The trial court found Finklea competent as to both phases of trial and Finklea argues on appeal only that the trial court erred in finding him competent to participate in the sentencing phase. We find the trial court's determination is supported by the evidence.

A person must be competent to stand trial. See Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[2] Drope, 420 U.S. at 171, 95 S.Ct. at 903, 43 L.Ed.2d at 112-13.

The defendant bears the burden of proving his lack of competence by a preponderance of the evidence. State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002), citing Dusky. The trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance. Id.

Finklea's counsel argued to the trial court that Finklea's amnesia prevented him from assisting his counsel at sentencing as he was unable to recall potential mitigating facts from the incident:

[2] Finklea incorrectly references Singleton v. State, 313 S.C. 75, 437 S.E.2d 53, 58 (1993) for the "appropriate test" for competency. Singleton considers the question whether a defendant is competent to be executed. The Singleton standard for competency is different from the standard required to stand trial, as it requires only that a party "understand they have been sentenced to death for murder and be able to communicate rationally with counsel." Id.

> In any capital case, I think the circumstances of the crime are critical when it comes to the penalty phase. . . . [L]et's say that based on these facts, [the jury] would have found both Mr. Finklea and [his accomplice] guilty no matter who pulled the trigger, certainly when it comes to the penalty phase, the circumstances of the crime are, they're central.
>
> If it was something that, you know, he startled me and it was just a horrible armed robbery gone bad, that's a lot more mitigating than, hey, he could identify me, so I blew him away. I mean, that's horribly aggravating.

Counsel conceded that Finklea would likely not succeed in the guilt phase and consequently, mitigation would be "dispositive." Based on her client's amnesia, she argued that he was not competent to proceed. Finklea testified prior to the trial and was questioned by both counsel and by the court. The trial judge later held a hearing regarding Finklea's competency and ultimately found Finklea competent to stand trial.

We find the trial court's ruling is supported by the evidence. Even assuming Finklea's amnesia is genuine, we decline to find him unable to assist counsel based on an inability to recall mitigating facts which may or may not exist. We note that Finklea was able to assist his counsel at sentencing in a number of ways, including: advising his counsel as to possible character witnesses; advising his counsel as to mitigating facts from his life, such as his military service; and making a statement to the jury in which he apologized for the crime, expressed remorse, and pleaded for his life. Moreover, any potential prejudice to Finklea's capacity to consult with his counsel due to his inability to recall the circumstances of the crime is lessened by the fact that the incident was captured on video. See Wilson v. United States, 391 F.2d 460, 463-64 (D.C. Cir. 1968) (recognizing significance of ability to reconstruct evidence of the crime). Finally, we note that a number of jurisdictions have found that a defendant's inability to recall

the facts of an alleged crime do not render the defendant incapable of assisting his counsel. See A.L.R.3d 544, §§ 2[a], 4 (2010).

Given the above, we find that the trial judge's ruling is supported by the evidence. We decline to adopt a competency standard for the sentencing phase of the trial different from that of the guilt phase. Finklea's bare assertion that his amnesia may have deprived him of the ability to present mitigating facts from the crime does not suffice to overturn the trial court's finding of competency. See State v. Weik, 356 S.C. at 81, 587 S.E.2d at 685.

II. Closing Argument

During the State's closing argument in the sentencing portion of the trial, the Solicitor held a lighted match-shaped, metal fire-starter before the jury as he described Finklea lighting Sykes on fire. Defense counsel objected to the use of the fire-starter as overly prejudicial but the trial judge overruled the objection, noting that the use was allowed for demonstrative purposes. Finklea appeals the trial court's ruling and argues that the death sentence must be vacated as a result of the Solicitor's action. We find that the Solicitor's demonstration was not unduly prejudicial so as to warrant a new sentencing.

A trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). The appellant has the burden of showing that any alleged error deprived him of a fair trial. Id. The relevant question is whether the solicitor's action so infected the trial with unfairness as to make the resulting conviction a denial of due process. See id. The Court must review the argument in the context of the entire record. Id.

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Consequently, the solicitor's closing argument must be carefully tailored so as not to appeal to the personal bias of the juror, nor be calculated to arouse his passion or prejudice. Id.

The Solicitor's closing argument[3] included the following to which Finklea objects:

> Can you imagine the horror, the horror of him seeing a bullet, the flash of the gun and it coming right into his lip? Can you imagine the horror of another shot going through his neck, and somewhere along in there he had to be on the floor, you remember Officer Mike Phipps that testified right here? He said, under that desk was blood splatter. He had to be below the desk. Did he shoot him when they're down, or they're down and then they get up and you remember that bloody hand print on the chair.
>
> And we're just getting started, now comes the real thing. Gasoline pouring on another human being and the fire, the fire, the burning. When you're cooking sometimes and you touch the stove or the frying pan or you reach the in oven and you touch that hot thing or you're grilling, whoo, oh, it hurts, it's painful. It grabs your attention, you probably run to the sink, want to put some water on it. Probably the most painful thing that a person can do --
>
> Defense counsel: Objection, Your Honor.
>
> Solicitor Myers: -- is to be lit on fire.
>
> The Court: Basis for the objection?
>
> Defense counsel: Solicitor Myers has just ignited some sort of fire device, appears to be some sort of

[3] The Solicitor also used a gas can and gun, neither of which was in evidence, during his closing argument. Though defense counsel made a timely objection to the gas can and gun, Finklea does not appeal the trial court's ruling permitting the demonstrative use of these objects.

lighter. It's extremely large. We believe it's prejudicial. It's meant to prejudice the jury, to enflame them.

The Court: Mr. Myers?

Solicitor Myers: Talking about the circumstances of this crime, Your Honor, physical torture.

The Court: The objection is overruled. The use of these things for demonstrative purposes is allowed.

Solicitor Myers: For that feeling and you can't get away from it. What about when you're burning trash and you got a bunch of limbs and leaves out there and you pour a little gasoline on it and you throw a match in there, whoof, the concussion just blows you back, sometimes it may singe your eyes. Well, what if it's all over your body and you can't get away from it, it's engulfed you? He's going back to the ATM machine. The last, last moments of a good man's life on fire.

It is clear the Solicitor was zealous in his closing argument. However, given the other evidence before the jury regarding the physical torture of Sykes, we find the Solicitor's use of the incendiary device was not unduly prejudicial. The jury was presented with the surveillance footage showing Sykes running from the building while engulfed in flames, Sykes's charred uniform, and autopsy photographs. Moreover, as noted, the Solicitor used a gas can and gun as props during his argument, neither of which was in evidence, just prior to the use of the fire-starter and Finklea does not

challenge their use on appeal. Given these facts, we find Finklea has not met his burden of showing that the trial judge committed reversible error in permitting the Solicitor to use the fire-starter as a demonstrative device in his closing. See Northcutt, 372 S.C. at 222, 641 S.E.2d at 881.

III. Proportionality Review

In accordance with S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the evidence supports the jury's finding of aggravating circumstances and that the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, after review of other decisions, we find the sentence is neither excessive nor disproportionate to sentences imposed under similar situations. See, e.g., State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002) (capital sentence upheld where an aggravator was physical torture); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) (capital sentence upheld for murder committed in course of armed robbery); State v. Huggins, 336 S.C. 200, 519 S.E.2d 574 (1999) (capital sentence upheld for murder committed in course of armed robbery).

CONCLUSION

We find the trial court properly determined that Finklea was competent to participate in the sentencing phase and that the Solicitor's demonstrations during closing argument were not so prejudicial as to warrant new sentencing. The verdict and sentence of the trial court is therefore

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Martha Lewin Argoe, Appellant,

v.

Three Rivers Behavioral Center and Psychiatric Solutions, Its Successor; Phyllis Bryant-Mobley, MD; Glenn Hooker, MD; Aiken Regional Medical Center, Aurora Pavilion; David A. Steiner, MD; Cheryl C. Dodds, MD; Doris Ann Burrell, RN; Carolina Care Plan; James F. Walsh, Jr.; G. Lewis Argoe, Jr.; and George L. Argoe, III, Defendants,

Of Whom James F. Walsh, Jr. is the Respondent.

Appeal from Lexington County
John M. Milling, Circuit Court Judge

Opinion No. 26844
Heard March 17, 2010 – Filed July 26, 2010

AFFIRMED

Charles M. Black, Jr. and Mitchell C. Payne, both of Warner Payne & Black, of Columbia, for Appellant

M. Dawes Cooke, K. Michael Barfield, and John W. Fletcher, all of Barnwell Whaley Patterson & Helms, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: In this case, Martha Lewin Argoe (Appellant) appeals the trial court's order granting summary judgment to Attorney James F. Walsh, Jr. (Respondent). We affirm.

FACTS/PROCEDURAL BACKGROUND

Appellant filed the underlying lawsuit against Respondent arising out of his representation of her husband, Lewis M. Argoe, Jr. (Husband), and son, G. Lewis Argoe, III (Son). Although now divorced, Appellant and Husband were experiencing marital difficulties at the time Respondent represented Husband and Son.[1]

Husband and Son entered into an attorney-client relationship with Respondent, informing him that they were seeking his help in protecting Appellant from her own irresponsible and erratic behavior. They told

[1] The legal issues presented in this case arise out of Respondent's representation of Son. However, Respondent also assisted Husband in the filing of an Application for Involuntary Emergency Hospitalization for Mental Illness, which caused Appellant to be admitted against her will to the South Carolina Department of Mental Health Psychiatric Hospital.

Respondent that Appellant was acting strangely and had become financially irresponsible.[2] Specifically, Husband and Son informed Respondent that Appellant had taken out a loan against a condominium she owned in Beaufort County, South Carolina (the Beaufort Property). Appellant told no one about the loan, allowed it to go into default, and the Beaufort Property was about to enter foreclosure. Respondent learned that Son was Appellant's attorney-in-fact pursuant to a Durable Power of Attorney executed by Appellant on April, 20, 2004.[3] In order to avoid financial disaster, Respondent assisted Son in the transfer of title to the Beaufort Property to a trust for the benefit of Appellant. Son was the residual beneficiary to the trust and would receive legal title to the Beaufort Property in the event of Appellant's death. Pursuant to Appellant's then-existing estate plan, Son was already to receive the property upon her death. Thus, the creation of the trust at issue was consistent with the status quo.

Appellant alleges that Husband orchestrated the transfer of title to the Beaufort Property and her involuntary commitment because he feared she was going to divorce him. Husband and Son maintain these actions were taken to protect Appellant from herself. Respondent understood Husband and Son's motivations to be benevolent and there is no evidence in the record to indicate that he had reason to believe otherwise.

On August 15, 2006, Appellant filed an action against Respondent in Beaufort County asserting various causes of action, including setting aside influenced transactions, professional negligence, breach of fiduciary duty, breach of trust, invasion of privacy, intentional infliction of emotional distress, violation of civil rights, conspiracy, conversion, and abuse of process. On June 6, 2007, Appellant filed another action in Lexington

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[2] In addition to sharing details about Appellant's financially irresponsible behavior, Husband and Son told Respondent that Appellant claimed to be tormented by demons and witches and had become paranoid.

[3] Prior to April 20, 2004, Husband was Appellant's attorney-in-fact. Appellant claims she made Son her attorney-in-fact because she feared husband would use this power to harm her.

County arising out of the same facts and circumstances, but naming additional defendants. The two lawsuits were combined in Lexington County. Respondent filed a motion for summary judgment, which was granted by the trial court as to all causes of action.

ISSUES

Appellant timely filed a notice of appeal and presents the following issues for review:

I. Did the trial court err in granting summary judgment because it found no legally cognizable duty owed by Respondent to Appellant?

II. Did the trial court err in granting summary judgment as to Appellant's cause of action for intentional infliction of emotional distress?

III. Did the trial court err in granting summary judgment as to Appellant's cause of action for legal malpractice?

IV. Did the trial court err in granting summary judgment as to Appellant's cause of action for abuse of process?

V. Did the trial court err in granting summary judgment because it found no conflict of interest between Respondent and Appellant?

STANDARD OF REVIEW

Appellate courts review the grant of summary judgment under the same standard applied by the trial court. *Houck v. State Farm Fire & Cas. Ins.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). Summary judgment is appropriate where there are no genuine issues of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c),

SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences that reasonably can be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007).

ANALYSIS

I. Duty

Appellant argues she had an attorney-client relationship with Respondent arising out of his representation of Son. Therefore, Appellant asserts that the transfer of title to the Beaufort County Property without her knowledge breached a duty of care Respondent owed to her. We disagree.

"Generally, 'an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.'" *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (quoting *Garr v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)). Further, an attorney owes no duty to a non-client unless he "breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

We find that Appellant was not Respondent's client and, therefore, was not owed a duty of care arising from such a relationship. The April 20, 2004 Durable Power of Attorney executed by Appellant unequivocally appointed Son as her attorney-in-fact to act on behalf of Appellant "in all matters pertaining to [her] care and maintenance." Specifically, Appellant appointed Son to act in her name and gave him broad powers with respect to her estate, including the power to convey real estate.[4] Because Respondent represented

[4] Specifically, by way of the April 20, 2004 Durable Power of Attorney, Appellant empowered Son to:

Son and not Appellant in the Beaufort Property transaction, the only duty of care arising out of that relationship was owed to Son. Thus, we agree with the trial court's finding that Respondent did not owe a duty of care to Appellant.

II. Intentional Infliction of Emotional Distress

Appellant argues that the trial court erred in granting Respondent's motion for summary judgment with respect to Appellant's cause of action for intentional infliction of emotional distress. We disagree.

In order to recover for intentional infliction of emotional distress, a plaintiff must establish:

> 1. The defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;

> [A]llot, assign, buy, care for, collect, contract with respect to, continue any business of [hers], convey, convert, endorse, deal with, dispose of, enter into, exchange, hold, improve, incorporate any business of [hers], invest, endorse, cash, lease, manage, mortgage, grant and exercise options with respect to, take possession of, pledge, receive, release, repair, sell, sue for and in general, to exercise all the powers in the management of [her] affairs and estate which any individual could exercise in the management of similar property owned in his own right, upon such terms and conditions as [her] attorney-in-fact may seem best, and to execute and deliver any and all instruments and to carry and to do any and all acts which [her] attorney-in-fact may deem proper or necessary to care for [her] in a manner and to the same degree of comfort to which [she] ha[s] become accustomed to living.

2. The conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
3. The action of the defendant caused plaintiff's emotional distress; and
4. The emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

Hansson, 374 S.C. at 356, 650 S.E.2d at 71.

The trial court granted Respondent's motion for summary judgment with respect to Appellant's cause of action for intentional infliction of emotional distress because it found no evidence in the record to suggest that Respondent's conduct was "so extreme and outrageous as to exceed all bounds of decency." *Id*. Appellant argues that Respondent's conduct was sufficiently extreme and outrageous to survive a summary judgment motion because he owed Appellant a duty of care arising out of an attorney-client relationship, thus breaching a duty owed to Appellant. Because we find that Appellant was not owed a duty of care arising out of an attorney-client relationship with Respondent, this argument is without merit. Thus, we affirm the trial court's grant of summary judgment as to Appellant's cause of action for intentional infliction of emotional distress.

III. Legal Malpractice

Appellant argues that the trial court erred in granting Respondent's motion for summary judgment as to the cause of action for legal malpractice. We disagree.

A plaintiff in a legal malpractice action must establish four elements:

1. The existence of an attorney-client relationship;
2. A breach of duty by the attorney;
3. Damage to the client; and

4. Proximate cause of the plaintiff's damages by the breach.

Rydde v. Morris, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009) (citing *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996)). Appellant cannot satisfy the first element of this cause of action because, as discussed above, there is no evidence in the record to suggest that an attorney-client relationship existed between Respondent and Appellant. Thus, the trial court correctly granted Respondent's motion for summary judgment with respect to the cause of action for legal malpractice.

IV. Abuse of Process

Appellant argues the trial court erred in granting summary judgment as to her cause of action for abuse of process. We disagree.

"The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. Am. Med. Intern., Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) (citing *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967)). The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. *Food Lion, Inc. v. United Food Commercial Worker's Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002).

We find no evidence in the record to suggest that Respondent had an "ulterior purpose" to his actions, let alone a "willful act in the use of the process not proper in the conduct of the proceeding." *Hainer*, 328 S.C. at 136, 492 S.E.2d at 107. In fact, the record indicates the contrary: Respondent acted with Appellant's best interests in mind, transferring her property to a trust for her benefit so that she might not bring financial harm to herself. Thus, we affirm the trial court's grant of summary judgment as to Appellant's cause of action for abuse of process.

V. Conflict of Interest

Appellant argues the trial court erred in granting summary judgment because there was evidence that Respondent had a conflict of interest with her. We disagree.

Appellant's argument as to conflict of interest is predicated on the assumption that she was Respondent's client for the purposes of the Beaufort Property transaction. For the aforementioned reasons, no such attorney-client relationship existed, thus Appellant's argument is without merit.

Nonetheless, Appellant also argues Respondent had a conflict of interest with her arising out of an alleged self-gift to Son effectuated by the creation of the trust. The logic of this argument is puzzling because even if the creation of the trust effectuated a self-gift to Son a conflict of interest between Respondent and Appellant could not exist absent the existence of an attorney-client relationship. Nonetheless, addressing the argument raised, there is no evidence in the record indicating a self-gift to Son was effectuated by the creation of the trust.

In responding to Appellant's allegations concerning a self-gift to Son, the dissent recognizes "an attorney may be liable to a third party where he conspires with a client against a third." However, the dissent goes too far when it states evidence in the record suggests a conspiracy between Respondent and Son against Appellant, and this evidence is sufficient to survive a motion for summary judgment in this matter.

The record indicates Son retained Respondent to represent him in his capacity as Appellant's attorney-in-fact for the purpose of protecting Appellant's assets. Specifically, Son wanted to protect the Beaufort Property from Appellant's financial irresponsibility, an action permitted pursuant to Appellant's Durable Power of Attorney. The creation of the trust for the benefit of Appellant achieved the goal of protecting the Beaufort Property from Appellant's irresponsible behavior and there is no evidence in the record

to suggest the transfer was intended as, or effectively created, a self-gift to Son. The fact that Son was the named residuary beneficiary of the trust does not compromise the legality of the transfer, or suggest a conspiracy between Son and Respondent. As residuary beneficiary, Son did not obtain legal title to the property and none of the powers that would accompany such an ownership interest. Additionally, naming Son the residuary beneficiary of the trust paralleled Appellant's estate plan and such a decision was presumably made because it mirrored Appellant's desires for the Beaufort Property. Thus, the record does not suggest Son and Respondent engaged in a conspiracy against Appellant resulting in a self-gift to Son, but rather indicates that Son and Respondent intended to protect Appellant's assets from her infirmities while honorably considering her intentions for the property as manifested in her estate plan.

Additionally, the dissent would create a rule that would extend an attorney's liability to those in privity with his or her client. We disagree with this general rule and vehemently oppose its adoption as it would apply in this situation. The Durable Power of Attorney at issue in this case was executed by Appellant so that Son could protect her interests from her poor judgment and erratic behavior. This type of arrangement is commonplace and serves a good purpose: the protection of the infirm from their own infirmities. The fact that an infirm principal of a Durable Power of Attorney does not appreciate an action taken by an attorney-in-fact pursuant to the power she willfully gave him, as is the case here, does not create liability for the attorney facilitating a transaction that is called into question.[5] Recognizing a duty owed to a third-party, even one in privity to an attorney's client, would undermine the good and common practice of executing Durable Powers of Attorney that are intended to provide the principal protection from their own infirmities.

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[5] To be clear, third-party liability in a situation such as this could arise if it is shown that an attorney "breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client." *Onorato*, 318 S.C. at 300, 457 S.E.2d at 602. There is no evidence in the record to support a claim that Respondent acted in any manner that would create liability to third parties, including Appellant.

For the aforementioned reasons, we find no conflict of interest existed between Respondent and Appellant and that no self-gift was effectuated by the creation of the trust.

CONCLUSION

Respondent did not owe any duty to Appellant arising out of his representation of Son in the Beaufort Property transaction; thus, the trial court's order granting summary judgment with respect to all causes of action should be affirmed. Additionally, no conflict of interest existed between Respondent and Appellant. Therefore, the trial court's order is affirmed.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my view, there are genuine issues of material fact which preclude summary judgment here.

I agree that, generally, where an individual who holds a power of attorney hires an attorney, that attorney's client is the attorney-in-fact and not the principal who executed the power. E.g., Estate of Keatinge v. Biddle, 789 A.2d 1271 (Me. 2002). I also agree that, in general, an attorney who acts in good faith with the authority of his client is not liable to a third party for the performance of his professional services. E.g., Gaar v. North Myrtle Beach Realty, Inc., 287 S.C. 525, 339 S.E.2d 887 (Ct. App.1985). However, an attorney may be liable to a third party where he conspires with a client against that third party, see Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995), or where his professional negligence injures a party in privity with his client. Garr, *supra*.

In other words, I largely agree with the majority on the applicable law. Where I disagree, however, is with the consequences, at least for the purposes of summary judgment, of respondent's advice and assistance to Son to exercise his authority as Appellant's attorney-in-fact to transfer title to the Beaufort Property from Appellant's name into a trust. Unlike the majority, I am not persuaded that, because at the time the property was transferred to the trust, Son was also the devisee under Appellant's current will, it can be said that this transfer was, as a matter of law, not a self-gift.[6] Until the transfer of title to the trust, Appellant had the right to dispose of the property during her lifetime or to change her testamentary disposition of the Beaufort Property. Once the trust was established, however, she could no longer dispose of this property during her lifetime or in her will.[7]

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[6] It appears that the majority and I agree that Son's power of attorney did not contain a provision permitting Son to make a gift to himself. See e.g. Loftis v. Eck, 288 S.C. 154, 341 S.E.2d 641 (Ct. App. 1986).

[7] It appears that the trust has been dissolved and fee simple title to the property returned to Appellant as part of a settlement between her and Husband and Son. In my view, while this fact may affect Appellant's damages it does not impact Respondent's potential liability.

In my opinion, the evidence here is sufficient to withstand respondent's motion for summary judgment on appellant's claims of legal malpractice and conflict of interest. I would reverse.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Fisher, Respondent,

v.

Jill M. Tucker and Tommy C. Tucker, Appellants.

Appeal from Anderson County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 26845
Heard May 27, 2010 – Filed July 26, 2010

AFFIRMED

William Patrick Yon, of Chapman Byrholdt & Yon, of Anderson, for Appellants.

Kenneth Philip Shabel, of Campbell & Shabel, of Spartanburg, for Respondent.

Mary Jane Goodwin, of Anderson, Guardian Ad Litem.

JUSTICE PLEICONES: This is a parental rights case concerning the paternity of a child born in wedlock. The family court ruled against the mother and her husband, who sought to have the child declared a child of their marriage, and they appealed. We affirm.

FACTS

James Fisher and Jill Tucker met in March 2005, and began a sexual relationship that same month. At that time, Ms. Tucker was married to and residing with Tommy Tucker. In March 2006, Ms. Tucker revealed to Mr. Fisher that she was pregnant and in July 2006, Ms. Tucker, along with two of her children, moved in with Mr. Fisher. According to Mr. Fisher, Ms. Tucker told him that he was the father of her unborn child.

Mr. Fisher testified that he attended all doctor's appointments with Ms. Tucker, was present at the hospital on October 13, 2006, when the child was born, and spent three days at the hospital following the birth when the child was admitted to the neonatal intensive care unit. The child was given Mr. Fisher's surname.

Following the birth of the child, Ms. Tucker was required to complete a form for state records. A hospital employee testified that, based on conversations with Ms. Tucker, Mr. Tucker was not the father of the child. The employee advised Ms. Tucker that "when a mother is married to her husband and another man is involved as the father of the child, that she could not list her husband's name on the baby's birth certificate, that she could put [']refused['] on there." As a result, Ms. Tucker wrote "Refused" in the box marked "Father's Current Legal Name." The hospital provided a "complimentary birth certificate" which listed Mr. Fisher as the child's father.

Ms. Tucker and her children continued to live with Mr. Fisher after the birth of the child. Mr. Fisher testified that he and Ms. Tucker sent out birth announcements to family and friends and published a birth announcement in the local newspaper. In January 2007, Ms. Tucker returned to her husband. A few months later, Ms. Tucker took the child to the doctor's office and, in

filling out the paperwork, listed Mr. Fisher as the child's father. Ms. Tucker used Mr. Fisher's insurance for the visit.

In March 2007, Fisher filed this action seeking a declaration of paternity. Mr. and Ms. Tucker requested that the judge deny Fisher's request and declare the child to be a child of their marriage. In April 2007, a temporary hearing was held at which time a guardian *ad litem* was appointed for the child and Mr. Tucker was ordered to undergo paternity testing. The test revealed a 0.00% probability of Mr. Tucker being the father of the child. Prior to Ms. Tucker moving out of his home, Mr. Fisher had arranged for a paternity test which revealed a 99.999% probability of Fisher being the father of the child.

The matter was tried in the family court. At trial, Mr. Tucker testified that he was residing with and had sexual intercourse with Ms. Tucker during the month in which the child was conceived. Mr. Tucker also admitted that he had a vasectomy approximately ten years before the birth of the child and used protection during sexual intercourse with Ms. Tucker during the month of conception. Ms. Tucker testified that she had sexual intercourse with Mr. Fisher during the month of conception but did not use protection.

The trial court issued an order of paternity finding for Mr. Fisher. Mr. and Ms. Tucker appealed. This Court certified the case for review pursuant to Rule 204(b), SCACR.

STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. See Strickland v. Strickland, 375 S.C. 76, 82, 650 S.E.2d 465, 469 (2007). However, this broad scope of review does not require this Court to disregard the findings of the family court. See Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005).

ISSUES

I. Did the family court err in finding that Fisher overcame the presumption of legitimacy?

II. Did the family court err in adopting the doctrine of paternity by estoppel?

III. Is the "deeply rooted interest in maintenance of the family unit" protected by upholding the presumption of legitimacy?

DISCUSSION

I. Presumption of legitimacy

The Tuckers argue that the family court erred in finding that Fisher defeated South Carolina's common law presumption of legitimacy. In short, the Tuckers contend that "even though Mr. Fisher has provided evidence to show doubt and suspicion that the child is legitimate, he has not provided the necessary facts to overcome the presumption that the child is a legitimate product of Mr. and Ms. Tucker's marriage." We disagree. We find the statutory presumption, rather than the common law presumption, controls in the instant case.

In South Carolina, there is a common law presumption that a child born during lawful wedlock is a child of the marriage. See Barr's Next of Kin v. Cherokee, Inc., 220 S.C. 447, 68 S.E.2d 440 (1951), *superseded by statute on other grounds as recognized in* South Carolina Dep't of Soc. Serv. v. Burris, 297 S.C. 537, 539, 377 S.E.2d 578, 579 (1989). "Where the child is born after lawful wedlock, and after the lapse of the usual period of gestation, it should require *a very strong state of circumstances* to overthrow the presumption of legitimacy, such as impossibility of access, absolute non-access, ab[a]ndonment, or *something equally as conclusive*." Id. (emphasis added).

Despite the common law presumption, the family court found a "rebuttable presumption" of Mr. Fisher's paternity was created under S.C. Code Ann. § 20-7-956(A)(3) (2007).[1] The family court further found that Fisher had overcome the common-law presumption of legitimacy. Id. We agree with the family court and believe the court properly determined paternity.

S.C. Code Ann. § 20-7-956(A) provided: "[t]he following evidence is admissible at a hearing to determine paternity . . . (3) Test results which show a statistical probability of paternity. A statistical probability of ninety-five percent or higher creates a rebuttable presumption of the putative father's paternity." S.C. Code Ann. § 20-7-956(A)(3) (2007). At trial, Fisher presented the results of a test with the DNA Diagnostic Center showing a statistical probability of 99.999% that he was the father of the child. Consequently, there arose a rebuttable statutory presumption that Fisher is the father. See S.C. Code Ann. § 20-7-956(A)(3) (2007).

We find Mr. and Ms. Tucker produced no evidence to rebut this presumption. The Tuckers demonstrated only that they were married at the time of Leigha's birth and had sexual intercourse during the month of conception. At trial and in their brief, they seem to rely on the common-law presumption. However, common law rules must yield to statutes enacted by the General Assembly. See Burris, 297 S.C. at 539, 377 S.E.2d at 579 (holding Lord Mansfield's rule superseded by statute specifying parentage as a permissible subject for husband and wife testimony). Accordingly, under the facts of this case the statutory presumption controls and the Tuckers failed to overcome the presumption.[2]

The Tuckers contend that the common law presumption controls despite the statutory presumption found in S.C. Code Ann. § 20-7-956(A)(3).

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[1] This section is now codified at S.C. Code Ann. § 63-17-60(A)(3) (2010).

[2] We note that the common law presumption may still control in other parental rights cases. Under the facts of this case, however, where a person has met the requirements of § 20-7-956(A)(3), the rebuttable presumption set forth by the General Assembly controls.

They base their argument on Burris, and specifically on the Court's holding that the common law presumption "is not affected by" another provision of § 20-7-956 – subsection (5). We find the Court's holding in Burris simply recognizes the absence of a conflict between subsection (5) and the common law presumption and is therefore not on point.

Moreover, even if we were to hold the common law presumption controlled, we are confident that Fisher overcame the presumption. Fisher presented evidence of two genetic tests, one showing him to have a 99.999% probability of being the child's father and the other showing Mr. Tucker to have a 0% probability. Significantly, Fisher elicited testimony establishing that Mr. Tucker had undergone a vasectomy and used protection while having sexual intercourse during the month of conception. These facts are tantamount to a showing of infertility and constitute "something equally as conclusive" as the examples, set forth in Burris, to overcome the presumption of legitimacy.

CONCLUSION

We find the family court properly determined paternity. Mr. Fisher was entitled to a rebuttable presumption of paternity under § 20-7-956(A)(3) and the Tuckers failed to overcome that presumption. The order of the family court is therefore

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

Chad Wyman Mead, Claimant,	Petitioner,
v.	
Jessex, Inc. d/b/a Midlands Glass, Employer, and Uninsured Employer Fund, Carrier,	Defendants,
of whom Uninsured Employer Fund is the	Respondent.

ORDER

This Court granted a writ of certiorari to review the opinion of the South Carolina Court of Appeals in Mead v. Jessex, Inc., 382 S.C. 525, 676 S.E.2d 722 (2009). The parties now ask this Court to approve the settlement agreement which includes a request to vacate the opinion of the Court of Appeals.

The settlement is approved and this matter is dismissed. Further, the opinion of the Court of Appeals is vacated.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ Kaye G. Hearn J.

I believe that this is an appropriate case to seek a recommendation from the Court of Appeals before acting on the request to vacate the opinion. Rule 261(d), SCACR. Therefore, I would not act on the request to vacate until a recommendation is obtained from the Court of Appeals.

s/ John W. Kittredge J.

Columbia, South Carolina

July 22, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sharon Brown,

Appellant,

v.

William B. James,
Superintendent for Cherokee
County School District,

Respondent.

Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 4674
Heard October 13, 2010 – Filed April 12, 2010
Withdrawn, Substituted and Refiled July 21, 2010

REVERSED AND REMANDED

Fletcher Smith, Jr., of Greenville, for Appellant.

M. Jane Turner, David Duff and Kiosha A. Hammond, all of Columbia, for Respondent.

GEATHERS, J.: Sharon Brown (Brown) appeals the circuit court's decision granting District Superintendent William B. James' (James) motion for summary judgment in the matter she brought against him alleging a

violation of her rights under the South Carolina Teacher Employment and Dismissal Act (Employment and Dismissal Act).[1] Brown asserts that (1) the circuit court abused its discretion when concluding she had not exhausted her administrative remedies; (2) the circuit court misinterpreted the Employment and Dismissal Act; (3) she had a legal right to appeal directly to the circuit court because the Board of Trustees (Board) had already reached a final decision regarding the nonrenewal of her contract; and (4) the circuit court abused its discretion when concluding that her motion to amend her complaint to add parties was moot. We reverse and remand.

FACTS

Brown was a teacher, assigned to Limestone Central Elementary School (Limestone) in Cherokee County, South Carolina, for the 2006-2007 school year. Brown had been a teacher at Limestone for eight years before she filed this action. On April 10, 2007, Brown was called to the Cherokee County School District (District) office to meet with Mr. William A. Jones (Jones), Chief Administrative Officer/Director of Personnel for the District. Jones and Brown discussed an "improvement letter" Brown had received from Limestone's Principal, Sharon Jefferies (Jefferies), and the fact that Brown had filed a sexual harassment complaint with the Equal Employment Opportunity Commission against Jefferies.[2] Brown informed Jones that she

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[1] S.C. Code Ann. §§ 59-25-410 to -530 (2004).

[2] The record does not explain what an improvement letter is, but it can be inferred that it is a letter outlining a plan to improve the teacher's performance. Section 59-25-440 of the South Carolina Code (2004) states:

> Whenever a superior, principal, where applicable, or supervisor charged with the supervision of a teacher finds it necessary to admonish a teacher for a reason that he believes may lead to, or be cited as a reason for, dismissal or cause the teacher not to be reemployed he shall: (1) bring the matter in writing to the attention of the teacher involved and make a reasonable effort to assist the teacher to correct

had planned to file the sexual harassment complaint even before she received the improvement letter.[3] Jones told Brown she could either go back to work or take leave under the Family Medical Leave Act due to the "hostile/threatening" work environment. Brown chose to take the leave because Jones told her she would be paid until the end of her contract year, which was July 2007. Jones then informed Brown that he was going to recommend that her teaching contract not be renewed and advised her to resign.

Subsequently, Brown received a letter dated April 12, 2007, from James, stating that at Jefferies' recommendation, her contract for the upcoming year would not be renewed. Brown retained attorney Theo W. Mitchell (Attorney Mitchell), and within fifteen days of the April 12, 2007 notice, she submitted a written request for an opportunity to be heard under the Employment and Dismissal Act. The Board received Brown's request on April 27, 2007. However, on April 24, 2007, the Board took up James' April 12th "notice of intent not to renew" letter and voted to terminate Brown's contract that same day. The Board did not inform Brown of its decision.

Even though the Board had already made its final determination regarding Brown's contract, the Board asked Attorney Mitchell if Brown would waive the fifteen-day requirement for scheduling the hearing to give it an opportunity to discuss the matter. Brown agreed to the waiver. The Board then notified Attorney Mitchell that it wanted to depose Brown before the hearing.

Subsequently, Attorney Mitchell informed the Board that Brown would not be available for a deposition prior to a hearing. Thereafter, on two separate occasions, the Board informed Attorney Mitchell that if it did not

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> whatever appears to be the cause of potential dismissal or failure to be reemployed and, (2) except as provided in section 59-25-450, allow reasonable time for improvement.

[3] Brown's initial pro se complaint and her sworn affidavit make reference to her EEOC complaint, which she filed based on claims of sexual harassment, racial discrimination, and retaliation.

receive a response from either Brown or him regarding the scheduling of a deposition, it would consider Brown's noncooperation as a voluntary withdrawal of her request for a hearing, and the case would be closed. Brown did not participate in a deposition. On November 27, 2007, an attorney for the Board sent Attorney Mitchell a letter stating, "As I have had no contact from you since September 25, 2007, the District now considers the request [for a hearing] to be withdrawn and the matter closed." The Board did not schedule or give notice of a hearing. Consequently, on November 29, 2007, Brown filed an action in the circuit court against James for violation of the Employment and Dismissal Act.

PROCEDURAL HISTORY

Brown filed her initial complaint in circuit court because she believed her due process rights were violated under the Employment and Dismissal Act in that her contract was not renewed and she was never afforded an opportunity to be heard. Specifically, in her complaint against James, Brown alleged breach of contract, fraud, breach of contract accompanied by a fraudulent act, negligence and/or negligent misrepresentation, breach of duty of good faith and fair dealing, and intentional infliction of emotional distress. In the case before us, Brown asserts the Board made a final decision regarding her employment before she was afforded an opportunity to be heard as required by the Employment and Dismissal Act. Brown also asserts that she could not comply with the Employment and Dismissal Act's thirty-day appeal process regarding the Board's final determination as she did not have knowledge of the Board's final determination until eleven months after the decision.[4] James did not file a formal answer that addressed any of the issues Brown raised in her complaint. Instead, on January 18, 2008, fifty days after the complaint was filed and served, James filed a motion to dismiss under Rule 12(b)(6), SCRCP, or in the alternative, a motion for summary judgment under Rule 56, SCRCP.

[4] The Board never sent Brown a formal notification of its final decision regarding her termination. She became aware of the date of the final decision through the Board's discovery responses to the case before the circuit court.

On February 13, 2008, Brown filed a motion to add the Board as a defendant. On March 7, 2008, James renewed his motion, stating only that Brown had not exhausted her administrative remedies. During February and March 2008, Brown filed a request for production of documents and requests to admit. During March and April, James answered the requests. After Brown received the responses to the request for production, she sought to amend her complaint to add the Board's attorneys as defendants predicated on their knowledge of and involvement in what she perceived to be a fraudulent act.

On April 28, 2008, the circuit court heard Brown's motion to amend and James' motion to dismiss. On May 5, 2008, the circuit court issued an order granting James' motion to dismiss,[5] concluding that Brown had not exhausted her administrative remedies. The court also concluded that based on the dismissal, Brown's motion to amend was rendered moot. On May 12, 2008, Brown filed a motion for reconsideration, which included a request that if the court upheld the dismissal, that it be without prejudice. On June 20, 2008, the circuit court issued an order denying Brown's motion. This appeal followed.

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[5] James filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCP, or, in the alternative, a motion for summary judgment pursuant to Rule 56, SCRCP. Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. Id. In the order granting the dismissal, the circuit court considered "the record in this case, the applicable law, and the argument of counsel and Brown." In doing so, it effectively treated James' Rule 12(b)(6) motion to dismiss as a Rule 56 motion for summary judgment as it based its ruling on allegations and information set forth outside the complaint. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); Gilbert v. Miller, 356 S.C. 25, 27, 586 S.E.2d 861, 862-63 (Ct. App. 2003).

ISSUE ON APPEAL

The issue presented in this case is whether the circuit court erred in granting James' motion for summary judgment because it concluded that Brown failed to exhaust her administrative remedies.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, an appellate court applies the same standard of review as the circuit court under Rule 56, SCRCP. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Knox v. Greenville Hosp. Sys., 362 S.C. 566, 569-70, 608 S.E.2d 459, 461 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

LAW/ANALYSIS

I. Exhaustion of Administrative Remedies

Brown argues the circuit court erred in concluding that her claims were not properly before it due to her failure to exhaust her exclusive statutory remedy under the Employment and Dismissal Act. We agree.

Initially, we address the applicability of the doctrine of exhaustion of administrative remedies to local school boards. Whether under the Administrative Procedures Act (APA),[6] general administrative law standards, or the fundamental principles of administrative law, Brown was required to exhaust her administrative remedies before seeking judicial review. Moreover, the Board was also subject to the limitations and exceptions to the exhaustion doctrine.

[6] S.C. Code Ann. §§ 1-23-310 to -400 (2005 & Supp. 2009).

> The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. This doctrine is well established, is a cardinal principle of practically universal application, and must be borne in mind by the courts in construing a statute providing for review of administrative action.

2 Am. Jur. 2d Administrative Law § 595 (1962) (citing Bustos-Ovalle v. Landon, 225 F.2d 878 (9th Cir. 1955); James v. Consol. Steel Corp., 195 S.W.2d 955 (Tex. Civ. App. 1946); Bowen v. Dep't of Soc. Sec., 127 P.2d 682 (Wash. 1942)) (footnotes omitted);[7] see also 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 15 (3rd ed. 1994) (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938)) ("[It is] the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.").

Under the APA, section 1-23-380 specifically states, "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." Our courts have applied the APA standards to certain local school board administrative decisions. In Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, a case involving a local school board's decision regarding a charter school application, our Supreme Court established that the standard of judicial review was the APA standard of review. 371 S.C. 561, 565, 641 S.E.2d 24, 26 (2007). Also, and more notably, the Court referred to its analysis in Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998), as establishing the requirements for administrative agencies when presenting their findings. The Court stated:

[7] Although the current version of 2 Am. Jur. 2d Administrative Law does not include the quotation, the cases cited for its propositions are still binding.

"[a]lthough Porter addresses the Public Service Commission, we find it applicable to all administrative agencies, including local school boards." Lee County Sch. Dist., 371 S.C. at 567, 641 S.E.2d at 28. (emphasis added).

Further, in McWhirter v. Cherokee County School District No. 1, 274 S.C. 66, 261 S.E.2d 157 (1979), our Supreme Court referred to the actions of a local school board in language that indicates that the board is held to the standards of an "agency" as defined in the APA. In McWhirter, similar to the case at hand, an elementary school teacher sought to enjoin the school district from terminating her under the Employment and Dismissal Act. The Court stated:

> In Law v. Richland County School District No. 1, 270 S.C. 493, 243 S.E.2d 192 (1978), we held that if any of the charges against a teacher are supported by substantial evidence, the school board's decision to dismiss must be sustained. We defined "substantial evidence" as "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." (citation omitted).

McWhirter, 274 S.C. at 68-69, 261 S.E.2d at 158 (emphasis added).

Additionally, there has also been a decision from this Court interpreting the power of the circuit court under the APA when dealing with a local school board's discretion in teacher terminations under the Employment and Dismissal Act. In Adamson v. Richland County School District One, this Court stated: "S.C. Code Ann. § 1-23-380(6) (Supp. 1997) [an APA provision] gives the circuit court authority to reverse an agency decision 'made upon unlawful procedure' or in excess of 'statutory authority.'" 332 S.C. 121, 128, 503 S.E.2d 752, 755-56 (Ct. App. 1998) (emphasis added).

Hence, the aforementioned authorities militate the conclusion that the parties in the instant action are subject to the exhaustion of administrative remedies doctrine of the APA. And although the standards of the APA apply

in this case, the application of the Employment and Dismissal Act primarily informs the analysis and renders its outcome.

In this case, Brown received notice that her teaching contract was recommended for nonrenewal.[8] In order to fully exhaust her administrative remedies, Brown was required to request a hearing before the Board within the time frame prescribed by the Employment and Dismissal Act. Section 59-25-420 of the South Carolina Code (2004) states, "Any teacher, receiving a notice that he will not be reemployed for the ensuing year, shall have the same notice and opportunity for a hearing provided in subsequent sections for teachers dismissed for cause during the school year."

In order to secure her opportunity for a hearing, Brown was required to make a written request to the Board within fifteen days of the notice of nonrenewal pursuant to section 59-25-460 of the South Carolina Code (2004). Here, there is no dispute that Brown timely requested a hearing after receiving the Board's April 12, 2007 notice. The analysis of this matter is convoluted for two reasons: (1) the Board officially voted to terminate Brown's contract on April 24, 2007 (unbeknownst to Brown) prior to affording her the opportunity for a hearing, and (2) the Board dismissed her appeal on November 27, 2007, because she refused to submit to a deposition. We will address each of these issues in turn.

A. Finality of an Agency Action

Brown asserts that the April 24, 2007 vote by the Board constituted a final action. We agree. The minutes of the April 24, 2007, Board meeting show a final decision regarding the termination of Brown's contract was made even before her fifteen-day period to request a hearing had expired.[9] On

[8] The notice did not inform Brown of the cause for the nonrenewal of her contract, as required by sections 59-25-420 and 59-25-460 of the South Carolina Code (2004).

[9] The Agenda for the April 24, 2007 Cherokee County School District No. 1, Board of Trustees, Board Meeting is replete with separate and distinct

appeal, James admits a final determination regarding Brown's contract was made on April 24, 2007, but argues that the Board accepted the recommendation "subject to the [Employment and Dismissal] Act's procedural protections, particularly [Brown's] right to a Board hearing."[10] Yet, there is no language in the Employment and Dismissal Act that states a final decision of the Board is subject to a teacher's right to a hearing after the fact.

Our Supreme Court has expounded upon the exhaustion of administrative remedies with regard to an agency's final decision. In South Carolina Baptist Hospital v. South Carolina Department of Health & Environmental Control, the Court held:

> An agency decision which does not decide the merits of a contested case . . . is not a final agency decision subject to judicial review . . . It would be premature for a court to decide the merits of a dispute when the agency responsible for making the decision has not yet had an opportunity to decide the merits of the case.

291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987).

In that case, the Court did not find judicial review of an interlocutory decision to be appropriate. Id. Conversely, judicial review would have been appropriate if an evidentiary hearing was conducted and a final decision was made regarding the merits of the case. Id.[11] Additionally, in Canteen v.

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categories that address personnel recommendations; however, the reference to the nonrenewal of Brown's contract is titled "Terminations."

[10] James makes these assertions on pages 8 and 9 of the Final Reply Brief of Respondent.

[11] In Darby v. Cisneros, 509 U.S. 137, 144 (1993), the United States Supreme Court held that "the finality requirement is concerned with whether the initial agency decision maker has arrived at a definitive position on the issue that

McLeod Regional Medical Center, 384 S.C. 617, 624, 682 S.E.2d 504, 507 (Ct. App. 2009), the Appellate Panel of the Workers' Compensation Commission reversed the findings of the single commissioner regarding a brain injury and remanded the case for a determination of permanency to body parts other than the claimant's brain. The claimant immediately sought judicial review and the employer filed a motion to dismiss, arguing the Appellant Panel's decision was interlocutory because it had remanded the case for further proceedings. Id. However, this Court held, "because the appellate panel ruled on [the only issue before it], there was a final agency decision on the merits in this case and [the claimant] exhausted all of her administrative remedies." Id.

In the case at hand, whether or not to terminate Brown was the only issue to be determined, and when the Board unanimously voted to terminate Brown, it reached a final decision on the merits. Section 59-25-480 of the South Carolina Code (2004) specifically states, "The decision of the district board of trustees shall be final, unless within thirty days thereafter an appeal is made to the court of common pleas of any county in which the major portion of such district lies."

Further, when the Board voted to accept James' recommendation for the nonrenewal of Brown's teaching contract prior to conducting a hearing, its decision had an immediate effect on Brown's legal rights.[12] Sections 59-25-

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inflicts an actual, concrete injury . . . ." Additionally, in Idaho Watersheds Project v. Hahn, 307 F.3d 815, 825-28 (9th Cir. 2002), the Ninth Circuit held that under certain circumstances, an agency's initial decision can be considered final for exhaustion purposes. Specifically, when an agency has completed the process for reaching an initial decision that has immediate legal effects on the petitioner, the initial decision will be considered a final decision, even though the initial decision-maker may reconsider its decision or the initial decision is subject to review within the agency.

[12] During oral argument, the Court stated, "Her [Brown's] contract was terminated on the 24th," to which counsel for James interjected, ". . . effective on June 7th." Consequently, in order for there to be an effective date of

460 and 59-25-470 of the South Carolina Code (2004) make it expressly clear that before the Board makes a final decision regarding the acceptance or rejection of a recommendation for nonrenewal of a teacher's contract, the teacher must be afforded the opportunity to be heard. The observance of the procedural requirements of the Employment and Dismissal Act is mandatory and not a matter of discretion.

With regard to what Board action constituted a final agency decision, James inaccurately interprets the procedure outlined in section 59-25-470 and improperly conflates the requirements of section 59-25-410 with those of section 59-25-470.[13]

Section 59-25-410 of the Employment and Dismissal Act instructs the Board to decide and notify the teachers "in their employ concerning their employment for the ensuing year." According to the statute, by April 15th of each year, the Board or its designee,[14] must notify the teachers in writing of the recommendations for non-renewal. James notified Brown with an April 12th letter of his intent not to renew her contract for the ensuing year. This satisfied the April 15th notice requirement of section 59-25-410. Thereafter, pursuant to section 59-25-470, the Board must afford the adversely affected teachers a hearing based on the notice of dismissal that was recommended by

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termination, there had to have been a decision to terminate Brown in the first place.

[13] "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003). "It is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

[14] In this case, the Board's designee was Cherokee County Superintendant James.

the superintendent. After the hearing is completed, the Board is required to either affirm or withdraw the notice and that action will translate into its final decision. See S.C. Code Ann. § 59-25-470 (2004); see also Adamson, 332 S.C. at 128, 503 S.E.2d at 756 (explaining the Board is free to reject the superintendent's recommendation, and, until then, there is no final board action).

Contrary to James' argument, there are no inconsistencies or conflicts between section 59-25-410 and 59-25-470. When the Board voted unanimously on April 24th to terminate Brown's contract, it clearly affirmed the notice of dismissal and this constituted a final decision. Consequently, there was nothing left procedurally under the Employment and Dismissal Act for Brown to do except appeal to the court of common pleas pursuant to section 59-25-480. The fact that an administrative hearing was not conducted below rests with the Board's failure to follow procedure as prescribed in the Employment and Dismissal Act, and not in any failure of Brown to exhaust her administrative remedies.

B. Exceptions to the Requirement of Exhaustion

Brown asserts that even if she failed to exhaust her administrative remedies before the Board, exhaustion was not required because her case satisfied one of the exceptions to the exhaustion requirement. We agree.

South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule. Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973); Ex parte Allstate Ins. Co., 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966). A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. Moore v. Sumter County Council, 300 S.C. 270, 273, 387 S.E.2d 455, 458 (1990); Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000); Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 39, 535 S.E.2d 642, 645 (2000). "Futility, however, must be demonstrated by a showing comparable to the

administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" Law v. S.C. Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (citing Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev., 907 F.2d 445, 450 (4th Cir. 1990)). Another exception to the exhaustion requirement is recognized when an agency has acted outside of its authority. Responsible Econ. Dev. v. S.C. Dep't of Health & Envtl. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007).

Brown argues she was not required to participate in a hearing after a final determination had already been made regarding the nonrenewal of her teaching contract, as such a pursuit would constitute a futile act. Consequently, she asserts that she was within her legal right to appeal directly to the circuit court. We agree.

Article 1, section 22, of the South Carolina State Constitution states:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review.

Further, section 59-25-470 states that after the hearing has taken place and the Board has had the opportunity to determine "whether the evidence showed good and just cause for the notice of suspension or dismissal," or in this case, nonrenewal of Brown's teaching contract, the Board "shall render its decision accordingly, either affirming or withdrawing the notice of suspension or dismissal." In his brief, James cites this section of the Code and admits "recommendations, when adverse to a teacher, are subject to the [Employment and Dismissal] Act's procedural protections, particularly the right to a Board hearing pursuant to § 59-25-470."[15]

Plainly, the procedure is set in place to afford the teacher a meaningful review of the evidence prior to the Board making a final determination, as a

[15] James makes this assertion on page 9 of the Final Reply Brief of Respondent.

review of the evidence after the fact would be futile. "The elementary and cardinal rule of statutory construction is that the Court ascertain and effectuate the actual intent of the legislature." Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 563, 416 S.E.2d 634, 636 (1992). Where, as here, the terms are clear and unambiguous, "the Court must apply them according to [their] literal meaning." Anders v. S.C. Parole & Cmty. Corr. Bd., 279 S.C. 206, 209, 305 S.E.2d 229, 230 (1983).

Our research has not revealed any specific South Carolina case law addressing whether a teacher must participate in a hearing after the Board has made a final determination regarding the nonrenewal of her contract. However, courts in other jurisdictions have analyzed issues similar to the case at bar. Specifically, the Indiana Court of Appeals has held:

> [T]he notice by the school corporation to the tenure [sic] teachers was not sufficient, as it did not comply with the statutory requirements for the dismissal of a tenure teacher and such failure to comply with the statutory requirements did not require a tenure teacher to go forth with the burden of requesting a hearing for cause.

Joyce v. Hanover Cmty. Sch. Corp., 276 N.E.2d 549, 564 (Ind. Ct. App. 1971) (finding that the school board's action was arbitrary and capricious as it pertained to tenured teachers), overruled on other grounds by Myers v. Greater Clark County Sch. Corp., 464 N.E.2d 1323 (Ind. Ct. App. 1984); see also Tippecanoe Valley Sch. Corp. v. Leachman, 261 N.E.2d 880, 887 (Ind. Ct. App. 1970) (holding that "evidence . . . was sufficient to sustain an implied finding by the trial court that the procedure provided by the contract for the removal of the plaintiff from his position as teacher was not followed and that failure to follow it was a gross abuse of discretion").

The statutes interpreted in the Pennsylvania case of In re Swink, 200 A. 200 (1938), are very similar to South Carolina law in that they afford a teacher who has been notified that her contract has been recommended for nonrenewal an opportunity to present her case to the local school board

before a final decision on termination is made.[16] In that case, the Pennsylvania Superior Court held the Board of School Directors failed to comply with the statutory requirements and reversed the board's actions, stating that the observance of the prescribed procedure "is not a matter of discretion." Id. at 203. The court further held, "[T]he purpose of the procedure prescribed by the act for the dismissal of a teacher . . . is to prevent arbitrary action by the board, to afford a fair hearing to the teacher . . . before dismissal, and to provide for full, impartial, and unbiased consideration by the board of the testimony produced." Id. (emphasis added).

Similarly, the North Dakota Supreme Court has held that in order for a teacher to benefit from a hearing, she must be allowed to present her case in an atmosphere where even though there exists a contemplated recommendation for nonrenewal, the ultimate decision of termination has yet to be made. Henley v. Fingal Pub. Sch. Dist. #54, 219 N.W.2d 106, 110 (N.D. 1974). Furthermore, the Supreme Court of Connecticut has explained:

> Notice before termination and notice after termination are not two sides of the same coin. Once the board has committed itself by its action to a particular result it may be too late in the day to suggest a change of direction; at that stage the urge to proceed along its committed course is compelling. But before the die is cast it is still possible for persuasion to affect the result.

Petrovich v. New Canaan Bd. of Educ., 457 A.2d 315, 318 (Conn. 1983).

Analogous to the cases cited above, in the present case, a hearing after the fact would have likely proven futile. Sections 59-25-420 and 59-25-430 of the South Carolina Code (2004) provide for a hearing prior to a final decision of the Board to avoid futility and allow for a meaningful and fair administrative hearing. Section 1-23-380 of the South Carolina Code (2005 & Supp. 2009) states in part, "A preliminary, procedural, or intermediate

[16] See 24 P.S. § 1121 (1937) and note, and §§ 1126, 1161, 1201, and 1202 (1937).

agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Id., see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 49 (2d ed. 2002).

Brown did all that was required of her under the Employment and Dismissal Act. Consequently, as a matter of law, Brown was entitled to have her case proceed before the circuit court, and the granting of James' motion for summary judgment was improper.

C. Procedures for Compelling Participation in a Deposition

Brown argues the circuit court incorrectly concluded that because she did not participate in a deposition as requested by the Board, she essentially abandoned her right to a hearing and the Board was justified in dismissing her case. We agree.

James argues Brown was required to participate in a deposition prior to a hearing and uses section 59-25-490 of the South Carolina Code (2004) to support his position. Section 59-25-490, in pertinent part, states, "Any party to such proceedings may cause to be taken the depositions of witnesses . . . ." (emphasis added).

However, the Employment and Dismissal Act does not authorize the Board to dismiss actions for lack of participation in a deposition. Instead, it outlines the procedure the Board should have taken. Specifically, the pertinent portion of section 59-25-490 states:

> Such depositions shall be taken in accordance with and subject to the same provisions, conditions and restrictions as apply to the taking of like depositions in civil actions at law in the court of common pleas; and the same rules with respect to the giving of notice to the opposite party, the taking and transcribing of testimony, the transmission and certification thereof and matters of practice relating thereto shall apply.

(emphasis added).

Here, when the Board did not receive any response from Brown or her attorney regarding her participation in the requested deposition, it should have served Brown with a subpoena in an effort to compel her attendance at a deposition pursuant to section 59-25-500 of the South Carolina Code (2004). Moreover, the Board could have moved before the circuit court to enforce such a subpoena under section 59-25-520.

The record does not indicate, nor was it asserted at oral argument, that the Board issued a subpoena or that one was served on Brown in an effort to compel her attendance at the requested deposition. Further, the record does not indicate that Brown was ever served with notice of the deposition or notice of a hearing before the Board. Section 59-25-520 of the Employment and Dismissal Act does not vest the Board with authority to dismiss Brown's request for a hearing based on her nonparticipation in a deposition;[17] rather, it prescribes procedural mechanisms including seeking sanctions from the circuit court to compel participation in a deposition. However, the Board did not avail itself of this; instead, it presupposed to dismiss her case, which is not sanctioned under South Carolina law.

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[17] James contends that the Board did not dismiss Brown's request for a hearing for a lack of participation in a deposition. However, in the November 27, 2007 letter to Brown's then attorney, Theo W. Mitchell, James' attorney states:

> I am writing to follow up on my letter to you dated October 25, 2007, in which I informed you that it is our position that because Ms. Brown is unable or unwilling to appear for a deposition, she has withdrawn her request for a hearing regarding her non-renewal. . . As I have had no contact from you since September 25, 2007, the District now considers the request to be withdrawn and the matter closed.

II. Dismissal of the Motion to Amend

Brown argues the circuit court abused its discretion when it dismissed her motion to amend her complaint to add parties on the grounds that her motion was moot in light of the fact that the court granted James' motion for summary judgment. We agree.

Rule 15(a), SCRCP, states in part, "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(c), SCRCP, further states, "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004). "Courts have wide latitude in amending pleadings and '[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal.'" Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 792 (Ct. App. 1997). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Id.

Here, Brown attempted to add the Board's attorneys as defendants based on responses she received from discovery requests. Brown asserted the alleged improper conduct of the attorneys arose out of the same transaction or occurrence set forth in her original pleading. Because the circuit court erred in concluding that Brown had not exhausted her administrative remedies and in granting James' motion for summary judgment, Brown's motion to amend her complaint should have been considered. We, however, do not address the merits of her motion to amend her complaint and we remand the issue of

whether Brown should be allowed to amend her complaint to the circuit court.

III. Automatic Renewal of Contract

Brown contends that because the Board did not recommend the nonrenewal of her contract before the April 15th deadline, her termination was illegal and her contract was automatically renewed. James argues the Board complied with the Employment and Dismissal Act's April 15th deadline as prescribed in section 59-25-410 of the South Carolina Code (2004) in that Brown received a letter on April 12, 2007, notifying her of his intention to recommend nonrenewal of her contract to the Board. Brown did not raise the issue of automatic renewal to the circuit court; thus, this issue is not preserved for our review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 592 S.E.2d 543, 546 (2000).

CONCLUSION

The wording of the Employment and Dismissal Act is unambiguous regarding procedure, and the record fails to show the Board complied with its requirements. As a result, the circuit court erred in concluding Brown did not exhaust her administrative remedies. The circuit court also erred in interpreting the Employment and Dismissal Act, as Brown was not required to request a hearing of the Board after a final decision had been made regarding the nonrenewal of her contract; and, as a matter of law, Brown was entitled to appeal directly to the circuit court. Accordingly, the circuit court erred when it granted James' motion for summary judgment and when it concluded that Brown's motion to amend her complaint to add parties was moot.

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

REVERSED AND REMANDED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth E. Wright and Bonnie L. Wright,	Appellants/Respondents,
v.	
Hiester Construction Co., Inc,	Respondent/Appellant,
and	
Dilia and Odin Painting Co.,	Respondent.

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

Opinion No. 4712
Heard November 16, 2009 – Filed July 21, 2010

AFFIRMED

Bradford N. Martin and Laura W.H. Teer, both of Greenville, for Appellants/Respondents.

Stephen L. Brown, Duke R. Highfield, and Russell G. Hines, all of Charleston, for Respondent.

J.J. Anderson and Eric M. Johnsen, both of Charleston, for Respondent/Appellant.

THOMAS, J.: These cross-appeals arise from an action for damages relating to the destruction of a new home as the result of a fire. The homeowners, Kenneth E. and Bonnie L. Wright sued their contractor, Hiester Construction Company (Hiester), for breach of contract, contractual vicarious liability, and negligence. The Wrights also named Hiester's subcontractor, Respondent Dilia and Odin Painting Company (D&O), as a defendant, alleging causes of action for breach of warranty of workmanlike construction, negligence, and vicarious liability. The case was tried before a jury, which found for the defendants. The Wrights appeal the denial of their motions for judgment notwithstanding the verdict and a new trial. Hiester cross-appeals on the ground that the trial judge should have directed a verdict in its favor instead of submitting the case to the jury. We affirm.

FACTUAL OVERVIEW AND PROCEDURAL HISTORY

In 2001, the Wrights and Hiester executed a contract drafted by Hiester under which Hiester would build a house for the Wrights in a gated community on Dataw Island.

Under the contract, Hiester was to assume "full responsibility for acts, negligence or omissions of all his subcontractors and their employees and for those of all other persons doing work under a contract for him." In addition, Hiester was required to maintain liability insurance to cover workers' compensation and other personal injury claims and "for property damage that may arise out of work under this Contract, whether caused directly or indirectly by Contractor or directly or indirectly by a subcontractor." The contract also required the Wrights to maintain liability insurance and property damage insurance at their own expense "on the work at the site to its full insurance value including interests of Owners, Contractor and subcontractors

against fire, vandalism, and other perils ordinarily included in extended coverage." It also provided that both parties would waive "all claims against each other for fire damage" covered by the property damage insurance that the Wrights were to maintain on the construction site.

Hiester began building the home in March 2001 and hired D&O as a subcontractor to stain some woodwork in the house. In September of that year, as construction neared completion, D&O sent three employees, Lizeth Torres, Manuel Garcia, and Oscar Garcia, to perform this task. In the early morning hours of Saturday, September 29, 2001, after the workers had spent several days in the house staining wood, a fire erupted, destroying the house.

The Wrights filed this lawsuit in May 2003. In their complaint, the Wrights claimed D&O's workers ignored well-known safety precautions by throwing used rags soaked with wood stain into a pile in a cardboard box that was left on the floor of the house after the workers left for the day. The Wrights further alleged the improper disposal caused the rags to combust, which in turn caused the fire. They sought damages of $474,000.

Both Hiester and D&O disputed the Wrights' allegations regarding the cause of the fire. In their depositions, both Manuel Garcia and Oscar Garcia claimed they put the rags in the trash in an outside dumpster. They further contended that, regardless of the cause of the fire, (1) the construction contract allocated the risk of fire damage to the Wrights and State Farm, their insurance carrier and (2) the Wrights and State Farm expressly waived any subrogation claim against them in the event State Farm was required to cover the loss.

The trial took place October 31 through November 3, 2005. The jury returned a verdict for Hiester and D&O. The Wrights moved for judgment notwithstanding the verdict or in the alternative for a new trial. The trial judge denied these motions, and the Wrights served their notice of appeal.[1]

[1] The Wrights' appeal of this matter first came before this court in 2008. In an unpublished opinion, this court affirmed the trial judge on the ground that the record on appeal failed to show the Wrights timely moved for a new trial.

ISSUES

I. Did the trial judge err in allowing evidence of insurance to come before the jury?

II. Should the trial have been bifurcated so that issues regarding insurance would have been separately presented to the jury only if the Wrights first received a verdict on either their breach of contract action or their negligence claim?

III. Did the trial judge commit reversible error in failing to give the jury the correct instruction regarding subrogation?

IV. Should liability have been found against Hiester as a matter of law based on (1) admissions by its president during his deposition, (2) written admissions during discovery, and (3) provisions in the contract under which Hiester assumed liability for its subcontractors' actions?

V. Were the Wrights entitled to judgment notwithstanding the verdict or a new trial based on the trial judge's refusal to admit into the evidence (1) the statements of D&O's workers and (2) testimony regarding their statements?

VI. Did the trial judge err in refusing to allow the fire chief to testify about statements allegedly made by D&O employees?

VII. Should the trial judge have allowed parol evidence to show the intent of the parties regarding the interpretation of the contract?

Wright v. Hiester Constr. Co., Op. No. 2008-UP-151 (S.C. Ct. App. filed March 10, 2008). The South Carolina Supreme Court reversed, noting the respondents "concede petitioners' motion was timely made" and remanded the matter to this Court for consideration of the issues on appeal. Op. No. 2009-MO-035 (S.C. Sup. Ct. filed June 29, 2009).

VIII. Were the Wrights entitled to judgment notwithstanding the verdict or a new trial based on the trial judge's failure to find as a matter of law that the waiver clause did not apply to D&O?

IX. Were the Wrights entitled to a judgment notwithstanding the verdict or a new trial based on (1) an improper closing argument by Hiester's attorney, (2) jury charges regarding negative inference and third-party beneficiary law, (3) communications from the trial judge to the jury regarding trial procedure or (4) an improper verdict form?

X. Did the trial judge err in denying the Wrights' motion to prevent an expert witness from testifying?

XI. Did the trial judge err in denying Hiester's motion for a directed verdict?

STANDARD OF REVIEW

The trial judge must deny motions for directed verdict or judgment notwithstanding the verdict "when the evidence yields more than one inference or its inference is in doubt." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). An appellate court "will reverse the trial court only when there is no evidence to support the ruling below." Id. An appellate court "will not disturb a trial court's decision granting or denying a new trial unless that decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law." Id.

LAW/ANALYSIS

I. Evidence of insurance

Before the testimony began, the Wrights unsuccessfully moved in limine to exclude references to insurance. Citing Landry v. Hilton Head Plantation Property Owners Association, 317 S.C. 200, 452 S.E.2d 619 (Ct.

App. 1994), the Wrights argued that the availability of insurance was irrelevant for purposes of determining liability on their causes of action grounded in contract and negligence. On appeal, the Wrights contend the denial of their motion was error because the introduction of evidence of insurance provides an "unfair advantage due to the inherent prejudice against insurance companies."[2] The Wrights further argue the admission of evidence of insurance and subrogation violated the collateral source rule.

In response, Hiester and D&O argue (1) the Wrights, in failing to object to the introduction of this evidence at trial, failed to preserve this issue for review and (2) this evidence was admissible because evidence of insurance in this case was not for the purpose of proving liability.

In a supplementary response to questions from this court during oral argument, counsel for the Wrights admitted the collateral source rule was not expressly raised during the trial, but further asserted the rule was "implied" in their objections to the reference to property insurance coverage. The Wrights, then, did not lay a proper foundation for this Court to address the issue of collateral estoppel. The trial judge's ruling was only "in reference to the insurance" and did not address the specific policy concern behind the collateral source rule. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating the familiar rule that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge" and further noting that "an objection must be sufficiently specific to inform the trial court of the point being urged by the objector); Citizens & S. Nat'l Bank of S.C. v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) ("The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer.") (emphasis added).

As to the error preservation concern raised by Hiester and D&O, we hold the Wrights' failure to object to the introduction of the disputed evidence

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[2] The quoted language appears in Edwards, Inc. v. Arlen Realty & Development Corp., 466 F. Supp. 505, 514 (D.S.C. 1978).

during the trial does not prevent this Court from considering the issue on appeal. The defendants referenced the issue of insurance in their opening statements, which appeared to have immediately followed argument on the pre-trial motions, and we do not fault the Wrights for addressing the issue themselves in an effort to mitigate the effect of the evidence. Cf. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[W]here a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection.").

Nevertheless, we hold the trial judge acted within his discretion in admitting the disputed evidence. In determining a party's culpability, Rule 411, SCRE, excludes evidence of liability insurance, but does not expressly address the admissibility of evidence concerning other types of insurance. See Rule 411, SCRE ("Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully.") (emphasis added).

We recognize the Wrights were contractually obligated to carry liability insurance as well as property damage insurance; however, no one contends they acted negligently or otherwise wrongfully. The focus of the controversy here, then, is whether the trial judge should have excluded evidence of the Wrights' property damage insurance. Because this evidence is not expressly excluded by Rule 411, "we must determine whether the probative value of the evidence is substantially outweighed by the prejudicial effect and potential for confusing the jury." Yoho v. Thompson, 345 S.C. 361, 365, 548 S.E.2d 584, 586 (2001). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE (emphasis added).

In their complaint, the Wrights included causes of action arising from their contract with Hiester, a contract that specifically contained a waiver of subrogation clause and a requirement that the Wrights maintain property

damage insurance on the premises during construction. The effect of these contractual provisions, which defendants asserted absolved them of responsibility for the fire irrespective of whether they were to blame for it, was relevant to the issue of liability. Moreover, the Wrights did not provide any other explanation—either at trial or in their appellants' brief—as to why evidence of insurance was more prejudicial than probative given that this lawsuit included causes of action for breach of contract and a defense was asserted based on insurance provisions included in the contract. The jury was made aware that Hiester was also contractually obligated to maintain insurance; therefore, any belief on the part of the jury that "deep pockets" were involved in this lawsuit could have applied as easily to Hiester and D&O as to the Wrights. We therefore cannot say the trial judge abused his discretion in refusing to exclude evidence of insurance. See Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) ("The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.").

II. Bifurcation

At the beginning of the trial, the Wrights also moved for bifurcation, suggesting that the jury first decide only the issue of liability. The Wrights requested that evidence regarding insurance be presented to the same jury only if the jury found the defendants were liable. The trial judge denied the motion, stating "it may very well come down to a point in the case that it becomes a matter of law as to the interpretation of the contract, but we're not there now." Assuming without deciding the Wrights are correct that the insurance issues could have been separately presented to the jury, we nevertheless uphold the denial of their motion for bifurcation.

A trial court "may order a separate trial . . . of any separate issue . . . always preserving inviolate the right of trial by jury . . . ." Rule 42(b), SCRCP (emphasis added). "Trial judges have discretion as to whether to bifurcate a trial." Durham v. Vinson, 360 S.C. 639, 644 n.2, 602 S.E.2d 760, 763 n.2 (2004). "A trial should be bifurcated only if the issues are so distinct

that trial of each alone would not result in injustice." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998).

Here, Hiester raised the issue of the waiver of subrogation as a defense to the lawsuit. Moreover, although the Wrights cite authority regarding "inherent prejudice against insurance companies,"[3] they have not asserted that such prejudice cannot be corrected through curative instructions or other means or that the alleged prejudice outweighed the probative value of the information, particularly as that information relates to the parties' contractual obligations. As we have noted in the preceding section, the contract required Hiester as well as the Wrights to maintain insurance; therefore, any inherent prejudice on the part of the jurors against insurers could have prejudiced the defendants as well as the Wrights.

III. Instructions regarding subrogation

The Wrights next allege the trial court incorrectly explained the concept of subrogation to the jury. This issue arose when the jury, during deliberations, submitted nine written questions, two of which are of concern in this appeal. In question number three, the jury inquired: "Can we find that the Plaintiffs are owed money based on negligence but w/out proximate cause[?]" In question number nine, the jury asked: "if the answer to our question #3 is yes can State Farm [the Wrights' insurer] sue Hiester or Zurich [Hiester's insurer] later? Or can State Farm ask the Wrights for their money back?"

The trial judge answered each question in order. Regarding question number three, he answered: "No. There has to be proximate cause of the negligent proximately cause [sic] the damages and you have to find that as I further instructed you." As to question number nine, the trial judge gave the following answer:

> Number nine, if the answer to our question[ ] number three which was the one [dealing with] proximate

[3] See Edwards, 466 F. Supp. at 513.

> cause is, yes, can State Farm sue Hiester or Zurich later or can State Farm ask the Wrights for their money back. You said if the answer was, yes, well obviously the answer was no, but I'm glad to answer that if you like. I'll read it again. If the answer to our question of can State Farm sue Hiester or Zurich later? The answer to that's no. This is the whole ball of wax all of the cases. And also the second part of that is or can State Farm ask the Wrights for their money back? The answer to that is no. So if I understand, y'all going back and discuss a little bit.

After the jury returned to the jury room, counsel for the Wrights placed on record a "suggestion" that because the jury was under the mistaken belief that if the jury awarded the Wrights a verdict, this would result in a double recovery that the judge issue a curative instruction "to let [the jury] know that under subrogation the verdict would be split between State Farm and Mr. Wright." The trial judge declined to follow the suggestion, stating he had answered the questions and it would be wrong to speculate as to what the jury intended to ask beyond the question they submitted.

We affirm the trial judge's rejection of the Wrights' request to advise the jury that any recovery would be split between the Wrights and their insurer. Having answered correctly that the Wrights could not recover if they proved only negligence and not probable cause on the part of the defendants, the trial judge answered question number nine in the negative based on his determination that if the Wrights did not prevail, any attempt by their insurer to recoup its losses—from the Wrights or anyone else—would fail as well.

Furthermore, as to whether the trial judge answered correctly the jury's question regarding State Farm's right to recover from its own insured, the adverse party, or the adverse party's insurance carrier, we find no reversible error based on the record before us. "A charge must be construed and considered as a whole before an assignment of prejudicial error will lie to that discrete portion complained of." Waldrup v. Metro. Life Ins. Co., 274 S.C.

344, 346, 263 S.E.2d 652, 654 (1980). The portions of the record submitted in this appeal do not include the general charge to the jury; therefore, we are unable to determine whether the trial judge's answer to the jury's question concerning subrogation, when considered in conjunction with the original instructions to the jury, was misleading.

IV. Liability against Hiester as a matter of law

The Wrights next contend that Hiester should have been found liable as a matter of law because of (1) admissions by Steve Hiester, the president of Hiester, to the effect that D&O caused the fire, (2) written admissions by Hiester Construction during discovery that the fire was caused by Hiester's subcontractors' leaving a box of oily rags in one of the rooms, and (3) provisions in the contract suggesting that Hiester was to be responsible for the acts of its subcontractors. We disagree.[4]

During his deposition, Steve Hiester acknowledged that after speaking with the fire investigators, his opinion was that oil-soaked rags probably spontaneously combusted and caused the fire. We agree with the trial judge that this opinion, which was based largely if not solely on Steve Hiester's conversation with the fire investigator, is not sufficient to settle the issue of liability against Hiester as a matter of law. See Lytle v. Reagan, 256 S.C. 269, 274, 182 S.E.2d 302, 305 (1971) (stating that when a party's testimony is "adverse to himself" and "consists mainly of estimates, opinions and conclusions, rather than actual facts within his knowledge, such is not conclusive upon him when there is other evidence in the record tending to

[4] As noted in D&O's brief, the Wrights, in conjunction with this argument also allege the trial court erred in not admitting certain statements made by Steve Hiester during his deposition. Assuming without deciding that this argument was adequately presented on appeal, we agree with the trial judge that the statements were cumulative to other evidence. See S.C. Dep't of Highways & Pub. Transp. v. Galbreath, 315 S.C. 82, 86, 431 S.E.2d 625, 628 (Ct. App. 1993) ("Even if the trial court erred in excluding evidence, there is no reversible error where the testimony would have been cumulative.").

prove that such estimates, opinions and conclusions on his part are not in accord with the true facts").

The written admission during discovery was in response to interrogatories, rather than a request to admit. As such, it was correctly construed by the trial judge "as seeking current information as of the time the question is asked and answered." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991); see also Rule 33, SCRCP (concerning interrogatories to parties); Rule 36(b), SCRCP (concerning requests for admission and stating "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission").

The Wrights further contend the admissions made on behalf of Hiester either by Steve Hiester or Hiester's counsel amount to judicial admissions that estop Hiester from denying liability for the fire. We reject this argument. "Judicial estoppel comes into play when the court is forced to take a position based on a factual assertion." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 43, 577 S.E.2d 205, 208 (2003). In the present case, no court has taken a prior position regarding the cause of the fire; therefore, judicial estoppel is not applicable.

The Wrights also maintain the contract required Hiester to assume liability for its subcontractors' actions. In conjunction with this argument, they also assert any waiver of Hiester's liability applies only to "faultless occurrences." We agree, however, with Hiester and D&O that the provisions of the contract at issue are tantamount to an enforceable waiver of subrogation rights. See Summit Contractors v. Gen. Heating & Air Conditioning, 358 S.C. 410, 417, 595 S.E.2d 472, 476 (2004) (noting waiver of subrogation clauses have been upheld "because they apply only to property loss, they waive subrogation only to the extent covered by first party insurance, and they merely give effect to the parties' agreement to allocate risk").

Finally, the Wrights contend that because neither Hiester nor D&O objected to the damages they presented, the amount of their damages was established as a matter of law. We need not address this issue in view of our disposition of the other issues on appeal. See InMed Diagnostic Servs. v. MedQuest Assocs., 358 S.C. 270, 279, 594 S.E.2d 552, 556-57 (Ct. App. 2004) (declining to address issues in the appeal concerning damages because the Court also determined the plaintiff's claim was barred as a matter of law).

V. Statements of D&O workers

The Wrights next contend the trial judge erred in refusing to admit transcripts of recorded statements from D&O employees or to allow any witness to testify as to conversations with the workers through their interpreter.[5] The Wrights argue the exclusion of this evidence was an abuse of discretion, contending the statements were either admissions, statements against interest, or otherwise admissible for impeachment purposes. They further contend the exclusion of the statements as hearsay was improper and any bias of the interpreter, who was related to a principal of D&O, would have been toward D&O. We disagree.

First, the statements, both oral and written, would not have been admissible as statements against interest because there was no showing that either the interpreter or the D&O workers were unavailable as witnesses. See Rule 804(b)(3), SCRE (recognizing a statement against interest as an exception to the hearsay rule and providing that such evidence is not excluded by the rule "if the declarant is unavailable as a witness").

Second, the South Carolina Rules of Evidence contemplate that use of a prior inconsistent statement for impeachment purposes is permitted only when the proponent is seeking to impeach a declarant who has testified at

[5] The statements at issue were allegedly made during an interview with Phil Brooks, an employee of State Farm, who testified as a fire and origin expert for the Wrights, and an earlier interview with the fire chief, whose testimony is discussed in the following section.

trial inconsistently with the prior statement. See Rule 613(b), SCRE (concerning extrinsic evidence of prior inconsistent statements of witnesses). Here, the two D&O employees whose statements the Wrights attempted to introduce were not called as witnesses; therefore, we fail to see how these statements could have been admitted for impeachment purposes.

The question of whether the statements could have been admitted as admissions under Rule 801(d)(2)(D), SCRE, presents a more difficult issue.[6] We agree with the Wrights that the translations were "in the field" and therefore not necessarily subject to rules applying to interpreters who translate in-court testimony. Here, however, the trial judge was uncertain as to whether the translations were accurate, irrespective of whether the interpreter, who did not testify at trial, was biased, and we cannot fault him for his concern.

On appeal, the Wrights cite authority from other jurisdictions to support their argument that statements translated by an unofficial interpreter did not create double hearsay. Aside from the fact that none of the cases are binding on this court, we believe each of them is distinguishable from the present appeal,[7] and none of them gives reason to hold the trial judge's exclusion of

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[6] Rule 801(d)(2)(D) of the South Carolina Rules of Evidence provides that "a statement by [a] party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is not hearsay.

[7] In their primary brief, the Wrights cite U.S. v. Ermichine, 2002 WL 869825 (S.D.N.Y. May 3, 2002), an unpublished opinion in which the court rejected the appellant's contention that the translations at issue were suspect because the translators lacked formal training in English. The court noted, among other things, the statements, as translated, were corroborated by the actions that followed the conversations during which the statements were allegedly made. Id. at *2. They also cite U.S. v. Dimas, 418 F. Supp. 2d 737 (W.D. Pa. 2005), in which a government agent was deemed qualified to testify to a sworn statement that was translated from Spanish to English by an interpreter who did not testify; however, the court also noted the agent, although not

these translated statements amounted to reversible error. As the trial judge observed, his reservation was not that the interpreter lacked formal credentials; rather, he was concerned that that the individuals whose statements were being translated did not have sufficient command of English to confirm that the translation was correct and that there were no other safeguards to verify its accuracy. See Clifford S. Fishman, Recordings, Transcripts, and Translations as Evidence, 81 Wash. L. Rev. 473, 503-04 (2006) (suggesting "at a bare minimum" that a party offering a translated conversation establish that the "translation witness" "has sufficient proficiency in each language to be able to understand, and be understood by, others who speak or write in each").[8]

We therefore hold the trial judge did not abuse his discretion in refusing to admit either the written statements of the D&O employees or in

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fluent in Spanish, had "moderate Spanish language proficiency" that was sufficient to establish the reliability of the statement. Id. at 747. In their reply brief, the Wrights cite three cases, each of which can be distinguished from the present case. In U.S. v. Stafford, 143 Fed. Appx. 531 (4th Cir. 2005), the defendant failed to object at trial to the certain translations, and the court upheld their admission into evidence, stating these "did not create double hearsay, as an unofficial interpreter is no more than a language conduit." Id. at 533. The court's holding was based on its determination that the "plain error" rule did not apply. Id. at 533-34. In the second case cited by the Wrights in their reply brief, DCS Sanitation Management v. Occupational Safety & Health Review Commission, 82 F.3d 812 (8th Cir. 1996), the interpreter was available to testify at the hearing. Id. at 816. Finally, in Alimi v. Gonzalez, 489 F.3d 829 (7th Cir. 2007), although the court upheld the admission of a translated statement despite the interpreter's absence at the hearing and lack of formal credentials, the party seeking to exclude the statement gave testimony confirming its truth. Id. at 835-36.

[8] The author of this article, in referring to the translator as the "translation witness," appears to have assumed that the translator would be called by the offering party to testify at the hearing.

refusing to allow testimony from other witnesses as to what they said. See Pike v. S.C. Dep't of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000) ("It is well settled that the admission and rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion.").

VI. Admission of testimony from the fire chief concerning statements allegedly made by D&O employees

The Wrights further maintain that the statements made by the painters through their interpreter, though arguably inadmissible hearsay, should have been admitted through the testimony of Fire Chief Clayton Ellis. The Wrights further contend Ellis should have been permitted to testify as an expert as well as a fact witness. We disagree.

Initially, the trial judge qualified Ellis, who had investigated the fire scene, as a cause and origin expert. Later, however, the trial judge restricted Ellis's testimony to his personal knowledge and would not allow him to testify as to what D&O employees told him through their translator or to give his opinion about the cause of the fire.

Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence. Jones v. Doe, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006). "The rule, however, does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion." Id. at 62-63, 640 S.E.2d at 519. Even if, then, the Wrights are correct that Ellis should have been qualified as an expert witness, his testimony regarding what D&O employees told him would have been admissible " 'for the limited purpose of informing the jury of the basis of the expert's opinion.' " Id. at 63, 640 S.E.2d at 519 (quoting 2 Kenneth S. Broun, et al., McCormick on Evidence § 324, at 418 (2006)).

We further find no abuse of discretion in the trial judge's ultimate refusal to allow Ellis to testify as an expert. According to the record, the trial

judge tentatively qualified Ellis as an expert in "fire and origin"; however, this qualification was with the proviso that Ellis's investigation was adequate and that he reached a definitive conclusion about the cause of the fire. Based on his perception that Ellis did not do an adequately thorough investigation, the trial judge stated Ellis did not have a sufficient basis to give an expert opinion as to the cause of the fire. The record supports this finding. Out of the jury's presence, Ellis testified that he could conclude only that the fire needed to be investigated and he had only a "very strong suspicion" but did not try to come up with a definitive cause. We therefore uphold the trial judge's decision to restrict Ellis's testimony to what he actually observed. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) (recognizing trial courts "have a gatekeeping role" concerning all expert testimony, whether the subject of expertise is scientific or nonscientific and requiring the court to "assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact"); Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) ("The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion.").

VII. Parol evidence

The Wrights contend the trial judge erred in refusing to allow either them or Steve Hiester to testify about their respective intents regarding the contract. We find no reversible error. The Wrights cross-examined Steve Hiester about his intent with regard to the contract and presented testimony during their case-in-chief about their own intent; therefore, even if the trial judge's ruling was incorrect, it ultimately did not prejudice them. See Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 35, 609 S.E.2d 506, 514 (2005) (affirming a verdict for the defendant based in part on the determination that the plaintiff failed to show prejudice from an erroneous evidentiary ruling).

VIII. Application of the waiver of subrogation clause to D&O

The Wrights also argue that any waiver of subrogation did not apply as a matter of law to D&O. We disagree. A hotly disputed issue in the trial was whether D&O workers properly disposed of the used rags before they left the job site. If the jury believed the Wrights did not meet their burden to show negligence on the part of D&O, this would support a finding that D&O was not liable. See Cash v. Kim, 288 S.C. 292, 296, 342 S.E.2d 61, 63 (Ct. App. 1986) ("Where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be set aside.").

IX. Judgment notwithstanding the verdict or new trial based on improper closing argument, jury instructions, trial procedure, and verdict form

A. Closing argument

The Wrights contend on appeal that Hiester's attorney improperly stated during closing argument that the jury could draw a negative inference against the Wrights because they had subpoenaed an expert witness but did not call him to testify. The Wrights, however, did not make a timely objection to this allegedly improper statement; therefore, this issue is not preserved for appeal. See State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993) ("To preserve an issue for appellate review, an appellant must object at his first opportunity.").

B. Jury instructions

The Wrights further argue the trial court should have granted their request to charge the jury that it could draw a negative inference from D&O's failure to call any witnesses at trial. They emphasize that D&O's failure to call the employees working at the job site before the fire occurred could have led to such an inference. We disagree. As the Wrights themselves stated in their brief: "A negative inference charge informs the jury that, in the absence of explanation, the failure or refusal of a party to produce a witness may

create an adverse inference, where such is within the party's power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if the witness were favorable to him."[9] (emphasis added). In the present case, the trial judge noted among the reasons for denying the requested instruction the absence of any circumstance suggesting the Wrights themselves could not have called the particular witnesses whose absences they sought to emphasize, and the Wrights do not challenge this finding on appeal.

The Wrights also maintain the jury was improperly charged on third-party beneficiary law, which they contend on appeal was inapplicable because it is an equitable remedy. At trial, however, they argued only that the contractor had to make a written request for a waiver of subrogation regarding the subcontractor. We therefore hold this argument was not properly preserved for appeal. See Gurganious v. City of Beaufort, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995) ("It is well settled that one cannot present and try his case on one theory and then change his theory on appeal.").

C. Trial procedure

Regarding trial procedure, the Wrights allege the trial judge erred when, in response to the jury's request to rehear certain testimony, he informed the jury that it would take three days for the testimony to be re-read to them. We find no error. As the judge remarked when the Wrights objected to the statement, he did not refuse the request and merely advised the jury to be "judicious in deciding what testimony they wanted to hear" because replaying the entire proceedings would take three days. We find nothing to indicate that the trial judge, in communicating this advisory to the jury, abused his discretion or that the remarks prejudiced the Wrights. See State v. Gregory, 198 S.C. 98, 103, 16 S.E.2d 532, 534 (1941) (stating the conduct of a trial is largely within the sound discretion of the trial judge, whose exercise of such discretion will not be disturbed on appeal absent a

[9] Similar language appears in Davis v. Spark, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959), which the Wrights cite in their appellants' brief.

showing of "an abuse of discretion, a commission of legal error in its exercise, and that the rights of the appellant have been thereby prejudiced").

D. Verdict form

The verdict form gave the jury three options regarding liability: (1) it could find for the Wrights against both Hiester and D&O; (2) it could find for the Wrights against D&O only; and (3) it could find for both defendants. The verdict form had a fourth option allowing the jury to find for the Wrights against Hiester; however, that option was crossed out before the form was given to the jury to complete.

The Wrights contend the form prevented the jury from finding that only Hiester was liable, which in turn improperly encouraged the jury to exonerate both Hiester and D&O. As support for this position, they maintain the jury could have found Hiester solely responsible for the fire based on a breach of its duty to remove waste and rubbish from the job site. During the proceedings, however, the Wrights conceded that Hiester's liability was contingent on a finding that D&O was negligent. Under these circumstances, we would hold the trial judge did not abuse his discretion in denying the Wrights' request to include the option that the jury could find "strictly against the contractor." See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 300, 641 S.E.2d 903, 906 (2007) ("The trial judge has the discretion to determine how a case is submitted to a jury.").

X. Expert witness

Based on the initial representation that Hiester's expert witness took a view that was consistent with the Wrights' position regarding the cause of the fire, the Wrights elected not to depose this witness and placed him under subpoena. On the eve of the trial, however, the Wrights learned the witness had changed his opinion and now believed the cause of the fire was undetermined. The Wrights then unsuccessfully moved at the start of the trial that the defendants not be allowed to call this particular witness, maintaining that his testimony would result in unfair prejudice. The Wrights also contend

they were entitled to a continuance to depose the witness based on his change of position. The expert, however, did not testify at all in the case; therefore, the Wrights were not prejudiced by either the refusal to continue the case or the decision not to prevent the defense from calling the witness. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("[R]eversal is not required unless appellant was prejudiced by the error.").

The Wrights further argue on appeal that Hiester's attorney improperly stated during closing argument that the jury could draw a negative inference against them because of their decision not to present this witness at trial. As we have previously noted, the Wrights did not make a timely objection to this statement; therefore, this issue is not preserved for appeal. See Webb v. CSX Transp., Inc., 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (holding a party waived its right to complain about an issue on appeal because its objection was untimely).

XI. Hiester's directed verdict motion

Based on our disposition of the Wrights' appeal, we do not find it necessary to address Hiester's cross-appeal, which concerns the denial of its directed verdict motion. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

As to the Wrights' appeal, we find no reversible error on the part of the trial judge warranting either a judgment notwithstanding the verdict or a new trial. Because Hiester prevailed at trial, we decline to address its argument that it should have received a directed verdict.

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kevin Patrick Kennedy, Sr., Appellant,

v.

Dawn Kennedy, Respondent.

Appeal From Spartanburg County
Georgia V. Anderson, Family Court Judge

Opinion No. 4713
Heard May 18, 2010 – Filed July 21, 2010

AFFIRMED

Kenneth Philip Shabel, of Spartanburg, for Appellant.

J. Edwin McDonnell, of Spartanburg, for Respondent.

WILLIAMS, J.: In this appeal, Kevin Kennedy (Husband) contends the family court erred (1) in awarding Dawn Kennedy (Wife) permanent

periodic alimony; (2) in dividing the parties' marital debts; and (3) in denying Husband's request for attorneys' fees. We affirm.

FACTS

Husband and Wife married on July 28, 1990. They had one child, Luke Kennedy (Luke), during the course of their marriage, who was emancipated prior to the final hearing. The parties separated on November 28, 2006, when the police arrested Husband for criminal domestic violence for threatening to kill Wife. Husband filed for divorce on January 4, 2007, and Wife counterclaimed requesting a divorce on the grounds of physical cruelty and habitual drunkenness. Husband then amended his complaint, requesting a divorce on the grounds of adultery and seeking to bar Wife's claim for alimony. The family court subsequently allowed the parties to amend their pleadings to also request a divorce based on one-year's continuous separation.

At the final hearing on April 16, 2008, the family court received testimony from the parties and their witnesses regarding the discord in the parties' marriage; the allegations of substance abuse, physical abuse, and adultery; and the source of several debts acquired during the marriage, specifically during the period of Husband's incarceration. In a separate order dated September 12, 2008, the family court granted the parties a divorce based on one-year's continuous separation. The family court ordered Husband to pay Wife $300 per month in alimony and divided the marital estate on a 50/50 basis with each party responsible for debt acquired in his or her name. The family court denied Husband's request for attorneys' fees, finding Wife did not have the financial ability to pay Husband's fees. This appeal followed.

STANDARD OF REVIEW

On appeal from a family court order, this court has the authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). When reviewing decisions of the family court, we are cognizant of the fact the family court had the opportunity to see the

witnesses, hear "the testimony delivered from the stand, and had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character." DuBose v. DuBose, 259 S.C. 418, 423, 192 S.E.2d 329, 331 (1972) (internal quotations and citations omitted).

ISSUES ON APPEAL

Husband claims the family court erred on three grounds in its final order, namely the following: (1) its award of alimony to Wife; (2) its allocation of marital debt; and (3) its denial of attorneys' fees to Husband.

LAW/ANALYSIS

I. Alimony

Husband argues he presented clear evidence of Wife's adultery; thus, the family court erred in granting Wife alimony. Alternatively, if this court finds insufficient evidence exists to establish Wife's adultery, Husband contends the $300 alimony award is excessive in light of Husband's fixed income. We disagree.

Proof of adultery must be "clear and positive and the infidelity must be established by a clear preponderance of the evidence." McLaurin v. McLaurin, 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct. App. 1987) (internal quotations and citations omitted). When the evidence is conflicting and susceptible of different inferences, the family court has the duty of determining not only the law of the case, but the facts as well, because it had the benefit of observing the witnesses and determining how much credence to give each witness's testimony. Anders v. Anders, 285 S.C. 512, 514, 331 S.E.2d 340, 341 (1985).

Husband contends the clear preponderance of the evidence establishes Wife committed adultery. He points to three witnesses who testified at the final hearing regarding Wife's alleged adulterous relationship with Adam

Jackson (Jackson). Two of the witnesses, Brittney and Adam Clark, stated Wife told them about her extramarital relationship. Husband's son from a prior marriage, Kevin Kennedy, Jr. (Kevin Jr.) testified he was in the parties' home during Husband's incarceration when he heard "stuff going on in the bedroom" and knocked on the parties' bedroom door. When Wife opened the door in her bathrobe, Kevin Jr. said he saw her paramour, Jackson, under the covers in the parties' bed.

Conversely, Wife denied engaging in an extramarital relationship and claimed she had no personal interaction with Jackson whatsoever. The parties' son, Luke, also testified at the final hearing about the allegations of his mother's adultery. He stated he was in the home the night Kevin Jr. claimed he witnessed Wife cheating on Husband and testified that Jackson was never in the home as Kevin Jr. claimed. Additionally, Wife's best friend, Patricia Diaz, stated she and Wife shared many intimate secrets and details of their personal lives over the course of their friendship, and Wife never told her she was having an affair. After hearing this testimony at the final hearing, the family court determined Wife had not committed adultery.

Based on this conflicting testimony, we believe the family court was in the best position to judge the witnesses' credibility and veracity on the issue of adultery, and thus, we find the family court did not abuse its discretion in denying Husband's request for a divorce on the grounds of adultery. See Cox v. Cox, 296 S.C. 414, 415, 373 S.E.2d 694, 694 (Ct. App. 1988) (finding when there is conflicting evidence as to whether a party committed adultery, the appellate court should not disregard the findings of the family court who saw and heard the witnesses and was in a better position to evaluate the witnesses' testimony).

Turning to Husband's argument regarding the excessiveness of the alimony award, we find the $300 monthly alimony award to be reasonable.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). In determining

whether alimony is appropriate, we recognize "[t]he purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Love v. Love, 367 S.C. 493, 497, 626 S.E.2d 56, 58 (Ct. App. 2006) (internal quotations and citations omitted). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005) (internal citations omitted). Thus, "[i]t is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

When awarding alimony, the family court considers the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code § 20-3-130(C) (Supp. 2009). No one factor is dispositive. Allen, 347 S.C. at 184, 554 S.E.2d at 425.

In awarding Wife alimony, the family court properly considered these relevant statutory factors from section 20-3-130(C). Specifically, the court noted the following in finding Wife was entitled to alimony: the seventeen-year duration of the marriage; Husband's monthly income of $2,023 from long-term disability and social security as opposed to Wife's monthly income of $155 from food stamps; both parties' misconduct during the marriage, particularly their issues with alcohol and substance abuse; Husband's and Wife's health problems and the resulting effects on their ability to earn a living; both parties' training as skilled laborers and their past employments and current unemployment; and the marital and non-marital property of each party.

Currently, Wife's income from food stamps is inadequate to maintain her former standard of living or to pay her current monthly living expenses. See Craig, 365 S.C. at 292, 617 S.E.2d at 362 ("Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage."). Wife's son, sister, and niece testified that they are supporting Wife financially because she cannot pay her basic living expenses due to her unemployment and mental instability. Any reduction in Wife's alimony award at this time would be inequitable considering each party's current financial standing. Furthermore, the family court included a provision for modifying Husband's alimony obligation if Wife establishes her entitlement to social security benefits in her pending claim before the Social Security Administration. If Wife's financial circumstances improve, Husband has the ability to petition the family court for a modification of Wife's alimony entitlement. See Serowski v. Serowski, 381 S.C. 306, 314-15, 672 S.E.2d 589, 593-94 (Ct. App. 2009) (finding wife's receipt of social security and annuity benefits improved her ability to meet her needs such that a modification, rather than a termination, of alimony was appropriate). Accordingly, we affirm the family court's decision to award Wife alimony.

II. Credit Card Debt

Next, Husband argues the family court abused its discretion in failing to equitably divide the parties' credit card debt on a 50/50 basis because the debt at issue was accrued during the parties' marriage and thus subject to equitable division. We disagree.

"Marital property" is defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." S.C. Code Ann. § 20-3-630(A) (Supp. 2009) (formerly § 20-7-473 (Supp. 2007)). For purposes of equitable distribution, a "marital debt" is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable. Hardy v. Hardy, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993).

Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. Smith v. Smith, 327 S.C. 448, 457, 486 S.E.2d 516, 520 (Ct. App. 1997). In equitably dividing the marital estate, the family court must consider "liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage[.]" S.C. Code Ann. § 20-3-620(B)(13) (Supp. 2009) (formerly § 20-7-472(13) (Supp. 2007)). Section 20-3-620(B)(13) creates a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in the totality of equitable apportionment. Hickum v. Hickum, 320 S.C. 97, 102, 463 S.E.2d 321, 324 (Ct. App. 1995) (citing to former section 20-7-473). When the debt is incurred before marital litigation begins, the burden of proving a debt is nonmarital rests upon the party who makes such an assertion. Id. at 103, 463 S.E.2d at 324.

Husband testified at the final hearing that Kevin Jr. and Wife accumulated almost $16,000 in credit card debt while he was in jail. Husband stated that during his forty-day imprisonment, Wife and Kevin Jr. incurred over $9,000 on his GM card, over $5,500 on his Bank of America card, and over $1,200 on his Chase card. However, Husband later admitted that several of the charges on his Bank of America card were actually attributable to him, and "about half the bill [was his] and half of it [was] hers." Husband's son, Kevin Jr., stated Wife used these credit cards and also gave him permission to use these credit cards for various purchases, including jewelry, DVD's, and a spoiler and rims for his car.

However, Wife contradicted this testimony, stating she never used the credit cards nor gave permission to Kevin Jr. to use the credit cards, and she believed Kevin Jr. should be responsible for paying off the debt instead of her. Wife admitted to writing several checks from Husband's checkbook to pay household expenses, but she stated the bank returned some of those checks because of insufficient funds, which she then had to repay herself.

Because the majority of the credit card debt was acquired prior to marital litigation, Wife was required to rebut the presumption that those debts were marital in nature. See Hardy, 311 S.C. at 437, 429 S.E.2d at 813 (holding former section 20-7-472 creates a rebuttable presumption that a debt of either spouse incurred prior to marital litigation is a marital debt). In its order, the family court implicitly found the credit card debts were nonmarital, concluding that Kevin Jr., not Wife, was responsible for the charges on Husband's credit card. Kevin Jr.'s testimony demonstrates the majority of his purchases benefitted neither Husband nor Wife as is required for debt to be equitably apportioned. See id. ("[A] 'marital debt' is debt incurred for the joint benefit of the parties . . . ."). Moreover, Husband even admitted that approximately half of the debt on the Bank of America card was a result of post-incarceration expenditures, specifically Husband's food, liquor, and hotel room, which clearly were not expenditures that benefitted the marriage. See Hickum, 320 S.C. at 103, 463 S.E.2d at 324 (stating that if the family court finds that a spouse's debt was not made for marital purposes, it need not be factored into the court's equitable apportionment of the marital estate, and the family court may order payment by the spouse who created the debt for nonmarital purposes). In light of the conflicting testimony, we believe the family court was in a better position to observe the witnesses and assess their credibility in determining whether this debt was marital or nonmarital. See Brown v. Brown, 379 S.C. 271, 277, 665 S.E.2d 174, 178 (Ct. App. 2008) (finding that when there is conflicting evidence, the family court has the duty of determining not only the law of the case, but the facts as well, because it has the opportunity to observe the witnesses and determine how much credence to give each witness's testimony). Accordingly, we discern no error in the family court's decision to hold Husband responsible for the repayment of the credit card debt.

III. Attorneys' Fees

Husband argues if this court finds the family court erred in its ruling on alimony or the equitable division of debts, we should remand the issue of whether Husband is entitled to attorneys' fees. Our decision to affirm the family court on both of these issues disposes of Husband's argument

regarding attorneys' fees. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (stating appellate courts need not address remaining issues when resolution of prior issue is dispositive); Haselden v. Haselden, 347 S.C. 48, 65, 552 S.E.2d 329, 338 (Ct. App. 2001) (finding one of the husband's arguments regarding attorneys' fees without merit when his argument to overturn the attorneys' fee award was based on his unsuccessful contention that the contempt ruling was in error).

CONCLUSION

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

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Perry Keith Strickland, Appellant.

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4714
Heard June 8, 2010 – Filed July 21, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek, 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 Deborah R.J. Shupe, all

of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

SHORT, J.: Perry Keith Strickland (Appellant) appeals his convictions for voluntary manslaughter and assault and battery of a high and aggravated nature (ABHAN), arguing the trial court erred in denying his directed verdict motion. We affirm.

FACTS

Appellant was indicted on murder and ABHAN. These charges arose after Appellant became involved in a knife fight with William Huckabee (Father), and his son, Christopher Huckabee (Victim), in Spartanburg County, South Carolina. Victim died as a result of the altercation. Three witnesses testified about what occurred: Father; Appellant's common law wife, Jennifer Weathers (Wife); and a neighbor, Barry Smith (Neighbor). Each gave a different account of what occurred.

Father testified that on the morning of the incident, Wife arrived at his trailer asking for a place to rest because Appellant had kicked her out of their trailer after an argument. Father agreed and allowed Wife to sleep on his sofa. While Wife rested, Father went to a store to purchase beer and cigarettes. Upon returning, he asked Wife to leave, which she did.

Later that night, Father, Victim, Neighbor, and Wife were at Father's trailer socializing when Appellant returned to the trailer for the third or fourth time. Neighbor and Wife were sitting on a sofa, and Appellant joined them. Appellant angrily demanded the key to their trailer from Wife. Wife denied having a key, and Appellant responded by yelling and screaming at her. Victim, who was sitting nearby, told Appellant, "I'm not going have this in my daddy's house." Appellant told Victim to "shut your fucking mouth." Victim pushed his chair back and was getting up when Father attacked Appellant.

Father hit Appellant, who fell to the couch. Father landed on the floor, and Victim asked him if he was all right. After that, Father passed out. When Father awoke, he was behind Appellant and saw Appellant kneeling over Victim. Father attacked Appellant again. The next recollection Father had was finding Victim dead.

Wife testified that on the morning of the incident she did not go to Father's trailer, but went to her grandmother's house after she and Appellant had a fight. Upon returning, she and Appellant cleaned a neighbor's yard. Father or Victim had invited Wife and Appellant to socialize at Father's trailer. Later that night, Wife went to Father's trailer, and Appellant arrived fifteen to twenty minutes later.

Wife said she was seated on the couch when Appellant came in and politely asked her for the key to their trailer. Before she could respond, Victim attacked Appellant and Father joined the fight. Victim and Father were armed with knives. The three men ended up on the floor, and Wife observed Appellant get cut with a knife. After the fight, Wife and Appellant left Father's trailer.

Officer Allen Wood, of the Spartanburg County Sheriff's Office, testified Wife's testimony conflicted with a statement she gave to the police a few hours after the incident. In that statement, she stated Appellant came into Father's trailer and said, "Where the fuck is my door key[?]" The statement also indicated that after this exchange between Appellant and Wife, Victim told Appellant to "get the fuck out of my house." According to Wife's statement, Victim punched Appellant in the face, and Appellant responded in kind. Father jumped into the fight after Victim and Appellant exchanged blows.

After this testimony, Appellant moved for a directed verdict, arguing he was entitled to act in self-defense. The trial court denied this motion. Appellant then presented the testimony of Neighbor.

Neighbor lived in the same trailer park as Appellant and Father. Neighbor testified he arrived at Father's trailer the night of the incident to find Father present. Wife arrived at the trailer, and thereafter, Victim appeared. Appellant arrived and knocked on the door, and Victim answered. Appellant addressed Wife and asked for the key to their trailer. Appellant was outside of the trailer, and Victim was standing in the doorway. The two stared each other down, then Victim made a move and a fight ensued. The two landed inside the trailer, and Father joined the fight. Victim pulled out a knife and kicked Appellant. At this point, Neighbor exited the trailer and did not witness anything else.

After the close of the evidence, Appellant again moved for a directed verdict, arguing he acted in self-defense. The trial court denied his motion. The jury found Appellant guilty of voluntary manslaughter and ABHAN, and the court sentenced him to concurrent terms of twelve and ten years' imprisonment, respectively. This appeal followed.

STANDARD OF REVIEW

In deciding whether the trial court erred in failing to grant a directed verdict in favor of a defendant in a criminal case, this court must view the evidence in the light most favorable to the State. State v. Hendrix, 270 S.C. 653, 657, 244 S.E.2d 503, 505 (1978). If there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the trial court must submit the case to the jury. Id. Additionally, unless it can be said as a matter of law that self-defense was established, it was not error for the trial court to submit the case to the jury. Id. If the State provides evidence sufficient to negate a defendant's claim of self-defense, a motion for directed verdict should be denied. State v. Dickey, 380 S.C. 384, 394, 669 S.E.2d 917, 922 (Ct. App. 2008).

LAW/ANALYSIS

Appellant argues the trial court erred in denying his directed verdict motion because he established self-defense as a matter of law. We disagree.

To establish self-defense, four elements must be present: (1) 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, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. Hendrix, 270 S.C. at 657-58, 244 S.E.2d at 505-06.

As to the first element, Appellant was not without fault in bringing on the difficulty. "The true rule is that the plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on." State v. Woodham, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931) (internal quotations omitted). Additionally, the question of whether the language used was opprobrious enough as to have reasonably been expected to bring on a difficulty is ordinarily a question of fact for the jury. State v. Ferguson, 91 S.C. 235, 242-43, 74 S.E. 502, 505 (1912).

Although the three witnesses presented differing accounts of the incident, Father testified he struck Appellant after Appellant told Victim to "shut your fucking mouth." We believe whether this language might reasonably have been expected to bring on the difficulty was a question for the jury. See id. (holding whether defendant's calling his mother a "damn lie" might reasonably have been expected to bring on the difficulty was a jury question in a prosecution for killing his father).

While we acknowledge that Wife testified Appellant came in and politely asked for the key to their trailer and did not address Victim, Father's contrary testimony created an issue of credibility and, at least, created a situation where the State produced enough evidence to survive a directed verdict motion. See Hendrix, 270 S.C. at 657, 244 S.E.2d at 505 (holding if there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the trial court must submit the case to the jury); see also State v. Pitts, 256 S.C. 420, 427, 182 S.E.2d 738, 742 (1971) (stating a motion for a directed verdict of acquittal is properly refused where the determination of guilt is dependent upon the credibility of a witness, as this is a question that goes to the weight of evidence and is clearly for determination by a jury). For these reasons we find the trial court properly submitted the case to the jury.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.