The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF LOUIS S. MOORE, PETITIONER

Petitioner was definitely suspended from the practice of law for one year. In the Matter of Moore, 382 S.C. 620, 677 S.E.2d 598 (2009). Thereafter, petitioner was definitely suspended for ninety (90) days, retroactive to May 18, 2009. In the Matter of Moore, 393 S.C. 361, 713 S.E.2d 293. Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
August 22, 2012

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
August 29, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Andrew P. Ballard, Respondent,

v.

Tim Roberson, Rick Thoennes,
Rick Thoennes, III, and
Warpath Development, Inc., Appellants.

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 27161
Heard February 7, 2012 – Filed August 29, 2012

AFFIRMED

Joshua L. Howard, of Haynsworth Sinkler Boyd, of Greenville, for Appellants.

Wallace K. Lightsey, of Wyche Burgess Freeman & Parham, and Hannah Rogers Metcalfe, of Metcalfe and Atkinson, both of Greenville, for Respondent.

JUSTICE HEARN: Relationships in business, like any other relationship, can quickly turn sour when they are predicated on unmet expectations, whether justified or not. Andrew Ballard worked for years crafting a plan for a marina through Warpath Development, Inc., the business he had incorporated for this very purpose. He eventually sought the investment and involvement of Tim Roberson, Rick Thoennes, Rick Thoennes, III (collectively, individual Appellants) to help realize this idea. When the marina did not develop the way the individual Appellants had hoped, they began to exclude Ballard from involvement with Warpath, leading Ballard to file suit against the individual Appellants and Warpath (collectively, Appellants). The circuit court found Appellants had acted oppressively to Ballard as a minority shareholder and ordered the purchase of Ballard's stock at fair market value. The court also ordered the individual Appellants to place 60,000 shares of Warpath stock in escrow. On appeal, Appellants argue that the facts do not support the court's holdings. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Ballard incorporated Warpath for the development of a marina on Lake Keowee in Pickens County, South Carolina. After several years of working with Duke Energy Carolinas, LLC, which owned the lakefront property, Warpath entered into a lease with Duke to use the property as indicated on the Conceptual Plan Ballard had negotiated with Duke.

Subsequently, Ballard began talks with the individual Appellants about their possible involvement with Warpath, and eventually the four men entered into a Stock Purchase Agreement. At that time, the corporation had issued only 40,000 shares of stock, all of which were owned by Ballard, although the Articles of Incorporation authorized the issuance of 100,000 total shares. Under the Agreement, the individual Appellants paid Ballard $1,000,000 "in exchange for 20,000 shares of Ballard's 40,000 and [received] from the corporation [60,000] additional shares so that Ballard [would] hold

20% of the stock and the other 80% [would] be held by Roberson, Thoennes and Thoennes III when all shares are finally issued.[1]"

The Agreement also detailed the duties of each of the parties: Ballard was to enter into a separate agreement with Warpath outlining his duties, to include securing certain permits, leases, and services; Thoennes and Thoennes, III were to enter into an agreement defining their duties regarding development work, assistance with proformas and obtaining permanent financing, and executing loan documents; and Roberson was to provide the necessary capital to obtain long term financing. The Agreement also acknowledged Ballard had already obtained a lease from Duke and approvals from Duke and Pickens County, but it stated final permits were still pending.

Incorporated into the lease with Duke was the Plan for the marina. The Plan included general numbers for certain details, including a projected number of 100-200 boat slips. The individual Appellants had reviewed the Plan and the proposed numbers prior to signing the agreement and knew that it guaranteed no more than 100 slips. A few months after the parties entered into the Agreement, they met with Duke and discovered that boat slips were available only on a portion of the anticipated area, which meant the architect could only squeeze in 102 slips, not the maximum of 200.

Upset over this decrease in the projected income due to significantly fewer slips than they had hoped for, the individual Appellants collaborated in drafting an e-mail to convince Ballard to return some or all the money that he had been paid, or to return his 20,000 shares to the corporation and cease involvement with the development. They eventually sent Ballard an e-mail asking that he return the $1,000,000 they had paid him in full or at least return a portion of it if he wanted to move forward. Ballard declined both of those options, and he subsequently was removed as a director at the first shareholders' meeting a few months later. At that same meeting, however, all three of the other shareholders were elected to the board and appointed as officers. Immediately thereafter, the individual Appellants—with the dissent

[1] The 60,000 shares of stock from Warpath were issued directly to Roberson, Thoennes, and Thoennes, III immediately after the Agreement was signed.

of Ballard—approved the issuance of an additional 900,000 shares "for the purpose of raising capital, paying expenses and offering employee incentives." This issuance would be in direct conflict with the Articles of Incorporation, which only authorized 100,000 shares and the Agreement, which stated Ballard would ultimately own 20% of the corporation. No motion was made to amend the Articles.

Realizing this increase in shares would dilute his holdings to 2%, Ballard initiated this lawsuit, alleging a violation of the Agreement and seeking an injunction preventing the issuance of the additional stock. In response, Appellants counterclaimed for fraud, breach of contract, breach of contract accompanied by a fraudulent act, and promissory estoppel. After discovery, Ballard amended his complaint to include shareholder derivative claims that the individual Appellants had breached the Agreement with respect to duties owed to Warpath and allegations of oppression of the minority shareholder. Appellants then amended their answer and counterclaimed for fraud, breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and violation of South Carolina Code Section 35-1-501 (Supp. 2011) in connection with the sale of securities.[2]

A jury trial commenced, but the jury was discharged when Appellants dismissed their counterclaims with prejudice. Thus, only Ballard's equitable claims remained. The circuit court[3] found sufficient evidence of oppression and ordered Appellants to purchase Ballard's stock at fair market value. Additionally, the court ordered that the individual Appellants place 60,000 of

[2] Within a few weeks of filing their amended answer and counterclaims, a shareholders meeting was held at which Ballard was elected a director at the motion of the individual Appellants, but no meeting of directors has been called since. While there apparently have been some discussions with Ballard regarding the permits, he has not received any updates from the directors about efforts to finance the company.

[3] Since 2007, Judge Miller has been designated by the Chief Justice as one of three business court judges in this State.

their shares in escrow pursuant to Section 33-6-210(e) of the South Carolina Code (2006). This appeal followed.

STANDARD OF REVIEW

"A shareholders derivative action, as well as an action for stockholder oppression, is one in equity." *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). Therefore, we may find facts according to our own view of the preponderance of the evidence. *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). However, this broad scope does not relieve the appellant of his burden to show that the trial court erred in its findings. *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001). Furthermore, we are not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses. *Id.* at 387, 544 S.E.2d at 622.

ISSUES PRESENTED

I. Did the circuit court err in finding that Appellants had acted oppressively and with unfair prejudice to Ballard?

II. Did the circuit court err in requiring the individual Appellants to place 60,000 shares of Warpath stock into escrow?

LAW/ANALYSIS

I. EVIDENCE OF OPPRESSION

Appellants first contend there is insufficient evidence to support the circuit court's finding that they acted oppressively and ordering the purchase of Ballard's stock at fair market value. We disagree.

Section 33-14-300(2)(ii) of the South Carolina Code (2006) allows the circuit court to dissolve a corporation if a shareholder has established that "the directors or those in control of the corporation have acted, are acting, or

will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation)." In an action to dissolve a corporation on the grounds stated in section 33-14-300, a court may instead order the corporation or other shareholders to purchase the shares of any shareholder at fair market value. S.C. Code. Ann. § 33-14-310(d)(4) (2006).

In *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001), we established how a court should determine whether majority shareholders have acted oppressively within the meaning of section 33-14-300. *Kiriakides* involved Atlas Food Systems and Services, Inc., a family owned close corporation, where the oldest brother, Alex, was the majority shareholder owning 57.68% of the shares. *Id.* at 591, 541 S.E.2d at 260. His siblings John and Louise, the plaintiffs in the case, owned 37.7% and 3% of the corporation, respectively. *Id.* John and Louise brought a lawsuit against Alex and the corporation seeking, among other things, judicial dissolution for oppression. *Id.* at 593, 541 S.E.2d at 261. In establishing the proper considerations for finding oppression, we observed that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." *Id.* at 602, 541 S.E.2d at 266. We also noted this was a fact-sensitive review and should therefore be determined through a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior." *Id.* at 603, 541 S.E.2d at 266. Although we declined to set out specific factors in *Kiriakides*, we observed several commonly considered ones including: "eliminating minority shareholders from directorate and excluding them from employment[,] . . . failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders." *Id.* at 605 n.28, 541 S.E.2d at 267 n.28.

Examining the facts of the case, we found it "present[ed] a classic situation of minority 'freeze out'" and noted several factors including Alex paying Louise less than was owed to her based on her ownership; Alex's conduct in transferring 21% of a wholly owned subsidiary to his children

instead of to a partnership which included John and Louise; Alex and his family receiving substantial benefits from ownership of the company through employment while Louise and John had no such expectations of benefit; Atlas having no intention of declaring dividends in the near future; Atlas's extremely low buyout options for John and Louise, offering them $4,000,000 in 1998 when John had been told by an accountant in 1995 that his interest alone was worth $10,000,000; and there being no market otherwise for John and Louise's stock. *Id*. at 605-06, 541 S.E.2d at 268.

We acknowledge that the facts before us are not as egregious as those in *Kiriakides,* which included actual fraud by Alex upon the minority. However, illegal or fraudulent conduct is not required under section 33-14-300(2)(ii), and we agree with the circuit court that the evidence in the record shows oppression by the majority in this instance. The concern and focus in shareholder oppression cases is that the minority "faces a trapped investment and an indefinite exclusion [from] participation in business returns." *Id.* at 604, 541 S.E.2d at 267 (quoting Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, 790-91 (2000)). Ballard here, like John and Louise in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.

In particular, e-mail communications between the other shareholders clearly indicate their desire to oust Ballard. The individual Appellants wanted to convince Ballard to return his 20% interest in Warpath in the hopes that "he [would] take his [$1,000,000] and run [] after a little threatening, posturing and whining." Furthermore, when discussing what options to give Ballard, Thoennes, III posited, "Don't we want to get him out of the deal?" Although at trial the individual Appellants sought to downplay the implications of these electronic exchanges, this enunciation of their intent to force out Ballard simply contextualizes their subsequent actions.

Ballard, who had conceptualized this project and had been the sole shareholder as well as a director and officer of Warpath, was not elected to

the board although the three individual Appellants were elected and subsequently appointed themselves officers. Furthermore, the individual Appellants then passed a corporate resolution authorizing 900,000 new shares of stock in violation of both the Agreement and the Articles of Incorporation. Issuance of this additional stock would result in the dilution of Ballard's ownership interest in violation of the Agreement—from 20% to 2%. Although the individual appellants deride the implication of this increase by noting that this dilution would affect all the shareholders with equal force, this contention ignores the larger problems with the resolution. Issuance of this additional stock is in direct conflict with the Articles, which have never been amended[4] to allow such an increase, and is contrary to the agreed upon allocations of the Agreement. Additionally, this issuance would allow Roberson to avoid his contractual obligation to provide the needed capital under the Agreement because the first reason listed for this issuance was "for the purpose of raising additional capital."

This increase also permitted the corporation to use the extra stock for "employee incentives," granting the majority more control over the allocation of benefits flowing from the corporation. There seems to be no plan to hire Ballard as an employee, and at trial Roberson stated his clear intention to hire various members of his family to assist in the enterprise.[5] Thus, Roberson would allow his own family to profit from his ownership—through both

[4] Although James Fayssoux, who served as the attorney for the corporation, stated in his deposition that amending the Articles was implicit at the meeting, he admitted no resolution had been passed authorizing the filing of the paperwork necessary to amend the Articles.

[5] Although Appellants sought to dismiss this consideration as hypothetical, Roberson stated at trial that after spending time at the lake with his niece and her family, he decided her husband was "the guy [he] want[s] running this thing" and "asked them if they would consider the job as on-site managers." He further testified making that decision "attracted . . . [his] whole family basically" including his eighty-nine year old mother, his older sister, and his younger sister, who moved to the area "to be a part of what's happening." It thus appears Roberson's decision to hire his family was more than "gross speculation," as claimed in Appellants' brief.

salary and, under the new resolution, stock incentives—while not affording Ballard similar benefits. This result is especially significant because returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends. *See* Moll, *supra*, at 758 (noting that "the close corporation investor typically looks to salary rather than dividends for a share of the business returns because the earnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits" (internal quotation omitted)). By increasing the amount of shares, the majority would be allowed further means through which to dictate and control the allocation of returns in favor of their own interests, and to the exclusion of Ballard's.

Moreover, Ballard has not been allowed to meaningfully participate in the development for lack of communication. Appellants admit they have not directly kept him updated on the progress of the permits although Ballard has attempted to stay informed on the status of the permits by maintaining contact with Duke, the engineers, and the Department of Health and Environmental Control. While Appellants contend they elected him as a director in an attempt to include him again, Thoennes admitted at trial that they have not had a directors' meeting since Ballard's election nor have they sent him any updates on financing.

We find the record evinces a clear intent by Appellants to "freeze-out" Ballard and exclude him from involvement with Warpath and from the benefits of ownership.[6] Although we acknowledge some harm alleged is arguably prospective, the statute envisions future harm, providing that a court can find oppression where the majority "will act" in a manner oppressive to the minority. Moreover, Ballard should not be prejudiced because he has sought to proactively protect his legal rights and did not wait for the complete evisceration of his involvement once he understood the Appellants meant to

[6] In the dissent's view of the facts, no one action by Appellants is so egregious as to warrant a finding of oppression. We, however, agree with the circuit court judge, that the evidence as a whole clearly demonstrates oppression by the majority.

force him out of the corporation.[7] We therefore affirm the circuit court's finding of oppression and its requirement that Appellants purchase Ballard's stock at fair market value.

II. ESCROW OF STOCK

The individual Appellants also argue the circuit court erred in requiring them to place 60,000 shares of Warpath stock in escrow pursuant to section 33-6-210(e). We disagree.

Section 33-6-210(e) requires that "the corporation must place in escrow shares issued for a contract for future services or benefits or for a promissory note." Although the individual Appellants argue that Ballard should have requested the shares be placed in escrow at the time the agreement was entered into, the language of the statute is a clear mandate to the corporation to escrow stock when shares have been issued in anticipation of future services. *See Edwards v. State Law Enforcement Div.*, 395 S.C. 571, ___, 720 S.E.2d 462, 464 (2011) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."). However, the individual Appellants aver that the $1,000,000 which they paid Ballard pursuant to the Agreement was in exchange for not only the 20,000 shares owned by Ballard, but also for the remaining 60,000 shares issued by the corporation. We agree with the circuit court that the weight of the evidence and the Agreement itself are directly contrary to this assertion.

The agreement states that Roberson, Thoennes, and Thoennes, III would pay Ballard "the sum of $1,000,000 in exchange for 20,000 shares of

[7] The dissent would have us require a showing of "imminent harm" to obtain relief under section 33-14-300(2)(ii) for future oppression. While we agree with the dissent that our analysis must be undertaken with caution, we see no need to impose a further requirement of "imminent harm" on minority shareholders seeking to protect their rights. Appellants have not asked us to engraft this requirement onto section 33-14-300(2)(ii), and the statute itself contains no such prerequisite.

Ballard's 40,000 and [would] receive from the corporation additional shares." "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Looking simply at the language of the agreement, it states the money tendered is "in exchange for the 20,000 shares" and the shares from the corporation are separate. Furthermore, the $1,000,000 was paid to Ballard directly and not the corporation. Although the individual Appellants argue that it would make sense to pay Ballard money owed to the corporation because he was the sole shareholder at the time, this entirely ignores the corporate form and the fact that the yet unissued 60,000 shares came directly from the corporation, not Ballard. Because the individual Appellants issued the check to Ballard, the corporation did not receive any money in exchange for the stock. Furthermore, the Agreement itself illustrates the "future services or benefits" that each party would perform by requiring the execution of separate agreements defining the respective duties of the parties.

Read as a whole, the language of the Agreement therefore indicates that the money exchanged was for the 20,000 shares previously held by Ballard and the remaining 60,000 shares were exchanged in anticipation of the services listed. Additionally, because we give great deference to the credibility determinations of the circuit court, we find it compelling that despite conflicting testimony,[8] the court determined that the money had been paid solely for the 20,000 shares directly from Ballard and the corporation had not otherwise been compensated for its issuance of the remaining 60,000 shares. We therefore find no error in the circuit court's finding that the individual Appellants must place 60,000 shares in escrow in accordance with section 33-6-210(e).

[8] This inconsistency existed not just between Appellants and Respondent, but even between the individual Appellants. At trial, when Thoennes was asked "[Y]ou [and your son] didn't buy those forty thousand shares when you paid Andy Ballard a million dollars. You've still got to earn them, right?" he responded simply, "Sure." However, his son testified, "In my opinion we were giving him a million dollars for eighty percent of the corporation."

CONCLUSION

Based on the foregoing, we affirm the circuit court's order directing Appellants to purchase Ballard's stock for fair market value and requiring the individual Appellants to place 60,000 shares of stock in escrow.

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

JUSTICE PLEICONES: I respectfully dissent. In my view, no oppressive conduct toward a minority shareholder has occurred in this case, and the possibility of future oppression is too remote to justify an equitable remedy.

Pursuant to S.C. Code Ann. § 33-14-300(2)(ii) (2006), dissolution of a corporation is appropriate when a court determines that "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial . . . to any shareholder." In applying this statute, courts must exercise caution in finding conduct to be oppressive. *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 597-98, 541 S.E.2d 257, 263 (2001) (quoting official comment that "[t]he court should be cautious in the application of these grounds so as to limit them to genuine abuse . . . ."). Although the statute permits dissolution when those in control *will act* in an oppressive manner, such a finding must be made as cautiously as a finding of past oppression. Thus, I would limit the application of the statute to instances in which the probability of future abuse is a near certainty. That is, a showing of imminent harm must be made. In my view, the evidence in this case fails to establish that oppression has occurred or is imminent.

I agree with the majority that a court-mandated buyout may be appropriate when a minority shareholder "faces a trapped investment and an indefinite exclusion [from] participation in business *returns*." *Kiriakides* at 604, 541 S.E.2d at 267 (citation omitted; emphasis added). In my view, however, the evidence does not demonstrate that Ballard has been or is in imminent danger of being excluded from *returns*, despite his exclusion from *management*.

Engaging in a power struggle for control of a corporation is permissible if acceptable tactics are employed in the struggle. *Id*. at 598, 541 S.E.2d at 263. By the same token, transferring management of a venture from one shareholder to another is not oppressive if based on a valid business reason. *See also Cooke v. Fresh Exp. Foods Corp., Inc.*, 169 Or. App. 101, 110, 7 P.3d 717, 722 (Or. App. 2000) ("Courts give significant deference to the

majority's judgment in the business decisions that it makes, at least if the decisions appear to be genuine business decisions."). In this case, although Appellants were disgruntled with Ballard and removed him as manager of the project, it is undisputed that the project remains in the developmental stage. The likelihood is small that any investor will see a return on investment in the near future. Ballard does not argue that Appellants are seeking to liquidate the corporation's assets or transfer them to other entities. Thus, I do not understand how the majority finds evidence of oppression in the fact that Ballard is unlikely to see a return on his investment in the near future.

The majority also finds that the stock authorization was intended as a means for Roberson to avoid his contractual obligation to provide long-term financing. I do not agree that Roberson's obligation to obtain long-term financing was a commitment to provide all capital needed by the corporation, and it is axiomatic that a corporation may authorize and issue stock for the purpose of raising additional capital. Moreover, in my view the Agreement in this case did not prohibit such action but rather established what the initial stock distribution would be among the various investors.

I also do not find significant the board's failure to amend the articles of incorporation when it authorized the additional shares. This action did not violate the articles, which specified the number of *issued* shares rather than the number of *authorized* shares. Moreover, in my view the absence of a specific amendment to the articles of incorporation is no more than a technicality when the same votes that authorized the shares would also have amended the articles.

The majority reasons that Appellants' intent was to gain greater control over allocation of returns on the parties' joint investment. However, as the majority shareholders, Appellants already had full control of the corporation and its distribution of profits and benefits. Thus, the question is not whether the majority shareholders were seeking control but whether they would have abused or did abuse that control. *See Kiriakides*, *supra*.

I also do not find it significant that the majority shareholders failed to communicate information to Ballard since, by the time it could be fairly said they should have communicated financial information to him, Ballard had filed suit against them. Nor would I imply that a minority shareholder is entitled to be apprised of every detail of a firm's operations, even in a closely held corporation. In my view, Ballard has not shown that he was deprived of information he needed to protect his interests as a shareholder. *See Masinter v. WEBCO Co.*, 164 W.Va. 241, 256-57, 262 S.E.2d 433, 443 (W. Va. 1980) ("The fact that [the minority shareholder] received diminished financial information after his removal as a director and officer may reflect nothing more than the practical recognition that an officer-director needs more financial information, in order to intelligently exercise his responsibilities, than does a shareholder. On the other hand, upon a fuller factual development, the withholding of information may be linked to the 'freeze-out' in that it may have denied him relevant information.").

Likewise, I do not find evidence of oppression in the fact that one of the Appellants planned to employ several family members at the marina. Not only would the planned marina require the services of several employees, but Ballard does not contend that he wished to be employed or have his own family members employed in the operation. Thus, there is no reason to conclude that Appellants intended to deprive Ballard of a benefit he expected. On the contrary, the evidence in the record indicates that Ballard intended to participate only in the development of the project and subsequent returns on investment. Thus, any plans by Appellants to employ family members would be entirely appropriate in the absence of excessive compensation to them.

In sum, although evidence in this case may point to the possibility of oppressive intent by Appellants, it is far from conclusive in establishing that such an eventuality would have become a reality. In my view, this evidence falls well short of the standard articulated in *Kiriakides*. Thus, I respectfully dissent.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lawrence J. Purvis, Jr., Respondent

Appellate Case No. 2012-212199

Opinion No. 27162
Submitted July 2, 2012 – Filed August 29, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Charlie Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Lawrence J. Purvis, Jr., of Law Offices of N. David DuRant & Assoc., of Surfside Beach, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand. In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School and the Notary Public Law course offered by the South Carolina Bar within twelve (12) months of the imposition of a sanction. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent represents Client in a domestic action. Respondent instructed Client to obtain written statements from anyone who could potentially serve as a witness in her case and to bring the statements to him for review. Client gave respondent four handwritten statements from potential witnesses. Respondent's office typed the statements in affidavit form and gave them back to Client with instructions to have the affidavits signed and notarized.

Client returned the signed affidavits to respondent; however, the statements were not notarized. Respondent instructed Client to contact each of the witnesses by telephone. Respondent maintains that the individuals to whom he spoke on the telephone confirmed that each of them had signed the affidavits in question. Despite the affiants not signing the documents in his presence, respondent notarized the four statements and presented the affidavits to the court at the temporary hearing. One of the alleged affiants presented a subsequent affidavit to the court stating that she had never submitted an affidavit on Client's behalf. Respondent represents that, based on his telephone conversations, he believed that the individuals he spoke with had executed the affidavits.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.3(a)(1) (lawyer shall not knowingly make false statement of fact to tribunal); Rule 3.4(b) (lawyer shall not falsify evidence); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violates Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall complete the Legal Ethics and Practice Program Ethics School

and the Notary Public Law course offered by the South Carolina Bar within twelve (12) months of the date of this opinion. Respondent shall provide the Commission on Lawyer Conduct with proof of his completion of each program within (10) days of each program's conclusion.

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 Christopher Lance Sheek, Respondent

Appellate Case No. 2012-212394

Opinion No. 27163
Submitted July 16, 2012 – Filed August 29, 2012

PUBLIC REPRIMAND

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

Christopher Lance Sheek, of Greenwood, *pro se.*

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand. Respondent further agrees: 1) to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of a sanction; 2) to complete the Legal Ethics and Practice Program Ethics School within one (1) year of the imposition of a sanction; and 3) to retain and work with a law office management advisor for two (2) years following the imposition of a sanction. We accept the Agreement and issue a public reprimand. In addition, we impose the conditions of discipline agreed to by the parties. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Client A hired respondent to represent him on appeal from his criminal conviction. Respondent failed to timely file the record on appeal and the appeal was dismissed. Respondent moved for reconsideration of the dismissal, but failed to respond in writing to two letters from the court and his motion was dismissed. Respondent failed to inform Client A of the dismissal of the appeal and his failure to have the appeal reinstated.

Client A discovered his appeal had been dismissed when he wrote to the appellate court. An attorney with the Office of Appellate Defense later had Client A's appeal reinstated and Client A prevailed on appeal.

Matter II

Respondent represented Client B in a probate court appeal. The appeal was dismissed when respondent failed to appear for a roster meeting. Respondent maintains he was unaware of the roster meeting until the clerk's office called on the morning of the meeting; however, several weeks earlier the clerk's office had sent a memorandum advising that the roster had been posted online.

Respondent moved for reconsideration, but submitted the motion to the wrong judge. Respondent was advised he had ten (10) days to submit the motion to the judge who had dismissed the appeal. Respondent failed to timely submit the motion to the correct judge, but the judge learned of the motion and issued an order denying the motion for reconsideration. When respondent notified Client B that the motion for reconsideration had been denied, she terminated the representation.

Matter III

Respondent represented Client C, the wife, in a domestic action which did not result in a divorce. Several years after he was initially hired, respondent met with Client C and her husband about a change of custody. Respondent was advised the parties had agreed to divorce and for the husband to have custody of the couple's

minor children. Respondent prepared the proposed agreement as Client C's attorney.

After the parties executed the agreement, Client C advised respondent that she did not want to proceed with the agreement. Respondent refused the husband's demands that he file the agreement, but did write a letter on the husband's behalf advising the school that the husband had joint custody of the couple's son and should be notified if anyone tried to remove the child from school. Respondent did not have Client C's permission to write the letter and admits his conduct violated the Rules of Professional Conduct.

Matter IV

Respondent represented the widow in an estate in which the widow and the decedent's child were the only heirs. The probate court removed the widow as personal representative, replacing her with the decedent's child. Both heirs agreed for respondent to serve as the special administrator.

As the special administrator, respondent failed to diligently pursue the closing of the estate. The probate court repeatedly wrote respondent in an effort to get him to take the steps necessary to close the estate. On one occasion, the court noted respondent had failed to respond to an earlier inquiry and, on another occasion, the court threatened to issue a rule to show cause. Eventually, the probate court administratively closed the estate with leave to restore.

Matter V

Respondent represented Client D at trial on criminal charges. Client D was convicted and sentenced to life imprisonment. Thereafter, Client D wrote respondent twice requesting a complete copy of his file and information about his appeal. Respondent did not respond to Client D's first two letters.

More than a year after the second letter, Client D wrote respondent, again demanding his file. In response, respondent wrote Client D indicating the file was too voluminous to mail to the prison and stating he had explained this several times to Client D's family. Eventually, respondent had the file delivered to the prison.

Matter VI

This matter arises from respondent's representation of a father in a child custody action. The complaint was filed by the child's mother who appeared *pro se* throughout the litigation.

Respondent prepared the proposed order; he failed to submit a copy of the proposed order to the mother. Further, respondent submitted the proposed final order to the judge in an untimely manner and accidently failed to include a restraining order as well as some details regarding visitation. The order was signed and filed before respondent realized the omissions in the order.

Law

Respondent admits that by his conduct 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 (lawyer shall keep client reasonably informed about the status of matter; lawyer shall promptly comply with reasonable requests for information); Rule 1.7 (lawyer shall not represent client if the representation involves concurrent conflict of interest); Rule 1.16(d) (upon termination of representation, lawyer shall take steps to the extent reasonably practicable to protect client's interests, such as giving reasonable notice to client, allowing time for employment of other counsel, and surrendering papers and property to which client is entitled); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall: 1) pay the costs incurred in the investigation and prosecution of

this matter by ODC and the Commission within thirty (30) days of the date of this opinion and 2) complete the Legal Ethics and Practice Program Ethics School within one (1) year of the date of this opinion. Respondent shall provide the Commission with proof of his completion of the Legal Ethics and Practice Program Ethics School within ten (10) days of the conclusion of the program.

Further, respondent shall retain a law office management advisor approved by the Commission who shall work with respondent for a period of two (2) years from the date of this opinion. The advisor shall conduct a thorough review of respondent's law office management practices. Within ninety (90) days of the date of this opinion, the advisor shall submit a report to the Commission which contains an analysis of and recommendations concerning respondent's law office management practices. For the remainder of the two (2) year period, respondent shall meet with the advisor on at least a quarterly basis and the advisor shall submit quarterly reports concerning the status of respondent's law office management practices to the Commission. Respondent shall be responsible for payment of the advisor and for timely submission of the advisor's reports. Respondent's failure to comply with any of the conditions of discipline set forth in this opinion or with the advisor's recommendations shall constitute grounds for discipline.

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 William Ashley Boyd, Respondent

Appellate Case No. 2012-212362

Opinion No. 27164
Submitted July 17, 2012 – Filed August 29, 2012

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka McCants Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William Ashley Boyd, of Andrews, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any sanction in Rule 7(b), RLDE. Respondent requests that any suspension or disbarment be made retroactive to July 14, 2011, the date of his interim suspension. *In the Matter of Boyd*, 393 S.C. 367, 713 S.E.2d 296 (2011). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School prior to seeking reinstatement. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to July 14, 2011. Further, we order respondent to pay the costs incurred in the investigation and prosecution of this matter by ODC

and the Commission within thirty (30) days of the date of this opinion. Respondent shall not file a Petition for Reinstatement until he has completed the Legal Ethics and Practice Program Ethics School. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Complainant A, the Executive Director for a development corporation, retained respondent on June 9, 2010, to foreclose three properties on behalf of the corporation. Respondent was to be paid $1,500.00, plus court costs, for each foreclosure action. Respondent mailed out certified letters to each debtor advising they had fifteen days to become current with their monthly payments to the development corporation. Two of the debtors paid their arrearages; one debtor, a funeral home, did not pay the arrearage.

Respondent agreed to pursue the foreclosure action against the funeral home and was paid $1,650.00 for that representation. At times during the representation, respondent assured Complainant A that the foreclosure was proceeding. Respondent also told Complainant A that he was waiting on a hearing date when, in fact, he had not filed anything with the court.

On August 9, 2010, the Court suspended respondent from the practice of law for six months. *In the Matter of Boyd*, 388 S.C. 516, 697 S.E.2d 603 (2010). Respondent did not notify Complainant A of his suspension. Instead, respondent offered advice to Complainant A regarding the foreclosure action while he was suspended from the practice of law.

When Complainant A learned respondent had not filed the foreclosure action, he requested a refund of the fees paid to respondent. Initially, respondent refused to refund the money, stating the fee was non-refundable. In February 2011, respondent refunded the money to Complainant A in order to avoid a lawsuit.

Matter II

As noted above, on August 9, 2010, the Court suspended respondent from the practice of law for six months. *Id.* He was reinstated to the practice of law on June 14, 2011. *In the Matter of Boyd*, 393 S.C. 159, 711 S.E.2d 898 (2011). Prior to his suspension, respondent worked for a law firm. At the time, a law student named Richard Thomas Roe[1] worked at the same firm.

In May 2011, Claimant A had a pending matter before the Workers' Compensation Commission. Michael Petit, Esquire, represented the insurance carrier on Claimant A's claim.

On May 25, 2011, after Richard Thomas Roe was sworn-in as a member of the South Carolina Bar and while respondent was suspended from the practice of law, respondent sent a letter to Mr. Petit on behalf of Claimant A under the assumed name of Tom Roe. The May 25, 2011, letter was on the letterhead of a fictitious law firm that respondent called "Roe Law, LLC." The address on the letterhead was respondent's home address. The telephone number on the letterhead was respondent's cell phone number. Respondent's May 25, 2011, letter included a Notice of Appearance on Behalf of Claimant A with the Workers' Compensation Commission signed by respondent using the assumed name Tom Roe.

Believing that respondent was an attorney named Tom Roe, Mr. Petit prepared a settlement agreement and forwarded it to respondent at the address on the letterhead. On May 28, 2011, respondent signed the settlement agreement on behalf of Claimant A using the assumed name Tom Roe. The settlement agreement was filed by Mr. Petit who was unaware at the time that Tom Roe was a name fabricated by respondent.

On June 9, 2011, respondent sent a copy of the Notice of Appearance on Behalf of Claimant A, signed by respondent using the assumed name Tom Roe, to the Workers' Compensation Commission by email using the email address which included the phrase "tomroelaw@." The same day, the Workers' Compensation Commission issued a notice of settlement hearing to be held on June 14, 2011.

[1] Richard Thomas Roe is a pseudonym.

On June 10, 2011, respondent telephoned the South Carolina Bar from his cell phone and left a message identifying himself as Tom Roe and requesting an address change for bar member Tom Roe. A member of the staff at the Bar returned the call and left a voice mail message with instructions about how to change the address.

On June 13, 2011, respondent faxed a document entitled "Termination of Attorney/Client Relationship" to Mr. Petit under the assumed name Tom Roe. On June 14, 2011, the settlement hearing was held by Workers' Compensation Commissioner Derrick Williams. Claimant A did not appear and no one appeared on his behalf.

On June 15, 2011, at approximately 9:00 a.m., respondent called the South Carolina Bar a second time, falsely represented himself as Tom Roe, and requested that the address on file for that attorney be changed. The address respondent requested that the Bar use was his home address. At approximately 10:00 a.m. on June 15, 2011, Commissioner Williams held a conference call in which he called the number in the file for "Tom Roe." Mr. Petit also participated in the conference call. Respondent answered the call and falsely identified himself as Tom Roe. During the conference call, respondent falsely stated that he was a graduate of Clemson University and the Charleston School of Law. He gave Commissioner Williams the bar number for Richard Thomas Roe.

On June 22, 2011, respondent appeared at a rescheduled hearing before Commissioner Williams, falsely identified himself as Tom Roe, and gave a false bar number to the commissioner. At that hearing, respondent requested to be relieved from representation of Claimant A. Commissioner Williams instructed respondent to submit a written motion and proposed order. On June 24, 2011, respondent submitted a Motion to be Relieved as Counsel for Claimant A to the Workers' Compensation Commission. Respondent signed the name "Tom Roe" to the motion.

Matter III

On May 20, 2011, and May 31, 2011, while he was suspended from the practice of law, respondent accepted two installment payments of $750.00 from a potential client for representation in a criminal matter. At the time respondent accepted the payment, he did not tell his client that his license to practice law was suspended.

Respondent represents he did not appear in court or draft any legal documents for the client while he was suspended.

Respondent refunded most of the payment to the client immediately after being placed on interim suspension on July 14, 2011. *In the Matter of Boyd*, *supra*. Respondent still owes the client $40.00.

Matter IV

Mary Doe owned property in Beaufort County. The property was sold by the Beaufort County Tax Collector's Office. Complainant B subsequently purchased the property for $60,000.00 and recorded a quitclaim deed.

Complainant B retained respondent to bring a quiet title action for the property. Respondent was paid $750.00 for the representation.

Complainant B repeatedly asked respondent for updates on his case and received assurances from respondent that the quiet title case had been commenced and would be completed soon. At the time respondent made the representations, no action had been filed.

In May 2011, while suspended from the practice of law, respondent traveled to Florence and delivered Complainant B a copy of an "Order Clearing Title." The order purported to be an order from a Special Referee who respondent represented to be William Boyce. Respondent prepared the "Order Clearing Title" and forged the name of an alleged special referee.

Complainant B retrieved the following documents from the file of the Beaufort County Clerk of Court: 1) Complaint dated July 5, 2011, and filed July 28, 2011; 2) Acceptance of Service dated July 26, 2011, and filed July 29, 2011; and 3) Answer by Mary Doe dated July 28, 2011, and filed July 29, 2011. The documents were filed by respondent while on interim suspension.

Mary Doe died in 2002. Respondent forged the Acceptance of Service and Answer and filed the forged documents with the Beaufort County Clerk of Court.

Matter V

Respondent was retained to represent a client in a criminal matter. Respondent quoted the client a fee of $2,000.00. On August 9, 2010, the Court suspended respondent from the practice of law for six months. *In the Matter of Boyd*, *supra*. Respondent failed to refund the unearned fees to the client.

Law

Respondent admits that by his conduct 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); Rule 1.4 (lawyer shall reasonably consult with client about the means by which the client's objectives are to be accomplished and keep client reasonably informed about the status of matter); Rule 1.16 (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect client's interests, such as refunding any advance payment of fee that has not been earned); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rule 3.4 (lawyer shall not falsify evidence); Rule 4.1 (in the course of representing client, lawyer shall not knowingly make false statement of material fact to third person); Rule 5.5 (lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); 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 lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall constitute ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(3) (it shall constitute ground for discipline for lawyer to willfully violate a valid order of the Supreme Court); Rule 7(a)(5) (it shall constitute 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); and Rule 7(a)(6) (it shall constitute ground for discipline for lawyer to violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension, July 14, 2011. 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. Respondent shall not file a Petition for Reinstatement until he has completed the Legal Ethics and Practice Program Ethics School. 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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Anthony Gracely, Appellant.

Appellate Case No. 2010-166147

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

Opinion No. 27165
Heard May 2, 2012 – Filed August 29, 2012

REVERSED AND REMANDED

Chief Appellate Defender Robert M. Dudek, South Carolina Commission on Indigent Defense, of Columbia, and Reid T. Sherard, of Nelson Mullins Riley & Scarborough, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Joshua Richard Underwood, all of Office of the Attorney General, of Columbia, and, Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

CHIEF JUSTICE TOAL: Anthony Gracely (Appellant) appeals his conviction for conspiracy to traffic four hundred grams or more of methamphetamine in violation of section 44-53-375 of the South Carolina Code. Appellant argues that the circuit court improperly limited his cross-examination of the State's witnesses, thereby violating his rights under the Confrontation Clause of the United States Constitution. Appellant also argues that the State did not present sufficient evidence to support his conviction. We reverse.

FACTS/PROCEDURAL HISTORY

In 2008 the State Grand Jury (SGJ) began an investigation, titled "Vanilla Ice," after a resident of Pickens County approached law enforcement and provided information regarding the sale of methamphetamine within the community. On June 10, 2009, the SGJ returned an Indictment alleging fifty-two separate crimes against various individuals. Count Two of the Indictment alleged that Appellant conspired to sell "more than four hundred grams of methamphetamine."[1] At trial, the State relied on a "historical" case,

[1] Counts 1, 2, and 3 of the Indictment contained allegations of conspiracy to traffic methamphetamine in violation of section 44-53-375(C) of the South Carolina Code from 2007 to 2009.

At the time of trial, Section 44-53-375(C)(5) of the South Carolina Code provided in pertinent part:

> A person who knowingly sells, manufacturers, delivers, purchases, or brings into this State . . . ten grams or more of methamphetamine or cocaine base . . . is guilty of a felony which is known as 'trafficking in methamphetamine or cocaine base' and, upon conviction, must be punished as follows if the quantity involved is:

in which the central evidence presented was in the form of testimony from seven individuals also named in the Indictment. The State offered the testimony of Frank Posey, Brian Stegall, Kimberly Taylor, Joel Hall, Stacey Anderson, Ernest Craft, and Lance Halloway. The defense sought to show the potential bias of each witness by presenting to the jury information regarding the significantly lighter sentences these witnesses received in exchange for their testimony.

Counts One and Two of the Indictment alleged that Frank Posey conspired to traffic four hundred grams or more of methamphetamine. Defense counsel asked Posey whether trafficking four hundred grams or more of methamphetamine carried a minimum of twenty-five years' and up to thirty years' imprisonment. Posey replied "true." The State objected, and the court instructed defense counsel that the State's witnesses could be questioned about the maximum punishment, but not the mandatory minimum punishment, for those charges they had in common with Appellant. Posey admitted under cross-examination that the State allowed him to plead guilty to a first offense of trafficking ten to twenty-eight grams of methamphetamine in exchange for his cooperation. The state recommended a sentence of five years' imprisonment.

Count One of the Indictment alleged that Bryan Stegall conspired to traffic four hundred grams of methamphetamine. Count Forty-four of the Indictment alleged that Stegall distributed methamphetamine on March 19, 2008.[2] Stegall testified that Appellant would "front"[3] him methamphetamine

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> (5) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a *mandatory minimum* of term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars.

S.C. Code Ann. § 44-53-375(C)(5) (Supp. 2005 & Supp. 2010) (emphasis added).

[2] The Indictment alleged that several of the witness distributed methamphetamine. Unless otherwise indicated the Indictment alleged that the witnesses violated section 44-53-375(B) of the South Carolina Code.

for his own use, and to sell on Appellant's behalf. Stegall testified that he would also bring other individuals to Appellant to buy methamphetamine, and in return Appellant would give Stegall a proportionate amount of drugs. Stegall testified that, in exchange for his cooperation, the State allowed him to plead guilty to a first offense of trafficking ten grams, but less than twenty-eight grams, of methamphetamine. This charge carried a sentence of no less than three years but a maximum of ten years' imprisonment. Additionally,

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> That section provided in pertinent part:
>
> > A person who . . . distributes . . . methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony . . . . Possession of one or more grams of methamphetamine or cocaine base is prima facie evidence of a violation of this subsection.

S.C. Code Ann. § 44-53-375(B) (Supp. 2005). In 2009, at the time of the Indictment, the statue provided that a first offense must be punished by a term of imprisonment of not more than fifteen years or fined not more than twenty-five thousand dollars, or both. *Id.* Upon conviction of a second offense the statute directed the court to sentence the offender to "not less than five years nor more than thirty years." *Id.* The court could also fine the offender fifty thousand dollars in lieu of imprisonment, or impose both penalties. *Id.* For a third or subsequent offense, the statute provided that the offender "be imprisoned not less than fifteen years nor more than thirty years, or fined not more than fifty thousand dollars, or both." *Id.* In 2010, the General Assembly modified the statute and reduced the mandatory minimum sentence for a third offense to ten years. *Id.* § 44-53-375(B) (Supp. 2010).

[3] "Fronting" provides a convenient basis for the government to establish a conspiracy between those engaged in the drug trade. The party providing the drugs will give the receiving party the product essentially on credit. The receiving party will then pay for the drugs following re-distribution, thereby creating a fund with which to pay for the drugs. *See, e.g., United States v. Ferguson*, 35 F.3d 327, 331–32 (7th Cir. 1994); *State v. Hammitt*, 341 S.C. 638, 645, 535 S.E.2d 459, 463 (Ct. App. 2001).

the State allowed Stegall to plead guilty to a first offense of distribution of methamphetamine, despite previous convictions for possession and possession with intent to distribute methamphetamine. Stegall testified that he originally faced up to thirty years' imprisonment for trafficking more than four hundred grams of methamphetamine and that he could have been charged in Count Two, with Appellant, and faced up to another thirty years' imprisonment. Defense counsel also elicited testimony from Stegall that he would have faced another thirty years' imprisonment because the current charges would have constituted his third offense for distribution of methamphetamine. Instead, the State recommended that Stegall receive a fifteen year sentence for these charges in exchange for his testimony.

Following Stegall's testimony, defense counsel requested the trial court reconsider the cross-examination limitations. According to the defense, it was critical to present to the jury the possible credibility issues with a witness that they knew would go to jail "for twenty-five years at eighty-five percent." The State argued that revealing the mandatory minimum sentence would prejudice the prosecution because the jury would understand that "they're going to be putting a man in jail for twenty-five years." The court agreed with the State:

> Well, I believe that . . . with your skills that you'll be able to cross examine these witnesses sufficiently, showing the amount of time they could get. I believe to bring up a minimum sentence, even though your intent is to impeach this witness, the ripple effect is that it's going to, I think, prejudice the State because of what the jury is going to now have in their mind, that if we convict this person, it's going to be a twenty-five year [sentence].

The court also ruled that defense counsel could question the State's witnesses regarding the mandatory minimum sentences they avoided for those crimes in which the Appellant was not also charged.

Count Three of the Indictment alleged that Kimberly Taylor conspired to traffic four hundred or more grams of methamphetamine. Counts Twenty-two and Twenty-three of the Indictment alleged that Taylor knowingly distributed methamphetamine on May 19 and June 2, 2008. Taylor testified

that she purchased methamphetamine from Lance Holloway, and that Appellant provided Holloway drugs for re-distribution and sale. She described a drug transaction in which Appellant provided two ounces of methamphetamine to Holloway and in turn Taylor purchased one of those ounces to use and resell. Taylor also testified that Holloway and Gracely sold Taylor's ex-boyfriend an ounce of methamphetamine for $1,600. In exchange for her cooperation, Taylor pled guilty to a second offense of trafficking twenty-eight to one hundred grams of methamphetamine and received a twenty year sentence. Taylor admitted to three prior convictions for drugs including cocaine and marijuana. Taylor admitted under cross-examination that she did not identify Appellant until after accepting a plea deal. Defense counsel also pointed out that Taylor faced a minimum of thirty years' and a maximum of ninety years' imprisonment before accepting a plea deal for a twenty year sentence in exchange for cooperating with the State.

Counts Two and Three of the Indictment alleged that Joel Hall conspired to traffic four hundred or more grams of methamphetamine. Counts Twenty-five, Twenty-six, and Twenty-seven of the Indictment alleged that Hall distributed methamphetamine on April 1, 22, and 30, 2008. Hall testified that on one occasion he purchased half an ounce of methamphetamine from Appellant. In exchange for his cooperation, the State allowed Hall to plead guilty to a first offense of trafficking ten to twenty-eight grams of methamphetamine and a first offense of distribution of methamphetamine, and gave Hall a favorable sentencing recommendation of ten years' imprisonment. Hall had previously been convicted of possession of marijuana and obtaining controlled substances through fraud. Defense counsel pointed out that Hall faced a minimum of fifteen years' imprisonment, and a possibility of over one hundred years' imprisonment if convicted of the original charges.

Count Two of the Indictment alleged that Stacey Anderson conspired to traffic four hundred or more grams of methamphetamine. Counts Nine and Ten of the Indictment alleged that Anderson distributed methamphetamine on February 10 and May 7, 2008. Anderson testified that he regularly sold methamphetamine for $1,450 per ounce, and that Appellant owed him $7,300 for methamphetamine. In exchange for his testimony, Anderson pled guilty to trafficking twenty-eight to one hundred grams of methamphetamine and a

first offense of distribution of methamphetamine. Anderson received this deal despite his prior convictions for possession with intent to distribute. Anderson testified that in exchange for his cooperation he would receive a fifteen year prison sentence to run concurrently with federal gun charges.

Count Two of the Indictment alleged that Ernest Craft conspired to traffic four hundred or more grams of methamphetamine. Count Twenty-one of the Indictment alleged that Craft distributed methamphetamine on June 5, 2008. Craft testified that he observed methamphetamine in Appellant's possession, and witnessed Appellant sell methamphetamine. Craft also testified that Anderson supplied Appellant with methamphetamine. Because he cooperated with the State's prosecution of Appellant, Craft pled guilty to trafficking a lesser amount of methamphetamine, twenty-eight to one hundred grams. Craft also pled guilty to a first offense of distribution of methamphetamine despite numerous prior convictions for possession of methamphetamine. Defense counsel pointed out that Craft faced sixty years' imprisonment before the State offered him a fifteen year sentence in exchange for his cooperation.

Counts Two and Three of the Indictment alleged that Lance Holloway conspired to traffic four hundred grams of methamphetamine. Count Twenty of the Indictment alleged that Holloway distributed methamphetamine on August 1, 2008. Holloway testified that between June 2007 and February 2008 he and Appellant sold methamphetamine together at a rate of one and a half to two ounces per week. Holloway faced thirty years' imprisonment for each trafficking count, and an additional fifteen to thirty years' imprisonment for distribution. Thus, Holloway could have been sentenced to between seventy five years' to ninety years' imprisonment. However, like Craft, Holloway pled guilty to trafficking a lower amount of methamphetamine. Additionally, the State allowed Holloway to plead guilty to a first offense of distribution of methamphetamine, despite prior convictions for drug offenses including possession with intent to distribute cocaine. Holloway received a twelve year sentence for his cooperation.

Following the conclusion of the State's case, defense counsel moved for a directed verdict. The court denied the motion, and the jury found Appellant guilty of conspiracy to traffic four hundred or more grams of

methamphetamine. The court sentenced Appellant to twenty-eight years' imprisonment. Appellant appealed, and this Court certified the case pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED

I. Whether the trial court improperly limited the scope of defense counsel's cross-examination of the State's witnesses.

II. Whether the trial court erred in denying Appellant's motion for a directed verdict.

STANDARD OF REVIEW

This Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion. *State v. Johnson*, 338 S.C. 114, 124–25, 525 S.E.2d 519, 524 (2000) (citing *State v. Smith*, 315 S.C. 547, 551, 446 S.E.2d 411, 413–14 (1994)). When reviewing the denial of a motion for directed verdict, this Court employs the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Steinke v. S.C. Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The trial court will only be reversed when there is no evidence to support the ruling below. *See Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997).

LAW/ANALYSIS

I. Whether the trial court improperly limited the scope of defense counsel's cross-examination of the State's witnesses.

Appellant argues that the trial court erred in refusing to allow defense counsel to cross-examine the State's witnesses regarding the mandatory minimum sentences they avoided by testifying against Appellant. We agree.

A. Cross Examination

The Confrontation Clause provides "in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994) (citing *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)). A defendant demonstrates a Confrontation Clause violation when he is prohibited from "engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." *State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)) (alteration in original).

In *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991), one of the State's chief witnesses, Yolanda Bethel, testified that at the request of a man named "Henry," she agreed to transport a quantity of cocaine from Miami, Florida to Charleston, South Carolina. *Id.* at 170, 399 S.E.2d at 594. Upon her arrival, police apprehended Bethel and discovered a large quantity of cocaine in her suitcase. *Id.* at 170–71, 399 S.E.2d at 594. Bethel agreed to cooperate with law enforcement by contacting the defendant and accompanying the agents to deliver the suitcase to him. *Id.* at 171, 399 S.E.2d at 594.

Bethel testified that in return for her cooperation, she was allowed to plead guilty to one conspiracy charge for which she would receive a maximum sentence of seven and one-half years' imprisonment. *Id.* On cross-examination, Bethel admitted that she was originally charged with trafficking in cocaine, but that the charge was dropped as part of the plea agreement. *Id.* Defense counsel attempted to elicit from Bethel the punishment for trafficking in cocaine, but the trial judge sustained the prosecutor's objection to the line of questioning. *Id.* The defendant appealed and argued that the trial judge abused its discretion in limiting the cross-examination. *Id.*

This Court held that this limitation unfairly prejudiced the defendant:

> The sentence for trafficking in cocaine in the amount in question here is a mandatory one of at least twenty-five years without parole . . . . The fact Bethel was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that [defendant] should have been permitted to present to the jury. Moreover, Bethel's testimony was a crucial part of the State's case since she provided the only evidence of [defendant]'s knowing involvement in the drug transaction. We reject the State's argument that inquiry into the punishment was properly excluded because it would have allowed the jury to learn of [defendant]'s own potential sentence if convicted. We conclude appellant's right to meaningful cross-examination outweighs the State's interest here.

Id. at 171–72, 399 S.E.2d at 594.

The facts of the instant case are similar. Each of the State's witnesses faced a mandatory minimum sentence significantly longer than the sentence they received in exchange for their cooperation. The trial court allowed defense counsel to cross-examine the witnesses regarding possible bias, but improperly prevented questioning which would have examined the extent of that bias and the witnesses' possible motivations for testifying against Appellant.

In order to secure a conviction in the instant case, the State made certain "deals" with cooperating witnesses. The State allowed Posey to plead guilty to a lesser trafficking charge which carries a mandatory minimum of three years' imprisonment. This plea deal did not merely allow Posey to avoid the possibility that upon conviction he might be sentenced to the maximum thirty years' imprisonment. Instead, Posey avoided the possibility that upon conviction he would be sentenced to no less than twenty-five years' imprisonment. Stegall avoided the same twenty-five year mandatory minimum sentence, and received a fifteen year sentence, for both trafficking

and distributing methamphetamine, in exchange for his cooperation. The jury heard testimony that Hall avoided the maximum thirty year sentence associated with the two trafficking counts alleged in the Indictment. However, due to the trial court's limitation, the jury did not hear that Hall actually received ten years' imprisonment instead of the mandatory minimum. Defense counsel could not present to the jury that both Anderson and Taylor avoided the mandatory minimum twenty-five years' imprisonment by pleading guilty to lesser offenses. Craft received a ten year sentence and Holloway received a twelve year sentence in exchange for their testimony. However, although defense counsel presented to the jury that both witnesses avoided the maximum sentence for their respective charges, counsel could not show that they actually faced a twenty-five year mandatory minimum. The sentences received by many of these witnesses are not only far lower than the maximum sentence, within a judge's discretion, but are far lower than the mandatory minimum, in which a judge has no discretion. The trial court's instruction improperly prevented Appellant from demonstrating the possible bias rising from these plea deals through an examination reaching the requisite degree of granularity.

To the extent our directive in *Brown* was unclear, the instant case provides an opportunity to clarify. The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.[4]

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[4] It is important to note that when defense counsel asked Posey whether trafficking four hundred grams or more of methamphetamine carried a minimum of twenty-five years' and up to thirty years' imprisonment he answered "true." It is of no moment that at some point during the proceedings one of the witnesses confirmed the existence of a mandatory minimum sentence. The fact remains that Appellant was unable to fully develop this information through the cross-examination of Posey, and was expressly forbidden from doing so with regard to the State's remaining witnesses. Moreover, the trial court limited Appellant's cross-examination based on reasoning this Court has explicitly declined to adopt. *See Brown*, 303 S.C. at 171–72, 399 S.E.2d at 594 ("We reject the State's argument that inquiry into the punishment was properly excluded because it would have

B. Harmless Error

A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis. *Van Arsdall*, 475 U.S. 673, 680 (1986).

> Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include the *importance of the witness's testimony* in the prosecution's case, whether the testimony was *cumulative*, the presence or absence of evidence *corroborating* or contradicting the testimony of the witness on material points, the *extent of cross examination* otherwise permitted, and, of course, the *overall strength* of the prosecution's case.

Id. at 684 (emphasis added). *See State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) ("The list of factors as set out in *Van Arsdall* is not exhaustive."). Given the State's heavy reliance on circumstantial evidence, and the abysmal credibility of the State's witnesses, the error in this case was not harmless.

In *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002), this Court applied the *Van Arsdall* factors. In that case, Jamie and Jimmie Mizell (the defendants) were convicted of second degree burglary and grand larceny. *Id.* at 329, 563 S.E.2d at 316. The State's key witness, Donald Steele, testified that he accompanied the defendants to the site of the crime and explained how defendants entered the home, and what was taken. *Id.* at 330, 563 S.E.2d at 317. On cross-examination, Steele admitted that the State charged him with the same crimes as the defendants, but the trial court excluded evidence of the possible sentence he faced. *Id.* Steele admitted that if he had not cooperated with the State he would have faced "a long sentence." *Id.* However, Steele would have actually faced a maximum of life in prison had he been convicted of the charges he originally faced. *Id.* at 334–35, 563 S.E.2d at 319.

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allowed the jury to learn of [defendant]'s own potential sentence if convicted.").

This Court noted that the State presented testimony from the victim and the police that supported Steele's testimony. As a result, much of the disputed testimony was cumulative or corroborated by other witnesses. *Id.* at 334, 563 S.E.2d at 319. The State did not present any physical evidence tying the defendants to the scene of the crime. *Id.* Therefore, Steele's eyewitness testimony was the only evidence linking the defendants to the crime, but the trial court allowed only a limited examination of Steele's possible bias. *Id.* at 334, 563 S.E.2d at 319. However, if the jury found Steele unbelievable, there would be no other evidence before them tying the defendant's to the scene of the crime. Thus, the trial court's error was not harmless beyond a reasonable doubt. *Id.* at 335, 563 S.E.2d at 320.

In the instant case, the State presented cumulative testimony regarding Appellant's involvement in trafficking four hundred or more grams of methamphetamine. However, the testimony presented only corroborated other testimony, and the State chose not to present any physical evidence tying Appellant to the activities charged. This strategic decision enhanced the importance of that testimony, and the necessity that Appellant be permitted to demonstrate any bias on the part of the State's witnesses. The strength of the State's case relied on credibility determinations uniformly applicable to the witnesses presented. Thus, if the jury found the mandatory minimum issue affected one witness's credibility, that determination could have likely affected the believability as to all of the State's witnesses facing the same mandatory minimum sentence. Moreover, there was no other evidence to link Appellant to the indicted offense.

Finally, the background of the witnesses in this case should have cautioned the trial court against limiting Appellant's cross examination. As we observed in *State v. Davis*, 371 S.C. 170, 638 S.E.2d 57 (2006):

> Moreover, there are significant credibility problems with the fact witnesses . . . . All were involved with crack cocaine on the night in question and did not initially give informative statements to the authorities. Often, cooperation with police on this investigation came only after several witnesses had been jailed on other charges and were facing prison time themselves.

Id. at 182, 638 S.E.2d at 63–64. Analogously, all of the witnesses in the present case had significant involvement with illegal drugs and other criminal activities, and cooperated following arrest and the possibility of long prison terms. In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless. Based on the Record before this Court, it is impossible to conclude that the trial court's error did not contribute to the verdict beyond a reasonable doubt. *State v. Clark*, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (1994) ("The reviewing court must review the entire record to determine what effect the error had on the verdict.") (Toal, J. dissenting). Thus, reversal is required.[5]

REVERSED AND REMANDED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

[5] As to Appellant's contention that the trial court erred in denying his motion for a directed verdict, we disagree. We affirm the trial court's decision on this issue pursuant to Rule 220(b)(1), SCACR, and the following authority: *State v. Weston*, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006) (providing that a trial court examines a request for a directed verdict based on the existence or nonexistence of evidence, and that if there is any direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt, the case must be submitted to the jury).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Arrow Bonding Company Respondent,

v

Jay Edward Warren Appellant.

Appeal from Sumter County
Richard L. Booth, Master-in-Equity

Opinion No. 27166
Heard February 7, 2012 – August 29, 2012

AFFIRMED

Tara Dawn Shurling, of Columbia, for Appellant.

G. Murrell Smith, Jr., of Lee and Moise, of Sumter, for Respondent.

JUSTICE PLEICONES: Appellant (Warren) appeals an order denying his Rule 55(c) and Rule 60(b)(1), SCRCP motions, as well as his independent motion to set aside a judgment sale. On appeal, he contests only the denial of his motion to set aside. We affirm.

FACTS

Warren is a state bail bondsman, and respondent is also in the bond business. Warren agreed to be responsible if a mutual client forfeited a surety bond issued by respondent. In October 2006, respondent obtained a $5,120.00 judgment against Warren after the client forfeited. In August 2007, the clerk issued a Judgment Execution, and on September 19, 2007, the sheriff issued an Execution Account Statement. In this statement, he reported receiving a $1,000 payment from Warren, from which he deducted his $52.50 fee, leaving $947.50 to be applied against the debt. After deducting the $947.50 and adding the interest accrued as of September 19, 2007, Warren's judgment debt stood at $4,705.15.

In January 2008, respondent brought an action to foreclose its judgment lien. Warren did not answer, and on May 6, 2008, the clerk granted respondent's motions, ordering entry of the default against Warren, and referring the matter to the Master-in-Equity. On June 8, 2008, the Master issued an order foreclosing respondent's judgment lien and ordering a judicial sale of real property owned by Warren on July 7, 2008. On the sales day, Warren went to the sheriff's office and tendered the amount due ($5,343.82) under the original judgment, not the amount then due in light of the accumulated interest and other fees ($7,693.31**)**.[1] On July 18, the Master issued a deed to respondent, who bought all of Warren's properties, which were sold at the sale as a single lot for $2,500. This left a deficiency of $5,193.31.[2]

In October 2008, Warren filed a motion to set aside the default order under Rule 55(c) and/or Rule 60(b), and to set aside the foreclosure deed.

The Master denied all relief requested by Warren. He also denied Warren's request to reconsider his decision, and this appeal follows.

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[1] Warren has been refunded the $5,343.82.

[2] No deficiency judgment was requested.

ISSUES

1. Did the Master err in refusing to set aside the judgment sale because the selling price was grossly inadequate?

2. Did the Master err in refusing to set aside the sale because he sold the properties as a single lot?

ANALYSIS

1. Inadequate sales price

Warren argues that the Master erred in refusing to set aside the judicial sale because the bid at the sale was grossly inadequate. The Master denied this request, finding the price was not so grossly inadequate as to require the sale be set aside. Warren contends this was error. We disagree.

The Master found that the tax assessment records submitted by Warren[3] reflecting a combined value of $263,121 for the 13 tracts were sufficient to establish that sum as the value of the properties sold. He concluded that comparing the selling price of only $2,500 to the $263,121 assessed value of the property established that on its face the sales price would shock the conscience because of its gross inadequacy. See Poole v. Jefferson Stand. Life Ins. Co., 174 S.C. 150, 177 S.E. 24 (1934). The Master went on to find that Warren also presented evidence that some of the properties are subject to mortgage liens totaling more than $88,000 and that all the lots are subject to a federal tax lien in excess of $12,000. The Master also found that all thirteen properties were pledged as collateral to secure bonds issued by Warren in the course of his bail bondsman business.[4] Finally, citing In re Barr, 170 B.R. 772 (Bankr. E.D.N.Y. 1994) (a case applying Poole), he held that ad valorem

[3] The actual records were not submitted until the post-trial motion but Warren's affidavit attached to his original motion asserted this valuation.
[4] There is no evidence in the record indicating what this amount is.

taxes could be considered as affecting value, although he did not do so in this case.

Since the properties sold remained encumbered by the mortgages ($88,000) and the tax liens ($12,000), the Master added $100,000 to the sales price for a total of $102,500.[5] The Master concluded that the newly calculated sales price of $102,500 represented about 39% of the assessed value of the properties, a figure which did not justify setting aside the sale.

Warren argues on appeal that the Master erred in not judging inadequacy by directly comparing the sales price to the properties' value, without considering mortgages or liens. He cites Investor Savings Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990), and Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 662 S.E.2d 424 (2008), for the proposition that a property's value should not be discounted by a mortgage. Under the circumstances of this case, we disagree.

In Phelps, the mortgagee bid $500 at the foreclosure sale of its mortgage. On the thirtieth day after the sale, a stranger to the mortgage entered an upset bid of $510. See S.C. Code Ann. § 15-39-720 (2005). The mortgagee then moved to set aside the stranger's bid as grossly inadequate, the Master agreed, and the Court of Appeals affirmed. The Phelps court held that the mortgage amount was competent evidence of the property's value, compared it to the upset bid price of $510, and concluded that a bid of approximately 1.5% of the property's value was unconscionable. See also Wells Fargo, *supra* (mortgage value is evidence of property's value).

In both Phelps and Wells Fargo the judicial sale was to foreclose a mortgage rather than a sale in execution of a judgment. The effect of a mortgage foreclosure sale is to remove the mortgage encumbrance from the property, and therefore the amount of the mortgage is a fair gauge of the property's value in the hands of the buyer. In a judgment execution sale such as this, however, the buyer takes the property subject to the mortgage as well as other liens. E.g., Norman v. Norman, 26 S.C. 41, 11 S.E. 1096 (1886).

[5] The propriety of this method of calculating value is not challenged on appeal.

The Master properly considered the amount of the mortgages and tax liens in determining the true value of the properties to the buyer at an execution sale.

Warren has not met his burden of showing an abuse of discretion in the Master's finding that respondent's bid is not so grossly inadequate as to shock the conscience. E.g., Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001) (appellant in equity matter has burden of persuading appellate court of reversible error). This is especially so since the Master's calculations did not account for the properties' taxes due[6] or for the fact the properties were all pledged as collateral for Warren's bail bonds. Warren failed to demonstrate gross inadequacy in the sales price as the record is devoid of evidence of the true value of the properties. Pinckney, *supra*.

2. Master's error

Warren contends that even if we agree the sales price is not grossly inadequate, the Master erred in not setting aside the sale based on his decision to sell the thirteen properties as a single lot rather than individually. We disagree.

Warren concedes, as he must, that the Master had the authority to sell the properties as a single lot. The order referring the matter to the Master authorized him to "sell the properties (i) in bulk or (ii) in parcels, or (iii) in lots in such a sequence as he shall determine until such time as the net proceeds realized from such sale(s) shall equal the gross amount due [respondent], including accrued interest, expense of sale, and commissions." The Master found he did not abuse his discretion since a bulk sale was specifically permitted and since respondent, who attended the sale, requested that he sell the properties in bulk. We agree.

At oral argument, Warren contended the Master should have conducted a title search, discovered what liens attached to which parcel, determined the "true value" of each property, and then devised an order of sale that would satisfy the debt. We know of no authority which either requires or permits

[6] Warren's evidence showed delinquent taxes of $6,372.33 for 2007.

the Master to do this research and calculation. The individual conducting the judicial sale is not acting in a judicial capacity but rather "in a ministerial capacity as the arm of the court to carry out its orders . . . ." Ex parte Keller, 185 S.C. 283, 194 S.E. 15 (1937). While the Master was authorized to sell only so many of the lots as were necessary to satisfy the debt, it was not his obligation to research and calculate the value of each individual property. Compare Rule 71(a), SCRCP ("Any party who has appeared in the [foreclosure] action may present proof that the debt may be satisfied by selling property in parcels, rather than selling the whole to satisfy the claims.")

We can find no abuse of discretion in the Master's decision to sell the properties as a lot. Warren had defaulted, and at the time the sale was held the Master had before him no evidence of the value of any single tract, much less their collective value. Even at this juncture, the true value of the properties even after deducting mortgages and tax liens is unclear, as it appears they remain encumbered as collateral for Warren's bonds and that they are subject to tax delinquencies. Warren has not met his burden of demonstrating reversible error. Pinckney, *supra*.

CONCLUSION

The Master's order is

AFFIRMED.

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

JUSTICE BEATTY: I dissent. I would find that the Master-in-Equity abused his discretion and reverse his decision not to set aside the judgment sale. The Master's decision to sell thirteen separate parcels as a single lot was based on an error of law. The Master sold these thirteen separate parcels in one lot because he erroneously believed that he had no choice but to grant the request of the judgment creditor to sell the properties as one lot. This decision clearly ignores the tenets of Rule 71(b) and the order of reference. Both Rule 71(b) and the order of reference authorize the sale of the property or parts thereof as required to satisfy the claims [Rule 71(b)], or until such time as the net proceeds realized from the sale(s) shall equal the gross amount due plaintiff [order of reference]. Certainly, the sale of thirteen separate parcels valued in excess of $260,000 as a single lot was not required to satisfy a $7,693 judgment.

The Master's machinations with the value of each lot and the sale price are unpersuasive. Rule 71(b) and the order of reference grant the Master discretion in how to proceed with the sale but, at the same time, limit the amount of the judgment debtor's property that can be sold. To sell more than is required to do equity violates the rule, the order of reference, and principles of equity.

Moreover, there is no evidence in this record that indicates the Master exercised his discretion. In fact, the only evidence is that the Master mistakenly believed he had no discretion. The failure to exercise discretion is an abuse of discretion. See Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E. 2d 439, 441 (1990) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." (quoting State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981))); CEL Prods., LLC v. Rozelle, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004) ("When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred."); Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("A failure to exercise discretion amounts to an abuse of that discretion.").

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Joseph Fleming, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-169147

ON WRIT OF CERTIORARI

Appeal From Greenville County
Robin B. Stilwell, Post-Conviction Relief Judge

Opinion No. 27167
Submitted August 22, 2012 – Filed August 29, 2012

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Karen Christine Ratigan, all of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the denial of his application for post-conviction relief (PCR). We grant the petition, dispense with further briefing, and affirm the order of the PCR judge as modified.

Petitioner pled guilty to second degree burglary. He was sentenced to imprisonment for fifteen years, suspended on service of one year and three years of probation. No direct appeal was taken. At a subsequent probation revocation hearing, the revocation judge revoked eight years of petitioner's probationary sentence. No appeal was taken from the probation revocation.

On PCR, petitioner alleged he was denied his right to appeal the probation revocation. The PCR judge found there were no appealable issues to raise on appeal from the probation revocation hearing and dismissed petitioner's allegation that he was denied his right to a direct appeal.

Probation revocation counsel is not required to inform a probationer of the right to an appeal absent extraordinary circumstances. *Turner v. State*, 384 S.C. 451, 682 S.E.2d 792 (2009). However, when a criminal defendant requests an appeal, but counsel fails to file an appeal, counsel is deemed deficient. In such a case, the defendant is entitled to a belated appeal without showing the appeal would likely have had merit. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Rodriquez v. United States*, 395 U.S. 327 (1969). Accordingly, the PCR judge erred in finding petitioner was required to show there were appealable issues in order to support his allegation that he was denied his right to an appeal from the probation revocation.

We note that there were no objections made at the probation revocation hearing. Accordingly, no issues are preserved for appellate review. *State v. Bickham*, 381 S.C. 143, 672 S.E.2d 105 (2009) (arguments not raised below are not preserved for appellate review). We hold that the error by the PCR judge was harmless as an appeal from the probation revocation would be to no avail because the circuit court had subject matter jurisdiction to revoke petitioner’s probation and no issue was preserved for appellate review.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kareem J. Graves and Tara Graves, individually and as duly appointed personal representatives of the Estate of India Iyanna Graves, Appellants,

v.

CAS Medical Systems, Inc., Respondent.

Appeal from Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 27168
Heard November 30, 2011 – Filed August 29, 2012

AFFIRMED AS MODIFIED

J. Edward Bell, III, of Georgetown, for Appellants.

Clarke W. DuBose, of Haynsworth Sinkler Boyd, of Columbia, and Sarah P. Spruill, of Haynsworth Sinkler Boyd, of Greenville, for Respondent.

John S. Nichols, of Bluestein, Nichols, Thompson, and Delgado, of Columbia, for Amicus Curiae.

JUSTICE HEARN: India Graves, a six-month-old girl, died while being monitored by one of CAS Medical Systems' products. India's parents, Kareem and Tara Graves, subsequently filed a products liability lawsuit against CAS, contending the monitor was defectively designed and failed to alert them when India's heart rate and breathing slowed. The circuit court granted CAS's motion to exclude all of the Graves' expert witnesses and accordingly granted CAS summary judgment. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

India and her sisters, Asia and Paris, were triplets born prematurely to Kareem and Tara. All three girls spent the first six weeks of their lives in the hospital so they could be monitored, a standard practice for premature babies. When they were finally sent home, their doctor ordered that the Graves use a monitor manufactured by CAS to track their breathing and heart rates as a precaution. The monitor was designed to sound an alarm, which, by all accounts, is quite loud, if the subject were to experience an apneic, bradycardia, or tachycardia event.[1] Once the breathing or heart rate returns to normal, the alarm stops. Each machine also keeps a log of any events, which is the term for when the alarm sounds, and records the pertinent data and vital signs.

As an additional safety measure, CAS installed not only a back-up alarm, but also a feature that records whether the alarm sounded. This system operates primarily through an independent and separate microphone specifically designed to listen for the alarm. If it hears the alarm, it then makes a notation in the monitor's internal log. If it does not hear the alarm, then it records "Front alarm not heard," and the monitor will sound the back-

[1] When one stops breathing, it is called apnea. Bradycardia is when an individual's heart rate slows, while tachycardia is when the heart rate gets too high.

up alarm. A microphone listens for this back-up alarm as well and records whether it was heard. If the back-up alarm fails, all the lights on the front of the monitor flash.

On the night of April 10, 2004, India was hooked up to the monitor and fell asleep next to her father on his bed. At the time, Tara was awake doing chores.[2] Tara eventually moved India to her bassinet, and Tara herself went to sleep around 2:00 in the morning on April 11th. According to Tara, she woke up shortly before 4:00 a.m. from a bad dream and decided to go check on the babies. Paris and Asia responded to her touch, but India did not. When she realized India was not breathing, she immediately began CPR. Kareem woke up during the commotion and called 911. By the time EMS arrived, India was already dead. An autopsy revealed that she died from Sudden Infant Death Syndrome (SIDS), which essentially means that no attributable cause of death exists.

Tara and Kareem claim the monitor's alarm never sounded that night. Additionally, they testified that all the lights on the front of the monitor were on, although they were solid and not flashing. Another family member who was asleep downstairs from India also could not recall hearing the alarm go off. Tara further testified the machine was not turned off until the next day, when the monitor was removed for testing.

India's monitor recorded the following events beginning the morning of April 11th. At 2:39 a.m., the monitor first detected a slow heart beat from India. Over the next thirteen minutes, the monitor recorded twenty-three separate apnea or bradycardia events. By 2:52 a.m., India had passed the point of resuscitation. The monitor recorded six more events before showing it was powered down at 3:50 a.m. The log shows it was then powered back up the next morning. For every event, the monitor recorded hearing the alarm properly sound and accurately traced India's slowing breathing and heart rate. As India's treating physician put it, the machine's performance

[2] Due to the demands of raising triplets, the Graves received help from relatives. The relatives would generally care for the babies during the day while Tara slept, and Tara was on "night duty."

was tragically perfect: "[A]s sad as it is, the tracing is beautiful. It is a – you watch the baby die on the leads."

The Graves subsequently filed a strict liability design defect claim against CAS, contending the monitor's software design caused the alarm to fail.[3] Their claim revolves around what is known as "spaghetti code," which is when computer code is unstructured and becomes "a rather tangled mess." Spaghetti code can result from the overuse of "goto" or "unconditional branch" statements, which causes a signal working its way through the code to jump around instead of following a linear path. Boiled down, the Graves' theory is that certain unknown external inputs occurring during India's apneic and bradycardia events triggered some of these goto statements as the signal was being sent to sound the alarm. This in turn caused the signal to be pushed off course and never reach its destination.

To support this theory, the Graves designated three software experts to testify regarding the alarm's failure: Dr. Walter Daugherity, Dr. William Lively, and Frank Painter. In arriving at their conclusions that a software defect caused the alarm to fail, none of the experts did much actual testing of the software. Instead, they used a "reasoning to the best inference" analysis, which is similar to a differential diagnosis in the medical field where potential causes of the harm are identified and then either excluded or included based on their relative probabilities. In this case, three potential causes were identified: hardware error, complaint error, and software error. Complaint error means that the monitor was misused or the alarm did sound

[3] The Graves also sued CAS for negligence and breach of warranty. CAS moved for summary judgment on all claims, and the Graves understood this to be the scope of the motion. The circuit court granted CAS's motion in full. On appeal, however, the Graves only argue the court erred in granting summary judgment on the design defect claim. Accordingly, the Graves have abandoned these other causes of action. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

and the Graves failed to hear it.[4] All the experts were able to dismiss hardware error as a cause because the machine was tested and shown to have functioned properly. Thus, the question became whether complaint error or a software error occurred.

Dr. Daugherity excluded complaint error because the machine was hooked up to India properly and he did not believe anyone could sleep through the alarm. In other words, because the Graves claim the alarm did not wake them, that means it did not go off. After being confronted with the fact that the monitor listens for the alarm and separately records whether it was heard, Dr. Daugherity accordingly concluded it "is certain" the internal logs showing the alarm sounded on the morning of April 11th are not reliable "in light of the undisputed testimony that the alarm did not function."[5] Having dismissed hardware and complaint error, Dr. Daugherity ultimately concluded that software error was the most likely cause of the alleged failure

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[4] While there is no evidence suggesting that the Graves misused the machine on the night in question, there is evidence that the alarm worked properly and the Graves failed to hear it. In addition to the monitor's recordation of hearing the alarm sound, India's pediatrician testified he believes Kareem and Tara simply slept through it. As the father of triplets himself, the doctor was aware of just how exhausted the Graves were. In his opinion, Tara woke up when the alarm was going off, turned it off, and then discovered India had passed away. Although the alarm is piercingly loud, if one is tired enough, he testified that it is possible to sleep through it. His opinion was bolstered by the fact that the machine seems to have worked just as it was supposed to and recorded India's passing perfectly. The log also seems to show the alarm managed to stimulate the baby into breathing normally at times. We recite this evidence only to demonstrate complaint error is a valid consideration in this case.

[5] Dr. Daugherity also averred the logs are incorrect because they too are the product of spaghetti code. However, he never addressed how the code's categorization leads to the conclusion that an independent microphone could record hearing the alarm when it did not actually sound. In any event, his final conclusion rested on the "undisputed testimony" from the Graves.

based on his independent review of the code and other reported incidents of alarm failure.[6]

As to Dr. Lively, the record does not show he engaged in any analysis regarding complaint error. He did agree with Dr. Daugherity that the most likely cause was software error. In arriving at this conclusion, however, Dr. Lively relied only on Dr. Daugherity's review of the code and did nothing to search for a defect himself. In fact, he testified it was not his job to look through the code for errors, and that responsibility fell on Dr. Daugherity. He also relied on the same reports of other failures as Dr. Daugherity, but he admitted that he did not know whether these other reports had been substantiated.

Painter as well concluded a software error most probably caused the alarm to fail. He, like Dr. Daugherity, excluded complaint error because of the Graves' own statements that the alarm failed. Thus, during his deposition when he learned the monitor recorded hearing the alarm sound, Painter summarily concluded this had "no effect" on his opinion. Specifically, even though he conceded that this ordinarily would show the alarm sounded, he maintained this was not the case here "because the Graves say they didn't hear the alarm." When explaining software error was the cause, Painter also admitted that he never examined the code in any detail and only "spent a half an hour just thumbing through it and looking at it." In an affidavit he filed early in the case, Painter instead stated his conclusion rested on the opinions of Dr. Daugherity and Dr. Lively. In his deposition, on the other hand, Painter testified that his opinion actually was not based on the work of Dr. Daugherity and Dr. Lively, but on the reports of other alarm failures submitted to the FDA.

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[6] The record contains approximately fifty reports from the Food and Drug Administration of incidents where the alarm on a CAS monitor purportedly failed to sound during an event. None of the reports identifies a software error as the cause, and except where a hardware problem was involved, CAS was never able to repeat the alleged failure. Furthermore, none of the reports contains a detailed factual background describing the failure.

Finally, the Graves designated Dr. Donna Wilkins as an expert to testify whether India could have been revived had Tara or Kareem been woken up by the alarm. Although Dr. Wilkins stated she was not an expert in SIDS, it was her belief, based on her many years of experience and training as a neonatologist, that it was more likely than not Tara and Kareem would have been able to revive India had they heard an alarm. She did acknowledge no proof existed that a monitor can prevent SIDS, but from her tenure in the neonatal intensive care unit babies experiencing apneic events can be resuscitated.

CAS moved to have all the Graves' experts excluded, arguing none of them met the reliability factors for scientific testimony set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). CAS also moved for summary judgment, contending that without expert testimony the Graves have no evidence of a design defect. The court agreed that the Graves' computer experts all sought to introduce scientific testimony, but it went on to hold their opinions were unreliable both as scientific evidence and as nonscientific evidence and thus were inadmissible. It also excluded Dr. Wilkins' testimony because she was not an expert on SIDS and did not satisfy *Council*. Having excluded the opinions of all the Graves' experts, the court granted CAS's motion for summary judgment.

The Graves filed a Rule 59(e), SCRCP, motion, arguing in particular that even without expert testimony, they still presented enough circumstantial evidence to survive summary judgment. The court disagreed, holding that a product defect case cannot be proven by circumstantial evidence. This appeal followed.

ISSUES PRESENTED

I. Did the circuit court err in excluding the opinions of the Graves' experts?

II. Did the circuit court err in granting CAS's motion for summary judgment?

LAW/ANALYSIS

I. EXPERT WITNESSES

The Graves first argue that the circuit court erred in excluding the testimony of their four experts. While we agree the court erred in finding Dr. Wilkins unqualified and in excluding her testimony, we find no abuse of discretion in excluding the opinions of Dr. Daugherity, Dr. Lively, and Painter that a software defect caused the alarm to fail as unreliable.[7]

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise. *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). The qualification of a witness as an expert is within the discretion of the circuit court, and we will not reverse absent an abuse of that discretion. *Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010). An abuse of discretion occurs when the circuit court's rulings "either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be

[7] In considering the reliability of Dr. Daugherity's and Dr. Lively's opinions, we have reviewed all of their depositions and affidavits. We therefore do not need to reach the Graves' additional argument that the circuit court erred in excluding some of their affidavits under *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004), because they are inadmissible regardless.

a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* It is this final requirement of reliability which is the central feature of the inquiry. *White*, 382 S.C. at 270, 676 S.E.2d at 686.

If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in *Council*. *Id.* at 449–50, 699 S.E.2d at 177. Under *Council*, the court must consider the following: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517. However, these factors "serve no useful analytical purpose" for nonscientific evidence. *White*, 382 S.C. at 274, 676 S.E.2d at 688. In those cases, we have declined to offer any specific factors for the circuit court to consider due to "the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence." *Id.* Nevertheless, the court must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable. *Id.* Thus, while a challenge to an opinion's reliability generally goes to weight and not admissibility, this "familiar evidentiary mantra" may not be invoked until the circuit court has vetted its reliability in the first instance and deemed the testimony admissible. *Id.* at 274, 676 S.E.2d at 689.

A. Computer Experts

CAS concedes that the first two elements under Rule 702 have been met with respect to Dr. Daugherity, Dr. Lively, and Painter, i.e., their testimony would aid the jury and they are qualified. Thus, the only question on appeal is whether their opinions that a software defect caused the alarm to fail are reliable. The bulk of the arguments advanced by the Graves concern whether the court erred in categorizing the testimony as scientific and thus subject to *Council*.[8] They posit that when viewed instead under the proper

[8] It is unclear whether the court found Painter's testimony scientific. We will therefore analyze it as both scientific and nonscientific.

lens, it is admissible. However, we need not determine whether the court erred in classifying the opinions as scientific because we hold they are unreliable under either standard.[9]

As previously mentioned, we have declined to set a general test for nonscientific testimony due to the multitude of challenges which may arise. Thus, this evidence must be evaluated on an ad hoc basis. Although this is our first opportunity to assess the reliability of an opinion rendered using the reasoning to the best inference methodology, the United States Court of Appeals for the Tenth Circuit has already done so. In *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227 (10th Cir. 2004), the court held that "[e]xperts must provide objective reasons for eliminating alternative causes" when engaging in this analysis. *Id.* at 1237. Furthermore, "an inference to the best explanation for the cause of an accident must eliminate other possible sources as highly improbable, and must demonstrate that the cause identified is highly probable." *Id.* at 1238. Although the expert need not categorically exclude alternate causes, that does not relieve the expert of his burden to prove the alternate cause is at least highly improbable based on an objective analysis. *See id.* at 1237–38 & n.6. We believe this objectivity requirement is consistent with the quality control element of *Council*.

In this case, both the monitor's log reflecting that the alarm sounded and the testimony of India's pediatrician implicate complaint error as a potential issue. We therefore focus our attention on whether these experts sufficiently discounted it as highly improbable based on objective criteria.

Turning first to Dr. Daugherity, his exclusion of complaint error as a cause was premised on the Graves' own testimony that the alarm did not sound. He even went so far as to conclude that there is *no* "evidence that can support a finding that the alarm actually functioned the night of the incident." When presented with the evidence from the machine's internal log that the alarm did go off, Dr. Daugherity therefore dismissed it as unreliable based on the "undisputed testimony that the alarm did not function," i.e., the Graves

[9] In reaching this conclusion, we assume *arguendo* only that reasoning to the best interference is a valid scientific method.

contention that the alarm failed.[10] Dr. Daugherity simply assumed the alarm did not sound and provided no reason for discounting the evidence to the contrary other than the assertion of the person alleging a failure. Thus, Dr. Daugherity did not objectively discount the evidence of complaint error as required by *Bitler*. *See Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) ("Simply put, an expert does not assist the trier of fact in determining whether a product failed if he starts his analysis based upon the assumption that the product failed (the very question that he was called upon to resolve), and thus, the court's refusal to accept and give credence to [the expert's] opinion was proper.").

Dr. Lively's testimony is even more problematic. The record reveals no attempt on his part to eliminate complaint error as a contributing cause. At best, he simply forgot to consider it; at worst, he blithely dismissed it without comment despite evidence demonstrating it is a distinct possibility. In either case, not only has he failed to provide objective criteria for why this could not have occurred, but no evidence shows he endeavored to eliminate it as highly improbable to begin with.

Painter's testimony presents the same problem. When he learned for the first time during his deposition that the monitor has an independent system to listen for the alarm, he was able to conclude without hesitation or further review of the system that this evidence simply has no effect on his opinion. While he conceded this ordinarily would mean the alarm sounded, he baldly marginalized the evidence in this case simply because the Graves said the alarm did not go off. We therefore believe there is evidence that Painter too did not provide objective criteria for eliminating complaint error as a cause. Underscoring our concerns about the reliability of his opinion, Painter ultimately stated that the monitor "failed in a way that we don't really understand."

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[10] Dr. Daugherity references the testimony of Anita Kelly, the EMT who tended to India, as supporting his conclusion that the alarm did not go off. However, Kelly could not state whether she looked at the machine and saw it was even turned on when she was in the house. Her testimony therefore does not support either side of the debate.

We also agree with the circuit court that these experts improperly relied on reports of other failures to bolster their conclusions that software error was to blame. Evidence of similar incidents is admissible "where there is some special relation between the accidents tending to prove or disprove some fact in dispute." *Watson*, 389 S.C. at 453, 699 S.E.2d at 179. A plaintiff bears the burden of demonstrating the other accidents are "substantially similar to the accident at issue" by demonstrating that the products are similar, the alleged defect is similar, the defect caused the other accidents, and there are no other reasonable secondary explanations. *Id.* While the products in the FDA report are similar to the one here, the record contains no evidence suggesting any further connection to or whether a software error was even involved in these other cases. In order to deem these other incidents substantially similar, we would have to automatically equate an alleged failure with a software defect of the kind claimed by the Graves without any evidentiary basis for doing so. This we will not do.

Accordingly, we find evidence to support the circuit court's conclusion that the testimony of these experts is unreliable regardless of whether it is deemed scientific or nonscientific. Complaint error is a real possibility in this case, and there is evidence that none of the experts objectively found it to be highly improbable. Of great concern to us is that each of them began with the assumption that the monitor failed and then discounted evidence to the contrary based on the *ipse dixit* of the plaintiff who hired them, an analysis we find lacking in the indicia of reliability required for reasoning to the best inference. While the Graves may be correct that it is rare to exclude the testimony of three experts in a single case, we find no abuse of discretion based on the record before us.

B. Dr. Wilkins

The circuit court excluded Dr. Wilkins' testimony first on the ground that she was not qualified to render an opinion as to SIDS. This was due in large part to her statement that she would not consider herself a SIDS expert. However, an "expert need not be a specialist in the particular branch of the field." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. The record before us

reveals a doctor with over thirty years' experience as a neonatologist who stays current on SIDS literature. It is also clear from her testimony that she routinely encounters SIDS in her practice. We therefore find the circuit court abused its discretion in finding Dr. Wilkins was not qualified to render an opinion in this case.

The court further excluded her testimony on the ground that it was not reliable under the *Council* factors. We recognized in *Whaley*, though, that most doctors do *not* give scientific testimony. 305 S.C. at 142, 406 S.E.2d at 371. Thus, a doctor who merely applies his knowledge to every day experiences does not need to satisfy the additional foundation required by *Council*. *See id.* at 142, 406 S.E.2d at 371–72. All Dr. Wilkins did was apply the knowledge she has gained from her training and experience as a neonatologist to determine whether India would have survived had her parents been alerted to her condition. Accordingly, the circuit court committed an error of law in holding Dr. Wilkins to the *Council* standard for reliability. However, for the reasons discussed below, CAS is still entitled to summary judgment even if Dr. Wilkins' testimony is taken into account.

II. SUMMARY JUDGMENT

We turn now to whether the Graves have adduced sufficient evidence to withstand summary judgment without the opinions of their computer experts. We hold they have not.

In any products liability action, a plaintiff must establish three things: (1) he was injured by the product; (2) the product was in essentially the same condition at the time of the accident as it was when it left the hands of the defendant, and (3) the injury occurred because the product "was in a defective condition unreasonably dangerous to the user." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). If the plaintiff is pursuing a design defect claim, the only way to meet the third element is by "point[ing] to a design flaw in the product and show[ing] how his alternative design would have prevented the product from being unreasonably dangerous." *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). Summary judgment is appropriate when there are no genuine

issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP.

Here, there is no argument that the monitor was not in essentially the same condition as it was when it left CAS's factory. Furthermore, Dr. Wilkins testified it is more likely than not that India could have been revived had the parents been woken up by an alarm. Without the testimony of their experts, however, the Graves have no direct evidence of whether the monitor was unreasonably dangerous because there is no identification of a specific design flaw.[11] Thus, the question is whether the record contains sufficient circumstantial evidence of a defect required to survive summary judgment.

We take this opportunity to correct the circuit court's erroneous holding that a plaintiff cannot use circumstantial evidence to prove a design defect claim. "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." *St. Paul Fire & Marine Ins. Co. v. Am. Ins. Co.*, 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968). Thus, the general rule is any fact can be shown through circumstantial evidence, and it is up to the trier of fact to determine whether it alone is worth as much merit as direct evidence. Although CAS argues we foreclosed the use of circumstantial evidence for design defects in *Branham*, we recognized in that very case that other similar incidents can be used to show a design defect, which is classic circumstantial proof. *See* 390 S.C. at 230, 701 S.E.2d at 20. In this case, however, we need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony is nevertheless dispositive of the Graves' claim.

It is well-established that one cannot draw an inference of a defect from the mere fact a product failed. *Sunvillas Homeowners Ass'n v. Square D. Co.*, 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990). Accordingly, the plaintiff must offer some evidence beyond the product's failure itself to prove that it is unreasonably dangerous. Thus, while the Graves do have witnesses

[11] There was evidence introduced as to feasible alternative designs.

who testified that the alarm did not sound, that alone is not sufficient. In some design defect cases, expert testimony is required to make this showing because the claims are too complex to be within the ken of the ordinary lay juror. *Watson*, 389 S.C. at 445, 699 S.E.2d at 175 ("[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge."); *cf. Esturban v. Mass. Bay Transp. Auth.*, 865 N.E.2d 834, 835 (Mass. App. Ct. 2007) ("By its nature, an escalator is a complex, technical piece of machinery, whose design and operational requirements are not straightforward. Accordingly, any determination of the dimensions essential to its safe operation is generally beyond the scope of an average person's knowledge."); *Olshansky v. Rehrig Int'l*, 872 A.2d 282, 287 (R.I. 2005) (affirming grant of summary judgment in defect case involving a shopping cart in the absence of expert testimony because "[a]lthough average lay persons use shopping carts every day, we conclude that only an expert who understands the mechanics of constructing such a cart could understand and explain the mechanics of the cart and whether a defect proximately caused an injury such as Mr. Olshanky's"); *Burley v. Kytec Innovative Sports Equip., Inc.*, 737 N.W.2d 397, 407 (S.D. 2007) ("[U]nless it is patently obvious that the accident would not have happened in the absence of a defect, a plaintiff cannot rely merely on the fact that an accident occurred. It is not within the common expertise of a jury to deduce merely from an accident and injury that a product was defectively designed."); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006) ("A lay juror's general experience and common knowledge do not extend to whether design defects such as those alleged in this case caused releases of diesel fuel during a rollover accident. Nor would a lay juror's general experience and common knowledge extend to determining which of the fire triangle's fuel sources, diesel from the tractor or crude from the tanker, would have first ignited, or the source for the first ignition."). Whether expert testimony is required is a question of law. *Mack Trucks, Inc.*, 206 S.W.3d at 583.

We have little trouble concluding as a matter of law that the Graves' claim is one such case because it involves complex issues of computer science. Although we use computers in some form or fashion almost every day of our lives, the design and structure of the software they run is beyond

the ordinary understanding and experience of laymen. Hence, the Graves must support their allegations with expert testimony, and without it, their claims are subject to dismissal. Because we find the circuit court did not abuse its discretion in excluding the Graves' computer experts, CAS is entitled to summary judgment.

CONCLUSION

In conclusion, we hold the circuit court did not abuse its discretion in excluding the testimony of the Graves' computer experts. While the court did err in excluding Dr. Wilkins' testimony, the Graves are still left with no expert opinions regarding any defects in the monitor. In the absence of this evidence, CAS is entitled to summary judgment. We accordingly affirm the circuit court as modified.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Travis A. Roddey, as the personal representative of the Estate of Alice Monique Beckham Hancock, deceased, Appellant,

v.

Wal-Mart Stores East, LP, U.S. Security Associates, Inc., and Derrick L. Jones, Respondents.

Appellate Case No. 2010-163426

Appeal From Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5028
Heard April 10, 2012 – Filed August 29, 2012

AFFIRMED

John S. Nichols and Blake A. Hewitt, Bluestein, Nichols, Thompson & Delgado, LLC of Columbia; S. Randall Hood and William A. McKinnon, McGowan, Hood & Felder, LLC, of Rock Hill; and Brent Paul Stewart, Stewart Law Offices, LLC, of Rock Hill, for Appellant.

W. Howard Boyd, Jr. and Stephanie G. Flynn, Gallivan White & Boyd, PA of Greenville, for Respondents.

FEW, C.J.: Alice Hancock died in an automobile crash as she drove away from the Wal-Mart in Lancaster. She was being chased by Derrick Jones, an employee of U.S. Security Associates, Inc., which provided security in the Wal-Mart parking lot pursuant to a contract with Wal-Mart. Wal-Mart management had advised Jones that a passenger in Hancock's vehicle attempted to steal merchandise from the store, and they instructed him to get the vehicle's license tag number. At trial, the court directed a verdict for Wal-Mart, and the jury returned a defense verdict on the claims against Jones and U.S. Security. Hancock's estate appeals the decision to direct a verdict in favor of Wal-Mart. We affirm.

I. Facts and Procedural History

On the night of June 20, 2006, Hancock drove to Wal-Mart with her sister, Donna Beckham. Hancock entered the store with Beckham but later returned to her vehicle in the parking lot. While Hancock waited in the car, Beckham attempted to shoplift several items from the store by placing them in plastic bags. As Beckham testified at trial, "I then went and got a bag and went and put some pants into the bag[.] I shouldn't have done it."[1]

Hope Rollings, one of the store's customer service managers, saw Beckham do this. Rollings alerted fellow manager Shaun Cox and several other employees that Beckham was attempting to steal merchandise. Rollings then walked outside to speak with Jones, who was on duty in his company truck. As Rollings and Jones

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[1] Beckham also testified:

> Q: And you elected not to leave with [Hancock] because you were attempting to take clothing from the store, correct?
>
> A: Couple of pair of jeans, yes.
>
> Q: There's no question, Ms. Beckham, you had absolutely no intention of paying for the clothing items that night, did you?
>
> A: No, sir.

spoke, Cox used a handheld radio to tell them that Beckham was headed towards one of the exits. Rollings went back inside, and Jones drove to the exit. Jones testified he asked over the radio what he should do, as he did not have the authority to detain Beckham. He was told to "try to delay her. Try to talk to her until we can get out there."

As Beckham approached the exit with the bags of merchandise, a Wal-Mart greeter asked to see her receipt. Beckham told the greeter Hancock had the receipt in the car. She testified, "I told her that my sister had it but that was a lie." Beckham then put down the bags and walked out of the store. Jones saw Beckham and spoke to her briefly. Beckham testified Jones screamed at her. Beckham began running towards Hancock's car. Jones followed her in his truck but did not physically detain her. Hancock saw Beckham, pulled out of her parking space, and drove down a lane of the parking lot towards Beckham. Jones drove into the lane, blocking Hancock's vehicle. While Hancock's car was still moving, Beckham jumped into the back seat.[2] As Beckham later testified, she told Hancock to "get them the hell out of here." Hancock put her car in reverse, backed up at a high speed, struck a median in the parking lot, turned around, and drove towards the exit of the parking lot. Jones followed behind her.

As these events unfolded, Cox walked to the main entrance of the store and radioed to Jones, "Get her tag number." According to Jones, he received instructions over the radio from Cox and Rollings to get the license tag information from Hancock's vehicle. Jones testified, "And I'm on the walkie-talkie, telling them, I can't see this license plate tag number, and they're about to leave the parking lot." A Wal-Mart employee replied, "Man, well, you got to do what you got to do. You need to get that license plate number." These instructions by Wal-Mart personnel violated Wal-Mart's policy for investigating and detaining suspected shoplifters, which provided:

[2] The word "jump" comes from the testimony of Roddey's expert Jeffrey Albert, who used the word to describe what he observed in the video of Beckham leaving the Wal-Mart and entering Hancock's car.

> NEVER pursue a fleeing Suspect more than approximately 10 feet beyond the point you are located when the Suspect begins to run to avoid detention. Ten feet is about three long steps. This limitation applies both inside and outside the facility.
>
> NEVER pursue a Suspect who is in a moving vehicle.
>
> NEVER pursue a Suspect off the Facility's property.
>
> NEVER use a moving vehicle to pursue a Suspect.
>
> TERMINATE the pursuit of a Suspect, if the Suspect begins to enter a vehicle.
>
> LET THE SUSPECT GO, rather than continue a pursuit that is likely to injure or cause harm to someone.

As Hancock left the parking lot and drove onto a highway, she ran a stop sign and a stop light, nearly getting into an accident. In violation of his training and U.S. Security policy, Jones left the parking lot and pursued Hancock and Beckham onto the highway. According to Jones, Hancock drove up an onramp, "almost slamm[ing] into the back of another lady's car" and missing it by swerving to the left. Jones testified he lost Hancock and Beckham at that point, and he did not find them again until he saw her vehicle's hazard lights flashing off of the side of the road. However, Beckham testified Jones stayed close behind them. Crouching in the back seat, she periodically looked up over the seat and saw Jones driving "on [their] bumper" and flashing the high-beams on his truck. After about two miles, Hancock told Beckham "he's still on our ass," and then Beckham heard and felt a bump. Hancock's car left the road and crashed. Hancock died at the scene.

Travis Roddey, the personal representative of Hancock's estate, sued Wal-Mart, U.S. Security, and Jones for negligence. At trial, the court granted Wal-Mart's motion for a directed verdict. The jury found Hancock was 65% at fault and U.S. Security and Jones were 35% at fault. Roddey filed a motion under Rule 59(e), SCRCP, seeking a new trial as to all defendants on the basis that the court erred in directing a verdict for Wal-Mart. The court denied the motion.

II. How the Panel Votes to Affirm

Wal-Mart asserted three grounds for its directed verdict motion: (1) Roddey presented no evidence Wal-Mart breached its duty of care; (2) Wal-Mart's actions were not the proximate cause of Hancock's death as a matter of law because Jones' and Hancock's actions were not foreseeable; and (3) Hancock's fault in causing her own death was more than 50% as a matter of law. The trial court granted the motion on the first two grounds, stating "I . . . find that there is insufficient evidence that Wal-Mart was negligent, or even if [it was] there is a lack of proximate cause [in] that the events were not foreseeable." As to the third ground, the court stated it was "[un]able to find as a matter of law that Hancock was more than 50 percent [at fault]."

Judge Huff and I believe the trial court erred in finding there was insufficient evidence of Wal-Mart's negligence and in finding Jones' and Hancock's actions were not foreseeable. However, I vote to affirm because I believe Hancock was more than 50% at fault. As Judge Short explains in his concurring opinion, he votes to affirm because he believes the trial court correctly found no proximate cause as a matter of law. As Judge Huff explains in his dissent, he would reverse and remand for a new trial as to Wal-Mart.

III. Evidence of Wal-Mart's Negligence

Cox and Rollings' instructions that Jones get the tag number of Hancock's vehicle, including the command "do what you got to do," violated the Wal-Mart policy designed to prevent injuries and deaths caused by fleeing suspects. A defendant's violation of its own safety policies is some evidence of negligence. *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) (stating a defendant's standard of care in a negligence action "may be established and defined by . . . a defendant's own policies and guidelines"); *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) (holding "evidence of [a defendant's] deviation from their internal maintenance policies is admissible to show the element of the breach"); *Tidwell v. Columbia Ry., Gas & Elec. Co.*, 109 S.C. 34, 35, 95 S.E. 109, 109 (1918) (stating "violation [of a defendant's rules] was evidence tending to show negligence"); *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) (stating a jury may consider violations of internal policies or self-imposed rules as evidence of

negligence). Therefore, the trial court should not have directed a verdict on the basis that there was insufficient evidence of negligence.

IV. Foreseeability of Hancock's Actions

The purpose of Wal-Mart's policy is to prevent injury or death resulting from negligent or reckless driving in pursuit of a suspect. The policy states: "LET THE SUSPECT GO, rather than continue a pursuit that is likely to injure or cause harm to someone. . . . Remember to put people first. Protecting the physical well-being of Suspects . . . is your first priority." Similar instructions and reminders to "put people first" appear throughout the policy. The danger sought to be prevented by this policy arises from the anticipated negligent or reckless driving of the pursuer and the pursued. Therefore, the danger that a fleeing suspect or the security officer chasing her might drive negligently or recklessly and injure the suspect or someone else is not simply foreseeable—it is the very reason Wal-Mart adopted the policy in the first place. I disagree that Jones' and Hancock's actions were not foreseeable to Wal-Mart.

V. Hancock's Fault

There are two reasons this court should hold that Hancock was more than 50% at fault and on that basis affirm the directed verdict in favor of Wal-Mart. First, the jury's factual determination of how fault should be apportioned between Hancock, Jones, and U.S. Security is binding on Roddey even though Wal-Mart's actions were not included in the jury's analysis. Second, the trial court should have directed a verdict for Wal-Mart on the ground that Hancock was more than 50% at fault as a matter of law.

a. Effect of the Jury's Apportionment of Fault

In his post-trial motion, Roddey stated his theory of the case is that the "car accident was due less to the decedent's actions and more to (1) Wal-Mart's decision to encourage Derrick Jones to chase the decedent by vehicle, and (2) Jones' actions during the chase—flashing his lights and driving on the decedent's bumper." The specific allegations in Roddey's complaint were that Wal-Mart was liable in three ways: (1) it was vicariously liable for Jones' actions; (2) it failed to properly supervise Jones; and (3) it "improperly advised or instructed" Jones to follow

Hancock and obtain her license tag information.[3] None of these allegations can possibly result in liability against Wal-Mart, now that the jury has found Hancock to be 65% at fault in the accident.

With respect to the first allegation, Roddey claims Jones was Wal-Mart's agent, and therefore Wal-Mart is vicariously liable for his conduct. Roddey's right to recover from Wal-Mart under this claim depends entirely on whether Jones was liable. In other words, because Wal-Mart's liability is derivative of Jones' liability, the jury's finding that Jones was only 35% at fault forecloses the liability of Wal-Mart.

Roddey's other two allegations involve acts and omissions by Wal-Mart. Roddey argues that because the jury apportioned fault only between Hancock, Jones, and U.S. Security, Wal-Mart's conduct, if considered by the jury, could have reduced Hancock's proportion of fault to the point that her negligence was not greater than that of all the defendants. *See Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) ("If there is more than one defendant, the plaintiff's negligence shall be compared to the combined negligence of all defendants."). In many cases involving multiple tortfeasors, the negligence of a tortfeasor absent from the case could affect the relative fault of the plaintiff. In this case, however, Wal-Mart's conduct cannot reduce Hancock's proportion of fault.

The jury's comparison of fault necessarily involved an examination of the actions taken by the two participants in the chase—Hancock and Jones—and a determination of how their actions contributed to Hancock's death. Evidence was presented that Hancock drove through the parking lot towards Beckham as she ran from the store, did not stop the car as Beckham jumped into it, backed up in the parking lot at a high rate of speed, hit a concrete median, ran a stop sign and a stop light as she turned onto a public highway, swerved through traffic, and narrowly avoided two collisions with other cars.[4] There was also evidence that Jones

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[3] The complaint is not in the record on appeal. Roddey described his allegations in one of his briefs to this court.

[4] Because I am explaining evidence the jury considered in its apportionment of fault, I do not view the evidence described in this sentence in the light most favorable to Roddey. In all other portions of the opinion, I have described the evidence in the light most favorable to Roddey.

blocked Hancock's car, pursued her through the parking lot, left his assigned area, followed Hancock's car onto the highway, drove "on [the] bumper" of Hancock's car on the highway, flashed his headlights, and possibly made contact with Hancock's car. Whatever Jones' and Hancock's motivation may have been for taking those actions, it was the actions themselves that proximately caused the crash that killed Hancock. The jury already considered all of those actions, and it determined Hancock's actions made her 65% at fault.

Even under Roddey's theory of the case, Wal-Mart's conduct merely provides some explanation of what motivated Jones' actions. Wal-Mart's negligence could affect how much of the remaining 35% of fault is attributable to Jones, for if Jones was motivated by Wal-Mart's improper actions, arguably he would bear less of the fault for Hancock's death. However, Wal-Mart's actions can have no effect on Hancock's fault. Wal-Mart obviously did not advise or instruct Hancock to flee, nor did it enable her actions by failing to adequately supervise her. There is no evidence in the record that Hancock knew anything about what Wal-Mart told Jones. Therefore, Wal-Mart's alleged conduct could not have reduced Hancock's proportion of fault in the way it could have reduced that of Jones. Even if the jury had been permitted to consider Wal-Mart in its apportionment of fault, Wal-Mart's conduct could not have affected the jury's determination that Hancock was 65% at fault.

Because Wal-Mart's conduct could not have reduced Hancock's fault, Roddey is bound by the jury's finding that she was 65% at fault, and the trial court's decision to grant Wal-Mart a directed verdict could not have prejudiced Roddey. Therefore, I believe we must affirm. *See O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 497, 309 S.E.2d 776, 780 (Ct. App. 1983) (affirming directed verdict without deciding whether trial court erred because jury's verdict made error harmless).

b. Hancock's Fault as a Matter of Law

I would also affirm on the basis that no reasonable jury could have concluded Hancock was 50% or less at fault. *See Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006) ("The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor."); *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712-13 (2000) (stating a plaintiff in a

negligence action "may only recover damages if his own negligence is not greater than that of the defendant"). Beckham testified Hancock "had no idea I was going in there to steal." However, the evidence is overwhelming that once Beckham "jumped" into the back seat of Hancock's moving car, Hancock was aware that she was fleeing a crime scene. Rather than testifying Hancock did not know they were fleeing the Wal-Mart, Beckham testified she commanded Hancock to "get them the hell out of here." Viewing all the evidence in the light most favorable to Roddey, no reasonable jury could have concluded Hancock's fault was not greater than the fault of the defendants, even including Wal-Mart. *See Bloom*, 339 S.C. at 424, 529 S.E.2d at 714 ("Any factual issues which might exist as to Ravoira's fault in this accident cannot alter the inescapable conclusion that, as a matter of law, Bloom's fault exceeded fifty percent."). Therefore, even though the trial court did not grant the motion for directed verdict on this basis, I would affirm. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

VI. Conclusion

The trial court's decision to direct a verdict in favor of Wal-Mart is **AFFIRMED.**

SHORT, J., concurs in a separate opinion.

HUFF, J., dissents in a separate opinion.

SHORT, J., concurring in a separate opinion: I agree the trial court's order should be affirmed. I write separately because I would decline to rule on whether Wal-Mart breached its duty to Hancock and whether Hancock was more than 50% at fault. Rather, I affirm because even when viewing the evidence in the light most favorable to Roddey, I find Wal-Mart was entitled to a directed verdict on the proximate cause element of Roddey's negligence action based on the unforeseeability of Jones' actions. *See Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (explaining that in reviewing a motion for directed verdict, the evidence is viewed in the light most favorable to the non-moving party). Wal-Mart argued:

> This event . . . is about as classically unforeseeable as any event in the history of the law and there was simply no way for anyone to foresee that Derrick Jones would

> pursue Ms. Hancock off of the premises of Wal-Mart in a high speed pursuit just because he was asked to get a license tag on the premises. So on the grounds that no negligence on the part of Wal-Mart, secondly on the ground that no negligence of Wal-Mart was the proximate cause, we would ask that the Court grant our motion for directed verdict as to Wal-Mart . . . .

The trial court ruled: "I do find that there is insufficient evidence that Wal-Mart was negligent, or even if they were[,] there is lack of proximate cause that the events were not foreseeable . . . ."

I agree with the trial court that Wal-Mart was entitled to directed verdict based on proximate cause. I conclude Roddey failed to establish legal cause sufficient to submit the question to the jury. "Proximate cause requires proof of both causation in fact and legal cause." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1997). "Legal cause is proved by establishing foreseeability." *Id.* The test of foreseeability is whether the injury is the natural and probable consequence of the alleged negligent act. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "Where the injury complained of is not reasonably foreseeable there is no liability." *Crolley v. Hutchins*, 300 S.C. 355, 357, 387 S.E.2d 716, 717 (Ct. App. 1989). Where intervening acts occur, the original wrongdoer may be liable despite intervening acts if the intervening acts are foreseeable, or if not foreseeable, if the original wrongdoer's acts "'would have caused the loss in natural course.'" *Young v. Tide Craft, Inc.*, 270 S.C. 453, 463, 242 S.E.2d 671, 676 (1978) (quoting *Benford v. Berkeley Heating Co.*, 258 S.C. 357, 365, 188 S.E.2d 841 (1972)).

I agree with the learned trial court that it was not foreseeable to Wal-Mart that Jones would leave the parking lot and continue pursuit for several miles while flashing his high-beams and aggressively following Hancock as she ran a stop sign and a stop light and drove onto a highway. I would affirm the trial court's finding that Wal-Mart was entitled to directed verdict based on the lack of foreseeability of Jones' actions. *See Stone v. Bethea*, 251 S.C. 157, 161-62, 161 S.E.2d 171, 173 (1968) ("One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen. When the [original wrongdoer's] negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes

to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause."); *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995) ("For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable.").

HUFF, J., dissenting: I respectfully dissent. While I agree with Chief Judge Few that there is evidence of Wal-Mart's negligence in this matter that was foreseeable, I do not agree that the jury's finding that Hancock was 65% negligent renders Hancock 65% negligent as a matter of law, and that this jury finding is binding on Roddey as to his cause of action against Wal-Mart, considering that Wal-Mart's negligence was not factored into the jury's determination. Further, I disagree with Judge Short's determination that Wal-Mart was entitled to a directed verdict because there was no proximate cause as a matter of law. Accordingly, I would reverse and remand for a new trial against Wal-Mart.

Travis A. Roddey, as the Personal Representative of the Estate of Alice Monique Beckham Hancock, brought this tort action against Wal-Mart Stores East, LP (Wal-Mart), U.S. Security Associates, Inc. (USSA), and Derrick L. Jones, stemming from Hancock's death following an alleged vehicular pursuit by private security guard Jones, an employee of USSA who was stationed at the Lancaster Wal-Mart. From an order of the trial court granting Wal-Mart a directed verdict, Roddey appeals.

I. FACTUAL/PROCEDURAL BACKGROUND

The following facts are undisputed. On the night of June 20, 2006, Alice Monique Beckham Hancock and her sister, Donna Beckham, entered the Lancaster Wal-Mart together, but at some point Hancock returned to her car in the parking lot, while Beckham remained inside the store. After Hancock left, Beckham selected some clothing with the intent to remove the items from the store without paying for them. One of Wal-Mart's Customer Service Managers, Hope Rawlings, observed Beckham placing items in a bag at a register where there was no cashier. Rawlings radioed Shaun Cox, another Customer Service manager on duty that night, asked Cox to come to the front of the store, and informed Cox about what she had

observed.[5] Rawlings then approached both door greeters to instruct them to ask Beckham for a receipt, while Cox continued to observe Beckham. Cox pointed to Beckham for the store greeter, who then asked Beckham for her receipt. Beckham lied to the greeter, stating her sister had the receipt. Beckham then put the bag on the ground and walked out the door. During this time, as Rawlings reached the grocery door, she saw Derrick Jones in the security guard truck outside the door and walked outside to tell Jones about the shoplifter. As she did this, Cox radioed that Beckham was walking out the general merchandise door. There is varying witness testimony in regard to other matters, in particular between Jones and the two Wal-Mart employees, Rawlings and Cox, and between Jones and Beckham.

Jones' Testimony

Jones testified that he received a call over the walkie-talkie that a shoplifter was leaving through the general merchandise door. Jones responded by asking what they wanted him to do, as he was a security officer, not a police officer, and he could not detain an individual. He was then instructed to delay the shoplifter, talking to her until someone could get out there. As the shoplifter walked in front of his truck, he asked how she was doing, and requested to talk to her. The woman responded that she first had to throw her bag in her car, but would be right back. When Jones told her she did not need to do that, and their conversation would only take a minute, the woman "took off running." The woman got in a car, and those in the car were trying to leave the parking lot, but Jones used his truck to intentionally block their exit, at which point they backed up their car. Jones stated he blocked the car because he had been instructed by Rawlings and Cox that he had to get the license plate tag number. He maintained "the way they [Wal-Mart employees] were coming off," if he did not get the tag number he could be fired. Jones stated that both Rawlings and Cox were asking him to get the tag number, and he felt a sense of urgency in the request. As the suspects fled in their car, Jones observed that they almost had an accident in the Wal-Mart parking lot, causing him to slow down, which in turn allowed cars to get between them. Jones stated it was not a "chase," and he was just trying to get the tag number. Jones acknowledged he knew he was not supposed to follow them out of the parking lot, but all he was being told was, "Look, you got to get this license plate tag number." He therefore felt he had to get the tag number, even if he had to leave the parking

[5] Besides Jones, Rawlings, Cox, and Wal-Mart employee Chuck Campbell had walkie-talkies on them that night.

lot to do it, because "that's the way they came across." Jones testified it was like "we can care less whether you leave the parking lot or not. You need to get that license plate tag number." Jones again acknowledged that he should not have followed them out of the parking lot because he was not a policeman and he was not able to detain individuals, but he felt it was urgent that he obtain the tag number because of the way the Wal-Mart employees were "coming across." Jones testified, "And I'm on the walkie-talkie, telling them, I can't see this license plate tag number, and they're about to leave the parking lot. Man, well, you got to do what you got to do. You need to get that license plate number."

Once Hancock and Beckham left the parking lot, Jones observed a second near-accident between them and another car. According to Jones, he lost track of the women after they left the parking lot, but he continued to search for them in hopes of getting their tag number. Once he thought he had lost them, he turned his truck around. Thereafter, he saw headlights or hazard lights flashing and heard someone screaming for help. As he reached the car, he found the screaming passenger pinned by a chair, and the driver faintly breathing. Unable to get the passenger door open, Jones went to the road and stopped a passing motorist, who then called for help.

Jones again recognized he was wrong for leaving the parking lot and stated, "That was my mistake," indicating he made that mistake due to the fact that he was being told, "Oh, you need that license plate tag number," and "Go get it." Jones agreed that Wal-Mart's instructions to him caused him to not think about "safety first," explaining that it happened so fast that he did not think clearly and stating as follows: " - - when they're telling you, 'Look, man. You got to get that license plate tag. Yo - - get that license plate tag.' And I'm telling them, 'Well, they leaving the parking lot' - - 'Well, get that license plate tag number.' And that's all I'm hearing." Jones agreed Cox and Rawlings never instructed him to leave the parking lot to get the tag number, but he testified as follows: "[T]hey did stress that I needed to get the license plate tag number after I told them, 'Well, look **we're - - we're leaving the parking lot now**. You - - well, you - - you need to get that license plate number." (emphasis added). Jones testified the last communication he had with someone from Wal-Mart was as he was on a ramp heading toward a highway, less than a mile from Wal-Mart, with communication starting to break up then. The last clear conversation he had with them was as he was following behind Hancock and Beckham once they left the Wal-Mart parking lot.

Beckham's Testimony

Beckham testified that as she walked out of Wal-Mart, Jones was in the security truck and screamed at her stating, "Hey, I need to talk to you." Beckham told him, "No, you don't," and started jogging to her sister's car. Jones "zoomed in on" them in his truck, and Beckham got in the back seat of Hancock's car. Jones pulled in front of them. As they went through the parking lot, Jones was "on [them]." Beckham was crouched down in the back seat, but periodically "popped up" to look, and observed Jones "flashing his high beams with the light on top," staying on them as if she had gone into Wal-Mart "with a gun." They left the parking lot, and drove a couple of miles before the accident occurred, during which time Jones was on their bumper. Right before the crash, Beckham heard and felt a bump, and they shot off the road to the left. Just before they ran off the road, she heard Hancock say, "He's still on our ass," and Beckham saw the high beams still flashing. According to Beckham, Hancock had no idea she was going to attempt to shoplift from the store.

Rawlings' Testimony

Rawlings testified that her purpose in going to Jones and telling him about the shoplifter was for security for the door greeters who stopped the suspected person until management could arrive. Rawlings stated, before Cox came over the radio, she only told Jones that they had a shoplifter and she had seen the person putting items in a bag. She did not intend for her, or Jones, to stop or detain Beckham in any way, and denied that she asked Jones to approach or delay Beckham or even talk to Beckham. After Cox came over the radio, Jones went toward the general merchandise door, and Rawlings went back inside Wal-Mart from the grocery entrance and headed to the general merchandise door. As she reached the general merchandise door, she observed both Hancock and Jones run a stop sign and then run through a traffic light. Rawlings testified that she was "stunned" by this, and could not believe they left the parking lot. She did not expect Jones to leave the parking lot and continue to follow the car, nor did she ever tell Jones to pursue Hancock and Beckham. When asked if she could have radioed Jones and told him to stop, Rawlings stated, "It just all happened so fast and [Cox] was on the walkie trying to get Chuck up there and only one person can talk at a time on a walkie," such that someone would not be able to make use of it if another had the receiver pressed. Rawlings denied asking Jones to stop or delay the suspected shoplifter.

As to the assertion Cox told Jones to obtain the license plate number of Hancock's car, Rawlings stated she remembered Cox stating, "Just get the tag number."

Testimony of Cox

Cox testified that after the greeter spoke to Beckham, Beckham put down the bag, looked in her purse, said something to the greeter and then walked out the door. She and the door greeter did not chase or attempt to detain Beckham, and Cox did not ask Jones to stop or detain Beckham, to approach Beckham, to delay Beckham, or to even talk to Beckham. Cox walked toward the door after speaking to the greeter because she was curious to see what was going to happen. When Cox walked outside, she saw that Jones had pulled into the aisle, Beckham's car had come out in reverse, and the chase began. Beckham's car hit a median in the parking lot, went backwards, she "flipped her car around" to face the proper direction, and they exited the parking lot. As soon as Cox saw Hancock's car turn to go the other direction, Cox stated, "Get her tag number." Cox testified she did not instruct Jones to get the tag number when his truck was in front of the other car, but only after the pursuit had begun. She also stated she only instructed Jones to get the tag number one time, and she did so because she did not know why Jones was chasing her and what had happened in the parking lot prior to that, and thought if he got the tag number when they left that the matter could be handled at a different time. Cox did not think Jones would leave the parking lot and was very surprised when he did. When asked if she could have told Jones to stop, Cox stated she could have, but it happened so fast that it did not occur to her, because she had never encountered such a situation, and she was "shocked and scared" and did not know what to do. She later clarified that she or Rawlings could have called Jones off of the pursuit if no one else was speaking on the radio at the time and if she was aware that Jones could still hear them over the radio by the time he reached the back of the building. Cox did not intend for Jones to follow the women out of the parking lot, but meant for Jones to stop, instructing Jones to "get her tag number."

Plaintiff's Experts' Testimony

1. Jeff Gross

Jeff Gross, Roddey's expert witness in parking lot security, guard force management, and loss prevention, testified concerning Wal-Mart's policies and

guidelines, and the breach of some of those in this situation. Specifically, Gross noted Wal-Mart's Guidelines for Private Security Contractors provide that it is the primary function of the private security contractor to provide customers with a safe shopping experience, and the basic security method consists of two parts: "The first, protection, enables the security contractor to protect persons and property by acting as a deterrent in order to prevent thefts, damages, or accidents. The second, communications, enables the security contractor to be a source of information to Wal-Mart management." The guidelines further provide that the security guard's "patrol vehicle should not leave Wal-Mart property except for gas or maintenance," and it was Gross's opinion that provision was "clearly" violated in this case.[6] Gross also noted Wal-Mart's Investigation and Detention of Shoplifters Policy includes the following:

> NEVER pursue a fleeing Suspect more than approximately 10 feet beyond the point you are located when the Suspect begins to run to avoid detention. Ten feet is about three long steps. This limitation applies both inside and outside the facility.
>
> NEVER pursue a Suspect who is in a moving vehicle.
>
> NEVER pursue a Suspect off the Facility's property.
>
> NEVER use a moving vehicle to pursue a Suspect.

[6] The Guidelines themselves are in the record and include the following provisions, "At no time should you try to apprehend, or use your vehicle to apprehend any suspects; . . . Security Contractors are not a policing force and should not be used as one. It's Wal-Mart management's responsibility to enforce Wal-Mart policies and procedures; . . . In the event of a shoplifter situation, the security contractor should act as a witness, and only assist when directed to by a member of Wal-Mart management or Loss Prevention, or when you see the Wal-Mart associate in trouble or danger; . . . Remember, Security Contractors are precluded from searching or pursuing suspects, etc."

> TERMINATE the pursuit of a Suspect, if the Suspect begins to enter a vehicle.[7]

Gross testified that in his opinion, to a reasonable degree of certainty, these policies were violated. When asked who broke these rules, he replied that USSA, Jones, and "through tacit approval Wal-Mart," as Wal-Mart did not "do anything to stop [Jones]," but instructed him to get the license plate number, giving him no other direction or guidance. When asked whether he had an opinion to a reasonable degree of certainty about whether Wal-Mart's failure to ask Jones to stop the chase was a breach of safety rules, Gross opined that it "increased the risks dramatically," noting if Jones had not gone after them, they would not have sped away. Gross stated, "the very headwaters of this problem starts (sic) with them not following their own policies . . . asking [Jones] to do something that Wal-Mart specifically says they won't do themselves and they don't want their contractors to do." Asked if he had an opinion whether Wal-Mart, as a major retailer, knew about what could happen if something escalated, Gross opined Wal-Mart would have known based upon Wal-Mart's policies regarding "not chasing," and "about merchandise not being worth an employee being injured." Gross noted Wal-Mart had identified the results of doing certain things to the point that Wal-Mart was specific about not wanting those things to be done. Asked if he had an opinion about whether Wal-Mart violated its own policy by escalating the situation he stated, "They caused it to escalate . . . by telling [Jones] to do something their policy says you don't do. They won't allow their own people to do this but they instructed him to do it."

On cross-examination, Gross agreed he had no problem with anything Wal-Mart did within the store that evening relating to this matter, but only questioned Wal-Mart's (1) decision to ask Jones to get the license tag and (2) failure to call Jones back once he pursued Hancock off the premises. Gross further agreed that it was okay to ask a security officer in the parking lot to observe and report a license tag

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[7] Wal-Mart's Shoplifters Policy further specifically indicates that only certain authorized associates are allowed to surveil, investigate or detain a suspected shoplifter and may do so only in the presence of another Associate. This policy also emphasizes, reiterating often, that the authorized associate must let the suspect go rather than continue a pursuit that is "likely to injure or cause harm to someone," and that the authorized associate should terminate the pursuit of a suspect if the suspect begins to enter a vehicle.

if it could be done without extraordinary effort, and he had no problem with Jones getting the tag number in the parking lot had he not pursued the vehicle, if it was done in a safe fashion. However, it was not reasonable when done the way Jones did it. When asked about the Wal-Mart employees' failure to call Jones back and the fact that the parking lot incident lasted about thirty to forty seconds, Gross maintained they could have used the radio to communicate with Jones and the employee had enough time to process the information when she watched Jones leave the property, but she did nothing. He further noted that there was testimony indicating the range of the walkie-talkies was sufficient for communication off of the property.

2. Jeffrey Albert

Roddey also presented the testimony of Jeffrey Albert, who was qualified as an expert in the field of pursuit and the behavior of people being pursued. Albert was of the opinion that the pursuit started in the Wal-Mart parking lot once Jones "continued to follow, continued to go after Beckham," and lasted until the crash. He characterized Jones' actions as reckless, raising the risks beyond what was reasonably necessary. Albert also testified that he had performed studies on the actions of people being pursued and found there is a pattern where fleeing drivers tend to look behind them in order to observe what the pursuing person is doing, and a fleeing driver, who is going faster, may also be distracted by flashing lights. Albert opined that Jones "clearly . . . violated every rule in the book . . . by leaving the parking lot and going after the car against policy, against common sense, against training, against what he was told and raising the risk . . . to . . . certainly the driver and passenger in the car." When asked his opinion of whether these improper actions contributed to the crash, Albert testified, "In the sense that had he done what he should have done, stayed in the parking lot, not gone after her it's highly unlikely that that crash would have taken place." Albert agreed he had no problem with Wal-Mart trying to obtain the license tag number of the vehicle while in the parking lot, assuming there was no pursuit involved. He also acknowledged there was conflicting evidence of whether there was a continued pursuit until the accident.

Other Testimony and Evidence

1. Samuel Plyler

Samuel Plyler, a volunteer firefighter who lived close to the scene of the accident and arrived at the accident site within minutes of dispatch, testified he observed a gentleman in a security officer uniform at the scene. This person was saying "they need help and I got myself in a situation." Notably, when Plyler turned around, he observed this person writing down the tag number of the car.

2. Chris Tipton

Chris Tipton[8] testified that Wal-Mart contracted with an independent company to provide security services to the store, and that company was responsible for those security services. However, he acknowledged that, while on Wal-Mart premises, Wal-Mart had a limited right to have the security company employee perform some tasks, and Wal-Mart policy provided that the security company employee could "assist as requested." Tipton agreed that under Wal-Mart's loss prevention policy, because Beckham did not take any merchandise out of the store, Wal-Mart would not pursue a shoplifting prosecution against her, even though the law would have allowed such. Tipton explained the reason behind the policy to be that Wal-Mart wanted to give the customer the benefit of the doubt and did not want to "cause any risk for anybody," and acknowledged consideration of the balance between the store not losing any merchandise in such a situation versus the risk attendant to apprehending a shoplifter. Tipton felt there was nothing wrong with Cox asking Jones to obtain the tag number of Hancock's vehicle as she was attempting to leave the parking lot, if Jones could have done so while in the parking lot. He further testified he saw no evidence that any Wal-Mart employee did anything in violation of Wal-Mart policies, and found no fault in the failure of Wal-Mart employees to tell Jones to stop and come back, stating he did not believe the walkie-talkies range would have enabled them to do so, as they often had problems with the walkie-talkies inside the store. Additionally, he noted that the walkie-talkies only allowed one person to speak over them at a time.

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[8] It is not clear from the record who Tipton is and what his relationship is to this matter, but it appears he is a higher-level representative for Wal-Mart, with knowledge of employment matters and Wal-Mart policy.

II. MOTION FOR DIRECTED VERDICT

At the conclusion of Roddey's case, Wal-Mart moved for a directed verdict asserting, among other things, that there was no negligence on the part of Wal-Mart and there was no evidence any negligence on the part of Wal-Mart was the proximate cause of the accident. The trial court agreed, finding there was "insufficient evidence that Wal-Mart was negligent, or even if there were, there [was a] lack of proximate cause [in] that the events were not foreseeable." The court therefore granted Wal-Mart's motion for directed verdict and dismissed Wal-Mart from the lawsuit. The case proceeded against USSA and Jones, and the jury returned a special verdict form finding defendants USSA and Jones negligent and that their negligence proximately caused the injury, but likewise found Hancock negligent and that her negligence was a proximate cause of the injury. Taking the combined negligence that proximately caused the injury as one hundred percent, the jury determined the defendants, USSA and Jones, were thirty-five percent negligent, while Hancock was sixty-five percent negligent. The jury also determined USSA was negligent in hiring, training, supervision and retention, but found this negligence was not the proximate cause of the injury. Because the jury found Hancock's percentage on negligence to be greater than fifty percent, the jury did not make a determination as to the amount of damages.

III. STANDARD OF REVIEW

"When upon a trial the case presents only questions of law the judge may direct a verdict." Rule 50(a), SCRCP. In ruling on a motion for directed verdict, a trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *S.C. Fed. Credit Union v. Higgins*, 394 S.C. 189, 193-94, 714 S.E.2d 550, 552 (2011). A trial court must deny a motion for directed verdict where either the evidence yields more than one inference or its inference is in doubt. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "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." *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 415, 697 S.E.2d 558, 562 (2010). The trial court should be concerned only with the existence or nonexistence of evidence, and not with the credibility or weight of the evidence.

Higgins, 394 S.C. at 194, 714 S.E.2d at 552. Our standard of review likewise requires this court to view the evidence in a light most favorable to the non-moving party. *Id.*

Additionally, "[t]he question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006). "The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Id.*

IV. RODDEY'S APPELLATE ARGUMENTS

Roddey contends the trial court erred in granting Wal-Mart a directed verdict on the issue of both negligence and proximate cause. He asserts there was evidence presented that Wal-Mart employees were negligent in bringing Jones into the encounter, instructing Jones to delay the women and obtain their license tag number, and instructing Jones to get the tag number after Jones warned the Wal-Mart employees about their exit from the parking lot. Roddey further maintains that a reasonable jury could find from the evidence presented that the accident would not have occurred had Wal-Mart not given Jones those instructions, and that a serious injury was a foreseeable consequence of Wal-Mart's request that Jones engage in this task. Specifically, Roddey notes there is evidence Wal-Mart breached its duty of care by violating its own policies regarding who could pursue a suspected shoplifter and under what circumstances the pursuit could begin and those under which pursuit must be terminated. Additionally, Roddey notes there was evidence of Wal-Mart's negligence in instructing Jones to continue to get the vehicle tag number even though it meant a vehicular pursuit on a public street.

Roddey also argues there is evidence presented from which a reasonable jury could determine that Hancock's injury would not have occurred "but for" Wal-Mart's conduct in instructing and encouraging Jones in the pursuit. Further, Roddey contends, given the evidence that Wal-Mart violated its restrictive policy and engaged Jones in the situation, Wal-Mart should have reasonably foreseen that instructing Jones as it did would result in injury to a shoplifter or customer. He points to evidence that (1) Wal-Mart gave Jones instructions causing him to drive through the Wal-Mart parking lot after someone who was running to get into a

moving vehicle, (2) Wal-Mart employees saw this unfold, instructed Jones to interact with the women and failed to stop him, and (3) Wal-Mart instructed Jones to continue to get the tag number even though it meant a vehicular pursuit on the public street. Roddey also notes this case is not one involving an independent, intervening act of a third party that broke the causal chain, and asserts the law provides that if the acts of the intervening agency are a probable consequence of the primary wrongdoer's actions, the primary wrongdoer is liable.

Lastly, Roddey asserts the trial court's error in granting Wal-Mart a directed verdict requires a new trial, not just as to Wal-Mart, but as to USSA and Jones as well. He argues, under South Carolina's comparative negligence law, a plaintiff may only recover damages in a negligence action if his or her negligence is not greater than that of the defendant or the combined defendants, and the amount of a plaintiff's recovery is reduced in proportion to his or her negligence. Because the jury only had the opportunity to compare the negligence of Hancock to that of USSA and Jones, Roddey argues the comparative negligence of Hancock may have been less than that of the three defendants had Wal-Mart's negligence been considered, in which case recovery of damages would have been possible.

V. ANALYSIS

Negligence and Proximate Cause

As to Judge Short's concurring opinion, I believe the issues of Wal-Mart's negligence and proximate cause should have been submitted to the jury. Though there is admittedly evidence from which a jury could find that Wal-Mart was not negligent, or if it was, Wal-Mart's negligence was not reasonably foreseeable, I find there is evidence from which a reasonable jury could determine that Wal-Mart was negligent and that negligence proximately caused the injuries incurred. Thus, viewing the evidence in a light most favorable to Roddey, the evidence yields more than one inference, or its inferences are in doubt, and both matters should have been submitted to the jury.

In order to prove a cause of action for negligence, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached that duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or

damages. *Madison,* 371 S.C. at 135, 638 S.E.2d at 656. In the case at hand, the trial court directed a verdict based upon its determination that there was insufficient evidence of negligence on the part of Wal-Mart, and even if there were sufficient evidence of negligence, there was insufficient evidence that any such negligence was the proximate cause of the accident, as the events were not foreseeable.

1. Negligence

In regard to negligence, our law provides that "[t]he factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case." *Id.* at 140, 638 S.E.2d at 659. "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." *Id.* Evidence of a company's deviation from their own internal policies is relevant to show the company deviated from that standard of care, and is properly admitted to show the element of breach. *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005). *See also Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) (holding K-Mart's loss prevention manual was relevant on the material issue of the reasonableness of K-Mart's actions, noting, in negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care). Relevant rules promulgated by a defendant company are admissible in evidence in a personal injury action, regardless of whether the rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury. *Madison*, 371 at 141, 638 S.E.2d at 659 (citing *Tidwell v. Columbia Ry., Gas & Elec. Co.*, 109 S.C. 34, 95 S.E. 109 (1918)).

Here, viewed in the light most favorable to Roddey, there is evidence from which the jury could determine that Wal-Mart employees violated their own policies by instructing Jones to engage in actions prohibited by both their Guidelines for Private Security Contractors, as well as Wal-Mart's Investigation and Detention of Shoplifters Policy for employees. While a jury could very well conclude, based upon the evidence presented, that Wal-Mart employees merely requested Jones

speak with Beckham and simply made a singular request for Jones to obtain the tag number of Hancock's vehicle while he was safely in a position to do so, and these actions were permitted by Wal-Mart's guidelines and policies,[9] there was evidence presented from which a jury could also reasonably conclude Wal-Mart was negligent in deviating from its guidelines and policies in this instance. Specifically, Guidelines for Private Security Contractors prohibit the use of contracted security guards as a policing force, and note it is the responsibility of Wal-Mart management to enforce Wal-Mart policies and procedures. Further, these guidelines provide that security contractors are precluded from pursuing suspects, prohibit security contractors from using their vehicle in an attempt to apprehend any suspects, and only allow the patrol vehicle to leave Wal-Mart property for obtaining gas or maintenance for the vehicle. Additionally, the Investigation and Detention of Shoplifters Policy provides employees themselves are, at all times, prohibited from pursuing a fleeing suspect more than approximately 10 feet both inside and outside the facility, pursuing a suspect who is in a moving vehicle, pursuing a suspect off Wal-Mart's property, and using a moving vehicle to pursue a suspect. Further, employees are directed to terminate the pursuit of a suspect if the suspect begins to enter a vehicle. There is evidence from which a jury could reasonably conclude that Wal-Mart employees directed Jones, on more than one occasion, to obtain Hancock's tag number, that they did so while observing Jones pursue Beckham and Hancock in his patrol vehicle, and they observed the reckless driving of Hancock and Jones in the parking lot, *yet they continued to instruct Jones to obtain the tag number after Jones warned, not just that the women were leaving the parking lot, but that he and the women were leaving the parking lot.* Thus, there is evidence from which a jury could reasonably conclude that Wal-Mart employees acquiesced in, and possibly instructed, Jones' improper pursuit of the women in violation of the Private Security Contractors guidelines. Additionally, as noted by Roddey's expert witness, Gross, there is evidence from which a jury could find Wal-Mart employees instructed Jones to do something their policy strictly prohibited the employees themselves from doing. Accordingly, there is sufficient evidence of Wal-Mart's negligence such that the matter was a question for the jury.

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[9] In particular, we note the guidelines provide the security contractor may act as a witness, and is allowed to assist when directed to do so by a member of Wal-Mart management or Loss Prevention.

2. Proximate Cause

In order to prove proximate cause, a plaintiff is required to show both causation in fact and legal cause. *Madison*, 371 S.C. at 146, 638 S.E.2d at 662. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence, while legal cause is proved by establishing foreseeability. *Id.* at 147, 638 S.E.2d at 662. "Foreseeability is determined by looking to the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable." *Id.* Further, "[t]he defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." *Id.*

> Instead, it is sufficient if the evidence establishes that the defendant's negligence is a concurring or a contributing proximate cause. Concurring causes operate contemporaneously to produce the injury, so that it would not have happened in the absence of either. In other words, if the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability.

J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (citations, quotations, and emphasis in original omitted). An injury is considered foreseeable "if it is the natural and probable consequence of a breach of duty." *Hurd v. Williamsburg Cnty.*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005).

A primary wrongdoer's action "is a legal cause of an injury if either the intervening act or the injury itself was foreseeable as a natural and probable consequence of that action." *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 73, 393 S.E.2d 914, 917 (1990). Though an intervening force may be a superseding cause that relieves an actor from liability, in order for there to be relief from liability on this basis, that intervening cause must be one that could not have been reasonably foreseen or anticipated. *Rife v. Hitachi Const. Mach. Co., Ltd.*, 363 S.C. 209, 217,

609 S.E.2d 565, 569 (Ct. App. 2005). "For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995). "The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). The test for determining if the negligent conduct of the original wrongdoer is to be insulated, as a matter of law, "by the independent negligent conduct of another is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in light of the attendant circumstances." *Id.* One is not charged with foreseeing that which is unpredictable or which could not be expected to happen, and, thus, when it appears the negligence merely "brought about a condition of affairs, or a situation in which another and *entirely independent and efficient agency* intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Stone v. Bethea*, 251 S.C. 157, 161-62, 161 S.E.2d 171, 173 (1968) (emphasis added). The final result of a wrongful act, as well as every intermediate cause, will be considered to be the proximate result of the first wrongful cause if intervening acts are set in motion by the original wrongful act and are normal and foreseeable results of the original act. *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 521, 389 S.E.2d 155, 157 (Ct. App. 1989).

Here, there was evidence presented that, despite Wal-Mart's knowledge of the aggressive and reckless driving manners of Hancock and Jones and in spite of being advised both vehicles were leaving the property, Wal-Mart continued to instruct Jones to obtain the tag number. Notably, Roddey's expert witness in the area of pursuit, Albert, testified concerning the effects of vehicular pursuit on those being pursued, and specifically opined that had Jones stayed in the parking lot and not pursued Hancock's vehicle, it was highly unlikely the crash would have taken place. Thus, there is evidence that "but for" these actions by Wal-Mart, the accident would not have occurred.

With respect to foreseeability, there was evidence presented that the accident was a foreseeable consequence of Wal-Mart's instructions to Jones, which were in violation of Wal-Mart's established policies and guidelines, such that the matter should have been submitted to the jury. As noted, there was evidence presented

that (1) Wal-Mart gave Jones instructions causing him to drive through the Wal-Mart parking lot after Beckham, who then got into a moving vehicle, and Jones then pursued Hancock's moving vehicle in his patrol car, (2) Wal-Mart employees directed Jones, on more than one occasion, to obtain Hancock's tag number, while observing Jones pursue Beckham and Hancock in his patrol vehicle, with both vehicles being operated in aggressive and/or reckless manners, and (3) Wal-Mart continued to instruct Jones to get the tag number even after Jones informed them that he and the women were leaving the parking lot, thus encouraging a vehicular pursuit on the public street. Additionally, Wal-Mart's Shoplifters Policy specifically indicates that only certain authorized associates are allowed to investigate or detain a suspected shoplifter and may do so only in the presence of another associate, and their policy emphasizes and reiterates that the authorized associate must let the suspect go rather than continue a pursuit that is "likely to injure or cause harm to someone." Additionally, Roddey provided evidence, through expert testimony, that Wal-Mart had identified the results of "doing certain things," knew what could happen in such a situation, and as a result, adopted policies against them. Accordingly, there is evidence that the accident was a natural and probable consequence of Wal-Mart's negligent actions and therefore was reasonably foreseeable.

Additionally, I do not believe, considered in a light most favorable to Roddey, that as a matter of law Jones' actions were independent intervening acts which could not have been foreseen by Wal-Mart, or that Wal-Mart's acts were only a remote cause that did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, as there is evidence from which a jury could reasonably conclude Jones' acts were not "an entirely independent and efficient agency" and were not "a distinct, successive, unrelated and efficient cause of the injury." *See Stone*, 251 at 162, 161 S.E.2d at 173 (noting, when it appears one's negligence merely brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause); *Driggers v. City of Florence*, 190 S.C. 309, 313, 2 S.E.2d 790, 791 (1939) ("A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury, even though such injury would not have happened

but for such condition or occasion."). Clearly, there is evidence that any intervening acts of Jones were set in motion by the original wrongful acts of Wal-Mart and were the normal and foreseeable results of the original act. *Wallace*, 300 S.C. at 521, 389 S.E.2d at 157

Jury finding as to Hancock's negligence

As to Chief Judge Few's majority opinion, I do not believe that Wal-Mart's liability in this matter is strictly derivative of Jones' and/or USSA's liability such that the jury's finding that Jones was only 35% at fault foreclosed any additional liability on the part of Wal-Mart. While this may very well be true in regard to allegations of vicarious liability, as noted by Chief Judge Few, Roddey also alleged Wal-Mart was liable based upon its failure to properly supervise Jones, and Wal-Mart's improper advice or instruction to Jones to follow Hancock and obtain her license tag information. Thus, while a jury could very well find Hancock was still 65% negligent after considering Wal-Mart's potential liability, it could conceivably find, after factoring in any negligence by Wal-Mart, that Hancock was less than 50% at fault. I believe this is a question for the jury, and do not believe this court should invade such province of the jury. Accordingly, I would reverse the directed verdict in favor of Wal-Mart and remand for a new trial as to Wal-Mart alone.[10]

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[10] As to Roddey's assertion on appeal that the trial court's error in granting Wal-Mart a directed verdict requires a new trial as to all of the respondents, I would find Roddey has abandoned this issue on appeal and, additionally, we need not consider the argument based on Roddey's failure to set forth the argument in his statement of the issues on appeal. Though he cites law concerning the effect of a jury finding of comparative negligence on a plaintiff's ultimate ability to collect damages, he provides no supporting authority for his assertion that a court may require a new trial against defendants against whom a verdict has already been found and who are not then held responsible for damages based upon the jury's finding as to the relative percentages of negligence assigned to the various parties. Because Roddey fails to cite law that would allow this court to grant a new trial against a defendant who has not received any type of favorable ruling that was in error, I believe the argument is abandoned. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort,

conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."). Additionally, Roddey failed to set forth the argument in his statement of the issues on appeal. Therefore, the court need not consider it. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").