OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3

January 17, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Douglas E. Brafford, Respondent.

Opinion No. 26098
Submitted December 5, 2005 - Filed January 17, 2006

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

Douglas E. Brafford, pro se, of Charlotte, North Carolina.

PER CURIAM: In 1997, respondent was convicted of one count of conspiracy to operate an illegal gambling organization in violation of 18 U.S.C. § 371 and one count of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(1). By order dated January 16, 1998, he was disbarred from the North Carolina Bar.

Pursuant to Rule 29, RLDE, Rule 413, SCACR, the Office of Disciplinary Counsel (ODC) and respondent were asked to inform the Court as to any reason why the Court should not impose the same discipline as imposed in North Carolina. See Rule 29(d), RLDE, Rule

413, SCACR.[1] Both ODC and respondent stated they knew of no grounds upon which to oppose the imposition of identical discipline.

CONCLUSION

We hereby disbar respondent from the practice of law in this state. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DISBARRED.

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

[1] As a result of information submitted by respondent, the Court initially issued an order transferring respondent to incapacity inactive status and the matter to the Commission on Lawyer Conduct (Commission) to determine respondent's ability to assist in his own defense. See Rule 28(d), RLDE, Rule 413, SCACR. The Court has now determined that respondent is capable of assisting in his own defense, and, consequently, transfers respondent to active status and hereby proceeds with the imposition of reciprocal discipline.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeffrey J. Weston, Appellant.

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

Opinion No. 26099
Heard November 3, 2005 – Filed January 17, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, Senior Assistant Attorney General William Edgar Salter, III, and Solicitor Warren Blair Giese, of Columbia, for Respondent.

JUSTICE WALLER: Appellant, Jeffrey Weston, was convicted of murdering his mother, whose body was never found. He was sentenced to forty years in prison. We affirm.

FACTS

In late 1997, at age 38, Weston went to live with his mother, Frances Franchey, at her Harbison apartment. Franchey, in her late seventies, was a retired educator. According to Franchey's friends, during the months Weston lived with her, she became "very depressed, down, sad, agitated, nervous, very upset." The manager of the apartment complex testified that Franchey did not want Weston to live with her and was terrified of him. Shortly before her disappearance, Franchey talked about having Weston move out of her apartment. On Tuesday, August 4, 1998, Franchey told her bridge partner, Suzanne Allen, she was going to ask Weston to leave.

Franchey was last seen alive on August 6, 1998. That same day, Mark Jordan, the maintenance supervisor for the apartment complex, noticed that the trunk to Mrs. Franchey's car was open, and was lined with clear plastic.[1] Jordan testified he had never seen Weston driving Franchey's vehicle prior to her disappearance, but that Weston was driving it on Monday, August 10th.[2] Jordan also testified that Franchey did not want bumper stickers on her car but that, shortly after her disappearance, a new bumper sticker appeared on the car which read, "My kid beat up your honor roll student."

Randy Myers, a resident of the apartment complex, testified that, at 4:30 a.m. on Saturday, August 8th, he saw Weston loading garbage bags into the trunk of Franchey's car. The same day, Leslie Fuller, the apartment complex manager, received a phone call from a concerned friend of Franchey. Fuller went to check on Franchey and, receiving no answer, she went around back to the patio where she saw that all of Franchey's plants were turned over, and there was an empty bleach bottle on the porch. The next day, Fuller called Kathy Jarvis, a Richland County sheriff's deputy who lived at the complex and worked as its courtesy officer. Fuller and Jarvis went to the apartment and found Weston home. They saw Franchey's purse and glasses on her bed and were told by Weston that Franchey had "met

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[1] There was also testimony that Weston called in sick from his job at Target on Thurs. and Friday, August 6th and 7th, telling his supervisor he had a stomach virus.

[2] Weston's sister, Toni Franchey, testified that her mother did not allow him to drive the car as he did not have a driver's license.

some man and run off with him" leaving him a note on the coffee table.[3] According to Fuller, Weston came into her office a day or two later, very disheveled, sweating profusely, his eyes huge, and stated, "I was really angry with my mother and now I'm just scared."

On Monday, August 10th, Kathy Jarvis filed a missing person's report. The same day, a Richland County sheriff's deputy, Michael Kalec, went to the apartment and spoke with Weston. At that time, Kalec noticed there was no curtain in Franchey's bathroom. Weston advised Kalec that his mother's purse and keys were missing. Kathy Jarvis went to the apartment with police investigators on August 12th and noticed Franchey's purse was on the bed; she also noticed a brand new shower curtain was hanging in Franchey's bathroom.

The sheriff's department continued its investigation throughout the month of August. On September 4th, they returned to the apartment, which Weston had since vacated, and saw that the linoleum in the kitchen had been torn out, as well as a piece of the living room carpet. An area rug was covering the hole in the carpet.[4] It was not torn out by either the sheriff's department or apartment complex personnel. Police tested the floor where the linoleum had been removed and found blood; blood was also found on drag marks leading from the hole in the carpet. Investigators subsequently tested a piece of blood-stained molding from the apartment; the blood on the molding was Franchey's.

On August 9, 2000, Weston was indicted for the murder of his mother; he was apprehended in Seattle, Washington in October 2000. The defense put up no evidence at trial. The jury found Weston guilty, and he was sentenced to forty years imprisonment.

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[3] No other witness had ever seen Franchey in the company of a boyfriend.

[4] Weston had purchased a shower curtain and an area rug from his job at Target during the week of August 10-14th.

ISSUES

1. Did the court err in allowing Suzanne Allen to testify as to the change in Franchey's demeanor after Weston came to live with her, and in allowing Franchey's daughter to testify as to her mother's fear of Weston?

2. Did the court err in allowing the solicitor to question the apartment manager, Fuller, as to whether anyone other than Weston had any animosity toward Franchey?

3. Did the court err in allowing a police officer to testify that, other than Weston, she had never had anybody blankly stare at her and not respond to her questions?

4. Did the court err in allowing testimony to the effect that Weston stated, "I need a lawyer" upon finding a search warrant the police had left inside his storage unit?

5. Did the court err in refusing to grant a directed verdict of acquittal to the charge of murder since the evidence raised only a suspicion of his guilt?

1. TESTIMONY RE FRANCHEY'S CHANGE OF DEMEANOR

Weston asserts the testimony of Suzanne Allen and Toni Franchey was improper under this Court's opinion in State v. Garcia and under Rule 803(3), SCRE. We disagree.

Suzanne Allen, a friend of Franchey, testified that, during the time period before Weston moved in with her, Franchey was a happy person, cheerful, and fun to be with. When the Solicitor asked Allen what was Franchey's state of mind concerning Weston, defense counsel's objection pursuant to State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999) was overruled. Allen testified "She was very unhappy." The colloquy continued as follows:

Q. She was unhappy?
A. Very unhappy.
Q. Had her demeanor changed as she lived with her son?
A. Oh, yes.

Q. That summer of 1998, had you given her any advice about her son?

A. Yes, I encouraged her to ask him to leave by maybe providing some funds for him to get a place of his own because she seemed so miserable having him live with her. . . .

. . . . . .

Q. Did you have a conversation with Ms. Franchey on that Tuesday?

A. Yes. . . .

Q. Did she tell you that she intended to do something?. . .

A. Yes. . . . she said, I'm finally going to ask him to leave, I want my home back.

Q. . . . Did you ever talk to her after that Tuesday, August the 4th?

A. No I did not.

Thereafter, the state called Weston's sister, Toni Franchey, from whom Weston had been estranged for many years. Toni Franchey was living in Australia at the time of her mother's disappearance, but had come to Columbia for a family reunion in the summer of 1997. She testified that "at that time, I discussed with the family the fact that I became aware that Jeff was planning to move in with my mother and I strongly opposed it. I was afraid." Toni Franchey went on to testify about her July 1998 visit at which time she advised her mother that she should find Weston alternate housing. The state queried as follows:

Q. During that two week period just before your mother's disappearance, what was her - - I need to be specific. What was her state of mind about Jeff?

Defense counsel: I object to that. That is not a proper state of mind question. Foundation is not proper and I submit it's hearsay.

The court: Overruled.

A. She was - - she seemed—she seemed more nervous and ---

Defense counsel objected that this was not within the Garcia exception. The court overruled the objection and Toni Franchey continued:

> She seemed much more nervous and anxious than normal. My mother is very vivacious, outgoing and loves to, you know, have a laugh and, you know, go out and get something to eat and she just seemed more anxious and just uncertain. I know that while we were doing the house we – she said, well, please don't touch anything in Jeff's room and we didn't because she was afraid.

Weston contends the testimony of Suzanne Allen and Toni Franchey was improper. We disagree.

In Garcia, the defendant was charged with the murder of his girlfriend. He admitted shooting her, but claimed it had been an accident.[5] At trial, Garcia objected to the testimony of two witnesses who testified that the decedent was scared of him. These witnesses were allowed to go further and state that the day before her death, the victim had told her grandmother that Garcia kicked her, causing a bruise below her knee, and that, a week before her death, Garcia had told the victim that if she ever left him, he would kill her. 331 S.C. at 73-74, 512 S.E.2d at 508.

We held, "the victim's state of mind - that she was scared of appellant - was relevant because it -tended to disprove appellant's contention the shooting was an accident; the victim's fear suggests appellant may have intended the shooting." Id. at 74, 512 S.E.2d at 608. We then went on to hold:

> Consequently, **while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not**. United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir.1980) ("But the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to

[5] As here, the defendant in Garcia offered no evidence at trial.

declarations of condition—'I'm scared'--and not belief—'I'm scared because [someone] threatened me'."

334 S.C. at 76, 512 S.E.2d at 508 (emphasis supplied).

We find the testimony in the present case was properly admitted under Garcia. The testimony in this case did not give a **reason** for Mrs. Franchey's fear. Rather, Toni Franchey and Suzanne Allen testified only that Mrs. Franchey was afraid of Weston. To read Garcia as Weston suggests would require us to hold that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid **of the defendant**. This is simply too constrained a reading of Garcia. We specifically held that "the victim's state of mind- - that she was scared of appellant- - was relevant. . ." 334 S.C. at 74, 512 S.E.2d at 508. Accordingly, the testimony here was clearly admissible under Garcia.

In any event, even had the testimony been improperly admitted, Weston simply cannot demonstrate reversible error. The improper admission of hearsay is reversible error only when the admission causes prejudice. State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied, 519 U.S. 1061 (1997) (error without prejudice does not warrant reversal); State v. Mizell, 332 S.C. 273, 504 S.E.2d 338 (Ct. App. 1998) (in order to obtain new trial based upon erroneous admission of evidence, appellant must demonstrate both error and prejudice).

Here, prior to the testimony of either Suzanne Allen or Toni Franchey, the assistant manager of the apartment complex, Leslie Fuller, testified. When asked what was Franchey's state of mind in reference to her son the weekend of August 7-9, 1998, Fuller testified, without objection, as follows:

A. Well, when I saw her she was – she was usually crying and wringing her hands and I would say depressed, anxious.
Q. And who was she depressed or anxious about when she would – Were you aware of who she was depressed or anxious about?
A. Yeah, she talked with me about it.

Q. And who was she depressed or anxious about?
A. About Jeff.
Q. And that would be her son?
A. Yes.
. . . . . .
Q. Did you give her any advice about her son?
A. We talked about - - about her having Jeff move out.

Similarly, Claudia Young, the manager for the apartment complex until July 30, 1998, testified as to her observations of Franchey's demeanor up until her son came to live with her. Concerning the week leading up to Franchey's disappearance, Young was questioned:

Q. And during that time period did you become aware of her state of mind leading up until when you left July the 30th?
A. Yes, I was.
Q. What was her state of mind in regard to the defendant?
A. She did not want him to live there. She was terrified.
Q. And she was terrified specifically of whom?
A. Her son.
Q. And did you ever witness her demonstrating or did she ever do anything in your presence that indicated that?
. . . . .
A. She cried.
. . . .
Q. What did you suggest she do?
A. I asked her to let me change the locks on her apartment.

Weston did not object to this testimony.[6]

Given the testimony of Fuller and Young, the testimony of Allen and Toni Franchey was merely cumulative such that Weston cannot demonstrate prejudice. State v. Craig, supra (improper admission of hearsay is reversible error only when the admission causes prejudice).

[6] Although Weston did object to the proper foundation, no further objection is contained in the record.

2. WESTON'S ANIMOSITY TOWARD HIS MOTHER

Weston next asserts error in the solicitor's question to Leslie Fuller as to whether or not Fuller knew of anyone else, other than Franchey's son, who had any animosity toward Mrs. Franchey, contending this injected the solicitor's personal opinion into the matter, and was not based upon the evidence. We disagree.

Contrary to Weston's contention, immediately prior to this question, the solicitor questioned Fuller as to Franchey's disappearance. Fuller testified she had gone to check on Franchey around 10:00 a.m. on the morning of August 8, 1998, and gotten no answer when she knocked at the door. She continued calling and left a message on Franchey's answering machine. The following morning, after several phone calls to Franchey's telephone, Fuller contacted the apartment security officer, Jarvis, and they went and did a walk-through of the apartment. She finally got in touch with Weston at about 4:40 that afternoon and he expressed no concern over his mother's disappearance, telling her "she met some man and she ran off with him. She left me a note on the coffee table." Fuller continued to testify:

A. I don't recall if it was Monday or Tuesday, but one of those days he came back into my office.

Q. And what was his demeanor when he entered your office that Monday or Tuesday?

A. He was very disheveled and he was sweating profusely. His eyes were huge. And he just stood over my desk and he said, to begin with, I was really angry with my mother, and now I'm just scared."

Contrary to Weston's assertion, the above testimony is some evidence of animosity upon which the solicitor properly based her question. Accordingly, we find the trial court properly overruled his objection.

3. WESTON'S RESPONSE TO KATHY JARVIS

Weston objects to the testimony of Kathy Jarvis, the Richland County sheriff's deputy who served as "courtesy officer" for the apartment complex, to the effect that, when questioned about his Mother's disappearance, Weston "wouldn't answer anything," was "totally unresponsive," and "did not seem concerned" about his mother.

Although Weston now complains Jarvis gave unqualified "expert" testimony, the only objection below was that Jarvis was giving her opinion. Accordingly, this issue is procedurally barred from review because it differs from the objection raised at trial. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (party may not argue one ground at trial and an alternate ground on appeal).

In any event, Jarvis was simply relaying her personal experience in law enforcement and the fact that she had not encountered anyone so unresponsive. We find no basis for objection. State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975) (witness may state his impression or inference with respect to the appearance of a person, animal, object, or place if he has had adequate opportunity for observation, the details of such appearance cannot be reproduced before the jury to enable them to draw a correct inference, and he states as much as possible of the constituent facts).

4. WESTON'S STATEMENT AT STORAGE UNIT

Weston moved out of his mother's apartment the weekend of August 21, 1998, and moved into an apartment on Confederate Avenue, owned by his friend, Francis Perna. Perna helped Weston move into the apartment, retrieving Weston's personal belongings both from the apartment in Harbison, and from a Public Storage Unit on Broad River Road. When they arrived at the storage unit, they found a search warrant. Weston read the search warrant and said, "I need a lawyer."

Weston asserts the trial court erred in allowing Perna to comment that he stated "I need a lawyer." He contends this was an improper comment on his right to an attorney and that, in any event, it was impermissible under Rule 403, SCRE, as its prejudice outweighed its probative value. We disagree and find Weston has not shown reversible error from admission of this single comment.

In Doyle v. Ohio, 426 U.S. 610 (1976), the United States Supreme Court held that the due process clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story, told for the first time at the trial, by cross-examining him about his post-arrest silence after receiving Miranda warnings. Doyle also prohibits the State from commenting upon the defendant's request for an attorney. See Wainwright v. Greenfield, 474 U.S. 284 (1986); Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). The rationale for Doyle is that it would be a violation of due process to allow comment on the silence which Miranda warnings have encouraged.

Subsequent to Doyle, in Fletcher v. Weir, 455 U.S. 603 (1982), the Supreme Court clarified that Doyle was applicable only in situations in which the government had induced, via Miranda warnings, a defendant's belief that his exercise of a constitutional right would not be used against him. 455 U.S. at 607 ("in the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post arrest silence when a defendant chooses to take the stand." See also State v. Bell, 347 S.C. 267, 554 S.E.2d 435 (Ct. App. 2001) (recognizing that Doyle is applicable only after Miranda warnings have been given).

Doyle is simply inapplicable here. Unlike Doyle, Weston was not under arrest at the time he told Perna that he needed a lawyer, nor had he been given Miranda warnings by authorities. Under Fletcher, it is clear Doyle is inapplicable to Weston's statement to his friend. Accord State v. Baccam, 476 N.W.2d 884, 886 (Iowa Ct.App.1991).

5. DIRECTED VERDICT

Lastly, Weston contends the trial court erred in denying his motion for a directed verdict, claiming the state failed to prove the corpus delicti of a murder and that there was no evidence he caused Mrs. Franchey's death. We disagree and find the matter was properly submitted to the jury.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). See also State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002); State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272-73 (1990).

In a murder case, the corpus delicti consists of two elements: the death of a human being, and the criminal act of another in causing that death. State v. Martin, 47 S.C. 67, 25 S.E. 113 (1896). In State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987), this Court held that the circumstantial evidence surrounding the victim's sudden disappearance, considered with the unlikelihood of his voluntary departure as shown by his personal habits and relationships, was sufficient to establish the corpus delicti of murder or that the victim is dead by the criminal act of another. See State v. Speights, 263 S.C. 127, 208 S.E.2d 43 (1974). See also State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996).

Here, the state presented evidence that Mrs. Franchey had an active social life, was active with friends, at bridge club, and regularly kept in touch with the apartment complex managers, her sister, and her friends. She was last seen on August 6, 1998, via a bank video camera, making a withdrawal

from her bank account. She has not been seen nor heard from since. Under Owens, the state's presentation of the victim's habits, coupled with her mysterious disappearance, and the fact that she has not been seen nor heard from since August 1998, are sufficient to establish the corpus delicti of murder.

Further, the evidence presented by the state warranted submission of the case to the jury. Evidence was presented that Weston had gone to live with his mother in the fall of 1997, and that she became very upset and was depressed Weston was living with her. Friends and family advised Franchey to either change the locks, eject Weston, or find him another place to live. Two days before her disappearance, Franchey told a friend she had decided to tell Weston to leave. She was last seen alive on August 6, 1998. The same day, the maintenance supervisor of the apartment complex noticed that the trunk to Mrs. Franchey's vehicle was open, and was lined with clear plastic. The maintenance supervisor also testified that Franchey, a retired educator, did not have any bumper stickers on her car but that, immediately after she disappeared, a sticker which read "My kid beat up your honor roll student" was on the car. The apartment manager testified that when she went to the apartment on Aug. 8th, the shower curtain in Franchey's bathroom was missing.

Randy Myers, an apartment complex resident, testified that at 4:30 a.m. on Saturday, August 8th, he saw Weston loading garbage bags into the trunk of Franchey's car. Several people also testified that they had never seen Weston drive Franchey's car before, Weston did not have a driver's license, and that immediately after Franchey disappeared, Weston was driving her car.

The apartment complex manager testified that, when she went to check on Franchey, she saw that Franchey's plants on her back patio were turned over, and there was an empty bleach bottle on the porch. When initially confronted by the apartment complex manager and Officer Jarvis, Weston told them his mother had "met some man and run off with him" leaving him a note on the coffee table. No other witness had any knowledge of an alleged boyfriend. Further, although the apartment complex manager and Jarvis

remembered seeing Franchey's purse and glasses on her bed in the apartment on August 8th, Weston told police that his mother's purse was missing. The apartment complex manager also testified that Weston came into her office a day or two later, very disheveled, sweating profusely, his eyes huge, and stated, "I was really angry with my mother and now I'm just scared."

Immediately after Franchey's disappearance, Weston called in sick to his job at Target for two days, saying he had a virus. He returned to work on Monday, August 10th, and was seen by employees to have a limp, a bruise under his eye, and scratches on his arms. He told his supervisor his cat had scratched him. He told another co-worker he had stepped off a curb and fallen into some bushes. When Jarvis and the apartment manager spoke to Weston at Franchey's apartment, Weston was wearing a heavy black jacket on a hot August day such that his arms were not visible. When Weston went back to work at Target, he bought a new shower curtain, and a rug. When police investigated the apartment, they found an area rug covering a hole in the carpet of the living room floor. Linoleum in the kitchen floor had also been torn up and was missing. Police tested the floor where the linoleum had been removed and found blood; blood was also found on drag marks leading from the hole in the carpet. Investigators subsequently tested a piece of blood-stained molding from the apartment which was determined to be was Franchey's. Blood was also found on the rubber ring that lined the trunk of Franchey's car.

The above evidence, although circumstantial, is clearly sufficient to withstand a motion for a directed verdict. The judgment below is affirmed.

AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, J.J., and Acting Justice Stephen S. Bartlett concur.

The Supreme Court of South Carolina

In the Matter of Robert
Edward Hemingway, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b) and (c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Warren R. Herndon, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Herndon shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Herndon may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Warren R. Herndon, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Warren R. Herndon, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Herndon's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/Jean H. Toal
FOR THE COURT

Columbia, South Carolina

January 10, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elwood Porter Tomlinson and
Frances Goins Tomlinson, Respondents,

v.

Kenneth B. Mixon, d/b/a
Pavillion Custom Homes, and
All American Homes of NC,
LLC, Defendants,

Of Whom All American Homes
of NC, LLC is Appellant.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4070
Heard November 7, 2005 – Filed January 9, 2006

REVERSED AND REMANDED

Robert W. Buffington, of Columbia, for Appellant.

Eric S. Bland, of Columbia and Ronald L. Richter, Jr., of Charleston, for Respondent.

GOOLSBY, J.: This case involves claims for negligent misrepresentation and breach of contract. The appellant, All American Homes of NC, LLC, a manufacturer of modular houses, contends the trial court erred in not requiring the respondents, Elwood and Frances Tomlinson, to elect their remedy after the jury returned a verdict in their favor on each claim. We reverse and remand.

The Tomlinsons decided to build a home on Lake Wateree and contacted defendant Kenneth B. Mixon, doing business as Pavillion Custom Homes. Mixon held himself out as an All American authorized dealer. An All American business card also identified him as such.

The Tomlinsons later visited the All American factory in North Carolina where they met with David Bridges, a regional sales manager and corporate representative of All American, and reviewed building plans. Before the Tomlinsons left, they asked Bridges whether Mixon was an authorized dealer. Bridges assured them he was. Bridges also told the Tomlinsons All American had checked Mixon out and All American would "stand behind him." The Tomlinsons then contracted to purchase the All American home through Mixon.

After Mixon started construction, All American terminated its relationship with Mixon and never delivered the home to the building site. Calls by the Tomlinsons to All American went unanswered. All the while, the Tomlinsons, in reliance upon the contract, incurred various costs and expenses. They were also threatened with liens against their property.

When the Tomlinsons finally reached Bridges, he told them All American had dismissed Mixon as a builder and it would not build the home that the Tomlinsons had contracted to purchase.

This suit followed with the Tomlinsons alleging, among other things, that they had entered into a contract with All American for the construction of the house in question.

The trial judge advised in her charge to the jury that it was "to consider each [cause of action] as if the others don't exist," that "there is only one recovery for the wrong," and that "at some particular point there will be a mechanism by which to make the appropriate award to the plaintiff[s]." She expressly instructed the jury that it was not to add any damages awarded on multiple claims "in order to provide recovery to the plaintiff[s]."

In a special interrogatory, the jury found Mixon to be All American's agent. The jury returned a verdict in the amount of $46,149.00 on the Tomlinsons' breach of contract claim and $73,416.67 on their negligent misrepresentation claim.[1] The trial judge later denied a motion by All American to require the Tomlinsons to elect the remedy upon which they wanted to recover. She then entered judgment on both claims, allowing the Tomlinsons to recover total damages in the amount of $119,565.67.

We hold the trial judge erred in not requiring the election that All American sought.

In Save Charleston Foundation v. Murray,[2] this court said the following about the doctrine of election of remedies:

> The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73 (1945); Walker v. McDonald, 136 S.C. 231, 134 S.E. 222 (1926); Boardman v. Lovett Enterprises, Inc., 283 S.C. 425, 323 S.E.2d 784 (Ct. App. 1984). Its purpose is to prevent

[1] Although the jury's verdict for the breach of contract claim is $46,149.00 on the verdict form, slightly different amounts are contained in the record and in one of the briefs, but these discrepancies appear to be mere scrivener's errors.

[2] 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985).

> double redress for a single wrong. 25 Am. Jur. 2d Election of Remedies Section 1 at 646 (1966). Application of the doctrine should be confined to cases where double compensation of the plaintiff is threatened. Id. Section 3 at 650. When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both. Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983). "This rule rests on the principle that the plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery." Id. at 473, 309 S.E.2d at 766.[3]

For the doctrine of election of remedies to apply, therefore, two or more remedies must be available to the complaining party at the time of the election and these remedies must be inconsistent.[4] An inconsistency exists where, if an election is not made, a party will receive a double recovery.[5]

Here, the Tomlinsons recovered damages on claims of breach of contract and negligent misrepresentation. These recoveries rest on the same set of facts, viz., that All American represented its dealer Mixon to be its agent;[6] that the Tomlinsons contracted with All American

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[3] Id. at 175-76, 333 S.E.2d at 63-64.

[4] 25 Am. Jur. 2d Election of Remedies § 16, at 776 (1996).

[5] Id. § 17, at 777-78.

[6] During argument on the motion for a directed verdict, counsel for the Tomlinsons appeared to recognize that the question of whether Mixon was All American's agent served as the underpinning of its causes of action for breach of contract and negligent misrepresentation. After counsel pointed to Bridges's statement that All American would "stand behind Mixon and his work," counsel said in reference to that

through its dealer and agent Mixon to manufacture a modular house and have it delivered to and constructed upon the Tomlinsons' property on Lake Wateree; that All American failed to perform when it refused to deliver the house to the building site and complete the construction started by its agent, notwithstanding All American represented it would stand behind him; and that the Tomlinsons suffered damages as a consequence.

To avoid a double recovery, the Tomlinsons, therefore, should elect on remand which one of the two claims they wish to recover their damages upon.[7]

REVERSED and REMANDED.

SHORT, J., concurs. ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. I disagree with the reasoning and analysis of the majority. The holding of the majority misconstrues and misapplies the law extant in regard to the doctrine of election of remedies. I **VOTE** to **AFFIRM** the jury verdicts.

The jury rendered verdicts for Elwood Porter Tomlinson and Frances Goins Tomlinson (the Tomlinsons) against All American

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statement: "That's the basis of [the] negligent misrepresentation claim. It's also the basis of the contract claim, because they say we will stand behind his work. We make a promise."

[7] See Brown v. Felkel, 320 S.C. 292, 465 S.E.2d 93 (Ct. App. 1995) (holding the doctrine of election of remedies barred a plaintiff's claim against his accountant for the negligent promotion of his investments in, and loans to, another where the plaintiff earlier recovered from the accountant actual damages sustained as a result of the accountant making these investments and loans in an action premised on breach of contract).

Homes of NC, LLC (All American) on a breach of contract claim in the amount of $46,146.00 and a negligent misrepresentation claim in the amount of $73,416.67. All American contends the trial court erred as a matter of law in failing to require an election of remedies. I disagree.

FACTUAL/PROCEDURAL BACKGROUND

The Tomlinsons, who reside in Charlotte, North Carolina, planned to build their retirement home on a lot near Lake Wateree, South Carolina. In early 2001, the Tomlinsons contacted Kenneth Mixon, who worked as a manufactured home dealer, about a Cape Cod style home. Mixon told the Tomlinsons about All American Homes, a manufacturer of pre-built, modular homes which are sold to authorized builders/dealers, who in turn sell them to the end customer. The houses are made of wood, in sections, delivered to the sites and placed on foundations. The customer must purchase a home through a dealer.

Mixon suggested the Tomlinsons go to the company's factory. A meeting was scheduled. The Tomlinsons met with David Bridges, the regional sales manager for All American. Mixon promised to meet them there, but he did not attend due to car trouble. At the meeting, All American approved proposed changes for the home and gave the Tomlinsons assurances concerning Mixon. All American assured the Tomlinsons that Mixon had been checked out, he was an All American dealer in good standing, and Bridges would "stand behind him." Bridges does not recall any discussions regarding Mixon. However, the Tomlinsons declared that Bridges' assurances concerning Mixon affected their decision to proceed with the transaction.

The Tomlinsons appeared to have entered into a contract with Mixon on or about March 9, 2001, even though the meeting did not occur until later and Mixon had not yet been approved as a dealer for All American. The Tomlinsons issued a check made payable to Pavillion Homes in the amount of $10,000 dated March 9, 2001. The Authorized Builder Application of Mixon is dated April 23, 2001. Bridges believed the meeting occurred after May 18, 2001.

The assurances the Tomlinsons received at the meeting with All American only affected their going forward with building and not the entering into the contract itself. Although unsigned by Mixon, the written agreement lists a pre-tax purchase price of $176,694. The house model listed on the contract between the Tomlinsons and Mixon was not a Cape Cod style house, but rather a "Salt Box RSO." This model was sold by Mixon's former company, Virginia Homes, but not by All American.

The Tomlinsons obtained construction financing and work began on their house. On August 15, 2001, All American agreed to sell the house to Mixon for $109,700.97 and received a $1,000 deposit from Mixon. When construction slowed, the Tomlinsons tried to reach Mixon repeatedly. The Tomlinsons confronted Mixon at his house and were told that someone else would finish the house. All American had not initiated construction on the house because Mixon had not returned the required confirmation package, which consisted of a builder-approved floor plan and order contract.

On September 18, 2001, All American terminated Mixon as an authorized builder/dealer. The Tomlinsons were not informed of Mixon's proposed termination and continued with the building of their house. Mr. Tomlinson stated that if All American Homes had informed him of Mixon's termination when it happened, he would have "immediately" stopped the work that was being done on the site and the damages would have been limited at that point to $12,000. According to Mrs. Tomlinson, "a lot of expense" would have been saved. Prior to learning that Mixon was no longer a dealer with All American, the Tomlinsons withdrew approximately $32,000 on the construction loan. That loan was refinanced, and other costs – storage, marina rental, utilities at the site – also accrued, for damages of approximately $60,000.

In April 2002, the Tomlinsons filed a complaint against Mixon d/b/a Pavillion Custom Homes and All American Homes of North Carolina, LLC, alleging breach of contract, third party beneficiary contract rights, breach of contract accompanied by a fraudulent act,

constructive trust, constructive fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. The Tomlinsons presented damages in excess of $130,000.

Following a default by Mixon, the case was tried against All American before a jury. Only three claims remained at the close of trial: breach of contract, breach of contract accompanied by a fraudulent act, and negligent misrepresentation. In response to a special interrogatory, the jury found Mixon was an agent of All American. The jury returned verdicts in favor of the Tomlinsons on the breach of contract claim, awarding $46,146.00, and the negligent misrepresentation claim, awarding $73,416.67. On June 18, 2003, the trial court ordered post-trial motions and plaintiff's election of remedies to be filed within ten days. The Tomlinsons objected to an election. The trial court ruled no election was required.

LAW/ANALYSIS

I. The Doctrine of Election of Remedies

All American contends the trial court erred in denying its post-trial motion requesting an election of remedies. I disagree.

The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73 (1945); Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999); Brown v. Felkel, 320 S.C. 292, 465 S.E.2d 93 (Ct. App. 1995); Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995); Inman v. Imperial Chrysler-Plymouth, Inc., 303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990); see also Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (noting that election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action). Election of remedies is the

act of choosing between different remedies allowed by law on the same set of facts. Taylor, 324 S.C. at 218, 479 S.E.2d at 44-45; Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986).

The basic purpose behind the election of remedies doctrine is the principle that there can be no double recovery for a single wrong. Brown, 320 S.C. at 294, 465 S.E.2d at 95; Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E.2d 112 (Ct. App. 1994); see also Cowart, 337 S.C. at 364, 523 S.E.2d at 185 (purpose of doctrine of election of remedies is to prevent double redress for a single wrong). Use of the doctrine is limited to cases in which a double recovery by the plaintiff is threatened. Adams v. Grant, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1986); Save Charleston Found. v. Murray, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985).

When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both. Save Charleston Found., 286 S.C. at 176, 333 S.E.2d at 64; Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983). However, the plaintiff may not recover both. Id.

A defendant may raise the issue of election of remedies at any stage of the case. Cowart, 337 S.C. at 364, 523 S.E.2d at 185. Indeed, to carry out the doctrine's purpose, the trial judge should sua sponte require election if he lets both causes of action go to the jury. Id.; Brown, 320 S.C. at 294, 465 S.E.2d at 95. To hold otherwise would result in an impermissible double recovery. Adamson v. Marianne Fabrics, Inc., 301 S.C. 204, 391 S.E.2d 249 (1990); Inman, 303 S.C. at 15, 397 S.E.2d at 777.

Election of remedies is not applicable where there are two separate causes of action, each based on different facts. Taylor v. Medenica, 324 S.C. at 218, 479 S.E.2d at 45; Jones, 318 S.C. at 175, 456 S.E.2d at 432; Robert Harmon and Bore, Inc. v. Jenkins, 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984). When applying the doctrine of election of remedies, courts examine the underlying facts in the causes of action and determine if different conduct supports distinct injuries.

See Taylor, 324 S.C. at 218, 479 S.E.2d at 45; Creach v. Sara Lee Corp., 331 S.C. 461, 502 S.E.2d 923 (Ct. App. 1998); Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995).

In order to decide if the doctrine of election of remedies is applicable to the facts of the instant case, and because the application of the doctrine depends heavily on the specific facts of a case, I analyze prior precedent concerning election of remedies**.**

In Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995), our court summarized the principles of election of remedies. Jones brought an action against Winn-Dixie alleging slander, outrage, false imprisonment, and assault and battery after she had been forcibly detained at the store as a suspected shoplifter. Id. at 174, 456 S.E.2d at 431. The jury returned verdicts in the same amounts on the false imprisonment and assault and battery causes of action. Id. The trial court eliminated one of the awards under election of remedies, reasoning that the failure to do so would result in double recovery because Jones had essentially suffered one wrong. Id. In reversing that decision, this court explained:

> The doctrine of election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same causes of action. Stated another way, election of remedies is the act of choosing between different remedies allowed by law on the same set of facts. Its purpose is to prevent double redress for a single wrong. Where a party has asserted only one primary wrong, he is entitled to only one recovery. However, the principle has no application where two separate causes of action, each based on different facts, exist.

Jones, 318 S.C. at 175, 456 S.E.2d at 432. The court focused on the distinct elements of the differing causes of action in finding that "distinctive injuries occurred at different times," thus supporting each separate award against Winn-Dixie. Id.

Our Supreme Court, in Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996), cited Jones in concluding the trial court erred in forcing an election of remedies. Taylor brought suit for medical malpractice, complaining about the manner in which Dr. Medenica had handled the treatment of Taylor's breast cancer. As a result of Dr. Medenica's actions, Taylor was ineligible for alternative forms of chemotherapy. At the time of trial, it was uncontested that her condition was terminal. Id. at 210, 479 S.E.2d at 40. Taylor sought to recover under negligence and unfair trade practices. Id. The jury returned substantial awards on both causes of action. Id. at 219, 479 S.E.2d at 45. The court enunciated that an election of remedies was not proper. The court observed that the negligence cause of action was based on the provision of "reckless medical care," while the Unfair Trade Practices Act claim was premised on billing for useless and unnecessary tests. The court recognized that, because different conduct supports the UTPA and negligence claims, no election was required. Id.

Creach v. Sara Lee Corporation, 331 S.C. 461, 502 S.E.2d 923 (Ct. App. 1998), is analogous to the case at hand. Creach involved an action for negligence, breach of warranty, and strict liability for injuries suffered when Creach bit into a biscuit that contained a hard substance that injured her tooth. Id. at 463, 502 S.E.2d at 924. The jury found for Creach on all three causes of action and returned a verdict of $60,000 against Sara Lee. Id. The defense argued the verdict represented triple recovery and moved that the verdict be reformed. The court confirmed no election was required because only one recovery was sought and only one recovery was awarded. Id. The court of appeals expressed its imprimatur with the jury charge by the trial court. The trial court instructed the jury: "Creach was not entitled to multiple redress for a single wrong." Id. at 464, 502 S.E.2d at 924.

The first inquiry in an election of remedies case is whether the causes of action involved different elements of proof, speak to facts occurring at different points in time, and are not simply two ways of describing a single wrong. See Taylor, 324 S.C. at 218, 479 S.E.2d at

45; Creach, 331 S.C. at 464, 502 S.E.2d at 924; Jones, 318 S.C. at 175, 456 S.E.2d at 432. Here, All American contends the Tomlinsons should elect between the remedies for breach of contract and negligent misrepresentation. One cause of action, based in tort, addresses the circumstances and representations made prior to and after entering into the contract. The other cause of action is in contract and applies to the failure to perform.

II. Breach of Contract

The first remedy sought concerns breach of contract. A binding, valid contract must exist for there to be a cause of action for breach of contract. See Tidewater Supply Co. v. Industrial Elec. Co., 253 S.C. 483, 171 S.E.2d 607 (1969); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).

In order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement. Davis v. Greenwood Sch. Dist. 50, __S.C.__, 620 S.E.2d 65 (2005); Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989); see also Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) ("It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms."). The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. Player, 299 S.C. at 105, 382 S.E.2d at 894. "A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984).

A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 516 S.E.2d 923

(1999); Gaskins v. Blue Cross-Blue Shield of South Carolina, 271 S.C. 101, 245 S.E.2d 598 (1978); Regions Bank, 354 S.C. at 661, 582 S.E.2d at 439. These principles govern contract formation generally and specifically control the creation of a contract. Hodge v. National Fidelity Ins. Co., 221 S.C. 33, 68 S.E.2d 636 (1952).

The necessary elements of a contract are offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 581 S.E.2d 161 (2003); Armstrong v. Collins, Op. No. 4028 (S.C. Ct. App. filed Oct. 3, 2005) (Shearouse Adv. Sh. No. 38 at 41); see also Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975) (stating for a contract to arise there must be an agreement between two or more parties and an offer, acceptance, and meeting of the minds of the parties involved).

A contract may give a right to demand performance, but no cause of action arises until a party refuses or neglects to perform some duty required by the terms of the contract. See Tillinghast v. Boston & Port Royal Lumber Co., 39 S.C. 484, 18 S.E. 120 (1893), overruled on other grounds by Hendrix v. Hendrix, 296 S.C. 200, 371 S.E.2d 528 (1988). Thus, a contract cannot give rise to a cause of action until there has been some breach of such contract. Id. A breach of contract is defined as a failure without legal excuse to perform any promise which forms the whole or part of a contract. See Black's Law Dictionary 188 (6th ed. 1990). A party breaches a contract when he does not perform as he agreed to perform under the contract. A party's contractual duty is found in the obligation assumed by the party to the contract. Sechrest v. Forest Furniture Co., 141 S.E.2d 292 (N.C. 1965). A party's failure to comply with the contractual duty constitutes the breach. Id. Nonperformance of a valid contract is a breach thereof.

To recover for a breach of contract, the plaintiff must prove:

(1) a binding contract entered into by the parties;

(2) a breach or unjustifiable failure to perform the contract; and
(3) damage suffered by the plaintiff as a direct and proximate result of the breach.

Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach. Id. Damages recoverable for breach of contract either must flow as a natural consequence of the breach or must have been reasonably within the parties' contemplation at the time of the contract. Manning v. City of Columbia, 297 S.C. 451, 377 S.E.2d 335 (1989); Kline Iron & Steel Co. v. Superior Trucking Co., 261 S.C. 542, 201 S.E.2d 388 (1973).

Damages in a breach of contract action are to place the nonbreaching party in the position he or she would have been had there been no breach and the contract was performed. See Drews Co. v. Ledwith-Wolfe Assocs., Inc., 296 S.C. 207, 371 S.E.2d 532 (1988) (explaining that purpose of award of damages for breach is to give compensation, that is, to put plaintiff in as good a position as he would have been in had the contract been performed); Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996) (stating purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if contract had been performed). Damages give the nonbreaching party the benefit of his bargain. South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990), aff'd, 310 S.C. 232, 423 S.E.2d 114 (1992). The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960). In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed. Collins Entm't, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

The breach of contract action in the instant case pertains to All American's failure to construct a home at the Tomlinsons' property. As the jury responded to the special interrogatory finding Mixon was an agent of All American, it is reasonable to conclude the jury therefore found All American responsible for breach of the contract entered into between the Tomlinsons and Mixon. The Tomlinsons sought and recovered actual damages suffered as a result of All American's failure to manufacture, deliver, and/or install the Cape Cod Home on the property as contractually agreed.

III. Negligent Misrepresentation

The negligent misrepresentation cause of action dealt with the meeting that took place in North Carolina between the Tomlinsons and All American. South Carolina courts have recognized the common law tort of negligent misrepresentation. See Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 581 S.E.2d 161 (2003); Gilliland v. Elmwood Prop., 301 S.C. 295, 391 S.E.2d 577 (1990); Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001); DeBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000). Thus, one may bring an action sounding in tort for negligent misrepresentation.

"A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003). Recovery of damages in a negligent misrepresentation action is based upon negligent conduct and predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation. Evans v. Rite Aid Corp., 324 S.C. 269, 478 S.E.2d 846 (1996); Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992); see also First Fed. Sav. Bank v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988) (recognizing that under appropriate facts, negligent representations inducing property purchase could be actionable); Pittman v. Galloway, 281 S.C. 70, 313 S.E.2d 632 (Ct. App. 1984) (holding negligent representation inducing the

plaintiff's purchase of land is actionable). A claim for negligent misrepresentation may be made when the misrepresented facts induced the plaintiff to enter a contract or business transaction. Redwend, 354 S.C. at 474, 581 S.E.2d at 504.

To recover in a negligent misrepresentation action, a plaintiff must prove:

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

Sauner, 354 S.C. at 407, 581 S.E.2d at 166; Armstrong v. Collins, Op. No. 4028 (S.C. Ct. App. filed Oct. 3, 2005) (Shearouse Adv. Sh. No. 38 at 41); Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct. App. 2001); DeBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 266-67, 536 S.E.2d 399, 405 (Ct. App. 2000); AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992). For purposes of proving negligent misrepresentation, evidence that a statement was made in the course of the defendant's business, profession, or employment is sufficient to prove the defendant's pecuniary interest in making the statement, even if the defendant received no consideration for it. AMA Mgmt. Corp., 309 S.C. at 223, 420 S.E.2d at 874.

The negligent misrepresentation cause of action stems from the meeting in North Carolina where the Tomlinsons were told All

American had investigated Mixon and All American would "stand behind" him. The Tomlinsons sought and recovered actual damages suffered as a result of their reliance upon these representations given by All American regarding Mixon's dealership status. The Tomlinsons' reliance on those alleged misrepresentations was manifested in their decision to further deal with Mixon for the construction of their home and in continuing to do business with All American after Mixon failed to perform. After analyzing the different elements of a breach of contract and negligent misrepresentation, and the facts underlying the causes of action in the instant case, it is luculent that the two causes of action involved separate injuries occurring at different times.

CONCLUSION

The evidentiary record is the quintessential example of damages irrefutably pertaining to different causes of action, i.e., a separate and distinct breach of contract claim and a negligent misrepresentation cause of action. The breach of contract damages eventuated from All American's failure to deliver the home as ordered. The damages emanating from the negligent misrepresentation cause of action arose from the Tomlinsons' continued reliance on All American's relationship with Mixon.

Mr. Tomlinson testified if All American Homes had informed him of Mixon's termination when it happened, the work would have "immediately" stopped on the site and the damages would have been limited at that point to $12,000. According to Mrs. Tomlinson, "a lot of expense" would have been saved. Prior to learning that Mixon was no longer a dealer with All American, the Tomlinsons withdrew approximately $32,000 on the construction loan. That loan was refinanced, and other costs – storage, marina rental, utilities at the site – accrued, for damages of approximately $60,000.

Furthermore, All American knew or should have known the Tomlinsons were obtaining a construction loan and did not advise the Tomlinsons as to Mixon's status at All American. As the preparation of the Tomlinson home site and foundation began, the Tomlinsons

continued to incur expenses and were never informed that All American had terminated its relationship with Mixon and had no intention of delivering a home. Mr. Tomlinson averred that after All American terminated Mixon as a dealer and failed to inform the Tomlinsons, Mixon continued to draw on the home loan and work continued on the house. The Tomlinsons suffered damages in addition to the breach of contract damages as a result of this action. The negligent misrepresentation in the instant case stemmed from the Tomlinsons' continued reliance on All American's assurances even after Mixon had been dismissed, and in All American's failure to inform the Tomlinsons of Mixon's revocation as an All American dealer in order for the Tomlinsons to mitigate their damages.

The jury charges substantiated the conclusion that the causes of action involved different elements and created different damages. In describing the damages flowing from the breach of contract claim, the trial judge stated:

> Actual damages are intended to compensate that person and put them in as nearly as possible in the position that they would have been in before the breach occurred.
>
> Actual damages would be the actual losses and expenses which have been suffered by the plaintiff because the defendant breached the contract. Damages give the non-breaching party the benefit of his bargain.
>
> In a normal case, that would consist of two distinct elements. One would be the out-of-pocket expenses and costs that have actually incurred as a result of the contract and the other would be the gain above cost that would have been realized had the contract been performed.
>
> These damages must flow as a natural consequence of the breach or must have reasonably been within the contemplation of the minds of the parties at the time that the contract was made.

In identifying the damages resulting from the negligent misrepresentation claim, the judge asseverated:

> Finally, the plaintiff must prove that the plaintiff suffered a monetary loss as a direct and proximate result of the reliance on these statements. What we mean by that is that it must have been reasonably foreseeable that the plaintiff would rely on the statement and that he would be caused harm as a result of relying on that particular statement.
>
> Now, once you have determined whether or not the plaintiff has met those elements of the negligent misrepresentation then you would again consider the actual damages. And again, actual damages are the actual losses and expenses that have been suffered by the plaintiff because of the actions of the defendant.

The judge inculcated the jury to award **ONLY** damages resulting from the specific conduct concerning each cause of action on a separate and distinct basis. As in Creach v. Sara Lee Corp., 331 S.C. 461, 502 S.E.2d 923 (Ct. App. 1998), the jury in the instant case was given clear instructions as to the differing theories of recovery. **There were no exceptions to the jury charge.**

The trial court repeatedly instructed the jury that they were to consider each of the questions on the verdict form separately "as if the other claims did not exist." Moreover, the trial court charged the jury that the law did not allow for multiple recoveries for the same wrong. The judge commanded the jury to consider each cause of action separately. All counsel approved the charge and complimented the trial court on the delivery of a comprehensive and comprehensible jury charge.

The jury returned verdicts on the breach of contract claim in the amount of $46,149 and on the negligent misrepresentation cause of

action in the amount of $73,416.67. The jury determined different damages and amounts of damages flowing from the separate injuries of breach of contract and negligent misrepresentation, bolstering the ruling that no election of remedies is required. The verdicts of the jury are logically supported. Attempting to determine the allocation of the differing elements of damage would be an egregious and offensive invasion of the province of the jury.

The actual damages ultimately presented and argued to the jury aggregated $131,985.21. The combined verdict was $119,565.67. All of the amounts were liquidated. All American cannot argue that the amount awarded did not exceed the total actual amount presented. The jury found, in considering the actions separately, that certain losses flowed from the negligent misrepresentation, while certain other losses were more properly attributable to the breach of contract. Apodictically, the Tomlinsons did not receive double recovery.

I **VOTE** to **AFFIRM** the jury verdicts. No election is mandated in this case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kevin Covert, Appellant.

Appeal From Greenville County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4071
Heard November 7, 2005 – Filed January 17, 2006

REVERSED AND REMANDED

Katherine Carruth Link, of West Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Office of the Attorney General, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

SHORT, J.: Kevin Covert appeals his convictions for possession with intent to distribute cocaine in proximity of a school and trafficking in cocaine. Covert argues the trial court erred by denying his motion to suppress evidence due to a defective search warrant, allowing improper closing arguments, and using an unusual verdict form. We reverse and remand.

FACTS

Kevin Covert, Charles Henderson, and others were present in Covert's house in Greenville County when police searched it on September 26, 2002. When the officers entered the house they found Henderson in the living room with a coffee grinder containing a white powder substance, small plastic bags of white powered substance, a cutting agent, sifting instruments, and an electronic scale, all in front of him on a coffee table. A cell phone box on the couch next to him contained a large plastic bag of cocaine, weighing 441.50 grams. Cocaine, weighing 22.89 grams, was found on the coffee table. Two smaller quantities of cocaine, weighing 6.47 grams and 1.62 grams, were also recovered. Police also found $1,950 on the floor in front of the couch. Additionally, police found a pistol on a bookshelf. Henderson was the only person in the living room. Covert was found in a bedroom on the other side of the house. A holster for a gun, a 9-mm. magazine, and several dozen rounds of ammunition were found in an adjacent bedroom that belonged to Henderson.

All the individuals in the house were arrested and charged with trafficking in cocaine. However, Covert and Henderson were also charged with possession of a weapon during the commission of a violent crime. Donald Myers and Roger Harris, both charged with trafficking, pled guilty to simple possession and were to receive suspended sentences in exchange for testifying for the State. Myers testified he purchased cocaine from Covert and Henderson at the house numerous times. Myers stated his purchases usually amounted to between one hundred and two hundred dollars each for between one and three-quarters grams and three and one-half grams of cocaine. Myers also testified he had seen both Covert and Henderson bagging cocaine. On September 26, Myers was at the house to purchase cocaine from Covert.

Harris also testified he had purchased cocaine from Covert and Henderson at their house at least twice a week for the previous two years. Harris stated Henderson sometimes delivered cocaine to his house. Harris further testified that on the morning of September 26, Covert asked him to give him a ride to Atlanta. Harris testified they drove to a bar in Atlanta where Covert met another individual. Covert asked for Harris's "electronic door opener." Covert returned about thirty minutes later and they drove back to Greenville. Although the State attempted to establish that Harris drove Covert to Atlanta to obtain over 400 grams of cocaine, Harris did not see any cocaine during the trip.

After his arrest, Covert gave a statement to the police and admitted he purchased cocaine in Atlanta on September 26. Covert's statement identifies his connection in Atlanta and details the activities of the trip. Covert did not testify at trial. On Henderson's motion, Covert's statement was redacted to remove all references to Henderson and the edited version was read into the record. Covert was tried together with his co-defendant, Henderson, and convicted of both charges. Covert was sentenced to concurrent sentences of 25 years for the trafficking charge and 10 years for the distribution charge. Covert now appeals.

LAW/ANALYSIS

I. Suppression of Evidence

Covert contends the trial judge erred by denying his motion to suppress evidence and by applying a good faith exception to the statutory warrant requirement because the warrant was defective. We agree.

In criminal cases, an appellate court reviews errors of law only and is bound by factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant." State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003).

During the trial, Covert and Henderson moved to suppress evidence seized during the search on the basis that although the search was conducted on September 26, 2002, the magistrate's signature is dated September 28, 2002 on the warrant itself. The magistrate's signature and the date of September 26, 2002 only appear on two separate pages of the affidavit. During the trial, Detective Timothy Conroy testified that he did not see the magistrate sign the search warrant on the 26th and that "most probably she didn't sign that night and that was brought back to her on some other occasion to sign." Upon finding the warrant was defective under section 17-13-140 of the South Carolina Code (2003), the trial judge ruled a good faith exception to the Fourth Amendment's exclusionary rule should apply to South Carolina's statutory warrant requirement and denied the motion to suppress all evidence obtained during the September 26 search.

First, we must determine whether the warrant was defective because the signature was dated two days after the search was conducted. Section 17-13-140 of the South Carolina Code (2003) states that a warrant shall be "issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant." Though the statute does not specifically require that the warrant be signed, it requires that it be "issued." In Davis v. Sanders, 40 S.C. 507, 19 S.E. 138 (1894), "[our supreme] court held that the warrant was not 'issued' as required by law, and conferred no authority on the sheriff to make the arrest, because the magistrate did not sign at the foot as he intended to do, and because he did not intend the indorsement on the back as his signature of the warrant." Du Bose v. Du Bose, 90 S.C. 87, 90, 72 S.E. 645, 646 (1911). Therefore, a warrant is not issued until signed by an appropriate magistrate, municipal judicial officer, or judge of a court of record. See 77-370 S.C. Op. Att'y Gen. 295 (1977) (stating a warrant is properly issued only when signed by the magistrate and only upon a sworn affidavit). Thus, the warrant in this case was defective because there was no evidence that the magistrate signed the warrant before the search was conducted and the signature on the warrant is dated two days after the search was conducted.

Courts of other states have also held a search warrant must be signed because it is the confirmation that the magistrate determined the facts

asserted in the affidavit support a finding of probable cause.[1] In State v. Surowiecki, 440 A.2d 798, 799 (Conn. 1981), the Connecticut Supreme Court held that a warrant is not "issued" without a lawful signature on the search warrant by the person authorized to issue it. The court reached this conclusion even though there was no doubt the judge intended to sign the search warrant and failed to do so because of a "mere oversight." Id. at 798. There are also several public policy considerations to support a requirement that the warrant be signed prior to a search: it impresses upon the magistrate the importance of his action in issuing a warrant; it discourages police misconduct by dictating that officers can not reasonably rely on an unsigned document as an authorization for conducting a search and by requiring officers to take corrective measures before they conduct a search; and it provides needed protections and assurances to persons in control of the property to be searched that the search has been authorized. State v. Hentkowski, 397 N.W.2d 255, 258 (Mich. Ct. App. 1986).

Having found the warrant was defective because the signature was dated two days after the search was conducted, we must next determine whether the good faith exception to the Fourth Amendment's exclusionary rule should apply to South Carolina's statutory warrant requirement. The trial judge allowed the introduction of the evidence seized pursuant to a good faith exception as adopted by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984). The Leon rule applies when a search warrant is defective on Fourth Amendment grounds. Id. However, in this case, the evidence Covert sought to have excluded was obtained because of a defective search warrant based on a state statutory violation, not a constitutional violation.

In South Carolina, the statutory warrant requirement is separate and distinct from the prohibition in the federal and state constitutions against

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[1] Courts in other states have made the same determination: Kelley v. State, 316 So.2d 233 (Ala. Crim. App. 1975); Martin v. State, 344 So.2d 248 (Fla. Dist. Ct. App. 1976); Byrd v. Commonwealth, 261 S.W.2d 437 (Ky. Ct. App. 1953); United States v. Carignan, 286 F.Supp. 284 (Mass. Dist. Ct. 1967); People v. Hentkowski, 397 N.W.2d 255 (Mich. Ct. App. 1986); State v. Fleming, 227 S.W.2d 106 (Mo. Ct. App. 1950); State v. Williams, 565 N.E.2d 563 (Ohio 1991); State v. Cochrane, 173 N.W.2d 495 (S.D. 1970).

unreasonable searches and seizures. S.C. Code Ann. § 17-13-140 (2003); see U.S. Const. amend. IV; S.C. Const. art. I, § 10. In fact, as the South Carolina Supreme Court has recognized, section 17-13-140 of the South Carolina Code actually imposes stricter warrant requirements than the constitutional provisions. See State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). Therefore, the Leon good faith exception is not applicable to this case and we must determine whether there is a good faith exception to the statutory warrant requirement in South Carolina.

In State v. Sachs, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975), the Supreme Court of South Carolina found a good faith exception permits the introduction of evidence seized pursuant to a warrant that is defective under section 17-13-140 of the South Carolina Code if the officers have made a good faith attempt to comply with the affidavit requirement. In Sachs, the affidavit the officers relied on contained misstated facts; however, the court determined that such misstatements in an affidavit were "necessary hazards" encountered when federal and state authorities search in a joint effort and the affidavit satisfied a good-faith attempt to comply with the statute relating to search warrants. Id.

In State v. McKnight, 291 S.C. 110, 112-13, 352 S.E.2d 471, 472 (1987), the officers orally recited the facts upon which the warrant was based, but no affidavit was ever executed. As a result, the court found that there was no good faith effort to comply with the statute; however, the court declined to decide whether there is a good faith exception for officers who execute a search with objectively reasonable reliance on a warrant that is ultimately found to be invalid. Id. at 114, 352 S.E.2d at 473. The instant case falls somewhere between the cases of McKnight and Sachs. This is not a case of the "necessary hazards" of obtaining a warrant as in the case of Sachs and it is not a failure to comply with the statutory warrant requirement as in McKnight. Here, the officers failed to notice that either the magistrate did not sign the warrant on September 26 or that the signature on the warrant itself was misdated as September 28, while the search was conducted on September 26, 2002.[2] The officers could have discovered either error by simply looking at the warrant itself; therefore, we find there was no good

[2] The State did not offer any evidence that the magistrate signed the warrant on September 26, 2002, and the magistrate did not testify at trial.

faith effort to comply with the statute.

Because we find the warrant was defective and the good faith exception to the warrant requirement does not apply in this case, we must finally determine if the admission of the evidence found with the defective warrant constituted harmless error. "Error is harmless where it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). Generally, appellate courts will not set aside convictions due to insubstantial error not affecting the result. State v. Davis, 364 S.C. 364, 409, 613 S.E.2d 760, 784 (Ct. App. 2005). The violation found in this case cannot be seen as harmless error because exclusion of the evidence could have reasonably affected the result of the trial and the issue of the amount of cocaine allegedly possessed by Covert was a central issue in this case.

II. Trafficking Statute

Covert claims the judge erred by submitting the actual text of the trafficking statute to the jury in written form. We agree.

This is a novel question of law in South Carolina; however, historically, as a common practice, trial judges in South Carolina have not given the actual text of a statute in written form to a jury. The Court of Appeals of New York has ruled that the "consent of defense counsel is an 'absolute precondition' to furnishing the jury with the text of a statute because 'questions may arise concerning which sections of pertinent statutory material should be given to the jury.'" People v. Sanders, 70 N.Y.2d 837, 838 (N.Y. 1987) (citations omitted). Therefore, we find that the judge's submission of the actual text of the statute was in error because Covert's counsel did not consent to it being given to the jury.

REVERSED AND REMANDED.

ANDERSON, J., concurs in a separate opinion. GOOLSBY, J., dissents in a separate opinion.

ANDERSON, J., (concurring in a separate opinion):

I **VOTE** to reverse the conviction and sentence of the appellant and to remand for a new trial because of the egregious error committed by the circuit judge in submitting a copy of the trafficking statute to the trial jury.

PRESERVATION OF ERROR

After the circuit judge charged the jury and sent them back to the jury room to begin deliberations, the judge asked whether there were any exceptions from the State or the defense.

> **Mr. Warder [counsel for Covert]**: Yes, sir. **It's the procedure I'm beginning to object to. We've now sent the jury out with a statute that provides—**
>
> **The Court**: Did they—
>
> **Mr. Warder**: —four ways to—
>
> **The Court**: I meant to take up all those papers. Go get those papers from them. Every paper I gave them. Sir, go ahead.
>
> **Mr. Warder**: Yes, sir. **We have a verdict form that in essence breaks the statute down in parts. And, of course, for trafficking it gives them four different choices, all to find him guilty. You know, I figure if we gave everybody enough choices, if we broke it down long enough we could have fifteen or twenty ways to find somebody guilty. And I just think that's highly prejudicial.**
>
> **You know, I'd really like to send a sheet out that had the presumption of innocence, and the burden of proof, and have it all broken down in one line sentences so they could**

read through and check, do you find that on each of them? I mean, it's a way of highlighting the case to make it more likely that somebody will sooner or later check a yes. And it seems to me that it's highly prejudicial.

It seems to me like the form in itself tends to keep going until there's a high probability that somebody will think they're supposed to find one of the four. They have four things, and they're asked for an amount four times. And I think that the jury's going to think that they're supposed to fill one of them in and write an amount in. And I just—I just think it's prejudicial.

Mr. Abdalla: Your honor, I'd like to be heard on that. My position is I'd just rather have the indictment sent back as is with the way we've—I've always thought it was guilty or not guilty. And that's just my position, your honor.

The Court: Well, we can't do that because the jury has to determine the amount. So we can't just send the indictments in. **I note your exceptions**. I don't think by splitting it out into four is doing anything but making it easier for the jury to understand. They're going to still have every bit of it. And in a case like this, I can't conceive a jury deliberating without having a copy of the statute. It's very frequently that a copy of the statute is sent back in, or some portion of the charge that they request be in writing, or sometimes the entire charge is sent back in writing.

Mr. Warder: **You know, I've heard of the entire charge being sent, but I've never heard of a court selecting the parts that they want to send back so it would be emphasized. And I—**

The Court: Well, I've explained to them it's not that I'm emphasizing, it's trying to help them understand.

Mr. Warder: **I understand, but that's—**

The Court: Now I don't bring them back—I don't object to bringing them back out and telling them that, you know, they can't find them guilty of anything unless the State has proven that particular charge beyond a reasonable doubt. But I don't see how there can be any doubt in their minds of that fact.

Mr. Abdalla: And, your honor, just for the record, I've joined in on Mr. Warder's objections.

The Court: All right. **Well, it seems the verdict form doesn't suit anybody but me. But that's the way it's going back.** I'm going to make the couple of corrections that we made at the bench a few minutes ago and that I explained to the jury while I was going through it. And then I'll let you gentlemen look at it to be sure we've done that before I send it back. And then I'll have it sent back. So we'll be at ease a few minutes.

(Whereupon court was in recess)

The Court: All right. I have made the changes that we talked about to the verdict form. If either one of you want to look at it the bailiff has it. Mr. Warder, the jury has already asked that I send into them the definition of the trafficking statute, the print form.

Mr. Warder: **Well, I mean—**

The Court: **And I note your objection.**

Mr. Warder: —it's predictable when we took it all to them.

The Court: Well, it's—I think it's proper. I think it's good. I think it would be worse not to do it than to do it. **So I overrule your objection.**

"The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal." State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct.

App. 2005) (citing State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002)). Our courts have "consistently refused to apply the plain error rule." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (citations omitted). Instead, we have held: "it is the responsibility of counsel to preserve issues for appellate review." Id.

Our supreme court, in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), explained the rationale behind this longstanding rule:

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

Id. at 422, 526 S.E.2d at 724 (citations omitted); see also Ellie, Inc. v. Micchichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

The rule that an unpreserved issue will not be considered on appeal does have its exceptions. Foremost is the axiomatic principle of law that lack of subject matter jurisdiction may be raised at anytime, including for the first time on appeal. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991). Additionally, an exception exists where the interests of minors or incompetents are involved. See Shake v. Darlington County Dep't of Soc. Servs., 306 S.C. 216, 219 n.2, 410 S.E.2d 923, 924 n.2 (Ct. App. 1991) (noting, in a termination of parental rights action, that "[a]lthough it is questionable whether Mrs. Shake properly raised each of [the] grounds for termination at trial, we nevertheless address them all."); Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000) (approving the court of appeals' conclusion that procedural rules are subservient to the court's duty to zealously guard the rights of minors);

Caughman v. Caughman, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965) (holding that "the duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review.").

Furthermore, our courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused. See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding "[a]s to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile."); State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001) (employing the futility doctrine).

In the present case, counsel for Covert perspicuously raised an objection (1) to the submission of the statute to the jury and (2) to the lack of a "not guilty" option on the jury verdict form. As to the judge providing the jury with a written copy of the statute, counsel professed, "We've now sent the jury out with a statute," before his argument was interrupted by the court. Counsel noted he had "never heard of a court selecting the parts that they want to send back so it would be emphasized," and averred, "You know, I'd really like to send a sheet out that had the presumption of innocence, and the burden of proof, and have it all broken down in one line sentences so they could read through and check, do you find that on each of them?"

Additionally, Covert's attorney took exception to the jury verdict form's failure to provide for the option of "not guilty": "You know, I figure if we gave everybody enough choices, if we broke it down long enough we could have fifteen or twenty ways to find somebody guilty. And I just think that's highly prejudicial."

Lucidly, a contextual reading of the trial record demonstrates Covert's attorney timely objected both to the format of the jury verdict form and to the procedure of providing the jury with the trafficking statute. The circuit judge acknowledged: "I note your exceptions," and again, ". . . I note your objection." Further, the judge observed, "Well, it seems the verdict form doesn't suit anybody but me. But that's the way it's going back." Finally, he pronounced: "So I overrule your objection." Pursuant to Rule 18 of the South Carolina Rules of Criminal Procedure, "Counsel shall not attempt to

further argue any matter after he has been heard and ruling of the court has been pronounced." Rule 18(a), SCRCrimP. My reading of the transcript leads me to the ineluctable conclusions that (1) counsel raised multiple objections to the jury verdict form and the submission of the statute, and (2) the court acknowledged and overruled the objections. Therefore, both objections are pristinely preserved.

PREJUDICIAL SUBMISSION OF THE TRAFFICKING STATUTE TO THE JURY

Historically in South Carolina jurisprudence, circuit judges have **NOT** submitted in writing to the trial jury any portion of the jury charge. The circuit judge committed a colossal prejudicial error in the instant case by submitting only the trafficking statute. This practice defies fairness and justice by emphasizing the offense while ignoring the basic constitutional guarantees afforded the defendant which were in the jury charge, including: (1) the presumption of innocence; (2) the burden of proof beyond a reasonable doubt; (3) the credibility of witnesses; (4) an elemental analysis of the actual charge of which the defendant is accused; and (5) the right not to testify. In my judgment, submitting the statute to the jury violated Covert's right to a fair trial.

Admittedly, some states permit a judge to submit the jury charge to the fact finder for purposes of edification and enlightenment during jury deliberations. Most of the states that allow this procedure do so through a court rule or statute.

Under Louisiana law, after a court charges the jury, "a copy of the written charge shall be delivered to the jury if such delivery is consented to by both the defendant and the state in open court but not in the presence of the jury." LSA-C.Cr.P. Art. 801(B)(1). However, "No charge shall be reduced to writing at the request of a juror pursuant to this Article unless consent is obtained from both the defendant and the state in open court but not within the presence of the jury." LSA-C.Cr.P. Art. 808. See State v. Joseph, 875 So.2d 1011, 1016-17 (La. App. 5 Cir. 2004) ("With the 2001 amendments to LSA-C.Cr.P. arts. 801 and 808, it is now statutorily permissible for the jury to receive a copy of the written jury instructions to

use during deliberations. However, the use is clearly conditioned upon the consent of the parties.").

In Alabama,

> Neither a copy of the charges against the defendant nor the "given" written instructions shall go to the jury room; provided, however, that the court may, in its discretion, submit the written charges to the jury in a complex case.

Alabama RCRP Rule 21.1. See Wright v. State, 740 So.2d 1147 (Ala. Crim. App. 1999).

The Ohio Rules of Criminal Procedure require that written instructions be provided to the jury. "The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instruction to the jury for use during deliberations, and preserve those instructions for the record." Ohio Crim. R. Rule 30(A); see State v. Kersey, 706 N.E.2d 818 (Ohio Ct. App. 1997).

Under the West Virginia Rules of Criminal Procedure, "The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room." W.Va.Rules of Cr. P. 30; see State v. Lutz, 395 S.E.2d 478 (W.Va. 1988).

The law in Arkansas is succinctly declared by that state's supreme court in Oliver v. State, 691 S.W.2d 842 (Ark. 1985): "A.R.Cr.P. Rule 33.3 clearly states it is the duty of the judge to deliver to the jury a typewritten copy of the oral instructions. This is to be done upon the request of either party or any juror." Id. at 842.

The California Penal Code provides:

> Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

Cal. Penal Code § 1093(f) (West 2004).

The rule in Minnesota is:

> (4) Giving of Instructions. The court in its discretion shall instruct the jury either before or after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. The instructions may be in writing and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.

Rules Crim. Proc., rule 26.03, subd. 18(4), 27A M.S.A.

Unlike Louisiana, Alabama, Ohio, West Virginia, Arkansas, California, and Minnesota, there is no court rule or statute in South Carolina which gives a judge the discretion to submit to the jury written copies the charge. My research reveals no case from the appellate entities in South Carolina placing their imprimatur or approbation upon this practice.

In Florida,

> Under certain circumstances, it is reversible error for the trial court to provide the jury with a copy of only a portion of the jury instructions; if the trial court provides the jury with any written instructions, it must provide the jury with all of the instructions. Van Loan v. State, 779 So.2d 497 (Fla. 2d DCA 2000); Pettit v. State, 612 So.2d 1381 (Fla. 2d DCA 1992); Wilson v. State, 746 So.2d 1209 (Fla. 5th DCA 1999); Fla. R.Crim. P. 3.400(a)(3).

Bouchard v. State, 847 So.2d 598, 599 (Fla. App. 2 Dist. 2003).

According to Jewell v. State, 624 N.E.2d 38, 43 (Ind. App. 1 Dist. 1993):

> In Indiana, the accepted practice is not to allow the jurors to take the written instructions with them into the jury room. Cornett, 436 N.E.2d 765. However, the trial court has discretion to send the entire body of written instructions to the jury "cleansed" of extraneous information. Mitchell v. State (1989), Ind., 535 N.E.2d 498, 501.

See also Denton v. State, 455 N.E.2d 905 (Ind. 1983) ("It is also the general rule of law that jury instructions are not to be sent to the jury room.").

Pursuant to statute in New York,

> At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper.

N.Y. Crim. Proc. Law § 310.30 (McKinney 2002). In People v. Johnson, 81 N.Y.2d 980, 981-82 (N.Y. 1993), the Court of Appeals of New York held:

> We affirm the order of the Appellate Division because CPL 310.30 prohibits giving "copies of the text of any statute" to a deliberating jury without the consent of the parties. Here, defendant expressly objected to complying with the jury's request

to receive the entire charge in writing, which included statutory textual material.

> The fact that CPL 310.30 allows a deliberating jury to "request the court for further instruction or information * * * with respect to any * * * matter pertinent to the jury's consideration of the case" does not impliedly authorize an override of the specific prohibition. Inasmuch as the entire written jury instruction included forbidden statutory textual material, the Appellate Division correctly concluded that the trial court committed reversible error in providing that material to the jury over defendant's objection (see, People v. Taylor, 76 N.Y.2d 873, 560 N.Y.S.2d 982, 561 N.E.2d 882; People v. Nimmons, 72 N.Y.2d 830, 530 N.Y.S.2d 543, 526 N.E.2d 33; People v. Owens, 69 N.Y.2d 585, 516 N.Y.S.2d 619, 509 N.E.2d 314).

The New York case of People v. Sanders, 70 N.Y.2d 837 (N.Y. 1987), is particularly on point. In Sanders, the Court of Appeals of New York ruled the "consent of defense counsel is an 'absolute precondition' to furnishing the jury with the text of a statute because 'questions may arise concerning which sections of pertinent statutory material should be given to the jury.'" Sanders at 838.

Because South Carolina has no applicable statute or rule, I vote to reverse Covert's conviction on the ground that submission of only the trafficking statute to the jury tainted the fairness of his trial.

JURY VERDICT FORM

In addition to the submission of the trafficking statute, I find prejudicial error in the court's verdict form. The jury verdict form utilized by the circuit judge read as follows:

> **I. Trafficking in Cocaine**
>
> Do you unanimously find, beyond a reasonable doubt that Kevin Paul Covert:

1. Knowingly sold, manufactured, cultivated, delivered, purchased or brought into this state 10 grams or more of cocaine?

YES _____ **NO** _____

If yes, how many grams? _____

2. Provided financial assistance or otherwise aided abetted attempted or conspired to sell, manufacture, cultivate, deliver, purchase or bring into this state 10 grams or more of cocaine?

YES _____ **NO** _____

If yes, how many grams? _____

3. Was knowingly in actual or constructive possession of 10 grams or more of cocaine?

YES _____ **NO** _____

If yes, how many grams? _____

4. Knowingly attempted to become in actual or constructive possession of 10 grams or more of cocaine?

YES _____ **NO** _____

If yes, how many grams? _____

II. Possession with Intent to Distribute Cocaine

If your answer to all four of the above questions is **NO**, then answer this question:

Do you unanimously find, beyond a reasonable doubt that

Kevin Paul Covert possessed with intent to distribute less than 10 grams of cocaine?

YES _____ **NO _____**

III. Simple Possession of Cocaine

If your answer to all five of the above questions 1 through 4 and II is **NO**, then answer this question:

Do you unanimously find that Kevin Paul Covert possessed cocaine?

YES _____ **NO _____**

IV. Proximity

If your answer to any of the above questions except III, Simple Possession of Cocaine, was **YES**, then answer this question:

Do you unanimously find beyond a reasonable doubt, that the above conduct occurred within a radius of one half mile of the grounds of a public or private elementary, middle, or secondary school or public playground or park, a public vocational or trade school or technical educational center; or a public or private college or university?

YES _____ **NO _____**

In my view, the jury verdict form should have provided the specific option of finding the defendant **NOT GUILTY**. This Court, in State v. Myers, 344 S.C. 532, 536, 544 S.E.2d 851, 853 (Ct. App. 2001), observed,

> **It is the preferred practice to submit the possible verdict of "not guilty" to the jury; however, the law to be charged must be determined from the evidence presented.** State v. Somerset, 276 S.C. 220, 221, 277 S.E.2d 593, 594

(1981); State v. Rogers, 275 S.C. 485, 486, 272 S.E.2d 792, 792 (1980). **A jury should be instructed that one verdict it can reach is "not guilty," especially where the crime charged is of a serious nature.** State v. Griggs, 184 S.C. 304, 315-16, 192 S.E. 360, 365 (1937) (stating that where the trial judge in his charge instructed the jury that if it had a reasonable doubt as to appellant's guilt it must find him not guilty, there is no reversible error if the trial judge then fails to tell the jury that "not guilty" is one verdict it could render).

(Emphasis added.)

The Myers court found the "trial judge's clear and cogent jury instructions ameliorated any possible prejudice emanating from the failure to include 'not guilty' on the verdict form." Id. In contradistinction to the judge's "clear and cogent jury instructions" in Myers, the judge's jury instructions in this case failed to immunize the verdict form due to the improper and prejudicial act of submitting the trafficking statute to the jury. Not only was the jury inundated with the many ways it could find the defendant guilty, the defective verdict form omitted the "not guilty" option. Therefore, the judge's charging practice compounded the prejudice of the verdict form rather than ameliorating it.

"A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (citation omitted). I find the circuit judge's overemphasis of the ways the jury could find Covert guilty and the concomitant underemphasis of Covert's fundamental and constitutionally guaranteed rights encouraged the jury, again and again, to find the defendant guilty. The result in the instant case is that the jury was excessively encouraged to find the defendant guilty, rendering the trial unfair. Covert was deprived of due process of law. Accordingly, I **VOTE** to **REVERSE** the conviction and sentence and **REMAND** for a new trial.

GOOLSBY, J. (dissenting): I would affirm the judgment below and for that reason I write separately.

1. Covert maintains the trial court erred in denying his motion to suppress evidence due to what Covert claims was a defective warrant and in applying a good faith exception to a statutory warrant requirement.

On September 26, 2002, Greenville Detective Timothy Conroy, after being sworn by a magistrate to tell the truth, applied to the magistrate for a warrant authorizing the search of Covert's residence. The affidavit Conroy submitted in support of his application for a search warrant provided a description of the premises to be searched and the property sought. His application also incorporated an attached one-page, second affidavit that presented the facts on which he set forth probable cause for issuance of the search warrant. The date of September 26, 2002, and the signatures of Conroy and the magistrate appear on the affidavit and its attachment.

Later, at Covert's trial, Conroy testified in camera the magistrate reviewed his affidavit and issued the search warrant. Conroy also testified he and other officers, with the affidavit and search warrant in hand, immediately executed the search warrant at Covert's residence. An officer other than Conroy signed the return on September 27, 2002; however, the search warrant, which the magistrate signed, bears the date of the following day, i.e., September 28, 2002.

Covert moved to suppress the evidence seized from his residence pursuant to the search warrant, pointing to evidence that the search occurred prior to the date that appears on the search warrant and claiming the magistrate failed to sign the warrant prior to its execution. The trial court, however, upheld the search, basing its holding, as noted above and as Judge Short's opinion more fully discusses, on a good faith exception.[3]

Unlike Judge Short and the trial court, I see no need to address the question of whether a good faith exception should be applied in an instance where the issuing magistrate's signature reflects a date later than those

[3] The trial court, over Covert's objection, later admitted as a court exhibit the search warrant log maintained by the magistrate; however, the trial court did not change its earlier ruling regarding the sufficiency of the search warrant.

appearing on the affidavit and the return. Another ground appearing in the record supports the judgment of the trial court.[4]

The validity of the search warrant did not depend either upon a date appearing above the magistrate's signature nor upon there being a signature of the issuing judicial officer. Nothing in the statute governing the issuance of search warrants in South Carolina, S.C. Code Ann. § 17-13-140 (2003),[5] as Judge Short himself acknowledges, "specifically require[s] that the [search] warrant be signed." Moreover, nothing in the statute requires it to be dated, for that matter.

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[4] See State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995) (holding Rule 220(c), SCACR, allows the court of appeals to affirm on any ground appearing in the record); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (holding under Rules 208(b)(2) and 220(c), SCACR, a respondent, as a prevailing party in the trial court, may raise on appeal any additional reasons the appellate court should affirm the trial court regardless of whether the reasons were presented to or ruled on by the trial court, provided the respondent's additional sustaining grounds appear in the record on appeal).

[5] Section 17-13-140 provides in relevant part as follows:

> Any magistrate . . . having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize . . . any . . . drugs . . . possessed . . . in violation of any of the laws of this State . . . .
>
> . . . .
>
> A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant. If the magistrate . . . is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Here, the magistrate either wrote an incorrect date on the warrant when she signed it or failed to sign the warrant when she issued it, but then signed and dated the warrant after the officer returned it. At most, the omission of the date and signature or of the date when a magistrate issues a search warrant, without more, constitutes a ministerial defect that does not affect its validity.[6] And as this court has held, a ministerial error will not invalidate an otherwise valid search warrant under section 17-13-140.[7]

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[6] See State v. Smith, 562 N.E.2d 428 (Ind. Ct. App. 1990) (noting the search warrant statute contained no explicit requirement that the issuing magistrate sign a search warrant in order to validate it and holding the failure of the issuing judge to sign a search warrant did not invalidate the warrant when the magistrate found probable cause and intended to issue it; the court concluded the addition of a signature was a ministerial task); Commonwealth v. Pellegrini, 539 N.E.2d 514 (Mass. 1989) (holding a failure of a judge to sign a warrant was a ministerial error that did not invalidate the warrant in the absence of a constitutional or statutory requirement that the issuing judge, without exception, sign a search warrant); see also Yuma County Attorney v. McGuire, 512 P.2d 14, 15-16 (Ariz. 1973) (stating even where the statute required a magistrate's signature, "[w]arrants and the affidavits on which they are based must be read in a common-sense way rather than technically" and holding a magistrate's inadvertent failure to sign a search warrant was an oversight that did not invalidate the warrant where the judge signed the affidavit in support of the warrant and considered the existence of probable cause and thus intended by his action to give legal effect to the issuance of the warrant); People v. Superior Court, 141 Cal. Rptr. 917 (Ct. App. 1977) (holding a magistrate's inadvertent failure to sign a search warrant did not require suppression of evidence seized pursuant thereto); State v. Spaulding, 720 P.2d 1047 (Kan. 1986) (holding where a judge made findings of probable cause and intentionally issued a search warrant, the warrant was not void because the issuing judge failed to sign it where the warrant was executed and returned to the same judge and filed on the same date it was issued); State v. Andries, 297 N.W.2d 124 (Minn. 1980) (stating the requirement that an issuing judge sign a search warrant is a purely ministerial task); cf. S.C. Op. Atty. Gen. 295 (1977) (advising, per the attorney general, that only judicial officers may sign a search warrant).

I add one final note regarding the search warrant. Covert does not argue the search warrant otherwise failed to meet either constitutional[8] or statutory standards. He does not contend the magistrate did not issue the search warrant, she lacked probable cause to issue it, or she did not intend to issue it.

2. Covert argues the trial court abused its discretion in not granting a mistrial when the lawyer for Covert's codefendant, Charles Henderson, made

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The Arizona, California, and Minnesota statutes, respectively Ariz. Rev. Stat. § 13-1441 (now renumbered as § 13-3911), Cal. Penal Code § 1523, and Minn. Stat. Ann. §§ 626.05 and 626.11, expressly require a search warrant to be signed. Yet, the appellate courts of these three states found the lack of a signature to be ministerial in nature. Other courts, however, hold a failure to sign a warrant invalidates the warrant and renders its issuance a nullity where the statutes expressly require a signature by a judicial officer. See, e.g., Kelley v. State, 316 So. 2d 233 (Ala. Crim. App. 1975) (discussing a statute defining a search warrant as "an order in writing in the name of the state, signed by a magistrate"); Martin v. State, 344 So. 2d 248, 249 (Fla. Dist. Ct. App. 1976) (noting the statute contained language stating that the magistrate shall "issue a search warrant signed by him").

[7] See, e.g., State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004) (holding a failure to observe the requirement that search warrants be executed and a return made within ten days after the date of the warrant does not invalidate the search); State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995) (stating the failure to list on the return all the items seized or to make the return within ten days is a ministerial error that does not invalidate the search).

[8] Article 1, section 10 of the South Carolina Constitution, which mirrors the Fourth Amendment to the United States Constitution, contains no signature and dating requirement. S.C. Const. art. 1, § 10. It requires only that the warrant issue "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." Id.

an apparently factually incorrect statement regarding Covert during closing argument.

In his closing argument, Henderson's counsel attacked the credibility of Donald Myers and Roger Harris, both of whom testified about buying cocaine from Covert and Henderson. Counsel pointed to Myers's statements to the police and said the first time Myers implicated Henderson was after Myers received a free "get out of jail card." Counsel followed this assertion with the remark that "[a]ccording to Mr. Covert[,] he confirmed that Roger [Harris] . . . had been buying cocaine from him for two years" and that Myers's statement didn't "mention Mr. Henderson in a conspiracy with him." Covert objected, arguing this undermined Covert's credibility because counsel had mentioned Henderson's involvement and counsel's statement created the impression in the jury's mind that Covert had been dishonest with the police when he gave his statement to them following his arrest. Covert's criminal involvement with Henderson had earlier been redacted from Covert's published statement to the police.

Covert refused an offer by the trial judge for a curative instruction and insisted on a mistrial.

The question of whether to grant or deny a motion for mistrial rests within the sound discretion of the trial court[9] whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.[10]

The trial court did not abuse its discretion in this instance. The reference to Covert was an isolated one and was not directed to Covert's guilt, but to the veracity of Myers. Moreover, evidence as to Covert's guilt in the context of the entire record was overwhelming, particularly since he admitted to selling cocaine both before and after September 26, 2002.[11]

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[9] State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989).

[10] State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000).

[11] See State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (noting an appellate court will review an alleged error in the context of the

3. Covert further contends the trial court erred in not sustaining his objection to the closing argument of the solicitor.

After counsel for Covert offered a general objection to the solicitor's closing argument, the trial court effectively sustained the objection, saying, "Yes, sir. I think you need to move on to the facts of the case." Covert neither moved to strike the objectionable portion of the solicitor's argument nor moved for a curative instruction or mistrial. Having gotten what he asked for, Covert cannot complain now.[12]

4. Covert also complains about the special verdict forms and copies of the trafficking statute given by the trial court to the jury in connection with its charge on the offense of trafficking. The forms contained no statements regarding the presumption of innocence and the burden of proof. He claims these written materials had the effect of suggesting a guilty verdict to the jury.

Covert suffered no prejudice. Indeed, the trial court's oral jury instructions, which Covert did not challenge, removed any possible prejudice Covert may have suffered on account of the use by the jury of the forms and

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entire record and may affirm under a harmless error analysis where there is overwhelming evidence of guilt), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

[12] See, e.g., State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (holding the alleged impropriety of the solicitor's closing argument was not preserved for review where the trial court sustained an objection by defense counsel, but counsel did not move to strike or request a curative instruction); State v. McFadden, 318 S.C. 404, 458 S.E.2d 61 (Ct. App. 1995) (noting no error was preserved for review where the trial court sustained defense counsel's objection to testimony and counsel made no further motion to strike the testimony).

copies of the trafficking statute.[13] Moreover, the trial court made it abundantly clear to the jury that a "not guilty" verdict was one of the possible verdicts it could return with regard to each charge, notwithstanding the special verdict form did not have the words "not guilty" printed upon it. As for the copy of the trafficking statute given each juror, it merely provided additional information regarding an offense with which Covert was charged and served to aid the jury in reaching a proper verdict.

5. Regarding Covert's argument that a cumulative effect of errors requires a reversal of his conviction, the issue is not preserved for appeal, even assuming the presence of "errors." The issue was neither raised to nor ruled on by the trial court.[14] In any case, the purported errors, which Covert says involve the closing arguments and the written materials given the jury, are insufficient to warrant a new trial when weighed against the evidence of Covert's guilt, particularly when his statement to the police is considered.

I would affirm.

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[13] See State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct. App. 2001) (concluding the jury's use of a special verdict form did not prevent the jury from finding the defendant not guilty in light of the trial court's instructions).

[14] State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Moffet McDill, Gerri McDill, and Garrett McDill, a minor, Ryan Street, a minor, Edward Lee, a minor, Courtland Rogers, a minor, Defendants,

of whom Moffet McDill, Gerri McDill, and Garrett McDill, a minor, are Respondents,

v.

Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, Appellants.

Appeal From Florence County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4072
Heard December 6, 2005 – Filed January 17, 2006

VACATED

J.R. Murphy, of Columbia, for Appellants.

William P. Hatfield and Robert D. McKissick, both of Florence, for Respondents.

GOOLSBY, J.: Nationwide Mutual Insurance Company (Nationwide Mutual) and Nationwide Mutual Fire Insurance Company (Nationwide Fire) appeal from an order of the trial court reforming automobile insurance policies issued to Moffet and Gerri McDill to add underinsured motorist (UIM) coverage. We vacate the trial court's order on the basis of mootness.

I.

On July 23, 2001, Garrett McDill, a minor, was seriously injured while driving a 1992 Honda Accord that collided with a car driven by Christopher Lawhon, also a minor. The 1992 Honda Accord was owned and insured by Garrett's parents, Moffet and Gerri McDill.

The McDills filed this action on May 8, 2003, alleging neither Lawhon nor the vehicle's owner, Mark's Auto Sales, Inc., had adequate insurance coverage to compensate for Garrett's injuries and alleging Lawhon was an underinsured driver under the laws of South Carolina. The McDills sought to reform their own insurance policies issued by Nationwide Mutual and Nationwide Fire to include UIM coverage.

By order dated January 14, 2004, the trial court found the defendants did not make a meaningful offer of UIM coverage as required by S.C. Code Ann. § 38-77-160 (2002). The trial court granted summary judgment to the McDills and ordered that their automobile insurance policies be reformed to include UIM coverage up to the liability coverage limits of $100,000 per person and $300,000 per accident. This appeal followed.

By order of this court, we held the appeal in abeyance pending the resolution of a second lawsuit, McDill v. Mark's Auto Sales, Inc., a tort action involving the determination of liability for the automobile accident in

which the jury returned a verdict for the defendants. The action was brought by Gerri McDill on behalf of herself and her son Garrett against Lawhon, as well as Lawhon's father, his grandfather, and his grandfather's automobile dealership, Mark's Auto Sales, Inc., which was the owner of the vehicle Lawhon was driving in the accident.

Since we have affirmed the judgment finding no liability for the defendants in McDill v. Mark's Auto Sales, Inc., Op. No. 4068 (S.C. Ct. App. filed Jan. 9, 2006), the question of UIM coverage has now become moot because our decision will have no practical legal effect upon the existing controversy. As noted by our supreme court:

> An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. *See* Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

Curtis v. State, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (alterations in original).

In the underlying tort case, a jury determined the McDills were not entitled to any damages from the owner or driver of the underinsured vehicle; therefore, we hold the McDills would not be entitled to UIM coverage under either Nationwide policy even if the policies were reformed to provide UIM coverage. The Nationwide policies provided as follows:

> **We** will pay damages . . . because of **bodily injury** suffered by **you** or a **relative**, and because of **property damage**. Such damages must be due by law to **you** or a **relative** from the owner or driver of: . . . an **underinsured motor vehicle** . . . .

Thus, since the underlying tort action was decided adversely to the McDills, they are not entitled to UIM coverage because they are not entitled to damages from the driver of the underinsured motor vehicle. Any opinion on whether the policies should be reformed would, therefore, be merely advisory.[1] Cf. Empire Fire & Marine Ins. Co. v. Metro Courier Corp., 507 S.E.2d 525 (Ga. Ct. App. 1998) (holding an automobile insurer's declaratory judgment action to determine coverage issues, including the duty to defend, was moot once the insurer had denied coverage and refused to defend and a judgment was entered on the underlying suit because a court is not permitted to issue advisory opinions); see also In re Chance, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have "consistently refrained" from issuing purely advisory opinions).

II.

Based on the foregoing, we vacate the trial court's order in the current appeal that granted summary judgment to the McDills and reformed the policies to include UIM coverage.

VACATED.

SHORT, J., and CURETON, A.J., concur.

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[1] We note that, unless a party is trying to obtain coverage for an accident that has already occurred, litigation to reform an insurance policy to include UIM coverage would not be necessary. Where there is no current accident and UIM coverage is desired, a party could simply add such coverage with an agent to protect against future losses.