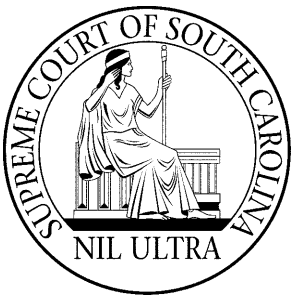

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
September 3, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark Andrew Peper, Respondent

Appellate Case No. 2014-001414

Opinion No. 27441
Heard August 5, 2014 – Filed September 3, 2014

PUBLIC REPRIMAND

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

Michael J. Anzelmo, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand with conditions. We accept the Agreement and issue a public reprimand with conditions as stated hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Client A, respondent's childhood friend, was the sole beneficiary of a trust established by Client A's mother prior to her death. The corpus of the trust included stocks and a parcel of land with a house where Client A and his wife resided. In January 2006, Client A approached respondent with a request that respondent take over as trustee of the trust. Respondent agreed and prepared a consent substitution of trust and a proposed Order Naming Successor Trustee.

Respondent acknowledges that his services as trustee for Client A's trust were law-related services and, therefore, the Rules of Professional Conduct apply pursuant to Rule 5.7. Further, respondent admits that at all times relevant to this matter, Client A believed respondent was acting as his attorney and, in fact, frequently referred to respondent as his attorney in conversations with respondent and others. As a result, respondent acknowledges that it was reasonable for Client A to believe that the trustee services respondent was providing carried with it the protections normally afforded as part of the attorney-client relationship and that respondent took no steps to advise him otherwise.

Misrepresentation to the Court

In the proposed Order Naming Successor Trustee, respondent significantly overstated his qualifications to serve as trustee. He stated that he was "an attorney licensed to practice law in the state of South Carolina and [that he had] an extensive background in the Probate field, including but not limited to, trust administration." In fact, as of the date of submission of the proposed order to the Probate Court, respondent had only been admitted to the Bar for three months. Although he had worked for a probate judge and a law firm as a law clerk for a total of one and one-half years, he had never actually handled a probate matter as an attorney and had no experience as a trustee or administrator of an estate. The probate judge signed the order naming respondent as successor trustee on February 28, 2006.

Respondent admits that he misrepresented his experience to the probate judge when he submitted the proposed Order Naming Successor Trustee. He further

acknowledges that he did not have sufficient experience to serve as Client A's trustee.

Financial Recordkeeping

The stocks held by the trust were managed by the investment division of a bank. The original trustee had set up a trust account at that bank to disburse funds as necessary for the benefit of Client A. At the time respondent was appointed successor trustee, the stock value was approximately $52,000.00. When funds were requested by Client A, respondent would contact a representative at the bank who would sell off some stock and place the proceeds of the sale into the trust account. Once respondent was advised that the funds were in the trust account, he would write a check. The check was given to Client A or used to pay funds on his behalf. The stocks were depleted between April 2006 and November 2007.

On March 17, 2009, respondent filed a petition to dissolve the trust. Respondent submitted an accounting of the disbursement of the funds generated by the sales of the stocks. On April 9, 2009, the probate judge signed respondent's proposed order dissolving the trust. Respondent did not retain copies of the invoices or bills he paid; he did not prepare receipts; he did not keep records of cash disbursed; and he did not retain reconciliations of the trust account.

During the time that respondent served as trustee, he personally provided financial assistance to Client A and his wife. This assistance was in the form of cash and checks to them or to third party creditors. Respondent estimates that the total assistance he personally provided was approximately $50,000.00; however, he maintained no records of these payments. In response to the disciplinary complaint, respondent reviewed his bank records and accounted for approximately $22,838.00 in payments to or on behalf of Client A and his wife.

There is no indication that any trust funds were misappropriated or mishandled. However, respondent does admit that he failed to comply with Rule 417, SCACR, which required that he maintain a receipt and disbursement journal, a beneficiary ledger, records of disbursement, check stubs, bank statements, records of deposit, the equivalent of pre-numbered canceled checks, and other documents reasonably

necessary for a complete understanding of the financial transactions for a period of six years.[1]

Transfer and Encumbrance of Real Property

The February 28, 2006, Order Naming Successor Trustee stated that the original trustee and respondent agreed that the real property held in trust was "to remain in the Trust and shall not be transferred out of the Trust under any circumstances." Contrary to that agreement and the order, respondent prepared a deed transferring the ownership of land and house from the Trust to Client A. Respondent also prepared a deed transferring ownership of the property from Client A to himself. He recorded the two deeds on May 29, 2008.

Respondent initially attempted to record an affidavit of consideration with the deed that stated that the property was exempt from the recording fee. When it was rejected by the clerk, he amended the affidavit to state that the consideration paid for the property was $50,000.00. Respondent did not actually pay Client A any money in connection with the transfer of title to the property. Respondent listed this amount on the affidavit of consideration based on his estimation of the total financial assistance he had personally provided to Client A and his wife, although at the time the assistance was provided, neither respondent nor Client A considered it a loan or that Client A would be obligated to repay it. At no time did respondent obtain an appraisal of the property to determine a fair price.

Respondent asserts that he and Client A agreed that Client A and his wife would have the right to remain living on the property rent free for the remainder of Client A's lifetime, with respondent paying all utilities, taxes, insurance, and other property-related expenses. However, there is no reference to a life estate or any other retention of interest by Client A or his wife in the deed prepared and filed by respondent. In fact, other than Client A's signature on the deed, there is no evidence of any writing provided to or signed by Client A regarding the terms of the transfer of the property to respondent.

[1] The version of Rule 417, SCACR, that governed respondent's conduct in connection with the trust required that he maintain certain financial records related to all "bank accounts which concern or affect the lawyer's practice of law." The current version of Rule 417 is limited to "client trust accounts."

Respondent did not seek or obtain approval from the Probate Court of the May 2008 transfers of the title to the property. In fact, when he filed his petition to resolve the Trust with the Probate Court in March 2009, he stated only that he "deeded the property to the beneficiary of the Trust." He did not disclose to the probate judge that he had simultaneously deeded the property to himself.

On July 30, 2008, respondent encumbered the property by borrowing $112,000.00 and signing a mortgage on the property for $224,000.00.[2] Respondent placed an insurance value on the property in the amount of $202,070.00. Respondent is unable to produce the property tax bills for 2008 or 2009, but the 2010 bill reflects an appraisal value for tax purposes of $285,000.00. Respondent used a portion of the proceeds of the loan to pay off personal debt and for personal expenses. Respondent represents that he used some of the proceeds to provide financial assistance to Client A and his wife and to pay expenses related to the property, but he has no record or accounting to support his assertions in this regard.

On September 17, 2009, respondent signed a second mortgage encumbering the property to secure a note for a $32,200.00 loan respondent received from a personal friend. Respondent represents that this was an error on the part of a staff person who drafted the mortgage, as it was his intention to mortgage his personal home, not the property obtained from Client A. Respondent states that he did not realize he had encumbered the wrong property until the disciplinary complaint was filed in March 2010. During the course of the disciplinary investigation, respondent satisfied both mortgages and transferred the property back to Client A by quitclaim deed.

Respondent acknowledges that the transfer of the property to himself was contrary to the order of the Probate Court. He further admits that the transfer and encumbrance of the property was a conflict of interest. Although Client A did have separate counsel to advise him regarding the transaction, respondent admits that the terms of the transfer were not fair and reasonable to Client A, that the terms of the transactions were not relayed to Client A in writing, and that he did not obtain Client A's informed consent. Respondent further admits that he should

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[2] The bank's explanation to respondent for the difference between the note (which references the amount actually borrowed) and the amount on the mortgage was "in case you later are able to increase the note amount you do not have to record a new mortgage," essentially provided an equity line of credit to respondent.

have disclosed to the Probate Court that he had arranged for the transfer of the property to himself.[3]

Matter II

Client B and Client C (Sisters) hired respondent for the administration of their mother's estate after her death on October 22, 2005. While the probate matter was pending, Sisters discussed with respondent the possibility of filing a civil action for malpractice against the medical facility where their mother was treated prior to her death. On August 15, 2006, Sisters signed a contingency fee agreement retaining respondent to "prosecute all claims arising out of the personal injury suffered by [their mother]." The fee agreement provided specific provisions for the "filing of a lawsuit." The only limitation on the scope of respondent's representation was that "[i]n the event an appeal is taken," the parties agreed they would enter into "a separate legal services agreement."

On May 16, 2007, respondent submitted a settlement demand to the facility's insurance carrier. The carrier responded with an offer well below the demand amount; the Sisters rejected the offer. Respondent continued settlement negotiations. On April 7, 2008, the insurance carrier sent a letter to respondent rejecting Sisters' latest counteroffer and terminating settlement negotiations due to impasse.

Change to the Scope of Representation

At the time respondent had accepted the case, he had no experience in personal injury cases, malpractice cases, or civil litigation. Although he studied and consulted with experienced attorneys in preparation for the case, he determined during settlement negotiations that he lacked the experience and competence to handle the matter. Respondent recalls that he met with Sisters personally after receipt of the first offer, explained to them that he was not the best person to represent them, and told them that he would not have any idea how to handle litigation. Respondent recalls that Sisters agreed to change the scope of the representation at that meeting and limit respondent's work to attempting to obtain a satisfactory settlement, but that he would not file suit if negotiations were

[3] Respondent's conduct in Matter I is subject to the version of the Rules of Professional Conduct in effect in 2006.

unsuccessful. Respondent has no documentation of this conversation and no written confirmation of changing the scope of the representation.

Sisters do not recall a conversation during settlement negotiations in which they agreed to change the terms of the representation. Their understanding was that, if respondent was unable to settle the matter, he would file a lawsuit for them. According to their recollection, it was not until after the insurance company terminated negotiations that respondent decided to associate another attorney to assist with the litigation. This would have been in accordance with the terms of the signed fee agreement which stated that "associate counsel may be employed at the discretion and expense of [respondent]." It was never their understanding that respondent's representation ended with the settlement negotiations.

Respondent acknowledges that the change in the scope of his representation to specifically exclude litigation required Sisters' informed consent. Respondent further acknowledges that his failure to obtain that informed consent in writing resulted in a misunderstanding between himself and Sisters regarding his role in the matter.

Association of Counsel for Litigation

In any event, it is undisputed that when settlement negotiations reached an impasse, respondent referred the matter to a more experienced attorney (Attorney) in his building. Sisters met with respondent and Attorney to discuss the case and Attorney's potential involvement. Following the meeting, Attorney accepted the case, understanding that she was being associated to assist respondent in the matter, respondent would remain involved in the matter, and that she and respondent would divide the fee. This was Sisters' understanding as well based on a confirmation letter they received from Attorney on July 25, 2008, which confirmed that they had "agreed to allow [Attorney's] association to assist in the handing of [their] mother's case." The letter specifically referred to Attorney's "association" twice more. The letter also confirmed that Sisters' contingency fee agreement would not change and that Attorney and respondent had agreed to divide the legal fee. Attorney sent respondent a copy of the July 25, 2008, letter along with a letter she sent on that same day to the insurance company advising it of her "association" on the matter.

Missed Statute of Limitations

On October 7, 2008, Attorney obtained a slightly higher settlement offer from the insurance company, but the case was not settled. The statute of limitations on the personal injury claim expired on October 22, 2008. Neither respondent nor Attorney filed a civil action in the personal injury matter. Sisters state that neither respondent nor Attorney advised them of the statute of limitations date or that it had been missed. Respondent asserts that he advised Sisters of the statute of limitations date when he referred them to Attorney, but admits he never advised them in writing. He further asserts that he had no responsibility for ensuring that suit was filed prior to the expiration of the statute of limitations. He learned of the missed statute of limitations in a meeting with Sisters on an unrelated matter in May of 2010.

Respondent now represents that it was his understanding that Sisters "formally terminated" his representation in July 2008 and that he had no further obligations in the matter after Attorney became involved. In spite of notice of Attorney's understanding that it was an association rather than a substitution of counsel, respondent made no effort to clarify the situation at the time. He did not respond to receipt of copies of Attorney's July 25, 2008, letters, he did not send a termination letter to Sisters, and he did not contact Attorney or Sisters to discuss the misunderstanding. In fact, respondent had no communication with Attorney or Sisters until the May 2010 meeting when he met with Sisters on an unrelated matter and inquired about the status of the personal injury case.

When respondent learned Attorney had missed the statute of limitations, he contacted the insurance company to determine if there was a possibility of payment of the last settlement offer. The insurance company declined. Respondent then referred Sisters to independent counsel regarding their potential legal malpractice claim. Sisters hired counsel and sued Attorney for malpractice. Attorney filed a cross claim naming respondent as a third-party defendant. Neither Attorney nor respondent had malpractice insurance coverage at the time. The civil claims were ultimately dismissed without prejudice and with no compensation to Sisters.

Respondent acknowledges that he did not act diligently in pursing the matter between August 2006 and July 2008 because of his insecurity about his abilities with regard to personal injury litigation. He further acknowledges that his lack of

diligence contributed to the association of Attorney a mere three months before the expiration of the statute of limitations. He also admits that it was incumbent upon him to ensure that both Sisters and Attorney were aware of the statute of limitations date.[4]

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence), Rule 1.3(diligence), Rule 1.4 (communication), Rule 1.8(a) (requirements for lawyer to knowingly acquire ownership, possessory, security or other pecuniary interest adverse to client), Rule 1.15(a) (safekeeping client property), Rule 1.16(d) (requirements upon termination of representation), Rule 3.3(a)(1) (candor to tribunal), and Rule 5.7 (responsibilities regarding law related services). In addition, respondent admits he violated the recordkeeping provisions of Rule 417, SCACR, which were in effect at the time he served as trustee of Client A's Trust.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We find respondent's misconduct warrants a public reprimand with conditions. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Further, as set forth in the Agreement, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the date of this opinion. In addition, respondent shall complete the Legal Ethics Practice Program Ethics School, Trust Account School, and Law Office Management School within nine (9) months of the date of this opinion and shall provide documentation of completion to the Commission no later than ten (10) days after the conclusion of the programs.

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[4] Respondent's conduct in Matter II is subject to the version of the Rules of Professional Conduct in effect in 2008.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shaul Levy and Meir Levy, Appellants,

v.

Carolinian, LLC, Respondent.

Appellate Case No. 2013-000650

Appeal from Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27442
Heard June 25, 2014 – Filed September 3, 2014

REVERSED

R. Wayne Byrd, Mark B. Goddard, and Carlyle Cromer, all of Turner Padget Graham & Laney, P.A., of Myrtle Beach; and R. Hawthorne Barrett of Turner Padget Graham & Laney, P.A., of Columbia, for Appellants.

Benjamin A. Baroody, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A. of Myrtle Beach, for Respondent.

JUSTICE KITTREDGE: This case is about the efforts of Respondent Carolinian, LLC (Carolinian) to acquire the distributional interest of Bhupendra Patel (Patel), a member of Carolinian, from judgment creditors, Appellants Shaul

and Meir Levy (collectively "Levys"), who purchased Patel's distributional interest at a foreclosure sale. The circuit court found that, pursuant to Carolinian's Operating Agreement, Carolinian could compel the Levys to sell their distributional interest after the foreclosure sale. We reverse.

I.

Carolinian is a closely held, manager-managed limited liability company (LLC), which is organized under the laws of South Carolina and which owns and manages various hotel and rental properties in Horry County, South Carolina. In February 2010, the Levys obtained a judgment against Patel[1] in the amount of $2.5 million. Thereafter, the Levys obtained a charging order in the circuit court, which constituted a lien against Patel's distributional interest in Carolinian.

Subsequently, the Levys filed a petition to foreclose the charging lien, and the foreclosure sale was held in April 2012. The Levys were the successful bidders, purchasing Patel's distributional interest for $215,000. Carolinian was represented at the foreclosure sale by its registered agent and its attorney, who unsuccessfully bid $190,000 on Carolinian's behalf.

Regarding the right to redeem or disencumber a member's distributional interest, Section 3.5 of Carolinian's Operating Agreement provides that a member's financial rights can be redeemed at any time up until foreclosure sale:

> Redemption of Member's Financial Rights Subjected to Charging Order. In the event a Member's Financial Rights are subjected to a charging order under Section 33-44-504 of the [South Carolina Code], the Management Committee may cause the Company to redeem the Member's Financial Rights so charged, with Company Property, *at any time prior to foreclosure of said Financial Rights* in accordance with Section 33-44-504(c) of the [South Carolina Code].

[1] Patel and two other persons are jointly and severally liable to the Levys for the judgment debt. However, because the two others are not involved in this lawsuit, we refer to Patel as the sole judgment debtor for ease of reference.

(emphasis added). It is undisputed neither Carolinian nor any of the remaining members redeemed Patel's interest prior to the foreclosure sale, and the Levys did not thereafter seek to be admitted as members of Carolinian.

Regarding a judgment creditor's acquisition of a member's distributional interest, Carolinian's Operating Agreement provides:

> [N]o creditor of a Member who obtains any portion of a Membership Share, including any Financial Rights, by charging order pursuant to Section 33-44-504 of the [South Carolina Code] . . . may become a full Member in the Company *without the unanimous written consent of the Members, obtained after the transfer*. . . . If the transferee of all or any part of a Member's Membership Share is not admitted as a Member, he shall be entitled to receive only the distributions to which the transferor would otherwise be entitled. *The transferee shall not have any Voting Rights and shall not be entitled to participate in the management of the Company or to exercise any rights of a Member*.

(emphasis added).

Following the foreclosure sale, Carolinian asserted it was entitled to purchase Patel's distributional interest from the Levys pursuant to Article 11 of the Operating Agreement. Article 11 of the Operating Agreement, which speaks to the rights of a "member" to transfer his membership share, provides in relevant part:

> 11.1 Restrictions on Transfer. No Member may voluntarily or involuntarily sell, transfer, gift, assign, pledge, mortgage, hypothecate, or otherwise convey or encumber any portion or all of his Membership Share to any Person without the prior written consent of those Members who own more than sixty-seven (67%) percent of the Voting Rights in the Company (without regard to the transferor Member). If [no] such consent is obtained, . . . any attempted conveyance or encumbrance of all or a portion of a Membership Share in contravention of this ARTICLE XI shall be null, void and without effect.

> 11.2 Right to Buy
>
> . . . .
>
> (b) Company and Members Right to Buy. If a Member attempts to transfer all or a portion of his Membership Share without obtaining the other Members' consent as required in SECTION 11.1, . . . such Member is deemed to have offered to the Company all of his Member Share . . . .

Carolinian contended that, since the Levys failed to obtain the consent required under Section 11.1 of the Operating Agreement, their distributional interest was deemed to have been offered to Carolinian, and Carolinian was entitled to purchase that interest under Section 11.2.

The Levys objected to Carolinian's attempt to force them to sell their interest, arguing they were not subject to the terms of Article 11 of the Operating Agreement and, thus, were not required to seek consent thereunder. The Levys subsequently filed suit, seeking a declaratory judgment that they were the lawful owners of Patel's distributional interest and that any right Carolinian had to compel the sale of the distributional interest terminated upon the foreclosure sale under the terms of Section 3.5 of the Operating Agreement.

Following a hearing, the trial court found the foreclosure sale, which resulted in the transfer of Patel's distributional interest in Carolinian to the Levys, changed the Levys' status from that of mere judgment creditors to transferees of Patel's distributional interest. The trial court further found that, as transferees, the Levys became subject to the provisions of Article 11 of the Operating Agreement. Specifically, the trial court held that Carolinian could force the Levys to sell Patel's distributional interest pursuant to Sections 11.1 and 11.2 of the Operating Agreement.

The Levys' appeal was certified to this Court pursuant to Rule 204(b), SCACR.

II.

The dispositive issue in this case is whether Carolinian may compel the Levys to sell the distributional interest they acquired through the foreclosure sale. The Levys admit Carolinian had the right to redeem Patel's distributional interest at any time *prior to* the foreclosure sale; however, the Levys contend the ability to redeem that interest was extinguished by virtue of the judicial sale. Thus, the Levys argue the circuit court committed an error of law in finding that, pursuant to Article 11 of the Operating Agreement, Carolinian may compel the Levys to sell their distributional interest. We agree.

The South Carolina Uniform Limited Liability Company Act of 1996 ("LLC Act")[2] provides the *exclusive remedy* by which a judgment creditor of a member may satisfy a judgment out of the judgment debtor's distributional interest in an LLC. S.C. Code Ann. § 33-44-504(e) (2006 & Supp. 2013); *see also Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 381, 746 S.E.2d 26, 33 (2013) (finding the exclusive remedy for a judgment creditor seeking to satisfy a judgment through the debtor's interest in an LLC is the process set forth in S.C. Code Ann. section 33-44-504).

The LLC Act provides in relevant part:

> (a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. . . . .
>
> (b) A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. *A purchaser at the foreclosure sale has the rights of a transferee*.

[2] S.C. Code Ann. §§ 33-44-101 to -1208 (2006 & Supp. 2013).

S.C. Code Ann. § 33-44-504 (emphasis added). In terms of disencumbering a member's interest that is subject to a charging lien, consistent with Section 3.5 of Carolinian's Operating Agreement, the LLC Act provides that a member's distributional interest in an LLC may be redeemed at any time *prior to foreclosure*. *Id.* § 33-44-504(c).

The LLC Act defines a member's distributional interest as "all of a member's interest in distributions by the [LLC]." *Id.* § 33-44-101(6). A distributional interest in an LLC is personal property and may be transferred in whole or in part. *Id*. § 33-44-501(b). A distributional interest does not include the member's broader rights to participate in management of the LLC. *Id*. § 33-44-501 cmt. "A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled." *Id*. § 33-44-502.

"A transfer of a distributional interest does not entitle the transferee to become or to exercise any rights of a member." *Id*. A transferee may become a member of the LLC if and only to the extent all other members consent or as otherwise set forth in the LLC operating agreement. *Id.* § 33-44-503(a). The operating agreement is the essential contract that governs the affairs of an LLC. *Id*. § 33-44-103 cmt. Although an LLC is generally free to modify the default provisions of the LLC Act by its operating agreement, an LLC may not "restrict [the] rights of a person, other than a manager, member, and transferee of a member's distributional interest" through the terms of its operating agreement. *Id*. § 33-44-103(b) (enumerating various non-waivable provisions of the LLC Act).

We find the trial court committed an error of law in finding the provisions of Article 11 of the Operating Agreement applied and restricted the Levys right to foreclose their charging lien without the consent of Carolinian or its members. First, the transfer restrictions of Section 11.1, by their express and unambiguous terms, apply only to "members," and unquestionably, the Levys have never been or sought to be members of Carolinian; they merely became transferees of Patel's distributional interest by virtue of the foreclosure sale. *See Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (noting courts are bound to give effect to the meaning of an agreement's terms, which are to be taken and understood in their plain, ordinary, and popular sense (citing *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988))). Further, the Levys did not attain the status of transferees until *after the foreclosure sale*; thus, Carolinian could not, through its

Operating Agreement, restrict the statutory rights of the Levys by requiring consent from Carolinian or its members *before the foreclosure sale*, as the Levys were mere judgment creditors at that time. *See* S.C. Code Ann. § 33-44-103(b)(7) (prohibiting an operating agreement from restricting the rights of a person other than managers, members, and transferees of a member's distributional interest). Thus, the Levys were not subject to the transfer restrictions of Section 11.1 at the time they foreclosed their charging lien.

Moreover, because the Levys were not required under Section 11.1 to obtain consent from Carolinian or its members prior to the foreclosure sale, we find Carolinian may not now invoke the right to purchase under Section 11.2, as that section, by its terms, applies only where consent under Section 11.1 is required and not obtained prior to the transfer. We hold that Carolinian's ability to purchase Patel's interest is not controlled by any part of Article 11, but rather by Section 3.5 of the Operating Agreement, which provided Carolinian the opportunity to purchase Patel's interest *before* the foreclosure sale, not after.[3] From the record, it appears Carolinian was simply unwilling or unable to pay the amount necessary to redeem Patel's distributional interest prior to the foreclosure sale; however, neither the law nor the Operating Agreement gives Carolinian the unilateral right, following the foreclosure sale, to purchase the distributional interest the Levys lawfully acquired in an effort to satisfy their judgment against Patel. *See Kriti Ripley*, 404 S.C. at 381–82, 746 S.E.2d at 33–34 ("A judgment creditor has a right to collect on his judgment . . . . Foreclosure is not a penalty, but rather is simply the ultimate remedy for collection of a debt owed. Foreclosure on an LLC member's interest does not divest the member of the interest without compensation or cause him to lose his interest. The member simply has a debt that must be paid.").

III.

We reverse the trial court and find that the provisions of Article 11 of the Operating Agreement did not restrict the Levys' right to foreclose their charging

[3] We note Carolinian also had the opportunity to obtain Patel's interest through the foreclosure sale; this opportunity was limited only by Carolinian's decision to cap the amount of its bid at $190,000.

lien against Patel's distributional interest, and we further find that Carolinian may not now invoke the provisions of Article 11 to compel the Levys to sell the distributional interest they acquired through the foreclosure sale.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Gilbert Gonzalez, Petitioner.[1]

Appellate Case No. 2012-210606

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27443
Heard February 4, 2014 – Filed September 3, 2014

AFFIRMED AS MODIFIED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, and Chief Deputy Attorney General John W. McIntosh, all of Columbia, for Respondent.

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[1] Gonzalez maintains his last name is Zubia but that it was erroneously entered as Gonzalez when he was incarcerated. Both variations appear in the record.

JUSTICE BEATTY: Gilbert Gonzalez was found by a jury to meet the definition of a sexually violent predator (SVP) under South Carolina's SVP Act, S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2013). The Court of Appeals affirmed. *In re the Care & Treatment of Gonzalez*, Op. No. 2012-UP-003 (S.C. Ct. App. filed Jan. 4, 2012). On certiorari, Gonzalez contends the Court of Appeals erred in affirming his SVP status because the State inappropriately asserted during closing argument that the jury could draw an adverse inference at trial from the absence of a psychiatrist Gonzalez retained to perform an independent evaluation. We affirm as modified.

I. FACTS

The predicate for Gonzalez's referral to the SVP program was his convictions for offenses involving three young girls who were four, five, and six. Gonzalez pled guilty on June 4, 1985 to committing a lewd act on a minor for lifting up the skirt of a four-year-old and fondling her. He was sentenced to nine months in prison. Gonzalez was already on parole for another crime when he committed the lewd act offense.

On June 3, 1985, the day before his guilty plea to the above offense, Gonzalez fondled a five-year-old girl. On April 28, 1986, while again out on bond, Gonzalez engaged in oral sex with a six-year-old girl, fondled her, and rubbed her genital area with his penis until he ejaculated. On November 5, 1986, Gonzalez pled guilty to lewd act on a minor for the offense against the five-year-old and to criminal sexual conduct (CSC) with a minor in the first degree for the offense involving the six-year-old. Gonzalez was sentenced to thirty years in prison on the CSC charge and a consecutive ten years in prison for the lewd act.

In January 2006, prior to Gonzalez's potential release, the multidisciplinary team found there was probable cause to believe Gonzalez was an SVP and referred the matter to the prosecutor's review committee. *See* S.C. Code Ann. § 44-48-30(1)(a)-(b) (Supp. 2013) (defining an SVP as "a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment").

The committee agreed with this finding and filed a petition in the circuit court for civil commitment proceedings. The circuit court made a determination of

probable cause and appointed Dr. Pamela Crawford to perform a psychiatric evaluation of Gonzalez. The circuit court thereafter granted Gonzalez's request to have an independent psychiatric evaluation performed by Dr. Thomas V. Martin.

A trial was held in the circuit court in February 2009. Dr. Crawford testified on behalf of the State and stated that, after examining Gonzalez and reviewing all of the pertinent records in his file, she had diagnosed him as having pedophilia and an anti-social personality disorder.

Dr. Crawford stated that pedophilia cannot be cured, but part of controlling it is for the individual to recognize the condition and to learn specific ways to resist inappropriate conduct. Dr. Crawford testified that she had a real concern regarding Gonzalez's risk for reoffending because, although he pled guilty to three charges, he maintained he did not "recall" doing certain acts of a sexual nature with the victims, and he stated that his sexual misconduct was caused by an ex-girlfriend who had become angry with him and put a spell on him. She stated the only crime that Gonzalez clearly admitted to her was the CSC offense on the six-year-old, and her review of the laboratory data from SLED showed Gonzalez's semen was found in the vagina and vulva of that victim.

Dr. Crawford testified pedophilia is a "hard-wired sexual attraction to children" and that a person has to admit responsibility for past misconduct and must "be very, very motivated" to combat this predisposition in order to reduce the risk of committing future acts of sexual violence against very young children. Dr. Crawford additionally noted that Gonzalez "had four major disciplinary infractions" during his incarceration, which also indicated a propensity for violence and an inability to control his behavior, even when incarcerated. Dr. Crawford stated in her medical opinion Gonzalez met the criteria for designation as an SVP, and he was in need of long-term control, care, and treatment at a secured facility.

During his testimony, Gonzalez acknowledged that he had pled guilty to the offenses involving sexual misconduct, but he denied full responsibility as he variously contended that he did not commit the crimes or that he did not commit all of the elements of the crimes. Gonzalez repeatedly maintained that he had been under a spirit or spell that had been placed on him by an ex-girlfriend, or he had been overtaken by a "demon" of sexual perversion, which he was in the process of overcoming.

He stated Dr. Crawford was wrong when she testified that he had only admitted the third incident involving the CSC charge. Gonzalez testified that he did tell the four-year-old victim in the first incident to lift her dress up, but he insisted that he never placed his hands on her. He completely denied the second incident with the five-year-old, stating he "never did nothing to her, never did lay [his] hands on her." However, he acknowledged that he did commit the third offense involving CSC on a six-year-old.

Gonzalez's girlfriend, Pamela Donahue, testified that Gonzalez had admitted to her that he committed the CSC offense, but she echoed Gonzalez's statements about having spells placed on him. She said she believed this meant if the devil wanted someone to do something, he would "misguide" the person.

During closing arguments, both the State and Gonzalez invoked the missing witness rule, i.e., arguing that the jury could infer that a party's failure to call a particular witness meant the witness's testimony would have been unfavorable to that party. Specifically, as is relevant here, the State argued the jury could infer the absence of Gonzalez's independently retained expert, Dr. Martin, indicated that Dr. Martin's testimony would have been unfavorable to Gonzalez.

The jury found beyond a reasonable doubt that Gonzalez met the statutory definition of an SVP. The circuit court ordered Gonzalez to begin involuntary civil commitment for long-term control, care, and treatment in the SVP treatment program administered by the South Carolina Department of Mental Health. In affirming Gonzalez's appeal, the Court of Appeals cited precedent holding the control of closing arguments rests in the circuit court's discretion, and it found the circuit court did not abuse its discretion because the State's closing argument was based on matters within evidence and the reasonable inferences arising therefrom. *In re the Care & Treatment of Gonzalez*, Op. No. 2012-UP-003 (S.C. Ct. App. filed Jan. 4, 2012), slip op. at 2. This Court granted Gonzalez's petition for a writ of certiorari to consider the propriety of the State's closing argument.

II. STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

"A trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury." *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006); *see also State v. Charping*, 333 S.C. 124, 508 S.E.2d 851 (1998) (stating the trial court must exercise its discretion as to whether to permit comment on a missing witness).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). To warrant reversal, an appealing party must demonstrate not only error, but also prejudice. *Id.* at 390, 529 S.E.2d at 539.

III. LAW/ANALYSIS

On appeal, Gonzalez asserts the Court of Appeals erred by affirming the trial court's ruling allowing the State to argue during its closing that the jury could draw a negative inference from the fact that Gonzalez's expert did not testify at trial.

During cross-examination, the State asked Gonzalez if he had obtained a second, independent evaluation after being seen by Dr. Crawford. Defense counsel objected, and a discussion was held at the bench, out of the jury's hearing. The contents of the objection were not placed on the record. Upon resuming, however, the State repeated its question and Gonzalez answered that he did obtain a second evaluation. The State then asked if he was evaluated by Dr. Tom Martin and if he recalled if it occurred in October 2006, and Gonzalez said that was correct. The State did not ask Gonzalez about the results of the evaluation, and no further questioning occurred on this subject.

After the State rested its case, defense counsel inquired whether the State intended to draw a negative inference from the absence of Gonzalez's expert at trial. The State indicated that it did. The circuit court stated, "I think he is entitled to ask him if he has been evaluated. Now the rest of it goes to how he argues it to the jury. You can always draw a negative inference from a witness not being called." During closing, the State told the jury that Gonzalez was entitled to get an independent evaluation and he had obtained one from Dr. Martin. The State then argued: "Dr. Martin is not here. [The State] would submit to you that you can draw an inference from his not being here that if he was here his testimony would be adverse to [Gonzalez's] case."

Following the jury's verdict, defense counsel moved for a new trial based, in part, on the State's adverse inference argument regarding Dr. Martin. The circuit court denied the motion.

To address the propriety of the missing witness rule here, we begin with a historical overview of the rule. Although it has been stated with some variations, it has long been the general rule in South Carolina that if a party fails, without satisfactory explanation, to produce the testimony of an available witness on a material issue in the case and the evidence is within his knowledge, is within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness. *See, e.g., Davis v. Sparks*, 235 S.C. 326, 111 S.E.2d 545 (1959). The rule is often referred to by the courts as the "missing witness rule," the "absent witness rule," or the "empty chair doctrine," and modern cases describe this principle as a permissible inference, not a presumption. *See* Alan Stephens, Annotation, *Adverse Presumption or Inference Based on a Party's Failure to Produce or Examine Witness with Employment Relationship to Party—Modern Cases*, 80 A.L.R.4th 405, 415 nn.10 & 11 (1990 & Supp. 2014).

The rule is based on the premise "that a party's failure to rebut evidence that the party naturally would be able to refute, through testimony or physical evidence, may warrant an inference that such evidence either does not exist or would be unfavorable." *In re Samantha C.*, 847 A.2d 883, 910 (Conn. 2004). "The fact that the unfavorable inference may be drawn does not require that the jury draw it." *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 476, 200 S.E.2d 681, 683-84 (1973). The rule has been applied in both civil and criminal cases, and it has been implemented as either a jury argument by counsel or a jury instruction by the trial court, or both. Stephens, *supra*. It has also been applied to non-testifying experts, including physicians. *See generally* Alan Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Question Examining Doctor—Modern Cases*, 77 A.L.R.4th 463 (1990 & Supp. 2014).

Early South Carolina cases stated the principle in fairly simple terms, with further details as to its parameters being added over time. In *State v. Charping*, 333 S.C. 124, 508 S.E.2d 851 (1998), for example, the Court remarked that it had previously recognized that a party should not be prejudiced by his failure to call a witness who is "equally available" to the other party:

> This Court has previously stated "it is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness." *State v. Hammond*, 270 S.C. 347, 356, 242 S.E.2d 411, 415 (1978). *See also State v. Bamberg*, 270 S.C. 77, 240 S.E.2d 639 (1977) (comment on failure to produce witness permissible); *State v. Cook*, 283 S.C. 594, 325 S.E.2d 323 (1985) (no error in allowing solicitor to comment on defendant's failure to produce his wife); *State v. Shackelford*, 228 S.C. 9, 88 S.E.2d 778 (1955) (not improper for prosecutor to comment upon defendant's failure to produce witnesses, accessible to the accused, or under his control, whose testimony would substantiate his story).
>
> However, in *Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959), we recognized the general rule that "a party is not to be prejudiced by his failure to call a witness who is equally available to the other party." *Citing* 20 Am.Jur. 193 *Evidence*, § 189.

Id. at 128, 508 S.E.2d at 853 (footnote omitted).

This Court has also discussed the factor of "control," which is sometimes used with a meaning similar to "available":

> If an inference is based upon the absence of a possible witness it must appear that the witness is in the 'control' of the party and available. 'Control' in this connection means only that the witness is in such relationship to the party that it is likely that his presence could be procured. The word 'available' is sometimes used with a meaning similar to 'control' and is held not to mean merely available or accessible for service of compulsory process.

Duckworth v. First Nat'l Bank, 254 S.C. 563, 576-77, 176 S.E.2d 297, 304 (1970) (citing 29 Am. Jur. 2d *Evidence*, § 180, at page 225). The element of control is judged at the time of trial. *See id.* at 577, 176 S.E.2d at 304 (holding where the witness was an employee of a party at the time of a contract but was not employed at the time of trial, the witness was no longer in the control of the party).

"Generally, the [missing witness] rule is applied when the uncalled witness is an agent, employee, relation, or associate of the party failing to call him, *or within some degree of control of said party*." *Davis*, 235 S.C. at 333, 111 S.E.2d at

549 (emphasis added). Moreover, the unfavorable inference may be drawn only from a party's failure to call an available, material witness where under all the circumstances, the failure to produce such witness creates suspicion of a willful attempt to withhold competent evidence. *Baker*, 261 S.C. at 475-76, 200 S.E.2d at 683. A party need not produce every witness who might testify in his favor, and a failure to do so does not necessarily imply an attempt on his part to suppress the truth. *Davis*, 235 S.C. at 334, 111 S.E.2d at 549. "Such suspicion is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses." *Id.* "Requiring a party to call all previously disclosed expert witnesses would unnecessarily prolong the trial and unnecessarily increase expenses." *Wilkerson v. Pittsburgh Corning Corp.*, 659 N.E.2d 979, 984 (Ill. App. Ct. 1995).

Invoking adverse inferences due to missing witnesses has been the subject of much debate. Some commentators, such as McCormick, have questioned whether the rule's usefulness has been outlived. In *O'Rourke on Behalf of O'Rourke v. Rao*, 602 A.2d 362 (Pa. Super. Ct. 1992), the court discussed the waning need for the missing witness rule in light of modern discovery rules:

> Despite the plenitude of cases recognizing the inference, refusal to allow comment or to instruct does not often serve as a ground for reversal. This counsel of caution is reinforced by several factors. Possible conjecture of ambiguity of inference is often present. The possibility that the inference may be drawn invites waste of time in calling unnecessary witnesses or in presenting evidence to explain why they were not called. Failure to anticipate that the inference may be invoked entails substantial possibilities of surprise. And finally, the availability of modern discovery and other disclosure procedures serves to diminish both the justification and the need for the inference. For some or all of these reasons and others, recognition of the inference may well be disappearing.

Id. at 363-64 (quoting *McCormick on Evidence* § 272 (3d ed. 1984, 1987 pocket part) (footnotes omitted)); *see also Routh v. St. John's Mercy Med. Ctr.*, 785 S.W.2d 744, 747 (Mo. Ct. App. 1990) (observing the rule pre-dates modern discovery rules, which would make the use of an adverse inference unnecessary, and its application "has presented continuing difficulty to the courts").

The missing witness rule is based on dictum in *Graves v. United States*, 150 U.S. 118 (1893).[2] *See* Robert H. Stier, Jr., *Revisiting the Missing Witness Inference -- Quieting the Loud Voice from the Empty Chair*, 44 Md. L. Rev. 137, 138-39 (1985) (noting the historical significance of the *Graves* case as the basis for the rule). In *Graves*, the Court ultimately rejected its application under the circumstances there, which involved the absence of the defendant's wife, a potential witness to the offense, from the defendant's murder trial, since the Court found she was incompetent to testify against her husband. *Id.* at 138 n.3.

In *Baker v. Port City Steel Erectors, Inc.*, Justice C. Bruce Littlejohn, in a concurring opinion, stated "[t]he rule came into being through the common law," and he suggested "eliminating it as a matter of common law." 261 S.C. at 477, 200 S.E.2d at 684. Justice Littlejohn observed that the rule creates more problems than it solves and permits a jury to speculate on what the evidence in the case *might have been*:

> I have many misgivings as to the wisdom of continuing the rule that when a party fails to produce the testimony of an available witness who is within some degree of control of the party, it may be inferred that the testimony of such witness, if presented, would be adverse to the party who failed to call the witness.
>
> After almost 25 years on the trial and appellate bench, I have found that the rule is subject to much mischief and perhaps causes more problems than it helps to solve. Application of the rule suggests to a juror that he may speculate as to what an available, but non-testifying witness would say.

Id.; *see also Crum v. Ward*, 122 S.E.2d 18, 26 (W. Va. 1961) (remarking, in another context, that although "wide latitude and freedom of counsel in arguments to a jury are and ought to be allowed, we have never held that such arguments may be based on facts not in the record, or on inferences based on, or drawn from, facts which are not even admissible" and "[t]o permit such arguments would . . . disturb . . . well known rules of . . . procedure").

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[2] The Court stated, "The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not creates the presumption that the testimony, if produced, would be unfavorable." *Graves*, 150 U.S. at 121.

In this case, there is no indication in the record that Gonzalez tried to suppress or conceal the testimony of Dr. Martin, which is a necessary predicate to allowing an adverse inference argument. *See Baker*, 261 S.C. at 475-76, 200 S.E.2d at 683 (stating an unfavorable inference may be drawn only where the failure to produce a witness creates suspicion of a willful attempt to withhold competent evidence). The failure to call a witness does "not justify an arbitrary presumption of suppression of evidence." *Parentini v. S. Klein Dep't Stores, Inc.*, 228 A.2d 725, 727 (N.J. Super. Ct. App. Div. 1967) (citation omitted). "The court must assess the nonproduction of a witness with a view to the person and testimony involved." *Id.*

In addition, due to the complexities of a psychiatric evaluation, it is not proper to assume Dr. Martin's diagnosis would only have been one of two results. As the court in *Parentini* observed, "We do not think it is proper to assume that normally a psychiatric opinion must support one of two opposite contentions; the opinion may lie somewhere in between, or go off in an entirely different direction." *Id.* at 727-28. The court concluded that, at best, the jury in that case could have concluded that the defendant's nonproduction of the expert witness indicated that his testimony would not have specifically contradicted the plaintiff's experts, and that it would not have materially aided his defense, but there was no basis for an assumption that the absent witness's testimony would have been favorable or unfavorable to anyone. *Id.* at 728.

Gonzalez had no obligation to produce medical evidence at trial, and the fact that he exercised his right to obtain an independent examination should not confer such an obligation upon him at trial. *Cf., e.g., Knotts v. Valocchi*, 207 N.E.2d 379, 382 (Ohio Ct. App. 1963) ("Defendant was free to accept or dispute plaintiff's medical evidence. He had no obligation to produce a doctor at trial, nor did the fact that he exercised his right of medical examination before trial fasten such obligation upon him. Therefore, he could not be called upon to answer for the absence of such a witness or his failure to call him.").

An expert's opinion is based on a myriad of facts and data, which may or may not be admissible in evidence, as well as the expert's analysis. *See* Rule 703, SCRE ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."). Particularly as to a non-testifying psychiatric expert,

it is inherently difficult to assume that his opinion must have been one of only two options.

The application of an adverse inference as to these types of experts allows a jury to simply *speculate* as to what the expert might have said. In our view, an adverse inference is not appropriate for psychiatric experts, as the expert's opinion about the psychiatric condition of an individual is based upon numerous complex factors that do not readily lend themselves to being reduced to a discrete position, as compared to a fact witness. *See Parentini*, 228 A.2d at 727-28.

Because of the risk of unfairness that such adverse inferences could impose, we hold today that a party's invocation of the missing witness rule should be limited to *fact* witnesses, and it should not be applied to *opinion* witnesses, particularly psychiatric experts. Moreover, we reiterate that the fact witness must be under the control of the party failing to call him. Control in this context is now expressly defined to mean the uncalled witness is an agent, employee, relation, or associate of the party failing to call him. This is a more definitive statement of the categories of persons subject to control than is stated in our existing precedent, and it should reduce uncertainty on this point. *Cf., e.g.*, *Davis*, 235 S.C. at 333, 111 S.E.2d at 549 (noting control refers to the fact that the uncalled witness "is an agent, employee, relation, or associate of the party failing to call him, or within some degree of control of said party").

In addition, because a jury instruction "carries with it the imprimatur of a judge learned in the law" and, therefore, usually has more impact on a jury than the arguments of counsel, *Dansbury v. State*, 1 A.3d 507, 522 (Md. 2010), we hold the better practice is that use of the missing witness rule should be limited to counsel's argument, and a jury instruction on the matter should not be given. *See, e.g., In re Samantha C.*, 847 A.2d 883, 889 (Conn. 2004) (finding public policy reasons support a conclusion that jury instructions should not be given regarding the missing witness rule).

Having found error in the State's adverse inference argument, we must next consider whether it constitutes reversible error. A fundamental principle of appellate procedure is that a challenged decision must be both erroneous and prejudicial to warrant reversal. *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249 (2009); *see also State v. Charping*, 333 S.C. 124, 508 S.E.2d 851 (1998) (confirming a ruling on a party's ability to comment on a missing witness is subject to a harmless error analysis). "No definite rule of law governs this finding; rather,

the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) (citation omitted). "Error is harmless where it could not have reasonably affected the result of the trial." *Id.*

We find any error in this case is harmless beyond a reasonable doubt because it could not have reasonably affected the result reached by the jury. As an initial matter, we note Gonzalez's argument on appeal to this Court focuses exclusively on the propriety of closing argument, and he does not set forth an issue challenging the State's cross-examination of Gonzalez about a second evaluation.[3] Once the existence of a second evaluation was before the jury during cross-examination, any adverse inference arguably arose at that time, so the explicit suggestion of an adverse inference by the State in its closing argument was merely cumulative. *See Price v. United States*, 531 A.2d 984, 993 (D.C. 1987) ("By pointing out a witness' absence, counsel is plainly suggesting that if that witness were produced the resulting testimony would be adverse to the other party."). In any event, the State did not elicit any details about the evaluation on cross-examination other than the name of the examiner (Dr. Martin) and the date when the evaluation was performed.

In addition, defense counsel strenuously rebutted the adverse inference by arguing to the jury in his closing that *the State* could have called Dr. Martin if it believed his testimony would be helpful to the State. Defense counsel also invoked the missing witness rule as to other witnesses, arguing the State had failed to call several experts, so it could be inferred that their testimony would not help the State.

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[3] The circuit court's statements at trial regarding balancing the probative value and the prejudicial effect of the evidence pertained to the admission of Gonzalez's testimony during cross-examination. The South Carolina Rules of Evidence govern the admission of this evidence. *See In re the Care & Treatment of Corley*, 353 S.C. 202, 577 S.E.2d 451 (2003) (discussing the SCRE, particularly Rules 401 and 403, in an SVP matter); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). In contrast, however, "[a]rguments made by counsel are not evidence." *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003).

Considering the entire record, we find these exchanges did not measurably affect the decision of the jury. The State set forth an abundance of evidence as to Gonzalez's mental abnormality based on Dr. Crawford's diagnosis of Gonzalez as having pedophilia and an anti-social disorder, as well Gonzalez's risk of reoffending and inability to control his actions based on the fact that he continued to commit offenses while out on bond and based on his steadfast refusal, or inability, to accept responsibility for his conduct. Gonzalez attempted to dilute the significance of this evidence by referring to examinations he had years earlier by other individuals. The State, however, rebutted this evidence by asserting these examinations were not recent and were not made in the context of evaluating his status as an SVP.

In the end, the determination whether the evidence indicated Gonzalez was an SVP was one to be made by the jury as the fact-finder, and the very brief reference to a second evaluation could not reasonably have affected the outcome here. If anything, Gonzalez's failure to fully acknowledge his prior sexual misconduct despite his guilty pleas to the offenses, and his unusual attempt to cast the blame for his sexual contact with children on a "spell" cast by an ex-girlfriend or on "spirits" or "demons," probably did more than any passing reference to a second evaluation to convince the jury that he was at a risk to reoffend if he did not receive long-term control, care, and treatment in a secure facility.

IV. CONCLUSION

The decision of the Court of Appeals upholding Gonzalez's SVP status and his involuntary commitment is affirmed as modified.

AFFIRMED AS MODIFIED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only in a separate opinion.

JUSTICE PLEICONES: I agree that the trial judge erred in permitting the State to invoke the "missing witness" rule, and that its error was harmless. I write separately because I do not join the portion of the majority opinion that would bar the application of the rule to *any* missing *opinion* witness. Instead, I would narrow our holding to address the issue in this case: whether the State should be allowed to invoke the rule against a SVP defendant who fails to call an examining psychiatric witness.

In every SVP proceeding, the key issue is whether the person "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." *See* S.C. Code Ann. § 44-48-30(1)(b) (Supp. 2014). The State must prove beyond a reasonable doubt that a SVP defendant's mental state is such that it warrants indeterminate civil commitment. The State meets that burden in part by procuring an evaluation of the SVP defendant's mental state and by having the expert testify as to the SVP defendant's likelihood of reoffending. Given the quasi-criminal characteristics of SVP proceedings and the fact that the State bears the burden of proof, I would prohibit the State from *ever* invoking the missing witness rule when a SVP defendant chooses not to call a psychiatric witness.

I would not use this case as the vehicle to decide the broader question: whether we should prohibit the use of the missing witness rule when a party fails to call an expert. Further, it is not necessary to a decision of this case to adopt a new rule for "control" in the context of invoking the missing witness rule for fact witnesses. Therefore, I cannot agree with the majority's definition of control as I fear the definition unnecessarily limits the viability of the rule for fact witnesses.

I also write separately to express my disagreement with the majority's analysis of Rule 403, SCRE. Since I would prohibit the State from invoking the rule in a SVP proceeding when a defendant chooses not to call a psychiatric expert, I see no need to engage in a Rule 403 analysis. Further, I see no need to distinguish between invoking the missing witness rule during cross-examination or closing argument because I would find the State should be foreclosed from *ever* invoking the rule in the SVP context.

Ultimately, I agree with the majority that the trial judge's error was harmless because there is overwhelming evidence to support the jury's determination. For the reasons stated herein, I therefore concur in result only and would affirm the Court of Appeals' decision as modified.

HE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Vincent Neal Way, Petitioner/Respondent,

v.

The State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-199686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27444
Heard November 20, 2013 – Filed September 3, 2014

AFFIRMED AS MODIFIED IN PART; CERTIORARI DISMISSED IN PART AS IMPROVIDENTLY GRANTED

Appellate Defender LaNelle Cantey Durant, of Columbia, for Petitioner/Appellant.

Attorney General Alan Wilson and Assistant Attorney General William M. Blitch, both of Columbia, for Respondent/Petitioner.

JUSTICE BEATTY: A jury found Vincent Neal Way met the definition of a sexually violent predator (SVP) under South Carolina's SVP Act, S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2013). The circuit court ordered Way to begin involuntary civil commitment for long-term control, care, and treatment in the SVP treatment program administered by the South Carolina Department of Mental Health. Way appealed, and the Court of Appeals affirmed. *In re the Care & Treatment of Way*, Op. No. 2011-UP-268 (S.C. Ct. App. filed Aug. 24, 2011). This Court granted cross petitions for a writ of certiorari filed by Way and the State. As to Way's appeal, we affirm as modified, and we dismiss the State's petition for a writ of certiorari as improvidently granted.

I. FACTS

In 1993, Way pled guilty to committing a lewd act on a minor. The victim was Way's 13-year-old niece, who was spending the night with Way (who was then about 28 years old) and his wife. The victim reported that Way put his hand inside her clothing while she was sleeping on the couch and fondled her, kissed her thigh, and then laid on her and "began humping her." Way was sentenced to ten years in prison, suspended upon the service of eighteen months in prison and five years of probation.

In 1995, while on probation, Way pled guilty to contributing to the delinquency of a minor. In that matter, Way allowed two girls who were runaways, one 13 and one 15, to spend the night at his home without notifying the police.

While still on probation in 1997, Way pled guilty to committing a lewd act upon a minor. The victim was a 13-year-old girl, who reported that Way met her at a boat dock in 1995 and gave her marijuana, then had sexual intercourse with her. Way was sentenced to fifteen years in prison for this offense.

In 2007, prior to his release from prison, Way was referred to the multidisciplinary team, which determined there was probable cause to believe Way met the statutory definition of an SVP.[1] The multidisciplinary team referred Way's

[1] An SVP is defined as "a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder

case to the prosecutor's review committee, which filed a petition with the circuit court for civil commitment proceedings. The circuit court concluded probable cause existed and ordered a mental evaluation of Way to be performed by Dr. Donna Schwartz-Watts. Dr. Schwartz-Watts performed an evaluation and was the State's expert. Way also obtained an independent mental evaluation by an expert of his own choosing, Dr. Tom Martin.

At the civil commitment proceeding in 2009, Dr. Schwartz-Watts testified that she believed Way suffered from a mental abnormality or personality disorder as defined by the SVP Act. Specifically, she diagnosed him as having a sexual disorder, not otherwise specified, based on his prior sexual history with several 13-year-old girls. She also diagnosed Way as having amnesia (for events prior to 1994) based on a head injury he sustained in a car accident in 1994. She found, however, that any memory loss was not due to brain damage because testing revealed Way has "a high average IQ."

Dr. Schwartz-Watts stated her evaluation indicated Way was likely to re-offend. In particular, she noted his subsequent offenses occurred while he was still on probation and the incidents occurred in places where others were present, which showed Way had an inability to control his impulses.

Just before Way testified, Way's counsel renewed a motion to preclude the State from mentioning the fact that Way had seen an expert of his own choosing, Dr. Martin, who would not be testifying. Counsel acknowledged Way saw Dr. Martin and was evaluated, but stated the doctor did not make a report of his findings.

The circuit court observed that one can always comment about a witness who is not called, and that it is done every day in criminal and civil cases. Way's counsel countered that the inference usually applies to fact witnesses, whereas here, they consulted an expert for an evaluation in accordance with a statute that made the funds available for a second evaluation. The court disagreed, stating the statute merely creates a right. The court explained, "I don't think there is anything that precludes the State from asking him, did you demand to be evaluated, to have

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that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(a)-(b) (Supp. 2013).

an independent evaluation, and was that evaluation done? I think that ends the inquiry."

During cross-examination, the State asked Way if, "in preparation for this hearing, you were transported . . . from the jail to Columbia to see a Dr. Martin to be evaluated for these proceedings," and Way confirmed that he was transported to see a doctor and that he was asked questions and had evaluations, but he did not recall any specifics.

In closing argument, the State made the following additional reference to Dr. Martin and invoked what is commonly called the "missing witness rule," arguing the jury could infer the absence of Dr. Martin indicated that his testimony would have been adverse to Way:

> Now on cross-examination I asked the respondent, did you go to be evaluated by Dr. Martin pursuant to this case?
>
> . . . .
>
> Now Dr. Martin is not here. And the question, I think the inference you can draw from that is would Dr. Martin's testimony, if he was here, be adverse to the respondent? So, that's where we are.

At the conclusion of the evidence, the jury found Way met the definition of an SVP, and the circuit court ordered him to be civilly committed for long-term control, care and treatment. Way appealed, and the Court of Appeals affirmed. This Court has granted cross petitions for certiorari by Way and the State regarding the State's cross-examination of Way and its closing argument.

II. STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012). "The scope of cross-examination rests largely in the discretion of the trial court." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009) (citation omitted). Likewise, "[a] trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury." *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). To warrant reversal, an appealing party must demonstrate not only error in the court's ruling, but also resulting prejudice. *Id.* at 390, 529 S.E.2d at 539; *see also Duncan*, 385 S.C. at 133, 682 S.E.2d at 884 (stating reversal requires a showing of both a manifest abuse of discretion and prejudice).

III. LAW/ANALYSIS

The pertinent issues before the Court of Appeals concerned (1) the cross-examination of Way, during which the State asked Way whether he had another evaluation performed by Dr. Martin; and (2) the State's closing argument, in which it argued an adverse inference could be taken by the jury from Dr. Martin's absence at trial. The Court of Appeals "agree[d] with the trial court's decision to allow the State to cross-examine Way regarding a second mental evaluation, [but] h[e]ld it was improper for the State to imply a negative inference regarding the absence of Way's expert witness before the jury." *In re the Care & Treatment of Way*, Op. No. 2011-UP-268 (S.C. Ct. App. filed Aug. 24, 2011), slip op. at 4. However, the Court of Appeals affirmed on the basis of harmless error. *Id.* at 6.

A. Way's Appeal

In his appeal, Way challenges the propriety of both the State's cross-examination of Way and its invocation of the missing witness rule in closing argument.

We disagree with the Court of Appeals to the extent it found it did not constitute error for the State to question Way about Dr. Martin. The Court of Appeals found this issue should properly be addressed according to the South Carolina Rules of Evidence (SCRE) and established precedent. *Id.* at 4. The court noted all relevant evidence is generally admissible under Rule 402, SCRE, yet relevant evidence may be excluded under Rule 403, SCRE if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* The court also cited precedent for the proposition that a trial judge has wide latitude in the admissibility of evidence, and that an appellate court reviews such rulings based on an abuse of discretion standard. *Id.* (citing, *inter alia, State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010)).

While the Court of Appeals was correct that the admission of this testimony is governed by the SCRE and our case law, for the reasons discussed in another decision issued today by this Court, *In re the Care & Treatment of Gonzalez*, Op. No. 27443 (S.C. Sup. Ct. filed September 3, 2014) we find the probative value of questioning Way about his retention of a non-testifying psychiatric expert was substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). As a result, we conclude the State should not have been allowed to cross-examine Way about his retention of his non-testifying expert witness, Dr. Martin.

We further conclude that it was error to allow the State to assert during closing argument that the jury could infer the missing witness's testimony would have been adverse to Way's case. The Court of Appeals found it was error because when a party lacks control over the retained expert witness, an adverse inference is improper. *Way*, No. 2011-UP-268, slip op. at 5. As we explained in *Gonzalez*, we believe invocation of the missing witness rule should be limited to fact witnesses, and it should not be invoked as to medical, psychological, psychiatric, or similar medical expert *opinion* witnesses. The application of an adverse inference as to these types of experts allows a jury to simply *speculate* as to what the expert might have said. In our view, an adverse inference is not appropriate regarding the opinions held by medical, psychological, psychiatric, or similar medical experts, as the condition of a party is based upon numerous complex factors that do not readily lend themselves to being reduced to a discrete, adverse inference, as compared to a fact witness.

That being said, however, we must next examine whether the errors as to the State's cross-examination and closing argument constitute reversible error under a harmless error analysis. "Error is harmless where it could not have reasonably affected the result of the trial." *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009). "Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result." *Id.* (citing *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Id.* (citation omitted).

In this case, the Court of Appeals held any error was harmless beyond a reasonable doubt, stating "[e]vidence of Way's prior sexual criminal history, the testimony of the State's expert witness, and the testimony of the victim of Way's 1993 [] offense provided relevant and substantive evidence to support the jury's determination." *Way*, No. 2011-UP-268, slip op. at 6.

During cross-examination, the State asked Way if he had seen Dr. Martin for an evaluation, and during cross and closing the State never referred to Dr. Martin as Way's expert or mentioned that Way had retained Dr. Martin for an independent evaluation but then did not call him as a witness, so there was only limited information elicited at trial in this regard. All of the information regarding Dr. Martin's role as Way's expert was confined to the colloquy among the parties and the circuit court. In addition, Way was not prevented from rebutting the adverse inference if he deemed it necessary. *See Dansbury v. State*, 1 A.3d 507, 522 (Md. Ct. Spec. App. 2010) ("Where a party raises the missing witness rule during closing argument, its use is just that—an argument. . . . Furthermore, the opposing side also has an opportunity to refute the argument and counter with reasons why the inference is inappropriate." (alteration in original) (citation omitted)). Consequently, we agree with the Court of Appeals that any error could not have reasonably affected the outcome here.

B. The State's Appeal

The State has filed a cross appeal in this matter. "Any party aggrieved may appeal in the cases prescribed in this title." S.C. Code Ann. § 18-1-30 (1985); *see also* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, or sentence may appeal."). An "aggrieved party" as contemplated by this section is one who is injured in a legal sense, i.e., one who has been denied a personal or property right, or where a burden or obligation has been imposed. *Dunson v. Dunson*, 278 S.C. 210, 294 S.E.2d 39 (1982); *Bivens v. Knight*, 254 S.C. 10, 173 S.E.2d 150 (1970). Thus, a party ordinarily may not appeal from a judgment, order, or decree in his own favor. *Wilson v. S. Ry., Carolina Div.*, 123 S.C. 399, 115 S.E. 764 (1923).

The statutory requirement rests on the principle that a reviewing court is concerned with correcting errors that have practically wronged the appealing party. *Cisson v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970). When an appellant has not been prejudicially or injuriously affected by the judgment, the party has no

standing to appeal. *Id.* at 178, 177 S.E.2d at 605; *see also First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998). It is this Court's duty to reject an appeal by a party who is not aggrieved in the legal sense by the judgment of the trial court. *Cisson*, 255 S.C. at 178, 177 S.E.2d at 605.

In this case, although the State disputes some findings made by the circuit court, it has prevailed on the ultimate issues that were decided, i.e., Way's status as an SVP and his involuntary civil commitment have been upheld. Consequently, the State is not an aggrieved party in the legal sense, so we dismiss certiorari as improvidently granted as to the State.

IV. CONCLUSION

Based on the foregoing, the decision of the Court of Appeals is affirmed as modified as to Way's appeal, and we dismiss certiorari as improvidently granted as to the State's cross appeal.

AFFIRMED AS MODIFIED IN PART; CERTIORARI DISMISSED IN PART AS IMPROVIDENTLY GRANTED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that it was error for the trial judge to permit the State to invoke the missing witness rule[2] for the reasons set forth in my concurrence *In the Matter of Gonzalez,* Op. No. 27443 S.C. ___, ___ S.E.2d ___, 2014 WL (S.C. Sup. Ct. filed September 3, 2014) (Pleicones, J., concurring). I also agree the error was harmless.[3] I therefore concur in result only and would affirm the Court of Appeals' decision as modified.[4]

[2] I disagree with the majority's discussion of Rule 403. As I understand the majority's opinion in *Gonzalez,* the missing witness rule can *never* be invoked for opinion witnesses. Therefore, a Rule 403 analysis is unnecessary. Likewise, I would find the majority's distinction between the invocation of the rule on cross-examination or during closing argument unnecessary.

[3] Unlike the majority, I do not base my harmless error finding on the fact that Way could have rebutted the adverse inference if he deemed it necessary.

[4] I disagree that the State cannot seek certiorari because it was not an aggrieved party. Rule 242(a), SCACR, permits *any party* to seek a writ of certiorari to review a final decision of the Court of Appeals. I would not impose a limitation on our certiorari jurisdiction as the majority has done. Therefore, I believe the majority has erred in dismissing the State's cross-petition as improvidently granted.