# The Supreme Court of South Carolina

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## N O T I C E

IN THE MATTER OF KELLY C. EVANS, PETITIONER

Petitioner was disbarred from the practice of law, retroactive to February 26, 2007. In the Matter of Evans, 376 S.C. 483, 657 S.E.2d 752 (2008). Petitioner has now filed a petition seeking to be readmitted.

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

Committee on Character and Fitness
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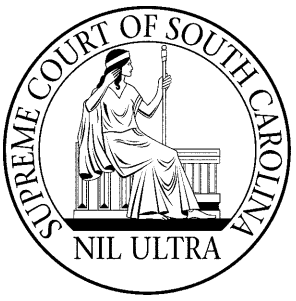
These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
October 4, 2012




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 36**
**October 10, 2012**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

M. Lee Jennings, Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc., of whom Holly Broome is, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Richland County
L. Casey Manning, Circuit Court Judge

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Opinion No. 27177
Heard October 18, 2011 – Filed October 10, 2012

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**REVERSED**

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Gary W. Popwell, Jr., of Lee Eadon Isgett & Popwell, of Columbia, for Petitioner.

Max N. Pickelsimer and Carrie A. Warner, both of Warner, Payne & Black, of Columbia, for Respondent.

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**JUSTICE HEARN:** Holly Broome was sued civilly for hacking Lee Jennings' Yahoo! e-mail account. The circuit court granted summary judgment in favor of Broome on all claims, including violation of the federal Stored Communications Act (SCA), 18 U.S.C. §§ 2701-12. The court of appeals reversed, finding that the e-mails she obtained from hacking Jennings' account were in electronic storage and thus covered by the SCA. We reverse.

## FACTUAL/PROCEDURAL BACKGROUND

The computer hacking at issue here emanated from a domestic dispute. After finding a card for flowers for another woman in her husband's car, Gail Jennings confronted him. Jennings confessed he had fallen in love with someone else, and although he refused to divulge her name, he admitted the two had been corresponding via e-mail for some time. Gail confided this situation to her daughter-in-law, Holly Broome.[1] Broome had previously worked for Jennings and knew he maintained a personal Yahoo! e-mail account. She thereafter accessed his account by guessing the correct answers to his security questions and read the e-mails exchanged between Jennings and his paramour. Broome then printed out copies of the incriminating e-mails and gave them to Thomas Neal, Gail's attorney in the divorce proceedings, and Brenda Cooke, a private investigator Gail hired.

When Jennings discovered his e-mail account had been hacked, he filed suit against Gail, Broome, and Cooke, individually and as shareholder of BJR International Detective Agency, Inc., for invasion of privacy, conspiracy, and violations of the South Carolina Homeland Security Act, South Carolina Code Ann. § 17-30-135 (2010). He later amended his complaint to include an allegation that the defendants violated the SCA. Jennings also moved to add Neal as a defendant. The circuit court denied this motion and granted summary judgment in favor of the defendants on all claims, including the allegations under the SCA. Jennings appealed. The court of appeals affirmed the grant of summary judgment as to Gail, Cooke, and BJR. *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010). However, the court reversed the circuit court's grant of summary judgment in favor of Broome only as to the SCA claim, finding that the e-mails at issue were in "electronic storage" as defined in 18 U.S.C. § 2510(17). *Id.* at 198-208, 697 S.E.2d at 675-680. We granted certiorari.

[1] Broome is married to Gail's son from a previous marriage.

## ISSUE PRESENTED

Did the court of appeals err in reversing the circuit court's grant of summary judgment because the e-mails in question were not in "electronic storage" as defined by 18 U.S.C. § 2510?[2]

## LAW/ANALYSIS

In arguing the court of appeals erred by holding the e-mails were in electronic storage, Broome contends the court misunderstood the definition of electronic storage under the Act and incorrectly concluded the e-mails had been stored for the purpose of backup protection. We agree.

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "Statutory construction must begin with the language of the statute." *Kofa v. U.S. Immigration & Naturalization Serv.*, 60 F.3d 1084, 1088 (4th Cir. 1995). "In interpreting statutory language, words are generally given their common and ordinary meaning." *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir. 1998). Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning. *Hall v. McCoy*, 89 F. Supp. 2d 742, 745 (W.D. Va. 2000).

Under section 2701(a) of the SCA, anyone who:

> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

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[2]The definitions of section 2510 pertaining to the Wiretap Act are incorporated into the SCA. 18 U.S.C § 2711(1).

18 U.S.C. § 2701(a). This section thus proscribes the unauthorized accessing of an electronic communication while it is in "electronic storage." The SCA defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for the purposes of backup protection of such communication." 18 U.S.C. § 2510(17). For Jennings to succeed in his claim against Broome under the SCA, he must prove the e-mails she accessed were in electronic storage as defined in section 2510(17). His argument in this regard extends only to subsection (B) of the Act; Jennings has never argued that the e-mails in questions were in electronic storage pursuant to subsection (A).

The court of appeals agreed with Jennings and held the e-mails were in "electronic storage" because they were stored for backup protection pursuant to subsection (B). Broome argues this conclusion was based upon an improper interpretation of section 2510(17), asserting that the definition of "electronic storage" within the SCA requires that it must be both temporary and intermediate storage incident to transmission of the communication *and* storage for the purposes of backup protection. She therefore contends that an e-mail must meet both subsection (A) and subsection (B) to be covered by the SCA. We acknowledge that this reading is the interpretation espoused by the Department of Justice as the "traditional interpretation" of section 2510(17). However, it has been rejected by the majority of courts in favor of a construction that an e-mail can be in electronic storage if it meets either (A) *or* (B). *See, e.g.*, *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114 (3d Cir. 2003), *aff'g in part, vacating in part, and remanding* 135 F. Supp. 2d 623 (E.D. Pa. 2001); *Strategic Wealth Group, LLC v. Canno*, No. 10-0321, 2011 WL 346592, at *3-4 (E.D. Pa. Feb. 4, 2011); *Cornerstone Consultants, Inc. v. Prod. Input Solutions, LLC*, 789 F. Supp. 2d 1029, 1055 (N.D. Iowa 2011); *Shefts v. Petrakis*, No. 10-cv-1104, 2011 WL 5930469, at *5 (C.D. Ill. Nov. 29, 2011); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 983 (C.D. Cal. 2010); *U.S. v. Weaver*, 636 F. Supp. 2d 768, 771 (C.D. Ill. 2009); *Flagg v. City of Detroit*, 252 F.R.D. 346, 362 (E.D. Mich. 2008). Because Jennings has only argued his e-mails were in electronic storage pursuant to subsection (B), it is unnecessary for us to determine whether to adopt the traditional interpretation advocated by the Department of Justice or the interpretation recognized by these cases. *See McCall*

*v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

In finding the e-mails were stored for "purposes of backup protection" and thus subject to subsection (B), the court of appeals relied heavily on *Theofel*, a case from the United States Court of Appeals for the Ninth Circuit. In *Theofel*, Integrated Capital Associates (ICA) was involved in commercial litigation with Farey-Jones. *Theofel*, 359 F.3d at 1071. Counsel for Farey-Jones subpoenaed ICA's internet service provider, NetGate, for the production of all e-mails sent or received by anyone at ICA "with no limitation as to time or scope." *Id.* NetGate complied as well as it could with such a voluminous request, but when ICA discovered this disclosure it filed a motion to quash the subpoena and requested the imposition of sanctions. *Id.* Additionally, several of the employees whose e-mails had been delivered by NetGate filed a civil suit against Farey-Jones for, *inter alia*, violations of the SCA in gaining unauthorized access to communications in electronic storage. *Id.* The court in *Theofel* held that ICA's e-mails which had been received and read, and then left on the server instead of being deleted, could be characterized as being stored "for purposes of backup protection" and therefore kept in electronic storage under subsection (B). *Id.* at 1075. We question the reasoning expressed in *Theofel* that such passive inaction can constitute storage for backup protection under the SCA; however, because we believe the plain language of subsection (B) does not apply to the e-mails in question, we reverse the conclusion of the court of appeals that they were in electronic storage under *Theofel*.

After opening them, Jennings left the single copies of his e-mails on the Yahoo! server and apparently did not download them or save another copy of them in any other location. We decline to hold that retaining an opened e-mail constitutes storing it for backup protection under the Act. The ordinary meaning of the word "backup" is "one that serves as a substitute or support." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/backup. Thus, Congress's use of "backup" necessarily presupposes the existence of another copy to which this e-mail would serve as a substitute or support. We see no reason to deviate from the plain, everyday meaning of the word "backup," and conclude that as the single copy of the communication, Jennings' e-mails could not have been stored for backup protection.

Accordingly, we find these e-mails were not in electronic storage. We emphasize that although we reject the contention that Broome's actions give rise to a claim under the SCA, this should in no way be read as condoning her behavior. Instead, we only hold that she is not liable under the SCA because the e-mails in question do not meet the definition of "electronic storage" under the Act.

## CONCLUSION

Based on the foregoing, we reverse the court of appeals' opinion and reinstate the circuit court's order granting summary judgment in favor of Broome.

**KITTREDGE, J., concurs. TOAL, C.J., concurring in result in a separate opinion in which BEATTY, J., concurs. PLEICONES, J., concurring in result in a separate opinion.**

**CHIEF JUSTICE TOAL**: I concur in result, but write separately to express my concern with Justice Hearn's adoption of the approach taken in *United States v. Weaver*, 636 F. Supp. 2d 769 (C.D. Ill. 2009). I believe the "traditional interpretation" of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701–12 (2000 & Supp. 2011), advanced by the Department of Justice (DOJ), coupled with the fact that Congress never contemplated this new form of technology, provide a sounder basis to reach our decision.

In *Weaver*, the court addressed the government's subpoena of e-mails in a defendant's Hotmail account and whether the e-mails were in "electronic storage," a determination which would dictate whether the government would need to obtain a warrant for the e-mails or whether a trial subpoena was sufficient. 636 F. Supp. 2d at 769–71. *Weaver* held that courts may issue a trial subpoena to compel internet service providers (ISPs) to produce the content of opened e-mails stored by a website provider for 180 days or fewer because such e-mails are not in "electronic storage." *Id.* at 71–73. *Weaver* relied on dicta found in *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), to conclude that *Theofel*'s holding applies only to e-mail systems where users download messages from the ISP's server onto their computers, and that e-mails stored in the cloud should not be considered stored for backup purposes. *Id.* at 72. Similar to *Weaver*, Justice Hearn concludes here that because Jennings left his e-mails on the Yahoo! Server and apparently did not download them from the server or retain a copy of them in any other location, the emails could not be held for "backup protection" within the meaning of the statute.

Justice Hearn relies on the Merriam-Webster Dictionary to argue that the definition of "backup" requires that there must be more than one copy of the email. The exact definition of "backup" varies from dictionary to dictionary. *See, e.g.*, *Webster's Third International Dictionary, Unabridged* 120 (3rd ed. 2002). Assuming for the sake of analysis that the definition of "backup" is "one that serves as a substitute *or support*," as Justice Hearn contends, this definition would suggest that an email message on an ISP's

server could be stored for *support* in the event that the user needs to retrieve it. As such, even if there is no second copy, the email could still constitute "backup protection."

Nevertheless, even if I could interpret "backup" in this matter, in a statute such as this, I am reluctant to read the word "backup" in isolation, but instead the phrase "backup protection" should be viewed in a statutory and historical context. As Professor Kerr explains:

> An understanding of the structure of the SCA indicates that the backup provision of the definition of electronic storage, see id. § 2510(17)(B), exists only to ensure that the government cannot make an end-run around the privacy-protecting ECS rules by attempting to access backup copies of unopened e-mails made by the ISP for its administrative purposes. ISPs regularly generate backup copies of their servers in the event of a server crash or other problem, and they often store these copies for the long term. Section 2510(17)(B) provides that backup copies of unopened e-mails are protected by the ECS . . . .
>
> There are many statutory signals that support this reading. Several were raised by the United States as amicus and rejected by the Theofel court, see Theofel, 359 F.3d at 1076-77, but a host of other arguments remain. I think the most obvious statutory signal is the text of 18 U.S.C. § 2704, entitled "Backup Preservation." See 18 U.S.C. § 2704 (2000). Section 2704 makes clear that the SCA uses the phrase "backup copy" in a very technical way to mean a copy made by the service provider for administrative purposes. See id. The statutory focus on backup copies in the SCA was likely inspired by the 1985 Office of Technology Assessment report that had helped inspire the passage of the SCA. See Office of Tech. Assessment, Federal Government Information Technology: Electronic Surveillance and Civil Liberties (1985). The report highlighted the special privacy threats raised by backup copies, which the report referred to as copies "[r]etained by the [e]lectronic [m]ail [c]ompany for [a]dministrative [p]urposes." Id. at 50.

Orin Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1217 n.61 (2004); *see also Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 555 (S.D.N.Y. 2008) ("The majority of courts which have addressed the issue have determined that e-mail stored on an electronic communication service provider's systems after it has been delivered, as opposed to e-mail stored on personal computer, is a stored communication subject to the SCA.") (citations omitted).

Furthermore, I am concerned that Justice Hearn's position on "backup protection" potentially leads to illogical results. *Weaver*, itself, concluded that the outcome would be different if a Hotmail user "opt[ed] to connect an e-mail program, such as Microsoft Outlook, to his or her Hotmail account and through it download[ed] messages onto a personal computer." *Id.* Under *Weaver*'s rule, the privacy protections of personal e-mail are contingent upon the operation of the e-mail system used.[3] It is not necessary for this Court to rely on *Theofel* dicta, which would lead us down the precarious path of saying that if one uses Microsoft Outlook for e-mail, one will be protected, but if one uses Yahoo! Mail for e-mail, there is no protection. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102

[3] *Theofel* stated in dicta, "A remote computing service might be the only place a user stores his messages; in that case, the messages are not stored for backup purposes." 359 F.3d at 1077. Relying on this, *Weaver* distinguished *Theofel* and claimed that it does not apply to web-based e-mail services where e-mails are stored in the cloud. 636 F. Supp. 2d at 771–73. Nevertheless, being stored in the cloud just means that the e-mails are stored on a Yahoo Mail server. *See Accessing Yahoo! Mail* (March 8, 2012), *available at* www. help.yahoo.com/tutorials/. The distinction between being stored on a Yahoo! Mail Server and being stored on the ISP's server in *Theofel* in the context of backup storage is slight in my view. *Compare id. with Theofel*, 359 F.3d at 1070, 1075. In addition, based on its dicta, *Theofel* never explicitly excluded web-based e-mails but spoke of "remote computing service[s]." Some courts, including our court of appeals, have concluded that web-based e-mail services like Yahoo! provide both electronic communication services (ECS) and remote computing service (RCS) making it problematic to rely on *Theofel*'s dicta to exclude web-based e-mails as *Weaver* has done. *See, e.g., In re Application of the U.S. for a Search Warrant, for Contents of Elec. Mail and for an Order Directing a Provider of Elec. Commc'n Servs. to Not Disclose the Existence of the Search Warrant*, 665 F. Supp. 2d 1210, 1214 (D. Or. 2009).

S. Ct. 3245, 3252 (1982) (holding "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *see also Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) (citation omitted) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature . . . .").

Instead, I advocate a rejection of *Theofel* entirely and the adoption of the "traditional interpretation" of the SCA, which tracks the statutory language and comports with legislative history. *Prosecuting Computer Crimes*, DOJML Comment 9-3.000, 5 Department of Justice Manual (Supp. 2011–13) [*hereinafter* DOJML Comment 9-3.000]; *see also* Kerr, *supra*, at 1216–18 (advocating the traditional approach and arguing that "the Ninth Circuit's analysis in [*Theofel*] is quite implausible and hard to square with the statutory text"). Under this approach, the term "electronic storage" has a narrow, statutorily defined meaning. DOJML Comment 9-3.000. It does not simply mean storage of information by electronic means. Rather section 2510(17) provides:

> **(17)** "electronic storage" means—
>
> > **(A)** any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; *and*
> >
> > **(B)** any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

18 U.S.C. § 2510(17) (Supp. 2011) (emphasis added).

I disagree with Justice Hearn's position that an e-mail is covered under section 2701(a) of the SCA if it meets the criteria of "either subsection (A) *or* subsection (B)." (emphasis in original). Plainly read, the definition of electronic storage encompasses both subsections A and B. I do not rely on Broome's over-analysis of the word "such" in the phrase "such communication" to reach this conclusion. Rather, I turn to the structure of the statutory text and also to the unambiguous use of the conjunctive "and." Both subsections A and B are

subsumed under section 17, which starts out with the phrase "'electronic storage' means—," suggesting that the definition of electronic storage encompasses both subsections A and B. Furthermore, subsections A and B are connected by the conjunctive "and" indicating that they must be read together. *See Bruesewitz v. Wyeth LLC*, 562 U.S. ___, 131 S. Ct. 1068, 1078 (2011) (noting that "linking independent ideas is the job of a coordinating junction like 'and'"). Had Congress intended two alternative definitions for electronic storage then it would have used the disjunctive particle "or" in place of "and." *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 2331 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."); *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009) (The "use of the word 'or' in a statute 'is a disjunctive particle that marks an alternative.'"). Justice Hearn's approach would delete a word and insert a new one into the statutory text, effectively writing out subsection A from the definition of electronic storage.

Thus, in my view, electronic storage refers only to temporary storage, made in the course of transmission, by an ECS provider, *and* to backups of such intermediate communications. Under this interpretation, if an e-mail has been received by a recipient's service provider but has not yet been opened by the recipient, it is in electronic storage. *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 461 (5th Cir. 1994) (holding that e-mail which had been sent to a bulletin board but not read by intended recipients was "in 'electronic storage'"). When the recipient opens the e-mail, however, the communication reaches its final destination. DOJML Comment 9-3.000. If the recipient chooses to retain a copy of the e-mail on the service provider's system, the retained copy is no longer in electronic storage because it is no longer in "temporary, intermediate storage . . . incidental to . . . electronic transmission." *Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623, 635–36 (E.D. Pa. 2001), *aff'd in part* 352 F.3d 107, 114 (3d Cir. 2004) (upholding district court's ruling on other grounds); *In re Doubleclick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 511–13 (S.D.N.Y. 2001) (emphasizing that electronic storage should have a narrow interpretation based on statutory language and legislative intent and holding that cookies fall outside of the definition of electronic storage because of their "long-term residence on plaintiffs' hard drives").

In this case, the circuit court judge found that the e-mails were "received, opened and read by [Jennings] . . . ." Because the e-mails were already opened by

Jennings when they were retrieved and printed out by Broome, they reached their final destination and fell outside the scope of the definition of electronic storage under the statute, which requires the e-mails to be in "temporary, intermediate storage . . . incidental to the electronic transmission thereof." 18 U.S.C. § 2510(17).

Much of the difficulty in applying the SCA to cases such as this arises because of the discrepancy between current technology and the technology available in 1986 when the SCA was first enacted. When the SCA was enacted, the process of network communication was still in its infancy; the World Wide Web, and the Internet as we know it, did not arrive until 1990. William Jeremy Robison, *Free At What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 Geo. L.J. 1195, 1198 (2010). An examination of how the Senate viewed e-mails in 1986 indicates just how strikingly different the technology was compared to the present:

> Electronic mail is a form of communication by which private correspondence is transmitted over public and private telephone lines. In its most common form, messages are typed into a computer terminal, and then transmitted over telephone lines to a recipient computer operated by an electronic mail company. If the intended addressee subscribes to the service, the message is stored by the company's computer "mail box" until the subscriber calls the company to retrieve its mail, which is then routed over the telephone system to the recipient's computer. If the addressee is not a subscriber to the service, the electronic mail company can put the message onto paper and then deposit it in the normal postal system.

S. Rep. No. 99-541, at 7 (1986). Viewing the statutory language of the SCA in this context, the traditional definition of electronic storage becomes more reasonable. The SCA is ill-fitted to address many modern day issues, but it is this Court's duty to interpret, not legislate. Moreover, I agree with Justice Hearn that it is prudent to limit our analysis to the language before us and give the language its literal meaning. However, I believe doing so requires us to adopt the traditional interpretation of 18 U.S.C. § 2510(17) rather than rely on the reasoning advanced by *United States v. Weaver*. 636 F. Supp. 2d at 769–73. Jennings and similarly

situated plaintiffs are not foreclosed from seeking redress by alternative theories, but under the SCA, Broome's actions do not give rise to a claim because the e-mails in question do not meet the definition of electronic storage.

**BEATTY, J., concurs.**

**JUSTICE PLEICONES:** I concur in result. I agree with Chief Justice Toal that "electronic storage" under the Stored Communications Act (SCA) refers to temporary storage of communications during the course of transmission, 18 U.S.C. § 2510(17)(A), and to backups of those communications, § 2510(17)(B). However, I view these two types of storage as necessarily distinct from one another: one is temporary and incidental to transmission; the other is a secondary copy created for backup purposes by the service provider.[4] Therefore, an e-mail is protected if it falls under the definition of either subsection (A) or (B). It does not end the inquiry to find that the e-mails at issue were not in temporary storage during the course of transmission (subsection (A)). Accordingly, because the e-mails in this case were also not copies made by Jennings's service provider for purposes of backup (subsection (B)), they were not protected by the SCA.[5] I therefore concur in result.

[4] The "backup" covered by subsection (B) is a copy made by the service provider to back up its own servers. It does not include an original e-mail that has been transmitted to the recipient and remains on the provider's server after the recipient has opened or downloaded it. *See Orin Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1217 n.61 (2004), quoted by Chief Justice Toal, *supra* (noting the technical meaning of "backup copy" as used in the SCA); *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

[5] Thus, I agree with Justice Hearn that we must interpret the language of subsection (B) and with her conclusion that the e-mails in this case were not protected.

# THE STATE OF SOUTH CAROLINA
## In The Supreme Court

In the Matter of Patrick James Thomas Kelley,
Respondent.

Appellate Case No. 2012-212834

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Opinion No. 27178
Submitted September 11, 2012 – Filed October 10, 2012

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## PUBLIC REPRIMAND

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

Patrick James Thomas Kelley, *pro se*, of Bluffton.

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

## Facts

Respondent failed to comply with the Regulations for Mandatory Continuing Legal Education and Specialization for Judges and Active Members of the South Carolina Bar for the 2011 calendar year in violation of Rule 408, SCACR, and

Rule 419(a), SCACR. The South Carolina Commission on Continuing Legal Education and Specialization notified respondent of his noncompliance by mail dated March 15, 2012, and by email dated March 20, 2012. On March 31, 2012, respondent was automatically suspended from the practice of law pursuant to Rule 419(c), SCACR. The South Carolina Commission on Continuing Legal Education and Specialization notified respondent of his suspension from the practice of law by certified mail dated April 3, 2012.[1]

On April 18, 2012, while suspended from the practice of law, respondent submitted pleadings and documents as attorney for the personal representative of an estate in a matter filed in the Beaufort County Probate Court. On April 19, 2012, respondent signed correspondence to the judge and opposing counsel in the same matter.

On April 30, 2012, respondent's administrative suspension was lifted after he complied with Rule 408, SCACR, and Rule 419, SCACR.

## Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5(a) (lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction) and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated the following Rule 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).

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[1] This is not the first time respondent has been suspended for failure to comply with continuing legal education requirements. In April 2009, the South Carolina Commission on Continuing Legal Education and Specialization administratively suspended respondent for failing to comply with continuing legal education requirements; he was reinstated in May 2009. The South Carolina Commission on Continuing Legal Education and Specialization again administratively suspended respondent in April 2010 for failure to comply with continuing legal education requirements; he was reinstated later the same month.

## Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

**PUBLIC REPRIMAND.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

In the Matter of Eleazer R. Carter, Respondent.

Appellate Case No. 2012-211406

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Opinion No. 27179
Heard September 20, 2012 – Filed October 10, 2012

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**PUBLIC REPRIMAND**

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

Eleazer R. Carter, of Manning, pro se.

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**PER CURIAM:** The Office of Disciplinary Counsel (ODC) filed formal charges against Eleazer Carter for alleged misconduct that occurred during his representation of Stacey Daniels in a civil suit. Following a hearing, a Panel from the Commission on Lawyer Conduct found Carter violated five rules of professional conduct, and accordingly recommended he receive an admonition, pay the costs of the proceedings, and complete the Legal Ethics and Practice Program's Ethics School within six months. Neither ODC nor Carter took exceptions to the Panel's findings or recommendations. Nevertheless, we find a greater sanction is warranted and publicly reprimand Carter.

## FACTUAL/PROCEDURAL BACKGROUND

In September 2008, Stacey Daniels engaged legal counsel and filed a civil lawsuit arising from a car accident. However, counsel was relieved by consent in May

2009, and Daniels subsequently contacted Carter seeking representation. Daniels met with Carter at his office, and they discussed the fee arrangement, prior settlement offers, authorization for medical records, and possible witnesses if the case went to trial.[1] At the time, discovery and some settlement negotiations had already taken place.

In September 2009, Daniels attended a roster meeting for his case. Although Carter was not present, Daniels informed the circuit judge Carter was representing him. Carter happened to be at the courthouse on another matter and was brought to the meeting where he confirmed to the judge and opposing counsel he was representing Daniels. The judge continued the case until the next term of court.

When the case appeared on the roster in March 2010, Carter again failed to appear, although Daniels was present. Opposing counsel moved to dismiss the case, but the judge again continued it until the next term. The following month, the defendant served Carter with notice of the deposition of Daniels,[2] but Carter never informed Daniels of the date, and neither Daniels nor Carter attended the deposition. Additionally, Carter never told opposing counsel he would not be at the deposition or that he was not representing Daniels. Opposing counsel subsequently moved to dismiss the case for failure to prosecute, and when the case came up again for trial, the judge called Carter and informed him the case was going forward. Carter knew Daniels was incarcerated when he received the motion, but he never contacted him about it. Carter argued the motion to dismiss, during which he informed the court he was not representing Daniels. The case was ultimately dismissed. Upon receipt of the order of dismissal, Carter forwarded it to Daniels with a handwritten note stating the case had been dismissed because they had not appeared in court. Daniels subsequently filed a grievance with the Commission on Lawyer Conduct.

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[1] Daniels alleges he signed the fee agreement at this initial meeting, but was never given a copy. Carter maintains Daniels never signed the agreement and took the blank form when he left.

[2] The testimony on the scheduling of this deposition is conflicting. Counsel for the defendant testified that his secretary scheduled the deposition with Carter personally. Carter stated he did not recall that conversation taking place, although he admitted she may have talked to someone in his office.

At the hearing before a Panel from the Commission, Carter argued he had never been representing Daniels because Daniels never signed his fee agreement. Alternatively, he contended that if he was Daniels' lawyer, he represented him diligently. Based on the foregoing facts, the Panel found Carter in violation of Rules 1.2, 1.3, 1.4, 1.16, and 8.4(e), RPC, Rule 407, SCACR. In determining the proper sanction, the Panel considered Carter's extensive disciplinary history in aggravation. Carter was admitted in 1989. In January 2002, he received a letter of caution with a finding of minor misconduct citing Rules 1.1 (competence), 1.3 (diligence), 1.15 (safekeeping of property), 8.1(a) (cooperation with disciplinary investigation), RPC and Rule 417, SCACR (financial recordkeeping). Shortly thereafter in July 2002, Carter received another letter of caution finding minor misconduct under Rule 1.16(b) (declining or terminating representation). In July 2008—around the time he began representation of Daniels—he received another letter of caution citing misconduct under Rules 1.5 (fees), 8.4(e) (conduct prejudicial to the administration of justice), RPC and Rule 416, SCACR (failure to comply with decision of Resolution of Fee Disputes Board). Finally, Carter received two letters of caution in May 2010 with findings of minor misconduct under Rules 1.3 (diligence), 1.4 (communication), 5.3 (supervision of nonlawyers), 8.1(b) (cooperating with disciplinary investigation), and 8.4(e) (conduct prejudicial to the administration of justice).

The Panel therefore recommended Carter receive an admonition, pay the cost of the proceedings, and complete the Legal Ethics and Practice Program's Ethics School within six months of the Court's order.

## LAW/ANALYSIS

Neither party took exception to the Panel Report; thus, the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations. Rule 27(a), RLDE, Rule 413, SCACR. Nevertheless, "[t]his Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). The Court may make its own findings of fact and conclusions of law; however, although it is not bound by the findings of the Panel, the Court gives great deference to its findings. *In re White*, 378 S.C. 333, 340-41, 663 S.E.2d 21, 26 (2008).

The initial issue is whether Carter formed an attorney-client relationship with Daniels giving rise to his duty to comply with the Rules of Professional Conduct. Carter contended that he was not representing Daniels because they had no written fee agreement and the Rules of Professional Conduct—as well as opinions of this Court—require a signed agreement when, as here, the fee is on a contingent basis. Technically, Carter's argument is correct. *See* Rule 1.5(c), RPC, Rule 407, SCACR ("A contingent fee agreement shall be in a writing signed by the client . . . .); *see also In re Atwater*, 355 S.C. 620, 621, 586 S.E.2d 589, 590 (2003) (publicly reprimanding attorney who failed, *inter alia*, to maintain a signed copy of a fee agreement with a client); *In re McDonough*, 348 S.C. 197, 198, 559 S.E.2d 832, 832 (1996) (disbarring lawyer for violations including failing to obtain a written copy of contingency fee agreement). However, Rule 1.5 and our opinions sanctioning lawyers for violation of this rule are designed to protect clients from inadequate representation, not to determine the presence of an attorney-client relationship. Moreover, we have also held that the existence of a retainer is not in and of itself dispositive of whether an attorney is representing a client. *See In re Broome*, 356 S.C. 302, 315, 589 S.E.2d 188, 195-96 (2003) ("[A] signed retainer agreement is not essential to create [an attorney-client] relationship."). Instead, a person can be deemed a client when he seeks legal advice and discusses those matters with a lawyer in confidence for the purpose of obtaining such advice. *Id.*

The Panel concluded, and we agree that Daniels had reason to believe Carter was representing him. Daniels and Carter had discussed both the possibility of settlement and how to proceed if they instead went to trial. Carter obtained medical releases from Daniels to procure evidence and made calls to the insurance adjuster on Daniels' behalf. Furthermore, Carter informed the judge at a roster meeting that he was representing Daniels. We therefore hold Carter established an attorney-client relationship with Daniels and was therefore obligated to comply with the Rules of Professional Conduct.

## I. SCOPE OF REPRESENTATION AND DECLINING OR TERMINATING REPRESENTATION

Pursuant to Rule 1.2, an attorney must "abide by a client's decisions concerning the objectives of representation . . . [and] consult with the client as to the means by which they are to be pursued." Here, Carter failed to pursue *any* objective by neither attempting to settle the case nor adequately preparing for trial. He also failed to reasonably consult with Daniels as to how he wanted his case resolved.

Although he knew Daniels was incarcerated when he received the motion to dismiss, he never contacted Daniels or arranged to have him present at the hearing to determine how he wished to proceed.

Furthermore, Rule 1.16(c) requires a lawyer to provide "notice to or permission of a tribunal when terminating a representation" and Rule 1.16(d) requires a lawyer to "take steps to the extent reasonably practicable to protect a client's interests." Although both the judge and opposing counsel had been led to believe Carter was representing Daniels, Carter waited until the hearing on the motion to dismiss to inform them he was not. Carter's concerns about representing Daniels without a signed fee agreement may have been justified; however, that does not alleviate his responsibility to clearly inform the court and his client that the relationship had been terminated. Instead, Carter allowed the case to be dismissed for failure to prosecute and did not give Daniels prior notice that the motion had been filed. Furthermore, he did not return Daniels' file to him to allow him the opportunity to obtain different counsel or proceed pro se.[3] We therefore agree with the Panel that Carter violated both Rules 1.2 and 1.16.

## II. DILIGENCE

Rule 1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client. Even though Carter received notice of Daniels' scheduled deposition, he never told Daniels about it. Additionally, Carter did not inform opposing counsel that he would not attend. After receiving the defendant's motion to dismiss, Carter did not file anything in response, and it appears he would not have attended the hearing if the judge had not called him. Furthermore, he neither told Daniels, who was incarcerated at the time, about the motion, nor arranged to have Daniels present at the hearing.

Although Daniels' case seemed relatively simple and Carter began representation after settlement discussions had begun, no settlement was ever obtained nor was Carter ever prepared to take the case to trial. Carter was aware Edgefield County had limited terms of court, but he did not monitor the docket and failed to

[3] As of the date of the hearing before the Panel, Carter was still in possession of Daniels' file and did not bring it the hearing. ODC informed the Court at oral arguments that Carter did not return Daniels file until March 2012.

voluntarily attend the roster meetings. Accordingly, we agree with the Panel that Carter failed to diligently represent Daniels in violation of Rule 1.3.

## III. COMMUNICATION

Although Carter met with Daniels at least twice and spoke on the phone with him several times, the Panel nevertheless found he violated Rule 1.4, noting that it appeared Daniels had initiated all communication. Rule 1.4 requires an attorney to "reasonably consult with the client" and "keep the client reasonably informed about the status of the matter." Carter failed to keep Daniels apprised of the progress of the case. He did not inform Daniels of his scheduled deposition, never contacted Daniels while he was incarcerated to discuss how he wished to proceed with his case, and never notified Daniels that the case was likely to be dismissed. Furthermore, when informing Daniels the case had been dismissed, he merely forwarded the order with a handwritten note to Daniels' home address despite knowing Daniels was incarcerated at the time.

Additionally, Rule 1.4 requires that a lawyer "consult with the client about any relevant limitation on the lawyer's conduct." Carter never clearly indicated to Daniels that his representation was contingent on the fee agreement being signed and that the absence of the agreement precluded him from representing Daniels.[4] Instead, Carter simply carried out a haphazard representation. Accordingly, we agree with the Panel that Carter violated Rule 1.4.

## IV. CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

The Panel also concluded Carter engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(e). Carter began representation of Daniels after the pleadings had been filed and some settlement discussions had already taken place. Nevertheless, he failed to advance the case during the fifteen months when he represented Daniels. Although the case came up three separate times on the roster, he either failed to show up or was unprepared to move forward, and the case was eventually dismissed. Despite knowing that his client was incarcerated and would only have a limited period of time within which to re-file

[4] We note Daniels testified that he signed a fee agreement, but was never given a copy.

his case, Carter chose to communicate the dismissal of the case by forwarding the order along with a handwritten note to Daniels' home address. We therefore agree with the Panel that Carter's conduct was prejudicial to the administration of justice, and therefore, he violated Rule 8.4(e).

## V. SANCTION

We accept the Panel's recommendations ordering Carter to pay the costs of these proceedings and complete Ethics School. However, although the Panel recommends an admonition, we find, based on Carter's conduct, his disciplinary history, and the concerning fact that some of letters of caution came so close in time to his representation of Daniels, a more severe sanction is warranted. We therefore hold a public reprimand is appropriate under these circumstances. *See In re DePew*, 350 S.C. 265, 267, 565 S.E.2d 305, 306 (2002) (publicly reprimanding attorney for violating rules regarding competency, diligence, communication, and engaging in conduct prejudicial to the administration of justice); *Matter of Barnes*, 325 S.C.148, 149, 480 S.E.2d 452, 452 (1997) (issuing public reprimand where attorney violated rules concerning diligence, communication, and engaging in conduct prejudicial to the administration of justice); *Matter of Hart*, 321 S.C. 272, 272, 468 S.E.2d 76, 76 (1996) (publicly reprimanding attorney for failing to provide competent representation, abide by clients decisions, act diligently in representation, reasonably communicate with client, and protect clients' interests upon withdrawal of representation); *Matter of Lefford*, 317 S.C. 177, 178, 452 S.E.2d 605, 606 (1994) (determining attorney's conduct warranted public reprimand where attorney failed to represent clients competently, communicate with clients, and cooperate with the Board of Commissioners on Grievances and Discipline, and also engaged in conduct prejudicial to the administration of justice).

## CONCLUSION

Accordingly, we find Carter violated Rules 1.2, 1.3, 1.4, 1.16, and 8.4(e) of the Rules of Professional Conduct. Based on the facts of this case as well as Carter's extensive previous disciplinary history, we hold the misconduct warrants a public reprimand. Additionally, Carter is to pay the costs of these proceedings within thirty days and complete the Legal Ethics and Practice Program's Ethics School within six months of the issuance of this opinion.

**PUBLIC REPRIMAND.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

The State, Respondent,

v.

Gregory Daniels, Appellant.

Appellate Case No. 2010-159728

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Appeal From Florence County
Thomas A. Russo, Circuit Judge

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Opinion No. 27180
Heard May 3, 2012 – Filed October 10, 2012

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**AFFIRMED**

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Appellate Defender Tristan M Shaffer and Deputy Chief Appellate Defender Wanda H. Carter, both of South Carolina Commission on Indigent Defense, of Columbia for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

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**JUSTICE PLEICONES:** Appellant was convicted of murder and possession of a weapon during a crime of violence and received concurrent sentences of life (murder) and five years (weapon). On appeal, he alleges the trial judge committed reversible error in charging the jury that they were acting "for the community" and that their verdict "will represent truth and justice for all parties that are involved." We agree that these charges are erroneous, but because appellant did not properly preserve his issues for appeal, we affirm.

## FACTS

The victim was shot at about 4:30 am on a Florence street. A witness who was to meet the victim testified that she heard a single gunshot and saw a person dressed in black clothing running away from the scene. There was testimony that appellant and the victim had argued at Shavonne's party. Shavonne did not observe the two fighting, but testified she was on the phone with the victim right before he was shot, and that he told her he was being followed by a man he had argued with at her party. Another witness testified that appellant had told him he had been hired to kill the victim. Appellant told this witness he had "done it" about an hour after the victim was killed.

Appellant and his girlfriend checked into a motel at about 5:35 am on the day of the murder. Excerpts from letters written to the girlfriend following appellant's arrest were introduced at trial. These letters suggested what she should tell people to give him an alibi. In one, he pointed out the absence of physical evidence to convict him, and in another asked her to contact his lawyer and suggests what to say, including the instruction that "it will help me and my bond hearing [sic] you are who I was with when they found him . . ." In short, while the State's case lacked forensic and eyewitness evidence, there was nonetheless substantial evidence that appellant murdered the victim.

At the pre-charge conference, appellant objected to the trial judge's inclusion of a charge that "You and I are acting for the community and that is why we must see to it that the trial is fair and the verdict is just." Appellant contended the "acting for the community" language was akin to a solicitor's improper golden rule argument, but did not object to the "fair and just" portion of this proposed charge. The judge declined to alter the "acting for the community" language. Appellant also objected to a different part of the proposed charge, which included the statement "[E]veryone is entitled to justice in this case," arguing that charge diluted the State's burden of proof. The judge agreed to omit this "everyone" charge.

The jury was charged on the presumption of innocence and the State's burden of proof beyond a reasonable doubt. Later, they were charged "You and I are acting for the community," and that "This court is of the confirmed opinion that whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Appellant renewed his pre-charge objection, but made no additional complaint about the charge.

## ISSUES

1. Did the trial judge's charge include an improper "Golden Rule" instruction?

2. Did the trial judge's charge improperly shift the State's burden of proof or dilute it?

### 1. Golden Rule

Appellant argued to the trial judge that to the extent the jury was to be instructed that it and the judge were acting for the community, the charge was erroneous because it was akin to an improper Golden Rule argument. The judge disagreed. We affirm.

A 'Golden Rule' argument is one in which the jurors are asked to put themselves in the victim's shoes. It is improper because it is meant to destroy the jury's impartiality, and to arouse passion and prejudice. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009). A charge that the jury is acting for the community, however, is not similar to a Golden Rule argument in that it does not ask the jury to consider the victim's perspective. While appellant has not shown reversible error here, we caution the trial judge to restrict his jury instructions to matters of law.

### 2. Burden of Proof

On appeal, appellant contends the jury charge unconstitutionally shifted the burden of proof. He specifically objects to the part of the charge in which the judge stated it was his "confirmed opinion" that the verdict would represent "truth and justice for all parties." To the extent appellant now complains about the "confirmed opinion" part of the charge, he is improperly attempting to expand on appeal the scope of his objection below. *E.g.*, *State v. Meyers*, 262 S.C. 222, 263 S.E.2d 678 (1974). There was no objection to the "confirmed opinion" language at the charge

conference, and appellant stood on his pre-charge objection after the jury instructions were given. It is axiomatic that an objection to a jury charge may not be raised for the first time on appeal. *E.g. State v. Rios*, 388 S.C. 335, 696 S.E.2d 608 (Ct. App. 2010); Rule 20(b), SCRCrimP.

Appellant also now argues the trial judge erred in charging the jury that their verdict would represent the "truth and justice for all parties."[1] The State contends that there was no contemporaneous objection made at trial to this "truth and justice for all" language in the charge. We agree. It is axiomatic that a party cannot raise an objection to a jury charge for the first time on appeal. *State v. Rios*, *supra*; Rule 20(b), SCRCrimP.

Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

## CONCLUSION

Appellant's convictions and sentences are

**AFFIRMED.**

**Acting Justice E. C. Burnett, III, concurs. TOAL, C.J., concurring in result in a separate opinion in which KITTREDGE, HEARN, JJ., and Acting Justice E. C. Burnett, III, concur.**

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[1] Appellant had objected to a different proposed charge at the pre-charge conference, that "Everyone is entitled to justice in this case." The judge agreed not to give this charge, and a review of the record shows that he did not.

**CHIEF JUSTICE TOAL:** I concur in the result reached by Justice Pleicones, but writing for a majority of the Court, find that Appellant's burden-shifting arguments are preserved. The adequacy of the trial court's entire overall instruction cured any possible constitutional deprivation. In addition, the State presented overwhelming evidence of Appellant's guilt, rendering any error in the jury instruction harmless.

## I. PRESERVATION

At trial, defense counsel objected to portions of the trial court's proposed jury instruction. First, defense counsel took exception to the trial court's proposed statement that "everyone is entitled to justice in this case."

> Defense Counsel: We would argue that this is burden shifting. The fact that we don't feel like the state is necessarily entitled to justice. Instead, they have the burden of proving defendant guilty beyond a reasonable doubt. And we would cite *Cage v. Louisiana* [498 U.S. 39 (1990)], which suggest that the jury instructions that dilute the burden of proof on the government prove [sic] beyond a reasonable doubt violate due process and constitute reversible error.
>
> . . . .
>
> The Court: I was going to say why isn't the State entitled to justice just as any defendant who comes into court is entitled to justice. Being entitled to justice doesn't remove a burden or lessen a burden. I am going to note your exception to that, but . . . .
>
> The trial court then agreed to remove the objectionable language:
>
> But it's fairly – you know, that paragraph you are referring to where it starts with that everyone is entitled to justice, I will take that out and just put your verdict in this case cannot be based on sympathy, compassion or prejudice, just doesn't seem to be that big a deal.

However, the trial court issued a jury instruction containing substantially similar language:

> Your verdict in this case is not to be based on sympathy, compassion, prejudice or some other emotion or other consideration that is not found in the evidence. This court is of the confirmed opinion that

*whatever verdict you reach will represent truth and justice for all parties that are involved in this case*.

(emphasis added).

Defense counsel also objected to the trial court's proposed language that the judge and jury were "acting for the community," and argued that this statement asked the jury to act as the "conscious of the community, similar to a golden rule argument." The court refused to remove this language from his instruction, "I'm going to note your exception to the language, I'm going to leave that language in."

The Court then stated the following during his instruction:

> You are not called to serve as jurors very often. And the proper performance of the duty requires each of you to reach the hithe [sic] of freeing your mind of all improper influences. You and I are *acting for the community* and that is why we see to it that this *trial is fair and the verdict is just*.

Following the completion of the jury instructions, the court referenced defense counsel's objections:

> The Court: Are there any exceptions or objections to the Court's charge by the State?
>
> The State: No sir.
>
> The Court: And by [defense counsel] other than what we discussed during the . . .
>
> Defense Counsel: That's all, Your Honor.

The Record clearly demonstrates that Appellant did not raise the propriety of the jury instructions for the first time on appeal, but objected to the offensive language both before and after the trial court delivered his instruction. Thus,

Appellant's objections were properly preserved for this Court's consideration on appeal, and consequently, we must address the critical burden shifting issue.[2]

## II. BURDEN SHIFTING

While I agree with Appellant's argument that the jury should not have been instructed that their verdict would represent truth and justice for the parties, this Court must consider instructions as a whole, and "if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard of review when considering an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution. *Id.* at 27, 538 S.E.2d at 251 (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). Under this standard, the trial court's improper statements do not require reversal.

In *Aleksey*, this Court addressed whether a trial court's instruction shifted the burden of proof to the defendant. In that case, the trial court issued a complete and proper instruction on reasonable doubt, the presumption of innocence, and the State's burden of proof. *Id.* at 26, 538 S.E.2d at 251. The trial court then instructed the jury to weigh the credibility of witnesses as follows:

> Ladies and gentlemen, throughout this entire process, you have but one single objective, and that is to seek the truth, to seek the truth regardless of from what source that truth may be derived. Now, all of these things, ladies and gentlemen, you will consider, bearing in mind that you must give the defendant the benefit of every reasonable doubt.

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[2] The trial court's instruction that the jury is "acting for the community" is dangerous, and has all the earmarks of a "Golden Rule" argument. While it may not directly instruct the jury to place themselves in the victim's shoes, a charge to "act for the community" carries the same connotation and effect. However, because of the overwhelming evidence of Appellant's guilt, discussed *infra*, any "Golden Rule" error harmless. *See Vasquez v. State*, 388 S.C. 447, 468–69, 698 S.E.2d 561, 572 (2010) ("Furthermore, even if the solicitor did make an improper 'Golden Rule' argument, I would find the error harmless in light of the enormity of the evidence against Petitioner.")

*Id.* at 26, 538 S.E.2d at 250.

The Court in *Aleksey* relied on *United States v. Gonzalez-Balderas*, 11 F.3d 1218 (5th Cir. 1994), in analyzing a contested jury charge. In *Gonzalez-Balderas*, the district court instructed the jury: "Remember, at all times, you are judges–judges of the facts. Your sole interest is to seek the truth from the evidence in this case." *Id.* at 1223. The defendant argued that instructing the jury that its "sole interest is to seek the truth" diluted the reasonable doubt standard of proof. *Id.* The Fifth Circuit Court of Appeals disagreed:

> As an abstract concept, "seeking the truth" suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt. The district court, however, did not use it in this way. Rather, the trial court began its instructions with a clear definition of the government's burden of proof in which it repeatedly stated that the defendant could not be convicted unless the jury found that the government had proven him guilty beyond a reasonable doubt.

*Id.*

Similarly, the trial court in *Aleksey* issued complete and proper reasonable doubt and circumstantial evidence charges. Although that trial court's statements regarding witness credibility were improper, this Court held that this did not taint the overall instruction. Thus, it was not reasonably likely that the jury applied the instructions in a manner inconsistent with the notion that the State has the burden of proof beyond a reasonable doubt. *Id.* at 28–29, 538 S.E.2d at 252.

In the instant case, the trial court included several improper statements as part of his jury instruction. However, the trial court prefaced those remarks with full and adequate instructions on reasonable doubt. It is troubling that the trial court concluded his jury instruction with statements that could have distracted the jury from their core functions: to examine evidence and make factual determinations, weigh credibility, and perhaps most importantly, decide whether the State has proven its case beyond a reasonable doubt. The injection of extraneous language only serves to distract the jury from performing their critical role. However, despite the trial court's mistake, the instruction as a whole properly

conveyed the law to the jury and it is not reasonably likely that the jury acted in contravention of the reasonable doubt standard. *See Aleksey*, 343 S.C. at 29, 538 S.E.2d at 252–53 (finding reversal not required when the trial court's improper instructions were given in the context of witness credibility and not reasonable doubt).

Furthermore, unconstitutional burden shifting does not result in reversible error when that error was harmless beyond a reasonable doubt. *Rose v. Clark*, 478 U.S. 570, 579–80 (1986); *Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 526 (2002).

The State presented substantial circumstantial evidence that Appellant committed the crime charged. One witness testified that, as the result of a "drug deal went bad," Gary Bostic hired Appellant to kill the victim for $1,000. This witness testified that Appellant told him four or five times that he planned to commit the crime. The witness stated that he and Appellant watched a news report regarding the murder, and that following the conclusion of the report, Appellant admitted to the murder.[3] The witness's girlfriend corroborated his testimony. She testified that she was present when Appellant watched the news report, and that she also heard Appellant state that he murdered the victim. The State also presented evidence that between September 5, 2008, the day of the murder, and September 9, 2008, Appellant and Bostic called each other forty-one times.

The most revealing evidence presented by the State consisted of actual letters Appellant wrote in which he attempted to convince his girlfriend to provide him with an alibi.

Appellant's girlfriend testified that she saw Appellant on the Thursday evening of September 4, 2008, at approximately 7:30 or 8:00 p.m., and the next time she saw him was at 5:30 a.m. the morning of September 5. On that morning, Appellant picked her up in a van driven by a man named Gary, and Appellant and his girlfriend checked into a motel. Following their check-in, Appellant left and returned some time later with a rental car. Appellant then drove his girlfriend back to her residence, and informed her that he would be changing his phone number that day, and called her later that day from the new phone number.

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[3] Bradley admitted that he faced pending federal charges for trafficking cocaine, but received no deal in exchange for his testimony, and only hoped to help himself in federal court.

The State introduced letters authored by Appellant, which sought to persuade his girlfriend to change her version of the events of September 4 and 5, 2008.

In a letter from October 2008, Appellant wrote:

> They aint got no gun, no bloody clothes, no shells, nothing . . . those are the main things they need to actually convict me it don't matter how many people say I did it or we argued the time that they say this happened. I told u that when we went to the room. Remember I said we was [sic] together at the settin [sic] up. But you told them u [sic] was sleep and I came and pick up [sic] in a van. My people told me that if u [sic] tell my solicitor that u will give him or her a statement saying we were together then they will give me a bond.

In another undated letter, Appellant wrote:

> Someone told me how u [sic] can help me getting [sic] out of here. I don't know what u [sic] told them people but all I need is for u [sic] to say is I was with you at morning noon and night.

In another letter dated October 2008, Appellant acknowledges that his version and his girlfriend's version of the events are not similar:

> Our stories are not the same. I told them we left off Carver Circle in a green van cab with a [sic] old driver. We were on the computer. But I will tell them I was still there playing dominoes u [sic] went home to get clothes and I came and got u [sic] from there. No times though . . . Make sure dude no [sic] this story. State Taxi . . . .

On November 16, 2008, Appellant wrote:

> But anyways I need you to call this number . . . and talk to . . . my lawyer. Tell him that you are my girl and we were at the room during the time they said that this occurred. You can still tell him that I picked you up in a van and we went to the room but tell him that you were waiting on me at your sisters [sic] house but you left because I took to [sic] long. If they ask you a time just say you don't know what

> time it was but you were asleep and we was at the room sleep when the report on the news said at 5:00 a.m. But anyways you don't have to but it will help me at my bond hearing. You are who I was with when they found him.

By February 2009, Appellant became desperate for his girlfriend to provide a false alibi:

> But your statement could hurt me in court because they saying you told them that it was not a taxi and it was a young dude driving the van and also that you was sleep and I was on the phone talking to somebody about dude but that has got to be when my phone started ringing and that I left you and didn't come back until 6:00 am but they said dude was dead at 5:17 a.m. and the receipt from the room show us checking in at 5:34 a.m. but the clerk saying he didn't see me but to cover that up I'll just say I was smoking a cigarette.

On June 14, 2009, Appellant admits that a man named "Gary" drove him to the hotel following the murder:

> Call 617-6919 and tell Gary that you calling [sic] for me and let him know that . . . said he will take $2,000 and come get me out tell him my mama need $1,000. *That's who . . . dropped us off at the room*.

(emphasis added).

These letters clearly demonstrate that Appellant could not account for his whereabouts at the time of the victim's murder. His attempts to pressure his girlfriend to provide a false alibi, and the testimony of two individuals who witnessed his confession provided the jury with substantial circumstantial evidence of his guilt. Put another way, the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis. *State v. Hernandez*, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009) (citing *State v. Edwards*, 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989)). Thus, based on the overwhelming evidence of guilt presented to the jury, the trial court's erroneous instructions could not have contributed to the guilty verdict. *See Lowry v. State*, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008) ("From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in

relation to everything else the jury considered on the issue in question, as revealed in the record.'") (internal citation omitted).

## III. CONCLUSION

As a final note, although no constitutional error occurred, the trial court's inappropriate statements in this case came close to jeopardizing the legitimacy of the trial. Judges and juries are critical actors in our judicial system. Jurors are sworn to declare the facts of the case as they are proved from the evidence placed before them. 50A C.J.S. *Juries* § 1 (2004). The very term "jury" connotes a deliberative body of persons. *Id.* A judge sits as a public officer, who presides over, conducts, and administers the law by virtue of the office, and does so cloaked in judicial authority. *Id.* Judges § 7 (2004). Judges and juries are not, as this trial judge put it, "in it together." While their functions may act as a complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as an unnecessary and improper distraction.

Judicial instructions to the jury in a criminal case that "whatever verdict you reach will represent truth and justice for all parties," that "we must see to it that the trial is fair and the verdict is just" and that you and I are "in it together," may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a "regular guy." However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.

It is critical that jurors understand the proper application of the reasonable doubt standard. That standard does not charge the jury with ensuring justice for all of the parties. Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the State's constitutional duty to prove guilt beyond a reasonable doubt. Thus, I join the Justice Pleicones's admonition to the trial court to restrict his jury instructions to matters of law, and refrain from issuing instructions which run the risk of depriving defendants of their right to a fair trial.

**AFFIRMED.**

**KITTREDGE, HEARN, JJ., and Acting Justice E. C. Burnett, III, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Christopher Manning, Appellant.

Appellate Case No. 2010-161686

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Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

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Published Opinion No. 5017
Heard May 8, 2012 – Filed August 1, 2012
Withdrawn, Substituted and Refiled October 10, 2012

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**AFFIRMED**

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Appellate Defender LaNelle C. DuRant, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General David A. Spencer, all of Columbia; and Solicitor Donald Myers, of Lexington, for Respondent.

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**WILLIAMS, J.:** In this appeal, Christopher Manning (Manning) asserts the circuit court erred by (1) denying Manning's motion to dismiss the case because the State violated section 56-5-2953 of the South Carolina Code (Supp. 2011) by failing to provide an affidavit of the arresting officer certifying that it was physically impossible to provide a video recording as required by the statue when Manning

needed emergency medical treatment; (2) denying Manning's motion to suppress the blood test evidence pursuant to section 56-5-2946 of the South Carolina Code (1991) because there was not sufficient probable cause for an arrest; (3) denying Manning's motion for a mistrial based on prejudice suffered by Manning after the circuit court severed the felony DUI charge and the possession of a schedule three substance charge after the jury was aware Manning was being tried on both charges; and (4) charging the jury on section 56-5-2950(b) of the South Carolina Code (Supp. 2011). We affirm.

**FACTS**

On July 31, 2009, Manning was working at Boondocks, a private club. Jacob Hill (Hill) was working at a nearby restaurant, Fisherman's Wharf. Hill needed a ride home from work, so he walked to Boondocks where he knew people because he had previously worked there. When he arrived at Boondocks, Hill started drinking with friends.

After Manning's shift at Boondocks was over at 11:00 pm, he began drinking with Hill and his friends until around 4:00 am. Heather Fairchild (Fairchild), one of the bartenders at Boondocks that night, testified that although Manning and Hill consumed a "pretty good amount of alcohol" by drinking beer and taking shots together, neither appeared to be visibly drunk. When Boondocks closed, Fairchild testified she heard Manning and Hill talk about going swimming in Lake Murray and also heard Manning say he had his car and he was going to drive.

Manning and Hill were subsequently in a single car accident, severely injuring Manning and killing Hill. Manning was arrested for felony DUI and possession of a quantity of hydrocodone and acetaminophen, both schedule three substances. During the two-day jury trial, the State argued Manning was the driver. Manning's defense at trial was that Hill was the driver of the vehicle.

Nathan Prouse (Prouse), an employee of the Lexington County Fire Service, testified he received a call shortly before 5:00 am about a vehicle accident on Highway 378. He was the first responder on the scene. When Prouse arrived, he saw two bodies lying on the ground in a field. EMS arrived immediately after Prouse and pronounced Hill deceased. Prouse went to assist Manning, who was severely injured. Prouse testified Manning appeared alert and told Prouse, "I f-ed up!" Other emergency responders testified they heard Manning say those same words. Elizabeth Grayson Simmons (Simmons), of Lexington County EMS,

testified the first thing she noticed was a strong smell of alcohol as she approached Manning. Simmons testified Manning's nose was split, and he had a wound as big as a fist in his abdomen exposing his intestines. Simmons testified she heard Manning state, "I f-ed up. I should have never done this. Look what I've done." Firefighter Victor Tomaino (Tomaino), who assisted in Manning's care, testified he heard Manning repeatedly say "I f-ed up" and "I should not have been driving."

Corporal Quest Hallman (Corporal Hallman) was the first police officer to arrive at the scene, but Manning had already been transported to the hospital. Corporal Hallman conducted an investigation of the scene to determine the identity of the driver. Corporal Hallman ultimately concluded that Manning was the driver and directed Trooper Jeffrey B. Baker (Trooper Baker) to retrieve a blood sample from Manning at the hospital. In explaining his request for the blood sample, Corporal Hallman testified, "In my experience and my determination, I determined [Manning] was the driver of the vehicle. And with there being a death involved, a legal blood sample was drawn."

Forensic toxicologist, Jennifer Brown (Brown), testified that Manning's blood alcohol level was .173, and Hill's blood alcohol level was .169 at the time of the accident. Brown also testified this level of intoxication would slow an individual's reaction time, impair his or her vision, and adversely affect his or her judgment.

Corporal James O'Donnell (O'Donnell) testified he worked for the South Carolina Highway Department Patrol with the Multidisciplinary Accident Investigation Team (MAIT). The State qualified O'Donnell as an expert in the field of accident reconstruction. O'Donnell further testified that in his opinion, the vehicle was going 89 miles per hour at the time of the accident. He opined that the vehicle went into a curve, went off the shoulder of the road, overturned multiple times, struck a tree, and flew across a ditch where it landed. O'Donnell estimated the vehicle travelled a total of 535 feet during the accident. O'Donnell noted the accident was so violent that the engine was dislodged from the engine compartment. Hill was found lying approximately fifty feet from the vehicle, and Manning was found approximately fifteen feet from the vehicle. O'Donnell testified there was no forensic evidence identifying the driver, and no witnesses. O'Donnell did note, however, that a driver has more obstacles than a passenger would to keep from being ejected, and that the steering wheel in this case could have caused Manning's abdominal injuries.

Prior to trial, the circuit court severed the felony DUI charge and the schedule three drug charge, and the jury found Manning guilty of felony DUI. The circuit court sentenced Manning to eighteen years' imprisonment and a $10,000 fine. Manning appeals.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

## LAW/ANALYSIS

### I. Section 56-5-2953

Manning argues the circuit court erred in denying his motion to dismiss because the arresting officer did not provide an affidavit in compliance with section 56-5-2953. We disagree.

Section 56-5-2953(A) provides that a person who operates a vehicle while under the influence of alcohol "*must* have his conduct at the incident site and the breath test site video recorded." (emphasis added).

Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. § 56-5-2953(B); *see also Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011) (explaining a previous version of subsection B that is nearly identical to the current version).

Manning relies on *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007), to argue the circuit court erred in failing to dismiss Manning's charges. In *Suchenski*, our supreme court affirmed the dismissal of the defendant's charges for

driving with an unlawful alcohol concentration due to the failure of the arresting officer to record a third field sobriety test because he unintentionally ran out of videotape. 374 S.C. at 14-16, 646 S.E.2d at 879-80. However, in that case, our supreme court found the lower court only considered subsection A of 56-5-2953, and not the exceptions to the videotaping requirement in subsection B of 56-5-2953. *Id.* at 15-16, 646 S.E.2d at 880. Therefore, the *Suchenski* court found any issue dealing with the exceptions outlined in subsection B of 56-5-2953 was not preserved for review. *Id.*

Here, the circuit court found there was no conduct to record under subsection A of section 56-5-2953 because the police arrived after Manning left the scene to seek medical treatment. The circuit court held subsection A of 56-5-2953 was inapplicable because Corporal Hallman and Manning were never simultaneously present at the incident site; therefore, there was nothing to record. Moreover, the circuit court held that even if Corporal Hallman had a duty to record or sign a sworn affidavit certifying that it was physically impossible to produce the video recording because Manning needed emergency medical treatment, section 56-5-2953 allows a circuit court to look at the totality of the circumstances and make a determination of whether the charges should be dismissed.

We find section 56-5-2953 was implicated by the facts of this case. Although the officers did not arrive to the incident site before Manning was sent to the hospital, the first sentence of subsection A plainly states that "[a] person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site . . . video recorded." § 56-5-2053(A). The important question here is whether the State satisfied an exception to the video recording requirement outlined in subsection B. § 56-5-2053(B).

We also find the circuit court properly refused to dismiss Manning's charges under subsection B. In this case, it was physically impossible for Corporal Hallman to produce a video recording of Manning at the incident scene because Manning had been transported from the scene for medical treatment prior to Corporal Hallman's arrival. Because the State did not submit an affidavit signed by the arresting officer and stating Manning was transported for medical treatment, Manning's charges should have been dismissed unless another exception under subsection B applied. *See* § 56-5-2953(B) ("Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal . . . if the arresting officer . . . submits a sworn affidavit certifying that it was physically

impossible to produce the video recording because the person needed emergency medical treatment . . . .").

Despite the failure to provide an affidavit under subsection B, the video recording was not required because Corporal Hallman was conducting an investigation of a traffic accident and Manning was arrested at the hospital. *See* § 56-5-2953(B) ("In circumstances including, but not limited to, . . . traffic accident investigations . . . , where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal."). Moreover, even if the traffic accident investigation exception was inapplicable, the circuit court properly concluded the video recording was not required due to the totality of the circumstances because Manning and Corporal Hallman were never at the incident scene at the same time. *See* § 56-5-2953(B) ("Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances . . . .").

Accordingly, we find the circuit court properly held section 56-5-2953 did not require the dismissal of Manning's charges.

## II. Section 56-5-2946

Manning also argues the circuit court erred in denying his motion to suppress the blood test evidence pursuant to section 56-5-2946 because there was not sufficient probable cause for an arrest. We disagree.

Section 56-5-2946 provides, in pertinent part:

> Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated [the law by driving under the influence] or is under arrest for [driving under the influence]. The tests must be administered at the direction of a law enforcement officer who has probable cause to believe that the person violated or is

> under arrest for a violation of § 56-5-2945 [offense of felony driving under the influence].

Probable cause to arrest without a warrant exists when the "circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe a crime has been committed by the person to be arrested." *State v. Cuevas*, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005). "In determining whether probable cause exists, 'all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received.'" *Id.*at 204, 616 S.E.2d at 721 (citing *State v. Roper*, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)). "Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." *Jackson v. City of Abbeville*, 366 S.C. 662, 658, 623 S.E.2d 656, 666 (Ct. App. 2005).

This court reviews the circuit court's probable cause determination under a "clear error" standard. *Baccus*, 367 S.C. at 48-49, 625 S.E.2d at 220. The finding that an arrest was made based upon probable cause is conclusive on appeal where supported by evidence. *State v. Jones*, 268 S.C. 227, 233, 233 S.E.2d 287, 289 (1977).

Here, the circuit court found that both Corporal Hallman and Trooper Baker had probable cause to arrest Manning for felony DUI. We agree.

Under our standard of review, we find a reasonable person with Corporal Hallman's knowledge would have probable cause to arrest Manning for felony DUI. The accident occurred at 5 am and was so violent that the car drifted off the road over 500 feet. Corporal Hallman testified he smelled alcohol in and around the vehicle, and saw a beer bottle in the accident debris. Corporal Hallman also testified he knew the address on the vehicle's registration matched Manning's Department of Motor Vehicle (DMV) record. Most importantly, Corporal Hallman testified he believed Manning to be the driver because Trooper Baker called him and told him Manning stated he was the driver. We find further support for a finding of probable cause based on Corporal Hallman's testimony he arrested Manning for felony DUI after speaking with fire service personnel and EMS at the scene, who were present with Manning shortly after the accident.

Second, if Trooper Baker was deemed to be the arresting officer, we find there is evidence to support Trooper Baker had probable cause to arrest Manning for felony DUI based on a statement made to him by a Highway Patrol officer indicating Manning was the driver, his observations at the hospital that Manning smelled of alcohol, and his observations that Manning sustained trauma consistent with having been in an accident. Accordingly, because the circuit court's finding that Corporal Hallman and Trooper Baker both had probable cause to arrest Manning is supported by the evidence in the record, we find no clear error. *See State v. Barrs*, 257 S.C. 193, 198, 184 S.E.2d 708, 710 (1971) (holding because there was evidence to support the circuit court's finding that officer had probable cause to make an arrest, it is conclusive on appeal).

## III. Severance of charges

Manning argued the circuit court erred in denying his motion for a mistrial after the circuit court severed the felony DUI charge and the possession of a schedule three substance charge because the potential jurors were told at the beginning of the trial that Manning was being tried for both charges, and both indictments were read.

In this case, Manning was indicted for two charges: felony DUI and possession of a quantity of hydrocodone and acetaminophen, both schedule three substances. At the beginning of jury selection, the circuit court read both indictments to the prospective jurors. After jury selection was complete and the jury was qualified, Manning moved to sever the charges, arguing because he had no hydrocodone or acetaminophen in his system at the time of the accident, it would be highly prejudicial under Rule 403 of the South Carolina Rules of Evidence for the jury to consider his possession of those substances in determining whether he was guilty of felony DUI. Manning asserted, "the natural assumption of the jury will be that [the possession of the schedule three substances] is something that deals with the felony DUI."

During the pre-trial hearing, after the State confirmed the schedule three substances did not appear in Manning's blood stream, the circuit court severed the charges. Manning moved for a mistrial, arguing the jurors would still speculate about the severed drug charge because they heard both indictments read at the beginning of jury selection. The circuit court denied Manning's motion stating:

> You didn't make that motion before the jury was qualified, and the Court is not going to be trapped [into a mistrial] like that. I'll be glad to give whatever instruction you want me to give [to the jury], but the case was called for trial in front of the Court. It was qualified. There were no motions at that time, except the one y'all brought to me in chambers on the continuance. So if it prejudices [Manning], that's a self-inflicted wound. That's not a wound inflicted by the State or this Court.

Manning declined the circuit court's offer to give an instruction to the jury to disregard the severed drug charge.

We find Manning waived this issue on appeal by failing to timely object to presenting both indictments to the prospective jurors. Manning did not contemporaneously object to reading both indictments to prospective jurors and did not move to sever the charges until after the jury selection process was complete and the jury was qualified. *See Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000) ("[I]n order to be timely, an objection usually must be made at the earliest possible opportunity."); *cf. State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (holding that the failure to contemporaneously object to prejudicial testimony "cannot be later bootstrapped by a motion for a mistrial"). Moreover, on the merits, we find the circuit court did not abuse its discretion in denying Manning's motion for a mistrial.

The decision to grant or deny a mistrial is within the sound discretion of the circuit court. *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). The circuit court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *Id.*; *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Granting a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way." *State v. Moore*, 377 S.C. 299, 311-13, 659 S.E.2d 256, 263 (Ct. App. 2008). A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. *Stanley*, 365 S.C. at 34, 615 S.E.2d at 460.

We find the single reference to the schedule three drug charge contained in the indictments read at the beginning of trial does not constitute sufficient prejudice to justify a mistrial. *See State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82

(Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). Ample evidence in the record supports Manning's conviction for felony DUI, and there is no evidence the jury considered the severed drug charge in reaching its verdict. Therefore, we affirm the circuit court's decision to deny Manning's motion for a mistrial.

## IV. Section 56-5-2950(b)

Manning argues the circuit court erred in charging the jury on section 56-5-2950(A) because the statute begins with "a person who drives" which is a statement on the facts and the identification of the driver was the primary issue at trial. We disagree.

Generally, the circuit court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004); *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). The law to be charged to the jury is determined by the evidence presented at trial. *Brown*, 362 S.C. at 261-62, 607 S.E.2d at 95. "Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). An appellate court will not reverse a circuit court's decision regarding jury instructions absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Section 56-5-2950(A) provides, in pertinent part:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs, or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol or drugs or a combination of alcohol and drugs.

Here, the circuit court charged the jury, in pertinent part:

> Felony DUI requires proof of three elements: Number one, the actor drives a vehicle under the influence of alcohol and/or drugs; number two, the actor does an act forbidden by law or neglected a duty imposed by law; and number three, the act or negligence, the act of neglect, proximately cause the death to another person . . . . In every case before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A [circuit] judge cannot intimate, state, comment on or make any statement to a jury about the facts in the case. Since you the jury are the sole judge of the facts, you are not to infer from what I have said during the progress of this trial . . . or anything that I say now during the course of this instruction to you that I have any opinion about the facts in the case. . . . An issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving the identity beyond a reasonable doubt. You the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you convict the Defendant.

The circuit court subsequently charged the jury with section 56-5-2950(A), reading the statute in its entirety.

Viewing the jury instruction as a whole, we find the circuit court did not abuse its discretion in charging the jury on section 56-5-2950(A). Prior to charging the jury on section 56-5-2950(A), the circuit court made clear it was not making any statements related to the facts, but rather the jury in its absolute discretion must decide beyond a reasonable doubt if Manning was the driver of the vehicle. It is unlikely that a reasonable juror would have singled out the phrase "a person who drives" and interpreted it as the circuit court's opinion on the facts of the case. *See State v. Jackson*, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989) ("[T]he test is what a reasonable juror would have understood the charge as meaning."). We therefore affirm the circuit court's jury charge on section 56-5-2950(A). *See id.* at 526, 377 S.E.2d at 572 ("Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error.").

**CONCLUSION**

Accordingly, the circuit court's decision is

**AFFIRMED.**

**THOMAS and LOCKEMY, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Benjamin Johnson, Appellant,

v.

Franklin Jackson, Daniel S. Harpster, Tantara Transportation, Inc., and Palmetto Health Alliance d/b/a Palmetto Health Baptist, Respondents.

Appellate Case No. 2011-187387

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Appeal From Richland County
C. Tolbert Goolsby, Jr., Special Circuit Judge

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Opinion No. 5037
Heard June 20, 2012 – Filed October 10, 2012

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**AFFIRMED IN PART and REVERSED IN PART**

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D. Michael Kelly and Brad D. Hewett, of Mike Kelly Law Group, LLC, of Columbia, for Appellant Benjamin Johnson.

John C. Bruton, Jr., Sarah Patrick Spruill, and John Michael Florence, Jr., of Haynsworth Sinkler Boyd, PA, of Columbia, for Respondents Daniel S. Harpster and Tantara Transportation, Inc.; Mason A. Summers, William C. McDow, and Shelton W. Haile, of Richardson Plowden & Robinson, PA, of Columbia, for Respondent Palmetto Health Alliance d/b/a Palmetto Health Baptist.

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**WILLIAMS, J.:** This is an appeal from an order dismissing Benjamin Johnson's ("Johnson") negligence claims against Daniel Harpster ("Harpster"), Tantara Transportation, Inc. ("Tantara"), and Palmetto Health Alliance d/b/a Palmetto Health Baptist ("Palmetto Health") (collectively, Respondents). On appeal, Johnson claims the circuit court erred in granting summary judgment to Palmetto Health because Johnson presented evidence that Palmetto Health owed a duty to him, thus creating a genuine issue of material fact for the jury. In addition, Johnson contends the circuit court erred in finding he was a statutory employee of Tantara and thus barred from bringing suit against Tantara and Harpster by the exclusivity provisions of the South Carolina Workers' Compensation Act (the Act). We affirm in part and reverse in part.

## FACTS/PROCEDURAL BACKGROUND

On August 10, 2007, Tantara contracted with Labor Ready, a temporary employment agency, to use several of its workers, including Johnson, to load computers at Palmetto Health for subsequent delivery to HP Financial Services. Tantara also employed Harpster, a licensed commercial truck driver, to load and transport the computers. Palmetto Health contracted with HP Financial Services to remove the computers from its facility; however, it neither hired nor contracted with Tantara, Harpster, or Johnson to pick up and transport the computers.

Harpster's dispatch ticket listed two Palmetto Health contacts and indicated the pick-up location did not have a loading dock, requiring Harpster to load the computers curbside. Accordingly, at approximately 8:00 a.m., Harpster parked his tractor-trailer adjacent to the Taylor Street curb in front of Palmetto Health's Physicians Building, facing west near the intersection of Taylor and Sumter Streets in downtown Columbia, South Carolina. The Taylor Street curb was marked in yellow and was not identified as a loading zone by any official signage. Harpster placed triangle warning signs around the tractor-trailer and activated the tractor-trailer's hazard lights during the four hours the truck was parked outside Palmetto Health. Both Harpster and Johnson testified during their depositions that the tractor-trailer was not obstructing traffic.

Johnson met Harpster at approximately 9:30 a.m. After receiving instructions on how to package and load the computers, Johnson helped Harpster load the

computers onto the tractor-trailer. At no point during this time was Johnson or Harpster required to cross the street to facilitate the loading process. As Johnson was standing on the tractor-trailer's lift gate, Franklin Jackson ("the Driver")[1] struck Johnson, Harpster, and the tractor-trailer with his vehicle as he was traveling west on Taylor Street. Johnson suffered severe and permanent injuries.[2] As a result, Johnson filed suit against the Driver on February 28, 2008, alleging the Driver negligently struck Johnson with the Driver's motor vehicle while Johnson was outside of Palmetto Health loading computers onto a tractor-trailer owned by Tantara and operated by Harpster.

On July 31, 2009, Johnson filed an amended complaint, adding common-law negligence claims against Respondents. As to Palmetto Health, Johnson alleged Palmetto Health was negligent in failing to provide him with a safe working place because it allowed Harpster to park and unload a tractor-trailer in a no-parking area. In response, Palmetto Health denied any liability and claimed it had no duty to Johnson and any of Johnson's injuries were not proximately caused by Palmetto Health. As to Tantara and Harpster, Johnson claimed they were negligent in parking the tractor-trailer along a yellow curb in a no-parking area. In response, Tantara and Harpster alleged Johnson was a statutory employee of Tantara at the time of the accident, and therefore, jurisdiction over his claims was vested exclusively in the Workers' Compensation Commission.

Prior to filing claims against Respondents, Johnson received lifetime workers' compensation and social security benefits for his injuries and settled his claim against the Driver.

On July 7, 2010, Palmetto Health filed a motion for summary judgment pursuant to Rule 56, SCRCP. On July 27, 2010, Tantara and Harpster filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP.

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[1] The Driver, an insulin-dependent diabetic, testified his insulin level dropped right before the accident, causing him to black out and lose control of his vehicle.

[2] As a result of the collision, Johnson suffered severe injuries, including a broken jaw, broken left arm, torn ACL in his left knee, amputated right leg, internal injuries, nerve damage, and head injuries. Johnson incurred over $1,000,000 in medical bills and was declared permanently and totally disabled by the Social Security Administration.

The circuit court held a hearing on both motions on November 2, 2010. On November 30, 2010, the court issued an order granting summary judgment in favor of Palmetto Health. The circuit court concluded Palmetto Health owed no legal duty to Johnson because (1) Johnson was not on Palmetto Health's property when the accident occurred; (2) there was no evidence of a relationship between Palmetto Health and Johnson; (3) Palmetto Health was not required by law to provide a designated loading zone for pick-up and deliveries of goods; and (4) the tractor-trailer was legally parked pursuant to section 56-5-2530 of the South Carolina Code (2006).

The circuit court also granted Tantara and Harpster's motion to dismiss pursuant to Rule 12(b)(1), SCRCP. Citing to the framework set forth in *Posey v. Proper Mold & Engineering, Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008), the court concluded the activities performed by Johnson were important, necessary, essential, and integral to Tantara's business and were also performed by Tantara's direct employees. Accordingly, Johnson was a statutory employee, and workers' compensation was Johnson's exclusive remedy. Johnson filed a Rule 59(e), SCRCP, motion for reconsideration in response to both of these rulings, which the circuit court denied. This appeal followed.

**STANDARD OF REVIEW**

As it pertains to Palmetto Health, when reviewing an order granting summary judgment, this court applies the same standard as the circuit court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860. On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

As it pertains to Tantara and Harpster, the determination of whether a worker is a statutory employee is jurisdictional and therefore the question on appeal is one of law. *Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004).

When deciding questions of law, such as this one, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. *Poch v. Bayshore Concrete Prods./S.C., Inc.*, 386 S.C. 13, 21, 686 S.E.2d 689, 693 (Ct. App. 2009).

## LAW/ANALYSIS

### I. Existence of a Duty: Palmetto Health

In the instant case, Johnson only asserts a common-law negligence cause of action against Palmetto Health. In support of his claim, Johnson asserts Palmetto Health voluntarily assumed a general duty to Johnson and other individuals who picked up and loaded computers at its business because it maintained primary control of the loading area, knowingly and frequently managed the pick-up process, and directed Harpster where to park the day of the accident. We agree and as set forth below, we find whether Palmetto Health owed a duty to Johnson on the day in question was a question of fact for the jury.

To succeed in a negligence cause of action, the plaintiff must establish (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Moore v. Weinberg*, 373 S.C. 209, 220-21, 644 S.E.2d 740, 746 (Ct. App. 2007). A crucial element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010). An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006).

Under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. *Madison*, 371 S.C.at 136, 638 S.E.2d at 656. Absent a duty, there is no actionable negligence. *Burnett*, 387 S.C. at 189, 691 S.E.2d at 173. Our courts, however, have recognized five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute

imposes a duty on the defendant. *Madison*, 371 S.C.at 136, 638 S.E.2d at 656. Moreover, "[u]nder common law, even where there is no duty to act but an act is voluntarily undertaken, the actor assumes the duty to use due care." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). The question of whether a duty to act arises in a given case may depend on the existence of particular facts. *Vaughan v. Town of Lyman*, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006). When there are factual issues regarding whether the defendant voluntarily undertakes a duty, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder. *Id.* at 446-47, 635 S.E.2d at 637.

We find a genuine issue of material fact exists as to whether Palmetto Health assumed a duty of due care to ensure Johnson's safety on the day of the accident, despite Johnson's lack of contractual privity with Palmetto Health. Testimony was presented that Palmetto Health employees affirmatively instructed Harpster where to park and where to load the computers. Harpster testified that upon his arrival at Palmetto Health, he went inside Palmetto Health and spoke with a woman who was listed as the contact for pick-up on his dispatch ticket. She instructed him where to park his tractor trailer. Upon exiting the building, Harpster stated the security guards at Palmetto Health also instructed him where to park and indicated that location was the common pick-up and drop-off parking zone for deliveries at the hospital.

Linda Taylor, the manager of desktop services at Palmetto Health, stated in her deposition that while she was one of the contacts on the dispatch ticket, she never tells the transportation companies where to park; rather, she tells them where the goods are located on Palmetto Health's premises. When questioned, she stated Palmetto Health has not changed their loading and unloading policies since the accident, and to her knowledge, deliveries were still being made at that location. Harpster's statement that he was instructed to park in the same location over a year after the accident affirms this testimony.

Based on the foregoing, we find conflicting testimony was presented about whether Palmetto Health assumed the responsibility of instructing individuals to park in this location, thereby creating a duty to ensure their safety. *See Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) ("Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder."). Because summary judgment should be denied if more than one

inference can be drawn from the evidence, we reverse the circuit court's grant of summary judgment to Palmetto Health on this ground.

## II. Tort Immunity: Tantara & Harpster

Next, Johnson argues the circuit court erred in granting tort immunity to Tantara and Harpster on Johnson's negligence claim because Johnson was not Tantara's statutory employee, its permanent employee, or its borrowed employee. We disagree and address each argument in turn.

### *a. Statutory Employee*

The Act is the exclusive remedy against an employer for an employee's work-related accident or injury. *Fuller v. Blanchard*, 358 S.C. 536, 540, 595 S.E.2d 831, 833 (2004). The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. *Tatum v. Med. Univ. of S.C.*, 346 S.C. 194, 201, 552 S.E.2d 18, 22 (2001). "The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee." *Poch*, 386 S.C. at 22, 686 S.E.2d at 694.

Coverage under the Act is typically dependent on the existence of an employer-employee relationship. *Edens*, 359 S.C. at 442, 597 S.E.2d at 868. However, there are certain statutory exceptions to this general rule. *Id.* One of these exceptions is found in section 42-1-400 of the Act, which, under some circumstances, imposes liability on an employer or business owner for the payment of compensation benefits to a worker not directly employed by the employer. *See* S.C. Code Ann. § 42-1-400 (1976); *see also Poch*, 386 S.C. at 24, 686 S.E.2d at 695 ("The concept of statutory employment is designed to protect the employee by assuring workmen's compensation coverage by either the subcontractor, the general contractor, or the owner if the work is a part of the owner's business.") (internal citation omitted).

The Act specifically provides that statutory employees are included within the scope of the Act:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

§ 42-1-400.

In determining whether a worker is a statutory employee, our courts consider the following three factors: "(1) whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the business, and (3) whether the identical activity in question has been performed by employees of the principal employer." *Poch*, 386 S.C. at 25, 686 S.E.2d at 695 (internal citation omitted). If the activity at issue meets even one of these three criteria, the worker qualifies as the statutory employee of the owner. *Edens*, 359 S.C. at 443, 597 S.E.2d at 868.

A review of prior South Carolina decisions demonstrates that no single bright-line test exists to determine whether an individual qualifies as a statutory employee. *Meyer v. Piggly Wiggly No. 24, Inc.*, 331 S.C. 261, 265, 500 S.E.2d 190, 192 (Ct. App. 1998). "Each situation, therefore, must be evaluated on a case-by-case basis." *Id.*

Tantara is a full-service transportation company that specializes in shipping high-value technological equipment. The primary services Tantara provides include: packaging goods for transport, loading goods onto its truck, transporting the goods, and unloading the goods at the desired destination. Tantara employs drivers who perform all of these functions, and when large transportation jobs exist, additional temporary workers are hired to assist the drivers with the packaging and loading aspect of the job.

Although Tantara was not Johnson's direct employer, we find Johnson was performing work for Tantara that would render him a statutory employee under the three tests espoused above at the time of the accident. First, packaging and loading technology equipment were an important part of Tantara's business. Because an integral part of Tantara's transportation business is agreeing to package and load goods, without these services, Tantara's financial profitability and customer base would undoubtedly diminish. To negate this factor, Johnson highlights the fact that Harpster has a commercial driver's license, which enables him to transport the equipment to its final destination, whereas, Johnson does not. While we agree with Johnson that transporting the goods is an important part of Tantara's business, this fact does not negate the importance and necessity of packaging and loading equipment, an undisputed prerequisite to the transportation component of Tantara's business. Last, Johnson performed the same tasks that Harpster performed. During Johnson's deposition, he testified he assisted Harpster with packaging the computers and loading them onto the tractor-trailer. When asked whether he recalled doing anything specific that Harpster did not do, Johnson replied, "No, he did just about everything." Therefore, we find all three tests are met in the present situation.

Johnson cites to several cases in support of his argument that an activity must be the "main function and basic operation" of the business, not merely essential or necessary, for statutory employment to exist. However, we find each of these cases distinguishable from the present situation because in those cases, the basic operation of the putative employer differed greatly from the activity in which the plaintiff was engaged at the time of injury. *See Meyer*, 331 S.C. at 267, 500 S.E.2d at 193 (finding grocery store was not statutory employer of deliveryman for wholesale bakery because although baked goods were sold at grocery store, the sale and delivery of baked goods was not essential to operating the grocery store and relationship was only that of a vendor and vendee); *Abbott v. The Limited, Inc.*, 338 S.C. 161, 163-64, 526 S.E.2d 513, 514 (2000) (finding driver/deliveryman for common carrier was not a statutory employee of retail clothing company because although receiving clothing was an important part of retailer's business, the transportation of the goods was not a part or process of the business); *Glass v. Dow Chem. Co.*, 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997) (finding welders who were contracted to replace the façade of a building were not statutory employers of chemical company because specialized nature of repairs were not part of chemical company's basic operation). In those cases, transportation was not a main and integral part of the defendant's business for purposes of the Act. Here, Tantara's

business *is* transportation of technological equipment, which necessarily includes packaging, loading, and unloading that equipment. Accordingly, we affirm the circuit court's legal determination that Tantara is entitled to tort immunity as Johnson's statutory employer.

***b. Casual Employee***

Next, Johnson claims he was a casual employee; thus, the exclusivity provisions of the Act do not apply. We disagree.

Under the Act,

> "[E]mployee" means every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, *but excludes a person whose employment is both casual* ***and*** *not in the course of the trade, business, profession, or occupation of his employer*.

S.C. Code Ann. § 42-1-130 (Supp. 2011) (emphasis added). When employment cannot be characterized as permanent or periodically regular, but occurs by chance, or with the intent and understanding of both employer and employee that it shall not be continuous, it is casual. *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 248, 647 S.E.2d 691, 697-98 (Ct. App. 2007). We agree with Johnson that his employment with Tantara on August 10, 2007 was casual, in the sense that it was neither permanent nor continuous, but this does not end the inquiry. As required by section 42-1-130, his employment must be both casual *and* not in the course of the trade, business, profession, or occupation of Tantara. *See Carrier v. Westvaco Corp.*, 806 F. Supp. 1242, 1246-47 (D.S.C. 1992) (finding work performed by plaintiff was part of the trade, business, profession or occupation of defendant, so it was unnecessary to consider whether plaintiff's employment was casual "since for an employee to be excluded under the [A]ct, his employment must be both casual and not in the trade, business, profession or occupation of his employer"). As stated above, Johnson's work the day of his accident was in the course of Tantara's business; thus, we find Johnson was not a casual employee of Tantara as contemplated by section 42-1-130.

### *c. Borrowed Employee*

Last, Johnson claims this court should employ the common-law borrowed employee test, which would establish that Tantara was not Johnson's special employer. We disagree, but because we find Tantara is Johnson's statutory employer, we need not address this argument. *See Poch*, 386 S.C. at 26, 686 S.E.2d at 696 (declining to address borrowed employee argument after finding defendant was plaintiff's statutory employer and entitled to workers' compensation immunity under that theory).

## CONCLUSION

Based on the foregoing, we affirm the grant of summary judgment as to Tantara and Harpster and reverse the grant of summary judgment as to Palmetto Health. Accordingly, the circuit court's decision is

**AFFIRMED IN PART and REVERSED IN PART.**

**THOMAS and LOCKEMY, JJ., concur.**