The Supreme Court of South Carolina

In the Matter of David Howard Wersan, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated May 21, 2009, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of David Howard Wersan shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

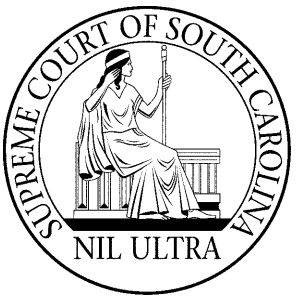
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

August 20, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37
August 24, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26692 – (Op. withdrawn, substituted and refiled) In the Matter of Frank Rogers Ellerbe, III) 14

26703 – State v. Karl Wallace 18

26704 – State v. John Gleason Hubner 26

26705 – State v. Janice M. Clasby 29

26706 – The Vestry v. Orkin Exterminating 40

26707 – David Neal v. Don Brown 51

26708 – Harold B. Turner v. State 58

26709 – Leola Richardson v. P.V. Inc. 65

Order – In the Matter of Frank Rogers Ellerbe, III 73

Order – In the Matter of Michael James Sarratt 75

Order – Friends of McLeod v. City of Charleston 76

Order – In the Matter of William F. Partridge, III 78

UNPUBLISHED OPINIONS

2009-MO-045 – Mickeal Larron Joe v. State
(Lancaster County, Judge Brooks P. Goldsmith)

2009-MO-046 – Douglas Terrell Weiters v. State
(Charleston County, Judge Kenneth G. Goode)

PETITIONS – UNITED STATES SUPREME COURT

26582 – State v. Kevin Mercer Pending

2008-OR-871 – John J. Garrett v. Lister, Flynn and Kelly Pending

2009-OR-086 – James Darnell Scott v. State Pending

2009-OR-234 – Renee Holland v. Wells Holland Pending

PETITIONS FOR REHEARING

26631 – Robert Dale Bullis v. State	Pending
26672 – Brian Major v. SCDPPPS	Pending
26675 – Lawrence Brayboy v. Workforce	Denied 8/19/09
26678 – Craig S. Rolen v. State	Pending
26681 – Sherrie Floyd v. Richard Morgan	Denied 8/20/09
26689 – Dan Williamson v. Alfred Middleton	Denied 8/20/09
26692 – In the Matter of Frank Rogers Ellerbe, III	Granted 8/20/09
26694 – Law Firm of Erickson v. Boykin	Pending
2009-MO-042 – Carolyn Austin v. Town of Hilton Head	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

4577-Butler, William v. Butler, Lynn 80

4609-State v. Holland, Lemond 92

4610-Milliken & Company v. Morin, Brian 105

UNPUBLISHED OPINIONS

2009-UP-402-State v. Paul Watkins
(Richland, Judge G. Thomas Cooper, Jr.)

2009-UP-403-SCDOT v. James L. Pratt
(Florence, Judge Thomas A. Russo)

2009-UP-404-SCDSS v. Kelley S.
(Barnwell, Judge R. Kinard Johnson, Jr.)

PETITIONS FOR REHEARING

4526-State v. Billy Cope Pending

4527-State v. James Sanders Pending

4552-State v. Fonseca Pending

4553-Barron v. Labor Finders Pending

4554-State v. Jackson, Charles Q. Pending

4556-Murphy v. Tyndall Pending

4560-State v. Commander Pending

4561-Trotter v. Trane Coil Facility Pending

4567-Fiddie v. Fiddie	Pending
4570-In Re: The Estate of Brown	Pending
4573-State v. Vick	Pending
4575-Santoro v. Schulthess	Pending
4576-Bass v. GOPAL, Inc.	Pending
4578-Cole Vision v. Hobbs	Pending
4579-State v. Howard	Pending
4580-Lanier Construction v. Bailey & Yobs	Pending
4583-Jones v. SCDHEC	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG, Inc.	Pending
4591-McCrea v. City of Georgetown	Pending
4593-Canteen v. McLeod Regional	Pending
4595-Judy v. Judy	Pending
4597-Lexington Cty Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman, Inc.	Pending
4604-State v. Hatcher	Pending
2009-UP-032-State v. James Bryant	Pending
2009-UP-222-Rashford v. Christopher	Pending
2009-UP-244-G&S Supply v. Watson	Pending
2009-UP-261-United of Omaha v. Helms	Pending

2009-UP-265-State v. H. Williams	Pending
2009-UP-266-State v. M. McKenzie	Pending
2009-UP-276-State v. N. Byers	Pending
2009-UP-281-Holland v. SCE&G	Pending
2009-UP-299-Spires v. Spires	Pending
2009-UP-300-Kroener v. Baby Boy Fulton	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-338-Austin v. Sea Crest (1)	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-341-Brightharp v. SCDC	Pending
2009-UP-342-Wooten v. State	Pending
2009-UP-345-Adams v. State	Pending
2009-UP-348-Steele v. Steele	Pending
2009-UP-359-State v. Cleveland	Pending
2009-UP-361-State v. Bolte	Pending
2009-UP-364-Holmes v. National Service	Pending
2009-UP-369-State v. T. Smith	Pending
2009-UP-376-Clegg v. Lambrecht	Pending
2009-UP-382-Kuznik v. Dorman	Pending

2009-UP-385-Lester v. Straker Pending

2009-UP-393-United Capital v. Technamax Pending

2009-UP-395-Kenneth W. v. Gretchen D. Pending

2009-UP-396-McPeake Hotels v. Jasper's Porch Pending

2009-UP-397-Does v. Tompkins Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4387-Blanding v. Long Beach Pending

4394-Platt v. SCDOT Pending

4417-Power Products v. Kozma Pending

4422-Fowler v. Hunter Pending

4423-State v. Donnie Raymond Nelson Pending

4436-State v. Edward Whitner Pending

4439-Bickerstaff v. Prevost Pending

4441-Ardis v. Combined Ins. Co. Pending

4444-Enos v. Doe Pending

4447-State v. O. Williams Pending

4448-State v. A. Mattison Pending

4450-SC Coastal v. SCDHEC Pending

4451-State v. J. Dickey Pending

4454-Paschal v. Price Pending

4455-Gauld v. O'Shaugnessy Realty Pending

4457-Pelzer, Ricky v. State	Pending
4458-McClurg v. Deaton, Harrell	Pending
4459-Timmons v. Starkey	Pending
4460-Pocisk v. Sea Coast	Pending
4462-Carolina Chloride v. Richland County	Pending
4465-Trey Gowdy v. Bobby Gibson	Pending
4469-Hartfield v. McDonald	Pending
4472-Eadie v. Krause	Pending
4473-Hollins, Maria v. Wal-Mart Stores	Pending
4476-Bartley, Sandra v. Allendale County	Pending
4478-Turner v. Milliman	Pending
4480-Christal Moore v. The Barony House	Pending
4483-Carpenter, Karen v. Burr, J. et al.	Pending
4487-John Chastain v. Hiltabidle	Pending
4491-Payen v. Payne	Pending
4492-State v. Parker	Pending
4493-Mazloom v. Mazloom	Pending
4495-State v. James W. Bodenstedt	Pending
4496-Kent Blackburn v. TKT	Pending
4500-Standley Floyd v. C.B. Askins	Pending
4504-Stinney v. Sumter School District	Pending
4505-SCDMV v. Holtzclaw	Pending

4512-Robarge v. City of Greenville	Pending
4514-State v. J. Harris	Pending
4515-Gainey v. Gainey	Pending
4516-State v. Halcomb	Pending
4518-Loe #1 and #2 v. Mother	Pending
4522-State v. H. Bryant	Pending
4525-Mead v. Jessex, Inc.	Pending
4528-Judy v. Judy	Pending
4542-Padgett v. Colleton Cty.	Pending
4544-State v. Corley	Pending
4550-Mungo v. Rental Uniform Service	Pending
2008-UP-116-Miller v. Ferrellgas	Pending
2008-UP-285-Biel v. Clark	Pending
2008-UP-424-State v. D. Jones	Pending
2008-UP-512-State v. M. Kirk	Pending
2008-UP-534-State v. C. Woody	Pending
2008-UP-539-Pendergrass v. SCDPP	Pending
2008-UP-546-State v. R. Niles	Pending
2008-UP-552-Bartell v. Francis Marion	Pending
2008-UP-565-State v. Matthew W. Gilliard	Pending
2008-UP-596-Doe (Collie) v. Duncan	Pending

2008-UP-604-State v. J. Davis	Pending
2008-UP-606-SCDSS v. Serena B and Gerald B.	Pending
2008-UP-607-DeWitt v. Charleston Gas Light	Pending
2008-UP-629-State v. Lawrence Reyes Waller	Pending
2008-UP-645-Lewis v. Lewis	Pending
2008-UP-646-Robinson v. Est. of Harris	Pending
2008-UP-647-Robinson v. Est. of Harris	Pending
2008-UP-648-Robinson v. Est. of Harris	Pending
2008-UP-649-Robinson v. Est. of Harris	Pending
2008-UP-651-Lawyers Title Ins. V. Pegasus	Pending
2008-UP-664-State v. Davis	Pending
2008-UP-673-State v. Randall Smith	Pending
2008-UP-705-Robinson v. Est of Harris	Pending
2008-UP-712-First South Bank v. Clifton Corp.	Pending
2009-UP-007-Miles, James v. Miles, Theodora	Pending
2009-UP-008-Jane Fuller v. James Fuller	Pending
2009-UP-010-State v. Cottrell	Pending
2009-UP-028-Gaby v. Kunstwerke Corp.	Pending
2009-UP-029-Demetre v. Beckmann	Pending
2009-UP-030-Carmichael, A.E. v. Oden, Benita	Pending
2009-UP-031-State v. H. Robinson	Pending

2009-UP-035-State v. J. Gunnells	Pending
2009-UP-039-State v. Brockington	Pending
2009-UP-040-State v. Sowell	Pending
2009-UP-042-Atlantic Coast Bldrs v. Lewis	Pending
2009-UP-060-State v. Lloyd	Pending
2009-UP-064-State v. Cohens	Pending
2009-UP-066-Darrell Driggers v. Professional Finance	Pending
2009-UP-067-Bernard Locklear v. Modern Continental	Pending
2009-UP-076-Ward, Joseph v. Pantry	Pending
2009-UP-079-State v. C. Harrison	Pending
2009-UP-093-State v. K. Mercer	Pending
2009-UP-113-State v. Mangal	Pending
2009-UP-138-State v. Summers	Pending
2009-UP-147-Grant v. City of Folly Beach	Pending
2009-UP-159-Durden v. Durden	Pending
2009-UP-172-Reaves v. Reaves	Pending
2009-UP-208-Wood v. Goddard	Pending
2009-UP-226-Buckles v. Paul	Pending
2009-UP-228-SCDOT v. Buckles	Pending
2009-UP-229-Paul v. Ormond	Pending

The Supreme Court of South Carolina

In the Matter of Frank Rogers Ellerbe, III, Respondent.

ORDER

Respondent has petitioned the Court for rehearing in this matter. We grant the petition, withdraw Opinion Number 26692 filed July 27, 2009, and substitute the attached opinion.

IT IS SO ORDERED.

s/ John H. Waller, Jr. A.C. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Toal, C.J., not participating

Columbia, South Carolina

August 20, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Frank Rogers Ellerbe, III, Respondent.

Opinion No. 26692
Submitted June 30, 2009 – Refiled August 20, 2009

DEFINITE SUSPENSION

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

John Barton, of Columbia, and Burnet Rhett Maybank, III, of Nexsen Pruet of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a ninety day suspension from the practice of law. We accept the Agreement and suspend respondent from the practice of law in this state for ninety days, retroactive to the date of his interim suspension.[1] The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension on May 14, 2009. In the Matter of Ellerbe, ___ S.C. ___, 677 S.E.2d 596 (2009).

FACTS

Respondent pled guilty to one count of failure to file state income tax returns. Respondent's sentence included a fine and payment of the costs of prosecution. Respondent has paid the taxes owed, the fine and the costs of prosecution.

LAW

Respondent admits that by his conduct he has violated Rule 8.4(b) of the Rules of Professional Conduct, Rule 407, SCACR (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). We also find respondent violated the following Rules of Professional Conduct: Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness); and Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of crime of moral turpitude or serious crime); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law). We also find respondent has violated Rule 7(a)(1), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We find a ninety day suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for a ninety day period, retroactive to the date of his interim suspension. Respondent shall fulfill all obligations of his sentence before he may file a Petition for Reinstatement under Rule 32, RLDE. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

WALLER, ACTING CHIEF JUSTICE, PLEICONES, BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Karl Wallace, Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

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

Opinion No. 26703
Heard March 18, 2008 – Filed August 17, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, of Columbia; and Solicitor Robert M. Ariail, of Greenville, for petitioner.

C. Rauch Wise, of Greenwood; and Everett P. Godfrey, Jr., of Godfrey Law Firm, of Greenville, for respondent.

ACTING JUSTICE BURNETT: Respondent Karl Wallace was convicted of criminal sexual conduct with a minor, second degree, for the sexual abuse of his stepdaughter (Victim). On appeal, the Court of Appeals reversed, holding the admission of evidence that respondent abused Victim's older sister (Sister) was improperly admitted.[1] We reverse.

FACTS

Victim testified the abuse began when she was twelve years old. When she was in seventh grade, respondent would periodically call her into his bedroom and tell her to go into the adjoining bathroom and take off her clothes. Victim's mother and Sister worked nights and were not at home when this happened. Respondent would touch Victim's breasts and would warn her, "Don't tell anyone 'cause they're not going to believe you anyway." This conduct continued during the time Victim was in the seventh and eighth grade.

One night when Victim was in ninth grade, respondent told her to sit on his bed. Victim's mother was not home and Sister had moved out of the house. Respondent forced Victim back on the bed, pulled off her pants and underwear, forced open her legs and "pushed his hands up [her] private parts." When Victim screamed, respondent put a pillow over her face and threatened to hit her if she did not stop. Victim's younger brother came to the door and respondent told Victim to go into the bathroom and dress. After the brother left, respondent forced Victim back onto the bed and took off her pants again but only looked at her. He then let her get back up and get dressed, and she left the room. Victim telephoned Sister who came to the house but respondent would not let Sister come inside.

---

[1] State v. Wallace, 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005).

The next day, Sister visited Victim at school to find out why Victim had called. Sister asked if respondent had "messed with her" and Victim told Sister what respondent had done. Sister reported the abuse and a police report was filed.

At trial, after an in camera hearing, the trial judge allowed Sister to testify that she was also sexually abused by respondent from the time she was in seventh grade until she moved out of the house after graduating high school. Sister testified that respondent would rub her back and sometimes put his hands up under her shirt and touch her breasts. After a while, he started touching her "private area" and performing oral sex on her. This would occur sporadically in respondent's bedroom or in Sister's bedroom when her mother was not at home. Sister testified respondent "would always tell me, you know, at the end, you know, 'You better not tell anyone. . . . 'They're not going to believe [you] so don't tell anyone.'" The trial judge found this evidence admissible under Rule 404(b), SCRE, as evidence of common scheme or plan.

ISSUE

Did the Court of Appeals err in finding Sister's testimony inadmissible as evidence of common scheme or plan?

DISCUSSION

Rule 404(b)

Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; *see also* State v. Lyle, 125 S.C. 406, 11 S.E. 803 (1923).[2] The Court of Appeals found it was error to admit Sister's

[2]Bad act evidence that is not subject to a conviction must be shown by clear and convincing evidence and is reviewed under an "any evidence" standard on appeal. State v.

testimony as evidence of common scheme or plan because "the trial court did not address any connection between the two crimes." Rather than viewing the similarity of the two events as establishing the required connection, the Court of Appeals found some further link was necessary.[3]

The process of analyzing bad act evidence begins with Rule 401, SCRE.[4] Pursuant to Rule 401, the trial court must determine whether

---

Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). Here, there is no challenge to the proof of the bad act.

[3] In support, the Court of Appeals points to Lyle, *supra*, in which this Court allowed evidence of a "similar crime" that occurred on the same date in the same town (Aiken), but disallowed evidence of "similar crimes" that occurred on other dates in other locations (Georgia). The Lyle court observed that there was no connection to show the Georgia crimes were "practically 'a continuous transaction,'" 125 S.C. at 427, 118 S.E. at 811, and therefore the evidence was inadmissible. The Court of Appeals read this holding in Lyle to mean a similarity in the acts is not enough without some further connection.

A careful reading of Lyle does not support the Court of Appeals' conclusion. The crime charged in Lyle was uttering a forged check. The Lyle court allowed the Aiken bad act evidence not only because it had occurred on the same date, but because it had a close degree of similarity to the particulars of the crime charged—the forged checks were issued using the same name and the same address. 118 S.E. at 807-808. The evidence that was not allowed was evidence of simply uttering other forged checks with no particulars in common with the events giving rise to the charge for which the defendant was tried. In other words, the commission of acts that fall into the same criminal definition is not sufficient. The acts must bear some factual similarity to constitute a connection between them.

[4]Rule 401 provides that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence

the evidence is relevant. Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence.

Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. *See* State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (evidence admissible as common scheme or plan where all victims were foster children of similar age and the types of sexual batteries were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (evidence admissible as common scheme or plan where both victims were defendant's daughters, were the same age at time of the initial attack, and defendant gave same explanation for his actions). We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

A close degree of similarity establishes the required connection between the two acts and no further "connection" must be shown for

---

to the determination of the action more probable or less probable than it would be without the evidence."

admissibility.[5] Here, the similarities between the acts include petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity. We find the Court of Appeals erred in ruling that Sister's testimony was improperly admitted under Rule 404(b).

Redaction

At the in camera hearing, Sister testified that digital penetration and oral sex eventually progressed to intercourse. The trial court ruled that in order to avoid unfair prejudice to respondent, any testimony regarding intercourse would not be allowed when Sister testified before the jury. The Court of Appeals found this was error because it made the two acts seem more similar than they actually were. We disagree.

We note that the trial court redacted only the last step in a progressive course of abuse. Sister's abuse began with touching of the breasts, digital penetration and oral sex, and then progressed to the point of intercourse. The fact that Victim's abuse was interrupted before it could culminate in intercourse does not diminish the similarity between the progression the abuse took in each case. Moreover, the trial court may properly redact dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant.

[5]The Court of Appeals relied on State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), which appears to require a connection beyond a degree of similarity in the details of the crime charged and the bad act evidence. We find this interpretation to be an overly restrictive view of our case law. Requiring a "connection" between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis.

Rule 403

Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE.[6] The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007). Here, the probative value of Sister's testimony as redacted substantially outweighs the danger of unfair prejudice. We conclude the trial court properly admitted the evidence. The decision of the Court of Appeals is

REVERSED.

TOAL, C.J., and WALLER, J., concur. BEATTY, J., concurring in result only. PLEICONES, J., dissenting in a separate opinion.

[6]Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, our cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a "common scheme or plan" under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence. Compare, e.g., Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct. App. 1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005) *vacated on other grounds* 371 S.C. 511, 641 S.E.2d 24 (2007) *internal citations omitted*, yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. See e.g. Rules 413 and 414, Fed. R. Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions,[7] I believe that thorough scrutiny is warranted.

[7] I note that The Advisory Committees on Criminal and Civil Rules, except for the Department of Justice representative, the Study Committee, except for the DOJ representative, and the Judicial Conference unanimously urged Congress to reconsider these Rules.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

John Gleason Hubner, Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26704
Heard March 18, 2008 – Filed August 17, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General David A. Spencer, of Columbia; and Solicitor Warren B. Giese, of Columbia, for petitioner/respondent.

Carol A. McCurry, of McCurry Law Firm, LLC, of West Columbia, for respondent/petitioner.

Matthew R. Howsare, of Nelson Mullins Riley & Scarborough LLP, of Columbia; J. Todd Kincannon, of Barnes, Alford, Stork & Johnson, LLP, of Columbia; and Jason B. Buffkin, of Crime Victim Legal Network, of Columbia, for *Amicus Curiae* South Carolina Crime Victim Legal Network.

Ernest Charles Grose, Jr., of Greenwood, for *Amicus Curiae* South Carolina Association of Criminal Defense Lawyers.

ACTING JUSTICE BURNETT: Respondent/Petitioner (Hubner) was convicted of six counts of lewd act upon a child and was sentenced to three consecutive twelve-year terms of imprisonment, two concurrent twelve-year terms of imprisonment, and one fifteen-year term of imprisonment, which was suspended on service of five years' probation. Hubner appealed.

The Court of Appeals reversed the convictions, holding the trial judge committed reversible error in admitting evidence of a prior sexual assault against a different victim. State v. Hubner, 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005). In light of our holding in State v. Wallace, Op. No. 26703 (S.C. Sup. Ct. filed August 17, 2009), the decision of the Court of Appeals is

REVERSED.

TOAL, C.J., and WALLER, J., concur. BEATTY, J., concurring in result only. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: For the reasons given in my dissent in State v. Wallace. Op. No. 26703 (S.C. Sup. Ct. filed August 17, 2009), I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Janice M. Clasby, Appellant.

Appeal From Pickens County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26705
Heard May 28, 2009 – Filed August 17, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III and Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Robert M. Ariail, of Greenville, for Respondent.

JUSTICE BEATTY: Janice M. Clasby appeals her conviction for lewd act upon a child,[1] arguing the trial judge erred in admitting evidence of prior bad acts involving the victim for which she was not indicted under the common scheme or plan exception to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE. Pursuant to Rule 204(b), SCACR, this Court certified this appeal from the Court of Appeals. We affirm.

FACTUAL/PROCEDURAL HISTORY

On August 6, 1994, a daughter, B.C., was born to Clasby and Bug Holliday. Although the couple lived together at the time of B.C.'s birth, the couple separated approximately a month and a half later. After the separation, Clasby had physical custody of B.C.

According to Holliday, he did not have contact with B.C. until she was four years old given he "never could find where [Clasby and B.C.] were staying at." Despite this reunion, Holliday stated that he did not establish a relationship with B.C. until she was six years old because Clasby "left again" with B.C. At that time, Holliday was awarded legal custody of B.C. after a family court custody proceeding. Even though the family court granted Clasby visitation, Holliday testified that Clasby did not exercise this right on a regular basis.

When Clasby became homeless in November 2003, Holliday permitted her to move in with him but the two did not maintain a romantic relationship. One month later, Clasby moved out of the home. Clasby did not establish contact with Holliday and B.C. until May 2004 when she sought to exercise her visitation rights. While Holliday was reluctant to permit Clasby to have visitation, he testified he did so in order to be in compliance with the family court order. Shortly thereafter, Holliday made the decision to seek a modification of

[1] See S.C. Code Ann. § 16-15-140 (2003) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.").

Clasby's visitation schedule so that he could get "some help from the police if [Clasby] didn't return [B.C.]" and "to keep track of [Clasby] better."

Although the exact date is unclear, B.C. at some point expressed that she no longer wanted to visit with Clasby. Because B.C. would not give a reason for this decision, Holliday decided to send B.C. to Cynthia Still, a licensed professional counselor. Holliday believed that a counselor would help him assess B.C.'s relationship with Clasby prior to another family court proceeding.

On June 23, 2004, Still began the first of twenty-seven counseling sessions with B.C. During the sixth visit, on August 16, 2004, Still noticed that B.C. "seemed different" and appeared "anxious." According to Still, B.C. described "some situations where she had been around a lot of talk that involved sexual issues that she was very uncomfortable with." In the course of an appointment two days later, B.C. conveyed to Still that she had been sexually abused. In turn, Still relayed to Holliday her concerns for B.C.'s safety.

After receiving this information, Holliday spoke with B.C. who then revealed her claims of sexual abuse. Based on this discussion, Holliday met with law enforcement regarding B.C.'s allegations. B.C. was then interviewed at the Pickens County Sheriff's Office. Following this interview, Clasby was arrested for CSC with a minor, first degree.

In September 2005, a Pickens County grand jury indicted Clasby for CSC with a minor, first degree and lewd act upon a child for offenses that allegedly occurred in June 2004.

At the trial for these offenses in October 2005, the solicitor sought to introduce evidence of prior bad acts involving Clasby with the victim that allegedly occurred prior to the indicted June 2004 incidents. The solicitor asserted that these incidents established "an escalating pattern of abuse that eventually culminated in criminal sexual conduct in the first degree." Clasby's counsel opposed the

introduction of the evidence on the ground it did not fit within the Lyle exception of common scheme or plan. Following arguments of counsel, the trial judge preliminarily ruled that the evidence could be introduced.

After B.C. began her testimony, the trial judge conducted an *in camera* hearing regarding the alleged prior bad act evidence. B.C. testified that when Clasby came to live with her and Holliday, she and Clasby would bathe together. B.C. testified that she would sit with her back against the bathtub while her mother sat with her back to her. She further testified that as she was washing her mother's hair, Clasby would "put her hair back . . . and touch my private and rub it."

B.C. testified that on another occasion she was watching a movie with her mother with a blanket over them in the living room and her mother "rub[bed] her private" inside of her underwear. She further stated that her mother "play[ed] with her private" while the two were sleeping together in her father's bed.

In addition to the incidents that B.C. testified occurred at her father's house, B.C. relayed an incident after her mother moved out of Holliday's home. Following her mother's departure in the spring of 2004, B.C. testified that she would visit her mother at Clasby's father's home. B.C. recounted one time when her mother "rub[bed] her private" and her mother asked her to "suck her breasts."

After outlining these prior incidents, the solicitor questioned B.C. regarding the June 1, 2004 incidents for which Clasby had been indicted. Although B.C. could not remember the exact date, she testified that her mother "put her finger" inside "her private" while they were lying on the floor in the bedroom of Heather Rhoda, Clasby's sister.

At the conclusion of B.C.'s *in camera* testimony, the trial judge ruled the prior bad act evidence was "clear and convincing" and admissible under the "common scheme or plan" exception to Lyle.

B.C. gave essentially the same testimony before the jury as she did during the *in camera* hearing. When questioned as to why she did not immediately reveal the abuse, B.C. claimed that her mother told her she would kill her if she told.

During her testimony, Clasby adamantly denied ever touching B.C. in a "sexually inappropriate manner." Through her testimony, Clasby inferred the sexual abuse allegations stemmed from animosity that existed between her and Holliday over their custody and visitation arrangement. Specifically, Clasby testified that Holliday told her "he would do whatever it took to keep [her] away from [B.C.]." In terms of the incidents described by B.C., Clasby explained the alleged misconduct would have occurred when B.C. visited her at Clasby's father's doublewide trailer which was shared by nine other relatives.

Heather Rhoda, Clasby's sister, testified there was no privacy in the trailer given the number of people who resided there. Rhoda claimed that B.C. usually slept with her cousin when she visited and was not alone with Clasby. She described Clasby and B.C. as having a "really good relationship." She further testified that she overheard Holliday tell Clasby that "he would do whatever he had to do to make sure that [Clasby] would not be able see [B.C.] again."

Ultimately, the jury convicted Clasby of lewd act upon a child, but acquitted her of CSC with a minor, first degree. The trial judge sentenced Clasby to fourteen years imprisonment. Clasby appealed her conviction to the Court of Appeals. This Court certified this appeal from the Court of Appeals.

DISCUSSION

Clasby argues the trial judge erred in admitting B.C.'s testimony in which she described four uncharged incidents of sexual misconduct involving Clasby. Because she was not indicted for these acts, Clasby contends the evidence was inadmissible in that it did not rise to the level of common scheme or plan evidence under Lyle. Specifically, Clasby asserts the prior bad acts were "separate in time and had no

connection with the incident from which she was charged" and, thus, served only to show that she had a "propensity for child molestation." If the admission of this evidence is found to have been in error, Clasby claims its admission did not constitute harmless error.

The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

As a threshold matter, the trial judge must initially determine whether the proffered evidence is relevant as required under Rule 401 of the South Carolina Rules of Evidence. Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence fits within an exception of Rule 404(b). According to Rule 404(b), evidence of prior crimes or misconduct is inadmissible to prove the specific crime charged unless the evidence tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); Lyle, 125 S.C. at 416, 118 S.E. at 807.

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "If the defendant was not

convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id.

When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. Id. (analyzing prior bad act evidence and finding the appellate court committed error by basing its ruling on its own view of the witness's credibility). If the trial judge concludes there is clear and convincing evidence that the defendant committed the uncharged acts, he or she must determine whether the prior acts fall within the common scheme or plan exception to Lyle.

"Where there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the Court of Appeals have held prior bad acts are admissible to demonstrate a common scheme or plan." Gaines, 380 S.C. at 30, 667 S.E.2d at 731. "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." State v. Wallace, Op. No. 26703 (S.C. Sup. Ct. filed August 17, 2009). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id.

"Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Gaines, 380 S.C. at 29, 667 S.E.2d at 731; see Rule 403, SCRE (providing that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) (applying probative versus prejudicial test of Rule 403, SCRE, to "other crimes" evidence). "The determination of the prejudicial

effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

We find the trial judge properly admitted the proffered evidence of the four incidents of uncharged sexual misconduct committed by Clasby on B.C. prior to the June 1, 2004 offenses for which she was indicted and tried. The alleged prior bad act evidence reveals a close degree of similarity to the facts of the indicted charges.

All of Clasby's alleged sexual misconduct was directed at the same victim. The incidents described by B.C. occurred each time Clasby reunited with B.C. In November 2003, Clasby moved in with Holliday after becoming homeless. B.C. testified that during this month-long stay, the following incidents occurred: (1) her mother touched her "private" while the two bathed together; (2) her mother "rub[bed] her private" inside of her underwear; and (3) her mother "play[ed] with her private" while the two were sleeping together in her father's bed. After another extended absence, Clasby sought to exercise her visitation rights with B.C. in May 2004. According to B.C., another incident occurred in the spring of 2004 where her mother "rub[bed] her private" and asked her to "suck her breasts" while they were lying on the floor together. Each of the incidents established a pattern of escalating abuse which ultimately culminated in Clasby's digital penetration of B.C. The four prior incidents of sexual misconduct by Clasby reveal the same illicit conduct with B.C. during periods of visitation prior to the June 1, 2004 indicted offenses.

Because a close degree of similarity exists between the crimes charged and the bad act evidence, we hold the proffered evidence satisfied the established requirements for the admissibility of evidence under the common scheme or plan exception. See Wallace (holding that in weighing the similarities and dissimilarities between the crime charged and the bad act evidence a trial court should consider, among other factors, the location where the abuse occurred, the use of coercion or threats, and the manner of the occurrence, for example, the type of sexual battery); see also State v. Whitener, 228 S.C. 244, 265, 89

S.E.2d 701, 711 (1955) (recognizing that the common scheme or plan exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties" (emphasis added)). To the extent Clasby claims the evidence was not "clear and convincing" on the ground B.C. was not definitive in her testimony regarding the time and place of the four incidents, we find any issue regarding B.C.'s credibility was properly evaluated by the trial judge.

Furthermore, under similar circumstances to the instant case, this Court and the Court of Appeals have found prior bad act evidence was properly admitted under the common scheme or plan exception. See State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (concluding that victim's testimony regarding prior attacks by defendant, which were not the subject of an indictment, was properly admitted under the common scheme or plan exception in trial for CSC with a minor, second degree where testimony showed "the continued illicit intercourse forced upon her by [defendant]"); State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121-22 (Ct. App. 2008) (holding evidence that defendant began touching and committing other sexual misconduct with victim when she was six or seven years old was admissible to show common scheme or plan during trial for the indicted offense of CSC with a minor, second degree on the ground that the "six to seven year pattern of escalating abuse of Victim by [defendant was] the essence of grooming and continuous illicit activity"); State v. Mathis, 359 S.C. 450, 464, 597 S.E.2d 872, 879 (Ct. App. 2004) (concluding evidence of uncharged sexual misconduct committed by the defendant on the victim three times prior to the indicted offense of CSC with a minor, second degree was admissible where the "three earlier assaults on the victim were all attempted in the same manner and under similar circumstances"); State v. Weaverling, 337 S.C. 460, 471, 523 S.E.2d 787, 792 (Ct. App. 1999) (finding victim's testimony regarding pattern of sexual abuse he suffered by the defendant was properly admitted as part of a common scheme or plan exception in trial for CSC with a minor and disseminating harmful material to a minor where the "challenged testimonial evidence of [defendant's] prior bad acts

show[ed] the same illicit conduct with the same victim under similar circumstances over a period of several years"). Accordingly, we find a decision to affirm the admission of the prior bad evidence is consistent with our jurisprudence.[2]

---

[2] We, however, note the existence of the decision of the Court of Appeals in State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). In Tutton, the defendant was convicted of CSC with a minor, second degree and two counts of lewd act upon a child. The charges arose out of allegations from two minor victims, who were sisters, that Tutton "rubbed their butts" and digitally penetrated one of the victims while they were spending the night at Tutton's home. Id. at 323, 580 S.E.2d at 188.

On appeal, Tutton claimed the trial judge erred by admitting evidence of uncharged criminal conduct under the common scheme or plan exception. Specifically, Tutton challenged the testimony of the victim identified in the CSC with a minor charge. This victim testified that Tutton sexually assaulted her four or five years prior to the time of the trial. Id. at 324, 580 S.E.2d at 189. The victim claimed while spending the night at Tutton's, he forced her to lie on her back and take off her underwear. According to the victim, Tutton then performed oral sex on her and forced her to perform oral sex on him. Id. The victim further testified that Tutton threatened to tell her parents that she was misbehaving if she spoke of the incident. Id.

The Court of Appeals reversed Tutton's convictions, finding "the similarities in this case are insufficient to support the inference that Tutton employed a common scheme or plan to commit the assaults alleged in this case." Id. at 333, 580 S.E.2d at 194. Although the Court of Appeals recognized the incidents involved the same parties and occurred at Tutton's residence, it found the dissimilarities were greater than these similarities. Specifically, the Court of Appeals noted that unlike the charged incident, Tutton threatened the victim after the uncharged incident. Additionally, Tutton did not attempt to assault the victim's sister at the time of the uncharged act with the victim. The Court of Appeals also pointed out that the victims had stayed with Tutton without incident on several occasions during the interim between the uncharged act and the charged offense. Id. at 332-33, 580 S.E.2d at 193.

We conclude Tutton is distinguishable from the instant case. Initially, we note that its holding was called into question by the majority opinion in Wallace on the ground the analysis constituted an overly restrictive view of our case law. Tutton is also factually dissimilar from the instant case given the sexual battery in the charged offense and the uncharged act was not of the same type. In contrast, the

Finally, we hold the probative value of this evidence substantially outweighed the danger of unfair prejudice to Clasby. Given there was no physical evidence to corroborate B.C.'s testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child.

CONCLUSION

Based on the foregoing, we find B.C.'s testimony regarding the four incidents of sexual abuse inflicted by Clasby prior to the indicted offenses constitutes the archetypal "common scheme or plan" evidence. Therefore, we affirm Clasby's conviction and sentence for lewd act upon a child.

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES and KITTREDGE, JJ., concur.

---

type of sexual misconduct of the charged offenses and the uncharged offenses were similar in the instant case. Furthermore, unlike the single uncharged incident relied on in Tutton, the solicitor in the instant case presented B.C.'s testimony which detailed four prior incidents which occurred over a relatively short period of time.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Vestry and Church Wardens of the Church of the Holy Cross, a South Carolina Corporation, Respondent,

v.

Orkin Exterminating Company, Inc., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 26706
Heard February 3, 2009 – Filed August 24, 2009

REVERSED

Ernest A. Finney, Jr., of The Finney Law Firm, of Sumter, J. Rutledge Young, III, of Duffy & Young, of Charleston, Kenneth R. Young, of Young, Reiter, Keffer & Donnald, of Sumter, and LeeAnn Jones, of Powell Goldstein, of Atlanta, for Petitioner.

Thomas S. Tisdale, Jr., and David J. Parrish, both of Nexsen Pruet, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: In this case, Respondents the Vestry and Church Wardens of the of the Church of the Holy Cross ("Holy Cross") filed suit against Petitioner Orkin Exterminating Company ("Orkin") for breach of contract. The case was tried, and the jury returned a verdict for Orkin. Shortly thereafter, the trial judge informed the parties that there were allegations of juror misconduct. Holy Cross moved for a new trial. After examining the jurors, the trial judge denied the motion. The court of appeals reversed and remanded the case for a new trial. *See The Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Company, Inc.*, 373 S.C. 200, 644 S.E.2d 735 (Ct. App. 2007). We granted Orkin's petition for a writ of certiorari to review the court of appeals' decision.

FACTUAL/PROCEDURAL BACKGROUND

The Church of the Holy Cross is located in Sumter and listed on the National Historic Register as a National Historic Landmark. In 1976, Holy Cross contracted with Orkin to annually treat and inspect the church for termites. Holy Cross discovered termite damage in 2000 and brought this suit for breach of contract.

A jury trial was conducted in August 2005. Per his usual instructions, the trial judge instructed the jurors before swearing them in that they should not discuss the case among themselves or with any other person, and that they should not undertake any investigation into the facts or law not presented to them during the course of the trial. At the end of a two-week trial, the jury returned a verdict in favor of Orkin.

Three days later, the trial judge sent a letter to all parties to inform them of a possible case of juror misconduct. The judge explained that he was contacted the morning after the trial by alternate juror Sherry Babb. Babb

informed him that juror Vicki Abrams had allegedly violated his instructions in the following instances: (1) early in the trial, Abrams questioned aloud the instructions not to talk about the case and made comments to other jurors in spite of these instructions; (2) she stated that "the historic people" "have money" and that Holy Cross was trying to get someone else to "pay their bills" when everyone knows that "old buildings fall down"; (3) she stated that she did not know why she had to hear both sides of the case and that she had discussed the case with her mother, who confirmed that "historic people" have money and should "clean up their own mess"; (4) she said she had talked to a painter who told her that termite damage can cause building walls to collapse; (5) she said that Holy Cross should tear down the church and bring in a double wide; and (6) on the day of deliberation, Abrams told jurors that she had prayed with her minister about the case, and that she had driven to Holy Cross over the weekend and that it looked fine to her. Babb also informed the judge that the jurors admonished Abrams for violating his instructions and that the jurors paid little attention to Abrams' comments.

Holy Cross filed a motion for new trial. The trial judge summoned the jurors to appear at the courthouse on September 7, 2005, for sworn examinations. The trial judge found that Babb's allegations were "in large measure . . . corroborated by" the jurors' testimony. One juror's testimony indicated that Abrams had commented that her minister had told her that "the church should take care of the church," and that "churches need to stick together." However, none of the jurors indicated that their final deliberations were affected by Abrams' misconduct.

On November 10, 2005, the judge held a hearing on the issue of whether Abrams should be held in contempt of court. Abrams's court-appointed attorney denied that she had committed any premeditated wrongdoing. Nevertheless, the judge found Abrams to be in contempt of court.

On February 22, 2006, the judge issued an order denying Holy Cross's motion for new trial. The judge found that Holy Cross failed to "demonstrate prejudice affecting the impartiality of the verdict," and that "[t]he statements

and actions by Ms. Abrams were not of a kind to impermissibly influence the jury or effect the verdict." The judge noted that there was nothing Abrams could have learned from driving to the church that was not already apparent from photographs in evidence. Likewise, the judge found that the statement made by the painter was consistent with statements made by Holy Cross's witnesses and therefore did not unduly prejudice Abrams's deliberation. Finally, the judge found that there was no evidence that Abrams's comments shaped the final deliberations or improperly influenced the other jurors, in light of the testimony indicating that the jurors admonished Abrams, "laughed off" her comments, and generally paid her little attention. The judge concluded that, "having conducted an extensive individual voir dire of each juror and having viewed the conduct of the offending juror, this Court has found no indication that the jury's unanimous verdict was compromised, and [Holy Cross] has not made the showing of any prejudice by clear and convincing evidence, as required by the applicable case law." Holy Cross appealed to the court of appeals.

In a split decision, the court of appeals reversed, holding that the trial judge erred in focusing his analysis on the eleven other jurors and in failing to adequately consider the question of whether Abrams's own conduct, which revealed her to be "unconcerned about granting [Holy Cross] the fair and impartial trial to which it was entitled," deprived Holy Cross of its right to a fair trial. In the opinion of the majority, under the circumstances of this case, "where at least one of [Abrams' acts of misconduct] was deemed so egregious by the trial judge that he punished [her] for criminal contempt, the failure of the trial judge to grant a new trial based upon those acts of misconduct amounts to an abuse of discretion." 373 S.C. at 206, 644 S.E.2d at 739. The dissent concluded that the trial judge conducted the appropriate procedure upon being presented with an allegation of misconduct, and did not err in denying Holy Cross's motion for new trial. We granted a writ of certiorari to review the court of appeals' decision. The following questions are presented for our review:

I. Did the court of appeals apply an incorrect standard of law regarding jury misconduct?

II. Did the court of appeals err in finding that the trial judge abused his discretion in denying Holy Cross's motion for new trial?

STANDARD OF REVIEW

The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000). The trial court is in the best position to determine the credibility of the jurors; therefore, this Court grants broad deference on this issue. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999).

LAW/ANALYSIS

Orkin alleges that the court of appeals applied an incorrect standard of law regarding jury misconduct and erred in finding that the trial judge abused his discretion in denying Holy Cross's motion for new trial. We agree on both counts.

Under South Carolina law, litigants are guaranteed the right to an impartial jury. *See* S.C. Code Ann. § 14-7-1050 (2008) ("in all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury."). If a potential juror has an interest in the lawsuit such that she is "not indifferent in the cause," the juror shall be deemed incompetent to serve on the jury. *See* S.C. Code Ann. § 14-7-1020 (2008).

Misconduct that does not affect the jury's impartiality will not undermine a verdict. *Harris*, 340 S.C. at 63, 530 S.E.2d at 627. In determining whether outside influences have affected the jury, relevant factors include: (1) the number of jurors exposed, (2) the weight of the

evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice. *Id.* (citing *Kelly*, 331 S.C. at 141-42, 502 S.E.2d at 104). The trial court has broad discretion in assessing allegations of juror misconduct, and should declare a mistrial only when absolutely necessary. *Council*, 335 S.C. at 12, 515 S.E.2d at 514. Instead, the trial court should exhaust other methods to cure possible prejudice before aborting a trial. *Kelly*, 331 S.C. at 141-42, 502 S.E.2d at 104. In order to receive a mistrial, the moving party must show error and resulting prejudice. *Id.*

I. Standard of Law in Cases of Juror Misconduct

Orkin first argues that the court of appeals applied the wrong standard of law by applying a general standard of "fundamental fairness" rather than the more specific standard of actual prejudice.[1] Although considerations of "fundamental fairness" are relevant to analyses of jury misconduct, we agree that the court of appeals failed to grant due deference to the trial judge's factual finding that Holy Cross did not suffer actual prejudice.

This Court has, in the past, used the language of "fundamental fairness" to describe the constitutional implications of juror misconduct. *See Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008) (holding that juror testimony involving internal misconduct "may be received only when necessary to ensure fundamental fairness"); *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (holding that premature jury deliberations "involve a matter of fundamental fairness."). However, not all juror misconduct impinges upon the fundamental fairness of a trial:

> A defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct . . . does not *ipso facto* justify the grant of a new trial; but in order that a

[1] "The basic issue here, as we see it, is whether the juror misconduct in question affected Holy Cross' right to fundamental fairness at trial." *Holy Cross*, 373 S.C. at 204, 644 S.E.2d at 737.

> new trial may be granted on such ground the misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors.

C.J.S. *New Trial* § 54 (1998). *See also State v. Grovenstein*, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999) (holding that misconduct does not entitle a party to mistrial unless it affects the verdict).

The court of appeals was thus entirely correct to discuss "fundamental fairness" in the context of jury misconduct. The court erred, however, by invoking the premise of "fundamental fairness" – in the face of the trial judge's determination that there was no evidence of actual prejudice – to support its conclusion that Abrams' misconduct was "so egregious" as to *ipso facto* justify the grant of a new trial. The majority's error is most evident from this passage:

> Although [Abrams] may not have learned anything from her visit to the site that she did not already know and her report to the other jurors of her actions may not have had any impact on them, [her] attempt to conduct an unsanctioned investigation into the facts of this case, when viewed with her other acts and comments, shows a juror unconcerned about granting Holy Cross the fair and impartial trial to which it was entitled.

373 S.C. at 207, 644 S.E.2d at 737. The dissent correctly observed that the majority placed too much emphasis on the nature of Abrams' undoubtedly improper conduct and neglected the determinative question of whether this conduct deprived Holy Cross of a fair trial. *Id.* Indeed, in order to receive a mistrial, Holy Cross bore the burden of showing that Abrams' conduct deprived it of a fair and impartial trial, not merely that Abrams was "unconcerned" about granting it a fair and impartial trial. The trial judge conducted an extensive inquiry and concluded that, although improper, Abrams' misconduct did not actually influence the jury's verdict. To the

extent that the majority of the court of appeals reversed this determination because Abrams' lack of "concern" for her role as an impartial juror violated "fundamental fairness," it was in error.

II. Abuse of Discretion

Orkin next argues that the court of appeals erred in holding that the trial judge abused his discretion in finding that Abrams' conduct deprived Holy Cross of a fair and impartial trial. We agree.

As noted above, the majority's reliance on an improper standard led it to conclude that "the failure of the trial judge to grant a new trial based upon [Abrams'] acts of misconduct amounts to an abuse of discretion." *Id*. In so holding, the majority appeared to be of the opinion that Abrams' participation in the deliberations was *ipso facto* evidence that her own bias tainted the jury's verdict. Setting aside the legal problems with this conclusion – which are addressed above – it indicates that the majority failed to fully consider the facts as well. Specifically, the trial judge examined the effect of Abrams's misconduct on the other jurors' deliberations *as well as her own*. The judge's thorough fact-finding inquiry led him to the conclusion that Abrams did not expose herself to any evidence not already in the record.

The trial judge thus found that there was no clear and convincing evidence that any of the twelve jurors – including Abrams – were improperly influenced by Abrams' misconduct. Bearing in mind the well-settled law that the refusal or grant of a mistrial "lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law," we hereby reverse the court of appeals. *Harris*, 340 S.C. at 63, 530 S.E.2d at 627-28.[2]

---

[2] A review of this Court's case law with regard to juror misconduct reveals few civil cases and even fewer instances where this Court has affirmed the finding that a mistrial was warranted. *See Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008) (where a juror's affidavit, alleging that deliberating jurors improperly considered defendant's failure to testify as

evidence of guilt, did not raise sufficient questions of fundamental fairness so as to be admissible evidence of jury misconduct); *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (where a guilty vote by one juror was based on another juror's reminder that everyone had to vote together to return a unanimous verdict, and a guilty vote by a second juror was based on other jurors' insistence, were not instances of internal influence that implicated fundamental fairness such that defendant was entitled to a new trial); *Alston v. Black River Elec. Co-op.*, 345 S.C. 323, 548 S.E.2d 858 (2001) (holding that members of an electric cooperative should be *per se* disqualified from serving on a jury when the cooperative is a party); *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626 (2000) (holding that juror's misconduct in consulting legal dictionary for definitions of "malice aforethought" and "manslaughter" did not entitle defendant to new trial); *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (holding that although premature jury deliberations could affect fundamental fairness of a trial, defendant was procedurally barred from receiving a new trial); *State v. Grovenstein*, 335 S.C. 347, 517 S.E.2d 216 (1999) (holding that an alternate juror's presence in jury room during first 20 to 30 minutes of deliberations was not grounds for mistrial); *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) (holding that the trial judge did not abuse his discretion in death penalty case by refusing to disqualify juror, who was initially uncertain as to whether she could presume defendant was innocent, where each time judge clearly explained law juror affirmed she could presume defendant innocent); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) (holding that a juror's misconduct in sharing pro-death penalty pamphlet with other jurors during penalty phase did not violate defendant's right to fair trial); *State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989) (where the fact that two jurors read newspaper article discussing alleged, extraneous crimes by defendant and summarizing testimony did not entitle defendant to mistrial); *Stone v. City of Florence*, 203 S.C. 527, 28 S.E.2d 409 (1943) (where, in action against city for injuries sustained by stepping into an unprotected drain-hole, some of the jurors visited the scene of accident and stepped from the curb into the hole, plaintiff was not entitled to a new trial on this ground).

CONCLUSION

For the reasons stated herein, we hereby reverse the court of appeals and reinstate the verdict for Orkin.

WALLER, J., and Acting Justices E. C. Burnett, III and Alison R. Lee, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm the Court of Appeals. I agree with the Court of Appeals that it takes only one juror to deprive the parties of a fair and impartial trial. While Abrams may not have influenced the other jurors, her actions and words are undeniable evidence of a juror who blatantly failed to honor her oath or to follow the instructions given her by the trial judge. I therefore agree with the majority of Court of Appeals and would uphold the grant of a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Neal, Respondent,

v.

Don H. Brown and South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Defendants,

of whom Don H. Brown is the Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Mikell R. Scarborough, Circuit Court Judge

Opinion No. 26707
Heard March 5, 2009 – Filed August 24, 2009

REVERSED

Andrew Epting, Jr., of Charleston, Clayton B. McCullough, and Daniel S. McQueeney, Jr., both of Pratt-Thomas & Walker, of Charleston, for Petitioner.

Michael A. Molony and Lea B. Kerrison, both of Young, Clement Rivers, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Office of Ocean and Coastal Resource Management (OCRM) granted Respondent's application for a dock permit, and Petitioner appealed to the administrative law court (ALC). The ALC affirmed, and Petitioner appealed to OCRM's Appellate Panel, which reversed the grant of the permit. Respondent appealed to the circuit court, which affirmed the Appellate Panel's ruling. Respondent then appealed the Court of Appeals, which reversed the circuit court and held that Respondent was entitled to a dock permit. We granted Petitioner a writ of certiorari to review the Court of Appeals' decision.

FACTUAL/PROCEDURAL BACKGROUND

In 1997, the McIver family conveyed three parcels of land in "Old Village" Mount Pleasant to Neal Brothers, Inc., of which Respondent David Neal ("Neal") is a part owner. The bulk of Neal's property is inland, and connected to Charleston Harbor by a narrow 5 foot wide, 119 foot long strip of property. Neal conducted a survey of the three parcels prior to the purchase, and recorded the survey with the Charleston County Register of Mesne Conveyances on September 10, 1997. Sometime thereafter, Neal Brothers transferred title of the property to Tompkins and Company, LLC ("Tompkins"), which is also partly owned by Neal.

In 1998, Neal first applied for a critical area permit to build a dock from the property's five feet of "water frontage." The OCRM denied the first application on the grounds that the lot "does not meet the minimum lot width standard in order to qualify for a single family dock." Neal filed and then withdrew an appeal, on the understanding that he could reapply for a permit.

In September 1999, an adjacent property owner claimed ownership of the narrow strip that connects Neal's property to the water. The trial court

examined both chains of title and determined that Neal (through Tompkins) owned the property in fee simple absolute.

In June 2001, Neal resubmitted his application for a critical area dock permit. At the time, the regulation controlling dock permits provided:

> For lots platted and recorded after May 23, 1993, before a dock will be permitted, a lot must have 75 feet of water frontage along the marsh edge and at least 75 feet of frontage between extended property lines . . . . Lots less than 50 feet wide are not eligible for a dock.

23A S.C. Code Ann. Regs. 30-12(A)(2)(o) (Supp. 2001) ("the regulation"). On September 12, 2001, the OCRM issued Neal a critical area dock permit, which allowed him to construct a 4 foot wide, 300 foot long dock from his 5 feet of "water frontage." Petitioner Don Brown ("Brown"), an adjacent property owner, appealed the issuance of the dock permit to the ALC, arguing that the property was not platted and recorded until 1997 and therefore did not comply with the regulation. The ALC found that "[t]he term 'platted and recorded' assumes the platting and recording involves a change in the configuration of the property." Finding that the 1997 recording of the survey was not the type of platting and recording intended to fall within the purview of the regulation, but was merely an action necessary to the purchase of land that had existed in the same configuration for over fifty years, the ALC upheld the issuance of the permit.

Brown appealed the ALC's decision to the OCRM's Coastal Zone Management Appellate Panel ("the Panel"). The Panel issued a brief opinion in which it reversed the issuance of the permit on the grounds that the ALC erred in holding that the 1997 recording did not constitute a platting and recording for the purposes of the regulation.

Neal appealed the Panel's decision to the circuit court, which affirmed the Panel. Neal then appealed to the Court of Appeals, which reversed the circuit court in a split decision. *David Neal v. Don H. Brown and South*

Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, 374 S.C. 641, 649 S.E.2d 164 (Ct. App. 2007). The majority of the court found that there was substantial evidence in the record to support the ALC's finding that the regulation did not bar Neal's dock permit because the property had been in the current configuration since 1940 and the 1997 survey did not amount to having the property "platted and recorded" under the regulation. The majority also found that the circuit court erred in making new findings of fact on matters not decided by the Panel. Brown petitioned this Court for a writ of certiorari, and we granted the writ to answer the following question:

> Did the Court of Appeals err in reversing the circuit court and upholding the issuance of Respondent's dock permit?

STANDARD OF REVIEW

In permitting cases, the ALC serves as the finder of fact. *Brown v. South Carolina Dep't of Health & Env. Control*, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). The Panel can reverse the ALC if the findings are not supported by substantial evidence or are based on an error of law. *Dorman v. South Carolina Dep't of Health & Env. Control*, 350 S.C. 159, 165, 565 S.E.2d 119, 122 (Ct. App. 2002). Judicial review of the Panel's decision is governed by S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006), which provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

LAW/ANALYSIS

The central question in this case is whether Neal's property was "platted and recorded" after May 23, 1993. The Panel and the circuit court held that Neal's 1997 survey constituted a "plat" under the regulation, and therefore, because Neal's water frontage is less than 75 feet, Neal should not be granted a critical area dock permit. The Court of Appeals held that Neal's 1997 survey did not constitute a "plat." We agree with the former interpretation therefore reverse the Court of Appeals.

We find this matter foreclosed by the fact that no single plat of the property in question was recorded prior to May 23, 1993. The McIver property initially consisted of three distinct parcels, each recorded separately with its own separate deed. Neal purchased these parcels together in 1997, conducted a "survey," and recorded the property for the first time as a single lot.[1] These facts alone indicate that this single piece of property was first "platted and recorded" after May 23, 1993, and that the regulation precludes the granting of a critical area dock permit.

Furthermore, the majority of the Court of Appeals relied heavily on OCRM employee Richard Chinnis's testimony before the ALC as to his interpretation of the term "plat." Chinnis drafted the regulation, and testified

[1] The current boundary of the property was actually first recorded in 2001, after a challenge by an adjacent landowner resulted in some minor changes to the configuration of the property.

that the word "plat" as used in the regulation, was intended to indicate a subdivision of property, not the recordation of a survey. Based upon this testimony, the Court of Appeals concluded that Neal's "survey" did not constitute a "plat" that would bring him under the scope of the regulation, even though the Panel disagreed with Chinnis's interpretation.

We find that the Court of Appeals erred in granting Chinnis's testimony deference over the Panel's interpretation for two reasons. First, as we have previously held, an agency's Appellate Panel, not its staff, is typically entitled to deference in interpreting agency regulations. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005). The majority of the Court of Appeals should have deferred to the Panel's interpretation, rather than Chinnis's.

Second, the regulatory language is clear and unambiguous, and the Court of Appeals erred in interpreting the regulation to permit the issuance of a dock permit. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In our reading, the distinction between a "survey" and a "plat" is illusory. The key question is whether a piece of real property was mapped and recorded for the first time after the effective date of May 23, 1993. Chinnis's testimony indicates that he believed the regulation was intended to prevent the owners of newly-*subdivided* lots from building docks on less than seventy-five feet of water frontage. However, this could have been easily incorporated into the language of the regulation if this was the true intent. We believe the plain language of the regulation indicates that it was intended to prevent owners of all newly created lots – whether subdivided or amalgamated (as in the present case) – from building docks on less than seventy-five feet of water frontage. Notwithstanding Chennis's involvement in the drafting of the regulation, the Panel is entitled to deference in interpreting its own regulation, and it found that the regulation prevented the granting of a permit in this case. In our view, the plain language of the regulation supports this interpretation.

CONCLUSION

For the reasons stated herein, we reverse the opinion of the Court of Appeals.

WALLER, J., and Acting Justices James E. Moore, Perry M. Buckner and Brooks P. Goldsmith, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harold B. Turner, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 26708
Submitted April 22, 2009 – Filed August 24, 2009

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Prentiss Counts, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Court granted a writ of certiorari to review the post-conviction relief (PCR) court's denial of relief to Petitioner Harold B. Turner.

FACTUAL/PROCEDURAL BACKGROUND

In 1994, Petitioner pled guilty to second degree burglary and was sentenced to fifteen years imprisonment, suspended upon time served and five years probation. Subsequently, his probation was revoked. Petitioner did not directly appeal his probation revocation. Petitioner filed an application for PCR alleging probation counsel was ineffective for failing to advise him of his right to a direct appeal.

At the PCR hearing, Petitioner testified that after the revocation hearing, he asked probation counsel, "What can we do?" and that counsel responded "the judge made his ruling," and testified that he would have requested an appeal if he had known his rights. Probation counsel testified that there were no appealable issues stemming from the probation revocation and that Petitioner never inquired about an appeal. The PCR court found that there were no non-frivolous grounds for an appeal and that no extraordinary circumstances existed and denied Petitioner relief.

This Court granted Petitioner's request for a writ of certiorari, and Petitioner presents the following issue for review:

> Did the PCR court err in finding probation counsel was not ineffective in failing to advise Petitioner of his right to a direct appeal from his probation revocation?

STANDARD OF REVIEW

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certiorari, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, this Court will reverse the PCR court's decision when it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

As a primary matter, we must first address the basis upon which Petitioner claims he is entitled to relief. Since Petitioner seeks relief due to ineffective assistance of counsel, Petitioner bases his PCR application on a violation of his Sixth Amendment right to counsel. *See Duckson v. State*, 355 S.C. 596, 598, 586 S.E.2d 576, 577 (2003), citing *McKnight v. State*, 320 S.C. 356, 465 S.E.2d 352 (1995) (observing that an ineffective assistance claim is premised on the violation of an individual's Sixth Amendment right to counsel). However, a probationer does not have a Sixth Amendment right to counsel.[1] Rather, the right to counsel may arise pursuant to the Due Process Clause under the Fifth and Fourteenth Amendments. *See Gagnon v.*

[1] In *Huckaby v. State*, 305 S.C. 331, 408 S.E.2d 242 (1991), we held that a probationer must be informed of his right to counsel and he must make a willing and knowing waiver of counsel. We also stated that "a probationer retains his full Sixth Amendment right to counsel." *Id.* at 335, 408 S.E.2d at 244. Because a probationer does not have a Sixth Amendment right to counsel, this statement is incorrect, and any interpretation of the opinion asserting that a probationer is afforded the same constitutional protections as an accused is erroneous. A South Carolina probationer's right to counsel in a probation revocation hearing is grounded in our case law and court rules. A constitutional right to counsel *may* arise pursuant to the Due Process Clause, but cannot arise pursuant to the Sixth Amendment.

Scarpelli, 411 U.S. 778, 790 (1973).[2] In South Carolina, however, all persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law. *Barlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 621 (1986); Rule 602(a), SCACR.

In *Duckson*, the parolee filed an application for PCR alleging that he received ineffective assistance of counsel at his parole revocation hearing. In South Carolina, a parolee has a statutory right to have counsel present at a parole revocation hearing[3] but, similar to a probationer, does not have a Sixth Amendment right to counsel. As *Duckson* makes clear, neither a parolee nor a probationer has a Sixth Amendment right to counsel. Accordingly, this Court held that because the parolee could not assert a Sixth Amendment violation and because he did not contend his due process rights were violated, the parolee failed to allege the parole revocation was unlawful and thus failed to state a claim cognizable in a PCR action.

We find the *Duckson* analysis instructive to the instant case. Although parole revocation and probation revocation are different types of proceedings,[4] to the extent there is a constitutional right to counsel in either context, it exists only by virtue of the Due Process Clause. *See Gagnon*, 411 U.S. 778, 782 n.3 (observing that, despite minor differences between parole

---

[2] In *Gagnon v. Scarpelli*, the Supreme Court held that whether a probationer has a constitutional right to counsel in a revocation hearing should be decided on a case-by-case basis, taking into consideration the complexity of alleged violations and whether the probationer can meaningfully contest the alleged violations.

[3] S.C. Code Ann. § 24-21-50 (Supp. 2002).

[4] Parole eligibility is a collateral consequence of sentencing and is a matter that falls within the province of the Board of Probation, Parole, and Pardon Services. *Brown v. State*, 306 S.C. 381, 382, 412 S.E.2d 399, 400 (1991); S.C. Code Ann. § 24-21-13 (Supp. 2006). Probation, on the other hand, is a matter within the jurisdiction of the trial court and is judicially-imposed at the time of sentencing. *Duckson*, 355 S.C. at 598 n. 2, 586 S.E.2d at 578 n. 2; S.C. Code Ann. § 24-21-450 (Supp. 2006).

and probation, the revocation of probation is constitutionally indistinguishable from the revocation of parole). Petitioner has only alleged a Sixth Amendment violation, namely that probation counsel was ineffective in failing to inform him of his right to a direct appeal, and thus, under *Duckson*, it appears he has failed to state a cognizable claim in a PCR action.

However, *Duckson* is distinguishable from the instant case in an important respect. Unlike a parolee, we have held that, pursuant to court rule, a probationer has a right to counsel. *See Barlet* and Rule 602(a). A parolee's statutory right to have counsel present is not comparable to a probationer's absolute right under state law to appointed counsel. We now hold that because a probationer has a right to counsel, albeit not a Sixth Amendment right, the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel. In our view, this approach does not elevate form over substance by, for example, allowing a probationer to proceed on a due process violation but not allowing him to proceed on an ineffective assistance claim despite the fact that both claims stem from the failure to be informed of his right to appeal. Additionally, this approach eases confusion as well as the burden on the lower courts by providing a uniform standard.[5]

[5] Our holding today does not alter our PCR jurisprudence regarding claims of ineffective assistance of counsel, nor should it be interpreted as creating additional rights to PCR applicants. Indeed, this Court has granted relief based on "ineffective assistance" of PCR counsel despite the fact that the right to PCR counsel arises from Rule 71.1, SCRCP, and not from the constitution. *See e.g., Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (granting PCR where the defendant alleged ineffective assistance of PCR counsel due to so many procedural irregularities) and *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing that the constitutional right to counsel does not extend to discretionary appeals on collateral attack, but allowing a PCR applicant to receive a belated appeal from the denial of his initial PCR application where first PCR counsel failed to file a notice of appeal); *but see Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991)

To this end, we must determine whether, under our *Strickland* jurisprudence, probation counsel was ineffective for failing to inform Petitioner of his right to appeal the revocation of his probation. We hold that he was not.

Following a trial, counsel must inform a defendant who has been found guilty of a crime of the possibility of an appeal and the method for taking an appeal. *Frasier v. State*, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991). In a plea proceeding, however, there is no requirement that plea counsel inform a defendant of the right to a direct appeal absent extraordinary circumstances. *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995); *see also Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (holding that counsel has a constitutional duty to inform a defendant of his right to appeal a guilty plea if there is reason to think that a rational defendant would want to appeal or that the defendant demonstrated an interest in appealing).[6]

We hold that probation counsel is not required to inform a probationer of his right to an appeal absent extraordinary circumstances. This holding is in accord with counsel's duties at a plea hearing. *See Weathers*, 319 S.C. at 61, 459 S.E.2d at 839 (holding that, "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea."). In our view, a probationer should not be afforded additional protections in a probation revocation hearing, a proceeding that is not a stage of criminal prosecution and that occurs after sentencing, which are not constitutionally mandated in a guilty plea hearing. In other words, probation counsel is not held to a higher performance standard than that imposed upon plea counsel.

In the instant case, the PCR court found probation counsel's testimony more credible than Petitioner's testimony. Additionally, there is evidence in

---

(holding that an allegation that prior PCR counsel was ineffective is not *per se* a sufficient reason allowing for a successive PCR application).

[6] Although decided prior to *Flores-Ortega*, the *Weathers* analysis is compatible with the *Flores-Ortega* analysis and remains good law.

the record to support the PCR court's finding that there were no non-frivolous grounds for an appeal and that no extraordinary circumstances existed. Accordingly, because Petitioner failed to show extraordinary circumstances, he is not entitled to relief.

CONCLUSION

For these reasons, we affirm the PCR court's order denying Petitioner relief.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leola Richardson as Personal Representative of the Estate of Dominick Richardson, Respondent,

v.

P.V., Inc. and Harbor Inn, Inc., Appellants.

Appeal from Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 26709
Heard May 28, 2009 – Filed August 24, 2009

AFFIRMED

J. Dwight Hudson and Mary A. Graham, both of Hudson Law Firm, of Myrtle Beach, for Appellants.

William Walker, Jr., of Walker & Morgan, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: Respondent filed suit against Appellants following the drowning death of Respondent's son. Appellants failed to respond to the complaint and an entry of default was entered. The trial court denied Appellants' motion to lift the entry of default. This appeal follows.

FACTUAL/PROCEDURAL BACKGROUND

On June 19, 2004, Dominick Richardson drowned in the swimming pool at Harbor Inn, a hotel owned by Jay Patidar located in Georgetown, South Carolina. Respondent filed survival and wrongful death actions arising out of the drowning. On May 12, 2005, a process server, Bobby Asbill, arrived at the Harbor Inn to serve the summons and complaint and asked the employee working at the desk, Demetria Cruel, if he could speak with the manager. Cruel informed Asbill that Patidar[1] was out of town for several days.

In her deposition, Cruel testified that Asbill told her that he was not coming back to the hotel and asked if she would call Patidar. She complied and gave the phone to Asbill, but testified that she could not hear their conversation. Cruel testified that after the phone conversation was finished, Asbill left the papers and walked out of the hotel. She later spoke with Patidar and informed him that Asbill left the papers. Patidar instructed Cruel to fax the summons and complaint to his insurance agent.

Asbill testified that when he spoke to Patidar on the phone, he identified himself and the reason for his visit. Patidar told him that he could leave the papers with Cruel or that he could come back when Patidar was there. Asbill also testified that he asked Cruel if Patidar gave her permission to accept the papers and she said "yes."

[1] Patidar is the registered agent for Harbor Inn.

Finally, Patidar testified that he told Asbill that he would be back in four or five days, but that Asbill told him that he (Asbill) was not coming back. Patidar then told Asbill it was up to Asbill whether or not to leave the papers.

Appellants failed to answer the complaint and an entry of default was entered on June 24, 2005. Appellants subsequently moved to set aside the entry of default. The trial court denied the motion finding that service was effective, thereby conferring personal jurisdiction on the court, and that Appellants failed to show good cause to set aside the entry of default. This Court certified the appeal pursuant to Rule 204(b), SCACR, and Appellants present the following issues for review:

I. Did the trial court err in ruling that service of process was effective and that the court therefore had personal jurisdiction over Appellants?

II. Did the trial court err in ruling that Appellants failed to show good cause to set aside the entry of default?

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. *Roberson v. S. Fin. of South Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Id.*

LAW/ANALYSIS

I. Service of Process

Appellants argue the trial court erred in finding service of process was effective. We disagree.

Service upon a corporation may be made "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rule 4(d)(3), SCRCP. Rule 4 serves at least two purposes: it confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). Exacting compliance with the rules is not required to effect service of process. *Id.*

Not every employee of a corporation is an agent of the corporation for the purposes of service of process. *See Roberson*, 365 at 115, 615 S.E.2d at 11 (holding that a clerical employee was not an agent authorized to accept service of process for the corporation). Whether an employee may accept service on behalf of a corporation depends on the authority the corporation conferred upon the employee. In order to determine whether an employee is an authorized agent, the court must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority. *Roberson*, 365 at 115, 615 S.E.2d at 10-11.

In the instant case, even if Cruel did not have actual authority, we find that she had apparent authority to accept service of process. When Asbill initially entered the hotel's office, Cruel was the only employee present, which represented to third parties that she was in charge. Asbill testified that Patidar told him that he could leave the papers with Cruel or that he could come back. Patidar similarly testified that he told Asbill it was up to him whether to leave the papers. Under these facts, we find that Patidar knowingly permitted Cruel to exercise authority to accept service of process and further find that his manifestations to Asbill indicated that Cruel had such authority.

For these reasons, we hold that evidence in the record supports the trial court's finding that Cruel was authorized to accept service. *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001) (recognizing that the findings of the circuit court on factual issues arising on a motion to quash service of process for lack of jurisdiction are binding on the appellate court unless wholly unsupported by the evidence or controlled by error of law).

II. Rule 55(c)

Appellants argue that the trial court erred in ruling that they failed to show good cause to set aside the entry of default. Specifically, Appellants claim that the insurance company's failure to respond was inadvertent and constitutes good cause to justify setting aside the entry of default. We disagree.

The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRCP, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRCP. *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, Op. No. 26700(S.C. Sup. Ct. Filed August 17, 2009). In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Harbor Island Owners' Ass'n v. Preferred Island Prop., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006).

As a primary matter, Appellants argue that the trial court erred in ruling on the merits of this issue because they did not have the opportunity to be heard and present evidence of good cause. We disagree. In their written

motion to set aside the entry of default filed prior to the hearing, Appellants maintained that the entry of default was void because service of process was defective. Additionally, Appellants requested that, if the trial court denied relief based on this ground, the trial court "schedule a subsequent hearing based upon the ground of mistake, inadvertence, surprise or excusable neglect"[2] because the insurance companies were still investigating the matter and they would "shortly have full information to support such a Motion." At the hearing, Respondent's counsel told the trial court that Appellants were moving to set aside the entry of default based on improper service and good cause and argued the merits of the good cause issue. Specifically, Respondent's counsel argued that there was nothing in the record from the insurance company explaining why it failed to answer the complaint and that, even if the failure to respond was due to negligent oversight, this did not constitute good cause. In rebuttal, Appellants' counsel argued that although the discovery process concerning the insurance company's failure to respond had not been completed, "we just really don't think we need to go that far."

After the trial court issued its order ruling that Appellants failed to show good cause, Appellants filed a motion to reconsider arguing that the trial court failed to consider the second part of the motion and never notified Appellants that it was denying their request for bifurcation. Additionally, Appellants attached affidavits from the insurance agent and the insurance company explaining why the insurance company never responded to the complaint. The trial court denied the motion for reconsideration.

In our view, bifurcation of this motion was not necessary, much less appropriate. Both "halves" of the motion went to the same issue, namely whether the trial court should set aside the entry of default, and Appellants had the opportunity to present evidence of improper service and good cause

[2] Appellants appear to have confused the Rule 55(c) "good cause" standard with the more rigorous Rule 60(b) "excusable neglect" standard in the motion to set aside the entry of default. *See Sundown*, Op. No. 26700 (S.C. Sup. Ct. Filed August 17, 2009) (explaining and comparing the applicable standards in a Rule 55(c) motion and a Rule 60(b) motion).

at the hearing.[3] In any event, we find that Appellants failed to reserve their right to revisit this issue. Appellants failed to move for bifurcation at the hearing, and even assuming that they requested bifurcation in the written motion filed prior to the hearing, Appellants did not seek a specific ruling on bifurcation from the trial court at the hearing. Furthermore, if the insurance company was in fact still investigating the incident, Appellants failed to seek a continuance in order to complete discovery on this issue.[4] In our view, Appellants were given a full and fair opportunity to be heard on this matter, and furthermore, Appellants had an opportunity to explain to the trial court why they needed more time to develop the record as to this issue.

Nonetheless, even considering the affidavits, Appellants' argument fails on the merits.[5] The insurance agent's affidavit indicates that he received a copy of the incident report, the police report, and inspection reports from the Department of Heath and Environmental Control (DHEC) from Patidar shortly after the drowning occurred and that he mailed these documents to the insurance company.[6] He also stated that after the complaint was filed, he began receiving correspondence from Respondent's counsel addressed to him as well as another attorney. The insurance agent assumed the other attorney was defense counsel hired by the insurance company when in fact the attorney was another attorney for the plaintiff. The insurance agent stated he

---

[3] Appellants' counsel submitted a letter to the trial court the day after the hearing "regarding the issue of 'good cause'" and including case law supporting their position.

[4] We note that although Appellants' counsel claimed the insurance company was still investigating the matter, he was able to submit the affidavits from the insurance company shortly after the hearing.

[5] In their brief, Appellants request that this Court "consider [the affidavits] and rule upon the 'good cause' issue."

[6] The insurance agent stated that he sells insurance policies and places coverage for his clients, but he has no role in the litigation process and once he reports a claim, the matter is transferred to the insurance company.

was not aware that the summons and complaint that Patidar forwarded to him were not also forwarded to the insurance company. An affidavit from the insurance company indicates that it never received the incident report from the insurance agent and the insurance company's internal process of contacting the adjusting company was therefore never triggered.

We hold that even assuming that the insurance company was at fault for not answering the complaint, Appellants failed to show good cause. Negligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve Appellants from the entry of default. *See Roberts v. Peterson*, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987) (observing that the "courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant") and *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994) (imputing an attorney's negligence to a defaulting litigant). Moreover, the *Wham* factors do not weigh in favor of lifting the entry of default. Appellants filed the motion to set aside over two months after the entry of default, and Appellants have not asserted a meritorious defense or argued that Respondent will not be prejudiced if the entry of default is lifted.

Accordingly, we hold that Appellants have not established good cause to justify lifting the entry of default.

CONCLUSION

For the foregoing reasons, we affirm the trial court's order refusing to set aside the entry of default.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Frank Rogers Ellerbe, III, Respondent.

ORDER

Respondent was suspended on August 20, 2009, for a period of ninety (90) days, retroactive to May 14, 2009. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JOHN H. WALLER, JR., ACTING CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Toal, C.J., not participating

Columbia, South Carolina

August 21, 2009

The Supreme Court of South Carolina

In the Matter of Michael James Sarratt, Respondent.

ORDER

Respondent was suspended on April 20, 2009, for a period of four months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

August 21, 2009

The Supreme Court of South Carolina

The Friends of McLeod, Inc., Petitioner,

v.

City of Charleston, City of Charleston Board of Zoning Appeals, and American College of the Building Arts, Respondents.

ORDER

This Court granted petitioner's request for a writ of certiorari to review the Court of Appeals decision in Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008). Respondents have filed a motion for substitution of parties and a motion to dismiss based on an agreement that renders this matter moot. We grant the motion.

Because we dismiss this matter as moot, the motion to substitute parties is denied.

Finally, we vacate the Court of Appeals opinion in Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008).

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Kittredge, J. not participating

Columbia, South Carolina

August 20, 2009

The Supreme Court of South Carolina

In the Matter of
William F. "Troup" Partridge,
III, Petitioner.

ORDER

On November 3, 2006, the Court placed petitioner on interim suspension and, on July 18, 2007, definitely suspended him from the practice of law for one (1) year. In the Matter of Partridge, 374 S.C. 179, 648 S.E.2d 590 (2007); In the Matter of Partridge, 371 S.C. 20, 637 S.E.2d 309 (2006). The Court denied petitioner's request to make the interim suspension retroactive to the date of his interim suspension. In the Matter of Partridge, supra.

On March 13, 2008, petitioner filed a Petition for Reinstatement and the matter was referred to the Committee on Character and Fitness (CCF). See Rule 33(d), RLDE, Rule 413, SCACR. The CCF filed a Report and Recommendation recommending the Court deny the Petition for Reinstatement.

Petitioner filed exceptions to the CCF's Report and Recommendation. The Office of Disciplinary Counsel (ODC) did not file exceptions to the CCF's Report and Recommendation.

After consideration of the entire record, the Court grants the Petition for Reinstatement. Petitioner is hereby reinstated to the practice of law.

IT IS SO ORDERED.

s/ John H. Waller, Jr. A.C. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ James E. Moore A.J.

Columbia, South Carolina

August 21, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William M. Butler, Appellant,

v.

Lynn M. Butler, Respondent.

Appeal From Richland County
Leslie K. Riddle, Family Court Judge

Opinion No. 4577
Heard March 18, 2009 – Filed August 19, 2009

AFFIRMED IN PART AND REMANDED IN PART

John O. McDougall, Peter G. Currence, and Robert L. Widener, all of Columbia, for Appellant.

Regina H. Lewis and Victoria L. Eslinger, both of Columbia, for Respondent.

LOCKEMY, J.: In this domestic action, William M. Butler (Husband) appeals from an order of the family court reducing Lynn M. Butler's (Wife) monthly alimony. We affirm in part and remand in part.

FACTS/PROCEDURAL BACKGROUND

Husband and Wife were married on September 26, 1970, and had two children. After one year's continuous separation in 1996, the family court approved an agreement entered into by Husband and Wife. Under the terms of their agreement, Husband agreed to pay Wife $7,500 per month in "permanent modifiable periodic alimony." A provision in their agreement stated: "Both parties acknowledge that under the law spousal support rights and responsibilities are subject to modification/termination based upon the laws of the State of South Carolina, including termination upon death of either party and remarriage of Wife." To secure his obligation to pay Wife alimony, the agreement required Husband to secure "no less than $650,000 of life insurance on Husband's life."

On June 17, 2002, Husband petitioned the family court to terminate or reduce his permanent, periodic alimony obligation and his life insurance obligation based on a substantial change in circumstances. Additionally, Husband requested reasonable attorney's fees and costs. In his complaint, Husband maintained Wife had inherited or was going to inherit substantial amounts of monies and other assets as a result of her mother's death. Subsequently, Husband amended his complaint on January 25, 2005, and made many of the same allegations. Additionally, Husband argued Wife had received or would receive substantial amounts of monies or assets as a result of her Father's death. He also requested the family court retroactively terminate his alimony obligation to June 17, 2002, the date of Husband's original complaint.

The parties proceeded to trial and presented testimony regarding their current financial situations. It became clear that Wife had inherited an interest in her mother's estate after her mother's death on April 5, 2002. Wife testified that her Brother was the executor of the estate. The record and testimony contain allegations that Brother was, and possibly still is, mishandling the estate and possibly acting fraudulently as executor.

However, Brother denies the allegations. Husband and Wife presented testimony regarding Wife's interest in her mother's estate and their current financial situations.

After finding Wife's net worth had changed based on the increased value in the assets she received as her share of the marital estate and the assets she inherited from her Father, rather than her Mother, the family court reduced Husband's alimony payment by $2,500. Specifically, the family court based its decision on Wife's "inherited assets, the $1,500 per month she receives there[ ]from, and appreciation of her equitable distribution assets . . . ." The family court found it was without jurisdiction to modify the divorce agreement requiring Husband maintain $650,000 in life insurance with Wife as beneficiary because their initial divorce agreement was "non-modifiable." Additionally, the family court awarded Husband $40,000 for his attorney's fees and costs. The family court stated the award was based primarily on attorney's fees and costs Husband incurred regarding discovery issues. Finally, the family court found alimony should be retroactive to the date of the filing of the amended complaint, January 25, 2005. Thus, the family court required Wife repay Husband approximately $22,500 by June 30, 2006, based on his "overpayment." However, in the same order, the family court ordered "Wife reimburse Husband $22,500 for the alimony he has paid her for the months June 1, 2005 through February 1, 2006, and that the $22,500 be paid on or before June 30, 2006."

After the family court issued its August 17, 2006 order reducing alimony, Husband filed a motion for reconsideration pursuant to Rules 52 and 59, SCRCP, and Rule 2(a), SCRFC. In his motion, Husband alleged the family court: 1) erred in refusing to terminate or alternatively reduce alimony; 2) erred in refusing to make the reduction in alimony retroactive to the date of the initial filing of the action to modify alimony; 3) erred in failing to award the Husband more fees and costs; and 4) erred in refusing to eliminate or further reduce the requirement of life insurance for alimony payments. Additionally, Husband requested the family court detail its consideration of the Wife's usufruct interest. The family court denied Husband's motion to reconsider. This appeal followed.

STANDARD OF REVIEW

When reviewing decisions from the family court, this court has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Semken v. Semken, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). Although this court may find facts in accordance with our own view of the preponderance of the evidence, we are not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Marquez v. Caudill, 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008). However, "[q]uestions concerning alimony rest with the sound discretion of the [family] court, whose conclusions will not be disturbed absent a showing of abuse of discretion." Kelley v. Kelley, 324 S.C. 481, 485, 477 S.E.2d 727, 729 (Ct. App. 1996).

ARGUMENTS/ANALYSIS

I. Failure to Terminate or Further Reduce Alimony

Husband argues the family court erred in failing to terminate alimony. Alternatively, Husband contends the family court erred in failing to further reduce alimony. In support of his assertion, Husband notes six "fundamental errors" of the family court and discusses each error in turn. Husband contends these errors viewed alone or cumulatively warrant termination of alimony or reversal and remand for a further reduction of alimony. We disagree.

A. Wife's Usufruct Inheritance

Husband and Wife agree Wife inherited an undivided, one-third interest in her mother's estate. Specifically, Wife inherited a "usufruct" interest in her mother's estate, which is a term of art under Louisiana law describing a type of interest in property. The interest is similar to the common law "life estate." Based on this inheritance, Husband contends Wife could use the income from her usufruct interest to become self-supporting; thus, the family court erred in failing to terminate his alimony payments or alternatively further reduce the payments.

Permanent, periodic alimony is a substitute for support which is normally incidental to the marital relationship. Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). Generally, the purpose of alimony is to place the supported spouse, to the extent possible, in the position she enjoyed during the marriage. Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). However, upon a change in circumstances, the family court may modify an alimony obligation. See Miles v. Miles, 355 S.C. 511, 516, 586 S.E.2d 136, 139 (Ct. App. 2003). Changes in circumstances must be substantial or material to justify modification or termination of an alimony award. Id. at 519, 586 S.E.2d at 140. Moreover, the change in circumstances must be unanticipated. Penny v. Green, 357 S.C. 583, 589, 594 S.E.2d 171, 174 (Ct. App. 2004). "The party seeking modification has the burden to show by a preponderance of the evidence that the unforeseen change has occurred." Kelley v. Kelley, 324 S.C. 481, 486, 477 S.E.2d 727,729 (Ct. App. 1996).

In his motion for reconsideration, Husband asked the family court to detail its consideration of Wife's usufruct interest. In response, the family court acknowledged Wife's entitlement to a usufruct interest in her Mother's estate and asserted it "expressly considered the usufruct interest in assessing the value of [Wife's] assets." Further, the family court stated it considered that Wife "is not entitled to the principal and interest on the usufruct, but could only be granted either the principal or the interest in the sole discretion of the Personal Representative." Moreover, the family court reiterated a statement from its first order in the present action by stating: "[i]t is also uncontroverted that [Wife] has yet to receive any of that money."

After reviewing the record, it remains unclear whether Mother's estate is producing income. If earnings are coming in, it is speculative as to what the actual earnings are. Husband's expert, Max Nathan, testified Wife was entitled to income on an ongoing basis. Though Nathan attempted to value Wife's interest in the estate, he did not testify as to the value of the estate's earnings. Without stating any numbers, Nathan mentioned estate property in his testimony and stated: "It's rented and it's got a lease . . . It's been collecting rents, and she should be getting those rents." Accordingly, it

would be mere speculation for any party to assign value to the estate's earning potential at this point.

In considering this appeal, we note with interest that Wife has not yet received any money from the usufruct inheritance. Wife testified she had made efforts to obtain the earnings she is entitled to from her Mother's estate. Specifically, Wife testified: "I have asked my [B]rother repeatedly [about the earnings]. He has been very evasive about it . . . He has not been forthcoming, and I have -- I tried everything." Additionally, Wife testified her Brother told her "there was nothing there." Patrice Viton, one of Husband's experts, also indicated Wife had not received any earnings from her usufruct interest. Additionally, a portion of Wife's Brother's deposition was read into evidence during trial proceedings. Wife's Brother replied "That's correct" when asked: "You advised that no assets had been distributed to [Wife] from her Mother's estate; is that correct?"

We recognize the family court reduced Husband's alimony obligation based on the inheritance she received from her Father. However, at this point in our review of the family court's decision, we are concerned only with whether Wife experienced a substantial or material change in circumstances based on the inheritance she received from her Mother. As noted above, Husband did not demonstrate that Wife received any proceeds from the usufruct trust. Further, it is a matter of debate as to when or whether Wife will ever receive proceeds. Not only do we find Wife's circumstances unchanged, but we believe at the time of the family court's decision Wife had not experienced a substantial or material change in circumstances with regards to her interest in her Mother's estate. Therefore, Husband failed to meet his burden under Miles v. Miles, 355 S.C. 511, 519, 586 S.E.2d 136, 140 (Ct. App. 2003) (requiring changes in circumstances must be substantial or material to justify modification or termination of an alimony award). Accordingly, we affirm the family court's decision based on Wife's unchanged circumstances. [1]

[1] Although Husband cited Sharps v. Sharps, 342 S.C. 71, 535 S.E.2d 913 (2000), for the proposition that in considering requests to modify alimony, the family court should consider not only whether the alleged change was contemplated but also whether the original alimony award reflected the

B. Husband's Ability to Pay

Husband maintains the family court referred to and relied upon his ability to pay in refusing to terminate alimony when his ability to pay was never an issue in the case. Instead, Husband argues: "the only issue was whether Wife needed alimony to maintain the marital standard of living." Additionally, Husband contends his ability to pay alimony is "not a consideration unless and until the court determines that Wife needs alimony." We disagree and find the family court did not err in considering his ability to pay in making its decision.

"Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse." Miles, 355 S.C. at 519, 586 S.E.2d at 140. Per statute, the complete list of factors the family court can consider in setting alimony include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses and needs of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2008). Therefore, the family court did not err in considering Husband's continued ability to pay alimony as one factor in its decision pursuant to Miles and section 20-3-130(C) (4),(6), and (8) of the South Carolina Code.

---

expectation of that future occurrence. However, we need not reach this question because Wife has not experienced a substantial change in circumstances at this time.

C. Wife's Extinguished Expenses

Husband contends the family court improperly calculated his new alimony obligation by subtracting Wife's total monthly expenses from her total monthly income. Husband maintains this "simplistic approach" overlooked Wife's reduction in expenses since their divorce agreement, Wife's improper expenses for alimony purposes, and her substantial assets. We disagree.

Husband maintains many of Wife's expenses at the time of their divorce no longer exist. Specifically, Husband maintains Wife no longer has a mortgage payment, a North Carolina property expense, or child support expenses. In its order the family court found Wife's satisfaction of her mortgage obligation was "certainly anticipated by the parties at the time of the divorce . . ." We agree and also believe termination of Wife's child support obligation and North Carolina property expenses were in the parties' contemplation when they divorced. Based on this contemplation, we find the family court did not err in refusing to terminate or further reduce Husband's alimony obligation based on Wife's reduction in expenses. See Penny v. Green, 357 S.C. at 589, 594 S.E.2d at 174 (requiring the change in circumstances be unanticipated). Therefore, the family court properly considered the expenses and assets of each party in setting Husband's reduced alimony payment of $5,000 per month.

D. Wife's Improper Expenses and Frugal Lifestyle

Husband contends Wife's monthly expenses are excessive in different sections of his brief. We consolidated his assertions regarding Wife's expenses here. Under "Wife's Expenses," Husband argues the family court erred in calculating his new alimony obligation by considering improper expenses of Wife for financial declaration purposes. Later, under "Wife's Frugal Lifestyle," Husband maintains Wife does not live a "frugal" lifestyle, and Wife should not be allowed to use alimony to avoid becoming self-sufficient, especially in light of her net worth. Specifically, Husband maintains he should not be responsible for several of Wife's expenses including charitable donations, contributions to their son's medical school

tuition, fresh flowers and houseplants, household maintenance, and major home repairs. We disagree.

Frugal or not, Wife is entitled to support which is normally incident to the marital relationship. Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988) ("Alimony is a substitute for the support which is normally incident to the marital relationship."). In this regard, Wife testified she and Husband "always had a history of donations," and "that has been our history, and I continue to do that." Furthermore, Wife testified she and Husband "had a history of helping our children" and that she "wanted [their son] not to have debt when he graduated." Based on Wife's testimony and other financial considerations, we find the family court did not err in taking Wife's expenses into account in setting the current alimony obligation.

In regards to Wife's other expenses, including fresh flowers and plants, and household maintenance, we do not believe Wife's 2005 financial declaration expenses significantly differ from Wife's initial financial declaration expenses. In 1995, Wife anticipated spending $1,485 in "maintenance," while she estimated spending $1,793.88 in "maintenance" in her 2005 financial declaration. Furthermore, many of the same categories listed in her initial declaration appear again in her 2005 declaration. Accordingly, we find Husband and Wife anticipated his alimony obligation would go toward many of these "maintenance" items. We also note Wife listed fresh flowers and plants in her 1995 financial declaration as well as house painting, maid service, yard maintenance, tennis, cosmetics, jewelry, donations, expenses for her two sons, and more. Based on Wife's detailed list of expenses, and her candidness regarding them, again we find Husband anticipated having to continue paying such expenses. Furthermore, though Husband argues many of these expenses are "not the stuff of alimony," such an assertion is untrue when the parties established a certain standard of living during their marriage. Hawley v. Hawley, 363 S.C. 318, 323, 610 S.E.2d 309, 312 (Ct. App. 2005) ("Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage.") (internal citation omitted). Accordingly, we find the family court did not err in calculating Husband's new alimony obligation by considering Wife's current expenses for financial declaration purposes.

E. Financial Declarations of Wife and Net Worth

Finally, Husband maintains the family court relied on incorrect financial declarations of Wife. Specifically, Husband contends the family court found Wife's net worth was $4.3 million, when Wife's actual net worth was $4.7 million. Husband further discusses Wife's net worth and asserts simply that Wife is rich, and she could support herself for the rest of her life with more than $3 million of 'available' net worth." Though we note Wife and Husband both have substantial assets, we disagree with Husband's assertion that she should be required to exhaust her net worth so he no longer has to pay alimony.

It is undisputed that Husband and Wife have substantial assets. In its order, the family court found "[Wife] is not required to exhaust her assets over the course of her lifetime to maintain her standard of living so that [Husband] can reduce his alimony payments." Further, the family court found Wife believed and practiced never to invade principal. Finally, the family court held: "[Wife] has invested her assets conservatively and that she has followed the same investment practice of conservative investment which she learned from her father and which she and [Husband] continued during the course of their marriage and continue today."

We agree with the family court that Wife should not be required to change investment strategies or invade her principal so Husband can terminate or further reduce his alimony payments. First, the parties anticipated the other's net worth would grow over time. Penny v. Green, 357 S.C. at 589, 594 S.E.2d at 174 (finding change in circumstances must be unanticipated to warrant reduction in alimony). Second, Wife should enjoy a position similar to the one she enjoyed when she was married. Hawley v. Hawley, 363 S.C. 318, 323, 610 S.E.2d 309, 312 (Ct. App. 2005) (explaining alimony should place the supported spouse in the same position enjoyed during the marriage). In that regard, Wife should not have to exhaust resources or change long-held investment beliefs. Accordingly, we affirm the family court's decision on this issue.

II. Relate Back Date

Husband argues the family court erred in refusing to make the reimbursement of alimony relate back to the date of the filing of the action. We agree.

The family court found alimony should be retroactive to the date of the filing of the amended complaint, January 25, 2005. Thus, the family court required Wife repay Husband approximately $22,500 by June 30, 2006 based on his overpayment. However, later in the same order, the family court ordered Wife reimburse Husband $22,500 for the alimony he has paid her for the months June 1, 2005 through February 1, 2006, and that the $22,500 be paid on or before June 30, 2006. In oral argument, both sides stated it was unclear how the family court determined Husband's retroactive alimony obligation. We believe the family court made an error regarding the retroactive date of alimony and in its calculation of Wife's reimbursement obligation to Husband based on his initial filing date and his amended filing date.

Husband filed his initial complaint in the present action on June 17, 2002. Subsequently, Husband amended his complaint on January 25, 2005. Therefore, it is unclear why the family court required Wife to reimburse Husband for his overpayment from June 1, 2005 through February 1, 2006. We remand this issue to the family court for clarification and a recalculation of an amount relating back to Husband's initial filing in June of 2002, or his amended filing date of January 25, 2005.

III. Other Issues on Appeal

Husband argues the family court erred in refusing to terminate or proportionately reduce his obligation to maintain life insurance to secure his alimony obligations. Later, in separate arguments, Husband maintains the family court erred in refusing to order Wife to pay all fees and costs related to her obstructive discovery tactics. Additionally, Husband argues the family court erred in refusing to order Wife to pay "ordinary" fees and costs Husband incurred by successfully litigating this case. These issues are abandoned on appeal. Husband cited no statute, rule, or case in support of

these arguments in either his argument section or his "Background Legal Principles" section. Furthermore, he makes conclusory statements without supporting authority. Therefore, we decline to address these issues on the merits. Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); see also Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

CONCLUSION

We find the family court did not err in refusing to terminate or alternatively reduce Husband's alimony obligations based on changed circumstances. However, we believe the family court erred in calculating Wife's reimbursement obligation to Husband; accordingly, we remand this issue back to the family court for a recalculation setting forth the appropriate dates and amounts with specific findings of facts and conclusions of law. All other issues raised to this court are abandoned on appeal. The decision of the family court is therefore

AFFIRMED IN PART AND REMANDED IN PART.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lemond Corneilus Holland, Appellant.

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 4609
Heard June 9, 2009 – Filed August 18, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso

Simon, Jr., Office of the Attorney General, of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

GEATHERS, J.: Lemond Holland (Holland) seeks review of his convictions for murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. Holland challenges the trial court's admission of testimony about his possession of a handgun prior to the incident and the trial court's failure to charge the jury on voluntary manslaughter. We affirm Holland's convictions.

FACTS/PROCEDURAL HISTORY

Shortly after midnight on December 30, 2005, Brandt Koehler (Koehler) and his girlfriend, Yessica Caruthers (Caruthers), went to McCatz Tavern and Bar in North Myrtle Beach. The two socialized and bought drinks at the bar. Before leaving the bar, Koehler became involved in a verbal altercation with Holland. None of the eyewitnesses could determine the subject of the argument, but they all confirmed that there was no physical contact between the two men. After the argument dissipated, Koehler and Caruthers left the bar through the south exit. Jeffrey Bennick (Bennick), the bar's manager and bartender, witnessed Holland watching Koehler and Caruthers exit. Holland then exited the bar through the north door. Bennick and Raphael Walke (Walke) followed Koehler and Caruthers to try to prevent another altercation in the parking lot. Bennick testified that Koehler took off his shirt while facing Bennick and Walke, as if preparing for an altercation. Bennick assured Koehler that nothing was going on and told him to get into his car. Koehler and Caruthers then proceeded to get into Caruthers' car.

Holland's friend, Carlos Adams (Adams), realized that Holland was still agitated over his verbal altercation with Koehler, and, therefore, Adams followed Holland out of the bar's north door in an attempt to calm him down and determine what was happening. According to Adams, Holland went to his car, reached inside, and then locked the door. He then ran toward the passenger side of Caruthers' car, where Koehler was sitting. At this point,

Caruthers was attempting to drive out of the parking lot. Holland began banging on the car's passenger side window and pulling on the passenger door. Caruthers testified that Holland was pointing a gun at Koehler through the window. Bennick never saw a gun, but he testified that the banging on the window sounded like metal hitting glass. Adams testified that while he did not see Holland pull anything out of his car that night, a few weeks earlier Holland had shown him a semi-automatic gun that he had in his car.

Caruthers got out of her car and went around to the passenger side of the car, yelling for Holland to stop hitting her car. Holland continued to pull on the passenger door. Both Caruthers and Walke tried to pull Holland away from the car, but they were unsuccessful. Bennick then saw the passenger door open, but he was unsure whether Holland was able to pull the door open or whether Koehler opened the door himself. Holland and Koehler then grabbed each other and locked arms, moving about fifteen to twenty feet away from Caruthers' car. According to Bennick, Koehler had his head down at this time, while it appeared that Holland was hitting Koehler over the head. Then, three shots were fired. After the third shot, Koehler fell to the ground. Holland then ran to his car and drove away. Koehler received a gunshot wound to the head that led to his death, and Walke received a gunshot wound to his leg. Holland was charged with murder, possession of a weapon during the commission of a violent crime, and assault and battery with intent to kill (ABIK).

Crime scene investigators found two shell casings at the scene. South Carolina State Law Enforcement Division (SLED) agent David Black determined the shell casings to be 9 mm Luger caliber cartridge casings. Agent Black also determined that the same gun fired the two casings. Also, the fatal bullet retrieved from Koehler's head was consistent with 9 mm Luger caliber bullets.

At trial, defense counsel objected to the State's questioning of Adams about his observation of a weapon in Holland's possession weeks prior to the incident. Counsel initially argued that the testimony was not relevant, and the trial court overruled the objection. After a break in the trial, defense counsel

asserted that he was making his objection pursuant to Rule 403, SCRE, on the ground the testimony's prejudicial effect outweighed its probative value. The trial court allowed Adams to answer the question, and Adams testified that a few weeks prior to the incident, Holland had shown him a semi-automatic gun that he kept in his car.

The trial court also denied counsel's request for a jury charge on voluntary manslaughter on the ground there was no evidence of sufficient legal provocation.[1] The jury returned a verdict of guilty for all three charges against Holland, and the trial court denied all of Holland's post-trial motions. The trial court sentenced Holland to fifty years of imprisonment for the murder conviction, twenty years for the ABIK conviction, concurrent, and five years for possession of a weapon during the commission of a violent crime, to run consecutively to the other sentences. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in refusing the charge the jury on voluntary manslaughter?

2. Did the trial court err in allowing Adams to testify about his observation of a weapon in Holland's possession prior to the incident?

STANDARD OF REVIEW

The conduct of a criminal trial is left largely to the discretion of the trial court, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Therefore, this Court reviews errors of law only and is bound by the

[1] "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Charge on Voluntary Manslaughter

Holland asserts that the trial court erred in refusing to charge the jury on voluntary manslaughter because the evidence showed he acted in a sudden heat of passion upon sufficient legal provocation. We disagree.

"The law to be charged must be determined from the evidence presented at trial." Cole, 338 S.C. at 101, 525 S.E.2d at 512. In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). However, "[a]n instruction should not be given unless justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). This Court will not reverse the trial court's ruling regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005).

> Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing.

Cole, 338 S.C. at 101, 525 S.E.2d at 513 (internal citations omitted).

> "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition,

> must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence."

Id. at 101-02, 525 S.E.2d at 513 (quoting State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996)).

"[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996). Further, merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation. See State v. Johnson, 324 S.C. 38, 40-41, 476 S.E.2d 681, 682 (1996) (holding that the trial judge properly refused to charge voluntary manslaughter despite testimony that individuals approached the defendant as they were "trash talking" and that one of the individuals removed his hat and "stepped out a little bit," demonstrating a willingness to fight, because there was no evidence that anyone made an overt threatening act toward the defendant).

Moreover, "[t]he exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence." State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997). "A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

Here, there is no evidence, nor any reasonable inferences from the evidence, that at the exact moment Holland killed Koehler, Holland's rage was justified by legal provocation. The rage experienced by Holland when he fired the fatal shot had already been continuously sustained from the moment of his initial fury during the verbal argument inside the bar. Although the argument ended inside the bar, Holland's fury never subsided as

he relentlessly pursued a retreating Koehler. Holland saw Koehler and Caruthers leaving through the bar's south exit, and he immediately stepped outside through the north exit and went directly to his car to retrieve his gun. He then ran toward the passenger side of Caruthers' car where Koehler was sitting as Caruthers was trying to drive out of the parking lot. Holland banged on the car's passenger side window, pointed a gun at Koehler, and repeatedly yanked on the passenger door to get to Koehler. Holland also rebuffed attempts by Caruthers and Walke to stop him from pursuing Koehler.

At this point, Bennick saw the passenger door open, but he was unsure whether Holland was finally able to open the door or whether Koehler himself opened the door. However, even if Koehler opened the door, that act could not be considered sufficient legal provocation because it was obvious that Holland wanted to get Koehler out of the vehicle; Holland, who was already furious and was armed, was on a mission to inflict harm. Further, the witnesses' vague characterizations of the physical contact between Holland and Koehler as "tussling" and "wrestling" does not permit an inference that Koehler threw any punches or otherwise posed a genuine threat to Holland through any specific, identifiable hostile act. There was absolutely no evidence that Koehler did anything to pose a genuine threat to the armed and determined Holland.

Holland argues that the following evidence showed sufficient legal provocation: (1) the argument inside the bar; (2) Koehler taking off his shirt in the bar's parking lot; (3) the altercation between Holland and Caruthers; and (4) "wrestling" between Holland and Koehler when the gunshots were fired. We disagree.

First, the argument inside the bar was not accompanied by any physical contact between Koehler and Holland or any threatening gestures by Koehler. Therefore, the argument itself could not serve as sufficient legal provocation because "mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." Rogers, 320 S.C. at 525, 466 S.E.2d at 362. When "death

is caused by use of a deadly weapon, the offending words must be accompanied by an overt, threatening act." Id. at 525, 466 S.E.2d at 362-63 (quoting State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotations omitted)).

Further, there is no evidence, nor any reasonable inferences from the evidence, that Holland saw Koehler remove his shirt in the parking lot. Even if Holland had seen Koehler remove his shirt, and even if this was a signal that Koehler was ready for a fight, merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation. See Johnson, 324 S.C. at 40-41, 476 S.E.2d at 682 (holding that the trial judge properly refused to charge voluntary manslaughter, despite testimony that an individual approached the defendant and demonstrated a willingness to fight, because there was no evidence of any overt threatening act toward the defendant).

Moreover, evidence of the confrontation between Caruthers and Holland could not support a voluntary manslaughter charge because there is no evidence that she posed a threat to Holland either by possessing a weapon or through hostile acts.[2] Her attempt to pull Holland away from her car as he was trying to open the passenger door to get to Koehler was justified and, therefore, did not rise to the level of legal provocation. See Ivey, 325 S.C. at 142, 481 S.E.2d at 127 ("The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence.").

Additionally, the "wrestling," as described by one of the witnesses, between Holland and Koehler was initiated by Holland and showed nothing more than Koehler's attempt to defend himself from Holland's aggression. "The exercise of a legal right, no matter how offensive to another, is never in

[2] Cf. State v. Wharton, 381 S.C. 209, 214-15, 672 S.E.2d 786, 788-89 (2009) (holding that there was no evidence of sufficient legal provocation on the part of an individual who argued with the defendant because he did not pose a threat to the defendant either by possessing a weapon or through hostile acts).

law deemed a provocation sufficient to justify or mitigate an act of violence." Ivey, 325 S.C. at 142, 481 S.E.2d at 127. "A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." Shuler, 344 S.C. at 632, 545 S.E.2d at 819; see also State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984) (holding that the trial court properly refused to charge the jury on voluntary manslaughter because evidence of a struggle as the victim resisted an armed robbery showed that the victim was defending himself).

During oral arguments, Holland's counsel insisted that the instant case is a classic case of voluntary manslaughter. In support of his argument, he discussed the following cases: State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); and State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988). The instant case is clearly distinguishable from these cases.

In Knoten, one of the defendant's statements given to police indicated that the victim cut the defendant with a knife and chased him out of her apartment into the frigid weather while he was naked and that he reached into his trunk to obtain a metal pipe, presumably to defend himself as he went back into the apartment to retrieve his clothes. 347 S.C. at 303-04, 555 S.E.2d at 395. As he entered the apartment, the victim cut him with a knife a second time, and the defendant then hit the victim on the head with the metal pipe. 347 S.C. at 304-05, 555 S.E.2d at 395-96. Unlike the evidence of the victim's second assault of the defendant in Knoten, there is simply no evidence in the instant case that any action of Koehler after he retreated from the bar precipitated a new provocation rising to the level of "legal provocation," sufficiently distinct from any provocation Holland had already experienced inside the bar.

The facts in the instant case are also different from those in Lowry, in which there was testimony that the victim moved toward the defendant in a menacing fashion with his arms and hands outstretched toward the defendant

as if to grab him. 315 S.C. at 398, 434 S.E.2d at 273. The Lowry Court stated that this testimony tended to show that the victim was about to **initiate** a physical encounter when the shooting occurred. 315 S.C. at 399, 434 S.E.2d at 274. There was no testimony in the instant case that could be similarly characterized.

In Carter, the defendant's heat of passion was provoked by the victim's striking the defendant and forcefully ejecting him from the victim's house. 301 S.C. at 397, 392 S.E.2d at 185. And in Gilliam, the defendant's heat of passion was provoked by the victim's firing a gun at the defendant. 296 S.C. at 397, 373 S.E.2d at 597. Here, Holland's rage was provoked by a mere verbal argument inside a bar, which does not rise to the level of legal provocation. Again, there is no **reasonable** inference of a specific, identifiable hostile act of Koehler that posed a genuine threat to Holland. The requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis or to ignore the overwhelming, clear evidence of Holland's mission of violence against Koehler—a state of mind that began before Koehler even stepped out of Caruthers' vehicle. Cf. Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 296, 504 S.E.2d 347, 350 (Ct. App. 1998) ("In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party.").

In sum, the trial court could have determined that based on the lack of evidence of any genuine threat posed by Koehler, a charge on voluntary manslaughter would have confused the jury. Therefore, the trial court properly declined to give this charge. See Blurton, 352 S.C. at 208, 573 S.E.2d at 804 ("If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury."); Ivey, 325 S.C. at 142, 481 S.E.2d at 127 (holding that where no actions by the victim constitute legal provocation, a charge on voluntary manslaughter is not required). We find no abuse of discretion. Therefore, we are unable to reverse on this ground. See Williams, 367 S.C. at 195, 624 S.E.2d at 445 (holding that this Court will not reverse a ruling on a jury instruction unless the trial court abused its discretion).

II. Testimony concerning handgun

Holland argues that the trial court erred in allowing Adams to testify about his observation of a weapon in Holland's possession prior to the incident because the danger of the testimony's undue prejudicial effect outweighed its probative value. We disagree.

Rule 403, SCRE, states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case. State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

This Court reviews a trial court's decision regarding the admissibility of evidence under Rule 403 pursuant to the abuse of discretion standard and must give great deference to the trial court's judgment. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "A trial [court's] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Id. at 358, 543 S.E.2d at 593-94. The trial court's determination should be reversed only in exceptional circumstances. Id. at 357, 543 S.E.2d at 593.

Here, Adams' testimony concerning Holland's storage of a semi-automatic gun in his car within weeks prior to the incident was consistent

with the ballistic evidence gathered by investigators after the shooting. Further, it solidified Caruthers' identification of Holland as the person who possessed the weapon used to kill Koehler and injure Walke. Therefore, Adams' testimony was indispensable in proving the elements of all three charges against Holland—possession of a weapon during the commission of a violent crime, murder, and ABIK. The trial court acted within its discretion in determining that the probative value of Adams' testimony outweighed any danger that the jury might base its decision on improper considerations. See State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (holding that the probative value of a witness' testimony that he knew the defendant possessed a nine millimeter pistol, which tended to identify the defendant as the possessor of the murder weapon, outweighed any prejudice because the identity of the user of the murder weapon was the critical issue at trial).

Holland also argues that Adams' testimony was unduly prejudicial because it was evidence of a prior bad act, showing Holland as a person of bad character. However, he did not raise this specific ground before the trial court. Therefore, this specific argument is not preserved for this Court's review. See State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (holding that an issue is not preserved for review when a party argues one ground in the trial and then an alternative ground on appeal).

In any event, there is nothing in Adams' testimony concerning the handgun from which the jury could infer a prior bad act on Holland's part. The testimony did not indicate that Holland's mere possession of the handgun was illegal, that Holland had used the gun to commit any bad acts prior to the incident, or that Holland had a criminal record involving weapon-related offenses. Notably, during oral arguments, Holland's counsel conceded that there was no negative inference that could be drawn from the mere possession of a weapon unaccompanied by any other act.

Further, even if a prior bad act could be inferred from the testimony, this evidence solidified Caruthers' identification of Holland as the person who possessed the weapon used to kill Koehler and injure Walke. The probative value of this identification evidence outweighed any prejudicial effect.

Hence, it was admissible under both Rule 403 and Rule 404(b), SCRE, which provides that evidence of other crimes, wrongs, or acts may be admissible to show identity.[3] Therefore, Adams' testimony did not constitute improper character evidence. Cf. State v. Dickerson, 341 S.C. 391, 396-97, 535 S.E.2d 119, 121-22 (2000) (holding that a murder defendant's drug use was admissible because the medical examiner's testimony connected it to the violent "overkill" nature of the murder, which involved multiple stab wounds, and thus it served to identify the defendant as the "overkill" murderer).

CONCLUSION

Accordingly, Holland's conviction is

AFFIRMED.

HUFF and PIEPER, JJ., concur.

[3] Rule 404(b), SCRE, states, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Milliken & Company, Appellant/Respondent,

v.

Brian Morin, Respondent/Appellant.

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

Opinion No. 4610
Heard March 4, 2009 – Filed August 20, 2009

AFFIRMED

Charles E. Carpenter, Jr., and Carmen V. Ganjehsani, both of Columbia; and John C. Glancy, L. Gray Geddie, Jr., and Phillip A. Kilgore, all of Greenville, for Appellant-Respondent.

C. Mitchell Brown, of Columbia; and William S. Brown, Giles M. Schanen, Jr., and Dowse B. Rustin, IV, all of Greenville, for Respondent-Appellant.

SHORT, J.: Milliken & Company (Milliken) appeals from the circuit court's order, arguing the court erred in denying the equitable relief it requested because the jury found Brian Morin breached the covenants in his employment agreement and the verdict was only an award of nominal damages. In his cross-appeal, Morin argues the circuit court erred in finding the inventions assignment and confidentiality provisions of the employee agreement are enforceable. We affirm.

FACTS

Morin obtained his Ph.D. in Experimental Condensed Matter Physics from Ohio State University in 1994, and on April 10, 1995, he began working for Milliken as a research physicist. As a condition of his employment with Milliken, he was required to sign a written Associate Agreement (Agreement). Morin was promoted to Senior Research Physicist on July 13, 1998. While working at Milliken, he went to a composites conference in California that Milliken paid for him to attend to get new applications for their products. Afterwards, Morin began developing an idea to create a high modulus multifilament polypropylene fiber, which is a fiber that has a high resistance to stretching. Morin testified there was a possible five billion dollar market for the fiber, but Milliken refused to support research in multifilament fiber manufacturing when he presented it with the idea. Milliken does not manufacture or sell any multifilament fiber to any third parties. Nor does it possess any production equipment for the extrusion of multifilament fiber.

Morin resigned from Milliken on May 17, 2004, and registered his company, Innegrity, LLC, with the South Carolina Secretary of State the same week.[1] On November 5, 2004, Morin filed his patent for Innegra-S, a high modulus multifilament polypropylene fiber, and immediately assigned

[1] Morin testified he is the president of Innegrity and owns thirty percent of the company. He also testified there are thirty-eight other investors.

the patent to Innegrity. To promote his new fiber, Morin gave a presentation at InnoVenture in Greenville, South Carolina, in May 2005.[2] On June 21, 2005, Milliken's counsel sent Morin a letter demanding he stop his work with the Innegra product because the activity violated Morin's Agreement with Milliken. Furthermore, Milliken asserted Morin's invention, Innegra-S, belonged to Milliken pursuant to the Agreement. In a response letter, Morin claimed he did not experiment with or develop any of his technology using Milliken's equipment, information, or time.[3] The letter also proposed a meeting with Milliken to discuss possible resolutions; however, Milliken did not respond and instead filed an action against Morin and Innegrity.

Milliken's Amended Complaint alleged nine causes of action: (1) breach of contract (inventions assignment provision); (2) breach of contract (covenant not to compete); (3) breach of contract (confidentiality provision); (4) misappropriation of trade secrets; (5) unfair trade practices; (6) breach of the implied covenant of good faith and fair dealing; (7) breach of contract accompanied by a fraudulent act; (8) conversion; and (9) breach of the duty of loyalty. The causes of action for conversion and violation of the South Carolina Unfair Trade Practices Act were the only causes of action against both Morin and Innegrity. In his Answer to Milliken's Amended Complaint, Morin asserted nine defenses including claims that the Agreement was unenforceable and was void under public policy. Morin filed an Amended Answer, asserting five counterclaims: (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) breach of the implied covenant of good faith and fair dealing; (4) fraud and misrepresentation; and (5) violation of the South Carolina Unfair Trade Practices Act.

Morin filed a Motion for Summary Judgment arguing, among other things, the Agreement's covenant not to compete provision, the inventions

---

[2] InnoVenture is a convention where entrepreneurial companies can make presentations to prospective investors.

[3] Morin also testified he told Milliken his company would not interfere with Milliken's business, and he planned for Innegrity to be a customer of and supplier to Milliken.

assignment provision, and the confidentiality provision were unenforceable. The motion was denied. Shortly before trial, Milliken voluntarily dismissed four of its causes of action with prejudice, including its two causes of action against Innegrity for conversion and violation of the South Carolina Unfair Trade Practices Act. Morin filed a Motion for Judgment as a Matter of Law, asserting Milliken's claim for the assignment of several patents currently held by Innegrity fails as a matter of law because Innegrity was dismissed from the case.[4] After Milliken rested its case, Morin moved for a directed verdict on all causes of action and the relief sought by Milliken relating to the patents and patent applications owned by Innegrity. The court denied the motion.

At the conclusion of the trial, only four causes of action against Morin were submitted to the jury: (1) breach of the inventions assignment provision of the Agreement;[5] (2) breach of the confidentiality provision of the

---

[4] The court did not rule on Morin's motion at that time, stating: "I think we can take care of that matter after we take care of the jury. That would be something that I can hear you on at the end of the verdict. It might not even be an issue, who knows. But if it is, then we will address that later."

[5] Milliken's "Inventions Assignment" provision is found in section A of the Agreement and is as follows:

> With respect to Inventions made, authored and conceived by me, either solely or jointly with others, (1) during my employment, whether or not during normal working hours or whether or not at Milliken's premises; or (2) within one year after termination of my employment; I will:
>
> a. Keep accurate, complete and timely records of such Inventions, which records shall be Milliken property and be retained on Milliken's premises.
>
> b. Promptly and fully disclose and describe such Inventions in writing to Milliken.

c. Assign (and I do hereby assign) to Milliken all of my rights to such Inventions, and to applications for letters patent, copyright registrations and/or mask work regulations in all countries and to letters patent, copyright registrations and/or mask work registrations granted upon such Inventions in all countries.

d. Acknowledge and deliver promptly to Milliken (without charge to Milliken but at the expense of Milliken) such written instruments and to do such other acts as may be necessary in the opinion of Milliken to preserve property rights against forfeiture, abandonment or loss and to obtain, defend and maintain letters patent, copyright registrations and/or mask work registrations and to vest the entire right and title thereto in Milliken.

NOTICE: This is to notify you that paragraph A of this Milliken "Associate Agreement" you are being asked to sign as a condition of your employment does not apply to an Invention for which no equipment, supplies, facility or proprietary information of Milliken was used and which was developed entirely on your own time, and (1) which does not relate (a) directly to the business of Milliken or (b) to Milliken's actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by you for Milliken.

In paragraph 4, the Agreement defines "Inventions" as:

"discoveries, improvements and ideas (whether or not shown or described in writing or reduced to practice), mask works (topography or semiconductor chips) and works of authorship, whether or not patentable, copyrightable or registerable, (1) which relate directly to the business of Milliken, or (2) which relate to Milliken's actual or demonstrably anticipated research or development, or (3) which result from any work performed by me for Milliken, or (4) for which any equipment, supplies, facility or Trade Secret or Confidential Information of Milliken is used, or (5) which is developed on any Milliken time."

Agreement;[6] (3) violation of the South Carolina Trade Secrets Act; and (4) breach of the duty of loyalty. The jury found Morin liable for breach of the Agreement, under its inventions assignment and confidentiality provisions, and awarded Milliken $25,324 in actual damages.[7] The verdict form submitted to the jury contained a single blank for the jury to award actual damages should it find Morin breached the Agreement. Neither party objected to the form or requested a more detailed form. The verdict form did not specify which action by Morin constituted a breach of the Agreement, or what particular invention or confidential information was involved in Morin's breach of the Agreement.

Milliken filed a Motion for Equitable Relief and to Alter or Amend Judgment, and Morin filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. After a hearing on the motions, the court denied the motions of both parties. Milliken appeals and Morin cross-appeals.

---

[6] Milliken's "Confidentiality" provision is found in section B of the Agreement and is as follows:

> "I also agree not to use, disclose, modify or adapt any Confidential Information as defined in paragraph 3 hereinabove until three (3) years after the termination of my employment except as authorized in the performance of my duties for Milliken."

In paragraph 3, the Agreement defines "Confidential Information" as:

> "all competitively sensitive information of importance to and kept in confidence by Milliken, which becomes known to me through my employment with Milliken and which does not fall within the definition of Trade Secret above."

[7] The jury also found for Milliken on Morin's counterclaims.

STANDARD OF REVIEW

An action for breach of contract based on an employment agreement is an action at law. King v. PYA/Monarch, Inc., 317 S.C. 385, 388, 453 S.E.2d 885, 888 (1995); Moore v. Crowley & Assoc., Inc., 254 S.C. 170, 171, 174 S.E.2d 340, 341 (1970). In an action at law, on appeal of a case tried by a jury, the jurisdiction of this court extends merely to correct errors of law. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). The factual findings of the jury will not be disturbed on appeal unless the record does not contain any evidence that supports the jury's findings. Id.

LAW/ANALYSIS

I. Milliken's Appeal

Milliken argues the circuit court erred in refusing to grant the equitable relief it requested because the jury found Morin breached the covenants in his Agreement and the verdict was only an award of nominal damages. We disagree.

Generally, equitable relief is available only where there is no adequate remedy at law. Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." Id. The party seeking an injunction must prove it has no adequate remedy at law. Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).

In its Amended Complaint, Milliken requested actual damages and permanent injunctive relief on its claims for breach of contract. At trial, Milliken presented evidence of past and future money damages it allegedly suffered as a result of Morin's breach of the Agreement, specifically $1,403.26 in travel expenses for the conference Morin attended in California;

$81,080.00 in benefits and salary compensation; $3,862.85 in paid unused vacation days; and an estimated $60 to $65 million in future lost profits from the fiberglass market.

The verdict form submitted to the jury contained a single blank to award actual damages should the jury find Morin breached the Agreement under either the inventions assignment provision or the confidentiality provision. Milliken did not object to the form; however, Milliken asked the judge to charge the jury on nominal damages and suggested $100.00 as a symbolic nominal amount. In his charge to the jury on actual and nominal damages, the judge did not charge the jury with a specific amount for nominal damages, but stated "they have been referred to as a trivial or trifling sum." Neither party objected to the charge. The verdict form did not specify whether the damages were for Morin's breach of the inventions assignment provision, the confidentiality provision, or both.

The jury awarded Milliken $25,324.00 in actual damages, which is far from the $100.00 amount Milliken requested as an example of nominal damages. Also, the amount of damages awarded by the jury appears to be a specific amount that was calculated by the jury in some manner, as opposed to a general amount such as $25,000.00. Thus, we find Milliken had an adequate remedy at law, and the trial judge correctly found Milliken was not entitled to equitable relief.[8]

[8] We do not reach the merits of Milliken's remaining issues because this issue is dispositive of the case. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

II. Morin's Appeal

In his cross appeal, Morin argues the circuit court erred by finding the inventions assignment and confidentiality provisions of Milliken's Agreement were enforceable.[9] We disagree.

On appeal of the denial of a motion for a directed verdict or JNOV, this Court applies the same standard as the trial court and views the evidence in the light most favorable to the non-moving party. Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007). "An appellate court will only reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law." Id.

In South Carolina, restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer. Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). The enforceability of a covenant not to compete depends on whether it is: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. Id. at 675-76, 301 S.E.2d at 143; Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 293, 471 S.E.2d 721, 723 (Ct. App. 1996).

---

[9] Morin also argues that if one provision is found to be unenforceable, the whole Agreement is unenforceable; however, we need not address this issue because we find both provisions to be enforceable. Furthermore, Morin raises this argument for the first time on appeal; thus, the issue is not preserved. Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

In Muckenfuss, this court determined a covenant not to divulge trade secrets had the effect of a covenant not to compete, and thus, was subject to the same strict scrutiny. Id. at 294, 471 S.E.2d at 723. In making its decision, the court found the section substantially restricted Muckenfuss's competitive employment activities by preventing him from using the general skills and knowledge he acquired at Carolina Chemical; was unlimited in time and territory; was far greater than necessary to protect any legitimate business interest; and was unreasonable from the standpoint of public policy because of its effects on both the employee and the competitive business environment. Id. at 294-95, 471 S.E.2d at 723-24. The court also noted the provision defined trade secrets "so broadly that virtually all of the information Muckenfuss acquired during his employment would fall within its definition." Id. at 296, 471 S.E.2d at 725.

Also, in Nucor Corporation v. Bell, 482 F.Supp. 2d 714, 729-30 (D.S.C. 2007), the South Carolina District Court found a non-disclosure agreement was subject to the same requirements as a non-compete covenant. Using this standard, the court determined the agreement was unenforceable because it defined "'confidential information' so broadly that virtually all of the information Bell acquired during his employment would fall within its definition" and "forbid[] Bell from engaging in any employment similar to his employment with Nucor." Id.

Morin asserts that both the inventions assignment and confidentiality provisions should be scrutinized under the standards of a covenant not to compete because both provisions were overly broad; harsh and oppressive in curtailing his legitimate efforts to earn a livelihood; inappropriate as they prevent him from using the general skills and knowledge he acquired at Milliken; and unreasonable from the standpoint of sound public policy. However, the inventions assignment provision limited the inventions to those made, authored, and conceived by Morin, either solely or jointly with others, during his employment, whether or not during normal working hours or whether or not at Milliken's premises, or within one year after termination of his employment with Milliken. It did not apply to inventions for which no equipment, supplies, facility, or proprietary information of Milliken were

used; that were developed entirely on an employee's own time; that did not relate directly to the current or anticipated business of Milliken; or that were not the result of any work performed for Milliken. Thus, the inventions assignment provision was narrowly drafted to restrict the category of inventions that were assigned to Milliken to those related to Milliken's business or research, or that were created using Milliken's resources. Furthermore, the inventions assignment provision was limited to one year and to subject matter that Morin worked on or had knowledge of during his employment with Milliken.

Milliken's confidentiality provision limits the information to all competitively sensitive information of importance to and kept by Milliken for three years.[10] The three-year provision did not prohibit Morin from disclosing or using any and all information he learned working at Milliken, or using the general knowledge and skills he learned while working there. Furthermore, Morin testified he could have obtained other jobs without violating the confidentiality provision. Thus, the confidentiality provision did not substantially restrict Morin's competitive employment activities.

Additionally, Morin argues the provisions were unenforceable because they were unlimited in territory. In Dudley, our supreme court found a "geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." Dudley, 278 S.C. at 676, 301 S.E.2d at 143. Furthermore, "[w]hile 'the general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business . . . [p]rohibitions against contacting existing customers can be a valid substitute for a geographic limitation.'" Rockford Mfg., Ltd. v. Bennet, 296 F.Supp. 2d 681, 689 (D.S.C. 2003) (quoting Wolf v. Colonial Life and Accident Ins. Co., 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992)). Here, the

[10] The confidentiality provision is limited to three years, and the inventions assignment provision is limited to one year after employment. In Dudley, the court found a three-year time restraint was not unreasonable. Dudley, 278 S.C. at 676, 301 S.E.2d at 143.

provisions were limited to competitors of Milliken, which is reasonably necessary to protect Milliken's business. Therefore, we find the trial judge correctly found the confidentiality and inventions assignment provisions of Milliken's Associate Agreement were enforceable.

CONCLUSION

Therefore, we affirm the circuit court's denial of Milliken's request for equitable relief and the circuit court's finding that the inventions assignment and confidentiality provisions of Milliken's Associate Agreement are enforceable.

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.