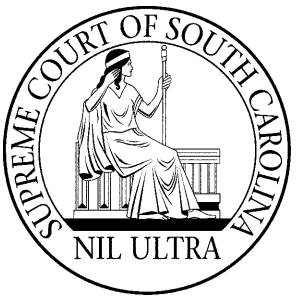

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
November 7, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of G. Turner Perrow, Jr.,

Respondent.

Opinion No. 27063
Submitted October 24, 2011 – Filed November 7, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, Susan B. Hackett, Assistant Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, all of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard and Stephanie N. Weissenstein, both of Ballard Watson Weissenstein, of West Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of a public reprimand or definite suspension not to exceed two (2) years. In addition, respondent agrees to complete the Ethics School and Trust Account School portions of the Legal Ethics and Practice Program within six (6) months of the issuance of a public reprimand or before seeking reinstatement from a suspension. He further agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission)

within thirty (30) days of the imposition of discipline. We accept the agreement and issue a public reprimand. Further, we order respondent to complete the Ethics School and Trust Account School portions of the Legal Ethics and Practice Program within six (6) months of the date of this opinion and to the pay the costs incurred in this matter no later than thirty (30) days from the date of this opinion. The facts, as set forth in the agreement, are as follows.

FACTS

In November 2009, respondent agreed to assist Client in recovering funds from her former employer. Client believed she was due funds from unused vacation time. In a meeting with Client's former employer, respondent learned that, pursuant to company policy, Client was not owed any money for unused vacation time.

Over the next year, Client regularly called respondent's office requesting updates regarding her claim. Respondent assured Client that the matter was progressing even though respondent knew the former employer denied any liability and that Client did not have a viable claim.

On December 17, 2010, respondent wrote Client explaining he had an offer of $592.32 representing 49.36 hours at $12.00 per hour. Additionally, the letter stated respondent had over two hours of work on the case, but he was willing to reduce his fee to $150.00 so Client's total recovery would be $442.32. This letter contained false information because respondent had not pursued the matter beyond his initial meeting with the former employer and had not received a settlement offer. The letter requested Client advise respondent if she would accept the offer.

When respondent had not heard from Client by December 22, 2010, he sent her another letter. In this undated letter, respondent advised Client of the same offer and his reduction in fee. Respondent also noted that he knew Client would like to have the money by Christmas.

Upon her receipt of the letter in mid-December 2010, Client called respondent and accepted the purported offer. Despite Client's prompt response to respondent's letter, respondent did not communicate with Client again for almost two months. On February 18, 2011, respondent wrote to Client apologizing for the delay and providing her with a check in the amount of $442.32 written on his general account. Respondent represents he paid personal funds to Client because he knew she needed money.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with requests for information); Rule 2.1 (in representing client, lawyer shall exercise independent professional judgment and render candid advice); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to the administration of justice). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice).

CONCLUSION

We find that respondent’s misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. In addition, we order respondent to complete the Ethics School and Trust

Account School portions of the Legal Ethics and Practice Program within six (6) months of the date of this opinion and to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kenneth Darrell Morris, II, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4872
Heard March 8, 2011 – Filed August 17, 2011
Withdrawn, Substituted and Refiled November 2, 2011

AFFIRMED

Johnny Gardner and Jonathan Hiller, both of Conway, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all of Columbia; and Solicitor Kevin S. Brackett, of York, for Respondent.

THOMAS, J.: During a traffic stop, police officers searched the trunk of a car driven by Kenneth Darrell Morris, II, and discovered a quantity of ecstasy pills. A large amount of marijuana was also found during the subsequent inventory search. During his trial for trafficking ecstasy and possession of marijuana with intent to distribute, Morris unsuccessfully moved to suppress the drugs as fruit of an illegal search. A jury convicted Morris of both charges. Morris appeals the trial court's decision not to suppress the drugs. We affirmed the decision in a published opinion filed August 17, 2011. We now issue this amended opinion to emphasize the outcome of this appeal is governed by our standard of review.

FACTS

On the afternoon of February 6, 2008, Morris and a passenger, Brandon Nichols, were traveling northbound on I-77 in York County in a rented Ford 500. While riding in an unmarked police cruiser, Officer L.T. Vinesett, Jr., and Constable W.E. Scott noticed the Ford following a truck too closely. The vehicle exited the interstate and proceeded to a gas station and rest area, where Officer Vinesett initiated a traffic stop.

Officer Vinesett approached the passenger side of the vehicle, where Nichols was sitting. Officer Vinesett asked for Morris's license and registration, and after a rental agreement was produced, Officer Vinesett noticed the car was rented to Nichols and Morris was not an authorized driver. Speaking through the passenger window, Officer Vinesett instructed Morris to exit the car, and as Morris opened the driver's side door, Officer Vinesett noticed hollowed Phillies Blunts[1] in the center console and blunt tobacco in the center console and on the floorboard.

To avoid the rain, Officer Vinesett had Morris sit in the front passenger seat of the police cruiser while he inquired about Morris's travel plans.

[1] Phillies Blunts are a brand of inexpensive, American-made cigars. The tobacco inside a Phillies Blunt is often emptied in order to roll a marijuana cigar.

Morris told him Nichols rented the vehicle the previous day in Greensboro, North Carolina, and they were on their way back from visiting some women in Atlanta, Georgia. Officer Vinesett also asked Morris whether Morris had a drug record. Morris disclosed he had been arrested for a marijuana offense when he was a minor.

Officer Vinesett returned to the Ford, and outside the presence of Morris, Nichols stated the pair was returning from a basketball game in Atlanta. Officer Vinesett consequently radioed for a nearby canine unit to bring a drug dog to the scene. He explained that he pulled over two men who offered conflicting stories of their plans, one of whom had a previous drug conviction, and that he had seen loose blunt tobacco in the car, suggesting they had been rolling marijuana in the blunts.

While waiting for the drug dog, Morris consented to a search of his person, and the search yielded no contraband. Morris then went to the restroom under Constable Scott's supervision. Officer Vinesett asked Nichols to exit the car and requested consent to search Nichols's person. Nichols consented, and again, the search yielded no contraband.

Moments later, Officer Gibson arrived with a drug dog. While Morris was still in the restroom, Officer Vinesett and Officer Gibson asked Nichols for permission to search the car, saying the officers would use the drug dog if consent was not given. Nichols refused to give consent, so Officer Gibson walked the dog around the car twice. The dog did not alert on either lap around the car and was returned to the police cruiser. Officer Vinesett again asked Nichols for consent to search the car, and Nichols again refused. Roughly thirteen minutes after the stop had been initiated, Nichols stated he "was ready to go."

Shortly thereafter, the officers held a conversation away from Morris and Nichols. Officer Vinesett returned to the Ford, leaned through the still open window of the car, and looked around for a few moments. He then returned to Nichols, who was still seated in the police cruiser, and stated that he could have "swor[n he] could smell some marijuana." Nichols responded

that Officer Vinesett was confusing the smell of the Black & Mild he recently smoked with marijuana and he neither had marijuana, nor was he a marijuana smoker.

At that time, Officer Vinesett and Officer Gibson returned to the car and searched the passenger compartment. The emptied blunts contained no marijuana or marijuana residue, and the officers found no other evidence of contraband in the passenger compartment. However, Officer Vinesett searched the trunk and eventually found a plastic bag containing 393 ecstasy pills inside a gift box. The men were arrested slightly over fourteen minutes after the initiation of the stop. The car was impounded, and a subsequent inventory search of the car yielded nearly a half pound of marijuana hidden under the spare tire.

At trial, Morris moved to suppress the drug evidence, arguing the officers illegally extended the scope and length of the traffic stop and probable cause did not support the search of the trunk. During the suppression hearing, Officer Vinesett testified that, although he failed to mention it to Constable Scott at the scene or Officer Gibson when he requested the dog, he smelled the odor of burnt marijuana when he first approached the car. The trial court denied the motion. It specifically discounted what Officer Vinesett classified as Morris's and Nichols's "inconsistent stories." However, it found Officer Vinesett's testimony regarding the smell of marijuana credible, and it held the length and scope of the stop was reasonable in light of the circumstances. Additionally, the trial court found that even though the dog did not alert on the car, the marijuana smell, loose tobacco, and hollowed blunts, in light of the officer's knowledge and experience, amounted to probable cause to search the entire car, including the trunk. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in finding the officers had reasonable suspicion to expand the scope and length of the traffic stop?

II. Did the trial court err in finding the search of the trunk was supported by probable cause?

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, our standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). "[T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).[2]

[2] Tindall articulated the standard of review subsequently repeated in Wright. However, Tindall's ensuing discussion included a footnote explaining that this standard of review requires a two-part analysis: (1) whether the record supports the trial court's factual findings and (2) whether those factual findings establish reasonable suspicion or probable cause. See Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5 ("While we acknowledge that we review under the deferential 'any evidence' standard, this Court still must review the record to determine if the trial judge's ultimate determination is

I. Scope and Length of the Stop

Morris argues the trial court erred in failing to suppress the drugs because (1) Officer Vinesett's testimony he smelled burnt marijuana during the detention lacks credibility and (2) Officer Vinesett unlawfully extended the traffic stop.

Upon a lawful traffic stop, an officer "may order the driver to exit the vehicle . . . [,] request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citations omitted). However, a lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005); see also Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). The extension of a lawful traffic stop is permitted if (1) the encounter becomes consensual or (2) the officer has a reasonable, articulable suspicion of other illegal activity. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion requires "'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). It "is something more than an inchoate and unparticularized suspicion or hunch." State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). Therefore, in determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. Id.

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supported by the evidence. In short, we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall." (citation omitted)).

Initially, we must reject Morris's first argument. Regardless of whether we believe Officer Vinesett's testimony that he smelled marijuana, the trial court found that testimony to be credible. The appellate court's task in reviewing the trial court's factual findings on a Fourth Amendment issue is simply to determine whether any evidence supports the trial court's findings. See State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("This Court's scope of review is determined by our State constitution which limits our scope of review in law cases to the correction of errors of law. In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." (citations omitted)).

We must also reject Morris's second argument. Under the facts of this case as found by the trial court, we must affirm the trial court's holding reasonable suspicion existed to extend the duration and scope of the stop for a reasonable investigation of drug activity. Officer Vinesett testified he smelled marijuana as he approached the car, and after requesting Morris's license and registration, he learned Morris was not an authorized driver. Cf. State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct. App. 2003) (finding that an officer's detection of the odor of alcohol during a traffic stop justified the extension of the stop based on the reasonable suspicion that open containers were located in the vehicle) (per curiam); see also State v. Odom, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct. App. 2007) (indicating that the sight of Swisher Sweet cigars, the strong odor of marijuana, the defendant's admission he smoked marijuana earlier in the day, and the presence of a gun holster in the back seat amounted to reasonable suspicion of the existence of drugs). Upon stopping the Ford, moreover, Officer Vinesett had the authority to order Morris out of the car, and when he did so, he observed the hollow blunts and loose tobacco, which in his experience indicated drug use. See Pichardo, 367 S.C. at 98, 623 S.E.2d at 847-48 (providing that upon a lawful traffic stop, an officer may order the driver out of the vehicle, "request a driver's license and vehicle registration, run a computer check, and issue a citation"). Thus, Officer Vinesett properly gained reasonable suspicion

Morris and Nichols were using drugs, and he was permitted to take reasonable steps to confirm or dispel this suspicion. See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (providing that during a traffic stop, "the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity"; "[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper"; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011). He did so by asking both Morris and Nichols a series of questions, receiving consent to search their persons, and calling in a drug dog.

II. The Search

Morris next argues the trial court erred in declining to suppress the drug evidence as fruit of an illegal search. Morris does not contest Officer Vinesett's search of the passenger compartment, but he argues Officer Vinesett lacked probable cause to search the trunk. We disagree.

The Fourth Amendment prohibits unreasonable searches, and a warrantless search generally is unreasonable. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, the ready mobility of and the lessened expectation of privacy in automobiles endorse an exception to that rule based upon probable cause. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). A probable cause analysis involves the use of a fact-based, objective perspective that requires more than reasonable suspicion of criminal activity:

> Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of

> reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.

State v. Brown, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010) (internal citations omitted).

"The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993). Therefore, "[i]f probable cause justifies the [warrantless] search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." United States v. Ross, 456 U.S. 798, 825 (1982); see also State v. Brannon, 347 S.C. 85, 94, 552 S.E.2d 773, 777 (Ct. App. 2001) (Anderson, J., concurring in result only) ("Under the automobile exception, if probable cause exists to justify the warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.").

In this case, the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, "He had probable cause to search." In light of the summary nature of this ruling, we must determine whether the same factual findings that supported the finding of reasonable suspicion also support a determination of probable cause. Emphasizing our deferential standard of review, we determine they do.

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently

hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

CONCLUSION

For the aforementioned reasons, the ruling of the trial court is

AFFIRMED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sheila R., Appellant,

v.

David R., Respondent.

Appeal From Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 4900
Heard October 3, 2011 – Filed November 2, 2011

AFFIRMED

Charles M. Black, Jr., Matthew E. Steinmetz, Max N. Picklesimer, and Carrie A. Warner, all of Columbia, for Appellant.

J. Falkner Wilkes, of Greenville, for Respondent.

Debra L. Walsh, of Greenville, for Guardian ad Litem.

CURETON, A.J.: After the parties' divorce, the family court entered an order awarding custody of the parties' minor child, S.R., to David R. (Father) but provisionally placing her with Sheila R. (Mother). The family court later awarded Father "primary physical placement" as well as legal custody. Mother appeals, arguing the family court erred in (1) using its own standard to determine who should receive custody of S.R. and failing to conduct a best-interests analysis when it subsequently granted Father full custody and (2) failing to appoint a guardian ad litem (Guardian) or consider S.R.'s wishes when determining custody. On appeal, Mother also argues the family court lacked subject matter jurisdiction over the custody issue at the time of the issuance of its 2009 order. We affirm.

FACTS

Mother and Father married in 1987 and had two daughters. H.R. was born June 5, 1990, and S.R. was born July 20, 1995. In July 2005, Mother filed a complaint seeking separate support and maintenance, equitable apportionment of the marital estate, and custody of both children. Father answered and counterclaimed for the same relief but also petitioned the family court to appoint a Guardian for the children and to require Mother to undergo a psychological examination.

In September 2005, the family court entered a temporary order appointing Debra L. Walsh as the children's Guardian, ordering the parties and children to undergo psychological evaluations by Dr. Craig Horne, temporarily placing both children with Mother and allowing Father visitation, and permitting the parties to engage in discovery. In a subsequent order, the family court removed H.R. from Mother's custody and placed her with Father.

In September 2006, the Guardian served her report, which cited more than one hundred resources and spanned seventy-six pages. The Guardian recorded her observations about both parents and both children in great detail. The Guardian did not recommend either parent receive custody of the

children but instead expressed concern that both parents "demonstrate[d] signs of unresolved anger[] and an inability to accept full responsibility for their own actions." According to the Guardian, Father regarded himself as superior to Mother, and Mother refused to address unresolved issues from her childhood that appeared to affect her parenting. Each parent shared with the children inappropriate information about the ongoing conflict and tended to make the non-resident child feel uncomfortable in his or her home. While Father demonstrated an even and patient temperament, he undertook to manipulate those around him by controlling the information available to the Guardian and others and may have engaged in some physical confrontations with the children. While Mother orally expressed a desire to raise both children, she sought custody of only S.R., in whom she encouraged infantile behaviors. In addition, Mother expressed interest in Father's severing contact with S.R. as Mother had done with H.R. Despite making extensive recommendations concerning the parties' and children's future paths, the Guardian's sole recommendation concerning custody was that the children "should be in the custody of the parent most able to provide them with an environment that allows them to be physically and emotionally safe, and allowed to grow in to fully adult young women."

The case was tried over five days in September 2007. The family court devoted more than ten pages of its final order to factual findings concerning the parties', particularly Mother's, disturbing behavior, with subsections devoted to the observations of Dr. Horne and the family court. This order, dated November 29, 2007, granted Mother a divorce on the ground of one year's continuous separation, divided the costs of suit between the parties, and equitably apportioned the marital estate. It established a detailed visitation schedule, obligated Father to pay Mother both alimony and child support, and relieved the Guardian from further responsibilities. Notably with regard to the issue of custody, the family court recognized Mother had been the children's primary caretaker prior to the separation, was an involved parent, exhibited adequate day-to-day parenting skills, and clearly loved the children. Nonetheless, the family court found Mother was "not fit to have custody of the children" due to numerous demonstrations that she lacked appropriate

parental judgment in matters involving Father and failed to recognize the negative impact her behavior had on the children.

As a result of these complicated findings, the family court awarded Father sole custody of both children but placed S.R. physically with Mother. In addition, the family court reserved jurisdiction over the issue of S.R.'s custody for a period of eighteen months,[1] adopting a "wait-and-see" approach. It further required Mother and S.R. to complete Parent and Child Transition classes and all parties to undergo family counseling.

Both parties filed and argued motions for reconsideration. On July 8, 2008, the family court entered an order amending Father's financial obligations to Mother, expanding Father's visitation with S.R., establishing sibling visitation between H.R. and S.R., and denying all other relief. Both parties appealed from the November 2007 and July 2008 orders.

Subsequently, each party filed a complaint for contempt against the other. Six of Father's eight causes of action related to Mother's alleged violations of the family court's orders concerning custody and visitation. Mother's causes of action related to property issues.

On June 5, 2009, following a trial, the family court entered an order finding both parties in contempt of court, awarding Father primary physical placement of S.R. effective immediately, and relinquishing its reservation of

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[1] The order specified:

> The Court reserves its jurisdiction to fully merge custody and placement with [Father], or take other necessary actions in any subsequent enforcement action on this issue within eighteen (18) months of the filing date of this order. In any such action the burden of proof shall be on [Mother] to show that she has acted properly and has shown the high level of respect for the father/daughter relationship intended under this provision.

jurisdiction over S.R.'s custody.[2] The family court found Mother used S.R.'s physical placement with her to prevent S.R. from engaging in the team sports in which Father had enrolled her and to stop the sibling visitation ordered by the family court. Furthermore, the family court found Mother's inflexibility and refusal to cooperate undermined Father's healthcare decisions as legal custodian. Specifically, the order noted Mother refused to ensure S.R. cared for her teeth and pursued a costly and questionably beneficial growth hormone treatment for S.R. over Father's objection. According to the family court, Mother's behavior constituted a "willful and wanton violation of the Final Order and was done out of disregard for the Court's order and Father's authority." Finally, the family court found Mother failed to comply, albeit not willfully, with requirements that she deliver S.R. timely for visitation with Father. The family court reasoned giving Father both sole custody and primary physical placement was in S.R.'s best interest:

> This action is made absolutely necessary because of the on-going conflict between the Mother and the Father, who has legal custody, about the medical necessity for growth hormone treatment for the child; and the lack of cooperation of the Mother by not complying with the child's extra-curricular activity schedules related to the swimming classes and the cross country running team that she was enrolled in by the Father.

The family court also re-appointed Walsh as Guardian to conduct further investigation into "whether the growth hormone treatment sought by Mother

[2] Although the family court entered its order transferring placement after the eighteen-month reservation period expired, the trial of the issues addressed in that order occurred on April 21, 2009, which was within the reservation period.

on behalf of [S.R. was] necessary and in the best interest of the child." Mother appealed from this order as well.[3]

STANDARD OF REVIEW

When reviewing a decision by the family court, the appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Lewis v. Lewis, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). This broad scope of review does not require the appellate court to disregard the findings of the family court. Id. Neither is the appellate court required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Latimer v. Farmer, 360 S.C. 375, 380, 602 S.E.2d 32, 34 (2004). "Because the family court is in a superior position to judge the witnesses' demeanor and veracity, its findings should be given broad discretion." Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003).

LAW/ANALYSIS

I. CUSTODY AND BEST INTERESTS OF S.R.

Mother first asserts the family court erred in using its own standard to determine who should receive custody of S.R. and in failing to take S.R.'s best interests into consideration when it subsequently granted Father full custody. We disagree.

In all child custody controversies, the controlling considerations are the child's welfare and best interests. Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978). In determining custody, the family court "must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." Woodall v. Woodall, 322 S.C. 7, 11, 471

[3] The issues on appeal concern only S.R. because any custody issues relating to H.R. were mooted when she turned eighteen in June 2008.

S.E.2d 154, 157 (1996). Thus, when determining which parent shall receive custody of a child, the family court "must weigh all the conflicting rules and presumptions together with all of the circumstances of each particular case, and all relevant factors must be taken into consideration." Ford v. Ford, 242 S.C. 344, 351, 130 S.E.2d 916, 921 (1963). In other words, "the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." Parris v. Parris, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995).

We affirm the family court's award to Father of full physical and legal custody of S.R., because we believe it is clear the family court considered the peculiar circumstances before it and based its decision upon a carefully conducted best-interests analysis. See Cook, 271 S.C. at 140, 245 S.E.2d at 614 (recognizing the child's welfare and best interests are paramount in deciding custody); Parris, 319 S.C. at 310, 460 S.E.2d at 572 (requiring the family court deciding custody to evaluate the totality of the circumstances); Housand v. Housand, 333 S.C. 397, 400, 509 S.E.2d 827, 829 (Ct. App. 1998) (stating party seeking change in custody must demonstrate "sufficient facts . . . to warrant the conclusion that the best interest of the child will be served by the change").

In both the June 2009 order and the November 2007 order underlying it, the family court painstakingly recorded explicit factual findings related to S.R.'s best interests. The June 2009 order cited Mother's refusal to transport S.R. to the sporting activities in which Father had enrolled her, refusal to cooperate with Father in caring for S.R.'s health, and inability to drop S.R. off timely according to the court-ordered visitation schedule. Concluding its factual findings, the family court found awarding Father physical placement as well as sole legal custody of S.R. was in S.R.'s best interest, was "absolutely necessary," and would provide an immediate remedy to the child-related conflicts between Mother and Father. The record fully supports both of these findings and the decision to award Father full custody of S.R.

We recognize there is some incongruity in the family court's November 2007 order awarding placement of S.R. to Mother in spite of its extensive

findings regarding Mother's unfitness and inability to foster a relationship between S.R. and Father, as well as her otherwise poor judgment. Clearly, the family court would have been fully justified in not placing S.R. with Mother initially. In its November 2007 order, the family court described numerous disturbing incidents, including Mother's unnecessary calls to law enforcement during Father's visits (such as the call during S.R.'s tenth birthday party seeking removal of Father's mother and another call during Father's visitation with S.R. seeking to have Father and his brother removed from her home), Mother's report to the Guardian that Father was "on drugs,"[4] and Mother's employment of celebratory signs and gifts to curry S.R.'s favor. The family court cited with concern Dr. Horne's opinion that Mother and S.R. were in danger of developing an "enmeshed" relationship in which neither parent nor child could fully function independently of the other. All of these findings militate in favor of limiting S.R.'s exposure to Mother.[5] Nevertheless, the court in this same order adopted a "wait and see" approach to the "custody of [S.R.]" and provided for counseling for all the parties for eighteen months.

In view of these facts, the June 2009 order simply announced the family court's well-considered conclusion that Mother continued to exhibit a pattern of inflexibility and uncooperativeness in spite of the specific instructions and conditions the family court had imposed on S.R.'s placement with her. Accordingly, we find the family court's June 2009 grant to Father of physical and legal custody of S.R. simply confirmed that the original arrangement, which gave Mother physical placement of S.R. but Father legal custody of her, was not workable.

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[4] In response to this allegation, the Guardian required Father to undergo a hair strand drug test, which revealed no use of illegal drugs.

[5] One of the family court's findings states, "[Father]'s custody of [S.R.] is subject to placement continuing with [Mother] (for school assignment and emergency purposes)." We interpret this finding to mean that the family court considered the impact on S.R. of removing her from her present school setting.

For the reasons discussed above, we find unpersuasive Mother's argument that the family court imposed its own standard on the custody determination, ignoring S.R.'s best interests and effectively creating an impermissible local rule. The family court was required to weigh "all the conflicting rules and presumptions . . . together with all of the circumstances of each particular case" and to consider "all relevant factors." Ford, 242 S.C. at 351, 130 S.E.2d at 921. The facts identified by the family court, as well as others set forth in the Guardian's exhaustive report, reveal a complicated power struggle between Mother and Father, fueled by their religious and social views and occasionally punctuated by acts of personal antagonism. We find the family court conducted a thorough best-interests analysis, considered the totality of the circumstances before it, and properly awarded sole custody of S.R. to Father, with liberal visitation to Mother.

II. GUARDIAN/CHILD'S WISHES

Next, Mother asserts the family court erred in failing to appoint a Guardian or consider S.R.'s wishes when determining custody. We disagree.

This issue pertains only to the family court's June 2009 order, which mentions neither a Guardian's custody recommendation nor S.R.'s wishes.[6] Moreover, the record does not contain a transcript of the hearing upon which that order was based, and Mother's 2009 complaint for contempt does not raise this issue. Nevertheless, section 63-15-30 of the South Carolina Code (2010) requires the family court to consider "the child's reasonable preference for custody . . . based upon the child's age, experience, maturity, judgment, and ability to express a preference." "The significance to be attached to the wishes of [a child] in a custody dispute depends upon the age of the child[]

[6] In its November 2007 order, the family court discharged the Guardian. The order on reconsideration did not alter the custody arrangement. In its June 2009 order, the family court re-appointed the Guardian for the limited purpose of investigating whether S.R. might benefit from the growth hormone treatment proposed by Mother.

and the attendant circumstances." Brown v. Brown, 362 S.C. 85, 93, 606 S.E.2d 785, 789 (Ct. App. 2004).

The family court did not abuse its discretion in failing to appoint a Guardian or consider S.R.'s preference as to custody. With regard to S.R.'s wishes, S.R. was nearly fourteen years old at the time of the June 2009 order and, therefore, old enough to form and communicate her own desires regarding custody. However, we find her age and circumstances weighed heavily against considering her preference. After conducting a thorough and detailed investigation prior to the 2007 hearing, the Guardian reported to the family court that Mother "[i]ndulged, petted and infantilized" S.R., while simultaneously subjecting S.R. to enormous pressure to view the parties as adversaries and protect Mother. The Guardian further noted S.R. responded to Mother by becoming inappropriately clingy. Both Dr. Horne and another witness who interviewed the parties and their children expressed concern that the relationship between Mother and S.R. was becoming enmeshed. Dr. Horne specifically recommended that the family court assign S.R.'s custody preference no weight. In view of this evidence, we conclude that under the particular circumstances present in this case, the family court did not err in failing to consider S.R.'s preference as to custody.

No basis existed for appointing a Guardian. The family court did not make the requisite finding that would have enabled it to involve a Guardian. See S.C. Code Ann. § 63-3-810(A) (2010) (permitting appointment of a Guardian only after a finding that the family court would "likely not be fully informed about the facts of the case and there is a substantial dispute which necessitates a [G]uardian"). On appeal, Mother argues a "substantial dispute" existed concerning S.R.'s health and care. The record reflects a substantial dispute existed between Mother and Father concerning whose healthcare decisions should prevail, in spite of the family court's order seating legal authority with Father. The record does not suggest any reason existed for the family court to believe it would not likely be fully informed about the case without the further assistance of a Guardian. Accordingly, the family court did not err in failing to appoint a Guardian before placing S.R. with Father.

III. SUBJECT MATTER JURISDICTION

At oral argument, Mother contended for the first time that the family court lacked subject matter jurisdiction to modify custody of S.R. in its June 2009 order. We disagree.

"The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006). "Subject matter jurisdiction is the power of a court to hear cases in the general class to which the proceedings in question belong." Altman v. Griffith, 372 S.C. 388, 396 n.2, 642 S.E.2d 619, 623 n.2 (Ct. App. 2007) (citing Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). The family court is a creature of statute, and, as such, it is a court of limited jurisdiction. State v. Graham, 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000). The family court has jurisdiction over child custody disputes. S.C. Code Ann. §§ 63-3-510(A)(1)(e), -530(A)(30) (2010).

Mother argued that, because the family court improperly placed its reservation of jurisdiction in the portion of the November 2007 order devoted to factual findings and not in the decree portion, the reservation was inoperative. Even if this argument were persuasive, it would not affect the family court's statutory authority to hear and decide disputes over child custody. See §§ 63-3-510(A)(1)(e), -530(A)(30) (giving jurisdiction over child custody matters to the family court). Accordingly, the family court did not lack subject matter jurisdiction over any child custody determinations in 2009.

CONCLUSION

We find the family court conducted the proper best-interests analysis prior to awarding Father both legal and physical custody of S.R. We further find the family court did not err in failing to appoint a Guardian or consider S.R.'s wishes when determining custody and placement. Finally, we find the

family court did not lack subject matter jurisdiction over S.R.'s custody. Accordingly, the decision of the family court is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kareen Donyell Lee, Petitioner,

v.

State of South Carolina, Respondent.

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

Opinion No. 4901
Heard October 5, 2011 – Filed November 2, 2011

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Petitioner.

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

KONDUROS, J.: In this post-conviction relief (PCR) action, Kareen Donyell Lee contends the PCR court erred in not finding plea counsel ineffective for failing to have him evaluated for competency before his guilty plea when a competency evaluation conducted approximately six months after his plea revealed he had an intelligence quotient (IQ) of 61 and was not competent to stand trial. We affirm.

FACTS

In June 2005, Lee pled guilty to two counts of breaking into a motor vehicle, unlawful carrying of a pistol, two counts of attempted second-degree burglary, and two counts of second-degree burglary. He was twenty-two years old at the time of the guilty pleas. Lee pled guilty at the same time as two other defendants in unrelated cases. Lee answered last of the three in response to the majority of the plea court's questions and responded similarly to the other two with "Yes, sir" or "No, sir" to most questions. The plea court asked Lee to speak up several times throughout the proceeding. When the plea court asked Lee why he was not speaking up, he responded that he was a "soft spoken person." Lee received concurrent sentences of five years' imprisonment for each charge of breaking into a motor vehicle, one year for unlawful carrying of a pistol, fifteen years for each attempted burglary charge, and fifteen years for each second-degree burglary charge. He did not appeal his guilty pleas and sentences.

At the time of the pleas, Lee was on probation. The guilty pleas were a violation of probation, necessitating a probation violation hearing. Prior to the hearing, a judge ordered a competency evaluation for Lee because his probation violation counsel reported difficulty in communicating. In Lee's December 2005 forensic evaluation conducted by the South Carolina Department of Disabilities and Special Needs (DDSN), he was found not competent to stand trial.

On May 2, 2006, Lee filed a PCR application. Lee's December 2005 forensic evaluation was offered at the PCR hearing. The evaluation indicated

Lee scored 61 on a 1996 IQ test. He had completed high school and obtained a driver's permit, but he had no stable employment history. Records cited in the evaluation revealed Lee had once been hospitalized for behavioral problems, received other mental health services for about five months, was diagnosed with mild mental retardation and disruptive behavior disorder, and had a significant history of setting fires and engaging in cruelty to animals. The evaluation stated that Lee was evaluated in 2002 by the Department of Mental Health to determine his capacity to stand trial. According to the 2005 evaluation, in 2002 the doctor found evidence of mental retardation but issued no opinion on competency and referred Lee to DDSN for further evaluation. However, the 2005 evaluation noted that the solicitor's office notified DDSN in 2004 that it was not going to pursue further evaluation through DDSN.

The 2005 evaluation further stated Lee demonstrated a basic understanding of the charges that resulted in his probation and those he committed while on probation. He knew crimes vary in seriousness and punishment is commensurate. He defined guilty as "you did it" but was unsure of defense counsel's role. While Lee understood the solicitor was an antagonistic party, he did not seem to understand the requirement that the solicitor prove guilt. The evaluation concluded Lee was not able to communicate effectively with counsel and "the fact that he would not be able to provide adequate assistance in his defense are sufficient grounds for issuing an opinion that he is not at this time competent to stand trial."

The psychologist who conducted the evaluation testified at the PCR hearing. He said Lee may have been found incompetent in the past, he had received mental health treatment as early as 2000, and his records from school and DDSN indicated a history of mental retardation. Specifically, the psychologist stated Lee did not understand the plea bargain concept. The psychologist believed Lee's incompetence was caused by mental retardation which would have been present in June 2005, the time of the guilty pleas. However, the psychologist admitted he had only met with Lee one time and acknowledged his report stated Lee would not be competent for a hearing held sometime after December 2005.

Lee's aunt testified he lived with her for five years after his mother died. His aunt said Lee began to collect social security checks for a disability based on his mental status when he turned eighteen years old. His aunt averred she informed plea counsel Lee had a disability and was "not supposed to" make decisions without her or Lee's brother. She said plea counsel agreed to inform her of Lee's court date but plea counsel failed to do so. She stated that in the same conversation, plea counsel informed her she may be going on maternity leave. His aunt testified she visited Lee in jail the week before he pled guilty and he never mentioned his upcoming court date. She agreed Lee had entered guilty pleas in the past following earlier evaluations, but she was present for those pleas. Additionally, she testified he underwent a mental evaluation in 2002 through the court system. Lee's aunt further testified that Lee was a follower. She explained: "[I]f it sounds like he should say yes, then he would say yes . . . . [I]f it sounds like he should say no, then he will say no."

Plea counsel testified she met with Lee at least three times and he appeared to understand a discussion about pleading guilty. Plea counsel said when she has clients facing serious charges, she makes them explain their situation so she knows they understand. In Lee's case, the explanation he gave did not raise any "red flags." Plea counsel did not recall the discussion with Lee's aunt, and she stated no one informed her of Lee's prior mental evaluations or disability checks. Plea counsel confirmed she was pregnant around the time of Lee's case and did take maternity leave for a few months. Plea counsel said Lee never told her of any prior mental health treatment. Plea counsel testified:

> One of my standard questions I ask defendants even before we plea is do you have any type of mental disability, have you ever been treated for any type of mental disability in the past? His response to that was no. That was before the plea.

> He never informed me of that during any of the previous meetings. . . . If he doesn't tell me that he's got a problem, I don't see a problem in talking with him and he understands what I'm speaking with him about and indicates that he understands, I'm not a mind reader. I'm not able to find that out.

She admitted if Lee had told her he was on disability, she would have investigated, but she stated she had "no basis to initiate any type of investigation."

The PCR court found Lee failed to prove he was incompetent on the day of his guilty plea. The PCR court noted Lee told the plea court he did not suffer from any mental condition. Additionally, the PCR court found persuasive the psychologist's admission that the evaluation could not speak to Lee's competency at the time of the plea hearing. Further, the PCR court noted Lee had several prior convictions in 2000, 2001, 2003, and 2004, but he presented no evidence that he had been evaluated in connection with those plea hearings. The PCR court found plea counsel's testimony was "extremely credible" and Lee failed to prove her ineffective. The PCR court found plea counsel met several times with Lee, was never informed of his mental health history, and was "not required to be clairvoyant." The PCR court denied Lee's application. Lee petitioned this court for writ of certiorari, which we granted. This appeal followed.

STANDARD OF REVIEW

An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

LAW/ANALYSIS

Lee asserts plea counsel was ineffective in failing to obtain a competency evaluation of him prior to his guilty pleas. We disagree.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687-88, 692 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 688; Cherry, 300 S.C. at 117, 386 S.E.2d at 625; see also Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50-51 (2004) ("In order to find that petitioner's trial counsel was ineffective for refusing to request a Blair[1] hearing on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings."). To show "prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, 'the [petitioner] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea.'" Matthews, 358 S.C. at 459, 596 S.E.2d at 50 (alterations by court) (quoting Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)).

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. Jeter, 308 S.C. at 232, 417 S.E.2d at 595. To prevail in a PCR action, the petitioner must prove by a preponderance of the evidence he was incompetent when he entered his guilty plea. Matthews, 358 S.C. at 458-59, 596 S.E.2d at 51; see also Rule 71.1(e), SCRCP. Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal. Jeter, 308 S.C. at 232, 417 S.E.2d at 596. "The test of competency to enter a plea is the same as required to stand trial." Id. "The accused must have sufficient

[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." Id.

In Matthews, 358 S.C. at 459, 596 S.E.2d at 51, a psychiatrist, in describing petitioner's mental condition, referred to petitioner's quick, nonsensical responses to questions. When the psychiatrist "asked petitioner where he was, he gave the quick, basic response of 'here.' When asked if he was in a prison, cafeteria, or zoo, petitioner responded, 'zoo.' When asked what his name was, petitioner responded, 'me.'" Id. at 459-60, 596 S.E.2d at 51. The supreme court affirmed the PCR court's finding counsel ineffective, holding that through the psychiatrist's testimony, "petitioner clearly established by a preponderance of the evidence that he was incompetent at the time he entered his guilty plea. Consequently, petitioner's trial counsel was deficient for failing to request a Blair hearing so that the court could examine petitioner's fitness to stand trial." Id. at 460, 596 S.E.2d at 51. The supreme court held "trial counsel's failure to request a Blair hearing prejudiced petitioner under the Jeter standard because there was, at minimum, a 'reasonable probability' that petitioner was incompetent at the time of his guilty plea." Id.

In Jeter, 308 S.C at 233, 417 S.E.2d at 596, the court found "[t]he evidence addressed at the PCR hearing was insufficient to show deficient performance on the part of [plea] counsel." Plea counsel discussed petitioner's case and his options with petitioner on several occasions prior to his plea. Id. The supreme court found plea counsel reasonably relied on his own perceptions, particularly because counsel was familiar with petitioner from previous representation. Id. The family who testified at the PCR hearing never raised any concerns regarding petitioner's competency to plea counsel. Id. The supreme court affirmed the PCR's court determination that plea counsel's failure to request "a psychiatric evaluation was not outside the range of reasonable professional assistance." Id.

Matthews and Jeter can be reconciled by our standard of review for PCR appeals. In each case, the supreme court found evidence to support the

PCR court's findings and thus affirmed the PCR court. Likewise, considering the PCR court's findings of fact, this case is more aligned with Jeter, as plea counsel testified that Lee's answers did not raise any suspicions. Even the psychiatrist testified Lee had a basic understanding of his charges and to some degree the criminal process.

In this case, under our standard of review, we are constrained to affirm the PCR court's decision.[2] Some evidence in the record supports the PCR court's findings. Although the PCR court found Lee did not present evidence of incompetence at the time of plea, the psychiatrist's testimony that Lee's mental status dated back to when he was in school and he had a documented history of mental retardation was sufficient to show a reasonable probability that he was incompetent at the time of the plea. However, Lee also had to demonstrate plea counsel's performance was deficient. Plea counsel could not be deficient if she had no indication of Lee's mental status.[3] Although

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[2] We do not know Lee's adaptive functioning and whether plea counsel should have recognized a cognitive issue from her conversations with him, as in Matthews. We encourage defense counsel to always inquire whether a defendant receives a Supplemental Security Income (SSI) check or a Social Security Administration (SSA) check as a threshold determination. While our holding is appropriate under our standard of review, a man with a questionable IQ and a history with mental health and mental retardation issues pled guilty on several occasions with multiple lawyers without the benefit of a Blair hearing.

[3] At oral argument, Lee argued plea counsel should have been alerted to his mental status due to a prior evaluation. The record contains no documentation of the evaluation. It does contain Lee's aunt's statement that an evaluation occurred, the psychologist's reference to it in his report and his testimony, and PCR counsel's questioning plea counsel if she was aware Lee was evaluated in 2002 regarding his capacity to stand trial in another case. PCR counsel stated that the recommendation from the examination was to refer Lee to DDSN for further evaluation as to his competency. However, PCR counsel posited that evaluation did not occur "because [the solicitor's office] informed DDSN via letter that they were not going to pursue further

Lee's aunt testified she informed plea counsel of Lee's mental status, plea counsel testified she did not recall a conversation with her. Further, plea counsel testified Lee indicated he had no prior mental conditions and none of his answers led her to suspect otherwise. We are required to defer to the PCR court's findings of credibility, and the PCR court found plea counsel "extremely credible." Accordingly, the PCR court's order is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

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evaluation through DDSN." Plea counsel responded that she did not know anything about the evaluation and what had occurred afterwards.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carol M. Kimmer, Personal Representative of the Estate of Richard Kimmer, deceased, Respondent,

v.

Philip E. Wright, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4902
Heard March 23, 2011 – Filed November 2, 2011

REVERSED AND REMANDED

Warren C. Powell, Jr., of Columbia, for Appellant.

Thomas H. Pope, III, of Newberry, for Respondent.

HUFF, J.: Philip Wright appeals the trial court's order granting partial summary judgment to Carol M. Kimmer, as personal representative of the

estate of Richard Kimmer,[1] in which the court held the statute of limitations had not run on Kimmer's legal malpractice action. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On January 29, 1999, Kimmer was injured in a motor vehicle accident as he was driving to work for his employer, Murata. He hired attorney Philip Wright to represent him. Without notice to Murata, Wright settled Kimmer's claims with the at-fault driver's insurance carrier for his policy limit of $15,000 on June 16, 1999. Kimmer filed a Form 50 on June 18, 1999, and an Amended Form 50 on May 29, 2002, seeking workers' compensation benefits. Murata filed its Form 51 denying Kimmer's claim and asserting as a defense the third party action had been settled without consent. In a meeting at Wright's office, Wright informed Kimmer about his mistake in settling the third party claim and advised him to get another attorney due to the potential for Kimmer to file a claim against him. Wright followed up this conversation with a letter dated February 1, 2000. On that same date Kimmer signed a waiver of conflict recognizing he might have a right to make a claim against Wright due to his representation in the workers' compensation action but agreeing to let Wright continue to represent him in the personal injury case. Kimmer terminated Wright's representation of him on February 24, 2000.

In an order dated July 31, 2003, the single commissioner found Kimmer's injuries compensable because Murata provided him with a car allowance and mileage. However, the single commissioner denied Kimmer's claim, concluding the settlement of the third party claim, without notice to Murata, constituted an election of remedies and barred the workers' compensation claim. The Appellate Panel affirmed and adopted the order of the single commissioner. In its amended order, the circuit court reversed the order of the Appellate Panel, finding Murata suffered no prejudice as a result of the settlement without notice. It held Kimmer was totally and permanently disabled and was entitled to an award of total and permanent disability, less an offset for the third party settlement. This court reversed the order of the

[1] Richard Kimmer passed away March 2, 2008, while this case was pending. For ease of reference, the name "Kimmer" will refer interchangeably to either Richard Kimmer, the personal representative, or to both parties collectively.

circuit court and reinstated the order of the Appellate Panel. Kimmer v. Murata of Am., 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006), cert. denied, (Oct. 18, 2007).

While the appeal was proceeding in the workers' compensation case, Wright and Kimmer entered into a tolling agreement on October 30, 2003, which provided the time period between the date of the agreement and its termination at no later than November 1, 2004, would not be included in determining a statute of limitations or laches defense. However, the agreement provided it would not be deemed to revive any claim that was already barred on that date. Kimmer brought this action on October 14, 2004. On May 13, 2005, Wright filed an amended answer asserting Kimmer's legal malpractice action was barred by the statute of limitations.

On June 20, 2005, the Honorable S. Jackson Kimball denied Wright's motion for summary judgment on the statute of limitations defense. The judge explained that the adverse ruling of the Workers' Compensation Commission would be the similar "trigger" event as the adverse jury verdict that triggered the running of the statute of limitations in Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The court held, "This Court believes that there is at least an issue of fact in the present case as to when [Kimmer's] awareness of the possibility of an error by [Wright] became sufficient to put him on notice that he actually had an existing legal malpractice claim against [Wright] as opposed to being told merely that he 'may have' a claim. The resolution of that possibility involved legal issues upon which, to this point, the Commission and the Circuit Court disagree." Judge Kimball granted a stay of the legal malpractice action until the appeal of the workers' compensation case was completed.

After the supreme court denied certiorari of this court's decision in the workers' compensation case, both parties moved for summary judgment in the legal malpractice action. The motions were heard before the Honorable John C. Hayes. While Judge Hayes noted the facts suggested Kimmer had notice of a potential claim before the Commission's adverse decision, he held he was bound by Judge Kimball's determination that the statute of limitations was triggered by the Commission's order denying benefits. This appeal followed.

LAW/ANALYSIS

A. Law of the Case

Wright argues Judge Hayes erred in holding Judge Kimball's order was the law of the case. Kimmer conceded this issue in his brief. "A denial of summary judgment does not establish the law of the case and is not directly appealable." In re Rabens, 386 S.C. 469, 473, 688 S.E.2d 602, 604 (Ct. App. 2010). Accordingly, we find Judge Hayes erred in this ruling.

B. Statute of Limitations

Wright argues the trial court erred in holding as a matter of law the statute of limitations had not run on Kimmer's malpractice claim. We agree.

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); see also Berry v. McLeod, 328 S.C. 435, 444, 492 S.E.2d 794, 799 (Ct. App. 1997) (finding section 15-3-530(5) provides a three-year statute of limitations for legal malpractice actions). The discovery rule applies in this action. See Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 632-33, 682 S.E.2d 1, 4 (Ct. App. 2009) (applying discovery rule in legal malpractice action). Under the discovery rule, "the three-year clock starts ticking on the 'date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.'" Martin v. Companion Healthcare Corp., 357 S.C. 570, 575-76, 593 S.E.2d 624, 627 (Ct. App. 2004) (quoting Bayle v. S.C. Dep't. of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001)); see also S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). The supreme court explained reasonable diligence means

> simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.** Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.

Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (citation omitted).

Kimmer relies on Epstein to support her position the statute of limitations in a legal malpractice case does not start to run until an adverse judgment in the underlying action. We find this reliance is misplaced. In Epstein the supreme court refused to adopt the continuous representation rule, which holds the statute of limitations is tolled during the period an attorney continues to represent the client on the same matter out of which the alleged malpractice arose. Id. 363 S.C. at 380, 610 S.E.2d at 820. The supreme court similarly rejected Epstein's argument the statute of limitations should not be deemed to have run until the conclusion of the appeal of the underlying action because it was not until that date upon which he suffered "legal damages." Id. Instead, the court held the statute of limitations had begun to run by the conclusion of the trial in the underlying action. Id. at 382, 610 S.E.2d at 821. The court cautioned:

> We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the [statute of limitations] begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest.

Id. at 383 n.8, at 610 S.E.2d at 821 n.8 (emphasis added).

Thus, the court did not establish a bright-line test the statute of limitations cannot begin to run until the jury's adverse verdict, but held, in that particular case, the latest it began to run was the conclusion of the trial. See also Kelly, 383 S.C. at 637, 682 S.E.2d at 6 (holding statute of limitations on Kelly's legal malpractice action began to run well before Kelly was dismissed from underlying action).

Kimmer asserts the statute of limitations was not triggered until the Commission's adverse ruling because until then he could not have established an injury that was proximately caused by Wright's negligence. He asserts until then there was a possibility the Commission would hold his claim was not compensable because it was not work-related or that the third-party settlement did not bar his claim. These issues could have been litigated in the legal malpractice action if necessary. See Doe v. Howe, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005) (holding as to damages, the plaintiff must show he most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice and the question of the success of the underlying claim, if suit had been brought, is a question of law). In a case cited by Epstein, the Indiana Court of Appeals rejected such a contention and held the statute of limitations in a legal malpractice claim began to run when the attorney informed the clients that he had failed to timely file a medical malpractice claim and not when summary judgment was granted on the declaratory judgment action. Basinger v. Sullivan, 540 N.E.2d 91, 93-94 (Ind. Ct. App. 1989). The court explained:

> Where legal malpractice is claimed for an attorney's failure to commence an action within the period of limitations it is generally held that one of the necessary ultimate proofs for a recovery of damages is that a recovery would have been had if the suit had been properly brought. Can it then be contended that the limitation period does not commence to run on the attorney's negligence until plaintiff's right to recovery on the original claim has been judicially

> established? Clearly, the answer is no. To permit such reasoning would for all practical purposes preclude the statute from ever commencing to run.

Id. at 93 (citations omitted).

Further, we find Kimmer's assertion does not comply with our precedent. This court held: "[O]nce a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." Binkley v. Burry, 352 S.C. 286, 297-98, 573 S.E.2d 838, 844-45 (Ct. App. 2002) (citation and internal quotation marks omitted).

In Wright's February 1, 2000 letter, Wright explained that the workers' compensation statutes require the claimant to notify the Commission, the employer, and the employer's insurance carrier in the event of a settlement with a third party. He admitted, "I did not give those parties notification, so that may prejudice your right to recover workers' compensation benefits, if, in fact, you were entitled based on the facts of the case to receive those benefits." He informed Kimmer the attorney for Murata denied Kimmer was entitled to workers' compensation benefits because Wright had settled with the third party without providing the required notice. Kimmer signed a Waiver of Conflict dated February 1, 2000, which provided: "I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation action."

In his deposition, Kimmer stated that during an office conference some time before February 1, 2000, Wright told him he had "screwed this up" and Kimmer would have to get another attorney to take the workers' compensation case. Kimmer acknowledged he understood from Wright's February 1, 2000 letter the reason he was not receiving workers' compensation benefits was because Wright had made a mistake and Kimmer might have a claim against him. Kimmer admitted beginning in 1999, the failure to receive workers' compensation payments caused him problems. He stated the failure to receive benefits contributed to his having post-traumatic

stress disorder and depression problems. A medical report dated October 17, 2000, refers to Kimmer having severe post-traumatic stress syndrome.

Thus, more than three years before he and Wright entered into the tolling agreement, Kimmer was aware Wright had made a significant error in settling the third-party claim without notice, that he was not receiving workers' compensation benefits because of Wright's error, and he was suffering financial and emotional damages due to the error. Accordingly, the trial court erred in holding the statute of limitations did not begin to run until the single commissioner issued her order.

C. Equitable Tolling

As an additional sustaining ground, Kimmer urges this court to apply the doctrine of equitable tolling. The South Carolina Supreme Court recently adopted this doctrine. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). The court explained the doctrine of equitable tolling may be applied to toll the running of the statute of limitations "to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." Id. at 115, 687 S.E.2d at 32. The court explained:

> The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Id. at 116-17, 687 S.E.2d at 33 (citation and quotation marks omitted). The court noted the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Id. at 115, 687 S.E.2d at 32. It cautioned equitable tolling was a doctrine that should be used sparingly and only when the interests of justice compel its use. Id. at 117, 687 S.E.2d at 33.

Kimmer argues the court should apply the doctrine because 1) Wright testified for Kimmer in the workers' compensation hearing; 2) Wright entered into the tolling agreement a year after he contends the statute ran; and 3) Wright did not assert the statute of limitations defense until 2005 when his insurance counsel moved to amend his answer. He asserts he "should not be penalized for pursuing his quasi-judicial rights at the Workers' Compensation Commission."

The tolling agreement specifically provided it would not be deemed to revive any claim that was already barred on that date. Kimmer does not direct this court's attention to any action by Wright that would establish Wright led Kimmer to believe he would not assert the statute of limitations as a defense. Further, Kimmer could have protected his claim against Wright while pursuing his workers' compensation claim. In Epstein, the supreme court rejected Epstein's argument that requiring him to pursue an appeal while simultaneously filing a malpractice suit against his attorney would have put him in the awkward position of arguing inconsistent positions in two different courts. Epstein v. Brown, 363 S.C. 372, 381-82, 610 S.E.2d 816, 821 (2005). The court noted a plaintiff could take measures to avoid such inconsistent positions such as filing the malpractice action and then seeking a stay of the malpractice agreement during the appeal or entering into a tolling agreement for the malpractice claim for the pendency of the appeal. Id. Kimmer could have requested a tolling agreement earlier or brought his malpractice action and requested a stay.

Although we are sympathetic to Kimmer's situation, we are mindful the supreme court cautioned the doctrine of equitable tolling was to be used sparingly. We find application of the doctrine is not justified under the circumstances of this case.

CONCLUSION

We find the trial court erred in holding the statute of limitations did not bar Kimmer's legal malpractice action. Accordingly we reverse the order of the trial court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PIEPER, J., concurs.

FEW, C.J., dissenting: Attorney Philip Wright concedes that a mistake he made in the course of representing Richard Kimmer in a workers' compensation case was a breach of the duty he owed to his client. He thus concedes the first two elements of a legal malpractice claim existed as of the date of the mistake. However, as with many mistakes lawyers make in the course of litigation, no damage resulted from the mistake until the workers' compensation commission denied benefits to Kimmer. At that point, the other two elements which must be present before a cause of action for legal malpractice accrues—causation and damage—came into existence for the first time. Kimmer filed suit against Wright within three years of the date all four elements existed, and thus complied with the statute of limitations. I respectfully dissent.

The statute of limitations requires that legal malpractice actions "be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." Berry v. McLeod, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997). A legal malpractice cause of action consists of four elements: "(1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). When any one of these elements is missing, the client does not have a legal malpractice cause of action against the lawyer. Thus, the statute of limitations does not begin to run until all four elements, including damage, are present.

A lawyer's breach of duty to the client necessarily occurs before the damage resulting from the breach. In other words, damage is always the last element of a legal malpractice claim to occur. Therefore, our courts have

described the point at which the statute of limitations begins to run as "where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Mitchell v. Holler, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (emphasis added) (internal quotation marks and citation omitted). In Mitchell, as in every published decision on the statute of limitations in a legal malpractice case except for one, the prospective plaintiff discovered the injury before learning of the negligent act or omission that caused it. In each of those cases, the court held that the occurrence of the injury put the client on notice to inquire as to whether the injury was caused by the attorney's negligence.[2]

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[2] See Christensen v. Mikell, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996) (finding statute ran from point when client knew he did not have title insurance); Mitchell, 311 S.C. at 409, 429 S.E.2d at 795 (holding knowledge of murder conviction, coupled with complaint about trial counsel's performance, commenced running of statute); Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 145, 697 S.E.2d 644, 654 (Ct. App. 2010) (holding there was conflicting evidence on when client should have known deed of trust with priority over client's interest caused damage); Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 635-36, 682 S.E.2d 1, 6 (Ct. App. 2009) (finding statute ran from client's knowledge she had not been named as a plaintiff in medical malpractice action); Binkley v. Burry, 352 S.C. 286, 297, 573 S.E.2d 838, 844 (Ct. App. 2002) (holding statute ran from date landowners knew their property was encumbered by easement not disclosed at closing); Peterson v. Richland Cnty., 335 S.C. 135, 139, 515 S.E.2d 553, 555 (Ct. App. 1999) (holding statute ran from client's knowledge of improperly indexed judgment); Holy Loch Distribs., Inc. v. Hitchcock, 332 S.C. 247, 254, 503 S.E.2d 787, 791 (Ct. App. 1998) (holding statute began to run when ATF agents notified plaintiffs they were operating their business in violation of federal law due to lack of appropriate permits and licenses), rev'd on other grounds, 340 S.C. 20, 531 S.E.2d 282 (2000); Berry, 328 S.C. at 445-46, 492 S.E.2d at 800 (holding that where plaintiffs claimed a right to hold referendum on municipal bond, statute began to run when plaintiffs knew bond was issued without a referendum); Burgess v. Am. Cancer Soc'y, S.C. Div., Inc., 300 S.C. 182, 187, 386 S.E.2d 798, 800 (Ct. App. 1989) (holding statute was triggered by client's knowledge of attorney's affair with

Here, the situation is different. Wright made Kimmer aware of the negligence, but Kimmer did not suffer an actionable injury for another three years. The majority has taken language from these prior cases, inapplicable to the facts of this case,[3] and used it to hold that when the client learns of his lawyer's negligence, the statute of limitations begins to run even though he has yet to suffer any injury. I respectfully disagree.

My point is illustrated by Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), the one decision in which the factual scenario is similar, although not identical, to this one. Dr. Epstein sued Brown for legal malpractice Brown allegedly committed in the course of defending Dr. Epstein in a medical malpractice lawsuit. 363 S.C. at 374-75, 610 S.E.2d at 817. The medical malpractice lawsuit resulted in a $6,028,535.88 verdict against Dr. Epstein. Id. The trial court granted summary judgment to Brown on the basis that Dr. Epstein had not complied with the statute of limitations. 363 S.C. at 375, 610 S.E.2d at 817. The supreme court affirmed, holding "Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." 363 S.C. at 382, 610 S.E.2d at 821.

I will discuss below my contention that Epstein is controlling, and that the statute therefore began to run "at the conclusion of [Kimmer's] trial," the date of the single commissioner's ruling. However, even if Epstein is not controlling, the supreme court's holding illustrates an important reality about litigation that requires us to affirm the circuit court: lawyers make mistakes during the course of litigation, and yet if the client wins the case, no damage results from those mistakes. Recognizing this reality is essential to the analysis of a statute of limitations question in a legal malpractice action arising out of litigation because the existence of damage is one of the

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officer of company client was suing). But see True v. Monteith, 327 S.C. 116, 120-21, 489 S.E.2d 615, 617 (1997) (holding although client knew of injury for years, there was a question of fact as to when she should have learned of attorney's conflict of interest in transaction causing the injury).

[3] See discussion of Binkley below.

elements. Rydde, 381 S.C. at 646, 675 S.E.2d at 433 (stating the elements of a legal malpractice claim include "damage to the client"). Like Kimmer in this case, Dr. Epstein made allegations of malpractice against Brown arising out of events that occurred long before the trial.[4] However, if the jury found in Dr. Epstein's favor, he would not have suffered damages, and no cause of action would ever have accrued against Brown.

The same is true here. The effect of Wright's negligence on Kimmer's right to recover workers' compensation benefits was not known until at least July 31, 2003, when the single commissioner ruled against Kimmer and denied his claim for benefits. Until then, Kimmer and his lawyers were working hard to win the case, despite Wright's negligence. The damages element was missing because the possibility remained that Kimmer would prevail on the claim. When the single commissioner ruled, however, Kimmer knew Wright's negligence caused him to lose his workers' compensation case. Because damage existed then for the first time, Wright's negligence became actionable malpractice for the first time. Kimmer commenced this action on October 14, 2004, well within the statute of limitations.

The majority's reliance on Binkley and the "reasonable diligence" language from Epstein is misplaced. In Binkley, and in all cases in which the

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[4] For example, as the supreme court stated:

> In his complaint, Dr. Epstein alleged Brown was negligent in numerous particulars, including: failing to conduct an adequate investigation, failing to advise Epstein to settle, failing to keep Epstein adequately informed during the pendency of the case, representing multiple defendants with conflicts of interest, . . . and adopting a defense which was contrary to Dr. Epstein's medical opinion.

Epstein, 363 S.C. at 376, 610 S.E.2d at 818. Several of these allegations arise out of actions Brown took before he even filed an answer. Presumably, for example, Brown made the decision to represent multiple defendants almost as soon as Dr. Epstein's complaint was served.

reasonable diligence language is important, the prospective plaintiff was aware of the damage, but was unaware of the attorney's negligent conduct that caused the damage. In Binkley, for example, we held the statute of limitations began to run when the plaintiffs knew of the existence of an easement allowing a conservation district to cause flooding on the plaintiffs' property. 352 S.C. at 297, 573 S.E.2d at 844. We held this even though no flooding had yet occurred, and the plaintiffs had no idea the defendant law firm had negligently failed to disclose the easement. Id. We explained that the mere existence of the easement was sufficient damage to put the plaintiff on inquiry notice. Id. ("An easement by its very nature involves the right to encroach upon another's property."). Because the plaintiffs knew of the easement, we held they "had inquiry notice of a possible claim against [the law firm] regarding the easement." Id. In Binkley, it was knowledge of the existence of damage that caused the statute of limitations to begin to run.

However, the majority relies on the following language from Binkley: "the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." 352 S.C. at 298, 573 S.E.2d at 845 (emphasis added). The majority interprets the emphasized language to support its position that a legal malpractice cause of action can accrue, and thus the statute of limitations begins to run, before any damage has occurred. I respectfully disagree with the majority's interpretation. Rather, the Binkley court's previous statement that the mere existence of the easement caused the landowner damage, taken in the context of the case, indicates this emphasized language refers to the insignificance of the fact that no flooding had yet occurred. My point is supported by a footnote at the end of the emphasized language, in which we cited Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996), for the principle "the fact that the injured party may not comprehend the full extent of the damage is immaterial." 352 S.C. at 298 n.21, 573 S.E.2d at 845 n.21. These circumstances demonstrate that the language from Binkley relied on by the majority does not indicate that a legal malpractice cause of action can accrue before there is damage. Rather, we used the language relied on by the majority to indicate that on those facts, the circumstance that the flooding had not yet occurred did not delay the commencement of the statute of limitations.

The majority also relies on the following language from Epstein:

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist.

363 S.C. at 376, 610 S.E.2d at 818. The majority quotes this language, which emphasizes the word "might." Here, the correct language to emphasize is "injured party" and "the facts and circumstances of an injury." The language is used to describe a situation when a known injury "might" have resulted from a lawyer's negligence. The language was never intended to apply to a situation like we have here, where a lawyer's known negligence "might" later result in injury. The same is true in all of our published decisions on the statute of limitations in legal malpractice cases, except Epstein. In each case, the prospective plaintiff was aware of the injury, and that awareness put the plaintiff on notice to inquire into whether the injury was caused by the lawyer's negligence.[5]

Wright asserts several additional reasons the statute of limitations began to run earlier than the date of the single commissioner's ruling. First, he argues the "unmistakable" quality of his malpractice caused the statute to begin to run immediately. I disagree. As an initial matter, to condition the commencement of the statute of limitations in a legal malpractice case on the degree of the lawyer's negligence creates an unmanageable standard for courts to apply. Even assuming Wright is correct that his malpractice was unmistakable, how would the court treat malpractice that was barely mistakable, or merely probable? Second, the circuit court's ruling on appeal from the commission establishes that Wright's malpractice was not unmistakable. It would be patently unfair for this court to say Kimmer should have known he would eventually be damaged, and thus had a cause of action against Wright, when a circuit judge made precisely the opposite

[5] See footnote 2.

ruling in the same case. The fact that this court later reversed the circuit judge is not important. The circuit court's ruling established that Kimmer retained a reasonable chance of winning his workers' compensation claim even after Wright's "unmistakable" negligence.

Wright also argues the statute of limitations began to run because Kimmer did in fact suffer damage before the single commissioner's ruling due to the carrier's denial of temporary benefits. I disagree. First, this also creates an unmanageable standard. The courts cannot condition the commencement of the statute of limitations on whether a workers' compensation insurance adjuster agrees or refuses to pay temporary benefits. Taken not even to its extreme, Wright's argument provides that a cause of action accrues against a workers' compensation claimant's lawyer any time some minor mistake in the lawyer's office results in even a brief delay in requesting temporary benefits. Second, and more importantly, a claimant who is denied temporary benefits but later prevails at the final hearing is entitled to receive retroactive benefits. See Langdale v. Harris Carpets, Op. No. 4853 (S.C. Ct. App. filed July 20, 2011) (Shearouse Adv. Sh. No. 24 at 97, 106) (affirming commission's award of temporary benefits after employer denied payment). Thus, Kimmer did not suffer any damage resulting from his interim loss of temporary benefits. Rather, as with any other type of contested workers' compensation benefits, his entitlement to temporary benefits depended on the ultimate decision of the commission. See Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 343, 513 S.E.2d 843, 848 (1999) (affirming commission's award of temporary total benefits).

Finally, and most importantly, the supreme court addressed this question in Epstein, and held that in an action based on alleged malpractice during the course of litigation, the statute of limitations begins to run when a lawyer's negligence results in a ruling adverse to the client in a trial. "Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." Epstein, 363 S.C. at 382, 610 S.E.2d at 821 (emphasis added). The comparable point in time in this case, when under Epstein the statute of limitations began to run, is the single commissioner's ruling. I believe we are bound to apply Epstein to this appeal, and must affirm.

The majority argues, however, that Epstein is not controlling, emphasizing a footnote in which the court stated:

> We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the [statute of limitations] begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest.

363 S.C. at 383 n.8, 610 S.E.2d at 821 n.8 (emphasis added). The majority argues the emphasized language "at the latest" means that under some circumstances the statute could begin to run before an adverse decision by a trial court or administrative agency, but could never begin to run afterwards.

However, I believe "at the latest" means the opposite of what the majority contends. In order to understand this point, consider the dissenting opinion filed by the Chief Justice and the unique damages claim made by Dr. Epstein. In her dissent, the Chief Justice argued that no injury occurred, and thus the statute of limitations did not begin to run, until all appeals were exhausted and the remittitur had been sent to the lower court. 363 S.C. at 383, 610 S.E.2d at 822. As to Dr. Epstein's damages claim, he alleged damages to his reputation arising from adverse publicity when the verdict was announced, in addition to economic losses arising from the $6 million judgment against him. See 363 S.C. at 376, 382, 610 S.E.2d at 818, 821.

Several paragraphs before the Epstein majority's "at the conclusion of his trial" holding, and the "at the latest" language of footnote 8, the majority began discussing the position the Chief Justice took in her dissent as follows:

> Dr. Epstein asserts that, even if we do not adopt the continuous representation rule, the statute of limitations should not be deemed to have begun to run until the date on which this Court denied certiorari (January 11, 2001), because it was not until that date upon which he suffered "legal damages." We disagree.

363 S.C. at 380, 610 S.E.2d at 820. The Epstein majority then gave several reasons it disagreed. First, the court cited a number of decisions from other jurisdictions which "tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of the appeal." 363 S.C. at 380-81, 610 S.E.2d at 820-21. Second, the court refuted the argument "that requiring [a plaintiff] to pursue an appeal while simultaneously filing a malpractice suit against his attorney puts him in the awkward position of arguing inconsistent positions in two different courts." 363 S.C. at 381-82, 610 S.E.2d at 821.

Then the Epstein majority cited the "discovery rule," and noted "[t]he fact that the injured party may not comprehend the full extent of the damage is immaterial." 363 S.C. at 382, 610 S.E.2d at 821. Applying the discovery rule "[u]nder the facts of this case," the Epstein majority pointed out: "The damages [Dr. Epstein] claims are largely those to his reputation." Id. After discussing what Dr. Epstein knew before the trial and during the course of the appeal about his lawyer's performance, the court concluded: "It is patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001." 363 S.C. at 383, 610 S.E.2d at 821. Footnote 8 is found at the end of the next sentence.

I believe the purpose of footnote 8 and the "at the latest" statement is to demonstrate that the Chief Justice's argument would not change the outcome of Epstein because of the allegation of injury to reputation. In other words, the purpose of footnote 8 is to explain that even if an appellate court had reversed the verdict, thereby eliminating the economic portion of Dr. Epstein's damages claim, the alleged injury to his reputation was at least partially irreversible and would have remained. In that situation, regardless of what the appellate court did to reverse his economic injury, Dr. Epstein suffered injury to his reputation as of the date of the jury verdict. Therefore, the court stated "under the facts of this case, Dr. Epstein knew of a potential claim against Brown by [the date of the jury's verdict], at the latest." 363 S.C. at 383 n.8, 610 S.E.2d at 821 n.8.

Under this reading, the Epstein majority did not intend the "at the latest" statement to indicate that the statute might have started to run before the verdict. Rather, the statement is part of the majority's response to the

argument that the statute begins to run after the appeals have been exhausted, and specifically recognizes that the unique allegation of damage to Dr. Epstein's reputation makes that argument inapplicable to the facts of that case. Thus, the majority's reason for distinguishing Epstein is unfounded, and we are left with no basis on which to conclude that the supreme court did not mean what it said when it chose these words: "Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." 363 S.C. at 382, 610 S.E.2d at 821. Epstein therefore controls the outcome of this case: the statute of limitations did not run on Kimmer's claim.

The practice of law is an imperfect art in which lawyers necessarily take risks and make mistakes. However, when a litigator makes a mistake—indeed commits malpractice, such as Wright did in this case—nobody knows whether the mistake will cause damage until the damage materializes in the form of an adverse judgment. For this reason, the statute of limitations did not begin to run on Kimmer's claim against Wright until July 31, 2003, when the single commissioner denied workers' compensation benefits. Kimmer filed suit on October 14, 2004. Because he commenced his action against Wright within the three-year statute of limitations, the circuit court correctly granted partial summary judgment to Kimmer.

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Willie Albert Gilmore, Appellant.

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

Opinion No. 4903
Heard May 3, 2011 – Filed November 2, 2011

AFFIRMED

Appellate Defender Breen Stevens, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., and Solicitor W. Barney Giese, all of Columbia, for Respondent.

FEW, C.J.: Willie Albert Gilmore appeals his conviction for first-degree criminal sexual conduct (CSC). The central issue in the appeal is whether the trial court erred in declining to charge the jury on assault and battery of a high and aggravated nature (ABHAN) as a lesser-included offense. We hold the facts do not support an ABHAN charge. We also hold the trial court acted within its discretion in allowing the victim to testify regarding two statements Gilmore allegedly made during the sexual assault. We find two other issues raised by Gilmore to be unpreserved for appellate review. We affirm.

I. Facts and Procedural History

Gilmore and the victim knew each other for approximately ten years, dated each other for about six months, and lived together in Gilmore's house until three weeks before the crime. The victim testified that on the day of the crime she visited the house to check on furniture she left behind. Gilmore was not home when she arrived, so she talked with another woman for a short while until Gilmore returned. After the other woman left, Gilmore and the victim talked while Gilmore gave her a foot rub. The victim gave Gilmore money to go to the liquor store. Gilmore returned with a pint of gin, which they drank together. After they finished drinking the gin, Gilmore went to the back of the house to speak with a man who had stopped by, and the victim stayed in another room talking to a woman who was with the man. The victim testified that after the man and woman left, Gilmore came running at her in a rage and slapped her two or three times in the face. She later explained that Gilmore was angry because he thought she had said something to the woman about another man. She testified she attempted to leave after being slapped, but Gilmore would not allow it.

The victim then testified to the events of the sexual assault. Gilmore told the victim he wanted to have sex and pulled a knife. He forced her to remove her clothes and to pull a mattress into another room. He then raped her on the mattress. She testified that during the sexual assault he told her: "If I was like I was, Bitch, I would have killed you. You would be a dead Bitch," and "I've killed one, and I'll kill again."

At the conclusion of the presentation of evidence, Gilmore requested a charge for ABHAN as a lesser-included offense of CSC. The trial judge denied the request. The jury found Gilmore guilty of first-degree CSC, and the trial judge sentenced him to life in prison.

II. ABHAN as a Lesser-Included Offense

Gilmore contends on appeal there is evidence in the record from which the jury could have concluded he committed ABHAN and not CSC. We disagree. CSC in the first degree is defined by statute as follows: "the actor engages in sexual battery with the victim and . . . (a) [t]he actor uses aggravated force to accomplish sexual battery." S.C. Code Ann. § 16-3-652(a) (Supp. 2010). ABHAN is a lesser-included offense of first degree CSC. State v. Primus, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005). If there is evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge must instruct the jury on the lesser-included offense. Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) ("[A] judge is required to charge a jury on a lesser-included offense 'if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.'" (quoting State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996))).

In criminal cases, we review the decisions of the trial court only for errors of law. State v. Gibson, 390 S.C. 347, 353, 701 S.E.2d 766, 769 (Ct. App. 2010). Therefore, in the context of a trial court's decision not to charge a requested lesser-included offense, we review the trial court's decision de novo. We must reverse and remand for a new trial if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged.

There is evidence in the record Gilmore committed ABHAN.[1] For example, the victim testified Gilmore slapped her "pretty hard" in the face two or three times, and a nurse testified the victim had swelling on the side of her face. The victim also testified Gilmore grabbed her after the rape and after he washed up, and thus prevented her from leaving the house. See State v. Whitten, 375 S.C. 43, 46, 649 S.E.2d 505, 507 (Ct. App. 2007) (stating "'ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation,'" including "'the intent to commit a felony, infliction of serious bodily injury, . . . [and] a difference in gender'" (quoting State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000))). The mere existence of evidence of ABHAN, however, is not sufficient to require the jury charge. Rather, there must be evidence the defendant committed ABHAN instead of CSC. Dempsey, 363 S.C. at 371, 610 S.E.2d at 815.

Our courts have identified three types of cases in which the evidence can support an inference that the defendant is guilty of ABHAN instead of CSC: (1) there is evidence the defendant committed ABHAN by an unlawful sexual touching in the course of attempting CSC, and there is conflicting evidence as to whether the defendant accomplished sexual battery; see, e.g., State v. Pressly, 292 S.C. 9, 9-10, 354 S.E.2d 777, 777 (1987); State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986); (2) there is evidence the defendant committed a nonsexual ABHAN, such as in a fight, and in addition to evidence to support CSC, there is evidence the two never had sex; see, e.g., State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983); and (3) there is evidence the defendant committed a nonsexual ABHAN contemporaneous with CSC, but there is evidence that instead of CSC the two had consensual sex; see, e.g., State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542-43 (2004).

In this third type of case, which this case involves, the evidence must support the existence of two conditions before the trial judge is required to charge the jury on the lesser-included offense of ABHAN. First, the

[1] The State essentially conceded this at trial, stating "the slap is a totally separate—it's a separate charge. I guess we could have charged him with either . . . CDV or an ABHAN or hitting her."

nonsexual ABHAN must have occurred "contemporaneously" with the alleged CSC. Compare White, 361 S.C. at 412-13, 605 S.E.2d at 542-43 (ABHAN charge required because ABHAN occurred "contemporaneously" with alleged CSC) with Dempsey, 363 S.C. at 371, 610 S.E.2d at 815 (evidence of ABHAN on occasions not contemporaneous with alleged CSC did not warrant ABHAN charge). Second, there must be evidence that the victim consented to have sex. This requirement is illustrated in our opinion in State v. White, 353 S.C. 566, 572, 578 S.E.2d 728, 731 (Ct. App. 2003), and in the supreme court's opinion affirming. 361 S.C. at 413, 605 S.E.2d at 543. In White, it was not possible for the defendant to be guilty of ABHAN instead of CSC unless there was evidence of consensual sex. 361 S.C. at 412, 605 S.E.2d at 543.[2] Without evidence of consent, the ABHAN would have been in addition to CSC. See id.

The rationale for both of the required conditions is that if either condition does not exist, the evidence will not support the inference the ABHAN occurred instead of the CSC. Rather, if either condition does not exist, the ABHAN necessarily occurred in addition to the CSC. In this case, the evidence supports the existence of the first condition: the ABHAN was contemporaneous. Gilmore slapped the victim within minutes before, and "grabbed" her within minutes after, the alleged CSC.[3] The second question is much more difficult. However, we find insufficient evidence to support a finding of consensual sex.

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[2] To illustrate this requirement, the supreme court compared the facts of White to the facts this court addressed in State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003), in which we upheld the trial judge's decision not to charge ABHAN where there was "no evidence" of consensual sex. White, 361 S.C. at 412-13, 605 S.E.2d at 543; see Fields, 356 S.C. at 523, 589 S.E.2d at 795 ("Although defense counsel suggested in opening remarks that the sex was consensual, no evidence was presented at trial to support this assertion.").

[3] The facts of White demonstrate that "contemporaneous" includes at least events that occur within minutes of the alleged CSC. 361 S.C. at 412-13, 605 S.E.2d at 542-43.

In all of the cases in which our appellate courts have found evidence of consensual sex, the defendant testified directly that the sex was consensual. See, e.g., White, 361 S.C. at 412, 605 S.E.2d at 543 ("White's testimony that he and the victim engaged in consensual sex, the victim stabbed him, and he hit the victim in the eye, is evidence from which the jury could infer White committed ABHAN rather than CSC."). Here, however, Gilmore did not testify. The only other eyewitness to the alleged CSC was the victim, who testified the sex was not consensual. Therefore there is no direct evidence that the victim consented to have sex.[4]

Because there is no direct evidence that the victim consented to sex, we must determine whether circumstantial evidence of consensual sex required the charge on ABHAN. In making this determination, we are mindful that our conclusion must be based on the existence of evidence, and not simply on the possibility that the jury might not have believed the evidence offered by the State. See State v. Patterson, 337 S.C. 215, 232, 522 S.E.2d 845, 854 (Ct. App. 1999) (On appeal from the denial of a directed verdict motion, the court stated "[i]t is irrelevant that the jury might have disbelieved any portion of the evidence because that involves the weight of the evidence."); State v. Franks, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) ("'The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense.'" (quoting State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006))).

In a case such as White, where there is direct evidence of consent, the trial court, and this court on review, must use the any evidence standard to determine whether the requested charge should be given. 361 S.C. at 412,

[4] We recognize the victim testified she was raped, and thus there is direct evidence that there was no consensual sex. However, a jury charge on ABHAN in this type of CSC case is not required unless there is evidence that consensual sex did occur. In reviewing a circuit court's ruling on whether to charge ABHAN under these circumstances, we do not consider the strength, or even the existence, of evidence to the contrary.

605 S.E.2d at 542. On the other hand, in a purely circumstantial evidence case such as this one,[5] the existence of "any" circumstantial evidence would not necessitate the charge on ABHAN. The situation is analogous to determining when purely circumstantial evidence requires the denial of a directed verdict. Our courts have held that the trial court must deny the directed verdict motion and submit the case to the jury "'[i]f there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused.'" State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011) (emphasis added) (quoting State v. Weston, 362 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006)). We find we should use the same standard for circumstantial evidence in evaluating the sufficiency of the evidence on a lesser-included offense. See Geiger, 370 S.C. at 607, 635 S.E.2d at 673 ("To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense. . . . The court looks to the totality of evidence in evaluating whether such an inference has been created." (citing State v. Tyndall, 336 S.C. 8, 21-22, 518 S.E.2d 278, 285 (Ct. App. 1999) ("Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense."))). When the evidence supporting a request for a charge on a lesser-included offense is purely circumstantial, we examine the record to determine if there is sufficient circumstantial evidence to permit a reasonable inference that the defendant is guilty only of the lesser crime.

We note initially that Gilmore's counsel conceded the two had sex. However, the theme of counsel's opening statement, cross-examination, and closing argument was to highlight evidence the sex was consensual. On appeal, Gilmore argues the following evidence supported that theme and permitted a reasonable inference the victim consented to have sex. First, the events occurred in the context of the victim going to Gilmore's house

[5] By "purely circumstantial evidence case," we mean the evidence that the victim consented to sex is purely circumstantial. As stated in footnote 4, there is direct evidence the victim did not consent to sex. There is also direct evidence that Gilmore used aggravated force to accomplish sexual battery, and thus that he is guilty of CSC.

purportedly to check on her furniture, but staying for hours alone with him. The victim testified she knew Gilmore wanted to get back together with her, and they talked about it that afternoon. The victim denied any such interest, but defense counsel elicited testimony on cross-examination which indicated she was thinking about getting back together with Gilmore as well.[6] After being at Gilmore's house for some time, the victim gave Gilmore money to buy a bottle of gin, which they drank together. At some point during all of this, Gilmore gave the victim a foot massage. Finally, a nurse testified the medical examination of the victim's genital area by the doctor and the nurse indicated no evidence of sexual trauma.[7]

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[6] Several witnesses testified the victim was jealous of the other women who stopped by that day. The victim admitted she asked Gilmore if either of them were his new girlfriend.

[7] We are aware of this court's statement in Geiger: "It is inconsequential that there was no forensic evidence of sexual assault." 370 S.C. at 611, 635 S.E.2d at 675. However, we do not believe this statement forecloses our consideration of this circumstance. We distinguish Geiger on this point for three reasons. First, the defendant was not charged with CSC, but rather with assault with intent to commit CSC. Second, we also found in Geiger that the victim's "injuries were consistent with the victim's narrative of the events." Id. Third, the issue in Geiger was not whether there was consent, but whether there was evidence the defendant did not attempt a CSC. We also acknowledge the State's position that the results of the forensic examination should be characterized as "no evidence," and should not be considered the existence of evidence. We disagree. The nurse and a doctor performed a medical examination and the nurse testified to the results of the examination. Her testimony that neither she nor the doctor found any injuries resulting from sexual trauma is the existence of one circumstance relating to the question of whether the sex was consensual. However, even when considered along with the other circumstantial evidence in this case, this circumstance is not sufficient to permit a reasonable inference the sex was consensual.

Issues involving circumstantial evidence present unique challenges, "requir[ing] careful reasoning by the trier of facts." State v. Grippon, 327 S.C. 79, 87, 489 S.E.2d 462, 466 (1997) (Toal, J., concurring) (quoting People v. Ford, 488 N.E.2d 458, 465 (N.Y. 1985)). "[A]nalysis of circumstantial evidence is a more intellectual process, requiring jurors to engage in lawyer-like scrutiny and forcing them to see both sides." 327 S.C. at 87-88, 489 S.E.2d at 466 (Toal, J., concurring) (quoting Irene Rosenberg and Yale Rosenberg, "Perhaps What Ye Say Is Based Only On Conjecture"—Circumstantial Evidence, Then and Now, 31 Hous. L. Rev. 1371, 1412 (1995)). Similarly, we may not base our decision on appeal on the strength of the evidence that Gilmore committed CSC. Rather, we must consider both sides. We must examine the record to determine whether sufficient circumstantial evidence exists to support a reasonable inference that Gilmore and the victim had consensual sex, and thus that Gilmore is guilty of ABHAN instead of CSC. Viewing all of the evidence in the light most favorable to Gilmore,[8] we find there is not sufficient evidence of consensual sex to permit the jury to reasonably conclude that Gilmore was guilty only of ABHAN. The trial judge correctly refused to give the ABHAN charge.

III. Admissibility of Gilmore's Statements

The victim testified that Gilmore made two statements to her as he was preparing to rape her: "If I was like I was, Bitch, I would have killed you. You would be a dead Bitch," and "I've killed one, and I'll kill again." Gilmore objected to the statements under Rule 404(b), SCRE. We find the trial judge acted within her discretion to admit the statements.

The State argues that the statements were offered to prove what happened in this case, not to prove some other crime, wrong, or act. Rule 404(b), SCRE. Thus, the State argues, the statements were admissible as part

[8] See State v. Hernandez, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) ("In determining whether the evidence requires a [lesser-included] charge . . . , the . . . court views the facts in a light most favorable to the defendant.").

of the res gestae.[9] Our courts have recognized that the State may prove the actions of the defendant when those actions are part of the crime, not separate. See State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) (stating "the res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred"), overruled on other grounds by Gentry, 363 S.C. at 106, 610 S.E.2d at 501. Here, the State offered the statements to prove how Gilmore subdued the victim in order to commit the rape. The trial judge acted within her discretion to admit the statements as part of the crime.

Gilmore argues, however, that even though the statements may be part of the crime, evidence of the previous killing described in one of the statements is evidence of an "other crime," and therefore inadmissible under Rule 404(b). We disagree. The focus of a court's inquiry in determining admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b)

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[9] Before the adoption of the South Carolina Rules of Evidence in 1995, the latin term "res gestae" meant two things. First, the term described an exception to the rule against hearsay, essentially a combination of the present sense impression and excited utterance exceptions now found in Rules 803(1) and (2). See Rule 803, SCRE, Note (citing State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989)). The term is no longer used to describe a hearsay exception. Second, res gestae meant the evidence was part of the body of the crime. See Black's Law Dictionary 1173 (5th ed. 1979) ("'Res gestae' means literally things or things happened . . . ."). Under the Rules of Evidence, which do not use the term, arguing an event is part of the res gestae is equivalent to arguing the evidence is not an "other" act under Rule 404(b), but rather is integral to the crime or event. Our courts have continued to use the term to describe details of a crime or event which are not to be excluded as "other crimes, wrongs, or acts" under Rule 404(b). See State v. Wiles, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009) (stating "evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as res gestae evidence") (citing State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996))).

is the purpose for which the evidence is offered. See 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."). If the evidence is offered for the prohibited purpose of "prov[ing] the character of a person in order to show action in conformity therewith," Rule 404(b) excludes it. However, if the evidence is offered for one of the other purposes listed in the second sentence of Rule 404(b), the rule does not exclude it. Rule 404(b), SCRE ("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."). We believe the trial judge acted within her discretion to conclude the statements were not offered for the prohibited purpose of proving Gilmore's character "in order to show action in conformity therewith," but rather were offered to prove intent. See State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."). The trial judge properly concluded the statements were admissible.

IV. Other Issues

Gilmore raises two other issues on appeal. We find that neither of the issues are preserved, and decline to address them. As to whether the judge erred in excluding evidence of Gilmore's prior conviction: State v. Elmore, 368 S.C. 230, 238, 628 S.E.2d 271, 275 (Ct. App. 2006) (adhering to the rule that when a defendant does not testify he fails to preserve pretrial rulings on impeachment); see also State v. Glenn, 285 S.C. 384, 385, 330 S.E.2d 285, 286 (1985). As to whether the judge erred in allowing witness testimony: State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (holding an issue conceded in the trial court cannot be argued on appeal); State v. Whipple, 324 S.C. 43, 50-51, 476 S.E.2d 683, 687 (1996) (finding a defendant was found to have waived his right to complain of inadequate time to review discovery after the trial court granted an approximately thirty-hour delay when the defendant sought no further time, expressly conceded he was ready to proceed with trial, and proceeded without further objection).

V. Conclusion

For the reasons stated above, Gilmore's conviction is

AFFIRMED.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Everett Burris, Respondent,

v.

Propst Lumber & Logging, Inc., Appellant,

and Capital City Insurance, Respondent,

and SC Uninsured Employers' Fund, Respondent.

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Opinion No. 4904
Heard September 13, 2011 – Filed November 2, 2011

AFFIRMED

Amy V. Cofield, of Lexington, for Appellant.

Mark D. Cauthen and Peter P. Leventis, IV, both of Columbia, for Respondent Capital City Insurance Company.

GEATHERS, J.: Appellant Propst Lumber and Logging, Inc. ("Employer") challenges a decision of the Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel") concluding Employer's workers' compensation policy did not provide coverage on the date Respondent Everett Burris ("Claimant") sustained injuries while working for Employer. We affirm.

FACTS/PROCEDURAL HISTORY

Respondent Capital City Insurance Company ("Carrier") is a servicing carrier for the South Carolina Workers' Compensation Assigned Risk Plan, which facilitates the issuance of workers' compensation insurance policies to employers who are unable to obtain coverage through the voluntary market. The National Council on Compensation Insurance ("NCCI") administers the Assigned Risk Plan, which is governed by NCCI's South Carolina Operating Rules and Procedures.[1]

Employer contracted with Carrier for workers' compensation insurance coverage for the period of June 2006 through June 2007. The terms of the contract required Employer to pay an initial estimated premium and allowed Carrier to determine the final premium after the policy period ended by auditing Employer's records. Carrier was allowed to bill or refund Employer for the difference between the final premium and the estimated premium. On August 8, 2007, Carrier executed a final audit resulting in an invoice to Employer for an additional payment of $1,440 for the policy period of June 2006 through June 2007.

[1] NCCI obtained its authority to promulgate these Operating Rules and Procedures from the South Carolina Department of Insurance.

In the meantime, Carrier renewed the policy for the subsequent period of June 2007 through June 2008, and Employer paid an estimated premium of $24,463 through Johnson & Johnson Preferred Financing. After Carrier conducted the final audit for the 2006-2007 policy, Carrier used the information from the audit for an endorsement to the 2007-08 policy to reflect a more accurate annual premium basis. On August 10, 2007, Carrier sent Employer a notice of an additional premium due in the amount of $4,862 to supplement the estimated premium Employer had already paid for the 2007-08 policy period.

On September 4, 2007, Carrier sent a notice cancelling the 2007-08 policy based on Employer's failure to pay the additional amounts billed for the 2006-07 policy and the 2007-08 policy. The notice advised Employer that the 2007-08 policy would be cancelled on October 10, 2007 if the additional premiums were not paid by then. Employer made partial payments on November 8, 2007 and November 15, 2007, but Employer did not pay the remaining amount due until November 26, 2007. Carrier then reinstated the 2007-08 policy, effective November 27, 2007; however, there was a lapse in coverage from October 10, 2007 through November 26, 2007.

On January 15, 2008, Claimant filed a Form 50/Employee's Notice of Claim and/or Request for Hearing with the Workers' Compensation Commission, alleging he injured his left leg and lower back on November 5, 2007, while working for Employer. On February 8, 2008, Carrier filed a Form 51/Employer's Answer to Request for Hearing denying it had provided coverage for Employer on the date of Claimant's injury. The 2007-08 policy was later cancelled in April 2008 due to safety violations and was not reinstated. On June 9, 2008, Carrier paid Johnson & Johnson a premium refund in the amount of $15,471 for the 2007-08 policy.

At the hearing before the single commissioner, Employer argued (1) the 2007-08 policy was not properly cancelled on October 10, 2007, because Carrier had no right to endorse the 2007-08 policy based on the August 8, 2007 audit; and (2) the reasons for cancellation of the policy were not proper because the required premiums had been paid, and no premiums were refunded for the period of the alleged lapse in coverage. The single

commissioner concluded Carrier properly cancelled the 2007-08 policy, resulting in a lapse in coverage at the time of Claimant's injury.

The Appellate Panel affirmed the single commissioner's order and held Employer directly responsible for paying benefits to Claimant. In its decision, the Appellate Panel concluded the Assigned Risk Supplement to the Basic Manual for Workers' Compensation and Employers' Liability Insurance (NCCI 2006) ("Assigned Risk Supplement") permitted the premium endorsement to the 2007-08 policy. The Appellate Panel also concluded Carrier properly cancelled Employer's coverage for non-payment of premiums and there existed a lapse in coverage from October 10, 2007, through November 26, 2007. This appeal followed.

ISSUES ON APPEAL

I. Did the Appellate Panel correctly conclude the Assigned Risk Supplement authorized the premium endorsement to the 2007-08 policy?

II. Did the Appellate Panel err in concluding Carrier properly cancelled Employer's coverage?

III. Did the Appellate Panel err in concluding a lapse in Employer’s workers' compensation coverage occurred from October 10, 2007, through November 26, 2007?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Specifically, section 1-23-380 of the South Carolina Code (Supp. 2010) provides this court may not substitute its judgment for the Appellate Panel's judgment as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an

error of law.[2] See Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 600-01 (Ct. App. 1999), modified on other grounds, 339 S.C. 68, 528 S.E.2d 667 (2000), overruled on other grounds, Allison v. W.L. Gore & Assocs, 714 S.E.2d 547 (2011) (interpreting section 1-23-380).

LAW/ANALYSIS

I. Authority for Premium Endorsement

Employer maintains the Appellate Panel incorrectly concluded that the Assigned Risk Supplement authorized Carrier's premium endorsement to the 2007-08 policy. Employer argues the policy did not permit a premium endorsement before the final audit at the end of the policy period because: (1) the policy's specific language states: "The final premium will be determined after this policy ends"; (2) there is no language in the policy informing

[2] The pertinent language of South Carolina Code section 1-23-380 follows:

> 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 or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Employer that the policy's terms are subject to the Assigned Risk Supplement; and (3) the language of the Assigned Risk Supplement did not require Carrier to issue a premium endorsement. We address each of these arguments in turn.

A. Policy Language

Employer contends the policy did not permit a premium endorsement before the final audit at the end of the policy period because the policy required the final premium to be determined after the policy had ended. Employer also argues the "Information Page" for the policy indicated that the audit period was annual; and, therefore, the policy prohibited Carrier from issuing an interim premium endorsement. We disagree.

Employer's policy states the following regarding the premium:

> All premium[s] for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.
>
> . . . .
>
> Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

2007-08 Workers' Compensation and Employers' Liability Insurance Policy, Part Five, sections A & B. These policy provisions are consistent with the

Assigned Risk Supplement's requirement for a premium endorsement to an assigned risk policy when a carrier discovers information indicating the need to more accurately reflect the exposure base or classification of the policyholder:

1) The carrier will periodically review the operations of the insured throughout the policy period to determine if the correct classification and/or payroll information is being used. If subsequent to assignment and/or initial policy issuance, the carrier discovers or receives, either through interim audit, endorsement request, claim information, loss prevention survey, or other means, verifiable:

    a) Payroll information that is not consistent with the annual exposure base as assigned or

    b) Classification information that raises doubt concerning the accuracy of the policy's classification(s)

[t]he carrier must investigate and make a determination within thirty (30) days of the carrier's knowledge whether an endorsement to the policy is needed to accurately reflect the exposure base and/or classification(s) of the policyholder.

2) The carrier must use sound underwriting judgment using the latest available audit information to develop [a] current policy premium.

Assigned Risk Supplement to the Basic Manual for Workers' Compensation and Employers' Liability Insurance § 2(D)(7)(b)(2)(a) (NCCI 2006) (emphasis added).

Significantly, the Assigned Risk Plan, which includes the Assigned Risk Supplement, has the force of law:

> The General Assembly has delegated certain authority over assigned-risk insurance to the Director of the Department of Insurance. South Carolina Code section 38-73-540(A)(1) states that "any mechanism designed to implement" the assigned-risk agreement executed by the state's insurers "must be submitted in writing to the director or his designee for approval prior to use, together with such additional information as the director or his designee may reasonably require." The Code does not require that the implementation mechanism be promulgated as a regulation. Rather, the mechanism attains the force of law when it is approved by the Director of the Department of Insurance.
>
> Moreover, the provisions of the Plan prevail over the workers' compensation regulations. Code section 38-73-540 specifically addresses assigned-risk insurance and the mechanism for implementing assigned-risk agreements, whereas the regulations address workers' compensation generally. The principle that more specific rules prevail over general ones applies, and the Plan is the product of a more specific statute. The Plan controls with respect to issues it addresses.

Avant v. Willowglen Acad., 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006) (citations omitted) (emphasis added).

The policy provision cited by Employer, i.e. Part Five, section E, governs the amount of the final premium and when it will be determined, as does the Information Page indicating that the audit period is annual; these provisions are not necessarily inconsistent with the specific provisions in the policy and the Assigned Risk Supplement authorizing a premium endorsement when necessary to reflect actual exposures. In any event, to the extent the final premium provision and the information page are inconsistent with the Assigned Risk Supplement, the Assigned Risk Supplement controls. See Avant, 367 S.C. at 319, 626 S.E.2d at 799 (holding the Assigned Risk Plan attains the force of law when approved by the Insurance Director). Therefore, the policy provisions did not prohibit Carrier from issuing the premium endorsement in this case.

B. Assigned Risk Supplement

Employer also contends there is no language in the policy informing Employer that the policy's terms are subject to the Assigned Risk Supplement, and, therefore, Employer is not subject to the Assigned Risk Supplement's provisions. We disagree.

Initially, this specific issue is not preserved for appellate review because Employer did not specifically raise this point in its Statement of Issues on Appeal. Therefore, the court need not consider it. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

As to the merits of this issue, undisputed evidence in the record indicates Employer's policy was an assigned risk policy provided by Carrier pursuant to the Assigned Risk Plan.[3] The Assigned Risk Plan, which includes the Assigned Risk Supplement, is controlling law with respect to the issues it addresses. Avant, 367 S.C. at 319, 626 S.E.2d at 799. Further, the

[3] Specifically, Carrier's Assistant Vice President for Residual Market Operations testified Employer's policy was an assigned risk policy issued in the residual market under the Assigned Risk Plan.

policy specifically states that any of its terms conflicting with the workers' compensation law are changed to conform to the law. 2007-08 Workers' Compensation and Employers' Liability Insurance Policy, Part One, section H(6). Therefore, the policy placed Employer on notice that it was subject to the Assigned Risk Supplement.

C. Premium Endorsement

Employer also argues the language of the Assigned Risk Supplement did not require Carrier to issue a premium endorsement because the additional premium generated by the August 8, 2007 audit did not reach 25% of the estimated annual premium. We disagree.

The Assigned Risk Supplement states that a carrier must issue an additional premium endorsement if the additional premium generated by an audit is at least $500 or 25% of the estimated annual premium, whichever is greater. Assigned Risk Supplement to the Basic Manual for Workers' Compensation and Employers' Liability Insurance § 2(D)(7)(b)(2)(b) (NCCI 2006). The additional premium for the 2007-08 policy, $4,862, was less than 25% of the estimated annual premium. The estimated annual premium for the 2007-08 policy period was $24,463. Twenty-five percent of this annual premium is $6,115.75.

However, another provision of the Assigned Risk Supplement requires Carrier to "investigate and make a determination . . . whether an endorsement to the policy is needed to accurately reflect the exposure base and/or classification(s) of the policyholder." Assigned Risk Supplement to the Basic Manual for Workers' Compensation and Employers' Liability Insurance § 2(D)(7)(b)(2)(a) (NCCI 2006). This language authorizes the carrier to exercise its discretion as to when a premium endorsement is necessary. Further, the Assigned Risk Supplement requires the carrier to use sound underwriting judgment using the latest available audit information to develop a current policy premium. Id. Therefore, at the very least, the Assigned Risk Supplement authorized, if not required, Carrier to issue a premium endorsement to Employer's 2007-08 policy despite the fact that the endorsement did not represent 25% of the estimated premium.

Based on the foregoing, the Appellate Panel properly concluded the Assigned Risk Supplement authorized the premium endorsement to the 2007-08 policy.

II. Cancellation of Coverage

Employer asserts the Appellate Panel erred in concluding Carrier properly cancelled Employer's coverage because: (1) the premium endorsement requiring Employer to pay an additional amount of funds was invalid for lack of a signature; and (2) Carrier failed to timely return the unearned portion of the premium paid by Employer. We address each of these arguments in turn.

A. Unsigned Endorsement

Employer contends the premium endorsement requiring Employer to pay additional funds was invalid for lack of a signature. However, Employer does not cite any authority for this proposition or present any further discussion in its brief for this conclusory statement. Therefore, Employer has abandoned this point. See State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (recognizing an argument is deemed abandoned on appeal when it is merely conclusory and made without supporting authority). Further, this specific point is not listed in the Statement of Issues on Appeal. Therefore, the court need not address it. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

B. Unearned premium

Employer argues Carrier did not properly cancel the policy because Carrier failed to timely return the unearned portion of the premium paid by Employer. We disagree.

On September 4, 2007, Carrier sent a notice of cancellation of the 2007-08 policy based on Employer's failure to pay the amounts billed by

Carrier for both the 2006-07 policy and the 2007-08 policy. The notice advised Employer that the 2007-08 policy would be cancelled on October 10, 2007, if the additional premiums were not paid by then. Employer made partial payments on November 8, 2007, and November 15, 2007, but Employer did not pay the remaining amount due until November 26, 2007, well after the October 10th deadline. Carrier then reinstated the 2007-08 policy, effective November 27, 2007, with a lapse in coverage from October 10, 2007, through November 26, 2007.

Unrelated to premiums, the 2007-08 policy was cancelled a second time in April 2008, due to safety violations, and it was never reinstated. On June 9, 2008, Carrier paid Employer's lender a premium refund in the amount of $15,471 for the 2007-08 policy. Carrier did not charge premiums to Employer for the period of lapse, October 10, 2007, through November 26, 2007. Rather, Carrier adjusted the premium to account for the lapse in coverage in determining Employer's refund following the final audit. Further, Employer admits in its brief that Carrier returned any unearned premium after the final audit.

Although Carrier did not send the refund to Employer's lender until June 2008, there are no provisions in the policy requiring Carrier to return any unearned premium immediately upon cancellation of the policy. The policy's cancellation provision allows the final premium to be calculated "pro rata based on the time [the] policy was in force." 2007-08 Workers' Compensation and Employers' Liability Insurance Policy, Part V, Section E(1) ("Final Premium"). Therefore, the timing of any refund is tied to the calculation of the final premium. This calculation is not required to be performed until "after the policy ends," so that Carrier may obtain accurate information on "the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by th[e] policy." 2007-08 Workers' Compensation and Employers' Liability Insurance Policy, Part V, Section E(1) ("Final Premium") (emphasis added).

Moreover, the calculation of the final premium necessarily involves an audit of the employer's records, and there is no provision requiring an audit to be conducted immediately upon cancellation of the policy. The policy

section addressing audits states, in pertinent part: "We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends." 2007-08 Workers' Compensation and Employers' Liability Insurance Policy, Part V, Section G ("Audit"); Policy Information Page. Based on the foregoing, Carrier's issuance of a refund for the lapse in coverage after completing the audit of Employer's records in June 2008 did not violate any policy provisions and thus did not invalidate cancellation of the policy in October 2007. Cf. Bowman v. State Roofing Co., 365 S.C. 112, 121-22, 616 S.E.2d 699, 704 (2005) ("[W]here an insurance policy provides for the return of unearned premiums upon cancellation, the tender of a refund is a condition precedent to an effective cancellation.") (emphasis added).[4]

III. Lapse in Coverage

Employer maintains the Appellate Panel erred in finding a lapse in Employer's coverage existed from October 10, 2007 through November 26, 2007. Employer argues the estimated premium paid through Johnson & Johnson in June 2007 should have been pro-rated to provide coverage for the ensuing nine months, which included the date of Claimant's accidental injury. We disagree.

Employer cites no authority for his argument that the estimated premium should have been pro-rated to provide coverage for the ensuing nine months.[5] Therefore, Employer has abandoned this argument. See State v.

[4] In its brief, Employer relies upon the following quote by our supreme court in the case of Wilkes v. Carolina Life Ins. Co., 166 S.C. 475, 478, 165 S.E. 188, 189 (1932): "[T]he premiums having been paid, and retained by the defendant, and not refunded, or tendered back, the policy as a matter of law could not have been canceled by the notice of, or attempt at, cancellation." However, the court was merely quoting language from a party's motion to dismiss the complaint and this language was not adopted as a holding by the court. Id.

[5] Employer quotes the following from the case of Moore v. Standard Mut. Life Ass'n of S.C., 191 S.C. 196, 201, 4 S.E.2d 251, 254 (1939): "[T]he

Garner, 389 S.C. at 67, 697 S.E.2d at 618 (recognizing an argument is deemed abandoned on appeal when it is merely conclusory and made without supporting authority). Nonetheless, the opinion of the Supreme Court of North Carolina in Klein v. Avemco Ins. Co., 220 S.E.2d 595, 597 (N.C. 1975) is instructive on this point. In Klein, the court stated: "'If the premium is not paid in the manner prescribed in the policy, the policy is forfeited. Partial payment, even when accepted as a partial payment, will not keep the policy alive even for such fractional part of the year as the part payment bears to the whole payment.'" 220 S.E.2d at 597 (quoting Clifton v. Mut. Life Ins. Co. of N.Y., 84 S.E. 817, 818 (1915)).

Here, Employer's policy required the initial payment of an estimated premium for coverage throughout the 2007-08 policy year and an adjustment to the premium after a final audit at the end of the policy period. However, the policy also deferred to applicable law, which authorized a premium endorsement to the policy during the policy period. See Assigned Risk Supplement to the Basic Manual for Workers' Compensation and Employers' Liability Insurance § 2(D)(7)(b)(2)(a) (NCCI 2006) (stating that when a carrier discovers information indicating the need to more accurately reflect the exposure base or classification of the policyholder, the carrier must investigate and make a determination whether an endorsement to the policy is needed to accurately reflect the exposure base and/or classification(s) of the policyholder). This endorsement effectively restated the estimated premium, which was initially due at the beginning of the policy period. Therefore, Carrier was justified in requiring the additional premium to be paid within approximately sixty days to avoid cancellation of the policy.

Further, because Employer did not pay the full amount billed for the additional premium until November 26, 2007, Carrier properly reinstated the policy with a resulting lapse in coverage from October 10, 2007, through

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contract could not be lapsed during the time for which the premiums had been paid." However, Moore involved monthly premiums for a life insurance contract. Therefore, the opinion provides no guidance with respect to an assigned risk workers' compensation policy with an estimated annual premium.

November 26, 2007. After Carrier determined it was necessary to issue a premium endorsement to accurately reflect the information it obtained from the August 8, 2007 audit, the $24,463 paid by Employer up front took on the nature of a partial payment that would not "keep the policy alive even for such fractional part of the year as the part payment bore to the whole payment." See Klein, 220 S.E.2d at 597 (quoting Clifton v. Mut. Life Ins. Co. of N.Y., 84 S.E. 817, 818 (1915)) ("'If the premium is not paid in the manner prescribed in the policy, the policy is forfeited. Partial payment, even when accepted as a partial payment, will not keep the policy alive even for such fractional part of the year as the part payment bears to the whole payment.'").

Based on the foregoing, the Appellate Panel properly concluded a lapse in Employer's coverage occurred from October 10, 2007, through November 26, 2007.

CONCLUSION

Accordingly, the Appellate Panel's decision is

AFFIRMED.

WILLIAMS, J., and CURETON, A.J., concur.