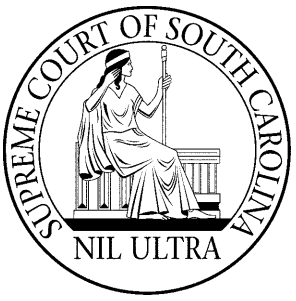


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**FILED DURING THE WEEK ENDING**

**November 3, 2003**

**ADVANCE SHEET NO. 40**

**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**PETITIONS - UNITED STATES SUPREME COURT**

None

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

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In the Matter of Harold Mark Chandler, Respondent.

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Opinion No. 25743
Heard October 9, 2003 - Filed November 3, 2003

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**DISBARRED**

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Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Assistant Disciplinary Counsel, both of Columbia, for The Office of Disciplinary Counsel.

Harold Chandler, of Surfside Beach, pro se.

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**PER CURIAM:** This attorney disciplinary matter consolidates multiple matters. After a hearing, the Panel recommended Respondent be disbarred. We agree with the Panel, and disbar the Respondent from the practice of law in this State.

PROCEDURAL HISTORY

Respondent was placed on interim suspension on July 17, 2002, and formal charges were filed in these matters on November 22, 2002.

Respondent did not file an Answer, and was held in default by the subpanel of the Commission on Lawyer Conduct. Pursuant to the Default Order, the factual allegations in the Formal Charges are deemed admitted by Respondent. Rule 24(a), Rules for Lawyer Disciplinary Enforcement (RLDE). Respondent did not appear at the Panel hearing. Respondent did not appear, nor was he represented, at the argument in front of this Court.

## FACTS

The following matters involving misconduct are before this Court:

### A. The Smith Matter

Respondent's firm was hired to conduct a real estate closing for Smith. Respondent was responsible for the closing, but an associate covered the closing for Respondent. The associate did not complete the closing because additional liens were recorded the day of the closing. Smith paid Respondent's firm $934.92 for fees and costs associated with the closing. The check was placed in a file, and Respondent took no further action. Smith contacted Respondent's office multiple times, but Respondent did not return Smith's calls. Smith filed a grievance. Respondent returned the money after receiving notice of the grievance.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.15 (Safekeeping of Property); Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(e)(Misconduct-Prejudice to the Administration of Justice). The subpanel found Respondent violated these rules in that he failed to complete the closing, failed to inform Smith the closing would not be completed, and failed to timely return Smith's funds. The subpanel also found that Respondent is subject to discipline pursuant to Rules 7(a)(1), 7(a)(5), and 7(a)(6) of RLDE, Rule 413, SCACR.

B. The Doe Estate Matter

Respondent was retained to represent the estate of Doe. Respondent failed to respond to reasonable inquiries and requests for documentation from the personal representative (PR) and beneficiaries. The estate was administratively closed by the Probate Court, and Respondent failed to inform the PR or beneficiaries. Respondent reopened the estate and promised to pay the beneficiaries any losses or expenses resulting from his lack of diligence.

Respondent's law firm was dissolved and Respondent opened a solo practice. Respondent failed to inform the PR or beneficiaries of his new address and phone number. Four months later, Respondent closed his practice without notifying the parties. The loss in value of the assets of the estate is estimated at $300,000 due to a downturn in the stock market during Respondent's delay.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 1.16 (Termination of Representation); Rule 3.2 (Expediting Litigation); Rule 4.4 (Respect for Rights of Third Persons); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

C. The Client A Matter

The seller retained Respondent to close on a property purchased by Client A. Respondent did not send the deed to Client A. Client A called Respondent multiple times, and Respondent assured Client A he would send it, however Respondent did not.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); and Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct).

D. The Client B Matter

Respondent entered into a real estate transaction with Client B and represented himself, Client B, and the seller at the closing. Respondent misappropriated funds from his trust fund, and converted them to personal use in the transaction. Respondent's firm dissolved, and his partner, Mr. Patrick, had to deposit funds to cover the deficit in the trust account.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.7 (Conflict of Interest-General Rule); Rule 1.8 (Conflict of Interest-Prohibited Transactions); Rule 1.15 (Safekeeping of Property); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(b) (Misconduct-Commission of a Criminal Act); and Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation).

E. The Company Matter

Respondent was hired to form Company, LLC. Respondent failed to file the Articles of Organization, and therefore, Company, LLC, was never legally formed. Respondent proceeded to handle closings on approximately 44 properties, naming Company, LLC as the seller, even though the LLC did not exist. Also, Respondent was aware of outstanding liens on the property and failed to inform the parties of the outstanding liens. Respondent also issued title commitments on 23 units, but failed to issue title policies to the purchasers.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.5 (Fees);

Rule 4.4 (Truthfulness in Statements to Others); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

F. The Builder Matter

Respondent represented both the seller and buyer in a closing on 12 lots. Respondent was informed both before and after the closings that there were outstanding judgments and tax liens encumbering the property. Respondent continued with the closing and did not inform the purchasers or the lenders of the encumbrances. Respondent instructed his assistant to record the deed, even though encumbrances existed. Respondent closed several other properties for Builder in a similar fashion.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.5 (Fees); Rule 1.7 (Conflict of Interest-General Rule); Rule 4.1 (Truthfulness in Statements to Others); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation).

G. The Sweetwater Matter

Respondent was ordered by the court to file an accounting of all the money held in escrow as a result of closings of units at Sweetwater development, which pertained to a civil matter. Respondent failed to file the accounting, and failed to inform the court when his partnership dissolved and he opened his own office.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.3 (Diligence); Rule 3.2 (Expediting Litigation); Rule 3.3 (Candor to the Tribunal); Rule 3.4 (Fairness to Opposing Party and Counsel); Rule 8.4(a) (Misconduct-Violation

of Rules of Professional Conduct); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

H. The Conservatorship Matter

Respondent represented a Georgia resident, Client C, who was serving as conservator for her husband. Client C and her husband owned property in South Carolina, which Client C was trying to sell. Respondent was to open an ancillary conservatorship estate for Client C in South Carolina by filing the Georgia conservatorship papers with the Horry County Probate Court. Respondent failed to file the papers, but proceeded with the closing. Due to Respondent's omission, Client C did not convey marketable title to the purchasers. Respondent also represented the purchasers in the closing.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.5 (Fees); Rule 1.7 (Conflict of Interest); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation).

I. The Title Insurance Matter

Respondent represented both seller and purchaser in a real estate closing. The property was encumbered by a mortgage, but Respondent failed to inform the purchasers, lender, or title insurance company of the encumbrance. The purchasers requested and paid for a title insurance policy, but Respondent failed to issue the policy. The purchasers hired a different attorney, Mr. Barnett, after being served with a foreclosure action for the property. Respondent informed Mr. Barnett that Respondent had issued a title insurance policy to the purchasers, even though he had not. The title insurance company ultimately assumed representation of the purchasers, and Respondent assured Mr. Barnett that he would pay Mr. Barnett's fees and costs. Respondent failed to do so. Respondent misrepresented to his partner, Mr. Patrick, that he had paid Mr. Barnett. Mr. Patrick paid Mr. Barnett $1,200 on Respondent's behalf and Respondent has not repaid Mr. Patrick.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 1.7 (Conflict of Interest); Rule 4.1 (Truthfulness in Statements to Others); Rule 4.4 (Respect for Rights of Third Persons); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

J. The Client D Matter

Client D paid Respondent in full for fees and costs to organize a number of LLCs. Respondent did not file any Articles of Organization. Upon dissolution of Respondent's firm, Respondent failed to take Client D's file with him to complete the job.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 1.16 (Termination of Representation); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

K. Client E Matter

Client E retained Respondent to represent her in a personal injury suit. Respondent filed a summons and complaint for Client E, but service was never perfected. Respondent falsely stated to Client E that he received a settlement check in her case for $42,000. The insurance company associated with the lawsuit has filed liquidation proceedings. Respondent had the lawsuit dismissed stating the case had been settled. The statute of limitations on Client E's claim has expired.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

L. Client F Matter

Client E's daughter, Client F, also retained Respondent for a personal injury claim arising out of the same incident. Respondent issued a check from his firm's operating account to the trust account, then issued a check in the same amount to Client E on behalf of her daughter. Respondent told Client E and Client F that the funds were proceeds from a settlement. This information was false. Respondent did not file a lawsuit on behalf of Client F, and the statute of limitations has expired. Respondent misrepresented to the firm's office manager that the funds were an advance to the clients to pay for a trip.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation).

M. The Misappropriation of Law Firm Funds Matter

After Respondent dissolved the partnership with Mr. Patrick, Respondent took approximately $100,000 from the firm's operating account and the title insurance account, which he was not authorized to do. Respondent made many unauthorized disbursements to third parties from the operating account. Respondent was supposed to repay the amount, but later, removed an operating account check from the office and negotiated it for $18,000. Respondent denied any knowledge of the transaction.

The subpanel found Respondent violated the following Rule of Professional Conduct found in Rule 407, SCACR: Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation).

N. Client G Matter

Respondent was retained to represent Client G. Respondent failed to appear for Client G's trial. Both Client G and the judge's secretary made unsuccessful attempts to locate and contact Respondent.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.16 (Termination of Representation); Rule 3.2 (Expediting Litigation); Rule 3.4 (Fairness to Opposing Party and Counsel); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

O. Client H Matter

Client H retained Respondent, and issued a check to Respondent for $2,000 as a retainer fee. Respondent negotiated the check, but did not put it in his trust account. Respondent met with Client H once, then failed to communicate with her, or take any action on her behalf. Respondent did not inform Client H that he was closing his law office. Respondent did not take any steps to protect Client H's interests upon termination of his representation of her. Respondent did not refund the retainer fee to Client H.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 1.15 (Safekeeping of Property); Rule 1.16 (Termination of Representation); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation).

P. The Bankruptcy Matter

Respondent represented the estate of Ms. Roe. Client J was the personal representative of the estate. Client J filed bankruptcy in Florida. The trustee in Florida contacted Respondent multiple times, through letters and phone calls, asking Respondent to make any disbursements meant for Client J to the trustee, as Client J's inheritance was an asset of the bankruptcy estate. Respondent did not respond. Two years after Ms. Roe's death, Client J died. Respondent assured the bankruptcy trustee that the estate would be closing in four weeks, and the funds would be distributed to the trustee. The trustee did not receive a distribution. A year later, after multiple calls and letters from the trustee, Respondent finally contacted the trustee and informed him that a distribution of $30,000 would be made to the trustee within a few weeks. No distribution was made. The trustee wrote Respondent again. Respondent did not respond.

When Respondent left his firm to open a solo practice, he did not inform the trustee. When Respondent closed his solo practice, he failed to inform the trustee. Respondent's former law partner discovered $30,000 that was deposited into the trust account from the estate. Respondent requested the office manager wire transfer $16,000 to the trustee, however, Respondent altered the recipient and had the money transferred to another client. The funds did not belong to the client, and no funds were ever distributed to the trustee.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.3 (Diligence); Rule 1.15 (Safekeeping of Property); Rule 1.16 (Termination of Representation); Rule 3.2 (Expediting Litigation); Rule 3.3 (Candor to the Tribunal); Rule 4.1 (Truthfulness in Statements to Others); Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

Q. Client K Matter

Respondent represented Client K in a real estate closing. Client K signed over to Respondent a check for $170,000, proceeds from the sale of Client K's home, as well as an additional $38,000. Respondent was to place the funds in an interest bearing account and draw funds on the account to pay the contractor who was building Client K's home. Respondent closed his law office with no notice to Client K. Respondent did not pay the real estate agent, nor the contractor. Respondent did open an account on behalf of Client K, but only placed one dollar in the account. Respondent misappropriated and commingled Client K's money.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.15 (Safekeeping of Property); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(b) (Misconduct-Committing a Criminal Act); Rule 8.4(c) (Misconduct-Conduct Involving Moral Turpitude); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

R. The Estate of R Matter

Respondent represented the Estate of R. Respondent failed to competently pursue legal matters on behalf of the estate. Respondent did not return phone calls to the PR. After Respondent closed the law practice with his partner, he failed to notify the PR. After Respondent closed his solo practice, he failed to notify the PR. Respondent did not comply with repeated attempts of his former partner to obtain the file from Respondent. Respondent was placed on interim suspension and failed to notify the PR or the Probate Court of his suspension.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.15 (Safekeeping of Property); Rule 1.16

(Termination of Representation); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); and Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit and Misrepresentation).

S. Failure to Cooperate with Disciplinary Authorities

Respondent did not respond to inquiries from the Office of Disciplinary Counsel (ODC). Respondent did have some contact, early in the proceedings, with the ODC, but failed to keep scheduled appointments and did not respond to the Notices of Full Investigation or Notices to Appear.

The subpanel found Respondent violated the following Rule of Professional Conduct found in Rule 407, SCACR: Rule 8.1(b) (Bar Admission and Disciplinary Matters).

Respondent did not present any evidence of mitigation. Respondent did assert he was suffering from depression and seeking treatment, however Respondent did not appear at meetings with ODC scheduled for the purpose of discussing his mental condition. The subpanel found no evidence that would support a finding of depression that would mitigate Respondent's conduct in this matter.

The subpanel recommended that Respondent be disbarred based upon the egregious nature of the misconduct; the significant financial losses to Respondent's clients, former law partner and other parties; the pattern of misconduct; the failure of Respondent to cooperate with the disciplinary investigation; and the failure of Respondent to appear at the hearing. As authority for its recommendation, ODC cites to In the Matter of Morris, 343 S.C. 651, 541 S.E.2d 844 (2001); In the Matter of Murph, 350 S.C. 1, 564 S.E.2d 673 (2002); In the Matter of Purvis, 347 S.C. 605, 557 S.E.2d 651 (2001) and In the Matter of Murdaugh, 342 S.C. 59, 536 S.E.2d 370 (2000). The subpanel also recommended that the opinion disciplining Respondent include a provision that Respondent is not to be reinstated or readmitted until he has compensated all persons or entities who have suffered financial losses as a result of Respondent's misconduct, including but not limited to

Respondent's clients, his former partner, the title insurance company, and the Lawyer's Fund for Client Protection.

The subpanel also recommended that Respondent be assessed the costs of these proceedings pursuant to Rule 7(b)(8), RLDE. The costs incurred were $271.45.

## CONCLUSION

The authority to discipline attorneys and the manner in which discipline is given rests entirely with the Supreme Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The Court may make its own findings of fact and conclusions of law, and is not bound by the Panel's recommendation. In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The Court must administer the sanction it deems appropriate after a thorough review of the record. Id.

We disbar Respondent from the practice of law in this state. Within thirty days of the date of this opinion, Disciplinary Counsel and Respondent shall establish a restitution schedule pursuant to which Respondent shall make restitution to all persons and entities who have suffered financial losses as a result of Respondent's misconduct, including but not limited to Respondent's clients, his former partner, the title insurance company, and the Lawyer's Fund for Client Protection. Failure to make restitution in accordance with this opinion and the restitution plan may result in Respondent being held in contempt of this Court. Respondent shall not apply for readmission until restitution has been paid in full.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, shall surrender his Certificate of Admission to the Practice of Law to the Clerk of Court, and shall pay the costs associated with this matter.

**DISBARRED**.

**MOORE, A.C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice L. Casey Manning, concur.**

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

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In the Matter of
Marvin Daniel Iseman, Respondent.

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Opinion No. 25744
Heard June 11, 2003 - Filed November 3, 2003

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**DISBARRED**

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Barbara M. Seymour, of Columbia, for The Office of Disciplinary Counsel.

Marvin Daniel Iseman, of Eastover, pro se.

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**PER CURIAM:** Marvin Daniel Iseman ("Respondent") has taken exception to the Subpanel of the Commission on Lawyer Conduct's ("Subpanel") recommendation that he be disbarred and required to pay the costs of these proceedings.

## FACTUAL/PROCEDURAL BACKGROUND

This attorney discipline matter arises from Respondent's conduct involving two separate events: (1) a series of money leasing transactions and (2) bank fraud.

## A. "MONEY LEASING" TRANSACTION

Evidently deft at putting together convoluted international business transactions that circumvent tax laws and involve large amounts of risk, Respondent was hired by a Kentucky law firm in late 1996 to scrutinize the structure of a business deal originating in London. According to Respondent, the deal was a "money leasing" transaction that involved raising $3 to $5 million in cash to "lease" $40 million in cash from a Mexican bank, which would be exchanged for a "German Bank Guarantee" and not constitute a taxable event. Respondent came in contact with Volker Schneider ("Schneider"), who invested $480,000 into the deal in February 1997. According to Respondent, Schneider told him that coming up with the rest of the $3 to $5 million needed to "lease" the $40 million would not be a problem. But then in late May 1997, Schneider informed Respondent that he could not raise the balance of the capital needed for the investment. Respondent alleges that he raised the rest of the seed money elsewhere.

The $480,000 that Schneider transferred to Respondent originally came from Mathias Heizmann ("Heizmann"), who had decided to invest a large portion of his family's savings with a Rudolf Wehrli ("Wehrli"). Heizmann discovered Wehrli in a local German newspaper advertisement, where he claimed to be a "professional financial advisor and broker." Wehrli gave the sum of money to Schneider for investment purposes only to discover later that the money had been "lost." Wehrli hired Hans Neuhauser, an attorney with an anti-fraud practice, to attempt to recover the large sum.

Respondent was in Zurich in September 1997, when he was approached by Neuhauser, who explained to Respondent about the origin of the $480,000. Neuhauser wanted the money returned to Heizmann. Respondent confirmed with Schneider the existence of a "Mr. Wehrli," returned to the United States, and decided to write Neuhauser a letter offering to return the $480,000 in exchange for a release and indemnity from Mr. Wehrli.[1]

[1] Wehrli assigned all of his claims against Respondent to Heizmann.

On September 30, 1997, Respondent and Neuhauser executed a Comprehensive Release, which provided that in exchange for Respondent's payment of $500,000, Respondent would be released from any claim asserted by Wehrli. Respondent postdated the $500,000 check for October 3, 1997, so that he could give himself a little "contingent time." Respondent also told Neuhauser that if he did not want to proceed with the agreement, he would issue a Stop Payment Order on the check. Respondent further stated that he did not believe that Neuhauser was aware of how the stop payment process functioned in the United States. In his Answer to the Commission on Lawyer Conduct's Filing of Formal Charges, Respondent wrote, "in truth, I think I simply wanted to get rid of Neuhauser as diplomatically as possible knowing I could either go forward with the Release or NOT, based upon Schneider's or my own opinion." After discussing the matter with Schneider, who reiterated that he did not want to back out of the deal, Respondent issued a Stop Payment Order for the check.

Unable to collect any of his $480,000, Heizmann hired a local attorney and filed a civil action in federal court here in South Carolina for breach of contract. In his Answer, Respondent generally denied all claims, and he did not reply to Heizmann's requests for admissions or motion for summary judgment. Consequently, Heizmann was awarded summary judgment against Respondent in the amount of $500,000 plus interest, and Respondent did not appeal the judgment.

The Subpanel found that Respondent's conduct in connection with his signing of the Comprehensive Release, coupled with his Stop Payment Order, constituted a violation of Rule 8.4(d) of the *Rules of Professional Conduct*, Rule 407, SCACR. We agree.

Rule 8.4(d) states that it is misconduct for a lawyer to engage in fraudulent, dishonest, and deceitful conduct. By his own admission, Respondent exhibited this type of misconduct because he never intended to perform his obligation under the Comprehensive Release, i.e., pay the $500,000.

Between September 22, 1997 (the date that Respondent faxed Neuhauser the letter requesting the indemnification) and September 30, 1997

(the date the Comprehensive Release was signed) Respondent spoke with Schneider, and Schneider stated that he would stay in the deal and "would not comply with [Respondent's] Sept. 22 letter to Neuhauser."[2] Knowing that the party who originally gave him $480,000 did not want him to remit the money to Wehrli, Respondent executed the agreement and post-dated the check to give himself some "contingent time." And believing that Neuhauser did not understand how the stop payment process functioned in the U.S., Respondent told Neuhauser that he could issue a Stop Payment Order if he wanted to get out of the deal.[3] Respondent then talked with Schneider and issued the Stop Payment Order.

Respondent essentially admits that Schneider maintained his position - that he wanted the deal to go through and that he did not want Respondent to sign the Comprehensive Release - throughout the transaction. We find that Respondent had no intention other than to decieve Neuhauser into thinking that the money would be returned to his client. Respondent could not have revealed his intent more lucidly than when he wrote, "[I]n truth, I think I simply wanted to get rid of Neuhauser as diplomatically as possible." Thus, we hold that Respondent violated Rule 8.4(d).

### B. BANK FRAUD

Respondent was indicted by the Grand Jury of the U.S. District Court of South Carolina on March 22, 2000, for five counts of wire fraud in connection with the Schneider/Wehrli/Heizmann scheme and three counts of bank fraud arising from an unrelated check-kiting scheme that occurred between August 1998 and December 1999. The U.S. government extradited Respondent in April 2000 from a Swiss prison, where he had been incarcerated in connection with the Heizmann affair.

In August 2000, Respondent entered into a Plea Agreement and agreed to plead guilty to Count 8, which claimed that he engaged in a scheme to

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[2] Respondent sent a copy of the September 22 letter to Schneider.

[3] No section of the Comprehensive Release indicated that the agreement was contingent on Respondent's decision to request a Stop Payment Order.

defraud and obtain money by false pretenses from Bank of America by presenting a check for deposit and cash drawn on another account at First Union, an account that he knew contained insufficient funds. The judge sentenced Respondent to twelve months in prison and ordered him to pay $116,220.38 in restitution.

According to Rule 16(d) of the *Rules of Lawyer Disciplinary Enforcement*, (RLDE), Rule 413 SCACR, "[a] certified copy of a judgment of conviction constitutes conclusive evidence that the lawyer committed the crime, and the sole issue in any disciplinary proceedings based on the conviction shall be the nature and extent of the discipline imposed." Respondent pled guilty to bank fraud, which is classified as a serious offense under Rule 2(z) of the RLDE. *In the Matter of Holt*, 328 S.C. 169, 492 S.E.2d 793 (1997). The Subpanel found that in committing bank fraud, Respondent violated Rules 8.4(b), 8.4(c), 8.4(d), and 8.4(e) of the *Rules of Professional Conduct*, Rule 407, SCACR.

## C. THE HEARING

Respondent takes exception to the Subpanel's denial of his motion for a new hearing. After being released from prison in January 2000, Respondent resided at Caughman Farms in Eastover, South Carolina. His initial hearing in front of the Subpanel was scheduled for June 13, 2000. Respondent originally told Barbara Hinson ("Hinson"), Administrative Assistant for the Commission on Lawyer Conduct, that the scheduled date was "fine" with him. Three days prior to the hearing, Respondent called Hinson to inform her that his brother-in-law would be representing him at the hearing but that his brother-in-law would be out of the country on that date. Respondent requested a continuance, which was granted. On June 14, Hinson sent a certified notice to Respondent at his Eastover address, which stated that the hearing had been rescheduled for July 9. She received the return receipt of the certified mailing on June 19, which was signed, but not by Respondent. Respondent claims that he never received the notice of the rescheduled hearing, and Edward Caughman attested to the claim in a sworn affidavit.

Respondent did not appear at the July 9 hearing, as he was in New York between June 23 and July 20, and the hearing proceeded without him. Respondent made a motion for a new hearing, which the Subpanel denied.

We hold that the Subpanel did not err in denying Respondent's motion for a new hearing because service was proper under Rule 233(b) SCACR (setting forth the proper service requirements in attorney discipline matters), and the Commission received the return receipt on June 19, which was four days prior to Respondent's departure to New York on June 23. Further, we agree with the Subpanel that Respondent had every reason to believe that the hearing would be promptly rescheduled after the June 13 hearing was continued.

## D. SANCTION

This Court holds the ultimate authority to sanction attorneys, and we are not bound by the Subpanel's findings. *In the Matter of Yarborough*, 327 S.C. 161, 165, 488 S.E.2d 871, 873 (1997). Nevertheless, we agree with the Subpanel's recommendation that Respondent should be disbarred because of his bank fraud conviction and his involvement in the defrauding of Mr. Heizmann.

In *Holt*, we determined that bank fraud, by itself, constitutes sufficient grounds for disbarment. *See also*, *In the Matter of Welch,* 355 S.C. 93, 584 S.E.2d 369 (2003) (a guilty plea of bank fraud constituted the primary justification for disbarment); *In the Matter of Yarborough*, 343 S.C. 316, 540 S.E.2d 462 (2000) (involvement in a check-kiting scheme, committing bank fraud, and using escrow funds to pay a margin call warranted disbarment).

Although Respondent's conviction of bank fraud alone is sufficient grounds for disbarment, his violation of Rule 8.4(d) in connection with the Heizmann matter provides additional support for the sanction of disbarment. Finally, we note that Respondent's prior disciplinary history exhibits a tendency to engage in lawyer misconduct involving deceit. *See In the Matter of Iseman*, 287 S.C. 194, 336 S.E.2d 474 (1985) (Respondent was issued a public reprimand for failing to preserve the identity of funds and property of a client; thus violating DR 1-102(A)(4), which is the present-day Rule

8.4(d).); *In the Matter of Iseman*, 290 S.C. 391, 350 S.E.2d 922 (1986) (Respondent was suspended for 90 days because he misrepresented the amount of Continuing Legal Education credits he had earned.).

## CONCLUSION

Accordingly, we disbar Respondent. Within fifteen days of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. We also require that Respondent pay the costs of these proceedings.

**TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.**

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

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The State, Petitioner,

v.

Kenneth Andrew Burton, Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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Opinion No. 25745
Heard September 25, 2003 - Filed November 3, 2003

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**REVERSED IN PART; VACATED IN PART**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia, and Solicitor W. Townes Jones, IV, of Greenwood, for Petitioner.

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for Respondent.

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**JUSTICE PLEICONES:** This Court granted the State's petition for writ of certiorari to review the Court of Appeals' decision in State v.

Burton, 349 S.C. 430, 562 S.E.2d 668 (Ct. App. 2002),[1] and further directed the parties to brief whether pointing and presenting a firearm is a lesser included offense of assault with intent to kill. We vacate Burton's conviction of pointing and presenting a firearm because it is not a lesser included offense of assault with intent to kill. Also, we reverse the Court of Appeals' ruling that the trial court erred in failing to direct a verdict on Burton's charges due to a search and seizure violation. That issue was not properly preserved for review.

## ISSUES

I. Is pointing and presenting a firearm a lesser included offense of assault with intent to kill so that the circuit court had subject matter jurisdiction to try or convict Burton of that offense?

II. Did the Court of Appeals err in holding that the trial judge erred in failing to direct verdicts because of a Fourth Amendment violation?

## FACTS

In March 1998, the Chief of Police for Laurens County asked six officers to serve outstanding warrants. Officer Tracey Burke explained that the officers printed out a sheet of the names of people with outstanding warrants, and said, "if we run into somebody we don't know, and we ask, then we'll get their name and we'll look through this piece of paper…so we'll know we have active warrants on these persons."

The officers went to the Green Street Mini-mart where several people were loitering in the parking lot. Burton was standing at a pay phone, with

[1] The United States Court of Appeals for the Fourth Circuit vacated and remanded Burton's federal conviction for unlawful possession of a firearm by a felon, which arose from the same incident. The court found that the "officer's search was not supported by a reasonable suspicion of criminal activity and therefore constituted an illegal search." United States v. Burton, 228 F.3d 524, 526 (4th Cir. 2000).

the receiver in his left hand, and his right hand in his coat pocket. Officer Burke[2] asked Burton if he could see Burton's ID, but "[Burton] wouldn't acknowledge nothing [Burke] told him at first." When Burton did not respond, the other officers came over to the pay phone. Officer Burke asked Burton, again, for some identification, but Burton "never said a word." The officers asked Burton to remove his hand from his coat pocket, but Burton still did not respond, and did not remove his hand.

Officer Burke testified that because Burton would not acknowledge the officer's questions, and would not remove his hand from his pocket, "a lot of things went through [Officer Burke's] mind. It could have been maybe a beer or anything, but my worse interpretation was it might have been a weapon. So, after him not acknowledging us or even saying anything, I was positioned behind [Burton]. I reached my hand around behind him to see what was inside of his coat, because at that point I'd done got worried." Officer Burke reached his hand in Burton's pocket, and Burton began to struggle with the officer. As Officer Burke and Burton fell to the ground, Officer Burke heard another officer say "He's got a gun." The other officers ran to assist Officer Burke, and during the struggle, Burton raised his left side, pointed the gun at Officer Burke, and fired the gun three or four times. The gun did not discharge because a bullet was "stove-piped in the barrel."[3] After Burton was subdued on the ground and handcuffed, Burton spit blood on Officer Deal's shoe.

Burton was indicted for two counts of assault while resisting arrest, and two counts of assault with intent to kill. Burton represented himself at trial. The trial judge granted a directed verdict as to assault with intent to kill Officer Deal, which stemmed from Burton spitting on Deal's shoe. Burton was found guilty of resisting arrest as a lesser included offense of assault

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[2] Officer Burke was dressed in plain clothes, and was wearing a bullet proof vest marked "Police" over his clothes.

[3] Officer Burke explained that the bullet was perpendicular in the chamber, which prevented the gun from firing.

while resisting arrest; pointing and presenting a firearm as a lesser included offense of assault with intent to kill Officer Burke; and assault while resisting arrest. Burton was sentenced to eight years imprisonment for assault while resisting arrest to run concurrently with his federal sentence,[4] and two one-year concurrent sentences for resisting arrest and pointing and presenting a firearm.

The Court of Appeals reversed, finding that Officer Burke did not have the right to search Burton's pocket for weapons, and therefore the search was improper. The Court of Appeals concluded that the trial court erred in not directing a verdict on all charges.

## DISCUSSION

### I. Pointing and Presenting a Firearm

We asked the parties to brief whether pointing and presenting a firearm is a lesser included offense of assault with intent to kill so that the trial court had subject matter jurisdiction to convict and sentence Burton for the offense. We hold that pointing and presenting a firearm is not a lesser included offense of assault with intent to kill and therefore the conviction must be vacated.

In a criminal case, the trial court's subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses. State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002). An offense is a lesser included offense of another if "the greater of the two offenses includes all the elements of the lesser offense." State v. Elliott, 346 S.C. 603, 606, 552 S.E.2d 727, 728 (2001). However, when an "offense has traditionally been considered a lesser included offense of the greater offense charged, [this

[4] Burton was convicted in federal court of unlawful possession of a firearm by a felon, stemming from the same incident, and was sentenced to 115 months imprisonment. The United States Court of Appeals for the Fourth Circuit vacated Burton's conviction for this charge because of the illegal search and seizure. See footnote 1, supra.

Court] will continue to construe it as a lesser included, despite the failure to strictly satisfy the elements test." Watson, 563 S.E.2d at 338.

The elements of pointing and presenting a firearm are (1) pointing or presenting; (2) a loaded or unloaded firearm; (3) at another. S.C. Code Ann. § 16-23-410 (2003). The elements of assault with intent to kill are "(1) an unlawful attempt; (2) to commit a violent injury; (3) to the person of another; (4) with malicious intent; and (5) accompanied by the present ability to complete the act." State v. Walsh, 300 S.C. 427, 429, 388 S.E.2d 777, 779 (1988) (overruled on other grounds). In State v. Walsh, this Court applied the Blockburger test and found that the offenses of pointing and presenting a firearm and assault with intent to kill constituted separate and distinct offenses in a double jeopardy case. Walsh, 388 S.E.2d at 779.

Assault with intent to kill does not require the use of a firearm. Therefore, strict application of the elements test leads to the conclusion that pointing and presenting a firearm is not a lesser included offense of assault with intent to kill. See e.g. Watson, 563 S.E.2d at 336 (Reckless homicide requires operation of an automobile while murder does not. Therefore, under the strict elements test, reckless homicide is not a lesser included offense of murder.) Also, pointing and presenting a firearm has not traditionally been considered a lesser included offense of assault with intent to kill. Walsh, 388 S.E.2d at 779.

Pointing and presenting a firearm is not a lesser included offense of assault with intent to kill. Therefore, Burton's conviction is vacated because the trial court lacked subject matter jurisdiction.

II. Preservation

The Court of Appeals held that Officer Burke conducted an illegal search of Burton's coat pocket, and therefore the trial court erred in not directing a verdict on all charges against Burton. We agree with the Court of Appeals that the search and seizure of Burton was illegal and we look with disapproval on the officers' conduct leading up to the seizure. However, Burton's argument was not properly preserved as to any of the counts. The

record reflects no attempt by Burton, at trial, to suppress any evidence on constitutional grounds. Instead, Burton only raised the propriety of the police action in a motion for directed verdict, *after* the evidence pertaining to the search and seizure had been admitted without objection.[5]

Burton made motions for directed verdicts at the close of the State's case. The appropriate "vehicle for challenging the admissibility of evidence based on a search and seizure violation is a motion to suppress." State v. Green, 350 S.C. 580, 567 S.E.2d 505 (Ct. App. 2002). A motion for directed verdict, on the other hand, challenges the sufficiency of the properly admitted evidence. Green, 567 S.E.2d at 505. Burton did not make a motion *in limine* nor did he timely move to suppress the evidence.[6] See State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001)(finding Fourth Amendment issue not preserved when defendant failed to join in a motion to suppress). "The general rule is that the failure to object to, or failure to move to strike, testimony renders such competent and accordingly entitled to be considered to the extent it is relevant." State v. Frank, 262 S.C. 526, 205 S.E.2d 827 (1974). Because Burton did not object to the evidence when offered, it was properly admitted. This properly admitted evidence was sufficient to withstand a motion for a directed verdict. Burton did not preserve the argument for appellate review and the Court of Appeals erred in reversing his convictions.

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[5] We note that Burton was a pro se litigant. A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law.

[6] "Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury *at this threshold point* to establish the circumstances under which it was seized." State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978) (emphasis supplied), modified by State v. Patton, 322 S.C. 408, 472 S.E.2d 245 (1996).

## CONCLUSION

Burton's conviction of pointing and presenting a firearm is VACATED because it is not a lesser included offense of assault with intent to kill. Further, we REVERSE the Court of Appeals' decision to direct verdicts as to the remaining convictions of assault while resisting arrest, and resisting arrest as a lesser included offense of assault while resisting arrest, as Burton's arguments were not preserved for review.

**TOAL, C.J., WALLER and BURNETT, JJ., and Acting Justice Reginald I. Lloyd, concur.**

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

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United Student Aid Funds, Inc., Petitioner,

v.

The South Carolina Department of Health and Environmental Control, an Agency of the State of South Carolina; Grady L. Patterson, in his official capacity as Treasurer for the State of South Carolina; and James A. Lander, in his official capacity as Comptroller General for the State of South Carolina, Respondents.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Richland County
Donald W. Beatty, Circuit Court Judge

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Opinion No. 25746
Heard September 24, 2003 - Filed November 3, 2003

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**AFFIRMED**

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Lil Ann Gray and James D. Cooper, Jr., of Cooper, Coffas, Moore & Gray, P.A., of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster and Assistant Deputy Attorney General J. Emory Smith, Jr., for Respondents State Treasurer and Comptroller General and General Counsel Carlisle Roberts, Jr., and Staff Counsel Elizabeth F. Potter, for Respondent The South Carolina Department of Health and Environmental Control, all of Columbia.

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**JUSTICE BURNETT:** The Court granted a writ of certiorari to review the decision of the Court of Appeals in United Student Aid Funds, Inc., v. South Carolina Dep't of Health and Envtl. Control, 349 S.C. 162, 561 S.E.2d 650 (Ct. App. 2002). We affirm.

## FACTS

The United States Congress enacted the Federal Family Education Loan Program to encourage the making of loans by private lenders to finance the post secondary education of eligible students. See 20 U.S.C.A. §§ 1071 et seq. (2000) (the Act). Under this Act, guaranty agencies guarantee payment of the loan to eligible lenders and pay the holder of the loan if the student defaults. 20 U.S.C.A. § 1078. Thereafter, the United States Secretary of Education reimburses the guaranty agency for these payments and loan collection costs under a reinsurance arrangement with the agency. 20 U.S.C.A. § 1978.

To assist private guarantee agencies in collecting defaulted student loans, Congress provided guaranty agencies with authority to administratively garnish the wages of student borrowers who have defaulted on their student loan agreements. 20 U.S.C.A. § 1095(a). Under the Act, a guaranty agency may issue a withholding order requiring a defaulted borrower's employer to withhold 10% of the borrower's disposable income until the debt is paid. 20 U.S.C.A. § 1095(a)(1). The Act permits guaranty agencies to sue an employer who fails to comply with the withholding order. 20 U.S.C. § 1095(a)(6). Specifically, § 1095(a)(6) provides:

> the employer shall pay to the Secretary or the guaranty agency as directed in the withholding order issued in this action, and shall be liable for, and the Secretary or the guaranty agency, as appropriate, may sue the employer in State or Federal court of competent jurisdiction to recover, any amount that such employer fails to withhold from wages due an employee following receipt of such employer of notice of the withholding order, plus attorneys' fees, costs, and in the court's discretion, punitive damages, but such employer shall not be required to vary the normal pay and disbursement cycles in order to comply with this paragraph . . . .

(Emphasis added).

In the present case, Brenda Irons obtained a student loan from private lenders to pay educational expenses under the Act. Petitioner United Student Aid Funds, Inc., (United) guaranteed the promissory note. When Irons defaulted on her loan, United paid the private lender the loan balance. The Secretary of Education reimbursed United for the amount of the defaulted loan.

United issued a wage withholding order to Respondent The South Carolina Department of Health and Environmental Control (DHEC), Irons' employer, after following the procedures outlined under the Act. DHEC failed to comply with the withholding order. United sued DHEC and other state representatives (collectively, the State) requesting monetary and equitable remedies.

The trial court dismissed the case finding the Eleventh Amendment barred United's action against the State. The Court of Appeals affirmed. United Student Aid Funds, Inc., v. South Carolina Dep't of Health and Envtl. Control, supra.

## ISSUES

**I. Did the Court of Appeals err by holding the Eleventh Amendment bars United's suit against the State for failing to comply with a withholding order issued pursuant to 20 U.S.C. § 1095(a)(6)?**

**II. Did the Court of Appeals err by failing to address the issue of injunctive relief?**

## DISCUSSION

## I.

### A. Statutory Construction

United asserts the United States Constitution is not implicated in its suit and, therefore, the Court of Appeals erred by holding the Eleventh Amendment bars its action. Relying on Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991), United asserts its claim presents an issue of mere statutory construction, not constitutional interpretation. We disagree.

In Hilton, the United States Supreme Court (USSC) addressed whether a private individual may sue a state-owned railroad in state court for tortious conduct. In particular, the Court considered whether the phrase "[e]very common carrier by railroad" as used in the Federal Employers' Liability Act (FELA) included state-owned railroads.

The Court determined suits against state-owned railroads in state court were permissible. It based its decision on several factors, the primary of which was stare decisis which "controlled and informed" the Court's decision. Id. at 201, 112 S.Ct. at 563, 116 L.Ed.2d at 569. In doing so, the Court reached its decision only after finding the matter was a question of

statutory construction, not constitutional interpretation.[1] Significantly, the Court believed the United States Constitution was not implicated based on prior decisions suggesting the Eleventh Amendment did not apply to actions brought in state courts. See id. at 204-05, 112 S.Ct. at 565, 116 L.Ed.2d at 570. Since the Constitution was not implicated, the Court did not have to determine if the phrase "[e]very common carrier by railroad" satisfied the Eleventh Amendment's "plain statement rule" jurisprudence. See Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (Court uses "plain statement rule" to determine whether Congressional Act applies to the states).

However, since Hilton, the USSC issued Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636, (1999), clarifying that the Eleventh Amendment does prohibit Congress from subjecting a state to suit in state court without its consent. Accordingly, in this case the Eleventh Amendment is implicated. The Court may not rely on the rules of statutory construction, but must apply the rules of constitutional interpretation involving the Eleventh Amendment.

## B. Private Actor

United asserts it is not a private actor suing the State in state court, but is, instead, an agent of the federal government not barred by the prohibitions of the Eleventh Amendment. We disagree.

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[1]Reliance on stare decisis was critical because of the USSC's previous holding in Parden v. Terminal R. Co. of Ala. Docks Dept., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), which held that States who chose to enter the railroad business after the enactment of the FELA waived sovereign immunity from suits based on tortious conduct. As a result many states excluded railroad workers from their workers' compensation statutes because the FELA provided an adequate alternative. Therefore, if the Hilton Court would have forbade suits against state-owned railroads in state court it "would have dislodged settled expectations and required an extensive legislative response." Alden v. Maine, 527 U.S. 706, 736, 119 S.Ct. 2240, 2258, 144 L.Ed.2d 636, 667 (1999).

United's amended complaint alleges only that it is a "non-profit corporation organized under the State of Delaware General Corporation law and has the power to prosecute this suit." It does not allege the action is being brought on behalf of the federal government. Moreover, the Act does not explicitly provide that a guaranty agency stands in the shoes of the federal government in suits to force compliance with withholding orders.

Additionally, United's argument is not preserved for review. Although United raised the issue to the Court of Appeals, it does not appear that the issue was raised to or ruled on by the trial court. See Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994) (an issue neither raised to nor ruled upon by trial court will not be considered on appeal); Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (where a trial court does not explicitly rule on an argument raised and appellant makes no Rule 59 motion to obtain a ruling, the appellate court may not address the issue); Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989) (an appellate court will not consider issues raised for the first time on appeal).

United's argument is not preserved and is otherwise without merit.

### C. Applicability of the Eleventh Amendment

United argues the Court of Appeals erred by failing to hold Congress intended to abrogate the states' Eleventh Amendment immunity in the Act. We disagree.

The Eleventh Amendment prohibits non-consenting states from being sued in federal or state court by private individuals. Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); Alden v. Maine, supra. However, Congress may, when acting pursuant to a valid grant of constitutional authority, abrogate the states' Eleventh Amendment immunity. Garrett, supra. Congress may abrogate the states' immunity only after it complies with the "plain statement rule" by

unequivocally stating in "clear and manifest" language its intent to abrogate the immunity. Gregory v. Ashcroft, supra.

United concedes that "Congress did not specifically say whether it intended to force states that happen to be employers to submit to suit without their consent." United asserts, however, that Congress' intent to include states in its definition of employers is manifest in a variety of ways including: 1) other federal statutes defining states as "persons" or "employers"; 2) the State defining itself as an "employer"; and 3) use of the word "state" in the Act itself.

United refers to other federal statutes which include state and local governments in the terms "persons" and "employer" to support its contention that the term "state" may fall under the definition of "employer." See, e.g., Fair Labor Standards Act, 29 U.S.C.A. § 203(d) (1998) ("employer" includes public agency); Age Discrimination in Employment Act, 29 U.S.C.A. § 630(b)(2) (1999) (employer includes a state).

We conclude if Congress intended to make states, when acting as employers, liable under the 29 U.S.C.A. § 1095(a), it would have so stated. Congress' failure to clearly define "employer" to encompass states in light of its knowledge and ability to do so in other statutes is fatal to United's argument.

Similarly, United refers to instances where the State is included in the term "employer" within the South Carolina Code of Laws. See, e.g., South Carolina Employment Security Law, S.C. Code Ann. §§ 41-27-210 and 220 (1986) ("employing unit" includes State); Workers Compensation Act, S.C. Code Ann. § 42-1-140 (1985) ("employer" includes the State).

The State's inclusion of itself as an employer in unrelated instances does not require the State to surrender its sovereignty to every law, both state and federal, which imposes liabilities on an employer. By specifically defining those circumstances under which it is to be treated as an employer, the State has indicated that it does not intend to subject itself to all laws regarding employers generally.

Attendant to these arguments is United's assertion that the plain statement rule is satisfied because of the liberal use of the word "state" in the text of the Act along with its legislative purpose to establish a federal loan program to assist the states. United suggests that because Congress clearly wanted to provide an enforcement mechanism for student loan debt collection agencies against non-compliant employers, then it would be Congress' intent to subject the states to the mechanism when they act as a non-compliant employer.

While this argument is logical, it defeats the purpose of requiring a plain, unambiguous statement. While one may argue it was Congress' intent to encompass states in the Act, the USSC has already decided that it will not engage in such debates but, instead, require a clear and plain statement. Gregory v. Ashcroft, supra.

The Court of Appeals correctly concluded the Eleventh Amendment is applicable and properly held that since Congress did not include a clear statement of its intent to abrogate state sovereignty, the suit was properly dismissed.

## II.

United argues the Court of Appeals erred by not addressing its request for injunctive relief. United asserts this Court should consider the injunction issue to prevent the State from failing to comply with future withholding orders.

It appears the Court of Appeals did not address the issue of injunctive relief because Irons is no longer employed by the State. Accordingly, the Court of Appeals concluded the only remaining remedy was damages incurred by United for the State's refusal to comply with the withholding order. See United Student Aid Funds, Inc., v. South Carolina Dep't of Health and Envtl. Control, supra.

The Eleventh Amendment does not prohibit a court from providing injunctive relief. See Alden v. Maine, supra; Green v. Kentucky Higher Educ. Assistance Auth., 78 F.Supp.2d 1259 (S.D. Ala. 1999). The issue in the present case is moot, however, because the State is not obligated to comply with the withholding orders.[2] See Discussion I, infra. Accordingly, there is no basis upon which to issue an injunction requiring the State to comply with the Act.

The decision of the Court of Appeals is **AFFIRMED.**[3]

**TOAL, C.J., PLEICONES, WALLER, JJ., and Acting Justice G. Thomas Cooper, Jr., concur.**

[2] We note that South Carolina law prohibits the State from employing any person who is considered in default of a federally insured student loan. S.C. Code Ann. § 59-111-50 (1990).

[3] In light of our disposition of United's appeal, we decline to address the State's Tenth Amendment argument.

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

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Ellis Franklin, Ricky George, Larry Hall, Herman Hughes, Johnny Pearson, Ted Powers, Kenneth Simmons, et al., Petitioners,

v.

Gary Maynard, Director, South Carolina Department of Corrections, and Charles M. Condon, Attorney General of South Carolina, Respondents.

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ORIGINAL JURISDICTION

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Opinion No. 25747
Heard February 4, 2003 - Filed November 3, 2003

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John H. Blume, of Ithaca, New York; Robert M. Dudek, Robert Edward Lominack, Elizabeth Fielding Pringle, Keir M. Weyble, Jeffrey P. Bloom, Diana L. Holt, Teresa L. Norris, all of Columbia; and David P. Voison, of Jackson, Mississippi, for petitioners.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for respondents.

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**PER CURIAM:** The United States Supreme Court (USSC), in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), held the execution of a mentally retarded person is cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. The USSC noted that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317, 122 S.Ct. at 2250. The USSC left "the task of developing appropriate ways to enforce the constitutional restrictions upon [the] execution of sentences" to the states. *Id.* Therefore, the state of South Carolina has the obligation to establish procedures for possible capital cases where the defendant is allegedly mentally retarded.

Petitioners, all either death-sentenced inmates or capital defendants, filed this petition for a writ of certiorari in our original jurisdiction requesting we establish procedures implementing the Atkins decision.[1]

## ISSUES

I. What is the definition of mental retardation?

II. What is the procedure for making the mental retardation determination in post-Atkins cases?

III. What is the procedure for cases where the defendant was sentenced to death prior to Atkins?

[1]The legislature is presently considering a Bill defining mental retardation and establishing procedures for implementing the Atkins decision.

## DISCUSSION

### I

We find it inappropriate to create a definition of mental retardation different from the one already established by the legislature in S.C. Code Ann. § 16-3-20 (C)(b)(10) (2003) (mental retardation is a statutory mitigating circumstance).[2] Section 16-3-20(C)(b)(10) defines mental retardation as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Altering this definition is a matter for the legislature.

### II

Regarding the procedures to be used in making the mental retardation determination in post-Atkins cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. *Cf.* State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998)[3] (defendant bears burden of proving incompetence by preponderance of evidence); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)[4] (same).

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[2]S.C. Code Ann. § 44-20-30(11) (2002) (under the South Carolina Mental Retardation Act) and § 44-26-10(11) (2002) (under the Act dealing with the rights of mental retardation clients) define mental retardation the same as § 16-3-20(C)(b)(10).

[3]*Cert. denied*, 525 U.S. 1150, 119 S.Ct. 1051 (1999).

[4]*Cert. denied*, 525 U.S. 1077, 119 S.Ct. 816 (1999).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is *not* mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. *See* S.C. Code Ann. § 16-3-20(C)(b)(10) (2003).[5] If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

## III

While petitioners argue we should establish procedures for cases where the defendant was sentenced to death prior to Atkins,[6] such procedures already exist.

A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law.[7] *See* S.C. Code Ann. §§ 17-27-20(a) and -160 (2003). As with other PCR claims, the applicant must show he or she is mentally retarded by a preponderance of the evidence. *See, e.g.,*

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[5]The jury will not be informed of the prior proceedings or the trial judge's findings concerning the defendant's claim of mental retardation.

[6]Atkins has retroactive application. *See* Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989).

[7]An applicant is not barred from raising the mental retardation issue in a second PCR application. *See* S.C. Code Ann. § 17-27-45(B) (2003) (when court whose decisions are binding upon this Court holds United States Constitution imposes upon state criminal proceedings substantive standard not previously recognized or right not in existence at time of state court trial, and if standard or right is intended to be applied retroactively, PCR application may be filed); Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (successive PCR application allowed where applicant could not have raised issue in previous application).

Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (competency for execution). If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

# The Supreme Court of South Carolina

In the Matter of David R. Harrison, Respondent

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O R D E R

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On September 29, 2003, Respondent was suspended from the practice of law for a period of thirty days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY: s/Brenda F. Shealy
Deputy Clerk

Columbia, South Carolina

October 29, 2003

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

MailSource, LLC f/k/a Wild Geese, LLC, Respondent,

v.

M. A. Bailey & Associates, Inc., Michael A. Bailey and Linda Bailey, Appellants.

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Appeal From York County
John Buford Grier, Circuit Court Judge

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Opinion No. 3688
Heard September 9, 2003 – Filed November 3, 2001

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**REVERSED**

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Douglas F. Gay, of Rock Hill, for Appellants.

Stephen M. Cox, of Rock Hill, for Respondent.

**STILWELL, J.:** MailSource, LLC, purchased a direct mail processing business from M. A. Bailey & Associates, Inc. Michael and Linda Bailey are the shareholders of M. A. Bailey (collectively Bailey). The asset purchase agreement contained a provision allowing either party to demand arbitration of any dispute arising out of or relating to the agreement. Bailey appeals the trial court's denial of its motion to compel arbitration. We reverse.

## FACTS

Pursuant to the agreement, MailSource paid part of the purchase price at closing and executed a promissory note for the rest. As part of the transaction, Bailey also signed a consulting agreement containing a non-compete clause. The principal agreement required the parties to attempt in good faith to settle any disputes first through consultation and negotiation, and then by mediation. If those attempts failed, the agreement provided "either party may demand that the dispute be arbitrated. . . ."

Bailey retained an affiliated business known as List Right, which provided mailing lists to customers. MailSource accused Bailey of conducting activities through List Right that violated the non-compete clause and also questioned certain financial information provided by Bailey prior to the sale. The parties exchanged letters regarding potential arbitration and the procedures that would govern the arbitration, but could not agree.

Bailey then filed an action against MailSource alleging nonpayment of the promissory note. The following day, MailSource filed this action against Bailey seeking damages and injunctive relief for alleged violations of the non-compete agreement, fraudulent inducement to enter into the contract, and unfair trade practices. Bailey moved to compel arbitration on this action. MailSource has made no motion to compel arbitration of Bailey's action on the promissory note.

In denying the motion to compel arbitration, the trial court found Bailey waived the right to arbitrate by failing to agree to proposals to arbitrate and by filing a lawsuit against MailSource. In a motion for reconsideration, Bailey argued MailSource had not proved it would be

prejudiced by requiring arbitration. The trial court denied the motion, concluding that Bailey inappropriately raised an issue in its 59(e) motion that could have been initially presented.

## STANDARD OF REVIEW

In reviewing a circuit court's decision regarding a motion to stay an action pending arbitration, the determination of whether a party "waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999).

## LAW/ANALYSIS

### I. Preservation Issue

MailSource contends whether it proved prejudice is not properly before this court as Bailey did not raise the issue until the motion for reconsideration. We disagree.

A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial. See, e.g., Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). However, the trial court found that Bailey had waived its right to require arbitration by first resorting to the courts. The trial court did not, however, address the issue of prejudice to MailSource. Prejudice is a component that must be addressed in determining whether waiver of arbitration has taken place. In the motion for reconsideration, Bailey merely asked the court to apply the appropriate standard in making a finding of waiver. Under these circumstances, it is appropriate to request a court to review a ruling which the party contends fails to use the proper standard. Therefore, the issue is preserved for review by this court. See Anonymous (M-156-90) v. State Bd. of Med. Exam'rs, 323 S.C. 260, 279-80, 473 S.E.2d

870, 880 (Ct. App. 1996), rev'd on other grounds, 329 S.C. 371, 496 S.E.2d 17 (1998).

## II. Waiver – Prejudice

Bailey argues the trial court erred in finding it waived the right to demand arbitration of the MailSource action by filing a lawsuit. Bailey contends MailSource has failed to demonstrate any prejudice would result from compelling arbitration. We agree.

The right to enforce an arbitration clause may be waived. Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). "'Waiver is the voluntary and intentional relinquishment of a known right.'" Liberty Builders, 336 S.C. at 665, 521 S.E.2d at 753.

> In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. Mere inconvenience to an opposing party is not sufficient to establish prejudice. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case. Furthermore, it is the policy of this state to favor arbitration of disputes.

Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Op. No. 25713 (S.C. Sup. Ct. filed Sept. 8, 2003) (Shearouse Adv. Sh. No. 33 at 41, 46) (citations omitted). In Sentry Engineering & Construction, Inc. v. Mariner's Cay Development Corp., the supreme court stated, "it is not inconsistency, but the presence or absence of prejudice which is determinative. In this context prejudice is undue burden on the objecting party, brought about by delay in the other party's making its demand for arbitration." 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985) (citations omitted). "'[W]aiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of a contract, but attempts to meet all issues raised in litigation between it and another party to the agreement.'" Id. (quoting Germany v. River Terminal Ry. Co., 477 F.2d 546, 547 (6th Cir. 1973)). "Ordinarily, however, bringing a suit based on the contract instead of relying on the arbitration provision constitutes a waiver of the right to arbitrate." Hyload,

Inc., 308 S.C. at 280, 417 S.E.2d at 624. "This is simply a particular instance of the general rule that acts inconsistent with the continued assertion of a right may constitute waiver." Id.

In Sentry, Mariner's Cay asserted Sentry's filing for an injunction was inconsistent with a right to arbitrate and that the resulting prejudice to it constituted waiver. Sentry, 287 S.C. at 351, 338 S.E.2d at 634. "Sentry counter[ed] that the petition for injunction did not seek to litigate any issue raised by arbitration, but was simply an attempt to correct work complained of by [Mariner's Cay]." Id. The court found "no prejudice by delay, only the inconvenience of litigating. . . ." Id. The court went on to find: "Sentry at all times sought to enforce its right to arbitrate under the contract; it is clear it had no intention to waive the right, and no waiver is shown." Id.

In Hyload, however, this court found waiver of the right to arbitrate. Hyload, Inc., 308 S.C. at 280, 417 S.E.2d at 624. In Hyload, Pre-Engineered refused to pay Hyload's invoices after it lost a job to a competitor "and sued Hyload for breach of its exclusive distributorship agreement. In turn, Hyload cancelled the distributorship agreement for nonpayment of the invoices." Id. at 279, 417 S.E.2d at 624.

> In response to Pre-Engineered's suit, Hyload demanded arbitration pursuant to the distributorship agreement. Pre-Engineered agreed to arbitrate and voluntarily dismissed the court action. Pre-Engineered then prepared and sent the arbitration documents to Hyload for its signature. Hyload never signed the documents. Instead, it commenced a claim and delivery action under the security agreement, recovering [materials and accounts receivable and then instituted an] action to recover the remaining balance . . . plus attorney's fees. Pre-Engineered answered and reinstituted its original action for breach of the distributorship agreement as a counterclaim.

Id. at 279-280, 417 S.E.2d at 624. This court affirmed the trial court's conclusion that Hyload waived its right to arbitrate Pre-Engineered's

counterclaims due to its refusal to sign arbitration papers and then initiating its own suit. Id. at 280, 417 S.E.2d at 624.

In Liberty Builders, this court again found waiver of the right to arbitrate where the party pursued active litigation for two and a half years, sought the court's assistance on numerous occasions, and forced Horton to incur substantial costs and attorney's fees, waiting to demand arbitration until litigation was almost complete. Liberty Builders, 336 S.C. at 667-68, 521 S.E.2d at 754. Liberty Builders required Horton to answer the complaint and respond to discovery which would not have been necessary in arbitration. Id. at 665-66, 521 S.E.2d at 753. In Liberty Builders, the court focused on the amount of time and extensive use of the judicial system. Additionally, the court specifically noted the finding of prejudice by the trial court and agreed that Horton was severely prejudiced by Liberty Builders' actions. Id.

There is no finding of prejudice to MailSource in this case. All parties agree MailSource needs to show prejudice for waiver to exist. Bailey's actions do not rise to the level found in Hyload or Liberty Builders. Bailey never induced MailSource to voluntarily dismiss a lawsuit to pursue arbitration. Additionally, Bailey exercised the right to demand arbitration within twenty days of MailSource filing its lawsuit, before even filing an answer. There has been no substantial use of judicial system resources, nor extensive requirements placed on MailSource as in Liberty Builders. MailSource admitted in oral arguments that the only prejudice, given the time frame, was the two claims being considered separately.

A significant feature of this case not present in most arbitration cases is that the arbitration clause is not mandatory. It is instead elective. Either party may demand arbitration of a dispute but neither is required to do so. Indeed, MailSource acknowledged in oral argument that it can demand arbitration of the lawsuit on the note, but candidly admitted that it does not want to arbitrate either claim. The only prejudice shown, that of having claims arising from the same transaction resolved in different forums, is therefore easily remedied; to the extent it is not remedied, any prejudice is self-inflicted.

**REVERSED.**

**HOWARD and KITTREDGE, JJ., concur.**

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

MailSource, LLC f/k/a Wild Geese, LLC, Appellant,

v.

M. A. Bailey & Associates, Inc., Michael A. Bailey and Linda Bailey, Respondents.

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Appeal From York County
John Buford Grier, Circuit Court Judge

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Opinion No. 3689
Heard September 9, 2003 – Filed November 3, 2003

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**AFFIRMED**

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Stephen M. Cox, of Rock Hill, for Appellant.

Douglas F. Gay, of Rock Hill, for Respondents.

**STILWELL, J.:** MailSource, LLC, purchased a direct mail processing business from M. A. Bailey & Associates, the shareholders of which are

Michael and Linda Bailey (collectively, the Baileys). In addition to the asset purchase agreement, the parties entered into a consulting agreement that included a non-compete clause. MailSource appeals the denial of its motion for an injunction seeking to restrain the Baileys from violating the non-compete clause. We affirm.

## FACTS

The business bought by MailSource was called "Mail Right" by the Baileys. The Baileys retained an affiliated business called "List Right." In addition to the asset purchase agreement and the consulting agreement, the parties also entered into a supply agreement. The supply agreement defined "direct mail processing services as: all labeling, addressing, inserting, sealing, sorting, bundling and delivery and directly related services provided by Sellers and Mail Right Company prior to Closing Date."

The non-compete clause in the consulting agreement provides:

> (a) Noncompetition. [The Baileys] shall not take any of the following actions during the applicable Noncompetition Period (as defined below):
>
> (i) Become employed by . . . involved or engaged in, or otherwise commercially interested in or affiliated with . . . any person or entity that competes with [MailSource] or an affiliate thereof (each, a "Company Affiliate") in the business of direct mail processing services.
>
> (ii) Solicit or attempt to solicit, for competitive purposes, the business of any of the clients or customers of a Company Affiliate, or otherwise induce such customers or clients or prospective customers or clients to reduce, terminate, restrict or alter their business relationship with a Company Affiliate in any fashion . . . .

MailSource alleges the activities the Baileys conducted through List Right violate the non-compete clause, pointing particularly to its activities on behalf of Church of the Rock. After MailSource purchased Mail Right, the Baileys, through List Right, provided a mailing list to the church sorted according to United States Postal Service requirements for receiving bulk mail discounted rates. They also provided the sorted list on mailing labels and the paperwork required by the post office. The only service not performed was applying the labels to the mailings. The Baileys through List Right provided similar services to other customers. Michael Bailey, President of List Right, stated in an affidavit:

> The List Right business is not engaging in any activity at the current time that it did not engage in prior to the sale of Mail Right to [MailSource]. It is selling lists to customers, and providing those lists to them in the format that the customer requests, which sometimes means providing the list to customers on pre-sorted labels. List Right is not doing any business now that was formerly done by Mail Right when your affiant was President of both.

MailSource filed an action against the Baileys seeking damages and injunctive relief for alleged violations of the agreement, fraudulent inducement, and unfair trade practices. MailSource asked for both preliminary and permanent injunctive relief. The trial court initially requested a proposed order granting a preliminary injunction but then issued an order denying a permanent injunction, finding that the pending appeal of the court's order denying arbitration divested it of jurisdiction. Pursuant to MailSource's second motion for preliminary injunction, the trial court issued an order denying it, stating: "The granting of said motion would alter the status quo during the pendency of the appeal."

## LAW/ANALYSIS

MailSource contends the trial court erred in refusing to grant its motion for an injunction. We find no abuse of discretion.

"The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion." City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520-21 (2000). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002).

To warrant a temporary injunction, the complaint must allege facts sufficient to constitute a cause of action for injunction and the information offered by both sides must demonstrate the injunction to be reasonably necessary to protect the legal rights of the plaintiff pending in the litigation. Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 480-81, 167 S.E.2d 313, 315 (1969). Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law. Roach v. Combined Util. Comm'n, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct. App. 1986).

> It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.

Transcon., 252 S.C. at 481, 167 S.E.2d at 315. "[T]he sole purpose of a temporary injunction is to preserve the status quo. . . ." Powell v. Immanuel Baptist Church, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). "[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. . . ." County Council of Charleston v. Felkel, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) (citations omitted). "A temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined

without reference to the temporary injunction." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). The court should be guided by general principles of equity:

> First, the equities of both sides are to be considered, and each case must be decided on its own particular facts. Second, the court of equity must "balance the equities" between the parties in determining what if any relief to give. The equities on both sides must be taken into account.

Foreman v. Foreman, 280 S.C. 461, 464-65, 313 S.E.2d 312, 314 (Ct. App. 1984) (citations omitted).

"[A] court can, and should, grant a preliminary injunction in an arbitrable dispute whenever an injunction is necessary to preserve the status quo pending arbitration." Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 47 (1st Cir. 1986). The fact that a court orders arbitration of a dispute does not "absolve [it] of its obligation to consider the merits of a requested preliminary injunction." Roso-Lino Bev. Distribs., Inc. v. Coca-Cola Bottling Co. of New York, 749 F.2d 124, 125 (2d Cir. 1984).

While we are troubled by the Baileys' continued insistence they are able to conduct business which is strikingly similar to the business they sold and with which they agreed not to compete, we agree with the trial court that an injunction would alter the status quo. MailSource apparently knew that the retained List Right business was closely related, if not complementary, to the business it purchased, having sought and received a right of first refusal to purchase List Right if the Baileys decided to sell. Additionally, Michael Bailey states in his affidavit that List Right continues to conduct business as it did before the sale.

At least two other reasons buttress the trial court's denial of the injunction. First, some of the covenants in the non-compete agreement have already expired, and the remainder will soon expire. While that does not moot the issue, we must recognize the reality that any injunctive relief would be short-lived under the terms of the non-compete clause. MailSource invites

our attention to the law of other jurisdictions where courts have extended the non-compete period following a breach to ensure the nonbreaching party receives the benefit of the bargain. We see no evidence this proposal was presented to the trial court for its consideration, nor do we find support for it in South Carolina law. We therefore decline to adopt this procedure as a matter of first impression, because to do so would essentially re-write the parties' contract, a service the courts of South Carolina do not perform. See, e.g., Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (courts do not rewrite contracts); Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (same).

Second, MailSource, in addition to seeking an injunction, seeks and should be able to prove money damages from any breach by the Baileys. Cf. Skinner v. Elrod, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992) (breach of noncompetition clause was compensable in liquidated damages). An injunction is an equitable remedy; as such, it is available only where no remedy at law exists or where the legal remedy would fail to make the party whole.

> The general rule is that an injunction should be granted only where some irreparable injury is threatened for which there is no adequate remedy at law. Whether a wrong is irreparable in the sense that equity may intervene, and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules.

Cartee v. Lesley, 286 S.C. 249, 256, 333 S.E.2d 341, 345 (Ct. App. 1985) (citations omitted), cert. granted in part on other ground and decision aff'd, 290 S.C. 333, 350 S.E.2d 388 (1986); see also Knohl v. Duke Power Co., 260 S.C. 374, 376, 196 S.E.2d 115, 116 (1973) (holding that a "complaint fails to state a cause of action for injunctive relief unless facts are alleged which show that the plaintiff has no adequate and complete remedy at law").

Based on the specific facts of this case, we find it is a close question whether a preliminary injunction should issue. However, we are unable to say the trial court abused its discretion in refusing to alter the status quo by

restricting the Baileys' activities. See Simpkins, 348 S.C. at 668, 560 S.E.2d at 904.

**AFFIRMED.**

**HOWARD and KITTREDGE, JJ., concur.**

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

The State, Respondent,

v.

Thomas Bryant Appellant.

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Appeal From Richland County
Mark H. Westbrook, Circuit Court Judge

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Opinion No. 3690
Heard May 14, 2003 – Filed November 3, 2003

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**AFFIRMED**

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

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**HOWARD, J.:** Thomas Bryant was convicted of murder and unlawful possession of a firearm. The circuit court sentenced him to life imprisonment without parole for murder and five years for possession of the firearm, to run concurrently. Bryant appeals, arguing the circuit court erred by admitting evidence of his prior bad acts and convictions. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

Bryant is a paraplegic who was staying at a Days Inn Hotel ("the Hotel") in Columbia, South Carolina. Bryant met Daniel Austin at a nearby nightclub.

At approximately 3:30 a.m. on July 23, 1999, Austin left the nightclub with Bryant. Nellie Connell, the front desk attendant at the Hotel, observed Austin and Bryant together at approximately 3:30 a.m., and Austin was pushing Bryant in his wheelchair. According to Connell, Austin subsequently came to the front desk and requested a key to Bryant's room. Connell gave Austin a key to Bryant's room.

Between 3:30 a.m. and 4:00 a.m., Kevin Hawkins, a guest at the Hotel, observed Bryant in the Hotel hallway. Bryant had a scrape on his nose and his pants were in his lap. Bryant told Hawkins he had been beaten and asked Hawkins to go to the front desk and ask for help. Hawkins went to the front desk and spoke to Connell, and Connell indicated she would call the authorities. As Connell was telephoning the police, she heard gunshots.

When the police arrived, Austin was lying in the breezeway bleeding from gunshot wounds, and Bryant was in his hotel room firing a gun through the door. After a standoff lasting approximately twenty minutes, officers heard one final shot. The officers entered Bryant's room and found Bryant on the floor with a self-inflicted gunshot wound to his stomach. Austin died from his gunshot wounds.

Following a jury trial, Bryant was convicted for murdering Austin and for unlawfully possessing a firearm. He was sentenced to

life imprisonment without parole for murder and five years for possession of the firearm, the sentences to run concurrently. Bryant appeals.

## LAW/ANALYSIS

### I. Prior Bad Acts

Bryant argues the circuit court erred in admitting testimony about Bryant's prior bad acts. We disagree.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). Furthermore, the admission of reply testimony is within the trial court's discretion, and a reviewing court will not find an abuse of discretion "if the testimony is arguably contradictory of and in reply to earlier testimony." State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986).

During direct examination in the state's case, John Campbell testified he first encountered Bryant at the nightclub a few days before the night of Austin's murder. Campbell was the bouncer for the club, and he stated he kept a "close eye" on Bryant on the night of the murder.

Campbell's testimony indicated Austin was not combative toward Bryant on the evening of the murder. Campbell testified Bryant arrived at the nightclub on the night of the murder between 8:00 p.m. and 8:30 p.m. Somewhere around 11:00 p.m., Austin entered the nightclub, and shortly thereafter, Bryant and Austin were "very chummy, [and] real friendly toward each other." Between 3:15 a.m. and 3:30 a.m., Austin and Bryant attempted to leave the nightclub, whereupon Bryant fell out of his wheelchair and required assistance by both Campbell and Austin to get back in his chair. Bryant and Austin then left the nightclub.

During cross-examination, Bryant's counsel attacked Campbell's independent ability to remember the events of the night of the murder, implying his recollection had been supplemented by his pre-trial discussions with the solicitor.

During re-direct examination, the solicitor sought to introduce testimony from Campbell that Bryant had threatened Campbell during their first encounter to explain why Campbell had maintained a close eye on Bryant on the night of the murder. Over Bryant's objection, the court allowed Campbell's testimony, ruling evidence that Bryant had previously threatened Campbell was relevant to establish Campbell's basis for focusing on Bryant on the night in question. In doing so, the court provided the following limiting charge to the jury: "Now, there was also testimony in the case about conduct of a defendant toward a witness in the case. That testimony was introduced in regard to the credibility of the witness who gave it and must not be considered against the character of the defendant."

Viewing the testimony in light of our standard of review, we conclude there was no abuse of discretion in the admission of this evidence. Bryant specifically attacked Campbell's credibility as to his observation of Bryant and Austin, implying Campbell's memory had been supplemented by the solicitor because he had no reason in a crowded bar to pay close attention to Bryant or Austin on the night of the murder. Campbell's redirect testimony was relevant on this credibility issue. The solicitor was entitled to introduce testimony "arguably contradictory of and in reply to earlier testimony" to strengthen Campbell's credibility once attacked. Todd, 290 S.C. at 214, 349 S.E.2d at 340. Therefore, Bryant's argument is without merit.

## II. Prior Convictions

Bryant argues the circuit court erred by admitting impeachment evidence of his prior firearms convictions because the prejudicial effect of the convictions outweighed their probative value.

The admission of prior convictions to impeach the credibility of a defendant is a matter within the sound discretion of the trial court, and thus, its decision will not be reversed on appeal absent an abuse of discretion. Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

Rule 609(a)(1) provides prior convictions can be used to impeach the accused when: 1) the crime was punishable by death or imprisonment in excess of one year, and 2) the court determines the probative value of admitting the evidence outweighs its prejudicial effect. Rule 609(a)(1), SCRE.

In weighing the probative value of prior convictions, the circuit court should consider all relevant factors including but not limited to the following: "1) the impeachment value of the prior crime; 2) the point in time of the conviction and the witness's subsequent history; 3) the similarity between the past crime and the charged crime; 4) the importance of the defendant's testimony; and 5) the centrality of the credibility issue." State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (1998); Green, 338 S.C. at 433, 527 S.E.2d at 101.

Prior to Bryant's testimony, the solicitor indicated he intended to impeach Bryant with evidence of prior convictions including voluntary manslaughter in 1987, possession of a firearm in 1997, and pointing and presenting a firearm in 1998. The circuit court first analyzed whether to admit the voluntary manslaughter conviction using the Colf factors. The circuit court refused to admit the conviction, ruling the probative value of the conviction was outweighed by the prejudicial effect. In so ruling, the circuit court made the following analysis:

> I think there is some substantial impeachment value to it . . . as . . . almost every two years various things that have come up with the defendant. And of course, the point in time, obviously, still works against allowing it, that

> was 16 years ago. *The third factor, the similarity between the two, is obviously significant . . . [for probative value]* . . . . But it's also extremely significant for the value of prejudice that it brings into the issue. As far as the importance of the defendant's testimony . . . it is important. [Bryant's defense witnesses] didn't help his case too much . . . . [Additionally,] the credibility issue is central.

(emphasis added).

However, the circuit court did admit Bryant's convictions for possession of an unlawful weapon in 1997 and pointing and presenting in 1998, ruling as follows:

> *[The other two convictions] are both over a year old, well within the 10-year period, and frankly, do indicate within themselves consistency as well as when considered with the manslaughter conviction* . . . . And I realize certainly . . . [the] prejudicial issue related to these, but frankly, I think under those circumstances the probative value does substantially outweigh the prejudice that could be directed from the toward the defendant from it. . . . [Furthermore,] the fact that he may tend to get in trouble from time to time, while it has a certain amount of prejudice in it, also, does include that issue of whether or not he's worthy of belief.

(emphasis added).

Bryant contends this analysis, combined with the statements made during the circuit court's voluntary manslaughter analysis, demonstrates the circuit court admitted the prior convictions based on

the improvident belief the evidence was admissible to demonstrate propensity.

Although, viewed in isolation, the statements made by the circuit court could be construed to indicate the circuit court allowed the evidence to prove propensity, we must view the circuit court's statements as a whole to determine its reasoning. See State v. Evans, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003).

Reviewing the circuit court's statements as a whole reveals the circuit court allowed the testimony based on its belief the testimony could lead to an inference Bryant was unworthy of credibility because of his prior convictions. This is an appropriate reason to admit prior convictions. See Green, 338 S.C. at 433, 527 S.E.2d at 101 (holding, under certain circumstances, admitting prior, similar convictions is appropriate to impeach the credibility of a defendant).

Furthermore, evidence exists within the record to support the circuit court's decision to admit the evidence. [1]

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[1] Both the conviction for possession of a firearm and the conviction for pointing and presenting a firearm are punishable by imprisonment in excess of one year. See S.C. Code Ann. § 16-23-30(e) (2003) (stating it is unlawful for any person who has been convicted of a violent crime to possess a pistol); S.C. Code Ann. § 16-1-90(F) (2003) (stating possession of a pistol by a person convicted of a violent crime is a Class F felony); S.C. Code Ann. § 16-1-20(A) (6) (2003) (stating a Class F felony is punishable by not more than five-years imprisonment); See S.C. Code Ann. § 16-23-410 (2003) (stating the crime of pointing and presenting a firearm is a felony punishable by not more than five-years imprisonment). Thus, we limit our analysis to whether the circuit court abused its discretion in its application of the Colf factors. See Rule 609(a)(1), SCRE (stating prior convictions can be used to impeach the accused when: 1) the crime was punishable by death or imprisonment in excess of one year, and 2) the court determines the probative value of admitting the evidence outweighs its prejudicial effect); Colf, 337 S.C. at 627, 525 S.E.2d at 248 (holding in

The state presented evidence indicating Bryant possessed the requisite intent for murder. In response, Bryant introduced the testimony of Johnny Stapleton, intending to demonstrate Bryant shot Austin in self-defense.

Although Stapleton could not remember giving the police a statement on the night of the murder because he was "highly intoxicated," he acknowledged a statement bearing his signature in which he indicated Austin, the victim, was intoxicated and demonstrated violent behavior on the night of the murder. Bryant then testified in his defense, asserting he shot Austin in self-defense. The state sought to introduce evidence of Bryant's prior convictions to impeach his credibility. After analyzing the Colf factors and conducting a meaningful analysis pursuant to South Carolina Rules of Evidence, Rule 609(a)(1), the circuit court admitted the evidence of prior convictions.

Viewing the evidence in light of our standard of review, the record indicates Bryant and Austin were the only people present when the shooting occurred. Additionally, the only other defense witness, Stapleton, did not remember the events of the night of the murder. Thus, Bryant's defense is essentially predicated upon his version of the facts. Furthermore, the convictions were not stale. Rather, the convictions were fairly close in temporal proximity to the charged offense.

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weighing the probative value of prior convictions, the circuit court should consider all relevant factors including but not limited to the following: "1) the impeachment value of the prior crime; 2) the point in time of the conviction and the witness's subsequent history; 3) the similarity between the past crime and the charged crime; 4) the importance of the defendant's testimony; and 5) the centrality of the credibility issue.").

Given the importance of Bryant's testimony to his defense, and the state's burden of discounting his testimony to prove the elements of murder, we hold the circuit court, having conducted a Colf analysis, was within its discretion to admit Bryant's prior convictions to impeach his credibility.

In so holding, we note, our supreme court has cautioned the bench and bar that admitting prior convictions similar to the charged offenses is inherently prejudicial and should only be done rarely. See Colf, 337 S.C. at 622, 525 S.E.2d at 246 ("[E]vidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions. Therefore . . . 'evidence of any similar offense should be admitted only rarely . . . .'") (quoting United States v. Beahm, 664 F.2d 414, 419 (4th Cir. 1981)). However, where, as here, the circuit court has conducted the appropriate analysis and evidence exists to support its ruling, we decline to disturb that ruling.

## CONCLUSION

Based on the foregoing, Bryant's convictions are

**AFFIRMED.**

**GOOLSBY, J., concurs.**

**BEATTY, J., dissents in a separate opinion.**

**BEATTY, J**: I respectfully dissent. I believe the trial judge erred in the admission of defendant's prior convictions for possession of an unlawful weapon, and pointing and presenting a firearm. The prejudicial effect clearly outweighed the probative value of these prior convictions. The trial court admitted the prior convictions solely because the crimes indicated a tendency to get in trouble. The trial court's reasoning amounted to prohibited character evidence under 404(b), SCRE.

A fundamental principle of our criminal jurisprudence is that an accused shall only be tried on the offense charged, indicted, and currently before the court. Thus, the courts, state and federal, closely scrutinize the admission of prior convictions of the accused. See Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). As a result, similar prior convictions are not *per se* inadmissible; however, they are generally excluded.[2]

In Green v. State, our supreme court opined, "admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged." 338 S.C. at 434, 527 S.E.2d at 101 (quoting United States v. Beahm, 664 F.2d 414, 418-419 (4th Cir. 1981)). The Green court set forth factors to be considered when weighing probative value against prejudicial effect.

The Green court provided the following factors for consideration when determining whether to admit evidence:

1. The impeachment value of the prior crimes.
2. The point in time of the conviction and the witnesses' subsequent history.
3. The similarity between the past crime and the crime charged.
4. The importance of the defendant's testimony.
5. The centrality of the credibility issue.

[2] "We decline to hold similar prior convictions inadmissible in all cases. Trial Courts must weigh the probative value of the prior conviction against their prejudicial effect to the accused. In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the government to prove the nature of the offense…[it] would amount to unfair prejudice." Green, 338 S.C. at 433 n.5, 527 S.E.2d at 101 n.5 (internal citation omitted).

Id.; see also State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

Here, the trial court considered the Colf factors when in determining whether to allow the manslaughter conviction into evidence. Notwithstanding the trial court's Colf analysis of the prior manslaughter conviction, the record does not clearly reflect similar treatment of the two additional prior convictions. In fact, the record only reflects an indirect consideration of 609 (a)(1), and (b) SCRE, absent the required Colf considerations, as it relates to these prior convictions.

During the colloquy on the admissibility of the prior convictions the trial court stated:

> And, of course, the credibility issue is central. I think when it comes down to it, in order for the jury to be able to see the credibility of this defendant as well as any other witness, they should be able to see all of these, but it's probably risky to let that in. So I'm going to have to rule that the manslaughter conviction would not be allowed to be used.
>
> However, the other two convictions, no question, would be allowed to be used. They are both over a year old, well within the 10-year period and, frankly, do indicate within themselves consistency as well as when considered with the manslaughter conviction. So I don't think there's any question that all of them do.
>
> And I realize certainly, Mr. Strickler, that prejudicial issue related to these, but, frankly, I think under those circumstances the probative value does substantially outweigh the prejudice that could be directed toward the defendant from it. So with that in mind, I'm going to allow the convictions that have been

> requested within the 10-year period but not the manslaughter conviction.

The trial court further stated:

> [I]t comes down to whether or not you present these to the jury to let them decide whether they consider the defendant worthy of belief or how much his worthiness of belief is affected by these convictions.
>
> And the fact that he may tend to get in trouble from time to time, while it has a certain amount of prejudice in it, also, does include that issue of whether or not he's worthy of belief.

It is clear that the trial judge did not properly consider the Colf factors. It appears that the trial judge improperly concluded that significant probative value exist merely because of the similarity of the crimes. Absent more, the court's reasoning is erroneous.

The prior convictions involved possession and pointing a gun, the current charge involves the use of a gun in a homicide. The prejudicial effect is inescapable. Further, it is evident that the trial court's conclusion that the probative value of the prior convictions outweighed the prejudicial effect was based upon the court's belief that the prior convictions, when considered with the manslaughter conviction, indicated that the defendant had a tendency to get in trouble. That tendency to get in trouble raised the issue of whether the defendant is worthy of belief. The foregoing amounts to no more than impermissible character evidence. 404(b), SCRE.

The defendant claimed self-defense. The record does not reflect overwhelming contrary evidence of his guilt; the only witnesses to the homicide were the defendant and the deceased. The defendant's testimony was important and his credibility was a central issue in the case. The prior convictions were an attack on the defendant's character and yielded very little if any impeachment value. Absent impeachment

value, there is no probative value in the admission of the prior convictions in this case. Therefore, I would reverse the trial court's ruling.

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

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**Alice C. G. Perry, Emily Mitchell, Eliza Tremble, and Doris Green,** **Respondents,**

**v.**

**Heirs at Law and Distributees of Charles Gadsden, C.H. Gadsden, Cecil S. Gadsden, C.S. Gadsden, Louise Gadsden, Cain Gadsden, John Gadsden, Lula Nelson, Louis Gadsden, Herman Gadsden, Carrie Gadsden, Estella Gadsden, Mattie Gadsden, United States Department of Agriculture, Farmers Home Administration, South Carolina Electric and Gas, Hazel Point Partnership, Luther Major, Martha Major, Queenie Taylor, Dolly Fripp, Beaufort-Jasper Comprehensive Health Services, Inc., also, the following persons believed to be living, Cecil J. Gaston, Jr. a/k/a Cecil J. Gaston, Cornelius Gaston a/k/a Cornelius Gadsen, Herman Gaston, Lisa Roacher, Linda Mason, Herbert Mason, Willis Gaston, and Louise Gaston a/k/a Louise Gadson, and all heirs at**

**law, devisees, or persons unknown claiming by, under or through any of the above-named persons, John Doe or Mary Roe, being fictitious names designating a class of persons, or a legal entity, infants, incompetents, persons in the military service, if any, known or unknown, who may be an heir, distributee, devisee, legatee, issuee, aliente, administrator, executor, creditor, successor or assign having or claiming to have any right, title, interest, estate in or lien upon the real estate described in the Complaint herein,** **Defendants,**

**of whom Heirs at Law and Distributees of Charles Gadsden, C.H. Gadsden, Louise Gadsden, Cain Gadsden, John Gadsden, Lula Nelson, Louis Gadsden, Herman Gadsden, Estella Gadsden, Mattie Gadsden are the** **Appellants.**

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**Appeal From Beaufort County**
**Thomas Kemmerlin, Master In Equity for Beaufort County**

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**Opinion No. 3691**
**Submitted October 6, 2003 – Filed November 3, 2003**

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**AFFIRMED**

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**Mary P. Miles, of West Columbia, for Appellants.**

**Louis O. Dore, Cheryl V. Doe and Thomas A. Holloway, all of Beaufort, for Respondents.**

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**PER CURIAM:** More than four years after the master-in-equity ordered the partition of the 110.54-acre tract of land at the heart of this litigation, Gadsden filed a Rule 60(b), SCRCP motion to set aside the partition order, alleging fraud on the court and inequitable prospective application of the order. The trial court denied the motion. Gadsden appeals. We affirm.

## FACTS AND PROCEDURAL HISTORY

On February 13, 1990, Alice C.G. Perry, Emily Mitchell, Eliza Tremble, and Doris Green ("Respondents") brought an action against their uncle Cecil J. Gadsden, Jr. and the heirs of their grandfather Cecil J. Gadsden, Sr. (collectively "Gadsden"), seeking the partition of 110.54 acres of land occupied by Cecil J. Gadsden, Jr. (Cecil, Jr.), as well as punitive damages and an accounting. (R. at 3.) The master determined the various heirs' interests in the property and awarded $100 in punitive damages, finding Cecil, Jr., had defrauded the heirs. The master ordered the parties to devise a partition plan within thirty days. When the parties failed to produce a plan, the master ordered a public sale of the property.

Gadsden appealed, and this court held that the master correctly found that Gadsden had defrauded the heirs, but ruled that the property should have been partitioned in kind rather than sold. Perry v. Heirs at Law & Distributees of Gadsden, 313 S.C. 296, 437 S.E.2d 174 (Ct. App. 1993). After granting Gadsden's petition for certiorari, the Supreme Court of South Carolina affirmed

our decision and remanded to the master to partition in kind. Perry v. Heirs at Law & Distributees of Gadsden, 316 S.C. 224, 449 S.E.2d 250 (1994).

On remand, the master entered a judgment against Cecil, Jr. and in favor of ten respondents in the amount of $151,146.27. Cecil, Jr. appealed again asserting that he had been wrongfully denied credit against the judgment for certain timber cultivation expenses and distributions to the heirs over the years. We affirmed the master's decision in an unpublished opinion.

To effectuate the partition mandated by our decision, partition commissioners were appointed by the master. The court empowered the commissioners to hire surveyors and appraisers as needed. (R. at 25.) In determining the appropriate division of the property, the commissioners considered, *inter alia*, the testimony of a licensed appraiser that the fair market value of the property was $354,000.00 as of February 9, 1995. (R. at 32.) Using this value as a starting point, the commissioners adjusted the value of the property to coincide with the increase in value of other properties in the immediate vicinity over the previous two years. (R. at 33.) Adopting a per annum increase of ten percent, the commissioners determined the current fair market value of the property to be $424,800.00. (R. at 33.) Based on the commissioners' report, the master entered an order in partition on February 20, 1998 that left Gadsden with title to 4.26 acres of the 110.54 acre tract. (R. at 37-39.)

More than four years after the 1998 partition order was entered, Gadsden filed a motion to reopen the judgment pursuant to Rule 60(b), SCRCP, asserting the $424,800.00 value assigned to the property by the commissioners was "so incorrect as to amount to fraud upon the Court." (R. at 61.) By order dated May 3, 2002, the trial court denied Gadsden's motion. This appeal followed.

## STANDARD OF REVIEW

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (1991). Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial judge.

Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). On review, we are limited to determining whether the trial court abused its discretion in granting or denying such a motion. Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 441 S.E.2d 835, 840 (Ct. App. 1994).

## LAW/ANALYSIS

### I. Fraud Upon The Court

Although other motions to reopen judgments based on fraud must be filed within a year of the judgment or order, Rule 60(b) allows a party to seek relief from an order for "fraud upon the court" after the expiration of one year. Fraud upon the court is a narrow and invidious species of fraud that "subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Chewning v. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003). Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator acted with the intent to defraud, for there is no such thing as accidental fraud. See Chewning, 354 S.C. at 78, 579 S.E.2d at 608 ("'Fraud upon the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court."); BLACK'S LAW DICTIONARY 660 (6th ed. 1990) ("As distinguished from negligence, [fraud] is always positive, intentional.").

Here, Gadsden's failings are several. First, Gadsden has not met his burden of showing fraudulent intent. In fact, Gadsden has failed to even allege the existence of fraudulent intent. Instead, Gadsden merely states that the "appraised value of $424,800.00 as applied by the commissioners to the realty in question is grossly insufficient and seriously understates the actual value of the property." (R. at 59.) Even if the value applied by the commissioners understated the property's value, any undervaluation would not amount to fraud unless the commissioners adopted the value with fraudulent intent. Gadsden has failed to assert this is the case. Moreover, nothing in the record suggests that the commissioners acted fraudulently.

Gadsden has not supported his charge of insufficiency of value with anything of an evidentiary nature. Gadsden has neither asserted what the "actual value of the property" is, nor offered affidavits in support of such an assertion. To this end, Gadsden has asked this Court to take judicial notice of the land's appreciation in value to support his claim. This, we cannot do. Gadsden cannot escape his burden of establishing the essential elements of fraud by passing that duty to the court. We hold Gadsden's allegation of insufficiency of value is so deficient that we would be compelled to find the trial court abused its discretion had it granted his motion.

## II. Inequitable Prospective Application

Rule 60(b)(5), SCRCP, provides that judgments may be set aside if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5) is based on the historical power of a court of equity to modify its decree "in light of subsequent conditions." Mr. G v. Mrs. G, 320 S.C. 305, 311, 465 S.E.2d 101, 107 (Ct. App. 1995). Gadsden asserts that this case fits under the "prospective application" language of the Rule. We disagree.

First, although motions under 60(b)(5) are not subject to the requirement that they be filed within one year of the judgment, they still must be filed within a reasonable time. Evans v. Gunter, 294 S.C. 525, 528, 366 S.E.2d 44, 46 (Ct. App. 1988). While we are reluctant to proclaim that four years is a per se unreasonable period of time, Gadsden, who bore the burden of showing the propriety of his motion, has failed to proffer an argument as to why we should find that a four-year delay is reasonable in this case.[1] We therefore affirm the trial court's holding that Gadsden's 60(b)(5) motion is untimely.

[1] At one point Gadsden does offer that the delay was "because [Appellants] lacked the information necessary to attack the judgment until that time. Once the data were in hand, however, appellants acted promptly to assert their rights." (Final Reply Br. of Appellants at 2.) Not only has Gadsden failed to disclose to the Court what this information is that only became available after four years, but also one cannot help but notice that the forgoing sounds suspiciously like a newly discovered evidence argument, which would be time barred under Rule 60(b)(2), SCRCP.

Second, a ruling that a partition order has prospective application would be inappropriate and an affront to the commonly understood meaning of the term "prospective application." The test typically applied to determine whether an order has prospective application is "whether it is executory or involves supervision of changing conduct or conditions by the court." Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 120, 441 S.E.2d 835, 838 n.3 (Ct. App. 1994). For example, injunctions ordinarily have prospective application. See, e.g., Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). Partition orders, on the other hand, are executed orders because they mandate a one-time change in the ownership of property. As a consequence, Gadsden's motion fails for being wholly outside the scope of Rule 60(b)(5).

**AFFIRMED.**

**HUFF, BEATTY, JJ., and CURETON, A.J., concur.**

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

S.C. Farm Bureau Mutual Insurance Company, Respondent,

v.

Mimi K. Oates, as GAL for Jonathan David Oates, Jr., a minor under the age of 14, Mimi K. Oates, individually, Jonathan D. Oates, Sr., individually, James W. Whitmore, Mary D. Whitmore, Dana Tomlin, individually and d/b/a Tender Loving Daycare (TLC) and Angela Dawn Adams, Defendants,

of whom Mimi K. Oates, as GAL for Jonathan David Oates, Jr., Mimi K. Oates, Individually, and Jonathan D. Oates, Sr., Individually are the, Appellants.

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Appeal From York County
J. Buford Grier, Special Circuit Court Judge

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Opinion No. 3692
Submitted September 8, 2003 – Filed November 3, 2003

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**AFFIRMED**

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James W. Tucker, Jr., of Rock Hill, for Appellants.

Forrest C. Wilkerson, of Rock Hill, for Respondent.

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**HOWARD, J.:** S.C. Farm Bureau Mutual Insurance Company ("Farm Bureau") brought this declaratory judgment action seeking a declaration that it did not provide coverage and had no duty to defend a pending tort action brought against its insured, Tender Loving Care Day Care ("TLC"), and TLC's owners, Jonathan W. Whitmore, Mary D. Whitmore, and Dana Tomlin. The circuit court ruled the Farm Bureau policy provided no coverage for the underlying claim and Farm Bureau had no duty to defend. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

On May 4, 1997, Farm Bureau issued an insurance policy to TLC, insuring for damages it may become legally liable to pay for bodily injury or property damage arising out of the ownership or maintenance of its premises. The policy, known as a special multi-peril liability policy, named TLC as the insured and provided:

> [Farm Bureau] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and arising out of the ownership, maintenance or use of the insured premises . . . and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . .

The policy also contained endorsement MP0023, entitled "Additional Policy Exclusion Endorsement." The exclusion stated: "This insurance does not apply to bodily injury, property damage, or premises medical payments: (a) arising out of any acts . . . of sexual or physical molestation, abuse, assault, or harassment caused . . . by any insured, or agent thereof . . . ." (emphasis added).

Following the issuance of the policy, Mimi K. Oates and Jonathan D. Oates, Sr. ("Oates") brought a tort action on behalf of themselves and their infant son, Jonathan, against TLC, its owners, and its employee, Angela Dawn Adams, alleging Adams severely injured Jonathan while he was in Adams' care. According to the complaint, Jonathan suffered permanent injuries from "shaken baby syndrome" on May 14, 1997.

Paraphrasing the complaint, it alleges that TLC and the owners of TLC are liable for the injuries to Jonathan caused by Adams because they were negligent in hiring her, training her, supervising her, understaffing the facility, failing to investigate reports of injuries, and generally, by allowing Adams to mistreat and/or injure Jonathan. The complaint also alleges Adams was an employee acting within the scope of her employment at the time of the injury, and was negligent in allowing herself to be placed in a position of caring for more children than her capabilities permitted, in injuring Jonathan on one or more occasions, in failing to ask for assistance, and in treating the child in a manner inconsistent with a nurturing caregiver.

Farm Bureau brought this declaratory judgment action to determine whether its insurance policy provided coverage for the acts forming the basis of the underlying tort claim, thus contractually requiring Farm Bureau to defend the suit. The circuit court ruled the acts alleged in the underlying tort action were not within Farm Bureau's policy coverage because: 1) the policy's exclusionary clause excluded Oates' negligence claims; and 2) Adams' acts did not constitute an "occurrence" within the provisions of the policy. Oates appeals. We affirm.

## LAW/ANALYSIS

Oates argues the trial court erred by finding Oates' negligence claims were excluded by the policy's exclusionary clause. We disagree.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to" the parties' intentions as determined by the contract language. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992); see Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975) (holding parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage). When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense. C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

The determination of whether an insurance company is obligated to defend an action under its policy provisions is based on the allegations of the complaint. If the facts alleged in the complaint fail to bring the case within the policy's coverage, the insurer has no obligation to defend. South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 291 S.C. 460, 463, 354 S.E.2d 378, 380 (1987).

Oates' tort claim alleges the owners were negligent, and as a result, Adams abused Jonathan, causing him bodily injuries. Oates does not allege any other damages as a result of the owners' negligence.[1] Thus, Oates' negligence claims are predicated on

[1] To the extent Oates' complaint alleges damages that are not bodily injury or property damages, Oates has not appealed these issues. Thus, they are deemed abandoned on appeal. See Gold Kist Inc. v. Citizens and Southern Nat. Bank of South Carolina, 286 S.C. 272, 275, 333

Jonathan's injuries, because without Jonathan's bodily injuries, the separate acts of negligence alleged by Oates are not actionable. See Estate of Cantrell v. Green, 302 S.C. 557, 560, 397 S.E.2d 777, 779 (Ct. App. 1990) (holding to prevail in an action founded in negligence, the plaintiff must establish the following three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty).

Consequently, we must determine if Jonathan's bodily injuries are excluded by the policy, for if his bodily injuries are excluded by the policy, Oates' negligence claims will also be excluded. See McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 320, 426 S.E.2d 770, 772 (1993) (holding plaintiff's tort claims against defendant for negligent training and supervision were excluded by provisions of the insurance contract, where plaintiff's injuries occurred during a car accident, and the insurance contract excluded coverage for damages "arising out of" the use, operation, or ownership of an automobile); Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 474, 438 S.E.2d 275, 277 (Ct. App. 1993) (holding plaintiff's negligence claims were excluded under the provisions of an insurance policy where the policy excluded any damages "arising out of" assault and battery, and plaintiff only alleged physical damages incurred when employees of the defendant attacked him).

The policy states it "does not apply to bodily injury . . . (a) arising out of any acts . . . of . . . abuse . . . caused . . . by any insured, or agent thereof . . . ." (emphasis added). (R. 132). We construe the language "arising out of" narrowly to mean "caused by." McPherson, 310 S.C. at 320, 426 S.E.2d at 771.

Farm Bureau's insurance policy does not define "abuse." Therefore, we look to the common meaning of "abuse" in conjunction with the other language of the contract to determine its meaning within

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S.E.2d 67, 70 (Ct. App. 1985) (holding issues not argued on appeal are deemed abandoned).

the policy. See Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (holding when faced with an undefined term, the court must interpret the term in accord with its usual and customary meaning); USAA Property and Casualty Ins. Co. v. Rowland, 312 S.C. 536, 539, 435 S.E.2d 879, 881-82 (Ct. App. 1993) (holding when a term is not defined in an insurance policy, the court should define the term according to the usual understanding of the term's significance to the normal person); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001) (holding dictionaries can be helpful tools for the purpose of defining terms); MGC Mgmt. of Charleston v. Kinghorn Ins. Agency, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999) (holding the court must give insurance policy language its plain, ordinary, and popular meaning).

Black's Law Dictionary defines "abuse" as "[a] depart[ure] from legal or reasonable use in dealing with (a person or thing); to misuse . . . . To injure (a person) physically or mentally." Black's Law Dictionary 8 (7th ed. 2000); see also The American Heritage Dictionary of the English Language 6 (1973) (stating abuse means "[t]o hurt or injure by maltreatment").

Similarly, the South Carolina Criminal Code defines "child abuse or neglect' . . . [as] an act or omission by any person which causes harm to the child's physical health or welfare . . . ." S.C. Code Ann. § 16-3-85 (2003); see also S.C. Code Ann. § 20-7-490(2)(a) (Supp. 2002) ("'Child abuse or neglect', or 'harm' occurs when . . . [a person] . . . inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child . . . .").

When the allegations supporting liability in the underlying negligence action are viewed under any of the above-stated definitions of abuse, Jonathan's injuries arose out of abuse as that term is used in its plain, ordinary, and popular sense. Thus, the bodily injuries Jonathan sustained, and the resulting damages from those injuries, are excluded by the insurance contract. Consequently, Farm Bureau is not

contractually required to defend TLC against Oates' negligence claims.[2] See South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 291 S.C. at 463, 354 S.E.2d at 380 (holding an insurer has no duty to defend where a party's claims fail to bring the case within the policy's coverage).

## CONCLUSION

For the foregoing reasons, the decision of the circuit court is

**AFFIRMED.**[3]

**STILWELL and KITTREDGE, JJ., concurring.**

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[2] Oates also argues the circuit court erred by holding Oates' tort claims did not constitute "occurrences," bringing the claims within the insurance policy's coverage. In that regard, Oates contends this case is analogous to Manufacturers and Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998). However, because we hold the claims are specifically excluded by the policy, we need not address this issue.

[3] Because oral argument would not aid the Court in resolving any issue on appeal, we decide this case without oral argument pursuant to South Carolina Appellate Court Rules, Rule 215.