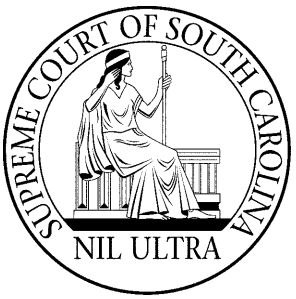

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
October 8, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Vicki L. Wilkinson, Appellant,

v.

East Cooper Community Hospital, Inc., d/b/a East Cooper Regional Medical Center, Carolina Plastic Surgery Institute, PA, and Thomas X. Hahm, M.D., Respondents.

Appellate Case No. 2012-213464

ORDER

The petitions for rehearing are denied. This Court does, however, substitute the attached amended majority opinion for the majority opinion previously filed in this matter. The amended opinion deletes the last sentence of the second paragraph on page nine of the original majority opinion.

s/Jean H. Toal C.J.

s/Donald W. Beatty J.

s/John Kittredge J.

s/Kaye G. Hearn J.

I would grant the petitions for rehearing.

s/Costa M. Pleicones J.

Columbia, South Carolina
October 3, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vicki L. Wilkinson, Appellant,

v.

East Cooper Community Hospital, Inc., d/b/a East Cooper Regional Medical Center, Carolina Plastic Surgery Institute, P.A., and Thomas X. Hahm, M.D., Respondents.

Appellate Case No. 2012-213464

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27423
Heard May 20, 2014 – Refiled October 3, 2014

REVERSED AND REMANDED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, L.L.C., of Columbia, and Daniel Nathan Hughey, of Hughey Law Firm, L.L.C., of Mt. Pleasant, for Appellant.

Robert H. Hood, James Bernard Hood, Harry Cooper Wilson, III, and Deborah Harrison Sheffield, all of Hood Law Firm, L.L.C., of Charleston; Daniel Simmons McQueeney, Jr., Kathleen Fowler Monoc, and Lindsay Kathryn Smith-Yancey, all of Pratt-Thomas Walker, P.A., of Charleston, for Respondents.

Andrew A. Mathias, of Nexsen Pruet, L.L.C., of Greenville, for Amicus Curiae, South Carolina Hospital Association.

JUSTICE BEATTY: In this medical malpractice case, Vicki Wilkinson appeals the circuit court's order dismissing her civil action with prejudice based on the motions filed by East Cooper Community Hospital, Inc. ("East Cooper"), Carolina Aesthetic Plastic Surgery Institute, P.A. ("Carolina Aesthetic Plastic Surgery"), and Dr. Thomas Hahm (collectively "Respondents"). Wilkinson asserts the court erred in finding: (1) the statute of limitations was not tolled because she failed to file an expert witness affidavit contemporaneously with her Notice of Intent to File Suit ("NOI") pursuant to section 15-79-125 of the South Carolina Code;[1] and (2) she failed to file her Complaint within the applicable statute of limitations given she did not contemporaneously file an expert witness affidavit with the Complaint or within forty-five days thereafter in accordance with section 15-36-100(C).[2]

---

[1] Section 15-79-125 provides, in part, as follows:

> Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, *the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100*, in a county in which venue would be proper for filing or initiating the civil action. . . . *Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations*.

S.C. Code Ann. § 15-79-125(A) (Supp. 2013) (emphasis added).

[2] Section 15-36-100 provides in relevant part:

> (B) *Except as provided in Section 15-79-125*, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), *the plaintiff must file as part of the complaint an affidavit of an expert witness* which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

This appeal requires the Court to review the decision of the Court of Appeals in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012) ("*Ranucci I*"), which held the pre-litigation filing requirement for a medical malpractice case found in section 15-79-125 incorporates only the parts of section 15-36-100 that relate to the preparation and content of an expert's affidavit. Recently, we reversed *Ranucci I*, holding that section 15-79-125(A) incorporates section 15-36-100 in its entirety. *Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) ("*Ranucci II*"). Therefore, we hold that Wilkinson could invoke section 15-36-

---

> (C)(1) *The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit.*
>
> . . . .
>
> (D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.
>
> . . . .
>
> (F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

S.C. Code Ann. § 15-36-100(B), (C)(1), (D), (F) (Supp. 2013) (emphasis added).

100(C)(1), which extended the time for filing the expert witness affidavit with her NOI and tolled the applicable statute of limitations. However, because the analysis in *Ranucci II* was confined to the dismissal of the pre-litigation NOI, it is not dispositive since the instant case involves the next procedural step in medical malpractice litigation. Specifically, we must analyze whether Wilkinson's failure to file an expert witness affidavit with her Complaint warranted the dismissal of her civil action. We hold the circuit court erred in dismissing Wilkinson's civil action as the expert affidavit filed with the NOI satisfied the statutory requirements of section 15-36-100 and, thus, it was not necessary to file a second expert affidavit in the same civil action. Accordingly, we reverse the circuit court's order and remand the case for further proceedings.

I. Factual / Procedural History

On September 4, 2008, Wilkinson was admitted to East Cooper to undergo reconstructive breast surgery performed by Dr. Hahm. Following the surgery, Wilkinson experienced complications throughout 2008 that required additional medical procedures.

On September 1, 2011, Wilkinson filed an NOI pursuant to section 15-79-125 against Respondents and several other defendants, which was designated as Case No. 2011-CP-10-6306.[3] Because the statute of limitations was due to expire within a short period of time, Wilkinson did not include an expert witness affidavit with the NOI, but stated that she would file one at a later date. On October 5, 2011, Wilkinson filed the affidavit of Dr. John D. Newkirk, a board certified plastic surgeon.

On January 25, 2012, five days after an unsuccessful attempt at pre-litigation mediation, Wilkinson filed a Complaint against the defendants named in the NOI, which was designated as Case No. 2012-CP-10-0558. Wilkinson did not file an expert affidavit with the Complaint nor did she reference the NOI or otherwise explain why she did not file an expert affidavit with the Complaint.

[3] In addition to Respondents, Wilkinson named Tenet Healthcare Corp. ("THC") and Tenet Healthsystem Medical, Inc. ("THMI") as defendants. On April 18, 2012, Wilkinson entered into a consent order with THC and THMI to dismiss the case as to them without prejudice. Thus, THC and THMI are not parties to this appeal.

Respondents separately answered and moved to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the ground the statute of limitations had expired. Citing *Ranucci I*, East Cooper asserted the NOI did not toll the three-year statute of limitations[4] because Wilkinson failed to contemporaneously file an expert affidavit with the NOI pursuant to section 15-79-125. Therefore, East Cooper argued that Wilkinson's Complaint, which was filed four months after the expiration of the statute of limitations, should be dismissed. Alternatively, even if the statute of limitations did not expire on September 4, 2011, East Cooper claimed Wilkinson's failure to file an expert affidavit with her Complaint or within forty-five days thereafter violated section 15-36-100 and warranted dismissal. In a separate memorandum in support of their motion to dismiss, Respondents Carolina Aesthetic Plastic Surgery and Dr. Hahm reiterated the arguments raised by East Cooper.

Wilkinson filed a memorandum in opposition to Respondents' motions. Because Respondents engaged in pre-litigation mediation and did not move to dismiss the NOI during the pre-litigation proceedings, Wilkinson maintained Respondents waived any argument regarding her NOI and the expiration of the statute of limitations. Additionally, Wilkinson asserted the failure to file an expert affidavit with her Complaint did not warrant dismissal as Respondents were already in possession of the previously filed affidavit of Dr. Newkirk.

After a hearing, the circuit court granted Respondents' motions to dismiss with prejudice. Based on *Ranucci I*, the court found that Wilkinson: (1) failed to file an expert affidavit contemporaneously with her NOI as required by section 15-79-125 and, thus, the statute of limitations was not tolled; and (2) failed to file an expert affidavit contemporaneously with her Complaint or within forty-five days thereafter as required by section 15-36-100. The court rejected Wilkinson's contention that Respondents' participation in statutorily mandated pre-litigation mediation waived their right to challenge the NOI. The court also found the exception codified in section 15-36-100(C)(1), which extends the time for filing an expert affidavit with the Complaint, was inapplicable because Wilkinson did not provide any explanation as to why the expert affidavit was not filed and, in any

[4] *See* S.C. Code Ann. § 15-3-545(A) (2005) (providing that a medical malpractice case "must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section").

event, failed to file an expert affidavit within forty-five days of filing her Complaint.

Following the circuit court's denial of her motion for reconsideration, Wilkinson appealed to the Court of Appeals. This Court granted Wilkinson's motion to certify the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Standard of Review

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (internal quotations omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

III. Discussion

A. Arguments

Initially, Wilkinson challenges the propriety of *Ranucci I* and urges this Court to reverse the decision of the Court of Appeals.[5] If the Court reverses *Ranucci I*, Wilkinson claims her NOI tolled the statute of limitations and, therefore, neither the NOI nor the Complaint should have been dismissed as untimely. However, even if her Complaint is deemed deficient based on her failure to contemporaneously file an expert affidavit, she contends any deficiency did not mandate dismissal. Rather, she asserts any dismissal under section 15-36-100(C)(1) is permissive given the statute states that a plaintiff's Complaint is "*subject to* dismissal for failure to state a claim." (Emphasis added.) Because dismissal is not statutorily mandated, Wilkinson claims the appropriate remedy

[5] East Cooper asserts Wilkinson failed to preserve this issue for appellate review because she did not raise it to the circuit court. This assertion is without merit. Because the circuit court was bound to follow *Ranucci I*, it would have been futile for Wilkinson to challenge the propriety of *Ranucci I* as the circuit court had no authority to alter the decision of the Court of Appeals.

would be for her to be given an opportunity to cure any defect as the Court permitted a plaintiff to file an amended Complaint after the expiration of the statute of limitations in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006).[6]

Alternatively, Wilkinson maintains her Complaint was not deficient as it stated facts sufficient to support a cause of action and Respondents were already in possession of the expert affidavit that was filed with the NOI. Thus, because Respondents were not prejudiced by the alleged deficiency, Wilkinson claims dismissal was not the appropriate sanction.

B. Application of *Ranucci II* as to the Sufficiency of the NOI

Recently, this Court reversed *Ranucci I*. *Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) ("*Ranucci II*"). In so ruling, we held that section 15-79-125(A) incorporates section 15-36-100 in its entirety. Thus, we ruled that a medical malpractice claimant may invoke section 15-36-100(C)(1), which permits the claimant to file an expert witness affidavit within forty-five days after filing the NOI. *Id.*

---

[6] In support of this proposition, Wilkinson relies on *Spence*, wherein this Court found that when a Complaint is dismissed under Rule 12(b)(6), "the dismissal generally is without prejudice" and "[t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Spence*, 368 S.C. at 129, 628 S.E.2d at 881. The Court explained:

> When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. *When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint*. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.

Id. at 130, 628 S.E.2d at 881-82 (emphasis added).

In the instant case, Wilkinson filed the NOI on September 1, 2011 in compliance with section 15-79-125(A). S.C. Code Ann. § 15-79-125(A) (Supp. 2013). Because the statute of limitations was due to expire within a short period of time, Wilkinson did not include an expert witness affidavit with the NOI, but stated that she would file one at a later date. Pursuant to section 15-36-100(C)(1), Wilkinson had an additional forty-five days to supplement her NOI with an expert affidavit. *Id.* § 15-36-100(C)(1). Wilkinson acted within the statutorily designated time period as she filed the affidavit of Dr. Newkirk on October 5, 2011. As a result, Wilkinson's properly filed NOI tolled "all applicable statutes of limitations" pursuant to section 15-79-125(A). Accordingly, the circuit court erred in finding that Wilkinson's NOI was not sufficient to toll the statute of limitations.

After the NOI was properly filed, the parties strictly adhered to the pre-litigation procedures outlined in section 15-79-125. Specifically, the parties engaged in discovery and participated in mediation within the statutorily mandated 120-day time period. *Id.* § 15-79-125(B) ("After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure."); *id.* § 15-79-125(C) ("Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause.").

Following the failed mediation attempt on January 20, 2012, Wilkinson initiated her civil action by filing a timely summons and complaint on January 25, 2012, as required by section 15-79-125(E). *Id.* § 15-79-125(E) ("If the matter cannot be resolved through mediation, *the plaintiff may initiate the civil action by filing a summons and complaint* pursuant to the South Carolina Rules of Civil Procedure. The action must be filed: (1) *within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end*; or (2) prior to expiration of the statute of limitations, *whichever is later*." (emphasis added)). Consequently, Wilkinson complied with the pre-litigation requirements and timely initiated her civil action.

C. Dismissal of Civil Action with Prejudice

Having found that Wilkinson timely initiated her civil action, the question becomes whether the Complaint was sufficient to comply with the requirements of section 15-36-100 as Wilkinson never supplemented this pleading with an expert affidavit.

As a threshold matter, we disagree with any contention that the clerk of court's assignment of separate Common Pleas case numbers to the NOI and the Complaint converted Wilkinson's medical malpractice case into two civil cases that required two expert affidavits. The assignment of a different case number to the pre-litigation pleadings and the litigation pleadings is of no consequence because they both comprise a single medical malpractice claim. *See Fisher v. Pelstring*, 817 F. Supp. 2d 791, 807 n.8 (D.S.C. 2011) (analyzing procedures for initiating medical malpractice claims and stating "[s]ection 15-79-125 also does not include any language indicating that the case number under which a Notice of Intent is served on a defendant must be the same as the case number assigned to the complaint served on that defendant if a civil action is ultimately initiated").

Once Wilkinson initiated the civil action, the proceedings continued to be governed by section 15-36-100. Significantly, section 15-36-100(B) states:

> *Except as provided in Section 15-79-125*, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), *the plaintiff must file as part of the complaint an affidavit of an expert witness* which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

S.C. Code Ann. § 15-36-100(B) (Supp. 2013) (emphasis added). As we interpret this provision, the plain language of the first sentence expressly exempts a medical malpractice claimant from filing a second expert affidavit as one has already been filed with the NOI pursuant to section 15-79-125.

Such a construction harmonizes the two statutes and is consistent with the intent of the legislature to create a unique pre-litigation period of discovery and

mandatory mediation via section 15-79-125 in order to filter out frivolous claims at the earliest stage in medical malpractice cases. However, this procedure does not create two separate cases. Rather, the plaintiff must properly initiate the claim with the NOI and attempt to resolve the case within a short timeframe. If the parties fail to resolve the case through mediation, the case almost immediately progresses as a customary professional negligence action. Thus, to require a second expert affidavit at the litigation stage in the proceeding leads to an absurd result as the plaintiff's claim has not changed during the pre-litigation proceedings. This conclusion, however, does not obviate the need for a plaintiff to offer additional expert testimony as it may be necessary to withstand a defendant's motion for summary judgment or to support the claim at trial.[7]

Finally, such an interpretation is consistent with the Court's decisions to permit medical malpractice cases to proceed on the merits rather than to affirm unwarranted dismissals based on technical noncompliance with the medical malpractice statutes. *See Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013) (concluding that failure to timely complete the pre-litigation mediation process as required by section 15-79-125 does not divest the trial court of subject matter jurisdiction or mandate dismissal); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012) (holding that the pre-litigation expert affidavit, which is filed pursuant to section 15-79-125, must specify at least one negligent act or omission and the factual basis for each claim, but does not need to include an opinion as to proximate cause and, therefore, medical malpractice claimant's case could proceed as the pre-litigation affidavit was sufficient).

Based on the foregoing, we hold the circuit court erred in granting Respondents' motions to dismiss as Wilkinson's Complaint was timely and sufficient to properly initiate a civil action for medical malpractice. In view of our decision, it is unnecessary to address Wilkinson's remaining argument that she should be permitted to supplement her Complaint with an expert affidavit based on *Spence*. *See Futch v McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613,

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[7] Although East Cooper references decisions from other jurisdictions to support the contention that a second affidavit is required, its reliance on these cases is misplaced as the underlying state statutes are distinctly different from our state's medical malpractice statutes. Moreover, our research did not reveal any state statutes that were identical to those in this state. Thus, even though cases from other jurisdictions involving medical malpractice may provide guidance as to policy or theory, the text of the underlying statutes is not similar enough to be dispositive in the instant case.

518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

IV. Conclusion

Having reversed *Ranucci I*, we hold Wilkinson could invoke section 15-36-100(C)(1), which extended the time for filing the expert witness affidavit with her NOI and tolled the statute of limitations. As a result, Wilkinson timely filed her Complaint. Moreover, Wilkinson was not required to file a second expert witness affidavit in order to properly initiate her civil action because the affidavit filed with her NOI was sufficient for statutory compliance. Accordingly, we reverse the decision of the circuit court and remand the case for further proceedings.

REVERSED AND REMANDED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. Appellant failed to file an expert witness affidavit contemporaneously with her Notice of Intent to File Suit as mandated by S.C. Code Ann. § 15-79-125(A) (Supp. 2013). I would therefore affirm the circuit court's decision. *See Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) (Pleicones, J., dissenting).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

William Coaxum, Sr., Respondent.

Appellate Case No. 2012-206607

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27452
Heard May 8, 2014 – Filed October 8, 2014

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark Reynolds Farthing, all of Columbia, for Petitioner.

Appellate Defender David Alexander, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State appeals the court of appeals' decision to reverse the convictions of William Coaxum, Sr. (Respondent), who was found guilty of armed robbery and possession of a firearm during the commission of a violent crime. *See State v. Coaxum*, Op. No. 2011-UP-496 (S.C. Ct. App. filed Nov. 7, 2011). The court of appeals found reversible error in the trial court's decision to remedy a juror's unintentional nondisclosure during voir dire by replacing the juror in the middle of Respondent's trial. We reverse.

FACTS/PROCEDURAL BACKGROUND

On November 27, 2007, around 11:00 p.m., two armed men robbed a Pizza Hut located in North Charleston, South Carolina. The robbers escaped in an "orange hatchback-type car." Within minutes, the police saw a vehicle matching this description in the same general vicinity of the Pizza Hut and attempted to conduct an investigatory stop. The driver of the vehicle, Respondent, refused to pull over, and a high-speed pursuit ensued.

Within two miles of the start of the chase, Respondent lost control of the vehicle and crashed into a fire hydrant, which caused a water line to rupture. Respondent and his passenger attempted to flee on foot. However, the police car hydroplaned in the water spilling from the broken fire hydrant and collided with Respondent. The police arrested Respondent at the scene of the crash, and their search of his car and person revealed a sawed-off shotgun and over $1,000 in cash.[1]

Prior to Respondent's trial, the trial court conducted voir dire of the prospective jurors. Specifically, the court asked: "Are there any members of the jury panel related [by] blood or marriage, socially or casually connected with [Respondent], or that have any business dealings, any connection whatsoever?" None of the prospective jurors responded. After the judge asked the jury pool several other questions, the parties selected twelve jurors and one alternate juror to serve as jurors during Respondent's trial, including Juror #7.[2]

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[1] Shortly after the passenger was arrested, he gave a written statement to police describing the Pizza Hut robbery in detail and naming Respondent as his co-conspirator.

[2] The parties selected Juror #7 as the second person to be seated on the jury. Prior to Juror #7's selection, the State had exercised two of its five available peremptory

At trial, after the State presented the first four of its eight witnesses, the judge received a note from the jury foreperson indicating that Juror #7 recognized one of Respondent's family members sitting in the courtroom. The judge conducted an off-the-record discussion with Juror #7 to determine the nature of her relationship with the family member and whether she could remain impartial during the trial. He then summarized his discussion with Juror #7 on the record.

The judge reported that Juror #7 and Respondent's family member were co-workers, and that the family member previously claimed that Juror #7 was a "distant cousin."[3] Juror #7 indicated that, once she recognized Respondent's family member, she felt uncomfortable not disclosing the working and family relationship between the two. She told the judge that the working and family relationships would not affect her decision in the trial.

The solicitor requested Juror #7 be removed from the jury, arguing that although Juror #7's initial nondisclosure during voir dire was unintentional,[4] "these types of relationships . . . [,] ultimately she may not be able to put it out of her mind." The solicitor further indicated that, had he known of the relationship between Juror #7 and Respondent, no matter how tenuous, he would have

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strikes; however, after Juror #7's selection, the State did not exercise any further peremptory strikes. Neither party exercised a peremptory strike during the selection of the alternate juror.

[3] The Record is unclear whether Juror #7 truly was related to Respondent's family member, to both the family member and Respondent, or to neither. Juror #7 was "not sure" whether she was a blood relative to Respondent's family. Presumably, her uncertainty is the reason she failed to answer during voir dire when the trial court asked the prospective jurors whether they were "related [by] blood or marriage, socially or casually connected with [Respondent]."

[4] "Unintentional concealment . . . occurs where the question posed [during voir dire] is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001).

exercised one of the State's three remaining peremptory challenges against her.[5]

In response, Respondent's counsel argued that alternate jurors do not pay as much attention to the evidence and testimony as the original twelve jurors, despite the court's warnings to the contrary. Therefore, Respondent's counsel argued for a public policy against replacing jurors in the middle of a trial.

After conducting a lengthy inquiry, the trial court found that the alleged connection between Juror #7 and Respondent would have been a material factor in the State's exercise of its peremptory challenges. The court did not view Juror #7's connection with Respondent and his family as a basis for a challenge for cause. However, the court ruled that the connection would have been a legitimate basis for the State's exercise of its peremptory strikes, and that the State would have struck Juror #7 had she disclosed the connection. Therefore, the trial court excused Juror #7 from the jury and replaced her with the alternate juror. The State then called its remaining witnesses, and the jury ultimately convicted Respondent of armed robbery and possession of a firearm during the commission of a violent crime.

The court of appeals reversed Respondent's convictions and remanded the case for retrial, concluding that a trial court may not "automatically" remove a juror for an unintentional failure to disclose requested personal information during voir dire. Further, the court of appeals held that it was an abuse of discretion for the trial court to have removed Juror #7 because, in essence, a trial court may remove a juror mid-trial only if the juror has *intentionally* failed to disclose. This appeal followed.

ISSUE

Whether the trial court abused its discretion in removing Juror #7 for her unintentional failure to disclose her relationship with Respondent's family member during voir dire?

STANDARD OF REVIEW

[5] The solicitor detailed his strategy for exercising peremptory strikes, stating that he specifically looked for ties to the community, longstanding employment history, and ties to the defendant or a key witness.

"In criminal cases, the appellate court sits to review errors of law only" and is "bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citation omitted). "In order to receive a mistrial, the defendant must show error and resulting prejudice." *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998); *see also State v. Galbreath*, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct. App. 2004) (requiring the defendant to show a prejudicial abuse of discretion (citing *State v. Covington*, 343 S.C. 157, 163, 539 S.E.2d 67, 69–70 (Ct. App. 2000))).

ANALYSIS

"All criminal defendants have the right to a trial by an impartial jury." *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (citing U.S. Const. amends. VI and XIV). To that end, the jury must render its verdict free from outside influences of all kinds. *Kelly*, 331 S.C. at 141, 502 S.E.2d at 105 (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)). To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determinate whether the jurors are aware of any bias or prejudice against a party, as well as to "elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge." *Woods*, 345 S.C. at 587, 550 S.E.2d at 284.

"[T]rial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." *Kelly*, 331 S.C. at 145, 502 S.E.2d at 106. Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge. *State v. Gulledge*, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982).

In the event of such juror misconduct, the trial court must inquire into whether the withheld information affects the jury's impartiality. *Kelly*, 331 S.C. at 141, 402 S.E.2d at 104. However, the court should not grant a mistrial based on a juror's concealment of information "unless absolutely necessary." *Id.* at 142, 502 S.E.2d at 104. "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." *Id.* (citing *State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989)); *see also State v. Williams*, 321 S.C. 455, 459–60, 469 S.E.2d 49, 52 (1996) (affirming the trial court's decision to seat an alternate juror midtrial after another juror's impartiality came into question); *State v. McDaniel*, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980) (same).

We have previously held that a new trial is required "*only* when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (emphasis added). In the face of a juror's intentional nondisclosure of pertinent information during voir dire, "it may be inferred, nothing to the contrary appearing, that the juror is not impartial." *Id.* at 587–88, 550 S.E.2d at 284. Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court's decision by proving the concealment was, in fact, intentional; however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent. *Id.* at 589, 550 S.E.2d at 285.

In contrast, if a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial.[6] *Cf. id.* ("'Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice.'" (quoting *Doyle v. Kennedy Heating & Serv., Inc.*, 33 S.W.3d 199, 201 (Mo. Ct. App. 2000))). Paralleling the inquiry in cases of intentional concealment, the trial court in the unintentional concealment situation must determine whether the information concealed would have supported a challenge for cause or would have been a material factor in a party's exercise of its peremptory challenges. *State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247–48 (2002) (citing *Woods*, 345

[6] *See, e.g.*, *State v. Sparkman*, 358 S.C. 491, 495–98, 596 S.E.2d 375, 377–78 (2004) (affirming the trial court's refusal to replace a juror when, after the verdict but before the sentencing hearing, the defendant became aware of the juror's unintentional nondisclosure during voir dire); *State v. Stone*, 350 S.C. 442, 448–49, 567 S.E.2d 244, 247–48 (2002) (finding the trial court abused its discretion in removing a juror during the punishment phase of a death penalty trial because of the juror's unintentional nondisclosure during voir dire); *Kelly*, 331 S.C. at 139–44 (affirming the trial court's decision to remove a juror midtrial and replace the juror with an alternate because the juror appeared to be biased); *Williams*, 321 S.C. at 459–60, 469 S.E.2d at 52 (same); *McDaniel*, 275 S.C. at 224, 268 S.E.2d at 586 (same).

S.C. at 587–88, 550 S.E.2d at 284).

However, "where the failure to disclose is innocent, no inference of bias can be drawn." *Woods*, 345 S.C. at 589, 550 S.E.2d at 285. Accordingly, the moving party has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges. In other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias.

Our previous decisions have not focused on the need for this prejudice analysis,[7] and the court of appeals has periodically omitted it when considering cases involving a juror's unintentional nondisclosure during voir dire. For example, the court of appeals has previously read *Stone* and its progeny to essentially eliminate the trial court's ability to remove a juror for an unintentional concealment, no matter how relevant the information disclosed would have been to exercising a peremptory strike:

> When a party contends a juror should be removed for failure to disclose information during voir dire, *Stone* requires the trial judge to consider two criteria from *Woods*. If the judge finds both of the *Woods* criteria exist, the judge must remove the juror. **However, if either of the criteria is absent, the judge may not remove the juror on that basis**. Here, we need only look to the absence of the first criterion to affirm. As in *Stone*, this juror's failure to disclose the

[7] Nonetheless, we have in fact conducted such an analysis. *See, e.g.*, *Sparkman*, 358 S.C. at 497, 596 S.E.2d at 378 ("Because [the juror's] concealment was unintentional our inquiry is over, however, we fail to see how [the defendant] was prejudiced given that the trial judge questioned the jury after the verdict."); *Stone*, 350 S.C. at 448, 567 S.E.2d at 247–48 (finding that a juror's "scant acquaintance" with the defendant's family would not have prejudiced the State had the juror remained on the jury); *Kelly*, 331 S.C. at 142, 502 S.E.2d at 104 ("While it was improper for Juror O to possess this pamphlet, in our opinion, appellant failed to show prejudice."); *Williams*, 321 S.C. at 460, 469 S.E.2d at 52 ("[W]e discern no prejudice to [the defendant] from the seating of the alternate juror here."); *McDaniel*, 275 S.C. at 224, 268 S.E.2d at 586 ("Moreover, appellant has failed to establish in what manner this procedure prejudiced him.").

> information was innocent. Thus, the removal of the juror would have been error.

State v. Burgess, 391 S.C. 15, 19–20, 703 S.E.2d 512, 514–15 (Ct. App. 2010) (bold emphasis added) (citations omitted).

The analysis in *Burgess* is the same analysis used by the court of appeals in Respondent's case; however, we find this analysis to be an improper reading of our prior case law, as it does not consider how material the information would have been to the parties in exercising their peremptory challenges. While the information concealed in *Burgess* may not have been material—and thus the court of appeals may have reached the correct result in that case—it is too broad to say that, in all cases, when the concealment is unintentional, it is automatically immaterial.

Moreover, as we have previously stated, "'a new trial is *required* only when the court finds the juror *intentionally* concealed the information . . . .'" *Stone*, 350 S.C. at 448, 567 S.E.2d at 247 (emphasis added) (quoting *Woods*, 345 S.C. at 587, 550 S.E.2d at 284). Here, there is no allegation that Juror #7's failure to disclose was intentional. While the trial court likely would have been justified in refusing to excuse Juror #7 from the jury, its decision to remove her is not an abuse of discretion given the thorough inquiry it conducted into the solicitor's strategy in seating or striking prospective jurors. *Cf. Kelly*, 331 S.C. at 142, 502 S.E.2d at 104 ("A mistrial should not be granted unless absolutely necessary."); *McDaniel*, 275 S.C. at 224, 268 S.E.2d at 586 ("[T]he procedure employed by the trial court [in replacing a juror midtrial and impaneling an alternate], however irregular, was not sufficient to deprive appellant of his right to a jury trial. There is no right to be tried by a jury composed of particular individuals. The alternate juror had been approved by both sides at the inception of the trial, and there is no showing that appellant withdrew that approval at the time of substitution. Moreover, appellant has failed to establish in what manner this procedure prejudiced him." (citations omitted)).

As stated, *supra*, to receive a new trial, the defendant must show a prejudicial abuse of discretion. *Galbreath*, 359 S.C. at 402, 597 S.E.2d at 847 (citing *Covington*, 343 S.C. at 163, 539 S.E.2d at 69–70). As there is no question the jury was impartial after Juror #7's removal, Respondent did not meet his burden, and therefore is not entitled to a new trial. Accordingly, we reverse the court of appeals decision reversing Respondent's convictions.

CONCLUSION

For the foregoing reasons, the court of appeals decision is

REVERSED.

., PLEICONES, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Amy Landers May, Respondent

Appellate Case No. 2014-002048
Appellate Case No. 2014-002050

ORDER

The Office of Disciplinary Counsel petitions the Court to transfer respondent to incapacity inactive status pursuant to Rule 28 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, and the appointment of an attorney to assist the Receiver pursuant to Rule 31, RLDE. Respondent consents to the issuance of an order transferring her to incapacity inactive status and to the appointment of the Receiver and an attorney to assist the Receiver.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to

Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

The Court appoints Heather Cairns, Esquire, to assist the Receiver in performing the duties imposed by Rule 31, RLDE.

The appointments shall be for a period of no longer than nine months unless an extension of the period of the appointments is requested.

s/ Jean H. Toal C.J.

Columbia, South Carolina

September 30, 2014

The Supreme Court of South Carolina

In the Matter of John A. Jackson, Respondent.

Appellate Case No. 2014-002076;
Appellate Case No. 2014-002077

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, pursuant to Rule 31, RLDE. By separate request, the Commission on Lawyer Conduct requests the Court appoint an attorney to assist the Receiver.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

This Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Finally, the Court appoints Kenneth Michael Barfield, Esquire, to assist the Receiver in performing the duties imposed by Rule 31, RLDE.

The appointments shall be for a period of no longer than nine months unless an extension of the period of the appointments is requested.

s/ Jean H. Toal C.J.

Columbia, South Carolina

October 2, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Wilson Pearson, Appellant.

Appellate Case No. 2012-212430

Appeal From Clarendon County
R. Ferrell Cothran Jr., Circuit Court Judge

Opinion No. 5251
Heard June 17, 2014 – Filed July 30, 2014
Withdrawn, Substituted and Refiled October 8, 2014

REVERSED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia, for Respondent.

GEATHERS, J.: Appellant Michael Wilson Pearson challenges his convictions for first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime. Pearson argues the State failed to present substantial circumstantial evidence of his involvement in any of the crimes charged and, therefore, the trial court erred in denying his motion for a directed verdict. We reverse.

FACTS/PROCEDURAL HISTORY

Around 6:15 a.m. on May 15, 2010, Edward "Slick" Gibbons was jumped by three men as he exited his garage. The three men robbed Gibbons of approximately $840, beat him, and wrapped duct tape around his head. Following the attack, the men fled the scene in Gibbons' 1987 Chevrolet El Camino. The vehicle was discovered approximately thirty minutes later, abandoned on the side of a nearby road. A fingerprint recovered from the rear of the vehicle was matched to Pearson. The duct tape removed from Gibbons' head contained DNA evidence, which was matched to Victor Weldon.

Pearson and Weldon were both indicted for attempted murder, first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime. A joint trial was held May 16 through May 18, 2012. At the time of trial, investigators had yet to identify a third suspect.

At trial, Gibbons testified that as he was leaving for work, three black men wearing masks came out of the storage room inside of his garage and threw him on the ground. According to Gibbons, one of the men sat on top of his legs, while the other two men hit and kicked him. While Gibbons was on the ground, the men wrapped duct tape around his head. Gibbons claimed that one of the men had something in his hand that "looked like a pistol." He further testified the men took all of the money in his wallet and then one of the men asked him, "Slick . . . where is the rest of it[?]" After the robbery, the three men left the garage and started to drive away. Gibbons described how he pulled himself off the ground and looked out a window in the garage to see them driving off in his El Camino. Gibbons noted that when he got up, one of the men, who was seated in the rear bed of the El Camino, jumped out of the vehicle, ran back, and knocked him unconscious.

Cecil Eaddy, a local farmer, testified he found the abandoned El Camino around 6:40 a.m. with the motor running and the passenger door open. Eaddy recounted how he turned the vehicle off and took the keys to Gibbons' auto parts store. Eaddy stated he returned the keys so that one of Gibbons' employees could drive the vehicle back to the store. Walter Bush, an employee at Gibbons' store, corroborated Eaddy's testimony. According to Bush, Eaddy picked him up from the store and drove him to the location of the vehicle. Bush testified he drove the vehicle "straight back to the store."

Ricky Richards, an investigator with the Clarendon County Sheriff's Office, testified he went to Gibbons' store, where he processed the El Camino. Richards stated he lifted fingerprints from the driver's side "door jamb" and the "rear quarter on the driver's side." On cross-examination, Richards admitted there was no way to determine when the fingerprints were left on the vehicle.

Investigator Thomas "Lin" Ham testified he visited Gibbons at the hospital on the day of the crimes.[1] Ham indicated that while he was at the hospital, he took the duct tape that was removed from Gibbons' head into evidence. In addition, Ham testified that during an interview with Pearson following his arrest, Pearson "adamantly denied knowing Mr. Gibbons." Ham elaborated: "[Pearson] told me he didn't know where [Mr. Gibbons] lived. He had never been there. He had never been to [Mr. Gibbons'] place of business. He had never come into contact with [Mr. Gibbons'] vehicle."

Marie Hodge, the automated fingerprint identification system (AFIS) examiner at the Sumter Police Department, was qualified as an expert in fingerprint identification. Hodge testified she ran seven fingerprints lifted from the vehicle through the AFIS but did not obtain an identification for any of the prints. After obtaining no hits, Hodge printed out the fingerprints of persons of interest from the AFIS and compared each set of prints "one-on-one" to the lifted fingerprints. According to Hodge, a side-by-side comparison of the prints showed that a right thumbprint found on the rear of the vehicle belonged to Pearson. Hodge later received a card containing Pearson's ink-rolled fingerprints from the Sheriff's Office and compared the prints on the card to the lifted thumbprint. Hodge testified the comparison "reaffirmed" that the thumbprint belonged to Pearson. On cross-examination, Hodge conceded that she was unable to "date" or "age" a fingerprint. She further testified that when left undisturbed, a fingerprint "can be there for quite some time."

Investigator Kenneth Clark testified he interviewed Pearson following Pearson's arrest. Clark noted that during the interview, Pearson denied ever being around Gibbons or Gibbons' property. According to Clark, when he informed Pearson that his fingerprint had been found on Gibbons' vehicle, Pearson declined to comment. Clark testified that subsequent investigation revealed Pearson had previously worked on a landscaping project at Gibbons' residence.

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[1] Investigator Ham testified he had known Gibbons all of his life and frequently referred to Gibbons as "Mr. Slick" throughout his testimony.

Clark also testified concerning the investigation into co-defendant Victor Weldon's involvement in the crimes. He noted that during an interview with Weldon, Weldon denied knowing Pearson or having any involvement in the crimes. Clark indicated, however, that records from the South Carolina Vocational Rehabilitation Center revealed Pearson and Weldon both worked at the same job training program from December 9 through December 12, 2008.

Richard Gamble, a local landscaper, testified Pearson had previously assisted him in doing landscaping work for Gibbons and Gibbons' son, who lived on the same block. Gamble could not recall the exact date of the landscaping project; however, he indicated it took place in the spring of 2009 or 2010. He estimated the project lasted "at least 5 days." Gamble testified that while working on the project, he observed Pearson enter Gibbons' garage in order to retrieve job-related tools that were located in the storage area.

The State also presented the testimony of John Hornsby, who worked as an area supervisor at the South Carolina Vocational Rehabilitation Center. According to Hornsby, time cards and attendance records revealed Pearson and Weldon were both assigned to the facility's woodshop from December 9 through December 12, 2008. Hornsby stated that around twenty-five individuals generally worked at the woodshop on a daily basis.

After the State rested, Pearson and Weldon both moved for a directed verdict on all charges. Pearson argued that even though his fingerprint was found on the outside of Gibbons' car, the fingerprint was insufficient to place him at the crime scene. In reply, the State argued the fingerprint was found on the rear of the vehicle, where Gibbons testified one of the men who robbed him had been seated as they fled his house. The State also pointed to evidence that the two co-defendants attended the same job training program over a four-day period, as well as testimony that Pearson had done landscaping work at Gibbons' home. The trial court denied Pearson's and Weldon's motions for a directed verdict. The trial court stated:

> As far as Mr. Pearson's fingerprint[,] the evidence in this case that has come before this jury that I recall he told the police officer he did not know Mr. Gibbons. He had not been at his house or his place of business. His vehicle was taken that morning. Within 30 minutes[,] the vehicle was found abandoned a mile and a half or two miles away. The vehicle was processed and was carried to the auto parts place and processed. That day his fingerprint

> was found on the vehicle. And I certainly think at least that's sufficient evidence for the jury to make a determination of guilt or innocence in this case. And I respectfully deny your motion.

The jury found Pearson and Weldon guilty of burglary in the first degree, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime. The trial court sentenced Pearson to a total of sixty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"On appeal from the denial of a directed verdict, [an appellate court] must view the evidence in the light most favorable to the State." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *Id.*

LAW/ANALYSIS

Pearson argues the circumstantial evidence presented by the State did not rise to the level of substantial circumstantial evidence necessary to submit the case to the jury. We agree.

"'A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.'" *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (quoting *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010)). "The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." *Id.*; *see also State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (noting the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act"). If there is substantial circumstantial evidence reasonably tending to prove the defendant's guilt, an appellate court must find the trial court properly submitted the case to the jury. *Lane*, 406 S.C. at 121, 749 S.E.2d at 167 (citing *Odems*, 395 S.C. at 586, 720 S.E.2d at 50). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). "The lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "'Suspicion' implies a

belief or opinion as to guilt based upon facts or circumstances [that] do not amount to proof." *State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404–05 (2001).

In this matter, the key evidence relied upon by the State to place Pearson at the crime scene was the presence of his fingerprint on the rear of Gibbons' vehicle. Our courts have addressed the sufficiency of fingerprint evidence where the State relies on such evidence to prove a defendant's guilt. We find a review of these cases is instructive in determining whether the circumstantial evidence presented by the State met the "substantial circumstantial evidence" standard.

In *Mitchell*, our supreme court affirmed this court's decision that Mitchell was entitled to a directed verdict on a burglary charge. 341 S.C. at 409, 535 S.E.2d at 127. The only evidence linking Mitchell to the burglary was his fingerprint on a window screen that was propped up against the exterior of the victim's house. *Id.* at 408–09, 535 S.E.2d at 127. The court found the fingerprint evidence was insufficient to prove Mitchell's guilt because there was testimony Mitchell had been in and around the victim's house at least three times before the burglary. *Id.* at 409, 535 S.E.2d at 127. Additionally, the court reasoned a directed verdict was appropriate because "[t]he State did not present any evidence whether the screen was on the window at the time the window was broken or when the screen had been removed." *Id.*

Similarly, in *State v. Bennett*, 408 S.C. 302, 306, 758 S.E.2d 743, 745 (Ct. App. 2014), this court assessed whether evidence of Bennett's fingerprint and DNA at the site of a burglary constituted substantial circumstantial evidence. Therein, a television, computer, monitor, and keyboard were stolen from a Spartanburg community center. *Id.* at 303–04, 758 S.E.2d at 744. Bennett's fingerprint was discovered on a wall-mounted television in the community room that appeared to have been manipulated by the burglar. *Id.* Additionally, two droplets of Bennett's blood were found directly below the location of a missing television in the computer room. *Id.* at 305, 758 S.E.2d at 745. It was undisputed that Bennett was a frequent visitor to the center before the crime and spent much of his time in the computer room. *Id.* at 307, 758 S.E.2d at 745. The director of the center testified she did not recall seeing Bennett in the community room, which was solely used for scheduled events. *Id.* at 304–05, 758 S.E.2d at 744. However, the director acknowledged that the community room was not always locked or consistently monitored. *Id.*

Applying the directed verdict standard, the *Bennett* court found the State did not present substantial circumstantial evidence reasonably proving Bennett's guilt. *Id.*

at 307, 758 S.E.2d at 746. The court recognized the evidence presented by the State "undoubtedly placed Bennett at the *location where a crime ultimately occurred*." *Id.* However, the court rejected the State's assertion that the evidence served to "place[] Bennett *at the scene of the crime*." *Id.* The court reasoned the exact locations of the DNA and fingerprint evidence "d[id] not rise above suspicion" because it was not "unexpected" to find Bennett's DNA and fingerprints in a communal area he frequented before the crime. *Id.*

Additionally, in *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004), our supreme court held that fingerprint evidence placing Arnold in the victim's borrowed vehicle on the same day the victim was last seen alive was not substantial and merely raised a suspicion of Arnold's guilt. In *Arnold*, the victim's body was discovered off a dirt road in Colleton County, South Carolina. *Id.* at 388, 605 S.E.2d at 530. The victim was last seen alive three days earlier, when he borrowed a colleague's BMW to go to a dentist appointment. *Id.* One of the State's witnesses testified he had introduced the victim to Arnold. *Id.* The witness indicated he had received a message from Arnold to call him at a phone number belonging to Arnold's father, who lived in Gray, Tennessee. *Id.* at 389, 605 S.E.2d at 530. The borrowed BMW was later found in a parking lot in Johnson City, Tennessee, approximately ten miles away from where Arnold's father lived. *Id.* at 389–90 & n.3, 605 S.E.2d at 530–31 & n.3. The BMW had unspecified scratches on it, and a coffee cup lid containing Arnold's fingerprint was found in the car's center console. *Id.* at 389, 605 S.E.2d at 530. In concluding that the circumstantial evidence presented by the State was insufficient to overcome a directed verdict motion, the court reasoned:

> Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed [the victim]. Further, there is no evidence [Arnold] was at the scene of the crime, which according to the State's theory was in Colleton County.

Id. at 390, 605 S.E.2d at 531 (footnote omitted).

Under the facts of this case and consistent with the reasoning in the aforementioned cases, there is insufficient evidence tying Pearson to the crimes. Here, the most damaging evidence was Pearson's fingerprint on the rear of Gibbons' vehicle. However, there was other evidence showing Pearson may have had an opportunity to come in contact with the vehicle before the crimes occurred. For instance, there was testimony that Gibbons regularly parked his vehicle in a public lot adjacent to his store. Moreover, there was testimony that Pearson assisted with a five-day landscaping project at Gibbons' residence, and he could have come in contact with the vehicle at that time. *See Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 (finding that fingerprint evidence was insufficient to prove the defendant's guilt because there was testimony the defendant had been in and around the victim's house at least three times before the burglary). Most notably, the State's fingerprint expert testified she could not determine when the print was placed on the vehicle and that such a print could remain on a vehicle for an indefinite period if left undisturbed. Because the State offered no timing evidence to contradict reasonable explanations for the presence of the fingerprint, the jury could only have guessed the fingerprint was made at the time of the crimes. *See Buckmon*, 347 S.C. at 322–23, 555 S.E.2d at 405 (holding defendant was entitled to a directed verdict where none of the evidence presented by the State placed defendant at the crime scene and the jury was left to speculate as to defendant's guilt).

We further note the additional incriminating evidence presented by the State failed to fill the gaps in proof and left the jury to speculate as to Pearson's guilt. *See State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) ("The motion [for a directed verdict] should be granted where a jury would be speculating as to the accused's guilt or where the evidence is sufficient only to raise a strong suspicion of guilt." (citation omitted)). In addition to the fingerprint, the State offered evidence that Pearson and his co-defendant, Weldon, previously attended the same job training program. It would be speculative, however, to infer a relationship between the two co-defendants considering approximately twenty-five individuals took part in the job training program. At most, this evidence demonstrates the two co-defendants worked in the same facility at the same time. Moreover, Pearson and Weldon both denied knowing each other during their separate interviews with investigators. Although it is possible Pearson and Weldon interacted during the program, it is not incredible that neither man could remember a fellow participant in a program they attended more than a year before the crimes. Despite the fact Weldon was tied to the crimes because of his DNA on the duct tape, nothing tied Pearson to the crime scene.

Viewing all of the evidence in the light most favorable to the State, there was insufficient evidence to submit the case to the jury. The recovered fingerprint directly tied Pearson to the stolen vehicle. Nonetheless, the fingerprint merely raised a suspicion of Pearson's guilt because there was no additional evidence showing when the fingerprint was placed on the vehicle. Moreover, none of the other evidence presented by the State placed Pearson at the crime scene or established a relationship between Pearson and Weldon. For this reason, the jury could only have guessed Pearson was involved in the crimes. "[S]uspicion, however strong, does not suffice to sustain a conviction." *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963). A defendant is entitled to a judgment of acquittal "where [the] evidence merely raises a suspicion of guilt, or is such as to permit the jury to merely conjecture or to speculate as to the accused's guilt." *State v. Brown*, 267 S.C. 311, 316, 227 S.E.2d 674, 677 (1976). Accordingly, we find the trial court erred by denying Pearson's directed verdict motion.

CONCLUSION

For the foregoing reasons, Pearson's convictions are

REVERSED.

FEW, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Energy Corporation, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2012-213180

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5274
Heard February 18, 2014 – Filed October 8, 2014

AFFIRMED

Eric S. Tresh and Maria M. Todorova, both of Atlanta, GA, and Jeffrey A. Friedman, of Washington, DC, all of Sutherland Asbill & Brennan, LLP, and Burnet Rhett Maybank, III and Tanya Amber Gee, Nexsen Pruet, LLC, both of Columbia, for Appellant.

Tracey Colton Green, John Marion S. Hoefer, and John William Roberts, Willoughby & Hoefer, PA, all of Columbia, Jonathon Abraham Gutting, Young Clement Rivers, LLP, of Charleston, Milton Gary Kimpson, of Columbia, and Harry A. Hancock, of Bordentown, NJ, for Respondent.

FEW, C.J.: This appeal arises from Duke Energy Corporation's claims to the South Carolina Department of Revenue for corporate income tax refunds totaling $126,240,645, plus interest, for tax years 1978 to 2001. We affirm the denial of Duke Energy's refund claims.

I. Facts and Procedural History

Duke Energy generates electricity and sells it to customers. Because it does business in North Carolina and South Carolina, Duke Energy must apportion its income between these states to determine the income tax due to each state. *See* S.C. Code Ann. § 12-6-2210(B) (2014) ("If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State.").[1] A taxpayer's income is apportioned using a formula—a fraction—in which the numerator represents the business the taxpayer did in the applicable tax year in this state, and the denominator indicates the total business the taxpayer did in all states. The South Carolina Income Tax Act provides two formulas: (1) the formula applicable to "manufacturers," which contains three factors in both the numerator and the denominator—property, sales, and payroll, S.C. Code Ann. § 12-6-2252 (2014);[2] and (2) the formula applicable to

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[1] This section was enacted in 1995. Act No. 76, 1995 S.C. Acts 460. Prior to tax year 1996, the apportionment of a taxpayer's income between states was governed by the predecessor to section 12-6-2210—South Carolina Code section 12-7-250 (1976), which was located in Article 9 of the now-repealed Chapter 7 of Title 12 in the Income Tax Act of 1926. *See* Act No. 76, 1995 S.C. Acts 536 (stating "this act is effective for taxable years beginning after 1995"); Act No. 76, 1995 S.C. Acts 535 (repealing "Chapter[] 7 . . . of Title 12 of the 1976 Code"). The wording of the former and current versions of the section differs slightly, but the effect of the sections is the same.

[2] Section 12-6-2252 applies to more than just manufacturers, as we discuss in section III of this opinion. Section 12-6-2252 was enacted in 2007. Its language, however, is identical to the predecessors that apply to this case: (1) former section 12-7-1140 (1976), which applied to tax years 1978 to 1995; and (2) former section 12-6-2250 (2000), which applied to tax years 1996 to 2001. Section 12-7-1140 was repealed and section 12-6-2250 was enacted in 1995. Act No. 76, 1995 S.C.

all other taxpayers, which contains only one factor—sales, S.C. Code Ann. § 12-6-2290 (2014).[3] In either formula, the business of the taxpayer in this state is converted to a fraction of its total business, which becomes the "base" upon which the taxpayer's state income tax is calculated.

Duke Energy filed timely income tax returns for each of the tax years at issue—1978 to 2001. In December 2002, Duke Energy filed amended tax returns for each of these years. Duke Energy sought to have its South Carolina income tax recalculated and requested refunds in the amount of $126,240,645, plus interest. In February 2003, the department denied the requests. In March 2003, Duke Energy appealed this decision to the department's Office of Appeals. The department did not act on the appeal until February 2010—almost seven years—when it issued a "determination" denying the appeal.

Duke Energy filed a contested case in the administrative law court ("ALC"). The ALC faced three primary issues: (1) whether Duke Energy's refund claims were timely, (2) which apportionment formula Duke Energy was required to use, which we refer to as the "manufacturing" issue, and (3) whether Duke Energy could include in the denominator of the applicable formula its gross receipts from sales of certain short-term investments, which we refer to as the "gross receipts" issue. The department moved for summary judgment on all three issues, and Duke Energy moved for summary judgment on the gross receipts issue. The ALC granted partial summary judgment to the department, ruling Duke Energy's refund claims were untimely for tax years 1978 to 1993,[4] and Duke Energy may not include gross receipts in the denominator of the applicable apportionment formula.

Acts 461, 535. Section 12-6-2250 was repealed in 2007 when section 12-6-2252 was enacted. Act No. 110, 2007 S.C. Acts 590, 595.

[3] Section 12-6-2290 was enacted in 1995, *see* Act No. 76, 1995 S.C. Acts 464, and amended in 2007, *see* Act No. 110, 2007 S.C. Acts 594, 595. The predecessor to section 12-6-2290 was South Carolina Code section 12-7-1190 (1976), which was effective in all tax years before 1996. Section 12-7-1190 was repealed when section 12-6-2290 was enacted in 1995. Act No. 76, 1995 S.C. Acts 535.

[4] The department concedes Duke Energy's refund requests for tax years 1994 to 2001 were timely due to the enactment of South Carolina Code subsection 12-60-470(A) (2014). Act No. 60, 1995 S.C. Acts 375-76.

The ALC then conducted a trial on the question of which formula Duke Energy must use and ruled for the department, finding Duke Energy must use the formula set forth in section 12-6-2252.

We find the ALC properly granted summary judgment to the department because it correctly determined Duke Energy may not include its gross receipts from sales of short-term investments. We also affirm the ALC's ruling that Duke Energy must use the apportionment formula in section 12-6-2252. Because our resolution of these issues is dispositive of this appeal, we do not reach the timeliness of Duke Energy's refund claims. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when the court's resolution of the issues it does address are dispositive of the appeal).

II. Standard of Review

We review the ALC's decision under subsection 1-23-610(B) of the South Carolina Code (Supp. 2013). The gross receipts issue is a pure question of law that the parties presented to the ALC on cross motions for summary judgment. Thus, we review the ALC's decision as to that issue under subsections 1-23-610(B)(a), (c), and (d). *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011) ("Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law."); *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012) ("[T]he parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary."); *id.* ("[C]ross motions for summary judgments . . . authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." (alteration in original) (citation omitted)); *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) ("Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law.").

As to the manufacturing issue, the ALC decided the question after a trial. Both parties, as well as the ALC, address the question as one of fact. However, we find the manufacturing issue to be primarily one of statutory interpretation in which the facts are undisputed. To this extent, we review the ALC's ruling as a question of law under subsections 1-23-610(B)(a), (c), and (d). *Centex Int'l, Inc. v. S.C. Dep't*

of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (stating "questions of statutory interpretation are questions of law"); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (stating "the proper interpretation of a statute is a question of law"). However, we review under a different standard the ALC's ruling that Duke Energy's "manufacturing" business is its "principal" business in South Carolina. In making this ruling, the ALC resolved a factual dispute as to the appropriate inferences that should be drawn from undisputed facts. Therefore, we review this ruling as a factual determination under subsection 1-23-610(B)(e) and must determine if it is "clearly erroneous in view of the reliable, probative, and substantial evidence." *See ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011) (stating "as to [the ALC's] findings of fact, we may reverse or modify decisions that . . . are clearly erroneous in view of the substantial evidence"); *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 358, 641 S.E.2d 763, 766-67 (Ct. App. 2007) (stating "we may not substitute our judgment for that of the AL[C] as to the weight of the evidence on questions of fact unless the AL[C]'s findings are clearly erroneous in view of the reliable, probative and substantial evidence").

III. The Manufacturing Issue

The central question regarding the manufacturing issue is whether the predecessors to section 12-6-2252 apply to Duke Energy. Section 12-6-2252 reads:

> A taxpayer whose principal business in this State is (i) manufacturing or a form of collecting, buying, assembling, or processing goods and materials within this State, or (ii) selling, distributing, or dealing in tangible personal property within this State, ...

If Duke Energy's principal business is considered "manufacturing," section 12-6-2252 applies and Duke Energy must use an apportionment formula based on three factors—property, sales, and payroll. If, however, its principal business is not manufacturing, or does not otherwise fall under section 12-6-2252, then section 12-6-2290 and its predecessors apply, which permits Duke Energy to use a formula based only on sales.

Both parties agree Duke Energy's business in South Carolina is the production and delivery of electrical power to homes and businesses. The ALC stated the parties

stipulated "[Duke Energy] is, and was during the 1978-2001 tax periods, engaged in the generation, transmission, distribution, and sale of electricity." Duke Energy characterizes its business as "the provision of electric service to its customers," while the department characterizes it as "the generation, transmission, distribution, and sale of electricity," and simply "providing electricity." Each of these variations accurately describes Duke Energy's business, and there is no dispute as to what Duke Energy does. The only dispute is how Duke Energy's business should be classified under the state tax laws—particularly under sections 12-6-2252 and 12-6-2290, and their predecessors.

"Manufacturing" is not defined in the tax code. We find, however, Duke Energy's undisputed activity meets the plain and ordinary meaning of the word. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) ("When faced with an undefined statutory term, the Court must interpret the term in accordance with its usual and customary meaning."). According to Webster's New Collegiate Dictionary, "manufacture" is defined as "to make into a product suitable for use," and "to produce according to an organized plan and with division of labor." *Webster's New Collegiate Dictionary* 695 (spec. ed. 1981). The ALC defined manufacturing as "the process of making wares by hand or by machinery especially when carried on systematically with division of labor," "productive industry using mechanical power and machinery," and "the act or process of producing something."

The ALC discussed the nature of Duke Energy's business, stating,

> Duke Energy operates plants in both South Carolina and North Carolina to produce electricity. In South Carolina, Duke Energy has two nuclear power plants, four coal power plants, three hydroelectric power plants, and several oil or gas power plants. The electricity that is produced and consumed by its customers is created at Duke Energy generation facilities. A generator is a "mechanical device" that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. Generators have been used to produce electricity in substantially the same manner for over 100 years. Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power

> to turn the generator. Although the sources or inputs (e.g., coal, uranium, water) used at these different types of generation facilities may vary, all use a generator to produce electricity. The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using a process that has not changed significantly since the early 20th century.

As described by the ALC, Duke Energy utilizes mechanical power, usually to generate steam, which is then used to create electricity. We find Duke Energy's business fits the definitions of "manufacture" stated above. Although Duke Energy would disagree with the word "create," it is undisputed that Duke Energy generates electricity, or an electrical charge, that did not previously exist. As the ALC stated, "No matter what moniker [is] used to describe the product produced by Duke Energy, the electric current that generates that field, or even the field itself, is produced through a mechanical process run by Duke Energy." We therefore hold that what Duke Energy does to generate electricity is "manufacturing" as that term is used in section 12-6-2252.

Our conclusion is supported by previous decisions of our supreme court, in which the court defined "manufacturer" and "manufactory" and held Duke Energy and other electric utilities to be manufacturers, for purposes of the tax code. In *Columbia Railway, Gas & Electric Co. v. Query*, 134 S.C. 319, 132 S.E. 611 (1926), an electric company challenged a tax assessed against it under the "Manufacturer's Tax Act." 134 S.C. at 321, 132 S.E. at 612. The circuit court upheld the tax assessment, and on appeal, "the single question [was] whether the plaintiff is 'engaged in the business of manufacturing,' with reference to its gas and power business." *Id.* The supreme court affirmed, stating, "We do not think that there is any doubt that the appellant is engaged in the business of manufacturing gas and electricity . . . ." 134 S.C. at 324, 132 S.E. at 612. Duke Energy argues the *Columbia Railway* decision is distinguishable because it was "issued in other contexts more than eighty years ago" and "under a different set of tax statutes." We disagree and find *Columbia Railway* is controlling.

In *Duke Power Co. v. Bell*, 156 S.C. 299, 152 S.E. 865 (1930), our supreme court made a specific determination that Duke Energy is a manufacturer. 156 S.C. at 304-06, 152 S.E. at 868. Relying on *Columbia Railway*, the *Bell* court addressed whether a state law that exempted "manufactories" from county taxes applied to an

electric power plant acquired by Duke Energy. 156 S.C. at 304-05, 152 S.E. at 867-68. The court explained the power plant constituted a "manufactory," stating,

> The word "manufactory" means, primarily, a physical plant, or a place or building, where manufacturing is carried on. If a company engaged in the generation of electricity is a "manufacturer" for the purposes of a statute imposing a tax, the plant or structure wherein the process of generating such electricity is carried on is a *manufactory* for the purposes of a tax exempting statute.

156 S.C. at 306, 152 S.E. at 868. *Bell* is important for two reasons: (1) it applied directly to Duke Energy, and (2) the court relied on *Columbia Railway* in a different context of tax law.

Because we find Duke Energy is a "manufacturer" of electricity, we need look no further than the introductory words of section 12-6-2252—"A taxpayer whose principal business in this State is (i) manufacturing"—to determine it applies to Duke Energy. Duke Energy argues, however, section 12-6-2252 is inapplicable because it does not manufacture anything "tangible," and the terms of section 12-6-2252 apply only if the taxpayer manufactures something tangible. Duke Energy points to the "goods and materials" language of section 12-6-2252 to argue it applies only to taxpayers whose business is "manufacturing . . . goods and materials." Thus, Duke Energy contends the statute does not apply to it unless electricity is physical or tangible.

We do not believe the outcome of this appeal should turn on whether electricity is "tangible." First, as we previously explained, our supreme court has ruled the production of electricity is manufacturing, and Duke Energy is a manufacturer. *See Bell*, 156 S.C. at 306, 152 S.E. at 868; *Columbia Railway*, 134 S.C. at 324, 132 S.E. at 612. Those rulings are not distinguishable, and therefore binding on us. Second, the word "manufacturing" in subsection 12-6-2252(A) stands alone. Duke Energy argues the phrase "goods and materials within this State" and the words "tangible personal property" in subsection 12-6-2252(A) modify "manufacturing" so that the statute applies only when the taxpayer manufactures a tangible good or product. We read "goods and materials within this State" to modify only "collecting, buying, assembling, or processing." Further, we find the words

"tangible personal property" in subsection (A)(ii) should not be read to modify the word "manufacturing" in subsection (A)(i).

Duke Energy and the department extensively address in their briefs the question of whether electricity is "tangible personal property" under section 12-6-2252, and the ALC went to great lengths to justify its conclusion that "[e]lectricity is a physical product with physical characteristics." Given our conclusion regarding this issue, however, we reject Duke Energy's argument that the intangible quality of electricity renders section 12-6-2252 inapplicable.

We also base our holding on the intent of the Legislature in drafting section 12-6-2252. Subsection 12-6-2210(B) provides "the South Carolina income tax is [to be] imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State." Section 12-6-2252 contemplates that, for some businesses, considering sales alone will not yield an allocation of income between states that "reasonably represents the proportion of the trade or business carried on within this State." § 12-6-2210(B). This is true of businesses that sell in other states a high percentage of the product they manufacture in this state. Those businesses have a more significant presence in South Carolina—i.e. "the proportion of the trade or business carried on within this State"—than their sales here reflect. Under that circumstance, the Legislature indicated its intent to consider capital investment and employment in this state, in addition to sales. Applied to this situation, we hold the Legislature intended a taxpayer like Duke Energy, whose business depends on significant capital investment and employment, to apportion "the trade or business [it] carrie[s] on within this State" using the multi-factor apportionment formula. In this case, calculating the apportionment based on sales alone would not reasonably represent the taxpayer's business because Duke Energy has significant capital investment and employment in South Carolina. Thus, for the same reasons the Legislature drafted section 12-6-2252 to apply to any manufacturer, the section applies to Duke Energy.

Duke Energy also argues it provides a "service" under section 12-6-2290, and thus it should have its income tax apportioned according to the formula in that section. We agree the usual and customary meaning of "service" includes selling electricity. In its order, the ALC initially began its discussion of the manufacturing issue by referring to Duke Energy's "service" of electricity:

> The metered *service* plan is based on usage, ... Regardless of the *service* plan, a portion of each Duke Energy customer's *service* charge recovers Duke Energy's costs associated with maintaining the infrastructure that Duke Energy uses *to provide electric service*.

(emphasis added). Additionally, the department's own expert witness testified Duke's provision of electricity on a flat-fee basis is a service. Thus, Duke Energy is fairly characterized as a "manufacturer" that provides electric "service." We do not believe, however, that Duke Energy's provision of electric service changes its status as a manufacturer or the applicability of section 12-6-2252.

Sections 12-6-2252 and 12-6-2290 require the court to focus on the taxpayer's "principal" business. Duke Energy argues we should determine which component of Duke Energy's business is manufacturing and which is service, and from that conclude Duke Energy's "principal business in this State" is providing a service. We disagree for the reasons explained above—Duke Energy is a manufacturer and section 12-6-2252 applies to manufacturers. Even if we were to accept Duke Energy's argument, however, we must affirm. The ALC found, "After considering the evidence in the record and the pertinent legal authorities, . . . Duke Energy has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing . . . ." The ALC's finding is supported by substantial evidence, the most important of which is (1) Duke Energy's charter, which states it is a "manufacturer," and (2) Duke Energy's designation of itself as a manufacturer in its original tax return for each of the tax years applicable to this appeal. *See Comm'rs of Pub. Works*, 372 S.C. at 358, 641 S.E.2d at 766-67 (Ct. App. 2007) ("[W]e may not substitute our judgment for that of the AL[C] as to the weight of the evidence on questions of fact unless the AL[C]'s findings are clearly erroneous in view of the reliable, probative and substantial evidence.").

IV. The Gross-Receipts Issue

Regardless of which formula is used to apportion a taxpayer's income between states, the formula contains a variable in its denominator for the taxpayer's sales from all states in which it does business. Under either formula, the larger the denominator, the less income tax the taxpayer owes in this state.

For the multi-factor formula in section 12-6-2252, which we hold is applicable to Duke Energy, the "sales factor" is defined as "a fraction in which the numerator is the total sales of the taxpayer in this State during the taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year." S.C. Code Ann. § 12-6-2280(A) (2014).[5] Duke Energy takes the position the denominator should include gross-receipts from the sale of short-term investment instruments that Duke Energy purchases from other entities. The department disagrees, arguing the denominator should include only the smaller net receipts. The definition of "sales" in section 12-6-2280 does not include the term "gross receipts." However, the definition does include "sales of intangible personal property."[6]

To understand whether Duke Energy's gross receipts from sales of short-term investments should be included in the formula, it is helpful to examine the investment transactions at issue. According to Sherwood L. Love, Duke Energy's Assistant Treasurer and General Manager of Long Term Investments, Duke Energy maintained a Cash Management Group within its treasury department that "provide[d] required liquidity support for Duke['s] commercial paper programs . . . for the short-term funding of additional electric generation, transmission and distribution facilities[.]" The Cash Management Group carried out this objective by "invest[ing] Duke['s] excess operating cash in various short-term marketable securities." These securities included municipal bonds, loan repurchase agreements, commercial paper, U.S. Treasury securities, and agency securities. According to Mr. Love, Duke Energy made these short-term investments "[p]retty much every day," and Duke Energy "typically [left] investments like this outstanding for [less] than 30 days."

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[5] Section 12-6-2280 was enacted in 1995 and amended in 2007. Act No. 76, 1995 S.C. Acts 463; Act No. 110, 2007 S.C. Acts 593; *see also* Act No. 116, 2007 S.C. Acts 739 (duplicate of Act 110 in amending this section). Prior to tax year 1996, former South Carolina Code section 12-7-1170 (1976) provided that the sales factor consists of "[t]he ratio of sales made by such taxpayer during the income year which are attributable to this State to the total sales made by such taxpayer everywhere . . . ."

[6] The definition of "sales" in section 12-6-2280 is essentially the same as the definition in former section 12-7-1170, applicable before tax year 1996. The words are arranged differently, but the concept is the same.

Mr. Love provided the details of one particular transaction, which we find useful to illustrate how the transactions worked in general. This representative transaction consisted of the following actions taken by Duke Energy: (1) investing $14,982,900 in a short-term instrument on August 7, 1996, (2) selling the instrument eight days later on August 15, (3) collecting $17,100 in interest, and then immediately reinvesting the total $15,000,000 in another short-term instrument. This transaction demonstrates that Duke Energy's argument is contrary to the legislative intent of the apportionment statutes.

Under Duke Energy's theory, the transaction described above yields a $15 million dollar receipt that Duke Energy may use in the denominator of the apportionment formula. However, if Duke Energy decided to sell the instrument on August 10, immediately reinvest the money, and sell the second instrument on August 15, its "gross receipt" would be $30 million. If Duke Energy sold and reinvested the money on August 9, August 11, August 13, and August 15—a scenario Mr. Love testified was entirely reasonable—Duke Energy's "gross receipt" would be $60 million. These slight variations on this representative transaction illustrate that allowing Duke Energy to include its gross receipts from short-term investment instruments would artificially reduce the "base which reasonably represents the proportion of the trade or business carried on within this State," *see* § 12-6-2210(B), by artificially inflating the denominator of the formula.

The ALC focused on the fact that the return of the principal from this and other similar transactions is not part of Duke Energy's "gross income." We find, however, the issue does not depend on the difference between "gross" and "net" receipts. Instead, the issue turns on whether the return of the principal of these investments is properly characterized as a "receipt" in the first place. Stated another way, the issue is whether the receipt Duke Energy received from these transactions is the total amount, including principal and return on investment, or just the return.

Generally, a "receipt" is "something received," *Webster's*, *supra*, at 956, and usually refers to money. In the business context, "receipt" means money the

business receives for its products or services—for what it does in its business.[7] Duke Energy is in the business of selling electricity, which includes the sale of electricity itself on a wholesale or retail basis or the sale of capital it uses to conduct its business, such as a power plant. The money it takes in from such a sale is properly considered a "receipt." When Duke Energy invests the proceeds of its business in a short-term financial instrument and sells the investment for a profit, the profit generated may be considered a receipt. However, the principal of the investment is its own money—not money it received for its products or services. Thus, the return of the principal is not a receipt.

We affirm the ALC's determination that Duke Energy may not include gross receipts from the sale of short-term investments in the denominator of the formula used to apportion its income.

V. Conclusion

We find the ALC correctly ruled (1) Duke Energy is a "manufacturer" and thus must apportion its South Carolina income using the formula in section 12-6-2252; and (2) its gross receipts from sales of short-term investments in other states may not be included in the denominator of the formula. Because our conclusions as to these two issues resolve the appeal, we need not address the timeliness of Duke Energy's refund claims. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598. We **AFFIRM.**

SHORT and GEATHERS, JJ., concur.

[7] Duke Energy recites a similar definition from a decision of the tax commission: "gross receipts is a broad term which includes all proceeds received by the entity so long as such receipts resulted from any part of its business."