The Supreme Court of South Carolina

In the Matter of Peyre Thomas Lumpkin, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 1986, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 3, 2006, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Peyre

Thomas Lumpkin shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Justice John H. Waller, Jr., not participating

Columbia, South Carolina

January 20, 2006

The Supreme Court of South Carolina

In the Matter of Ellis Merritt,
Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 1, 1970, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated December 5, 2005, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation. The records in the office of the Clerk show that he has returned his certificate to practice law.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Ellis

Merritt, Jr., shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Justice John H. Waller, Jr., not participating

Columbia, South Carolina

January 20, 2006

The Supreme Court of South Carolina

In the Matter of Samuel David Tigert Hawk, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 19, 1987, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 21, 2005, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Samuel

David Tigert Hawk shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Justice John H. Waller, Jr., not participating

Columbia, South Carolina

January 20, 2006

The Supreme Court of South Carolina

In the Matter of Carol Lee Wilkerson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 7, 1993, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar Association, dated November 19, 2005, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Carol

Lee Wilkerson shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Justice John H. Waller, Jr., not participating

Columbia, South Carolina

January 20, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4

January 23, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Willie May David and J.D. David, Appellants,

v.

McLeod Regional Medical Center, Dr. Ken Brusett, Individually, Pee Dee Cardiovascular Surgeons, Pee Dee Pathology, and Dr. H. K. Habermeier, Individually, Respondents.

Appeal from Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 26020
Heard February 1, 2005 – Refiled January 23, 2006

AFFIRMED

Eduardo K. Curry and Carl B. Grant, both of Curry & Counts, of Charleston; and Jayne G. Helm, of Mt. Pleasant, for Appellants.

J. Rene Josey, of Turner Padget Graham & Laney, of Florence; Mark W. Buyck, Jr., of Wilcox Buyck & Williams, of Florence; and Robert H. Hood, D. Nathan Hughey, and

Deborah H. Sheffield, all of Hood Law Firm, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: Willie Mae David (Appellant), the plaintiff in the underlying medical malpractice action, appeals the trial court's decision granting the respondents' motions for summary judgment. This case was certified from the court of appeals pursuant to Rule 204(b), SCACR. We withdraw our original opinion in this matter and substitute it with this opinion affirming the trial court's decision.

FACTUAL /PROCEDURAL BACKGROUND

Appellant underwent surgery after her family doctor found a lesion on Appellant's lower left lung. Specifically, Appellant underwent a "wedge biopsy," where a thoracic surgeon extracted a portion of the suspicious tissue and sent the tissue to a pathologist for diagnosis. The pathologist returned a preliminary diagnosis of "probable pulmonary blastoma," a rare form of cancer, which was confirmed by the pathologist's partner. Based on this diagnosis, the thoracic surgeon decided to remove the lower left portion of Appellant's lung while Appellant was still anesthetized and unconscious.

A final pathology report, issued three days after the surgery, concluded that the lesion was not cancerous, but rather, a "pulmonary endometrioma;" a rare form of endometriosis, which, from a visual inspection, closely resembles pulmonary blastoma.[1]

[1] The evidence in this case suggests that the tissue removed for diagnosis unfortunately proved difficult to analyze. The sample was so strange that after determining that the tissue was not cancerous, the pathologist sent the sample to the Department of Defense, who replied "[w]hile the endometroid glandular architecture would cause one to consider the possibility of pulmonary blastoma, the histology is completely compatible with a diagnosis of endometrioma…[t]hank you for sending this interesting case."

Appellant filed the underlying action and named the following parties as defendants: (1) the hospital where the surgery took place (McLeod Regional), (2) the thoracic surgeon who performed the surgery (Dr. Brusett), (3) Dr. Brusett's practice group (Pee Dee Cardiovascular Surgeons), (4) the pathologist who provided the preliminary diagnosis (Dr. Habermeier), and (5) Dr. Habermeier's practice group (Pee Dee Pathology). Appellant claimed that she suffers from several ailments as a result of the surgery, including chest and back pain, shortness of breath, and anxiety.

Respondents filed separate motions for summary judgment.[2] McLeod Regional sought summary judgment on the grounds that any alleged malpractice was performed by independent contractors; therefore, the hospital could not be vicariously liable for Appellant's alleged injuries. The remaining Respondents sought summary judgment arguing that Appellant had failed to establish the essential elements of her case; specifically, that Appellant had failed to produce expert testimony establishing the applicable standard of care, breach of that standard, and a causal connection between the breach and Appellant's injuries. The trial court granted the Respondents' motions for summary judgment in three separate orders. Appellant now raises the following issues for review:

I. Did the trial court err in granting the respondent physicians' motions for summary judgment?

II. Did the trial court err in holding that McLeod Regional was not vicariously liable for Appellant's alleged damages?

[2] Specifically, Respondents filed three motions for summary judgment: (1) McLeod Regional, (2) Dr. Brusett and Pee Dee Cardiovascular Surgeons, and (3) Dr. Habermeier and Pee Dee Pathology. The Respondents' briefs to this Court were submitted in this fashion as well.

LAW/ANALYSIS

I. The Respondent Physicians' Motions for Summary Judgment

Appellant argues that the trial court erred in granting summary judgment in favor of the respondent physicians. We disagree.

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

As the trial court recognized, the rules of civil procedure describe what an affidavit must contain in order to establish an issue of fact sufficient to defeat a motion for summary judgment. Rule 56(e), SCRCP provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein."

A physician commits malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances. *Durham v. Vinson*, 360 S.C. 639, 650-51, 62 S.E.2d 760, 766 (2004). Additionally, medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist. Specifically, a plaintiff alleging medical malpractice must provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendants' field of medicine under the same or similar circumstances, and (2) that the defendants

departed from the recognized and generally accepted standards. *Pederson v. Gould*, 288 S.C. 141, 143-44, 341 S.E.2d 633, 634 (1986); *Cox v. Lund*, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985). Also, the plaintiff must show that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages. *Green v. Lilliewood*, 272 S.C. 186, 193, 249 S.E.2d 910, 913 (1978). The plaintiff must provide expert testimony to establish both the required standard of care and the defendants' failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants. *Pederson*, 288 S.C. at 143, 341 S.E.2d at 634. Therefore, in order to withstand a properly supported motion for summary judgment in a medical malpractice action, any affidavits presented to the court must first comply with the terms of Rule 56, SCRCP, and the evidence as a whole must meet the criteria laid out in *Pederson* and its progeny.

In the present case, Appellant relies solely on the affidavit of pathologist Dr. Brian Frist to create a genuine issue of material fact as to the commission of malpractice by the respondent physicians.[3] The trial court ruled that Dr. Frist's affidavit failed to establish that he is familiar with the standard of care from which the respondent physicians allegedly deviated. We agree and find that the affidavit is insufficient.

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[3] Initially, Appellant named only one expert in her response to interrogatories: Dr. Hossein Tirgan, an oncologist in the state of New Jersey. Dr. Tirgan, by way of affidavit and deposition, opined that all Respondents were negligent in some manner. The trial court found that Dr. Tirgan was not qualified to render an expert opinion in this case, and Appellant did not appeal that ruling.

Appellant named Dr. Frist as an expert only two days before the summary judgment hearing. Respondents had no opportunity to depose Dr. Frist. As a result, the only evidence that the trial court had to consider was Dr. Frist's affidavit. Therefore, we focus solely on Dr. Frist's affidavit to determine whether summary judgment was proper.

In his affidavit, Dr. Frist's sole opinion as to Dr. Brusett's alleged malpractice is that Dr. Brusett failed "to make sure that he communicated to the pathologist his thoughts for treatment, so that the pathologist was aware of the treatment plan of the surgeon." First, Dr. Frist incorrectly relies on the assumption that the pathologist would have diagnosed Appellant's tumor differently had Dr. Brusett "communicated his thoughts for treatment" before Appellant's tumor was tested. Stated differently, Dr. Frist's affidavit fails to explain how Dr. Brusett's post-diagnosis treatment would have affected the pathologist's initial diagnosis of the tumor. As a result, there is no evidence that Dr. Brusett's failure to communicate Appellant's possible treatment options with the pathologist was the proximate cause of Appellant's injuries.

The dissent asserts that had the pathologist been aware that Dr. Brusett intended to immediately remove the affected portion of the lung upon a diagnosis of pulmonary blastoma, then the pathologist *might* have qualified or sought to confirm his preliminary diagnosis. The dissent's argument disregards the necessity that a surgeon be able to rely upon inter-operative diagnoses to determine a patient's proper treatment. Moreover, the position argued by the dissent would set the precedent that a speculative hypothetical may serve as the standard of care in an action for medical malpractice. In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture.

Second, Appellant provides no evidence that her expert, Dr. Frist, is familiar with the standard of care that Dr. Brusett or Dr. Habermeier allegedly breached, nor does Appellant offer what the applicable standard of care might be. Nothing in Dr. Frist's affidavit, or in the record, suggests it was unreasonable for Dr. Brusett to extract the lesion after receiving a diagnosis of "probable pulmonary blastoma," and nothing in Dr. Frist's affidavit, or in the record, instructs the Court with any specificity as to how competent practitioners in these fields would have performed this procedure differently.

We are mindful of the important interests at stake in this case. People who receive sub-standard medical care must be able to recover for injuries

caused by at-fault physicians, and Plaintiffs must have a meaningful opportunity to present and support their claims in court. However, all of the evidence in this case suggests that Appellant received competent medical care. This is a case where a thoracic surgeon removed a piece of suspicious tissue, a pathologist and his partner returned a preliminary diagnosis of rare cancer, and the surgeon decided to take the tissue out. In support of her claim, Appellant offers an expert's affidavits saying "you should have communicated better and you got the diagnosis wrong." The affidavits do not establish how the facts of this case would be different had the surgeon and pathologist "communicated better," nor do they address the standard of care in any detail.

In affirming the trial court, we rely solely on the requirements of Rule 56, SCRCP, and the specific requirements for expert testimony in medical malpractice actions. A doctor need not practice in the particular area of medicine as the defendant doctor to be qualified to testify as an expert. *Creed v. City of Columbia*, 310 S.C. 342, 345, 426 S.E.2d 785, 786. (1993). Regardless of the area in which the prospective expert witness practices, he must set forth the applicable standard of care for the medical procedure under scrutiny and he must demonstrate to the court that he is familiar with the standard of care. A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. Despite Dr. Frist's qualifications, his affidavit does not set forth the standard of care he alleges was breached, nor does it provide that he is familiar the standard of care. Therefore, we hold that the trial court did not err in granting summary judgment in favor of Respondents Brusett, Pee Dee Cardiovascular, Habermeier and Pee Dee Pathology.

II. Vicarious Liability of McLeod Regional

Appellant argues that McLeod Regional had a nondelegable duty to provide competent pathology care to Appellant and therefore was vicariously liable for Dr. Habermeier's preliminary misdiagnosis that resulted in unnecessary surgery. Because we hold that the trial court properly granted

summary judgment in favor of Dr. Habermeier and Pee Dee Pathology, we need not address this issue. *See Rookland v. Atlanta & C. Air Line Ry. Co.*, 84 S.C. 190, 192, 65 S.E. 1047, 1049 (1909) (judgment on the merits in favor of the agent bars a vicarious liability action against the principal).

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision granting the respondents' motions for summary judgment.

MOORE, J. and Acting Justice Paula H. Thomas concur. PLEICONES, J., dissenting in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I respectfully dissent from the majority's decision to affirm the grant of summary judgment to the Respondent doctors and their practices, but join the decision to affirm the grant to Respondent McLeod. As explained below, I find Dr. Frist's affidavit adequate to create a genuine issue of material fact whether the communication between the surgeon and the pathologist fell below generally accepted standards and procedures.[4]

As I understand Dr. Frist's affidavit, the assertion is that if Dr. Brusett had informed the pathologist that he intended to immediately remove the affected portion of the lung if the intra-operative diagnosis were cancer, then Dr. Habermeier might have qualified his preliminary diagnosis. Contrary to the majority's characterization of the affidavit, it does not assume that Dr. Habermeier's diagnosis would have been different, but rather opines that had Dr. Habermeier been aware of Dr. Brusett's intentions, Dr. Habermeier would have properly communicated "his pathological diagnosis and thoughts, to the rareness of his findings, so that the diagnosis could be used for the proper treatment of the patient at that moment."

The majority holds that there is nothing in the affidavit to suggest that it was unreasonable for Dr. Brusett to have removed part of the lung upon receiving the blastoma diagnosis. I do not disagree; however, as I understand the Appellants' theory, they allege a deviation from the standard of care in the communications between the surgeon and the pathologist, not in the

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[4] I note with concern that the majority opinion could be read to import the medical malpractice plaintiff's evidentiary burden at trial into the summary judgment standard. Durham v. Vinson, Pederson v. Gould, Cox v, Lund, and Green v. Lilliewood are all appeals from cases that went to trial, and which decide whether the plaintiff had met her burden at that proceeding. A motion for summary judgment is not a mini-trial, requiring the medical malpractice plaintiff to present evidence meeting her trial burden. We are concerned here with the sufficiency of Dr. Frist's affidavit, and not with whether "the evidence as a whole [meets] the criteria laid out in *Pederson* and its progeny [sic]." See Schulz v. Esposito, 210 A.D.2d 307, 308, 619 N.Y.S.2d 744, 775 (1994)("Issue finding rather than issue determination is the key [to summary judgment]").

surgical decision made upon receipt of the pathology report. In my opinion, the reasonableness of Dr. Brusett's decision is not relevant to the summary judgment motion.

The majority also affirms, without discussion, the trial court's holding that Dr. Frist's affidavit failed to establish his familiarity with the standard of care. I would hold that Dr. Frist's affidavit indicating proficiency in the specialty involved, coupled with the statement " It is my opinion, to a reasonable degree of medical certainty, that each of these Defendants deviated from the acceptable standard of care and were negligent . . . in the following particulars . . . ." is sufficient to establish that he is familiar with the standard of care.

In my opinion, the trial court erred in holding that Dr. Frist's affidavit did not demonstrate the existence of a genuine issue of material fact whether one or both physicians committed malpractice in failing to adequately communicate before and during the biopsy. See, e.g., Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004) (summary judgment is drastic remedy that should be cautiously invoked). I would therefore reverse the orders granting Respondents Brusett and Habermeier and their groups summary judgment. I would affirm the grant of summary judgment to McLeod, however, because there is simply no evidence in this record that the Appellants looked to the hospital rather than to the individual doctors for Mrs. Davis's care. Osborne v. McLeod Reg. Med. Center, 346 S.C. 4, 550 S.E.2d 319 (2001) (in order to hold hospital vicariously liable for staff negligence, plaintiff must present evidence that she looked to the hospital for care).

BURNETT, J., concurs.

The Supreme Court of South Carolina

In the Matter of Robert Lee Newton, Jr., Petitioner.

ORDER

On November 8, 2004, petitioner was suspended from the practice of law for one year, retroactive to the date of his interim suspension. In the Matter of Newton, 361 S.C. 404, 605 S.E.2d 538 (2004). By order dated October 19, 2005, the Court granted petitioner's Petition for Reinstatement subject to two conditions. Petitioner has now complied with the two conditions. Accordingly, we hereby reinstate petitioner to the practice of law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

January 17, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Esther Gillman, Appellant,

v.

City of Beaufort, South Carolina, A Municipal Corporation; City of Beaufort Public Works Department; State of South Carolina and South Carolina Department of Public Transportation, Respondents.

Appeal From Beaufort County
Curtis L. Coltrane, Special Circuit Court Judge

Opinion No. 4073
Heard October 5, 2005 –Filed January 17, 2006

AFFIRMED

Samuel L. Svalina, of Beaufort, for Appellant.

C. Scott Graber, of Beaufort, for Respondents.

SHORT, J.: Esther Gillman appeals the trial court's ruling, dismissing her claim for negligence against the South Carolina Department of Transportation and the State of South Carolina. We affirm.

FACTS

On May 27, 2001, Gillman was walking along a sidewalk in Beaufort when she fell because the sidewalk was uneven. On May 22, 2003, Gillman filed her initial complaint against the City of Beaufort, City of Beaufort Department of Public Works, St. Helena's Parish, Inc., and the Protestant Church of the Diocese of South Carolina for injuries she sustained to her wrist and knee as a result of the fall. All of the defendants answered on June 23, 2003 and each asserted that it did not own or exercise control over the sidewalk.

After Gillman learned the sidewalk was located on a right of way owned by the South Carolina Department of Transportation, she filed a motion to join SCDOT and the State of South Carolina (collectively "the State") as an indispensable party pursuant to Rule 19, SCRCP. On June 24, 2004, more than three years after the accident, the trial court ordered the State added as an indispensable party to the lawsuit because the State owned the sidewalk. The trial court also granted summary judgment in favor of St. Helena's Parish and the Protestant Church, and denied summary judgment to the City of Beaufort and the City of Beaufort Public Works Department. Thereafter, on July 24, 2004, Gillman filed an amended summons and complaint adding the State as a defendant.

The State filed a motion to dismiss, asserting the action was barred by the applicable statute of limitations. On November 12, 2004, the trial court granted the motion to dismiss. This appeal followed.

LAW/ANALYSIS

Gillman argues the trial court erred in dismissing her action against the State based on the statute of limitations. We disagree.

Rule 19, SCRCP allows a court to join, whenever possible, persons materially interested in an action so that a complete determination may be made. Rule 19 states:

> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

Gillman argues that because Rule 19(a) does not contain an express limitation proscribing the court's power to effectuate joinder of parties against whom the statute of limitations has run, the trial court must join a necessary party even if the statute of limitations would otherwise bar the claim.[1] Gillman also assets that our supreme court's decision in BancOhio Nat'l Bank v. Neville, 310 S.C. 323, 426 S.E.2d 773 (1993), indicates there is no limitation on a court's power to add an indispensable party. In BancOhio the supreme court ordered the State added as a party after an action was filed, tried, and heard on appeal because the State was a necessary party. Id. at

[1] Gillman does not argue that the amendment to her pleading adding the State as a party relates back to the date of the original pleading under Rule 15, SCRCP; therefore, we do not address that issue.

329, 426 S.E.2d at 777. BancOhio involved a property dispute concerning the closure of a roadway, and there was no statute of limitations which would have barred the claim against the State or limited the court's power to add the State as a necessary party pursuant to Rule 19, SCRCP. Id. at 328-29, 426 S.E.2d at 777. Therefore, BancOhio is distinguishable from the case at bar because Gillman is asserting a negligence cause of action against the State, to which the South Carolina Tort Claims Act applies. S.C. Code Ann. § 15-78-110 (2005).

The Tort Claims Act is a limited waiver of governmental immunity, and sets forth a maximum three-year statute of limitations in which negligence actions may be brought against the state. S.C. Code Ann. § 15-78-110 (2005) ("Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.")

Under the discovery rule, the statutory limitations period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371-72, 597 S.E.2d 27, 29 (Ct. App. 2004). The date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations. Id. at 371, 597 S.E.2d at 29.

Our courts have not specifically addressed the question of whether an indispensable party may assert the statute of limitations as an affirmative defense when the party is joined pursuant to Rule 19, SCRCP, after the applicable statute of limitations has expired. However, it is well established that the statute of limitations operates as a defense to limit the remedy available from an existing cause of action, and unless the action is commenced before the expiration of the limitations period, the plaintiff's claim is barred. City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225,

230-31, 599 S.E.2d 462, 464 (Ct. App. 2004) (quoting Blyth v. Marcus, 322 S.C. 150, 152-53, 444 S.E.2d 512 (1994); see also Bagwell v. Hinton, 205 S.C 377, 393, 32 S.E.2d 147, 153-54 (1944) (holding, in a pre-rule decision, that a statute providing for the amendment of pleadings does not permit a court, under color of ordering an amendment, to abrogate the statute of limitations).

We can find nothing in Rule 19 that prohibits a defendant from raising an affirmative defense, such as the statute of limitations, when a plaintiff attempts to join the party as necessary for a just adjudication. Moreover, Rule 12(b), SCRCP, expressly permits a party to assert every defense, in law or fact, that he may have in responsive pleadings. The parties agree that Gillman's accident occurred on May 27, 2001. Gillman did not serve the State until July 21, 2004, after the trial court ordered it joined as an indispensable party. The State asserted the statue of limitations as a defense, and the trial court dismissed the claim because more then three years had elapsed between the date of the injury and the date the State was joined as a necessary party. Because we can discern nothing that deprives a party joined under Rule 19 of any defense it may have, we find no abuse of discretion in the trial court's decision to grant the State's motion to dismiss. Therefore, the order of the trial court is

AFFIRMED.

GOOLSBY, and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rick Schnellmann and Jennifer Schnellmann, Appellants,

v.

Nancy Roettger, Respondent.

Appeal From Charleston County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4074
Submitted 12/1/2005 – Filed January 17, 2006

AFFIRMED

Stephan Victor Futeral, of Mt. Pleasant, for Appellants.

Max G. Mahaffee, of Charleston, for Respondent.

STILWELL, J.: Rick and Jennifer Schnellmann appeal the grant of summary judgment in favor of Nancy Roettger on claims of negligent misrepresentation, fraud, and unfair trade practices. We affirm.[1]

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FACTS

In June of 2001, the Schnellmanns engaged Island Realty, Inc. to aid them in purchasing residential property in Mount Pleasant, South Carolina. The Schnellmanns advised their chosen representative, Island Realty, that they wanted to purchase a home in excess of 3,000 square feet. Roettger, who was affiliated with another real estate firm, was the listing agent for property located at 2958 Pignatelli Crescent. Roettger advertised the property in the Charleston Trident Multiple Listing Service as having approximately 3,350 square feet. Island Realty sent information about the property to the Schnellmanns, and the Schnellmanns entered into a purchase contract with the sellers. Additionally, the Schnellmanns gave Island Realty power of attorney to act on their behalf regarding the purchase. After closing, the Schnellmanns acquired information indicating the home was only 2,987 square feet, and this lawsuit ensued.[2] The trial court granted Roettger's motion for summary judgment on all claims.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). In ruling on a motion for summary judgment, the evidence and the inferences that can be drawn therefrom should be viewed in the light most favorable to the non-moving party. Id.

[2] A second measurement taken by the Schnellmanns' expert revealed the square footage of the house was closer to 3,087 square feet.

LAW/ANALYSIS

I. Negligent Misrepresentation

To state a claim for negligent misrepresentation a plaintiff must show (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to communicate truthful information to the plaintiff; (4) the defendant breached that duty; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a result of such reliance. Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 473, 581 S.E.2d 496, 504 (Ct. App. 2003). The Schnellmanns argue that the trial court erred in concluding their reliance on Roettger's representation was unreasonable and they suffered no damages. We disagree.

The record shows that the MLS listing for the property indicated the square footage given was an approximation "deemed reliable but not guaranteed."[3] The listing also included the following disclaimer: "IF EXACT SQUARE FOOTAGE IS IMPORTANT TO YOU, MEASURE, MEASURE!" Furthermore, the sales contract granted the purchaser the privilege, and responsibility, to inspect the home prior to closing, the wording of the clause including specifically the home's square footage. A summary appraisal revealing the lesser square footage was performed prior to the closing. A copy of the report was not requested by the Schnellmanns.

It is well established that "there can be no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." Robertson v. First Union Nat'l Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002) (quoting West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)). The Schnellmanns could have discovered the misstatement by simply requesting a copy of the appraisal or by having someone come in to measure the property. They were informed via the MLS listing that the measurements were not precise. The Schnellmanns viewed the house, and

[3] The listing stated: Apx SqFt: 3,350.

proceeded with the purchase without finally determining the exact square footage. In light of the evidence presented, we agree with the trial court's conclusion that if the Schnellmanns relied on the approximation of the square footage contained in the listing, such reliance was unreasonable as a matter of law.

We also agree with the trial court's conclusions that the Schnellmanns suffered no damages as a result of the misstatement. As previously discussed, the property was appraised at the time of purchase and possibly again several months later as part of a refinancing.[4] The appraisals report a value more than the $478,000 purchase price paid by the Schnellmanns and reflect the square footage of the home is less than 3,000 square feet. The Schnellmanns walked through the property prior to the purchase and agreed to pay the $478,000 purchase price**.** Dr. Schnellmann testified, and his wife agreed, they were not arguing the value of the home at the time of purchase was less than what they paid.

> Q. And I understand from your direct testimony or, I'm sorry, your earlier testimony to Mr. Mahaffee, that you're not arguing with whether or not the house is in fact worth or was, at the time of sale, worth $478,000. You argue and contest the square footage.
> A. Correct.
> Q. But not the value.
> A. Uh, yes.
> Q. Is that correct?
> A. Yes.

Considering this evidence and testimony, the trial court properly concluded there was no genuine issue of material fact regarding the issue of damages.

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[4] Dr. Schnellmann was uncertain whether the appraisal he saw indicating the home was less than 3,000 square feet was performed at the time of the closing or a subsequent appraisal performed at the time of refinancing.

II. Fraud

The trial court likewise granted Roettger's request for summary judgment as to fraud based on the Schnellmanns' unreasonable reliance and lack of injury. To establish a claim of fraud, plaintiffs must show by clear and convincing evidence (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. King v. Oxford, 282 S.C. 307, 311, 318 S.E.2d 125, 127 (Ct. App. 1984). The Schnellmanns' inability to establish the last two of the nine requisite elements of fraud make the trial court's award of summary judgment entirely appropriate. See O'Shields v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974) ("Failure to prove any one of the . . . elements [of fraud] is fatal to recovery.").

III. Unfair Trade Practices

Finally, the trial court granted summary judgment in favor of Roettger on the unfair trade practices claim because the acts complained of did not affect the public interest nor result in a pecuniary injury to the Schnellmanns. "The statute clearly requires that in order to recover pursuant to the UTPA one must prove . . . : 1) a violation of the Act [by the commission of an unfair or deceptive act in trade or commerce], 2) proximate cause, and 3) damages." Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct. App. 1995). To be associated with trade or commerce, a defendant's acts must impact the public interest. Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). An impact on the public interest may be shown if the acts or practices have the potential for repetition. Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998). The potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices. Id. at 388, 496 S.E.2d at 23. In the present case, there was no evidence presented that Roettger had misstated square footage in MLS listings in the

past or that any procedure regularly employed by her would cause this misstatement to be made again. Even if a public impact had been shown, the Schnellmanns, as discussed above, suffered no pecuniary loss.

For all of the foregoing reasons, the ruling of the trial court is

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

William R. Douglas, **Appellant.**

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 4075
Heard January 10, 2006 – Filed January 23, 2006

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David Spencer, all of Columbia; and Solicitor C. Kelly Jackson, of Sumter, for Respondent.

ANDERSON, J.: William R. Douglas (Douglas) was convicted of committing a lewd act upon a minor and sentenced to twelve years. On appeal, Douglas argues the trial court erred in admitting the testimony of Gwen L. Herod as an expert in forensic interviewing and in disallowing the testimony of Amelia Douglas that the victim lied to her in the past. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In February of 2003, Cathryn Douglas and her daughter (the victim) talked about "the birds and the bees." Cathryn told the victim "about sex, [the] difference between [a] man and woman . . ., and not to do things with the man and if a man was to touch her for her to come out and say." At that time, the victim informed Cathryn that Douglas, Cathryn's husband, had "done that to her." The victim advised Cathryn that Douglas had touched her inappropriately during the summer and fall of 2002, when she was seven years old. Cathryn called the victim's grandmother, with whom the victim lived. The victim told her grandmother what occurred. Victim's grandmother notified the Sumter County Sheriff's Department.

On February 10, 2003, Officer Doris McGee, the investigator assigned to the case, contacted the victim's grandmother and asked to see the victim as soon as possible. That same day, the victim was interviewed by Gwen L. Herod, a victim assistance officer with the Sumter County Sheriff's Office. Based on this interview, Herod recommended the victim be taken for a medical examination at the Durant Children's Center in Florence.

During this time, Kathy Saunders worked as a pediatric nurse practitioner at the Durant Children's Center. On February 21, 2003, Saunders examined the victim and found tearing on her vaginal opening and scarring on her fossa, which "sits . . . just in front of the hymen."

Douglas was charged with first degree criminal sexual conduct with a minor and committing a lewd act upon a minor. At trial, the victim declared that (1) Douglas' "weenie" touched her mouth; (2) Douglas stuck his

"weenie" into her "pee pee"; (3) Douglas' mouth touched her "boobs"; (4) he "put his mouth into [her] mouth"; and (5) "the white stuff came out of [Douglas'] weenie." Douglas called his mother, Amelia Douglas, in part to impeach the victim's testimony that the victim "told the truth to her."

The State offered Herod as an expert in forensic interviewing. In addition, Saunders testified about the medical examination she performed on the victim, the vaginal tears, and the fossal scarring. Saunders opined that "the impression of the vaginal exam was that it was consistent with past penetration."

The jury found Douglas guilty of committing a lewd act upon a minor. The trial court granted a mistrial on the criminal sexual conduct charge. The judge sentenced Douglas to twelve years.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Walker, _S.C._, 623 S.E.2d 122 (Ct. App. 2005). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. Davis, 364 S.C. 364, 613 S.E.2d 760 (Ct. App. 2005); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

LAW/ANALYSIS

Douglas asserts the trial court erred in allowing Herod to testify as an expert in forensic interviewing because (1) forensic interviewing is not a recognized area of expertise; (2) Herod's testimony improperly bolstered the victim's testimony; and (3) the probative value of Herod's testimony was substantially outweighed by its prejudicial effect.

I. FORENSIC INTERVIEWING

Douglas contends the trial court erred in finding forensic interviewing is a field of expertise. We commence our unprecedented and neoteric juridical journey in analyzing this novel issue.

A. Qualification of Expert Witness

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); State v. Harris, 318 S.C. 178, 456 S.E.2d 433 (Ct. App. 1995); see also Prince v. Associated Petroleum Carriers, 262 S.C. 358, 365, 204 S.E.2d 575, 579 (1974) ("Whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue, are matters resting largely in the discretion of the trial judge."). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004); Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); see also Jenkins v. E. L. Long Motor Lines, Inc., 233 S.C. 87, 94, 103 S.E.2d 523, 527 (1958) ("It was for the trial [c]ourt to say whether the inquiry was one upon which expert testimony was proper, and its ruling thereon will not be disturbed unless its [sic] appears that there has been an abuse of discretion.").

An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields, 363 S.C. at 26, 609 S.E.2d at 509; Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) ("'[E]rror at law' exists: (1) when the circuit judge, in issuing [the order], was controlled by some error of law . . . or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v. Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) ("[T]he determination of the court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law."). A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. Fields, 363 S.C. at 26, 609 S.E.2d at 509; Grubbs, 353 S.C. at 379, 577 S.E.2d at 496; Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001).

To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., Op. No. 26073 (S.C. Sup. Ct. filed November 28, 2005) (Shearouse Adv. Sh. No. 46 at 33); Fields, 363 S.C. at 26, 609 S.E.2d at 509; Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. Fields, 363 S.C. at 26, 609 S.E.2d at 509.

The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). Rule 702, SCRE, articulates guidelines for the admissibility of expert testimony. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. There is no abuse of discretion as long as the witness has acquired by study or

practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991). For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Ellis, 358 S.C. at 525, 595 S.E.2d at 825; Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003); see also Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) ("To be considered competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'"). An expert is not limited to any class of persons acting professionally. Gooding, 326 S.C. at 253, 487 S.E.2d at 598; Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988).

The party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Henry, 329 S.C. at 274, 495 S.E.2d at 466. Generally, however, defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility. Id.; see also Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001) ("Any defect in the education or experience of an expert affects the weight and not the admissibility of the expert's testimony.").

The admissibility of scientific evidence is dependent on whether the expert relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). This standard is

designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). However, not all expert testimony is subject to a Jones challenge. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). "If the expert's opinion does not fall within Jones, questions about the reliability of an expert's methods go only to the weight, but not admissibility, of the testimony." Morgan, 326 S.C. at 513, 485 S.E.2d at 118. For instance, this includes the testimony of behavioral science experts. Id. at 513, 485 S.E.2d at 118 (finding the Jones analysis was not applicable to the type of behavioral science testimony at issue in that case). In finding that expert testimony on eyewitness reliability was found admissible, the supreme court in Whaley rejected the necessity of a Jones analysis for that type of evidence to show that the field was a recognized area of expertise:

> The admissibility of *scientific* evidence depends upon "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) (emphasis added). Dr. Cole's testimony, however, is distinguishable from "scientific" evidence, such as DNA test results, blood spatter interpretation, and bite mark comparisons. An eyewitness identification witness gives expert opinion evidence similar to the type given by doctors or psychiatrists. Where the witness is a qualified psychologist who simply explains how certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification, we see no reason to require a greater foundation. People v. McDonald, 690 P.2d 709 (1984). Consequently, we are not persuaded that this type of testimony is required to meet the Jones test.

Whaley, 305 S.C. at 142, 406 S.E.2d at 371-72 (emphasis in original).

B. Recognized Areas of Expertise in South Carolina

South Carolina recognizes a veritable plethora of areas in which an expert "has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997); see, e.g., Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005) (upholding the South Carolina Court of Appeals' decision that a physician's lack of board certification in a specialized area goes to his weight and credibility, and not his qualification as an expert); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) (reversing the decision of the trial court disallowing the expert affidavit of a law school professor that defendant law firm had an attorney-client relationship with plaintiff); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002) (affirming the admission of the expert opinion of a medical doctor that if defendant had diagnosed decedent's cancer earlier, cancer would have been more curable); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001) (finding a neuropsychologist qualified to offer his opinion of the cause and extent of plaintiff's injuries despite his not being a medical doctor); Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) (holding a licensed professional engineer may offer his opinion that a log skidder was defectively designed because it allowed debris into the throttle chamber, which caused the throttle to stick).

South Carolina appellate courts recognize the significance of expert testimony to assist or guide the trier of fact in criminal cases. See, e.g., State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (clarifying that while police officer may testify as expert in crime scene processing and fingerprint identification, he may not testify to ultimate issue as to whether defendant acted in self-defense); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (upholding trial court's decision to allow forensic pathologist to testify, during sentencing, about the amount of pain victim suffered); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) (finding eyewitness identification expert qualified); State v. Myers, 301 S.C. 251, 391 S.E.2d

551 (1990) (allowing expert in blood spatter interpretation to testify); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989) (qualifying a bloodhound handler as an expert witness).

More specifically, South Carolina courts allow the testimony of experts evaluating victims in sexual abuse cases. In State v. Schumpert, the Supreme Court of South Carolina held the trial court did not abuse its discretion in qualifying a mental health counselor to testify about rape trauma syndrome. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). The Court of Appeals, in State v. Weaverling, determined the trial court properly qualified a social worker as an expert in the field of victims of sexual abuse. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). Similarly, this court allowed the testimony of a mental health counselor in the field of evaluation and treatment of sexually abused children and posttraumatic stress. See State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997).

C. Other Jurisdictions

In Mooneyham v. State, 915 So. 2d 1102 (Miss. Ct. App. 2005), the Court of Appeals of Mississippi affirmed the trial court's qualification of a witness in the field of forensic interviewing:

> Carol Langendoen testified at trial that she had completed a forty-hour training course that was nationally recognized and accepted in the field of "Finding Words." The purpose of the course was to train social workers how to conduct forensic interviews of children suspected of having been sexually or physically abused, or who have witnessed a violent crime. The "Finding Words" protocol is designed to help interviewers to interview child witnesses in such a way as to avoid suggesting facts or testimony to the child. Langendoen stated that she had performed 134 interviews on children, and had completed 126 training hours in forensic interviewing, and some 215 hours in training for child abuse cases generally. Langendoen further testified that she had attended over 340 hours of continuing

education in the field of child abuse, and in forensic interviewing specifically.

. . . .

. . . We . . . find that there was a credible basis for accepting Langendoen as an expert in the area of forensic interviewing. The admission of Langendoen's testimony was within the sound discretion of the trial court, and no abuse of that discretion is evident.

Id. at 1104.

The Court of Appeals of Georgia, in In re A.H., 578 S.E.2d 247 (Ga. Ct. App. 2003), addressed the RATAC method of forensic interviewing:

A.H. also asserts that the investigator did not have proper training in handling a child interview appropriately and that he did not employ appropriate techniques. This assertion lacks merit. The investigator's primary duty was to investigate child abuse complaints, and he had taken specialized training courses in interviewing children in sex abuse cases. He conducted the interview in a specialized, "child-friendly" environment. Only he and the child were present, and **he employed a known method for interviewing child victims, the RATAC method,** described by a witness in Baker v. State, 252 Ga. App. 238, 239, 555 S.E.2d 899 (2001). This acronym stands for gaining rapport with the child, anatomy identification, touch inquiry, abuse scenario, and closure. Id. Although the investigator may not have been familiar with the specifics of the named protocol, he followed each of the steps in this case. After establishing initial rapport with the child victim, he used drawings to determine anatomy identification, and he questioned the child about good touch and bad touch. He then inquired specifically about the alleged abuse, before ending the interview. Reviewing all the factors to be considered, we conclude that the juvenile court did not abuse its discretion in admitting the videotape or considering the child's testimony.

Id. at 250 (emphasis added).

Thereafter, the Court of Appeals of Georgia found a psychologist was qualified as an expert in the area of forensic interviewing of child sexual abuse victims:

> Maddox charges his trial attorney with ineffective assistance in failing to object to testimony by the psychologist who conducted the pretrial interview of T.M. Maddox argues that certain testimony given by the psychologist amounted to improper bolstering of T.M.'s credibility. There is no merit in this argument. The psychologist was qualified as an expert in the field of conducting forensic interviews of children in sexual abuse cases. She testified to her training and experience, which included conducting hundreds of such interviews. After the videotape of the interview was played to the jury, the prosecutor commented that T.M. had not given any specific dates on which events had happened, and the psychologist was asked whether that was uncommon. The psychologist responded that it is more uncommon for a child (or for an adult) to be able to specify incident dates where, as here, there has been a recurrence of events over a prolonged period.
>
> Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror. Here, the witness testified on the basis of her experience in forensic interviewing as to the ability of interviewees to recall certain things in certain situations. That was in no way a comment on an ultimate issue of fact. And the court was authorized to find that the conclusion drawn by the expert was beyond the ken of the jurors. Therefore, counsel was not ineffective in failing to object.

Maddox v. State, 622 S.E.2d 80, 82 (Ga. Ct. App. 2005).

In State v. Hilton, 764 So. 2d 1027 (La. Ct. App. 2000), the Court of Appeal of Louisiana inculcated:

> Cheri Staten, the director of the Jefferson Parish Children's Advocacy Center, was qualified as an expert in forensic interviewing in the area of child sexual abuse. She testified that she does forensic interviews for Washington Parish and explained that a forensic interview is an interview with children used to gather information, not to conduct therapy. The children are given an opportunity to talk and are asked general questions, without discussing the allegations of the abuse. She also indicated that she wears an earpiece so that law enforcement officers can speak to her while they monitor the interview.

Id. at 1033; cf. Lena v. State, 901 So. 2d 227, 233 (Fla. Dist. Ct. App. 2005) ("The record does not demonstrate the existence of a recognized field of expertise in forensic interviewing, such that a person can be qualified as an expert in it. It was . . . perfectly permissible to present Ms. Silverman's educational background and work experience, but she should not have been presented to the jury as an expert in forensic interviewing.").

D. The Extant Factual Record

In the instant case, the State called Herod to testify. Herod explained she began working in the victim's assistance office for the Sumter County Sheriff's Department in 1998. She conducts forensic interviews of child victims and follows the victims through the court process. She declared:

> A forensic interview is a term that is used when interviewing children and what it means is that it's a clean interview. It's an interview where you don't ask any leading questions or you don't assume anything. We have . . . a forensic interviewing room where we bring the children in and conduct the interviews there and I do this for the sheriff's office and then I report my findings and make any recommendations that I have based on my

> interview and turn my findings over to the investigator that has been assigned that case.
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> . . . .
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> . . . Currently we conduct our interviews, I use the RATAC method, which there has been a movement nationwide because different agencies were using or doing different methods to interview children. The National Center for . . . Prosecution [of Child Abuse] wanted to, came up with a plan . . . [t]o standardize the interviewing process.

When Herod began to describe her training, Douglas objected and argued that Herod's training was not relevant. The trial court pointed out the State was eliciting "background information for purposes of qualifying the witness as an expert" and overruled the objection.

Herod articulated:

> South Carolina was actually the second state that went through that training and I was involved with the first training class that happened in South Carolina, the finding words class and it taught the RATAC method and I graduated from that class in March of 2001 and have actually been, they have offered an advanced class for the graduates of that first class and I graduated from that in June of 2003 and the RATAC method that they teach is standard operating procedure for our office at this time.

The State offered Herod "as an expert witness in the field of forensic interview." Douglas objected that "there is [no] such field of expertise." The trial court excused the jury and held a hearing on the qualification of Herod.

During the in camera hearing, Herod stated she had interviewed child victims "of similar types of cases, including criminal sexual conduct and lewd act," hundreds of times. When asked if she had testified in court before, Herod responded: "I've testified in court many times, I've testified as an expert witness and been qualified by different courts as an expert witness in interviewing child sexual assault victims in [the circuit court] as well a[s]

court[s] in federal jurisdiction and several times in family court." She explained the forensic interviewing method is widely used in law enforcement and is nationally recognized for interviewing child victims of sexual crimes. Herod received a week-long training in the RATAC method of forensic interviewing before she interviewed the victim. She received a second week of advanced training after she interviewed the victim.

Herod described the RATAC method she used to interview child abuse victims:

> I introduce myself to the child after being briefed by the investigator requesting the interview, bring her into the interview room, in the interview room it's just me and the person that I'm interviewing present in that room, but there is a two way mirror and a sound system where the investigator can listen to the interview, that way I can get any input that I need from them or find out any more specific details that they need and there will be a point that I do that. The child and I then engage in the interview and . . . we use the RATAC method, and RATAC is an acronym for each stage of the interview. The "R" being the rapport stage where I build rapport with the child and talk about school, family, whatever can make that child feel comfortable, also during that stage I go over the rules of the interview which is simply we talk about telling the truth, . . . and I explain to her my role and who I work for and what I do and we talk about that this is a safe place and the importance of telling the truth and if the child agrees to those ground rules, we go on with the interview. After the rapport stage, and where we name family members and that type of stuff and I use drawings during that, in this case, I drew a couple of houses I think, because she was explaining her family to me and we put family members in that house, the next stage is the anatomy identification and we use a drawing of an age appropriate, race appropriate boy and girl and that allows me to do a couple of things to see if she can differentiate gender, to see if she can name different body parts, and we name body parts to include eyes, nose and that allows me to know what the child

> calls, it's not a teaching, the interview process is not a teaching process, I'm not teaching her anything, and so I will refer to body parts by the same name that she does. After we identify the body parts on the anatomy identification section of the interview. The "T" is for the touch inquiry and by that we start opening up the dialogue about tell me some touches that you like, different responses will come from different children, some children like to be tickled, some children like to have their back scratched, some like hugs, and then after that I go into are there any places on your body that would not be ok for someone to touch and the child at that time will tell me parts of her body, the off-limit parts, the private parts or whatever. Then I will ask or I will transition into the part of the interview, has there ever been a time where anyone, keeping a true forensic interview, if she discloses at that point, that there has been touching by anyone, we go into the second "A" of the RATAC procedure which is the abuse scenario and that allows a child to disclose to me what has happened to her. After we have covered that, with as much detail as that child can give, with as many open ended questions from me, non-assuming questions from me, we end the interview on the "C" portion of the interview, which is the closure and at that point we talk about safety issues, that it's good to tell and I address any concerns that child has about what they've told during that interview and that's the basic interview that we do.

Herod stated she utilized the RATAC method in her forensic interview of the victim. After her interview with the victim, Herod met with Officer McGee and recommended that the victim "be taken for a medical exam at the Durant Center."

After the State proffered Herod's proposed testimony, Douglas objected to its admission on the grounds it was "hearsay, bolstering, and the prejudicial value outweighs the probative value." On cross-examination, Herod admitted she had a high school diploma, did not have a diploma from a university, was not a medical doctor, and the training she received to be

certified in the form of interview she specifically used on the victim was one week. When discussing her training, Herod declared:

> I had to have background and experience in interviewing child victims before I would have been accepted to enter into that training. The training itself for the initial course was a one week all day training session which incorporated the background as to the theory behind forensic interviewing and the method and then also a practical session where we actually had to conduct an interview.

Regarding the training she received, Herod emphasized that she had attended two weeks of courses and "had lots of experience in interviewing children and there have been other courses that [she had] been to dealing with interviewing children."

After the proffer, the State asserted "the fact of the question is her, basically her opinion that based upon her interview that further medical investigation was necessary." Douglas complained that "two weeks certification does not an expert make in the area of a legal procedure which we feel was created to bolster her testimony in the first place." The trial court concluded the evidence was admissible because "it will assist the trier of fact to determine a fact in issue and . . . it specifically will assist them in determining if an assault of the nature described by the young lady took place and what she did, what this witness did as a result of her interview." The judge determined Herod was "qualified by knowledge, skill, experience, training and education."

Herod testified in detail in front of the jury as to her qualifications as an expert in forensic interviewing. Herod declared that upon completing the first RATAC training course, she was certified as a forensic interviewer using that method. When questioned about further training, Herod elucidated:

> I've been back for follow up courses and advance courses and there's a national newsletter that comes out every month that we

> get and we keep up with the different issues and case law, things that are going on nationwide regarding this interview process.

The judge then qualified Herod as an expert in the field of forensic interviewing.

Herod interviewed the victim on February 10, 2003 using the RATAC method. They "talked about a series of events that began in the summer and continued until right before Christmas." The State asked: "[B]ased on your interview under the RATAC method, was it your opinion if any follow up was necessary?" Herod replied: "Yes sir. It was my opinion that [the victim] needed to go to the Durant Center for a medical exam and that was the recommendation that I made in my report."

The trial court did not abuse its discretion in finding Herod had "acquired by study or practical experience such knowledge of the subject matter of [her] testimony as would enable [her] to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997). Herod had previously been qualified in family court, circuit court and federal court as an expert witness in interviewing child sexual assault victims. She received specialized training on the RATAC method, which is used on a nationwide basis and is nationally recognized for interviewing child victims of sexual crimes. After completing the initial RATAC training course, Herod was certified as a forensic interviewer using that method. Herod receives a monthly national newsletter that informs her of current issues and case law regarding the RATAC method. The trial court had sufficient evidence that forensic interviewing was a recognized field. See State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); see also In re A.H., 578 S.E.2d 247, 250 (Ga. Ct. App. 2003) (rejecting claim that investigator was incompetent to conduct interview of child victim, noting he "employed a known method for interviewing child victims, the RATAC method").

E. Harmless Error

Even if the trial court had erred, we would hold this error to be harmless.

Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). No definite rule of law governs this finding. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). Rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. at 63, 584 S.E.2d at 897; State v. Davis, 364 S.C. 364, 613 S.E.2d 760 (Ct. App. 2005). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005); Thompson, 352 S.C. at 562, 575 S.E.2d at 83. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795. The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) (instructing that error in

admission of evidence is harmless where it is cumulative to other evidence which was properly admitted).

The only reasonable inference the jury could have drawn from Herod's testimony is that she believed the victim told the truth about being sexually assaulted. However, Saunders testified her examination revealed tearing and scarring consistent with past penetration. Douglas has not shown a reasonable probability the jury's verdict was influenced by Herod's testimony.

II. BOLSTERING

Douglas maintains Herod's testimony impermissibly bolstered the victim's testimony. We disagree.

Initially, we note the State argues this issue is not preserved for our review. Unless an objection is made at the time evidence is offered and a final ruling made, the issue is not preserved for review. See State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Bank v. North Carolina Mut. Life Ins. Co., 186 S.C. 394, 195 S.E. 649 (1938). A party must object at the first opportunity to preserve an issue for review. State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991); State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (Ct. App. 2002). Yet, this rule does not require defense counsel to harass the judge by making continued objections after the trial court has ruled upon the issue. See Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 426 S.E.2d 756 (1993); Long v. Norris & Assocs., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998); State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995).

Here, Douglas objected to Herod's testimony and the trial court held an in camera hearing to qualify the witness. During the hearing, Douglas objected and argued Herod's testimony improperly bolstered the victim's testimony. The trial court overruled this objection. When the State moved the court to qualify the witness as an expert before the jury, Douglas renewed

his objections. The trial court noted the objections "will run throughout the record." Therefore, Douglas properly preserved this issue for our review.

Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror. Maddox v. State, 622 S.E.2d 80 (Ga. Ct. App. 2005).

In State v. Barrett, the trial court allowed a social worker "to testify to the details of what [a v]ictim [of sexual abuse] had told her concerning the incident." Barrett, 299 S.C. 485, 486, 386 S.E.2d 242, 243 (1989). On appeal, defendant argued this testimony impermissibly bolstered the victim's testimony. The supreme court explicated:

> Ordinarily, when a witness has not been impeached, evidence of prior consistent statements is inadmissible. To this rule is an exception in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible as corroboration of the incident; however, the evidence must be limited to the time and place of the assault, and may not include particulars or details.

Id. at 486-87, 386 S.E.2d at 243 (citations omitted). The court reversed the conviction because the social worker "testified extensively to details of the sexual abuse reported by Victim." Id. at 487, 386 S.E.2d at 243.

State v. Jolly, 304 S.C. 34, 402 S.E.2d 895 (Ct. App. 1991), is instructive. In Jolly, a social worker testified only that the victim told her the defendant "messed with her." Jolly, 304 S.C. at 36, 402 S.E.2d at 896. The court of appeals distinguished Barrett and held that, because the social worker in Jolly did not provide extensive details of the incident, the testimony did not impermissibly bolster the victim's testimony. Id. at 39, 402 S.E.2d at 898.

In the case sub judice, Herod's testimony is less bolstering than in both Barrett and Jolly. Herod testified only about the time period in which the alleged events occurred, and opined that the victim needed a medical evaluation. Although the jury could infer Herod thought the victim told her the truth about being molested, Herod offered no testimony as to the alleged perpetrator or the particulars of the sexual abuse. Herod did not express her opinion as to whether or not the victim told her the truth during the interview.

Moreover, the testimony was not presented to bolster the victim's credibility, but as a measure to prevent a defense or argument that the victim's testimony was the result of police suggestiveness. The RATAC method was developed in response to concerns about child victims' testimony being tainted by police suggestiveness, as exemplified by State v. Michaels, 642 A.2d 1372 (N.J. 1994):

> [A] sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

Id. at 1379.

The trial court correctly found Herod's testimony did not impermissibly bolster the testimony of the victim.

III. RULE 403, SCRE

Douglas alleges the trial court erred in failing to exclude Herod's testimony "because its probative value was substantially outweighed by its unduly prejudicial effect." We disagree.

Rule 403, SCRE, provides:

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

See also State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case. State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). We review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. McLeod, 362 S.C. at 81-82, 606 S.E.2d at 220; State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004).

Here, Douglas argues Herod's testimony impermissibly bolstered the victim's testimony and unfairly prejudiced Douglas. Herod's testimony did not impermissibly bolster the victim's testimony. Douglas has not offered any "exceptional circumstances" for this court to reverse the trial court's decision regarding the comparative probative value of Herod's testimony and its prejudicial effect on Douglas' case. The trial court properly admitted Herod's testimony pursuant to Rule 403, SCRE.

IV. VICTIM IMPEACHMENT TESTIMONY

Douglas avers the trial court erred in not allowing him to impeach the victim with extrinsic evidence in the form of his mother's testimony.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005). An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. State v. Irick, 344 S.C. 460, 545 S.E.2d 282 (2001); State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003). In order for an error to warrant reversal, the error must result in prejudice to the appellant. See Rule 103, SCRE; State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005); State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). Error without prejudice does not warrant reversal. State v. King, Op. No. 4045 (S.C. Ct. App. filed November 21, 2005) (Shearouse Adv. Sh. No. 44 at 35).

Rule 613(b), SCRE, reads:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

In the present case, the victim admitted to lying in the past, and generally admitted lying to Amelia Douglas, Douglas' mother. However, on cross-examination, defense counsel asked: "Do you remember not telling the truth to Ms. Douglas before right?" The victim replied: "I told the truth to her." Defense counsel inquired: "Do you remember telling her that you didn't cut a cord that you cut?" The victim responded: "No."

During the presentation of his case, Douglas called Amelia to testify. When Amelia began testifying as to an incident in which the victim lied about cutting a wire in the house but later admitted to cutting the wire, the State objected. The trial court sustained the objection, but allowed Douglas to proffer Amelia's testimony. The court ruled the testimony was not

admissible as a prior inconsistent statement of a witness under Rule 613(b), SCRE, because the alleged prior statement was not inconsistent with the victim's testimony. Additionally, the trial court held the statement inadmissible under Rule 608(b), SCRE, which deals with specific instances of conduct. In his brief on appeal, Douglas argues the victim's "trial testimony was inconsistent with . . . her prior inconsistent admission of lying to [Amelia]."

The trial court did not abuse its discretion in finding Amelia's testimony about what the victim told her was consistent with the victim's testimony at trial that she had lied to Amelia in the past. The judge properly found this was "not a matter under [Rule 613(b)] where it is extrinsic evidence of a prior inconsistent statement of a witness because the witness, and that is the victim in this case, did not make an inconsistent statement, she actually admitted . . . she did . . . not tell the truth sometimes." Further, the judge did not err in excluding the testimony pursuant to Rule 608(b).

Assuming arguendo the trial judge erred in prohibiting Amelia's testimony, we find such error was harmless.

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Davis, 364 S.C. 364, 613 S.E.2d 760 (Ct. App. 2005). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).

If it did not contribute to the verdict obtained, then error is harmless beyond a reasonable doubt. Fletcher, 363 S.C. at 248, 609 S.E.2d at 586; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational

conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795.

Even if the judge erred in excluding this testimony, the error is harmless because the victim admitted to lying to Amelia in the past.

CONCLUSION

We hold that FORENSIC INTERVIEWING is a recognized field of expertise. We rule that Herod is qualified as an expert in forensic interviewing by virtue of her knowledge, skill, experience, training, and education. The judge did not err in allowing Herod to testify as an expert witness in the area of forensic interviewing. Herod's testimony satisfied Rule 702, SCRE. The judge properly concluded Herod's testimony would explain to the jury Herod's role in the process and Herod's decision to recommend a medical examination.

We find the testimony of Amelia does not meet the test of the victim impeachment rule in South Carolina. The trial court correctly exercised discretion in excluding Amelia's testimony.

Accordingly, Douglas' conviction and sentence are

AFFIRMED.

GOOLSBY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Craig Middleton, Appellant.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 4076
Submitted December 1, 2005 – Filed January 23, 2006

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for Respondent.

STILWELL, J.: Craig Middleton was convicted of second-degree burglary and safecracking and sentenced to concurrent terms of ten years. Middleton appeals the burglary conviction, arguing he was entitled to a directed verdict. We affirm.[1]

FACTS

On a Saturday night in April 2003, Officer Robert Bilyard, a police officer for the Town of Port Royal, responded to a telephone call about a burglar alarm at Henry J. Lee Distributors.[2] Bilyard and another officer arrived at the scene and met Senis Hodges, a Lee employee. The door to the main building was unlocked, and there was no sign of forced entry. The alarms and telephones in the main office were inoperable, and the bolts that secured the office safe to the floor had been cut. Hodges testified the safe contained a very large sum of money including over $100,000 in proceeds from sales at a golf tournament. The contents of the safe were undisturbed, except pieces of the bolts that had been cut were pushed up into the safe.

As Bilyard and Hodges left the building, they noticed the metal cover to the crawl space entrance was not in place. The crawl space does not provide direct access to the building. Officer Ronald Wekenmann, also of the Town of Port Royal police department, arrived on the scene and, as he approached the entrance to the crawl space, he saw Middleton hiding underneath the building near the crawl space trapdoor. Wekenmann apprehended Middleton, who was wearing torn latex gloves and was carrying a ski mask.

Another police officer investigated the crawl space and found numerous cut wires, torn insulation, a piece of a safe bolt, and a blue backpack containing latex gloves, wire cutters, and numerous other tools. Outside the crawl space, the officer found a flashlight, keys, and a cell phone.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Lee is a beer distributor.

After being advised of his rights, Middleton stated: "You caught me; I did what I did and that's all I have to say."

At trial, Middleton moved for a directed verdict on the burglary charge arguing there was no evidence of entry into the office building. The State argued the crawl space was part of the curtilage of the building. The trial court found there was circumstantial evidence of a break-in into the office, the crawl space was part of the building, and Middleton was not entitled to a directed verdict on the burglary charge.

STANDARD OF REVIEW

In reviewing the denial of a directed verdict motion, the evidence is viewed in the light most favorable to the State to determine if any direct or substantial circumstantial evidence exists that reasonably tends to prove the defendant's guilt or from which guilt may be fairly and logically deduced. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). The court is concerned with the existence or nonexistence of evidence, not its weight. Id.

LAW/ANALYSIS

Middleton argues the trial court erred in denying his motion for directed verdict on the burglary charge because the crawl space underneath the building does not meet the statutory definition of a "building" for purposes of the burglary statute. We disagree.

Middleton was charged with second-degree burglary in violation of South Carolina Code section 16-11-312(B), which provides in part:

> (B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:
>
> . . .

> (3) The entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-312 (B) (2003). As relates to the burglary statute, a building is defined in section 16-11-310:

> For purposes of §§ 16-11-311 through 16-11-313:
>
> > (1) "Building" means any structure, vehicle, watercraft, or aircraft:
> > (a) Where any person lodges or lives; or
> > (b) Where people assemble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored. Where a building consists of two or more units separately occupied or secured, each unit is deemed both a separate building in itself and a part of the main building. . . .

S.C. Code Ann. § 16-11-310 (2003). A "building" is a "[s]tructure designed for habitation, shelter, storage . . . and the like." Black's Law Dictionary 194 (6th ed. 1990).

Because we find no South Carolina case directly on point, we look to general rules of statutory construction. Criminal statutes must be strictly construed against the State. State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993). However, words in a statute must be given their plain and ordinary meaning. Id. Our courts take a common sense approach in defining the terms associated with the burglary statutes. See id. ("[B]y including 'building' the definition of 'dwelling house' is broad enough to include a boat in which a person lodges."). See also State v. Stone, 350 S.C. 442, 446, 567 S.E.2d 244, 246 (2002) (finding a screened porch meets the statutory definition of a dwelling). Applying a common sense meaning to the words used to define a "building" for purposes of the burglary statute leads to the inescapable conclusion that the crawl space is a part of the main building and therefore fits within the statutory definition of a building.

We find support from other jurisdictions that have found similar spaces constitute a building. See Garrett v. State, 578 S.E.2d 460, 463 (Ga. Ct. App. 2002) (finding a shelter with a contiguous wall used for storage for the main building is part of the main building); State v. Brower, 104 N.W. 284, 285 (Iowa 1905) (holding the word "building," within its accepted and legal signification, includes the cellar or basement); State v. Couch, 720 P.2d 1387, 1389-90 (Wash. Ct. App. 1986) (upholding conviction of second-degree burglary of building; finding basement of building part of the building as it was enclosed, associated with the building, and used in connection with the building—statute, however, provided broader definition of building). See generally Ghent, Jeffrey F., Annotation, What is "Building" or "House" Within Burglary or Breaking and Entering Statute, 68 A.L.R. 4th 425 (1989 & Supp. 2004).

In this case, the crawl space was underneath the office building and enclosed but for an opening concealed with a metal cover. Under the facts of this case, we find the crawl space to be an integral part of the structure of the building and the trial court did not err in denying Middleton's motion for directed verdict. For the foregoing reasons, the conviction is

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Miller L. Love, Jr., Respondent,

v.

Ann B. Love, Appellant.

Appeal From Horry County
Lisa A. Kinon, Family Court Judge

Opinion No. 4077
Heard December 7, 2005 – Filed January 23, 2006

AFFIRMED

Evander G. Jeffords, of Florence, and John S. Nichols, of Columbia, for Appellant.

J. Michael Taylor, of Columbia, and Joseph O. Burroughs, Jr., of Conway, for Respondent.

WILLIAMS, J.: Ann B. Love (Wife) appeals a family court order terminating her former husband's alimony obligation. We affirm.

FACTS

Miller L. Love, Jr., (Husband) and Wife married in Florence, South Carolina, on June 3, 1962. In January 1990, Wife was granted a divorce on the ground of adultery. The final divorce order incorporated a separation agreement entered into voluntarily by the parties. The agreement addressed all of the major issues arising from the marriage, including, but not limited to, custody, visitation, spousal support, and the division of marital property.

The parties agreed Husband would pay Wife $1,100 per month in alimony, an obligation which "shall end . . . upon the Wife's remarriage or death, whichever occurs first." With the exception of the provisions concerning the division of marital property, the agreement provides:

> The provisions of this Agreement . . . shall be subject to the approval, confirmation and adoption of the Court, such that it becomes the Order of the Court and enforceable and modifiable as such.

In 1995, Wife petitioned the family court for a modification of the alimony agreement. Prior to a hearing on the matter, the parties agreed Husband's alimony obligation would increase by $600 per month, making the total monthly payment $1,700.

In 1995, Wife began dating Otis Goodwin, who had recently divorced his first wife. Approximately a year and a half later, Wife moved in with Goodwin into the home they share today. Goodwin testified that Wife pays him $200 per week for rent and her share of the utilities. Over the course of their relationship, Goodwin loaned Wife $8,000, which was repaid, and a partially outstanding business loan of $25,000. Wife is also a cardholder on Goodwin's American Express Account, although each pays his or her own portion of the credit card bill. Mr. Goodwin has authority to write checks on Wife's business's checking account. In 1997, Goodwin transferred to Wife a parcel of land in Surfside, South Carolina worth approximately $40,000 for the consideration of "$5.00 love and affection." Goodwin routinely attends

holiday celebrations and special occasions with Wife's family and Wife's grandchildren refer to him with terms of affection such as "Grandpa O." Although both Wife and Goodwin openly admit the romantic nature of their relationship, they are not formally married, nor do they express plans of marrying in the future.

In 2003, Husband filed the present action, petitioning the court for further modification of the alimony agreement. Specifically, Husband alleged Wife's amorous relationship and seven-year cohabitation with Goodwin constituted grounds for termination, or at least a substantial reduction, of his alimony obligation. Husband averred that 2002 amendments to South Carolina Code Section 20-3-130(B)(1) (1976) prescribed this modification. Alternatively, he argued Wife's relationship was tantamount to marriage, warranting a termination of alimony as a significant change in circumstances under the common law of alimony.

The family court agreed with Husband and ordered the termination of alimony pursuant to both the recent statutory amendments and a determination that Wife's relationship is "tantamount to marriage." This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court has authority to find the facts in accordance with our own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). This broad scope of review, however, does not require us to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). We remain mindful that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002).

DISCUSSION

Wife argues the family court erred in terminating Husband's alimony obligation because the family court lacked the authority to do so under both the law of this state and the terms of the agreement. We disagree.

In Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983), our supreme court perspicuously held that the family court has the authority to modify alimony agreements "unless the agreement unambiguously denies the court jurisdiction" to do so. Id. at 352-53, 306 S.E.2d at 627; see also Degenhart v. Burriss, 360 S.C. 497, 500-01, 602 S.E.2d 96, 98 (Ct. App. 2004); Stoddard v. Riddle, 362 S.C. 266, 268, 607 S.E.2d 97, 98 (Ct. App. 2004). Not only does the present agreement fail to expressly deny the family court this authority, it definitively grants the court such in stating that its terms "shall be subject to the approval, confirmation and adoption of the Court, such that it becomes the Order of the Court and enforceable and modifiable as such." Accordingly, the family court had authority to modify the alimony in the present case.

Wife subtly concedes this point, a position due, no doubt, to the fact that she herself petitioned the court for an increase in alimony in 1995. Wife, however, would have us somehow distinguish between the power to modify alimony and the power to terminate alimony. We draw no such distinction. Parties to a separation agreement may either agree to make alimony unmodifiable, or leave the issue within the traditional oversight of the family court. See Moseley, 279 S.C. at 352-53, 306 S.E.2d at 627. Should the parties agree to the latter, the family court may modify alimony to the same extent permissible in court-awarded alimony, a scope of authority which certainly includes the power to terminate payments based on substantial changes in the parties' circumstances. See S.C. Code Ann. § 20-3-170 (1976); Bryson v. Bryson, 347 S.C. 221, 224, 553 S.E.2d 493, 495 (Ct. App. 2001) ("Changed conditions may warrant a modification or termination of alimony.").

Having concluded the family court possessed the authority to terminate alimony, we move to the issue of whether this authority was properly exercised in the present case. As a ground for termination, the family court concluded Wife's relationship with Goodwin was tantamount to marriage, constituting a substantial change in circumstances which warranted alimony termination. We affirm the family court's termination of alimony on this ground.[1]

"The purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Croom v. Croom, 305 S.C. 158, 160, 406 S.E.2d 381, 382 (Ct. App. 1991). "Living with another, whether it is with a live-in lover, a relative, or a platonic housemate, changes [a person's] circumstances and alters [his or] her required financial support." Vance v. Vance, 287 S.C. 615, 618, 340 S.E.2d 554, 555 (Ct. App. 1986). Because the State has "a compelling interest in promoting marriage and discouraging meretricious relationships," a rule allowing alimony to continue when the supported spouse cohabits without marrying is "illogical and offensive to public policy." Croom, 305 S.C. at 160, 406 S.E.2d at 382. Accordingly, courts will treat the relationship between a supported spouse and a third party as "tantamount to marriage" and terminate alimony when the two cohabitate for an extended period of time and some degree of economic reliance between them is established. See, e.g., Bryson, 347 S.C. at 225, 553 S.E.2d at 496; Vance, 287 S.C. at 617-18, 340 S.E.2d at 555.

Such a relationship is certainly established in the case at bar. Wife and Goodwin have cohabitated for over seven years. Despite their assertions to the contrary, the record reflects the pair share a substantial amount of

[1] Because we affirm the family court on the ground Wife's relationship constitutes a change of circumstance warranting alimony termination, we need not address the statutory grounds for the family court's termination of alimony. See I'On , L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000) (holding an appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record on appeal).

expenses, be it in the form of loans, reduced rent, or gifts. The record also reflects the romantic nature of the party's relationship and the unmistakable connection between Goodwin and Wife's family. See Bryson, 347 S.C. at 226, 553 S.E.2d at 496 (considering the bonds between cohabitating partner and the alimony recipient's family in determining whether relationship was tantamount to marriage). We therefore affirm the family court's conclusion that Wife and Goodwin are in relationship that is tantamount to marriage. Accordingly, the family court's order terminating Wife's alimony is hereby

AFFIRMED.[2]

STILWELL and KITTREDGE, JJ., concur.

[2] Because we affirm the result reached by the family court, we likewise affirm the family court's determination that neither party is entitled to attorney's fees. As Wife is clearly not the prevailing party in this action, the family court properly denied her request for fees. See E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992) (holding that the result obtained in litigation is an important factor in the consideration of whether to grant a party attorney's fees).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Terry Stokes, as Personal Representative of the Estate of Jennings E. Stokes, Appellant,

v.

Spartanburg Regional Medical Center; and Robert A. Cochran, Jr., M.D., and David C. Hull, M.D., each individually and as Agents/Employees of Hull, Green, Woods, Cochran and Woollen; and Hull, Green, Woods, Cochran and Woollen; and John Graham, CRNA, Defendants,

of whom Spartanburg Regional Medical Center is Respondent.

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

Opinion No. 4078
Heard November 10, 2005 – Filed January 23, 2006

REVERSED AND REMANDED

Kristi F. Curtis, David W. Goldman, Diane M. Rodriguez, all of Sumter, for Appellant.

Perry Boulier and Ginger D. Goforth, both of Spartanburg, for Respondent.

HEARN, C.J.: In this medical malpractice action, Terry Lee Stokes, the personal representative of Jennings E. Stokes's estate, appeals from a jury verdict in favor of Spartanburg Regional Medical Center (the Hospital). Appellant argues the trial judge erred in failing to instruct the jury that it could draw a negative inference from the Hospital's failure to preserve critical pieces of medical evidence. We reverse and remand.

FACTS

On June 10, 1998, Jennings Stokes, age seventy-seven, underwent surgery to remove his thyroid and lymph nodes, which were cancerous. Dr. Hull performed the surgery at the Hospital. No complications arose during the surgery, and according to Dr. Hull, Stokes's prognosis was very good.

After surgery, Stokes was transferred to the post-anesthesia care unit (recovery room), where he remained for two hours. While there, he received oxygen through a mask, and nurses monitored his oxygen saturation levels with a device called a pulse oximeter. During this two-hour stay in the recovery room, Stokes received five doses of morphine for pain, and nurses called Dr. Hull two times because of bloody drainage coming from the neck incision.

From the recovery room, Stokes was transferred to the third floor of the Hospital, which is designated "pediatrics."[1] While on the third floor, Stokes no longer had an oxygen mask and was not being monitored with a pulse oximeter. Stokes arrived on the third floor at 6:45 p.m., and according to the nurse's notes, by 7:30 p.m., his neck was "swollen" and his wound dressing was "saturated." Thirty minutes later, Stokes complained of pain and received Demerol combined with Phenergan, a narcotic medication. According to the nurse, Stokes began having "difficulty breathing" at 8:30 p.m., and at 8:55 p.m., his breathing stopped. Five minutes later, a "code" was initiated.

During the code, a nurse anesthetist tried to intubate Stokes in order to provide him with oxygen, but the intubation was unsuccessful. The nurse anesthetist called the anesthesiologist for help. Dr. Cochran, a partner of Dr. Hull's, was also notified of the code, and took charge of the resuscitation. At 9:21 p.m., Dr. Long, the anesthesiologist, arrived and successfully intubated Stokes. Despite the intubation, Stokes could not be revived. Dr. Cochran signed the death certificate, stating the cause of death was "respiratory failure."

Stokes's daughter-in-law, Ann, is a registered nurse and has worked in the Hospital's recovery room for fifteen years. Ann was by Stokes's side while he was in the recovery room, and she stayed with him even when he was transferred to the third floor. While Ann was there, other nurses were charged with caring for Stokes, but Ann monitored him as well.

After Stokes died, his son, Terry, served as the personal representative of Stokes's estate, and it was in this capacity that Terry (hereinafter Appellant) brought a survivorship action and wrongful death action against the Hospital and other defendants who are not parties to this appeal. At trial, Appellant and the Hospital disputed the cause of Stokes's death.

[1] The third floor is also an "overflow area" for patients receiving urological or gynecological surgery.

Appellant argued that Stokes died from a lack of oxygen, which could have been prevented if the Hospital's staff had not deviated from the standard of care for a patient recovering from a thyroidectomy. According to Appellant's experts, a well-known complication of this type of surgery is airway obstruction caused by the swelling of soft tissue in the patient's neck or postoperative bleeding, which can collect in one area and form a hematoma. A hematoma is especially dangerous after surgery to the neck because it can clog a patient's windpipe. To decrease the chance of a patient's airway being obstructed, Appellant's experts testified the patient should be on supplemental oxygen and vigilantly monitored for signs of respiratory distress. The experts further opined that a tracheotomy procedure kit should be kept next to the patient's bed in the event the patient's airway becomes so obstructed that an intubation tube cannot be placed into the patient's throat and a "surgical airway" must be created. It was the Appellant's position that the Hospital deviated from the standard of care by transferring Stokes to the third floor, where the nurse in charge had never cared for a thyroidectomy patient before and was not instructed to continue administering oxygen to Stokes. The Appellant further argued Stokes's third floor placement was unacceptable because there was no tracheotomy kit at his bedside.

The Hospital argued that Stokes died from a sudden and unexpected event, most probably a heart attack. It relied heavily on Ann, who testified as both an eyewitness and an expert witness. According to Ann, Stokes showed no signs of respiratory distress, though his respirations did slow down after he received pain medication. Ann found this reaction normal, but out of an abundance of caution, she stepped outside the room and asked for a pulse oximeter to measure his oxygen saturation level. She testified she left the room for less than a minute, and when she returned, she found Stokes's condition had deteriorated rapidly. His breathing was shallow, his pulse weak, and he was unresponsive. The Hospital also presented evidence that Stokes had suffered a minor heart attack sometime prior to the surgery.

During trial, Appellant pointed out two pieces of medical documentation that were missing from Stokes's medical records. First, there was evidence that blood had been drawn from Stokes's artery during the

code. This blood sample was drawn so that an arterial blood gas could be performed, which would indicate whether oxygen was reaching Stokes's bloodstream. The medical records, however, did not contain the results from this test. The second piece of missing evidence was the vital signs flow chart prepared by the floor nurse at the time of Stokes's death. The Hospital was unsure why the chart was missing, but speculated that it was misplaced during the code.

At trial, the judge held a conference to discuss jury charges. One of Plaintiff's requested charges was a "spoliation of evidence" charge, which allowed jurors to draw a negative inference if it found the Hospital's explanation regarding the missing records unsatisfactory. The trial judge agreed to the charge, and the Hospital did not object. However, when it came time to charge the jury, the trial judge failed to give the "spoliation of evidence" instruction. Appellant objected, but the court overruled the objection, explaining: "That charge I have some problems with this."

When the jury came back with a defense verdict, Appellant's counsel moved for a new trial based on the jury charge. The trial judge denied the motion, stating: "I could not have charged it as written I don't believe. I would have had to have modified it. And hopefully, my charge as a whole covered it and didn't prejudice your case in any way I hope." This appeal followed.

STANDARD OF REVIEW

A trial court is required to charge the current and correct law. Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002). When reviewing a jury charge for alleged error, our court must consider the charge as a whole, in light of the evidence and issues presented at trial. Id. An erroneous jury charge will not result in a verdict being reversed unless the charge prejudiced the appellant's case. Id.

LAW/ANALYSIS

Appellant argues the trial court erred in failing to instruct the jury on "spoliation of evidence," especially when the Hospital did not object to the proposed charge.[2] We agree.

In Welch v. Gibbons, 211 S.C. 516, 46 S.E.2d 147 (1948), *distinguished by* Ex parte Goodyear Tire & Rubber Co., 248 S.C. 412, 415-16, 150 S.E.2d 525, 526-27 (1966), our supreme court recognized circumstances under which a jury should be able to consider missing evidence. In Welch, the plaintiff sued a bottling plant, alleging it sold a soft drink which contained poison. The plaintiff had in his possession the bottled drink, but neither tested the contents himself nor allowed the defendant to test its contents. The supreme court held "the evidence excluded was a circumstance which the jury should have been permitted to consider." Id. The court also noted, "it is open to the plaintiff to explain his refusal to allow a chemical analysis to be made of the contents of this bottle and on another trial he is at liberty to do so."

Relying on the holding in Welch, our supreme court later upheld a jury charge which advised that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). In Kershaw, the school board sued the manufacturer of the ceiling plaster that had been installed in many of Kershaw County's schools, alleging the plaster contained asbestos. The trial court issued an order requiring the manufacturer be notified prior to any asbestos being removed.

[2] The Hospital initially argues this issue is not preserved for review because the term "spoliation of evidence" was never referenced at trial. While the exact term was not used, Appellant undeniably requested the jury be instructed that it could, but was not required to, draw a negative inference when a party fails to preserve material evidence for trial. Thus, we find the Hospital's lack of preservation argument to be manifestly without merit. See Rule 220(b)(2), SCACR ("The court of appeals need not address a point that is manifestly without merit.").

Despite this order, the school board did not notify the manufacturer before asbestos abatement was conducted at one of its schools, so the manufacturer moved for judgment in its favor on the claims related to that school. The trial court denied the motion, but charged the jury as described above. In upholding the charge, the supreme court stated: "[T]he trial court's decision was proper under the facts of this case." Id.

In the case at hand, there was evidence that two pieces of medical evidence were missing from Stokes's record: results from a blood test and the floor nurse's chart detailing Stokes's vital signs on the evening of his death. Rebutting that evidence, the Hospital suggested the blood drawn from Stokes's artery on the night of his death may never have been sent to the laboratory for testing. As for the missing chart, the Hospital speculated it may have been lost during the code.[3] While the jury may well have accepted the Hospital's explanations, it was also in its province to draw a negative inference from the Hospital's failure to produce those pieces of evidence. See id.

Appellant requested the trial court charge the jury as follows:

> I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted – but not required – to draw the inference that the evidence would have been unfavorable to the party's claim.

[3] In its brief, the Hospital also argues there was no evidence the vital signs flow chart maintained by the floor nurse was missing because the nurse did not testify at trial. However, several other witnesses testified that they reviewed the nurse's deposition and that she filled out the chart during her treatment of Stokes. This testimony came in without objection, and therefore the jury was presented with evidence that the chart was missing.

We believe this language reflects the law of South Carolina and should have been charged based on the evidence presented in this case. While we recognize that no exact language is required, the charge as given made no mention of missing evidence at all. Thus, we cannot say, as the Hospital urges, that the substance of the request was included in the trial judge's general instructions.

In addition to being erroneous, we find the failure to charge on "spoliation of evidence" was prejudicial to Appellant. Appellant's malpractice claim against the Hospital hinged on the jury believing Stokes died from lack of oxygen rather than from a sudden and unexpected heart attack. Both pieces of evidence the Appellant alleges are missing would have helped determine how Stokes died. Thus, it was crucial to Appellant's case that the jury know it could draw a negative inference from the Hospital's failure to produce those important pieces of evidence. We therefore find the Appellant was prejudiced by the trial court's failure to instruct the jury on "spoliation of evidence." See, e.g., Baker v. Weaver, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983) (finding trial court's erroneous jury charge prejudicial where requested instruction involved a substantial feature of the case).

CONCLUSION

Based on the foregoing, we find that the trial court erred in failing to charge the jury on "spoliation of evidence" and that this error was prejudicial. Accordingly, we reverse and remand for a new trial.

REVERSED and REMANDED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Roy Bailey, Respondent.

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

Opinion No. 4079
Submitted November 1, 2005 – Filed January 23, 2006

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Appellant.

Robert Bethune King, Jr., of Anderson, for Respondent.

BEATTY, J.: The State appeals the circuit court's decision to overturn Roy Bailey's magistrate court conviction for disorderly conduct. We affirm.[1]

FACTS

On October 15, 2002, Roy Bailey and Calvin Ladd, one of Bailey's employees, pulled into the Speedway gas station to get gas for the company truck. The company had a gas card with Speedway, and Ladd got out of the truck, swiped the gas card on the pump, and pumped $29 worth of gas. After pumping the gas, Ladd informed Bailey that the pump did not print a receipt. The two went inside the gas station to request a receipt from the clerk. The clerk informed the two that the gas had not been paid for. A dispute arose over whether the transaction on the gas card actually processed, and the police were called.

Deputy Stacy Brooks arrived on the scene. He testified that when he entered the store, Bailey was "extremely argumentative and loud and boisterous" such that customers inside the store were stopping to stare. Brooks stated he attempted to calm Bailey and asked him to step outside the store. Deputy Giles Gladsen arrived at that point and remained outside with Bailey while Brooks returned inside the store to get the clerk's version of the events. After the clerk showed Brooks the computer screen indicating that Bailey did not pay for the gas, Brooks returned outside to inform Bailey that he needed to pay for the gas. Brooks testified that Bailey then became loud, boisterous, and argumentative with him and Gladsen. According to Brooks, although Bailey never used profanity, his behavior drew a lot of attention from people inside and outside the store and that Bailey was "absolutely disorderly within the view of the general public." Brooks also testified that after Bailey refused to pay for the gas, he "continued being loud and boisterous with myself and Deputy Gladsen. At which point we had no choice but to place him under arrest for at the time petit larceny and public

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

disorderly conduct."[2] Deputy Gladsen similarly testified that Bailey was very loud and became disorderly and belligerent with him outside the store within close proximity of other people. Bailey was arrested for disorderly conduct. He complained of chest pains, and he was taken to the hospital for treatment.

The State rested its case after presenting the testimony of Deputies Brooks and Gladsen. Bailey immediately moved for a directed verdict, arguing the State failed to prove that Bailey used fighting words towards the police officers, and thus, he could not be convicted of disorderly conduct pursuant to State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991). The magistrate agreed Perkins may have some applicability, but he found there was evidence that Bailey was loud and boisterous in violation of section 16-17-530 such that the matter should go to the jury. After the denial of the motion for a directed verdict, Bailey presented evidence.[3]

Calvin Ladd, the employee with Bailey, testified that he and Bailey went inside the store to get a receipt for the gas card transaction. According to Ladd, he did "all the talking" with the store clerk regarding the gas card transaction, not Bailey, and the discussion was calm. Ladd stated Bailey was not loud with the deputies when they were talking outside, and he could not hear what was being said.

Bailey similarly testified at trial that Ladd was the person who spoke with the store clerk regarding the gas card. Bailey testified that once he was outside the store, Deputy Brooks threatened him, stating that Bailey should pay for the gas or else Brooks would find something with which to charge him. Bailey denied ever being loud or disrespectful with the deputies, and he stated that he only yelled when he was having chest pains and wanted medical attention. Bailey also denied there was a large crowd at the gas

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[2] Although the deputies intended to charge Bailey with petit larceny for failing to pay for the gas, Bailey's employee paid for the gas, and the charges were dropped.

[3] Bailey failed to renew his motion for directed verdict at the close of all evidence.

station watching the events. Bailey was convicted by the jury and sentenced to thirty days in jail, suspended upon the payment of a $258 fine.

Bailey appealed his conviction to the circuit court, arguing the magistrate court erred in: (1) failing to grant his motion for a directed verdict; and (2) failing to give his requested jury instructions, especially the one regarding "fighting words" which must be present in order to charge one with disorderly conduct towards a police officer pursuant to Perkins. After hearing arguments by both parties, the circuit court issued a form order reversing Bailey's conviction. The State appeals.

STANDARD OF REVIEW

Appeals from magistrate court convictions are made to the circuit court. S.C. Code Ann. §18-3-10 (Supp. 2004). The circuit court, acting as the appellate court, reviews the matters raised in the notice of appeal. S.C. Code Ann. § 18-3-70 (Supp. 2004) ("The appeal must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses . . . ."); State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) ("In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception."). The appellate court reviewing the circuit court appeal may review for errors of law only. Id.

LAW/ANALYSIS

The State argues the circuit court erred in reversing Bailey's conviction because: (1) the directed verdict issue was not preserved; (2) it was error to rely on Perkins; and (3) there was sufficient evidence to support Bailey's conviction. We disagree.

A. Preservation

The State initially argues the circuit court erred in reversing the magistrate court's denial of Bailey's motion for a directed verdict on an

unpreserved ground because Bailey failed to renew his motion for a directed verdict after the presentation of all the evidence.[4]

The State raises this issue for the first time on appeal to this court. The State never brought the preservation issue, an additional sustaining ground, to the attention of the circuit court on appeal. See I'on, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (noting that although a respondent may raise an additional sustaining ground on appeal, respondent may also "abandon an additional sustaining ground . . . by failing to raise it in the appellate brief."). Instead, both Bailey and the State vigorously argued the merits of whether Bailey was entitled to a directed verdict based upon Perkins. The circuit court reviewed the issues raised before it and reversed Bailey's conviction.

Because the preservation issue was never brought to the attention of the circuit court on appeal, no ruling on the matter was ever issued. Further, nothing in the record indicates the State brought the matter to the attention of the circuit court in a petition for rehearing. Accordingly, it is not appropriate for this court to review it. See City of Columbia v. Ervin, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (noting that the Court of Appeals should not have addressed an issue on appeal where Ervin failed to raise the issue to the circuit court as intermediate appellate court); Condor, Inc., v. Board of Zoning Appeals, 328 S.C. 173, 178 n.4, 493 S.E.2d 342, 344 n.4 (1997) (holding that an issue which was not presented in the verified petition of appeal to the circuit court was not properly preserved for review by the supreme court); see also Wilder Corp. v. Wilke, 330 S.C. 71, 75-76, 497 S.E.2d 731, 733 (1998) (noting in dicta that petitioner had preservation problems of its own where petitioner complained that issues reviewed by the Court of Appeals were not preserved for appellate review, but petitioner failed to "raise all of these issues to the Court of Appeals in its petition for

[4] If a defendant presents evidence after the denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency of the evidence. State v. Adams, 332 S.C. 139, 144, 504 S.E.2d 124, 126-27 (Ct. App. 1998).

rehearing;" the court further noted that it believed the issues were preserved for review by the Court of Appeals).

B. Propriety of Directed Verdict

The State argues the circuit court erred in reversing the denial of Bailey's motion for a directed verdict because it erroneously relied upon Perkins and because enough evidence existed to support Bailey's guilt. We disagree.

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. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001); State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999); State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). When ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight. Burdette, 335 S.C. at 46, 515 S.E.2d at 531; State v. Wakefield, 323 S.C. 189, 197, 473 S.E.2d 831, 835 (Ct. App. 1996). "If there is any direct evidence or any 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." Lollis, 343 S.C. at 584, 541 S.E.2d at 256. "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Rosemond, 356 S.C. 426, 429, 589 S.E.2d 757, 758 (2003).

Bailey was charged with public disorderly conduct. The pertinent portion of the public disorderly conduct statute provides that it is a misdemeanor for a person to "be found . . . at any public place or public gathering . . . otherwise conducting himself in a disorderly or boisterous manner . . . ." S.C. Code Ann. § 16-17-530(a) (2003). However, there is an additional requirement that "fighting words" must be used when one is charged with disorderly conduct towards a police officer. See State v. Perkins, 306 S.C. 353, 355, 412 S.E.2d 385, 386 (1991) ("[A]ppellants cannot be punished under § 16-17-530(a) for voicing their objections to sheriff's officers where the record indicates no use of fighting words."); see also City of Landrum v. Sarratt, 352 S.C. 139, 144, 572 S.E.2d 476, 479 (Ct.

App. 2002) (noting the Perkins court narrowly applied the fighting words exception to "cases involving words addressed to a police officer"); State v. LaCoste, 347 S.C. 153, 163-64, 553 S.E.2d 464, 470 (Ct. App. 2001) (finding there was ample evidence of disorderly conduct to support the trial court's denial of the motion for a directed verdict where the defendant shouted obscenities at officers, threw his hands up in a hostile manner, refused to comply with officers' demands, challenged the officers, and taunted the officers about their inability to get him under control); City of Columbia v. Brown, 316 S.C. 432, 436-37, 450 S.E.2d 117, 119-20 (Ct. App. 1994) (noting that the defendant's actions met the definition of "fighting words" where he shouted obscenities and racial slurs at police officers on a public street, he was not challenging any police action, and he was repeatedly told by the officers to leave the area prior to arresting him for loitering).

In Perkins, the two appellants went to the sheriff's office to obtain a copy of an incident report in order to obtain a warrant from the magistrate. After being told that the incident report was not yet available, the appellants became upset and raised their voices inside the sheriff's office. They were arrested upon leaving the sheriff's office and were charged with disorderly conduct. In reversing the appellants' convictions, our state supreme court noted as follows:

> "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." City of Houston v. Hill, 482 U.S. 451, 461, 107 S.Ct. 2502, 2505, 96 L.Ed.2d 398, 412 (1987). The State may not punish a person for voicing an objection to a police officer where no "fighting words" are used. Norwell v. Cincinnati, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973). To punish only spoken words addressed to a police officer, a statute must be limited in scope to fighting words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Hill, 482 U.S. at 461-62, 107 S.Ct. at 2509-10, 96 L.Ed.2d at 412 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974)). As further noted by the United States Supreme Court, the "fighting words" exception may require narrow

> application in cases involving words addressed to a police officer "because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen." Hill, 482 U.S. at 462, 107 S.Ct. at 2510, 96 L.Ed.2d at 412. As stated by the high court: The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. Id. at 462-63, 107 S.Ct. at 2510, 96 L.Ed.2d at 412-13.

Perkins, 306 S.C. at 386, 412 S.E.2d at 354-55.

In the present case, the circuit court relied upon Perkins in reversing Bailey's conviction. The court's form order stated "Officer's [sic] clearly arrested Mr. Bailey for being boisterous toward the officers. Under Perkins, the case is reversed as a matter of law." Thus, it appears the circuit court ruled Bailey was entitled to a directed verdict pursuant to Perkins.

Viewing the evidence in the light most favorable to the State, there was evidence to support a finding that Bailey's conduct inside the store amounted to "disorderly conduct" such that a directed verdict would be improper. However, Bailey was not arrested for his conduct inside the store. Despite the deputies' testimony that Bailey was disorderly in view of the public, Bailey was not placed under arrest until after his confrontation with the deputies outside. There is no evidence in the record that anything Bailey said to the deputies amounted to "fighting words." Thus, pursuant to Perkins, Bailey's actions outside did not amount to disorderly conduct. Bailey was entitled to a directed verdict on the disorderly conduct charge. Accordingly, we find the circuit court did not commit an error of law in reversing Bailey's conviction.

CONCLUSION

Because Bailey was arrested for being boisterous with the deputies and there was no evidence that his language amounted to "fighting words," the

circuit court correctly reversed Bailey's conviction for disorderly conduct. The circuit court's decision is

AFFIRMED.

HEARN, C.J., and HUFF, JJ., concur.