The Supreme Court of South Carolina

In the Matter of Susan Barnes, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 1, 1975, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated September 17, 2009, 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, 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 Susan

Barnes 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/ John H. Waller, Jr. J.

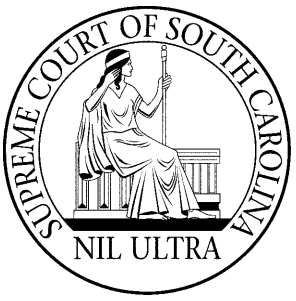
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

October 9, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
October 12, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Johnny Rufus Belcher, Appellant.

Appeal From Laurens County
William P. Keesley, Circuit Court Judge

Opinion No. 26729
Heard May 14, 2009 – October 12, 2009

REVERSED AND REMANDED

C. Rauch Wise, of Greenwood, and James E. Bryan, Jr., of Laurens, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

JUSTICE KITTREDGE: Appellant Johnny Rufus Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin, Fred Suber. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Of special significance was the

jury instruction that permits an inference of malice from the use of a deadly weapon.

It has long been the practice for trial courts in South Carolina, as sanctioned by this Court, to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon. We granted Belcher's petition to argue against this precedent. Having carefully scrutinized the historical antecedents to this permissive inference, we hold today that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. We therefore reverse Belcher's convictions and remand for a new trial.

I.

Fred Suber was shot and killed during a cookout with family and friends. Those in attendance included Suber's ex-girlfriend and Hansel Brown, whom Suber believed was the father of his ex-girlfriend's child. Suber confronted Brown and an argument ensued. Belcher interceded.

The testimony presented at trial revealed conflicting versions of the event. The State's view tended to show that after Belcher confronted Suber, Belcher retrieved a gun from Brown and, with no justification or excuse, fatally shot Suber. Conversely, Belcher presented evidence that after the confrontation between Suber and Brown was seemingly resolved, Suber without provocation confronted him (Belcher) with a gun. Belcher fled to Brown's truck where he retrieved a gun from Brown and fired it at Suber while he (Suber) was approaching, gun in hand.

The jury was instructed that "malice may be inferred by the use of a deadly weapon" and convicted Belcher of murder and the related firearm charge. This direct appeal is before us pursuant to Rule 204(b), SCACR, certification.

II.

A.

Because the evidence presented a jury question on self-defense, Belcher asserts it was error to charge the jury that it may infer malice from the use of a deadly weapon. We agree.

The trial court charged the jury, in part, as follows:

> Murder is the unlawful killing of another person with malice aforethought either expressed or inferred. . . . Malice can . . . be inferred from facts and circumstances that are proven by the State. Malice may be inferred by the use of a deadly weapon. But these inferences are evidentiary only and may be considered by you along with all the other evidence and given such weight, if any, as you determine that they should receive.

The charge given by the trial court has heretofore been considered textbook. Yet when confronted with Belcher's challenge, the learned and experienced trial court judge expressed "concern about [the charge] rising to a charge on the facts."

Where a jury is asked to consider a lesser included offense of murder or a defense, Belcher asserts the permissive inference charge violates our common law and our constitutional prohibition against charging juries on the facts.[1] We elect to decide this appeal solely under the common law. Relying on Belcher's common law challenge, we conclude that our modern day usage of this jury charge has strayed from this Court's original jurisprudence.

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[1] S.C. CONST art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

B.

We begin by reviewing the progression of the jury charge in this state.[2]

We begin with *State v. Hopkins*, 15 S.C. 153 (1881). Hopkins was convicted of murder. He pled accident, and objected to the following "use of a deadly weapon" implied malice instruction: "In every case of intentional homicide the presumption of malice arises, and the fact of killing intentionally by the use of a deadly weapon being shown in any case, the burden of proof is thereby imposed upon the defendant to rebut such presumption, unless the facts and circumstances shown in the testimony in behalf of the [S]tate incidentally rebut it."[3] *Id.* at 156. Under the circumstances, the charge was error, and Hopkins was granted a new trial.

Hopkins cited to the rule that "[t]here is no doubt whatever of the isolated proposition that the law presumes malice from the mere fact of homicide, but there are cases as made by the proof to which the rule is inapplicable." The Court explained that, "[w]hen all the circumstances of the case are fully proved there is no room for presumption. The question becomes one of fact for the jury, under the general principle that he who affirms must prove, and that every man is presumed innocent until the contrary appears." *Id.* at 156-57 (citing *State v. Coleman*, 6 S.C. 185 (1875)). *Hopkins* then quoted at length from *Coleman*:

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[2] We have selected a series of cases which represent our jurisprudence in this area.

[3] In reviewing this dated precedent, we note that the law then imposed the burden of proving various defenses (self-defense, for example) on the defendant. Under modern jurisprudence, burden shifting is not permitted. For this reason, we analyze this older precedent in light of prevailing law that forbids burden shifting.

> This presumption is not applicable when the facts and circumstances attending the homicide are disclosed in evidence so as to draw a conclusion of malice or want of malice, as one fact, from the evidence. Presumptions of this class are intended as substitutes in the absence of direct proof, and are in their nature indirect and constructive. The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for. The motive that impels to the taking of human life is no exception to this rule, and the importance of the consequences that depend on the accurate ascertainment of its nature in such cases, affords the strongest ground for limiting indirect and constructive proofs to the narrow grounds within which they belong. It appears, from the record before us, that the proofs embraced a statement of the origin of the difficulty between the parties; their conduct towards each other down to the time of the killing, and, to some extent, the subsequent conduct of the prisoner. When the evidence is of such a character, it must be presumed to be sufficient to enable the jury to draw from it a conclusion of fact one way or the other. Under such circumstances there was no necessity, and, therefore, no propriety in resorting to any general presumption arising by operation of law. When the circumstances preceding and attending an act of this character are full, as in the present case, the prisoner is entitled to the benefit of any doubt that may arise, and cannot be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of homicide. A charge may be erroneous, although the propositions of which it is composed may *severally* be conformable to recognized authority, if in its scope and bearing in the case it was likely to lead to a misconception of the law.

Id. at 157-58 (quoting *Coleman*, 6 S.C. at 186-87).

We next review the case of *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991). Levelle killed his wife and was convicted of murder. He appealed on several grounds, including a challenge to the State's requested jury instruction that "malice will be inferred from the use of a deadly weapon." Although that precise charge was not given, the Court addressed the issue, noting:

> [E]ven if it be assumed that the judge must be regarded as adopting the language used in the solicitor's ninth request, quoted above, we still think there was no error. In 2 Bish. Crim. Law[] § 680, it is said: "*As general doctrine, subject, we shall see, to some qualification, the malice of murder is conclusively inferred from the unlawful use of a deadly weapon, resulting in death.*" And to the same effect, see 3 Greenl. Ev. §§ 145, 147. This doctrine has also been recognized in this state. *See State v. Toohey*, [2 Rice Dig. 105 (1819)]; *State v. Ferguson*, [20 S.C.L. (2 Hill) 619 (1835)]; *State v. Smith*, [33 S.C.L. (2 Strob.) 77 (1847)]. It is true that the inference of malice drawn from the use of a deadly weapon may be rebutted by testimony, but, in the absence of any such testimony, malice may be and is inferred from the use of a deadly weapon causing death.

Levelle, 34 S.C. at 127, 13 S.E. at 320 (emphasis added).

Levelle's reliance on section 680 of *2 Bishop Criminal Law*, a criminal law treatise, is instructive but not entirely complete. It is our view that *Levelle* considered and incorporated the referenced "qualification" when it concluded that, "[i]t is true that the inference of malice drawn from the use of a deadly weapon *may be rebutted by testimony, but, in the absence of any such testimony*, malice may be and is inferred from the use of a deadly weapon causing death." *Id.* at 127, 13 S.E. at 320 (emphasis added). The recognition that some facts will not permit the inference of malice from the use of a deadly weapon lies at the heart of the qualification.

More specifically, Bishop's criminal law treatise ties the qualification to the proposition that malice is inferred from the "unlawful use of a deadly weapon." The malice inference would, therefore, have no place where the use of a deadly weapon was "lawful." As we shall see, the significant import of the qualifying term "lawful" was effectively abandoned in our subsequent decisions.

Levelle never expanded upon the "in the absence of any such testimony [rebutting malice]" qualification, perhaps because it was not necessary to the disposition of the appeal. We are persuaded, though, that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified. Our belief is supported by *Hopkins* and a comment in the section in Bishop's treatise immediately following the one cited in *Levelle*:

> If there is to be a rigid rule of law on the subject, it is reasonable to hold, that, where one uses a deadly weapon *without justification*, he evinces a disregard for human life and safety amounting to "malice."

2 JOEL PRENTISS BISHOP, COMMENTARIES OF THE CRIMINAL LAW § 681 (6th ed. 1877) (emphasis added).

Beyond the support we find in *Hopkins*, our imputation of section 681 of Bishop's treatise into the meaning of *Levelle*'s qualifying language is further supported by the case of *State v. Jackson*, 36 S.C. 487, 15 S.E. 559 (1892). *Jackson* affirmed a murder conviction where "there was not a shadow of testimony tending to show any excuse or provocation for firing the fatal shot which resulted in the instant death of the [victim]." *Id.* at 490, 15 S.E. at 560. The Court approvingly noted that "[t]he proof tends to show that the killing was done with a deadly weapon, and, under such circumstances, the law implies malice, and the killing would be murder, *unless there were some circumstances of justification or excuse in the case*." *Id.* at 490, 15 S.E. at 561 (emphasis added).

We pause here, for we view the approach to the "use of a deadly weapon" implied malice charge as seemingly settled law from *Hopkins* and the *Levelle–Jackson* qualification. This Court, however, then began a slow, and at first an almost imperceptible, retreat, as *State v. Byrd* illustrates. 72 S.C. 104, 51 S.E. 542 (1905).

In *Byrd*, this Court, in reviewing the jury instruction stated that: "The use of a deadly weapon presumes malice, *but the presumption may be rebutted*. So, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice, or not." *Id.* at 110, 51 S.E. at 544 (emphasis added). Relying on *Levelle* and *Jackson*, the *Byrd* Court found no error associated with the jury charge: "This was in exact accordance with the law . . . ." *Id.* at 110, 51 S.E. at 544. *Byrd* references *Levelle* and *Jackson*, yet approved of the charge even with evidence of mitigation.

The Court never expressly confronted the contradiction of inviting a jury to infer malice from the use of a deadly weapon where evidence was presented that would reduce, mitigate, excuse or justify the homicide, which was the core feature of *Hopkins*. In fact, whatever vestige remained of the *Levelle–Jackson* qualification was unceremoniously abandoned in two cases from 1920.

The first case is *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920). Hardin was indicted for murder. He pled self-defense and was convicted of manslaughter. Hardin presented the same argument Belcher advances. The jury in *Hardin* was charged that "malice may be implied from the use of a deadly weapon." Hardin excepted as follows:

> The error is that his honor had no right to instruct the jury that they might infer malice from the mere fact of killing with a weapon calculated to do serious bodily harm or to take life, for the reason that this is a charge on the facts contrary to the Constitution, in that it undertakes to intimate

> to and instruct the jury what facts in the case are evidence of malice.
>
> It was also error, in that after all the evidence is out, the presumption of malice from the use of a deadly weapon fades from the case, and the jury must find malice, if at all, from the evidence, without any aid from the court as to what weight should be attached to killing with a deadly weapon, or what inference they may draw from such.

Id. at 290, 103 S.E. at 560.

Without discussion, the *Hardin* Court rejected the challenge to the jury instruction: "The exceptions are all overruled, being without merit." *Id.* at 295, 103 S.E. at 561.

The second case from 1920 is *State v. Wilson*, 115 S.C. 248, 105 S.E. 341 (1920). Wilson claimed the killing was accidental but was convicted of murder. The jury was charged that "[m]alice may be implied from the intentional use of a deadly weapon." *Id.* at 249, 105 S.E. 341. Significantly, the trial court omitted the qualifying words "without just cause or excuse[,]" to which Wilson excepted. *Id.* at 249, 105 S.E. 341. Notwithstanding the absence of the language "without just cause or excuse[,]" *Wilson* held the "presiding judge[] delivered a full, clear, and able charge." *Id.* at 249, 105 S.E. 341.

Hardin's summary approval of the charge that malice may be presumed in any homicide from the use of a deadly weapon, coupled with *Wilson*'s approval of omitting the language "without just cause or excuse[,]" marked the end of the *Levelle–Jackson* qualification.

Subsequently, in the case of *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956), an extensive malice charge was upheld that included the instruction "that implied malice is presumed from the use

of a deadly weapon . . . ."[4] *Id.* at 445, 93 S.E.2d at 467. This portion of the malice charge was not central to Fuller's appeal, for Fuller's appeal focused on the purported lack of malice due to his deficient mental state.

After *Fuller*, no reported decisions addressed this charge until the case of *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). In *Lee*, this Court noted that, "the use of a deadly weapon implies malice." *Id.* at 318, 178 S.E.2d at 656. To support this statement of law, *Lee* cited to *Byrd*, discussed *supra*.

On the heels of *Lee*, we come to *State v. Maxey*, 262 S.C. 504, 205 S.E.2d 841 (1974) and *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252 (1975). *Maxey* and *Alford* upheld the "use of a deadly weapon" implied malice instruction where self-defense was submitted to the jury. *Maxey*, 262 S.C. at 507-08, 205 S.E.2d at 842; *Alford*, 264 S.C. at 34, 212 S.E.2d at 255. In fact, part of the charge in *Alford* was "[t]he State could just prove that the act was done with a deadly weapon and stop right there and malice would have been proven." *Alford*, 264 S.C. at 34, 212 S.E.2d at 255. The *Alford* Court found no error.

Thus, with this Court's continuing imprimatur, by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that "malice is presumed from the use of a deadly weapon." The critical observation is that the charge was proper even where evidence was presented that would reduce, mitigate, excuse or justify the killing.

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[4] The complete portion of this charge was: "I charge you that implied malice is presumed from the use of a deadly weapon, or from the wilful, deliberate and intentional doing of an unlawful act without just cause or excuse." The language may appear to incorporate the *Levelle–Jackson* qualification, but the use of the disjunctive term "or" maintains the "use of a deadly weapon" inference as a standalone, independent statement of the law.

C.

The law, of course, today speaks in terms of "permissive inferences," not "presumptions." This transition resulted from the United States Supreme Court's pronouncement that the Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant. *See Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (holding that the "Due Process Clause" forbids a state from placing the burden on the accused to prove his actions reduced the crime from "murder to manslaughter").

Following *Sandstrom* and its progeny, this Court followed suit. In *State v. Mattison*, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981), we stated that an "appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it."

Mattison, however, expressed no reluctance with the underlying premise that malice is inferred from the use of a deadly weapon. The jury in *Mattison* was charged: "[T]he law says that if one intentionally kills another with a deadly weapon, the implication of malice arises. In other words, the law implies malice from the use of a deadly weapon." *Id.* at 237, 277 S.E.2d at 599-600. As discussed more fully below, the transparent error in the use of the word "intentional" is that self-defense involves an intentional act.

Two years later, in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991), this Court again addressed the challenged jury instruction in light of the burden shifting jurisprudence of the United States Supreme Court. The instruction used in Elmore's

trial was held to have been a mandatory presumption, rather than a permissive inference, and therefore unconstitutional. The *Elmore* Court went on to set forth a jury charge it felt comported with the Due Process Clause.

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts[] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. at 421, 308 S.E.2d at 784. The Court noted that "only slight deviations from this charge will be tolerated." *Id.* at 421, 308 S.E.2d at 784. *Elmore* articulated the contemporary jury charge, until today.

D.

In examining the legal proposition in a homicide prosecution that an inference of malice may arise from the use of a deadly weapon, we are unable to harmonize the earlier writings of this Court with our modern jurisprudence.

One appellate court has described this jury charge as a "half-truth." *Glenn v. State*, 511 A.2d 1110, 1126 (Md. Ct. Spec. App. 1986). In discussing its meaning behind this observation, *Glenn* notes that malice includes the absence of justification, excuse and mitigation.[5] *Glenn*, 511 A.2d at 1122. When malice is viewed in light

[5] Under South Carolina law, "[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *State v. Fennell*, 340 S.C. 266, 275 n.2, 531 S.E.2d 512, 517 n.2 (2000); *see also State v. McDaniel*, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904) (same). "It is

of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half-truth." The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.

The burden shifting present in our earlier cases aside, the holding of *Hopkins* and the qualification set forth in *Levelle* and *Jackson* hew more closely to what we believe is the proper application of the charge than that expressed in *Byrd*, *Wilson*, *Hardin*, *Fuller*, *Lee*, *Maxey*, *Alford*, *Mattison* and *Elmore*.

Under our policy-making role in the common law, we hold that the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill[6]) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).

The use of the term "intentional" is instructive. Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise." *Elmore*, 279 S.C.

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something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); *see also Singletary v. State*, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984) (same); *State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct. App. 2007) (same).

[6] Because the crime of assault and battery with intent to kill requires malice, our holding today applies to ABWIK. *State v. Wilds*, 355 S.C. 269, 275, 584 S.E.2d 138, 141 (Ct. App. 2003).

at 421, 308 S.E.2d at 784. That highlights the "half-truth" nature of the charge.[7]

E.

We do not reach our decision lightly. The State understandably urges this Court to honor what has been treated as a settled fixture in our criminal law. The able trial judge diligently prepared the charge in faithful adherence to our precedent. Moreover, the trial court charged the jury that the "killing has to be unlawful" and that "[t]here has to be

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[7] Today's decision does not stand alone. Other states that have addressed this issue have rejected the charge under similar circumstances. *E.g.*, *Farris v. Commonwealth*, 77 Ky. 362 (Ky. 1878) (noting that when "there is evidence before the jury from which they might conclude that the killing was done in necessary self-defense or in the sudden heat of passion, such an instruction may be fatally misleading"); *Glenn v. State*, 511 A.2d 1110, 1126-28 (Md. Ct. Spec. App. 1986) (reversing a conviction for "assault with intent to murder" by recognizing that the jury charge only speaks to the "intent [that] may be inferred" from the use of a deadly weapon, but that the charge is misleading because it does not address whether the "intent was unexcused or unjustified or [whether] the intent was unmitigated"); *Erwin v. State*, 29 Ohio St. 186, 191 (Ohio 1876) ("[W]here the attending circumstances [of the killing] are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is misleading and erroneous to charge a jury that in such a case the law raises a presumption of malice and intent to kill from the isolated fact that death was caused by the use of a deadly weapon."); *State v. Jenkins*, 443 S.E.2d 244, 252 (W. Va. 1994) ("[I]t is erroneous in a first degree murder case to instruct the jury that if the defendant killed the deceased with the use of a deadly weapon, then intent, malice, willfulness, deliberation, and premeditation may be inferred from that fact, where there is evidence that the defendant's actions were based on some legal excuse, justification, or provocation."). For a discussion surrounding the history of this charge, see Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435 (2008).

a deliberate and intentional design to use or employ or handle a deadly weapon so as to endanger the life of another without just cause or excuse." Thus, while we acknowledge the State's argument, we are firmly convinced that instructing a jury that "malice may be inferred by the use of a deadly weapon" is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity.

F.

Errors, including erroneous jury instructions, are subject to harmless error analysis. *See Lowry v. State*, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008). In many murder prosecutions, as Belcher concedes, there will be overwhelming evidence of malice apart from the use of a deadly weapon.[8] Here, however, the error in charging that malice may be inferred by the use of a deadly weapon cannot be considered harmless. Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun. We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.

III.

Today we return to the rationale underlying *Hopkins*, *Levelle* and *Jackson* and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.[9]

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[8] "In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption. . . . Obviously[,] when a defendant walks into the store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (Brief of Appellant 9).

[9] The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a

The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved.[10] *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("hold[ing]

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reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging. "Do jurors need the court's permission to infer something? The answer is, of course not." Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008).

[10] The decision today overrules in part considerable precedent of this Court and the court of appeals. We overrule all cases involving a homicide or a charge of assault and battery with intent to kill where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide or the charged ABWIK. We overrule all such cases only insofar as they meet these criteria. The following represents our best efforts to catalogue the cases that are overruled: *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006); *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985); *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631 (1981); *State v. Mattison*, 276 S.C. 235, 277 S.E.2d 598 (1981); *State v. Arnold*, 266 S.C. 153, 221 S.E.2d 867 (1976); *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252 (1975); *State v. Maxey*, 262 S.C. 504, 205 S.E.2d 841 (1974); *State v. Martin*, 216 S.C. 129, 57 S.E.2d 55 (1949);

that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final"); *Harris v. State*, 543 S.E.2d 716, 717-18 (Ga. 2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline'—i.e., cases which are pending on direct review or not yet final"). Our ruling, however, will not apply to convictions challenged on post-conviction relief. *See generally Teague v. Lane*, 489 U.S. 288 (1989). We reverse and remand for a new trial.[11]

REVERSED AND REMANDED.

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

State v. Deas, 202 S.C. 9, 23 S.E.2d 820 (1943); *State v. Martin*, 149 S.C. 464, 147 S.E. 606 (1929); *State v. Cleland*, 148 S.C. 86, 145 S.E. 628 (1928); *State v. Strickland*, 147 S.C. 514, 145 S.E. 404 (1928); *State v. Wilson*, 115 S.C. 248, 105 S.E. 341 (1920); *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920); *State v. Hollis*, 108 S.C. 442, 95 S.E. 74 (1918); *State v. Jones*, 101 S.C. 111, 85 S.E. 239 (1915); *State v. Crosby*, 88 S.C. 98, 70 S.E. 440 (1911); *State v. Owens*, 79 S.C. 125, 60 S.E. 305 (1908); *State v. Byrd*, 72 S.C. 104, 51 S.E. 542 (1905); *State v. Foster*, 66 S.C. 469, 45 S.E. 1 (1903); *State v. Taylor*, 56 S.C. 360, 34 S.E. 939 (1900); *State v. Petsch*, 43 S.C. 132, 20 S.E. 993 (1895); *State v. Symmes*, 40 S.C. 383, 19 S.E. 16 (1894); *State v. McIntosh*, 40 S.C. 349, 18 S.E. 1033 (1894); *State v. Ballington*, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001); *State v. McLemore*, 310 S.C. 91, 425 S.E.2d 752 (Ct. App. 1992).

[11] Belcher's successful challenge to this jury charge requires the Court to reverse his convictions and remand for a new trial. We therefore decline to reach Belcher's remaining appellate issues. *See Hughes v. State*, 367 S.C. 389, 408-09, 626 S.E.2d 805, 815 (2006) (noting that appellate court need not reach remaining issues on appeal when addressed issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Compton, Respondent,

v.

South Carolina Department of Probation, Parole and Pardon Services, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
Marvin F. Kittrell, Administrative Law Judge

Opinion No. 26730
Submitted September 15, 2009 – Filed October 12, 2009

REVERSED AND REMANDED

Deputy Director for Legal Services Teresa A. Knox, Assistant Chief Legal Counsel J. Benjamin Aplin, Legal Counsel Tommy Evans, Jr., of S.C. Department of Probation, Parole and Pardon Services, of Columbia, for Petitioner.

Kenneth Hanson, of Hanson Law Firm, P.A., of Columbia, and Scott Franklin Talley, of Scott F. Talley, P.A., of Spartanburg, for Respondent.

PER CURIAM: Petitioner has filed a petition for a writ of certiorari pursuant to Rule 242, SCACR, to review an order of the Court of Appeals dismissing its appeal. We deny the petition for a writ of certiorari to the Court of Appeals because we find the Court of Appeals correctly determined the order of the Administrative Law Court (ALC) in this matter is not directly appealable. See S.C. Code Ann. § 1-23-380 (Supp. 2008) (a preliminary, procedural, or intermediate action or ruling in an administrative proceeding is immediately reviewable only if review of the final agency decision would not provide an adequate remedy); Leviner v. Sunoco Products, Co., 339 S.C. 492, 530 S.E.2d 127 (2000) (finding an order remanding a case for additional proceedings before an administrative agency is not directly appealable).

However, because our opinion in Cooper v. S.C. Dep't of Prob., Pardon, and Parole Servs., 377 S.C. 489, 661 S.E.2d 106 (2008), is being misinterpreted, we hereby issue a writ of certiorari pursuant to Rule 245, SCACR, and Article V, Section 5 of the South Carolina Constitution to review the decision of the ALC in this matter. Ex parte Gregory, 58 S.C. 114, 36 S.E. 433 (1900) (writ of certiorari will not be allowed where remedy by appeal is available unless exceptional circumstances exist).

Respondent appeared before the Parole Board on January 24, 2007, for a parole hearing. The Parole Board denied respondent parole. After the denial of respondent's request for rehearing, respondent appealed the Parole Board's decision to the ALC. The Parole Board filed a motion to dismiss the appeal. The ALC issued an order remanding the matter to the Parole Board for it to issue a decision in conformity with Cooper.

On remand, the Parole Board issued an "Amended Notice of Rejection" to respondent, which stated:

> After considering all of the factors published within Department [Form] 1212 (criteria for parole consideration), as well as the factors outlined in [S.C. Code Ann. § 24-21-640 (2007)], the Parole Board has decided to deny parole due to the following reason(s) listed below.

The Parole Board denied respondent parole due to: (1) the nature and seriousness of the current offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense.

Respondent filed a "Notice of Motion and Motion for Contempt and Ancillary Relief" with the ALC. The Parole Board filed a motion to dismiss, arguing the amended notice of rejection was in conformity with the ALC's remand order. The ALC denied respondent's motion for contempt and ancillary relief, but remanded the matter to the Parole Board. Specifically, the ALC found the Parole Board had "partially complied" with the original remand order. The ALC found the Parole Board included appropriate language indicating it complied with its own factors and section 24-21-640, but failed to include any "findings of fact and conclusions of law, separately stated," as required by Cooper. Thereafter, the ALC ordered the Parole Board to issue an amended decision in conformity with Cooper.

In Cooper, we held that if the Parole Board deviates from or renders its decision without consideration of the appropriate criteria, it essentially abrogates an inmate's right to parole eligibility and infringes on a state-created liberty interest, warranting minimal due process protection. Because the Parole Board in Cooper neither offered an explanation nor indicated it had considered the statutory criteria or the criteria set forth in Form 1212, we had no other choice but to determine the order was defective and the decision was arbitrary and capricious. We emphasized that this result could be avoided in the future if the Parole Board clearly states in its order denying parole that it considered the factors outlined in section 24-21-640

and the fifteen factors published in Form 1212, and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision.

In the instant case, the Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212, which is sufficient under Cooper. Accordingly, the ALC erred in remanding the matter to the Parole Board.

We, therefore, remand this case to the ALC with instructions to issue an order in compliance with this opinion.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Frederick D. Shuler, Petitioner,

v.

Tri-County Electric Co-op, Inc., Employer, and Federated Rural Electric Insurance Corp., Carrier, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26731
Heard September 16, 2009 – Filed October 12, 2009

AFFIRMED

Kevin Hayne Sitnik and John G. Felder, Jr., both of McGown, Hood and Felder, of Columbia, for Petitioner.

W. Hugh McAngus, Weston Adams, III, and Helen F. Hiser, all of McAngus Goudelock & Courie, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: In this case, we granted a writ of certiorari to review the court of appeals' decision affirming the denial of workers' compensation benefits to Frederick D. Shuler (Petitioner). We affirm.

FACTS/PROCEDURAL BACKGROUND

Petitioner was a member of the Board of Trustees of Tri-County Electric Co-op (Tri-County). As a trustee, Petitioner routinely received per diem allowances, reimbursement for expenses, and other benefits from Tri-County, as authorized by the Electric Cooperative Act and Tri-County's bylaws. Tri-County reported these payments as "Nonemployee Compensation" on 1099 tax forms, and Petitioner reported the payments as "business income," rather than as "wages."

Petitioner was injured in an automobile accident while traveling to the National Rural Electric conference in Dallas, Texas with the Board's authorization. Petitioner sought workers' compensation benefits from Tri-County for his injury. The single commissioner found that Petitioner was not an employee of Tri-County, thus was not eligible for benefits. The full commission reversed, finding Petitioner was an employee. On appeal, the circuit court reversed. The court of appeals affirmed the circuit court, holding that Petitioner was not an employee of Tri-County. *Shuler v. Tri-County Elec. Co-op., Inc.*, 374 S.C. 516, 649 S.E.2d 98 (Ct. App. 2007).

STANDARD OF REVIEW

Workers' compensation awards are authorized only if an employment relationship exists at the time of the injury. *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002), *overruled on other grounds by Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009). The existence of an employment relationship is a factual

question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard. *Brayboy v. Workforce*, 383 S.C. 463, 681 S.E. 2d 567 (2009). When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence. *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702. It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720, 723 (1964). "However, a construction should not be adopted that does violence to the specific provisions of the Act." *Id.*

LAW/ANALYSIS

I. Contract of Hire

Petitioner argues the court of appeals erred in holding he was not an employee of Tri-County under a contract of hire. We disagree.

Under the Workers' Compensation Act, an employee is defined as a "person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written . . . ." S.C. Code Ann. § 42-1-130 (1985 & Supp. 2008). To be considered an employee under a contract of hire pursuant to section 42-1-130, a person must have a right to payment for his services. *See Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994) ("The word 'hire' generally connotes payment of some kind.").

A plain reading of the Electric Cooperative Act and Tri-County's bylaws show that any compensation Petitioner received was discretionary. The Electric Cooperative Act states:

> The bylaws [of a cooperative] may make provision for the compensation of trustees; *provided*, however, that compensation shall not be paid except for actual attendance upon activities authorized by the board. The bylaws may also provide for the travel, expenses and other benefits of trustees, as set by the board.

> A trustee, except in emergencies, shall not be employed by the cooperative in any other capacity involving compensation.

S.C. Code Ann. § 33-49-630 (2006) (emphasis in original). As the statute indicates, cooperatives are not required to compensate their trustees, but may draft their bylaws to permit some payment. Additionally, any payment provided to the trustees may be given only for time spent on specific business authorized by the board, not as compensation for general services to the cooperative. Therefore, Petitioner was not compensated for his services to Tri-County, and he did not have a right to demand any payment at all. Further, the final sentence makes clear that the trustees are not considered employees of Tri-County and may only be employed by Tri-County in cases of emergency.

Tri-County's bylaws state:

> Board members shall not receive any salary for their services as such, except that the board may authorize a fixed sum for each day or portion thereof spent on cooperative business . . . . If authorized by the board, board members may also be reimbursed for expenses actually and necessarily incurred . . . or granted a reasonable per diem allowance . . . .

The bylaws expressly state the trustees do not receive compensation for their services to Tri-County, but rather they may, at the Board's discretion, receive a per diem or be reimbursed for their expenses. Therefore, because Petitioner was not entitled to compensation, he was not an employee under a contract of hire. The court of appeals correctly determined that the reimbursement for actual expenses and the additional benefits Petitioner received were discretionary and that Petitioner had no right to demand such payment.

II. Gratuitous Worker Doctrine

The court of appeals' analysis of the existence of an employment relationship confuses the "gratuitous worker" doctrine by stating that the "benefits and compensation [given to Petitioner] constitute gratuitous payments." *Shuler*, 374 S.C. at 524, 649 S.E.2d at 102. We take this opportunity to clarify that doctrine.

According to *Larson's Workers' Compensation Law*, which this Court relied upon in *Kirksey*, gratuitous employees are those who "neither receive nor expect to receive any kind of pay for their services." 3 *Larson's Workers' Compensation Law* § 65.01 (2009). Thus, the term "gratuitous," in this context, normally is used to describe the nature of the work being performed, not the nature of the compensation received.

For example, in *Kirksey*, the claimant argued that his employer's daughter, who helped out around the shop, qualified as the fourth employee for purposes of the Workers' Compensation Act. 314 S.C. at 44, 443 S.E.2d at 804. This Court disagreed, finding the daughter was a "gratuitous worker" because she helped her father without pay and on account of his poor financial situation. *Id.* at 45, 443 S.E.2d at 804. Furthermore, this Court specifically held that gratuitous workers are not employees under a contract of hire. *Id.*

Here, Petitioner performed his duties as a trustee of Tri-County without receiving compensation for his services. Although he may have received reimbursement for expenses and other benefits, these payments were given at the discretion of the Board and Petitioner had no right to demand such payment. Thus, Petitioner was not an employee because his services were offered gratuitously, not, as the court of appeals erroneously stated, because Tri-County's payments were gratuitous.

III. Appointment

Petitioner argues that his election to the Board constituted an appointment by Tri-County's membership to serve as a trustee. We disagree.

Section 42-1-130 does not define "appointment."[1] Regardless, Petitioner was elected to serve as a trustee, and the difference between an appointment and an election is clear. *Black's Law Dictionary* defines an appointment as "[t]he designation of a person, such as a nonelected public official, for a job or duty; especially, the naming of someone to a nonelected public office." *Black's Law Dictionary*, 8th ed. (2004). The emphasis on "nonelected" officials precludes the possibility that a person who is elected could also be appointed to the same position.

Further, the Electric Cooperative Act specifically states that "[a]t each annual meeting . . . the members shall elect trustees to hold office . . . ." S.C. Code Ann. § 33-49-640 (2006). Similarly, Tri-County's bylaws provide that "members of the board shall be elected by ballot at each annual meeting of the members . . . ." Petitioner was clearly elected to his position as a trustee, and therefore cannot simultaneously be employed under an appointment.

CONCLUSION

We hold that the court of appeals correctly concluded that Petitioner was not an employee of Tri-County under a contract of hire. However, the court of appeals confused the gratuitous worker doctrine, mistakenly applying the term "gratuitous" to the type of payment Petitioner received from Tri-County rather than the type of work Petitioner performed for Tri-County. Under a proper analysis, Petitioner was a gratuitous worker because

[1] Although the statute does not define the term, it certainly comprehends that "election" and "appointment" are two distinct concepts. *See* S.C. Code Ann. § 42-1-130 (including as employees "all officers and employees of the State, except those elected. . . or appointed").

he worked for Tri-County without the right to or expectation of pay. Furthermore, Petitioner was elected to serve as a trustee; therefore, he is not an employee under an appointment. We affirm the court of appeals' decision.

WALLER, PLEICONES, JJ., and Acting Justices James E. Moore and E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Anonymous Member of the South Carolina Bar, Respondent.

Opinion No. 26732
Heard September 2, 2009 – Filed October 12, 2009

CHARGES DISMISSED

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

Clayton Monroe Custer, of Greenville and Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: This is an attorney disciplinary matter involving a complaint filed against Respondent by an "anonymous member" of the South Carolina Bar for broadcasting an allegedly misleading television advertisement. The Commission on Lawyer Conduct filed formal charges against Respondent. Respondent filed an Answer in which he denied the alleged misconduct. Following a hearing, a Hearing Panel of the Commission on Lawyer Conduct ("the Panel") concluded that Respondent's advertisement was "neither inherently misleading nor actually misleading." As a result, the Panel recommended the dismissal of the formal charges against Respondent. The Office of Disciplinary Counsel ("the ODC") appeals the Panel's

recommendation. We agree with the Panel's recommendation and dismiss the formal charges against Respondent.

FACTUAL/PROCEDURAL HISTORY

Respondent, who has been licensed to practice law in South Carolina since 1995, is the managing member of a law firm located in Greenville.[1] Members of the firm primarily represent victims in personal injury and worker's compensation cases.

In December 2003, Respondent began airing a television advertisement to promote his legal services to potential clients who suffered on-the-job injuries. Respondent appeared in the advertisement and recited the following:

> It's not your fault you were hurt on the job, but I know you're afraid to file a job injury claim. You're afraid your boss won't believe you're really hurt - or worse, that you'll be fired. We'll protect you against these threats - these accusations - and work to protect your job. I'm not an actor, I'm a lawyer. I'm [Anonymous]. Call me and we'll get you the benefits you deserve. The [Law] Firm.

On September 20, 2006, an "anonymous member" of the South Carolina Bar filed a complaint against Respondent with the ODC regarding the "Job Injury" advertisement. The Complainant contended the advertisement was misleading in that it created the false impression that by retaining Respondent an injured employee would not lose his or her job by filing a worker's compensation claim.

Following an investigation by the Commission on Lawyer Conduct, the ODC filed formal charges against Respondent. The ODC alleged Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 7.1(a) and Rule 7.1(b).[2]

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[1] Respondent is also licensed and operates another office in Virginia.

[2] These rules provide:

Respondent filed a response to the ODC's formal charges in which he denied the alleged misconduct and raised constitutional challenges to the cited Rules of Professional Conduct.

On January 13, 2009, the Panel convened to hear evidence and arguments regarding the formal charges against Respondent.

Prior to this hearing, the Commission Chair and counsel for both parties agreed that expert opinions were inadmissible as to whether the Respondent's advertisement was misleading given this question presented an issue of law.

Based in part on this ruling, Respondent's counsel presented a motion *in limine* to exclude certain evidence that the ODC intended to introduce. Specifically, counsel sought to exclude the results of a market survey conducted on behalf of the ODC by Market Search, a market study company based in Columbia.[3]

> A lawyer shall not make false, misleading, deceptive, or unfair communications about the lawyer or the lawyer's services. A communication violates this rule if it:
>
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.1(a), (b), RPC, Rule 407, SCACR.

[3] After the Investigative Panel for the Commission on Lawyer Conduct determined that Respondent's advertisement was inherently misleading, it authorized the ODC to engage Market Search to conduct a study evaluating Respondent's advertisement.

Pursuant to a request by the ODC in March 2008, Market Search conducted a study to determine "the degree to which [Respondent's] ad 'creates an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.'" The intent of the study was to determine whether Respondent's advertisement created an unjustified expectation that a claimant would not be fired from his or her job if they filed a worker's compensation claim.

During the study, thirty participants selected by Market Search compared Respondent's "Job Injury" advertisement with four other televised attorney advertisements. Respondent was featured in two of the five advertisements. The study was conducted by having the thirty participants individually view the five advertisements and then rate on a scale of 1 to 5 whether each advertisement addressed a specific theme or statement that was created by Market Search. Although the survey included multiple questions, the two most pertinent questions were:

> For this process, please use a 5-point scale, where 1 means you would definitely not expect this based on the ad and 5 means you definitely would expect it based on the ad.
>
> 5(g). This law firm will protect you from getting fired if you hire them.
>
> 5(k). This law firm will protect you from threats if you hire them.

Even though all of the participants indicated to some extent that each of the five advertisements caused them to believe the advertising law firm could protect them from losing their job, most of the survey participants believed Respondent's "Job Injury" advertisement conveyed that message to them more than the other advertisements.

As the basis for the motion *in limine*, Respondent's counsel initially argued that the purchase of the market study was outside the scope of authority of the Commission on Lawyer Conduct, the

Investigative Panel, and the ODC. In the alternative, counsel asserted the results of the market research should be excluded because, absent the previously-excluded expert testimony, the study consisted only of inadmissible hearsay of the study participants.

After hearing arguments from counsel, the Panel reserved the right to rule on the motion and permitted the ODC to present evidence regarding the Market Search study.

Prior to the presentation of the ODC's case, the parties stipulated to the following: (1) there are statutory remedies available for a person in South Carolina who is fired in retaliation for filing a worker's compensation claim,[4] and (2) the parties' expert witnesses could not give an opinion as to whether or not the Respondent's advertisement is misleading.

During its case, the ODC offered the testimony of Graceanne Cole, the Vice President of Research for Market Search who orchestrated the study. Cole, the employee of Market Search who composed the questionnaires and conducted the interviews for the survey, was qualified as an expert witness in the area of market research. Cole explained the methodology of the study and chronicled a significant number of the participants' responses.

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[4] Section 41-1-80 of the South Carolina Code provides in relevant part:

> No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation Law (Title 42 of the 1976 Code), or has testified or is about to testify in any such proceeding.
>
> Any employer who violates any provision of this section is liable in a civil action for lost wages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section is entitled to be reinstated to his former position. The burden of proof is upon the employee.

S.C. Code Ann. § 41-1-80 (Supp. 2008).

On cross-examination, Cole admitted that the study was not statistically reliable given the small sample size of participants. Cole testified that normally a study consisted of at least one hundred participants. She further acknowledged Respondent's advertisement was the only one amongst the five that referenced anything about protecting a claimant's job. In conjunction, she also conceded that some participants had the expectation that the advertising law firm would protect their job even in the absence of language to that effect.

Respondent offered the testimony of Dr. Bryan E. Denham, a Clemson University professor in the Department of Communication Studies. Denham, who was qualified as an expert in communications and applied statistics, reviewed the five advertisements as well as the questionnaires and final report produced by the Market Search study. Based on his assessment, Denham criticized the results of the study given: (1) the small sample size; (2) the participants were "self-selected" from a database and, thus, not truly representative of the general population; (3) two of the five advertisements involved the Respondent; (4) the participants permitted Cole to write down their responses; and (5) each of the five advertisements had different main points in that they all did not discuss employment issues.

Respondent was the final witness to testify. Respondent specifically addressed the advertisement in question. Respondent explained that he wrote the advertisement after speaking with other attorneys about the potential issues that arise with job-injury claims. He characterized the portion of the advertisement indicating that his firm would "work to protect" a claimant's job as "special wording." Respondent believed the advertisement was truthful in that his firm did work "to protect the jobs of its clients" even though he could not guarantee that the clients would not lose their jobs if they hired Respondent's firm.

After hearing arguments of counsel, the Panel issued an oral ruling in which it found Respondent's advertisement was not inherently or actually misleading. Although the Panel considered the Market

Search study results, it noted that the ruling was "really not based on the survey."

On March 12, 2009, the Panel issued a written report in which it concluded that Respondent did not violate Rule 7.1(a) or 7.1(b). In reaching this conclusion, the Panel found: (1) there was no credible evidence that any member of the public was misled by Respondent's advertisement, and (2) the advertisement was "neither actually nor inherently misleading." In light of this decision, the Panel declined to rule on the constitutional and procedural objections raised by Respondent. Ultimately, the Panel recommended the dismissal of the formal charges against Respondent.

The ODC appeals from the Panel's recommendation.

DISCUSSION

The ODC contends the Panel's finding that Respondent's advertisement is not misleading is contrary to the evidence presented at the hearing. In support of this contention, the ODC lists the impressions of several Market Search participants who viewed Respondent's advertisement.[5] Based on these responses, the ODC claims that "there is a substantial likelihood that viewers will formulate the specific conclusion that Respondent can guarantee job protection." Because Respondent admitted that he could not guarantee that an injured employee would not be fired for filing a worker's compensation claim, the ODC argues the advertisement as a whole is actually misleading in that it gives the incorrect impression that a worker's compensation claimant would not be fired if Respondent was retained to pursue the claim.

Even if found not to be actually misleading, the ODC asserts the Panel erred in concluding the advertisement was not inherently misleading. The ODC avers that inherent in the advertisement is the

[5] Several participants indicated they believed Respondent could "basically guarantee you that you will not lose your job" if you file a claim or that you would "not have to worry about losing your job if you contact [Respondent]."

message that injured workers will not be fired if they retain Respondent. The ODC explains that the advertisement omits certain information which would inform the public that, despite statutory remedies for an employee wrongfully terminated in retaliation for filing a worker's compensation claim, the Respondent cannot prevent the termination.

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." In the Matter of Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses." In the Matter of Marshall, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998). "However, this Court may make its own findings of fact and conclusions of law." Id. Furthermore, a disciplinary violation must be proven by clear and convincing evidence. In the Matter of Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

As a threshold matter, there is no dispute that attorney advertisements are presumptively commercially-protected speech. Bates v. State Bar of Arizona, 433 U.S. 350, 383-84 (1977) (holding that First Amendment protection extended to "truthful" advertising of "routine" legal services by attorneys and, thus, "may not be subjected to blanket suppression").

Because this constitutional protection is not without limitation, a challenge to an attorney advertisement involves a determination of whether the advertisement is false or misleading. As the United States Supreme Court emphasized in In re R.M.J., 455 U.S. 191 (1982):

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the

> particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may also be presented in a way that is not deceptive.

Id. at 203; see Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985) (noting that the State may "prevent the dissemination of commercial speech that is false, deceptive, or misleading"); In the Matter of Pavilack, 327 S.C. 6, 7 n.1, 488 S.E.2d 309, 310 n.1 (1997) (recognizing that the State may freely regulate commercial speech which concerns unlawful activity or is misleading).[6] However, "[e]ven when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served." In re R.M.J., 455 U.S. at 203.

In view of these constitutional parameters, the Court must determine whether Respondent's advertisement was misleading.

Because our case law does not provide definitive guidance for the analysis of the issue presented in this case, particularly the definition of "misleading," a review of the relevant comments to Rule 7.1 is instructive. These Comments provide in pertinent part:

[6] Notably, Rule 7.2 of our state Rules of Professional Conduct specifically addresses the benefits of advertising but also cautions against the risk of misleading practices which would result in regulation and disciplinary action. See Rule 7.2, RPC, Rule 407, SCACR, cmt. 1 ("The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.").

> [1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful . . . .
>
> [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

Rule 7.1, RPC, Rule 407, SCACR, cmts. 1, 2.

Applying Rule 7.1 in its entirety to the facts of the instant case, we agree with the Panel's conclusion that Respondent's advertisement was not misleading.[7]

At the outset, there is no evidence that any member of the public was misled when Respondent aired his television advertisement. Moreover, we find the results of the Market Search study are suspect and do not definitively establish that the advertisement was misleading.

The sample group was smaller than normally used for such a study and, in turn, may not have been statistically reliable. The study had a 20% margin of error. The participants were shown a total of five attorney advertisements, of which two were produced by Respondent. This undoubtedly focused the participants' attention more keenly on the Respondent's advertisements. Respondent's advertisement was the only one of the five that referenced anything regarding a client's job.

[7] Because there is no allegation that Respondent's advertisement was false, we confine our analysis to a determination of whether the advertisement was misleading.

The questionnaires were also worded in a way that elicited the desired response from participants.

In the absence of any reliable data that the advertisement was misleading, the determination of this issue requires an analysis of the text of the advertisement in conjunction with Rules 7.1(a) and 7.1(b), RPC, and the related Comments. See Zauderer, 471 U.S. at 652 (noting that a State need not "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead" when "the possibility of deception" is self-evident (citation omitted)).

We find the text of the advertisement does not: (1) contain a "material misrepresentation," or (2) operate to "create an unjustified expectation" about the results Respondent could achieve for an injured worker.

In discussing the advertisement, Respondent testified he was truthful in his representation that he would "work to protect" an injured client's job if a worker's compensation claim was filed. This broad statement did not imply that Respondent could guarantee or ensure that a client would not lose his job. Instead, it was merely a statement of Respondent's role as an advocate on behalf of a client. Within this advocacy role, Respondent appeared to convey that he would use whatever means, including statutory remedies, which were available to guard against a client's loss of employment. Accordingly, we hold the ODC failed to prove by clear and convincing evidence that Respondent's advertisement violated either Rule 7.1(a) or Rule 7.1(b).

Based on the foregoing, we dismiss the formal charges against Respondent.

CHARGES DISMISSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael E. Atwater, Respondent.

Opinion No. 26733
Heard September 15, 2009 – Filed October 12, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary action, we suspend Michael E. Atwater (Respondent) from the practice of law for six months and order him to pay the costs of these disciplinary proceedings due to Respondent's repeated failure to respond to the Office of Disciplinary Counsel (ODC) in the investigation of five matters.

I. FACTS

Respondent was licensed to practice law in 1995. ODC investigated five complaints involving Respondent that were filed from 2004 to 2006. A hearing was held on September 13, 2007, at which Respondent appeared pro se. A Hearing Panel of the Commission on Lawyer Conduct found

Respondent had committed misconduct in three of the matters, but that the misconduct was not sanctionable, and it dismissed two of the matters.[1] The Hearing Panel further found Respondent had violated Rule 8.1(b) of the South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR, by his repeated failure to cooperate in the investigation of all five of these matters.

The Hearing Panel found three aggravating factors: (1) Respondent's "pattern of misconduct," in "that these grievances were received in sequence" and "[i]n each successive case," ODC notified Respondent of his obligation to respond, but he repeatedly ignored this obligation; (2) Respondent's lack of acknowledgment of wrongdoing, in that Respondent relied upon the fact that he ultimately came in and answered questions during an interview with ODC; and (3) Respondent's prior public reprimand in 2003 for misconduct, including the failure to cooperate with ODC. See In re Michael E. Atwater, 355 S.C. 620, 586 S.E.2d 589 (2003) (issuing a public reprimand for admitted misconduct and failing to respond to ODC).

The Hearing Panel noted Respondent had presented no mitigating evidence and that it found no circumstances of mitigation. The Hearing Panel recommended a definite suspension of nine months and the payment of costs for these proceedings.

Respondent thereafter obtained counsel and asked this Court to remand the matter so he could provide evidence in mitigation. This Court issued an order on July 22, 2008, remanding Respondent's case "*solely for the purpose of producing mitigating evidence*."

At the supplemental hearing on February 10, 2009, Respondent alleged that he suffered from depression, along with post-traumatic stress disorder and a phobic reaction that were related to his contacts with ODC, and he

[1] In the three matters involving misconduct, the Hearing Panel found Respondent (1) did not adequately communicate with a client (the Dixon Matter); (2) did not confirm a bill had been paid to a car rental company prior to disbursing funds in a personal injury case (the Cook Matter); and (3) should have more clearly set out the scope and limitations of his representation with another client (the Stanley Matter).

presented his psychiatrist as a witness. Respondent testified his emotional problems initially started with his divorce and child custody battle in 1998 and 1999.

The Hearing Panel issued a Supplemental Panel Report on April 8, 2009, in which it declined to amend its prior recommendations, finding the mitigation evidence presented by Respondent did not excuse his repeated failure to cooperate with ODC.

II. LAW/ANALYSIS

A. Definite Suspension

Respondent does not challenge the fact that he violated Rule 8.1(b), RPC, Rule 407, SCACR by failing to cooperate with ODC. Rather, he argues that the mitigation evidence "should have compelled a different, lesser recommended sanction" for his misconduct, such as a public reprimand or a short suspension.

In contrast, ODC asserts "that neither a public reprimand nor a short suspension is appropriate given the totality of the circumstances in these matters." ODC states, "A public reprimand is not appropriate because Respondent has already been publicly reprimanded for similar conduct." ODC contends the definite suspension of nine months recommended by the Hearing Panel is particularly appropriate because, unless otherwise ordered by this Court, Respondent would have to appear before the Committee on Character and Fitness for a determination of his fitness to return to practice, which would be advisable based on Respondent's assertions about his medical condition and his need for continued treatment.[2]

[2] See Rule 33(a), Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR (providing "[a] lawyer who has been suspended for a definite period of 9 months or more, has been suspended for an indefinite period, or has been disbarred, shall be reinstated to the practice of law only upon order of the Supreme Court"); Rule 33(d), RLDE, Rule 413, SCACR ("Unless otherwise directed by the Supreme Court, the petition [for reinstatement] shall be referred to the Committee on Character and Fitness.").

ODC states that in light of Respondent's many violations of Rule 8.1(b), the Hearing Panel's recommendation of a definite suspension for nine months is consistent with precedent, citing In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008) (finding an attorney's failure to timely respond to inquiries from ODC and the attorney's falsification of documents submitted to ODC, together with other acts of misconduct, justified a two-year suspension and requiring the payment of costs); In re Sturkey, 376 S.C. 286, 657 S.E.2d 465 (2008) (finding a nine-month suspension, the payment of costs, and participation in a law office management program was appropriate where, among other things, the attorney failed to communicate with his clients, failed to respond to requests for information, and failed to diligently pursue his cases; we noted the attorney's disciplinary history was an aggravating factor); In re Conway, 374 S.C. 75, 647 S.E.2d 235 (2007) (imposing a nine-month suspension and the payment of costs for various acts of misconduct and failing to cooperate with ODC).

"The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court." In re Tullis, 375 S.C. 190, 191, 652 S.E.2d 395, 395 (2007). The "Court has the sole authority . . . to decide the appropriate sanction after a thorough review of the record." In re Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "The Court is not bound by the [hearing] panel's recommendation and may make its own findings of fact and conclusions of law." In re Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008). "A disciplinary violation must be proven by clear and convincing evidence." In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see also Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

Although we have considered Respondent's mitigation evidence, we agree with the Hearing Panel's recommendation of a definite suspension in light of Respondent's prior public reprimand in 2003 for, among other things, failing to respond to ODC. After considering the record, however, we find that a suspension of six months is appropriate based on the fact that, unlike the cases cited by ODC, Respondent did not commit other instances of sanctionable misconduct in this instance. Cf. In re Braghirol, 383 S.C. 379,

680 S.E.2d 284 (2009) (finding, after the consideration of mitigating evidence, that a definite suspension of nine months was appropriate for an attorney who failed to respond in five matters under investigation and who committed other, sanctionable misconduct, including failing to attend scheduled court hearings and failing to pay funds to a client as ordered; the attorney had previously received a letter of caution for minor misconduct and failing to respond to ODC).

B. Costs

Respondent does not dispute that costs should be assessed in this matter based on his misconduct in failing to cooperate with ODC.

The imposition of costs and the determination of their amount are within this Court's discretion. See In re Thompson, 343 S.C. at 13, 539 S.E.2d at 402 ("The assessment of costs is in the discretion of the Court."); Rule 27(e)(3), RLDE, Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct."); Rule 7(b)(8), RLDE, Rule 413, SCACR (stating sanctions for misconduct may include the "assessment of the costs of the proceedings, including the cost of hearings, investigations, service of process and court reporter services").

We find costs in the amount of $5,190.18 should be assessed for the expenses incurred in this action, plus $857.00 for the cost of the court reporter's transcript.

III. CONCLUSION

Due to Respondent's failure to cooperate with ODC, we suspend Respondent from the practice of law for six months and order him to pay the costs of these proceedings in the amount of $5,190.18, plus $857.00 for the cost of the court reporter's transcript. Within fifteen days of the filing of this opinion, Respondent shall file an affidavit demonstrating that he has complied with the requirements of Rule 30, RLDE, Rule 413, SCACR (regarding an attorney's duties following suspension or disbarment).

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Shaquille O'Neal B., A Minor Under The Age Of Seventeen,[1] Appellant.

Appeal From Newberry County
John M. Rucker, Family Court Judge

Opinion No. 26734
Heard November 6, 2008 – Filed October 12, 2009

REVERSED

Hemphill P. Pride, II, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General David Spencer, all of Columbia, for Respondent.

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[1] The record contains several versions of Appellant's name, but his counsel has verified the correct spelling above.

JUSTICE BEATTY: Shaquille O'Neal B. (Appellant), a minor under the age of seventeen at the time of this proceeding in the family court, sought to remove his name from the South Carolina Sex Offender Registry. The family court found Appellant should be placed on the registry, and Appellant appeals. We reverse.

I. FACTS

On August 16, 2006, a Juvenile Petition was filed in Mecklenburg County, North Carolina, alleging Appellant (DOB 4/5/91) had committed the offense of Indecent Liberties Between Children in violation of N.C. Gen. Stat. § 14-202.2.

Appellant admitted the charge and was adjudicated delinquent by order of a North Carolina court. Appellant was placed on probation and the case was transferred to Newberry County, where Appellant resided with his mother.

On February 23, 2007, Appellant was notified by the South Carolina Department of Juvenile Justice (DJJ) that, pursuant to S.C. Code Ann. § 23-3-430, he was required to register his name on the South Carolina Sex Offender Registry.

Appellant thereafter filed a motion in the family court in South Carolina on June 1, 2007, seeking to have his name removed from the registry. Appellant asserted the South Carolina Department of Probation, Parole, and Pardon Services (the Department) ordered him to register as a sex offender on the basis the offense for which he was adjudicated delinquent in North Carolina was similar to the South Carolina offense of Committing a Lewd Act Upon a Child Under Sixteen, a violation of S.C. Code Ann. § 16-15-140. Appellant asserted this was error because, among other things, the South Carolina offense did not have the same elements as his adjudicated offense under N.C. Gen. Stat. § 14-202.2 and he was not required to register as a sex offender in North Carolina for his offense.

The family court denied Appellant's request as well as his subsequent motion to reconsider, finding he was properly required to register for the South Carolina Sex Offender Registry.

II. LAW/ANALYSIS

The initial question before us is whether or not the family court had jurisdiction to hear the matter.

In its Respondent's Brief, the State asserts that the family court did not have subject matter jurisdiction to consider Appellant's request to remove his name from the Sex Offender Registry. This issue was not raised below and was not ruled on by the family court, but subject matter jurisdiction may be raised for the first time on appeal. See, e.g., Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994) ("Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court.").

The State asserts the family court did not have subject matter jurisdiction to determine this matter because it is a court of limited jurisdiction and Appellant should have filed an action for a declaratory judgment in the court of common pleas to challenge the requirement that he must be placed on the registry, citing the recent case of Hazel v. State, 377 S.C. 60, 659 S.E.2d 137 (2008). We disagree.

In Hazel, the defendant filed a declaratory judgment action in the court of common pleas questioning whether he was required to be listed on the registry. Id. at 62, 659 S.E.2d at 138. The State argued the court of common pleas did not have jurisdiction to make this determination and that such a finding could only be made by the court of general sessions. Id. at 65, 659

S.E.2d at 140. We held the court of common pleas had jurisdiction to rule on this civil matter:[2]

> The Court of Common Pleas had the power to make this finding pursuant to the Declaratory Judgment Act. *See* S.C. Code Ann § 15-53-20 (2005) (courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed). The judge, in the Court of Common Pleas, properly determined respondent's status as affected by § 23-3-430, a civil statute. *See State v. Walls, supra* [348 S.C. 26, 558 S.E.2d 524 (2002)] (Sex Offender Registry Act not so punitive in purpose or effect as to constitute a criminal penalty). As a result, we approve the procedure utilized by the Court of Common Pleas and find that court has the power to make the determination that a prior kidnapping offense did not involve sexual misconduct such that the one convicted is required to register as a sex offender.

Id. (Emphasis added.)

Hazel, however, did not address the proper procedure for challenges to registration by a minor.

"The family court is a statutory court created by the legislature and, therefore, is of limited jurisdiction." State v. Graham, 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000). "Its jurisdiction is limited to that expressly or by necessary implication conferred by statute." Id.

Section 20-7-400 of the South Carolina Code, in effect at the time of these proceedings, provides for the subject matter jurisdiction of the family court. Riggs v. Riggs, 353 S.C. 230, 236 n.3, 578 S.E.2d 3, 6 n.3 (2003)

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[2] In Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003), the adult defendant was also allowed to dispute his classification by means of a declaratory judgment action, but we did not address the proper procedure for juveniles.

(noting "§ 20-7-420 determines the family court's subject matter jurisdiction"). In 2008, section 20-7-400 was repealed and recodified as S.C. Code Ann. § 63-3-510 by 2008 S.C. Act No. 361, but the new provision is virtually identical. Section 20-7-400 provides in relevant part as follows:

> (A) Except as otherwise provided herein, the court shall have exclusive original jurisdiction and shall be the sole court for initiating action:
>
> (1) Concerning any child living or found within the geographical limits of its jurisdiction:
>
> . . . .
>
> (b) Whose occupation, behavior, condition, environment or associations are such as to injure or endanger his welfare or that of others;
>
> . . . .
>
> (d) Who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred except as provided in Section 20-7-410 [now Section 63-3-520];
>
> . . . .
>
> (3) Concerning any child seventeen years of age or over, living or found within the geographical limits of the court's jurisdiction, alleged to have violated or attempted to violate any State or local law or municipal ordinance prior to having become seventeen years of age and such person shall be dealt with under the provisions of this title relating to children.
>
> . . . .

> (B) Whenever the court has acquired the jurisdiction of any child under seventeen years of age, jurisdiction continues so long as, in the judgment of the court, it may be necessary to retain jurisdiction for the correction or education of the child, but jurisdiction shall terminate when the child attains the age of twenty-one years. Any child who has been adjudicated delinquent and placed on probation by the court remains under the authority of the court only until the expiration of the specified term of his probation. This specified term of probation may expire before but not after the eighteenth birthday of the child.

S.C. Code Ann. § 20-7-400 (1985 & Supp. 2007) (emphasis added).

Appellant contends jurisdiction was proper in the family court based on subsection (A)(1)(d) – that jurisdiction applies to a child "who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred . . . ." S.C. Code Ann. § 20-7-400(A)(1)(d).

The family court has exclusive jurisdiction over children charged with crimes. See State v. Pittman, 373 S.C. 527, 558, 647 S.E.2d 144, 160 (2007) ("The family court has exclusive jurisdiction over children who are accused of criminal activity." (citing S.C. Code Ann. § 20-7-400(A)(1)(d) (footnote omitted)).

The State, in contrast, argues Appellant was not accused of violating any term of his probation or any statute or law at the time he filed this action to have his name removed from the registry, so (A)(1)(d) does not confer jurisdiction in this case. The State mistakenly assumes that only it can bring an action in family court concerning a delinquent child. S.C. Code Ann. Section 20-7-435 (1985)[3] allowed a parent to bring an action in family court involving a delinquent child. Appellant had been adjudicated delinquent by the North Carolina Court. Moreover, S.C. Code Ann. Section 23-3-440(3)

[3] This section has been recodified at S.C. Code Ann. § 63-3-550.

(2007) requires that Appellant register with the sheriff of the county where he lives. This registration is in addition to the registry maintained by SLED.

Section 23-3-440(3) also requires the parents or legal guardian of a person under the age of seventeen, such as Appellant, to ensure that he registers. Clearly, subject matter jurisdiction of the family court is necessarily implied if not expressed. Graham, 340 S.C. at 355, 532 S.E.2d at 263. Furthermore, Appellant was still on probation at the time he filed his action, so the family court had jurisdiction by virtue of the authority to oversee Appellant's probation. See S.C. Code Ann. § 20-7-400(B) ("Any child who has been adjudicated delinquent and placed on probation by the court remains under the authority of the court only until the expiration of the specified term of his probation.").

Thus, the question whether Appellant's adjudication for delinquency made him eligible for inclusion in the South Carolina Sex Offender Registry was properly before the family court.

Turning to the merits, Appellant asserts the family court erred in denying his motion to remove his name from the South Carolina Sex Offender Registry. Specifically, Appellant argues a juvenile offender may not be placed on the registry as a result of an offense that is not "registry eligible" in the state where the offense occurred and, further, the North Carolina offense of Indecent Liberties Between Children is not the equivalent of the South Carolina offense of Lewd Act Upon a Child Under the Age of Sixteen. Appellant additionally argues that a probation agent or a South Carolina Law Enforcement Division (SLED) agent should not be able to unilaterally decide whether an offense warrants registry and that it violates due process.

The South Carolina Sex Offender Registry Act[4] was passed by our legislature not to punish sex offenders, but "to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex

[4] S.C. Code Ann. §§ 23-3-400 to -550 (2007 & Supp. 2008).

crimes." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). As such, it is civil in nature and does not constitute a criminal penalty. Id.

In general, persons of any age who are convicted or adjudicated delinquent in South Carolina of an offense enumerated in the Act or who are convicted or adjudicated delinquent for a similar offense in a comparable court in the United States are required to register:

> Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, **or** who has been convicted, adjudicated delinquent, pled guilty or nolo contendere . . . in any comparable court in the United States, or a foreign country, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere . . . in the United States federal courts of a similar offense, **or** who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere . . . to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article.

S.C. Code Ann. § 23-3-430(A) (2007) (emphasis added).[5] The registry is administered under the direction of the Chief of SLED. Id. § 23-3-410(A).

Appellant argues section 23-3-430 requires registration for persons adjudicated delinquent in South Carolina for one of the offenses enumerated in the statute or for persons adjudicated delinquent outside the state for offenses for which the adjudicating state also requires registration. Appellant contends he was not required to register as a sex offender in North Carolina; therefore, he should not be required to register for the South Carolina Sex Offender Registry.

[5] Portions of section 23-3-430 were recently amended by 2008 S.C. Act No. 335, but the amendment does not affect this matter.

It is clear from the plain language of the statute that the Act requires placement on the South Carolina Sex Offender Registry when a person is convicted of an offense in another state that is similar to a South Carolina offense that requires registration: "Any person . . . who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere . . . in any comparable court in the United States . . . of a similar offense . . . shall be required to register pursuant to the provisions of this article." S.C. Code Ann. § 23-3-430(A) (emphasis added).

There is no additional requirement that the offense be one that is registry-eligible in the state where the offense occurred. Rather, this is an alternative basis for registration – that the person was "convicted of . . . an offense for which the person was required to register in the state where the conviction or plea occurred . . . ." Id. Thus, there are several bases on which to predicate registration in South Carolina: (1) the defendant was convicted in South Carolina of an offense delineated in South Carolina's registry statute, (2) the defendant was convicted of an offense in another jurisdiction for which registration is required in the jurisdiction where the offense occurred, or (3) the defendant was convicted in another jurisdiction of an offense that is similar to a South Carolina offense requiring registration.

Appellant next contends he should not be required to register because his North Carolina offense is not similar to the South Carolina offense of Lewd Act Upon a Child Under Sixteen.

Appellant was adjudicated delinquent in North Carolina for the offense of Indecent Liberties Between Children, which is prohibited by N.C. Gen. Stat. § 14-202.2(a):

> (a) A person who is under the age of 16 years is guilty of taking indecent liberties with children if the person either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at

> least three years younger than the defendant for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire.

SLED determined Appellant must be placed on the South Carolina registry because Appellant's North Carolina offense was similar to a South Carolina offense for which registration is required – Lewd Act Upon a Child Under Sixteen. See S.C. Code Ann. § 23-3-430(C)(11) (requiring registration for the offense of Lewd Act Upon a Child Under Sixteen).

South Carolina's offense of Lewd Act Upon a Child Under Sixteen is defined as follows:

> It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

S.C. Code Ann. § 16-15-140 (2003).

In Pennsylvania v. Miller, 787 A.2d 1036 (Pa. Super. Ct. 2001), the Pennsylvania Superior Court considered whether an offense was an "equivalent offense" for purposes of its sex offender registry. The court stated "[a]n equivalent offense is that which is substantially identical in nature and definition as the out-of-state or federal offense when compared to the Pennsylvania offense." Id. at 1039 (alteration in original) (citation omitted).

In Miller, the defendant pled guilty to the offense of sexual exploitation of minors in federal court in Hawaii, and then moved to Pennsylvania, where he was ordered to register as a sex offender. Id. at 1037. The Pennsylvania court held the offense from Hawaii was an "equivalent offense" of the Pennsylvania crime of sexual abuse of children through the use of computer depictions, which required registration. Id. at 1039. The Pennsylvania court concluded that, since "the elements of, the conduct prohibited by, and the public policy behind" the two statutes are the same, they are "equivalent offenses"; thus, the defendant was required to be placed on the Pennsylvania registry. Id.

In Massachusetts v. Becker, 879 N.E.2d 691 (Mass. App. Ct. 2008), cert. denied, 129 S. Ct. 320 (2008), the Appeals Court of Massachusetts recently stated that "when determining whether an offense is a 'like offense' or 'like violation,' we consider whether the 'elements of each underlying criminal act' are sufficiently similar under all of the circumstances." Id. at 699 (citation omitted).

In the current appeal, the State asserts: "Public safety is the goal of the registry and requiring an individual to register for committing indecent liberties on a minor child furthers that purpose because the act is the type of conduct that indicates a threat to the public."

While we share the State's concern for public safety, the determination of whether one is placed on the Registry is not determined by the goal of the Registry nor is it limited to a consideration of conduct alone. Rather, a consideration of the elements of the offense and the public policy behind the enactment of the statutes are also valid factors that should be examined. After reviewing all the variables in this case, we find that registration would not be appropriate because the elements of the two offenses and the public policy behind the enactment of these two offenses are not the same. In making its ruling, the family court likewise expressed reservations about requiring registration, stating it would have a "draconian" effect in this case.

The North Carolina offense of Indecent Liberties Between Children is targeted solely at acts committed between children and can be committed only by a child under the age of sixteen. N.C. Gen. Stat. § 14-202.2(a). Additionally, it must involve a child who is at least three years younger than the defendant. Id. It is punishable as a Class 1 Misdemeanor. Id. § 14-202.2(b). The maximum sentence in North Carolina for this offense for a Level I offender (i.e., one having no prior record) such as Appellant is from 1 to 45 days. Id. § 15A-1340.23.

Appellant's misconduct was classified by the North Carolina court as "minor" in the dispositional order. Further, the court found Appellant's delinquency history, based on a scale of "low," "medium," or "high," was "low." The North Carolina court required Appellant to be placed on probation for a period of nine months. Appellant's offense is not one that requires registration in North Carolina. Additionally, the purpose of the North Carolina statute differs significantly from South Carolina's. The North Carolina statute offers protection for both the child victim and the child perpetrator. It criminalizes the inappropriate sexual conduct, but protects the child perpetrator from the detrimental effects of the lifelong stigma of being placed on a sex offender registry as a result of an isolated childhood indiscretion.

In contrast, the South Carolina offense of Lewd Act Upon a Child Under Sixteen is not so limited in its scope. It also applies to adults and has a correspondingly greater sentence – it is a felony punishable by up to fifteen years in prison. S.C. Code Ann. § 16-15-140. Here, Appellant's adjudication for an offense limited to minors, which was classified by the North Carolina court as "minor," for which he received probation, and for which the maximum sentence is from 1 to 45 days, and which does not require registration in North Carolina, is not appropriately similar to the South Carolina offense, which applies to adults and carries a penalty of fifteen years in prison.

As Appellant notes, "Because North Carolina specifically did not and does not deem Appellant's offense to be 'registry eligible', the State of South

Carolina has not used a reasonable method of achieving the statute's good goal of protecting the public welfare and aiding law enforcement." Appellant further notes that "the North Carolina Court specifically categorized the seriousness of Appellant's offense as 'minor' (as opposed to the other available terms 'serious' and 'violent')[.]" Again, we recognize that whether the defendant was required to register in the jurisdiction where the offense occurred is not in itself determinative of the issue, but we believe it is a compelling factor in this particular case in light of the significant differences in the scope of the statutes and their penalties.

Thus, based on the record before us, we hold Appellant should not be required to be on the South Carolina Sex Offender Registry as his adjudicated offense in North Carolina is not sufficiently similar to the South Carolina offense of Lewd Act Upon a Child Under Sixteen.[6]

III. CONCLUSION

We conclude the family court erred in denying Appellant's motion to remove his name from the South Carolina Sex Offender Registry. The family court's order is, therefore,

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[6] Based on our holding, we need not reach Appellant's assertion that he was denied due process by being required to register for the Sex Offender Registry without first having a hearing on his eligibility. We question whether the issue was preserved, but Appellant has shown no error, in any event, as we have previously held that a person's due process rights are not violated by inclusion on the South Carolina Sex Offender Registry. See Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (rejecting the argument the State violated the appellant's due process rights because it deprived him of a liberty interest without a hearing and holding registration as a sex offender is non-punitive and as such "it cannot constitute a deprivation of a constitutionally protected liberty interest"); see also In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding a juvenile's due process claim was without merit and that no liberty interest is implicated in cases involving juveniles, just as in cases involving adults).

REVERSED.

WALLER, J., concurs. PLEICONES, J., concurring in result. TOAL, C.J., concurring in part, dissenting in part in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: While I concur with the majority regarding the subject matter jurisdiction of the family court, I respectfully dissent on the question of whether Appellant's name should be removed from the Sex Offender Registry. I believe Appellant's name should not be removed, and therefore I would affirm the family court's ruling that Appellant must register as a sex offender.

In deciding that the North Carolina statute at issue is dissimilar from S.C. Code Ann. § 16-15-140 (2003 & Supp. 2008), the majority focuses on the difference in the ages of the perpetrator and victim under the statutes. The North Carolina statute Appellant was charged under applies when the perpetrator is younger than sixteen years and the victim is at least three years younger than the perpetrator. The South Carolina statute at issue may be applied to any perpetrator over the age of fourteen years who engages in lewd acts with a person younger than sixteen years. The majority contends that this difference makes the statutes too dissimilar to require Appellant to register as a sex offender under S.C. Code Ann. § 23-3-430 (2003 & Supp. 2008).

In my view, the majority overlooks an important point: that Appellant's criminal sexual conduct with a four year old child meets the elements of both the North Carolina and South Carolina statutes. If Appellant had committed this crime in South Carolina, he could have been charged under Lewd Act Upon a Minor Under Sixteen, S.C. Code Ann. § 16-15-140 (2003 & Supp. 2008), which is a registry-eligible offense under S.C. Code Ann. § 23-3-430(C)(11) (2003). I believe the crime he committed in North Carolina is an offense similar to S.C. Code Ann. § 16-15-140 because it proscribes the very crime he committed. Because Appellant would have been ordered to register as a sex offender if he had committed the same act in South Carolina, I would affirm the family court and hold that he is required under S.C. Code Ann. § 23-3-430 to register as a sex offender in this state.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joanne Levesque Gignilliat, Appellant,

v.

Gignilliat, Savitz & Bettis, L.L.P., Respondent.

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26735
Heard April 8, 2009 – Filed October 12, 2009

AFFIRMED

Thomas L. Moses and Timothy J. Monahan, both of Monahan & Moses, of Greenville, for Appellant.

John Thomas Lay and Jenkins M. Mann, both of Ellis Lawhorne & Sims, of Columbia, and W. Duvall Spruill, of Turner, Padget, Graham & Laney, of Columbia, for Respondent.

JUSTICE BEATTY: Joanne Levesque Gignilliat (Mrs. Gignilliat) appeals from an order granting summary judgment to Gignilliat, Savitz & Bettis, L.L.P. (GSB) on her claims arising from GSB's continued use of her husband's name in the law firm name after his death. We affirm.

I. FACTS

Julian Gignilliat (Gignilliat) was a founding partner in 1968 of what became the GSB law firm. The firm did not have a written partnership agreement. Gignilliat was diagnosed with a serious illness in 2001. Gignilliat died on June 22, 2002. It is undisputed that Gignilliat, cognizant of his terminal illness, requested that GSB continue to use his name after his death and that GSB not be sued.[1]

The Personal Representative (PR) of the Estate of Julian Gignilliat filed an action against GSB and six partners in the firm at Mrs. Gignilliat's request. The PR alleged GSB continued to use and profit from the Gignilliat name without the consent of Gignilliat's estate and without making compensation for its use.

A Consent Order was filed wherein the PR of the estate assigned Mrs. Gignilliat the sole right to any of the estate's claims arising out of the complaint. Subsequently, Mrs. Gignilliat filed an amended complaint naming herself as the plaintiff in which she sought a declaratory judgment regarding the defendants' right to continue using the Gignilliat name without consent, and she asserted claims for (1) infringement on the right of publicity, (2) conversion, (3) unjust enrichment, and (4) quantum meruit. She sought damages and an injunction preventing further use of the Gignilliat name without compensation.

[1] Mrs. Gignilliat testified that her deceased husband visited her in a dream and said that he did not mind if GSB discontinued the use of his name. Nonetheless, this ghostly visit is not a revocation of consent.

The circuit court granted GSB's motion for summary judgment, finding no genuine issues of material fact existed as to any of these claims. The circuit court noted, "No South Carolina case has ever directly addressed whether a law firm may continue to use a deceased partner's name." Mrs. Gignilliat appeals, arguing the circuit court erred in granting summary judgment to GSB on all of her claims.[2]

II. LAW/ANALYSIS

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment 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." Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 534 S.E.2d 688, 692 (2000). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. Id. at 379, 534 S.E.2d at 692. "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Id. at 378, 534 S.E.2d at 692.

A. RIGHT OF PUBLICITY/WRONGFUL APPROPRIATION

Mrs. Gignilliat first contends the circuit court erred in granting summary judgment to GSB on her claim for infringement on the right of publicity. We disagree.

[2] Summary judgment was granted to the individual law firm partners in a separate order that is not at issue here; therefore, the individual partners are not parties to this appeal.

In her amended complaint, Mrs. Gignilliat asserted a claim entitled "Infringement on the Right of Publicity," in which she alleged (1) she owns an enforceable right in the Gignilliat identity, (2) GSB is using some aspect of Gignilliat's identity or persona (his surname) without permission and in a manner that makes Julian Gignilliat identifiable by GSB's use, and (3) GSB's use of the Gignilliat name is likely to cause damage to the commercial value of that persona. Mrs. Gignilliat maintained she was entitled to compensation for the use of Gignilliat's name by GSB and an injunction prohibiting its further use without just compensation.

The circuit court granted GSB's motion for summary judgment, finding South Carolina has not recognized the tort of infringement on the right of publicity. The court noted South Carolina does recognize the tort of wrongful appropriation of personality, but stated Mrs. Gignilliat did not label her cause of action as wrongful appropriation and she would not be entitled to recovery under this theory, in any event.

The court further ruled Mrs. Gignilliat was not entitled to any recovery for use of the Gignilliat name because her claims for damages concerned only the value of professional goodwill, which has no value apart from the individual professional. The court also found the South Carolina Rules of Professional Conduct prevent payment to Mrs. Gignilliat because they prohibit lawyers from sharing fees with nonlawyers. Finally, the court ruled any claim for publicity or wrongful appropriation does not survive the death of the named individual.

(1) Classification of Tort

Initially, we note that the character of a complaint is determined by its factual allegations, not the label assigned to it.

"The right of publicity is best defined as 'the inherent right of every human being to control the commercial use of his or her identity.'" Thomas Phillip Boggess V, Cause of Action for an Infringement of the Right of Publicity, 31 Causes of Action 2d 121, 144 (2006) (quoting McCarthy, The

Rights of Publicity and Privacy 2d § 1:3). "The focus is on commercial use and the right to control that use and to be compensated monetarily for that use; whereas, the right to privacy addresses damages of a person's mental psyche." Id. at 141.

Professor William Prosser identified four basic torts under the right to privacy: (1) intrusion, (2) disclosure, (3) false light, and (4) appropriation. Id. at 139. The first three torts are based upon the idea that a person has the right to be left alone, whereas the fourth is based on the theory that a person has the right to control his or her identity. Id. The term "right of publicity" was coined to break away from the theory of the right to privacy. Id. at 138. Most states now recognize some form of the right of publicity, either under the common law or by statute. Id. at 140.

Jurisdictions have recognized a right of publicity either by expressly acknowledging a separate tort for the right of publicity or by finding it is encompassed within the four classic privacy torts, specifically, wrongful appropriation. See Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000) (noting "[t]he common law right of privacy provides protection against four distinct categories of invasion: (1) intrusion upon a plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about a plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness," and this fourth category "is commonly referred to as appropriation . . . or the right of publicity"); Winterland Concessions Co. v. Sileo, 528 F. Supp. 1201, 1213 (D. Ill. 1981) ("One of the species of the right of privacy recognized by the cases and the commentators is the right of publicity. Violation of this right constitutes the tort of appropriation of a plaintiff's name or likeness for [the] defendant's benefit.").

We have previously stated that South Carolina recognizes three distinct causes of action under the rubric of invasion of privacy:

> In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999). Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity. *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989).

Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 325-26, 586 S.E.2d 108, 110 (2003).

Encompassed in these three recognized torts is the infringement on the right of publicity; it is denominated wrongful appropriation of personality. It addresses the plaintiff's right to the commercial protection of his name, likeness, or identity. See id. at 326, 586 S.E.2d at 110 (stating wrongful appropriation of personality concerns the plaintiff's right at common law to publicize and profit from his name or identity).

In fact, we have recognized this cause of action in some form since at least 1940. In Holloman v. Life Insurance Co. of Virginia, 192 S.C. 454, 458, 7 S.E.2d 169, 171 (1940), we considered the following question: "Does the invasion of privacy by a commercial use of plaintiff's name against her consent entitle plaintiff to damages?" We answered in the affirmative:

> The right of privacy is one which was not definitely recognized by the law until comparatively recent times. But we find ourselves in agreement with a number of authorities to the effect that the violation of such a right is under certain circumstances a tort which would entitle the injured person to recover damages. But the right of privacy is correctly defined in

> 21 R.C.L. 1196 as "the right to be let alone; the right of a person to be free from unwarranted publicity". Or more specifically but less accurately, "the right to live without one's name, picture or statue, or that of a relative, made public against his will".

Id. (emphasis added).

We hold South Carolina does recognize the tort of infringement on the right of publicity. The facts alleged, not just the name of the cause of action used, should be examined in assessing whether a valid claim has been asserted. Cf. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (stating when considering a motion to dismiss, a court should look to the factual allegations made in the complaint, and the "motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory").

(2) Survivability of Claim

We further hold the right to control the use of one's identity is a property right that is transferable, assignable, and survives the death of the named individual. The Supreme Court of Georgia has observed, "the trend since the early common law has been to recognize survivability" of this right. Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982) (stating appropriation of another's name and likeness without consent and for the financial gain of the appropriator is a tort and holding that the right of publicity survives the death of the owner and is inheritable and devisable).

The Georgia court reasoned that the right of publicity is assignable during a person's lifetime because, "without this characteristic, full commercial exploitation of one's name and likeness is practically impossible." Id. at 704. Likewise, if such rights are assignable, they should also be inheritable and devisable. Id.; see also McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994) (concluding the right of publicity is a property right that survives the death of an individual); Prima v. Darden Restaurants, Inc., 78 F.

Supp. 2d 337 (D.N.J. 2000) (holding, in a case involving the widow of a music performer, that New Jersey law recognizes the right of publicity as a property right that descends to the named person's estate upon his death); Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981) (deciding the right of publicity is a property right rather than a personal right that is attached only to the individual and that it is assignable during the person's lifetime and descends upon the individual's death like any other intangible property right).

Moreover, it appears that this Court recognized the survivability of the claim in Holloman when it defined the right of privacy as "the right to live without one's name, picture or statue, or that of a relative, made public against his will." Holloman, 192 S.C. at 458, 7 S.E.2d at 171. The inclusion of the right to protect the privacy of a relative necessarily contemplates survivability of the right.

(3) Nature of Damages

The circuit court found that "[t]he damages alleged in each of these causes of action [asserted by Mrs. Gignilliat] result *solely* from the alleged retention of the professional goodwill value of the Gignilliat name." (Emphasis in original and footnote omitted.) The circuit court stated that Mrs. Gignilliat "cannot claim value in or damages resulting from the professional goodwill of Gignilliat's name" because professional goodwill does not exist separate and apart from the individual. The trial court misconstrued Mrs. Gignilliat's claim as one solely for goodwill.

We have defined "goodwill" in general as follows:

> Goodwill may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity,

> or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

Donahue v. Donahue, 299 S.C. 353, 359, 384 S.E.2d 741, 745 (1989) (quoting Levy v. Levy, 397 A.2d 374, 377 (N.J. Super. Ct. Ch. Div. 1978)).

"Professional goodwill" has been further defined as having the following attributes:

> It attaches to the person of the professional man or woman as a result of confidence in his or her skill and ability. It does not possess value or constitute an asset separate and apart from the professional's person, or from his individual ability to practice his profession. It would be extinguished in the event of the professional's death, retirement or disablement.

Id. (quoting Rathmell v. Morrison, 732 S.W.2d 6, 17 (Tex. App. 1987) (internal citation omitted)).

In Donahue, we held the family court erred in placing a value upon the goodwill of the husband's professional practice and attempting to equitably divide it. Id. at 360, 384 S.E.2d at 745. We noted that the value of goodwill is inherently speculative because it is totally dependent on the professional. Id. Further, in Keane v. Lowcountry Pediatrics, 372 S.C. 136, 641 S.E.2d 53 (Ct. App. 2007), the Court of Appeals held that professional goodwill has no value that exists separate and apart from the professional.

We agree with the circuit court's finding that there is no separate value for goodwill in a professional practice, but we conclude the circuit court erred in characterizing Mrs. Gignilliat's claim as one strictly for goodwill. Mrs. Gignilliat is challenging GSB's assertion that it has the unfettered right to use the Gignilliat name without compensation, which is a distinguishable property right.

Ordinarily the partners remaining after one partner retires do not have an absolute right to continue using the partnership's old name, but such right may be acquired by express agreement with the retiring partner:

> Unless an agreement provides therefor, the partners remaining after one of them has retired are not entitled to the continued use of the old name. They do not secure that right by virtue of the conveyance to them by the retiring partner of all his right, title, and interest in the partnership business, property, or assets, or even the good will where it rests on the personal attributes of the partners.

68 C.J.S. Partnership § 226 (1998) (footnotes omitted). Section 277 of Corpus Juris Secundum further observes that where a partnership is dissolved by the death of a partner, the surviving partners may have the right to continue the use of the firm name, in the absence of a contrary agreement, citing the case of Mendelsohn v. Equitable Life Assurance Society, 33 N.Y.S.2d 733 (App. Term 1942) as authority for this proposition. Id. § 277. Mendelsohn, however, extended the New York common law previously applicable to trade firms to professional partnerships to achieve this result, while simultaneously observing there was an absence of authority in this regard applicable to professional partnerships. Mendelsohn, 33 N.Y.S.2d at 734. Additionally, the Mendelsohn court relied upon the fact that there was express consent to the use of the partners' names. Id.

We conclude the circuit court erred in finding Mrs. Gignilliat's claims fail as a matter of law because she is not entitled to seek payment for goodwill. Mrs. Gignilliat's claims concern the right to use of the Gignilliat name for commercial purposes, which is a recognized property right that is distinguishable from goodwill. Although we acknowledge there is a limited market available for the right to use the name in the legal field,[3] we agree

[3] The South Carolina Rules of Professional Conduct would prevent another law firm besides GSB from simply purchasing the Gignilliat name without having any relationship to Gignilliat. See Comment 1 to Rule 7.5 of Rule 407, SCACR ("[I]t is misleading to use

with other jurisdictions that have found there is a presumption of nominal damages in similar cases involving the infringement on the right to control the use of one's identity:

> Misappropriation of identity is a tort arising from the right to privacy and is designed to prevent the commercial use of one's name or image without consent. To plead misappropriation of identity, the plaintiff must claim "an appropriation without consent, of one's name or likeness for another's use or benefit." A claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity.

Petty v. Chrysler Corp., 799 N.E.2d 432, 441-42 (Ill. App. Ct. 2003) (internal citations omitted) (emphasis added); see also Ainsworth v. Century Supply Co., 693 N.E.2d 510, 514 (Ill. App. Ct. 1998) (holding the trial court erred in granting summary judgment to the defendant on the basis the plaintiff could not establish actual damages for his claim of misappropriation of his likeness; the Appellate Court of Illinois held the law presumes nominal damages in such an instance and noted that to hold otherwise "overlooks . . . the venerable principle that the law will presume that damages exist for every infringement of a right");[4] James v. Bob Ross Buick, Inc., 855 N.E.2d 119, 124 (Ohio Ct. App. 2006) (concluding the trial court erred in granting summary judgment on the plaintiff's claim of misappropriation of his name, stating, "a plaintiff need not establish actual damages in order to prevail on a misappropriation-of-name claim" and that "a plaintiff may seek to recover nominal damages for claims of misappropriation of the plaintiff's name or likeness").

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the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a non lawyer.").

[4] The tort of wrongful appropriation of personality was recognized in 1940; it is illogical to conclude that a tort can exist without any potential for compensation under any circumstances.

The presumed nominal damages recognized by courts are not considered to be the same as goodwill. However, we recognize that, on the facts of this case, damages other than the presumed nominal damages would be difficult to prove and even more difficult to distinguish from professional goodwill.[5]

We hold South Carolina does recognize the right of publicity, that the right survives death, and that nominal damages are presumed. Notwithstanding this holding on the recognition of the right of publicity and its presumed damages, however, we find GSB was entitled to summary judgment as a matter of law. An infringement on the right of publicity requires the unconsented use of the plaintiff's name, likeness, or identity by the defendant for the defendant's own benefit. Here it is undisputed that Gignilliat requested that GSB continue to use his name after his death. There is no evidence to the contrary.[6]

B. CONVERSION

The circuit court ruled GSB was entitled to summary judgment on Mrs. Gignilliat's claim for conversion because "[c]onversion does not apply to a claim for the non-tangible property rights at issue in this matter." The court stated, "The Gignilliat name is neither tangible nor represented by or connected to something tangible."

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[5] We note the circuit court, citing Rule 5.4(a) of the South Carolina Rules of Professional Conduct, found the payment of damages would constitute an impermissible fee-splitting arrangement because the money used to pay goodwill to Mrs. Gignilliat would come from legal fees generated by the remaining partners and associates of GSB. As stated above, we find Mrs. Gignilliat was not seeking solely goodwill damages. Moreover, a law firm's payment of tort damages does not constitute an impermissible fee-splitting arrangement as contemplated by the rule.

[6] This Court takes judicial notice of the custom and practice in this state of law firms continuing to use the names of deceased members in their firm names. Heretofore, the basis has been the taking for granted that the deceased partner would consent. Hereafter, it is presumed, unless proven otherwise, that the deceased partner consented to the continued use of his or her name in the partnership's name.

Mrs. Gignilliat argues the grant of summary judgment to GSB on her conversion claim was error and asserts she "is not aware of any South Carolina jurisprudence on the issue of whether intangible personal property, such as the right of publicity, may give rise to an action for conversion."

This Court has "defined conversion as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co., 378 S.C. 623, 629, 663 S.E.2d 492, 495 (2008); accord Moseley v. Oswald, 376 S.C. 251, 254, 656 S.E.2d 380, 382 (2008); SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990). "To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property." Moseley, 376 S.C. at 254, 656 S.E.2d at 382.

Our courts have previously held that intangible rights are normally not the proper subject for a conversion claim. In Hawkins v. City of Greenville, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004), the Court of Appeals observed that an action for conversion ordinarily lies only for personal property which is tangible or which is represented by or connected with something that is tangible.

"An action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document." 18 Am. Jur. 2d Conversion § 7 (2004) (emphasis added) (footnote omitted); see also H.D. Warren, Annotation, Nature of Property or Rights Other Than Tangible Chattels Which May Be Subject of Conversion, 44 A.L.R.2d 927, 929 (1955) ("[I]t is ordinarily held that an action for conversion lies only for personal property which is tangible, or at least represented by or connected with something tangible, and not for indefinite, intangible, and incorporeal species of property.").

While courts are recognizing that certain intangible rights may properly be the object of a suit for conversion, they are often limited to instances

where the rights have some documented basis to support them. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts, § 15, at 91-92 (5th ed. 1984) (observing the rule that only personal property may be the subject of a conversion claim "has been discarded to some extent by all of the courts," but noting "[t]he process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with[,] some document").

We are reluctant to expand the tort of conversion as it relates to intangible property and conclude that it should be limited to intangible property rights that are identified with some document. In the current appeal, the alleged property right Mrs. Gignilliat sought to enforce was intangible and there was no documentation evidencing this right. Thus, it is not properly subject to a claim for conversion and we hold the circuit court properly granted summary judgment to GSB on Mrs. Gignilliat's claim for conversion.

C. QUANTUM MERUIT AND UNJUST ENRICHMENT

Mrs. Gignilliat lastly argues the circuit court erred in granting summary judgment to GSB on her claims for quantum meruit and unjust enrichment. Mrs. Gignilliat asserts she has established the necessary elements by showing Gignilliat spent a lifetime developing the GSB law firm, GSB has derived a substantial benefit from carrying on the practice under the Gignilliat name, and it would be inequitable for GSB to retain this benefit without compensating Gignilliat's estate.

"This Court has recognized quantum meruit as an equitable doctrine to allow recovery for unjust enrichment." Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "*[Q]uantum meruit*, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000).

To prevail under this theory, a plaintiff must show the following elements: "(1) [a] benefit conferred by [the] plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." Id. at 8-9, 532 S.E.2d at 872; accord Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005).

We affirm the circuit court's grant of summary judgment on this claim. It is axiomatic that a claim for quantum meruit will not lie absent evidence of unjust enrichment. Unlike plaintiff's claim of wrongful appropriation/right of publicity where nominal damages are presumed at law, quantum meruit requires a showing of actual damages resulting from the wrongful retention of benefits (goods or services) by the defendant. Here, Mrs. Gignilliat has failed to offer any evidence of any goods or services bestowed upon GSB. The general argument that GSB "originated business" by associating itself with the Gignilliat name is too speculative. As such, it amounts to no more than an impermissible claim for professional goodwill.

We recognize that the use of the Gignilliat name has some value to GSB, otherwise this litigation would not exist. However, Mrs. Gignilliat has failed to offer any evidence that this value is anything more than sentimental. Thus, her claim for quantum meruit/unjust enrichment fails.

III. CONCLUSION

Based on the foregoing, we affirm the grant of summary judgment to GSB on Mrs. Gignilliat's claims for infringement on the right of publicity/wrongful appropriation of personality, conversion, and quantum meruit/unjust enrichment.[7]

[7] Justice Pleicones would grant summary judgment on the publicity tort based on his conclusion that the common law grants surviving partners the right to continue the use of a deceased partner's name, and because South Carolina recognizes the practice by statute and comments to Rule 7.5 of Rule 407, SCACR.

It is axiomatic that ethical rules for lawyers do not and cannot create substantive rights and certainly cannot deprive one of property. Section 33-41-1070(10) of the South

Carolina Code is offered as support for a partnership's continued use of a deceased partner's name. However, it should be noted that this law is designed to protect the deceased partner's property and makes no mention of the partnership's right to continued use of the deceased partner's name. Section 33-41-1070(10) protects a deceased partner's property from debts incurred by a partnership that continued to use the deceased partner's name.

Mendelsohn v. Equitable Life Assurance Society, 33 N.Y.S.2d 733 (App. Term 1942) is offered in support of the proposition that the common law authorizes the continued use of a deceased partner's name in a professional partnership. To determine whether or not Mendelsohn is applicable to this case, Mendelsohn deserves a closer look.

The issue in Mendelsohn was whether a pleading (Answer) could be drafted on behalf of the defendant by a law firm whose name included the names of deceased partners. The continued use of the deceased partners' names without consent was not an issue. The court expressly noted "there has always been an understanding and agreement between the partners" of the law firm that, in the event of the death or retirement of a partner, "the remaining partners shall own the exclusive right to the firm name[.]" Id. at 734. Mendelsohn recognized that "[a]lmost the entire body of the adjudicated cases dealing with the right to continue a firm name after dissolution refers to ordinary trades rather than professional partnerships." Id. Mendelsohn did not cite any authority for its decision to extend the common law applicable to trade or business firms to professional partnerships. Rather, the court did so on the basis it discerned no reason to apply a different rule to professional partnerships and the use of the firm name was sustainable by reason of an agreement between the partners. Id. Thus, Mendelsohn applied the New York common law authority used for ordinary trade or business firms. Id. (citing Caswell v. Hazard, 24 N.E. 707 (N.Y. 1890)). Further, later cases in New York stated the use of a firm name was purely by statutory authority. See Fisk v. Fisk, Clark & Flagg, 76 N.Y.S. 482, 484 (Special Term 1902) ("[T]he right to continue the use of a firm name after the death of a partner is, in this state, purely a matter of statutory permission. The general rule is that a firm name cannot be so continued if it includes the name of the deceased partner. In order to justify the continued use of the name, the case must be shown to fall within one of the exceptions prescribed by statute . . . .").

The concurring opinion includes no citation to South Carolina common law or English common law that gives a professional partnership the right to continue the use of the name of a deceased partner without consent. The general rule is that the successors to the old business must not, without express agreement, use the old firm name so as to convey the idea that the retiring individuals are still connected with it. Rowell v. Rowell, 99 N.W. 473 (Wis. 1904). However, where the name of an individual has continued to

AFFIRMED.

WALLER, ACTING CHIEF JUSTICE, KITTREDGE, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in a separate opinion.

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be used after his death, so that the name does not designate any existing individual, and has practically become an artificial one, designating nothing but the establishment, the general rule is not applicable. Id. at 479 (citing Slater v. Slater, 67 N.E. 224 (N.Y. 1903)). This is not the status of GSB at this time.

JUSTICE PLEICONES: I concur in the decision to affirm the circuit court order, but write separately on the publicity tort since I conclude that appellant has not stated a cause of action.

Appellant, as assignee of her late husband's estate, sued the law firm (respondent) of which her husband had been a named partner at the time of his death, for respondent's continuing use of his name after his death. At common law, the surviving partners in a business firm had the right to continue to use the firm name after the death of a partner. See Mendelsohn v. Equit. Life Assur. Soc., 178 Misc. 152, 33 N.Y.S.2d 733 (N.Y. App. Term. 1942). In the absence of a statutory bar or ethical prohibition, local custom permits continued use of a deceased partner's name in a professional partnership unless the partnership agreement provides otherwise. Id.; see also 68 C.J.S. Partnership § 277 (1998).[8] South Carolina recognizes the practice by statute,[9] and in the comments to Rule 7.5 of Rule 407, SCACR.[10]

By custom and practice, a law firm in South Carolina may continue to use the name of a deceased partner unless there is an agreement to the contrary. In my opinion, appellant, having asserted no such agreement, has

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[8] Section 277 discusses the use of a deceased partner's name while 68 C.J.S. Partnership § 226 is concerned with continued use of a name after a partner's retirement.

[9] See S.C. Code Ann. § 33-41-1070(10) (2006).

[10] Comment 1 provides in relevant part:

> A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic"….It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a non lawyer.

no cause of action against respondent. I would therefore affirm the circuit court's order.

The Supreme Court of South Carolina

Ann Thompson, Claimant, for John Michael Harvey, deceased employee, Petitioner,

v.

Cisson Construction Company, Employer, and Ohio Casualty Co., Carrier, Respondents.

ORDER

This Court granted petitioner's request for a writ of certiorari to review the Court of Appeals' decision in Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2008). Respondents have filed a request to withdraw the appeal based on a settlement agreement that renders the matter moot. We grant the motion.

Finally, we vacate the Court of Appeals opinion in Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2008).

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
October 8, 2009

The Supreme Court of South Carolina

In the Matter of
Samantha D. Farlow, Petitioner.

ORDER

On June 25, 2007, the Court suspended petitioner from the practice of law for two (2) years. In the Matter of Farlow, 374 S.C. 90, 647 S.E.2d 243 (2007).[1] The Court denied petitioner's request that the suspension be made retroactive to May 25, 2006, the date of her interim suspension.[2] Id.

On March 5, 2009, petitioner filed a Petition for Reinstatement and the matter was referred to the Committee on Character & Fitness (CCF) pursuant to Rule 33, RLDE, Rule 413, SCACR. After a June 19, 2009 hearing, the CCF issued its Report and Recommendation concluding petitioner has met the requirements for reinstatement and recommending that she be reinstated to the practice of law. Neither petitioner nor the Office of Disciplinary Counsel filed objections to the CCF's Report and Recommendation.

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[1] The opinion was refiled after discovery of a scrivener's error. In the Matter of Farlow, 380 S.C. 35, 668 S.E.2d 790 (2008).

[2] In the Matter of Farlow, 369 S.C. 48, 631 S.E.2d 75 (2006).

Petitioner's Petition for Reinstatement is granted. Petitioner is hereby admitted to the practice of law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

October 8, 2009

The Supreme Court of South Carolina

In the Matter of William R. Taylor, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Pearce W. Fleming, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Pearce W. Fleming, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Fleming's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina
October 9, 2009

The Supreme Court of South Carolina

In the Matter of Gilbert S. Bagnell,

Respondent.

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR. After thorough review of the petition, the Court determines that respondent's interim suspension is warranted. Accordingly, respondent's license to practice law in this state is hereby suspended until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina
October 9, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolina Renewal, Inc.,	Appellant,
v.	
South Carolina Department of Transportation, Daniel Shealy, Steve Gwinn, Robert Burriss, and David Figus,	Defendants,
Of Whom South Carolina Department of Transportation is the	Respondent.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4622
Heard February 18, 2009 – Filed October 8, 2009

AFFIRMED

Mark Weston Hardee, of Columbia, for Appellant.

H. Ronald Stanley, of Columbia, for Respondent.

HEARN, C.J.: Carolina Renewal contends the trial court erred in determining its breach of contract claim was barred by collateral estoppel. We affirm.

FACTS

In 2002, Carolina Renewal entered into a contract with the South Carolina Department of Transportation (SCDOT) to perform road construction in Spartanburg County. Shortly after work began, Robert Burriss, a SCDOT employee, made slanderous statements about David Smith, Carolina Renewal's sole officer and shareholder, to employees for Carolina Renewal. Burriss made the following statements to Carolina Renewal's employees: they risked not being paid because Smith had not paid any of his bills; Smith was going to jail for falsifying documents; Smith was going to default on the project; Carolina Renewal would not be able to work for the state anymore; and a different company owned by Smith would not do any more work for the Department. After hearing these statements, all of Carolina Renewal's employees quit work on the project. Because Smith was unable to hire additional employees, Carolina Renewal was unable to perform under the contract. As a result, SCDOT dismissed Carolina Renewal, and Carolina Renewal went out of business.

In November of 2002, Smith, in his individual capacity, commenced a lawsuit for slander against SCDOT. In his complaint and in his answer to interrogatories, Smith argued he was entitled to damages flowing from the contract between Carolina Renewal and SCDOT. At trial, Smith further testified about the contractual damages he and his corporation sustained as a result of the slanderous statements. Ultimately, the jury returned a general verdict in favor of Smith, awarding him $132,750.

In January of 2006, Carolina Renewal brought a claim for breach of contract against SCDOT. SCDOT responded by filing a motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6), SCRCP, arguing the doctrine of collateral estoppel prevented Carolina Renewal from recovering damages under the contract. Initially, the trial court denied SCDOT's motion to dismiss; however, at a subsequent hearing with a different judge, the trial court granted the Department's motion, finding "the issue of contract

damages, that is, loss of profits, loss of future opportunities, loss of income, loss of the bargain were all litigated in the (slander action)." This appeal followed.

STANDARD OF REVIEW

If the trial court considers matters outside of the pleadings in ruling on a motion under Rule 12(b)(6), SCRCP, the motion will be treated as one for summary judgment. Rule 12(b)(6), SCRCP. When reviewing the grant of a motion for summary judgment, this court applies the same standard as applied by the trial court pursuant to Rule 56(c), SCRCP. Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). 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). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in a light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

LAW/ANALYSIS

Carolina Renewal contends the trial court erred in applying collateral estoppel in this case because: (1) it was not a party to initial slander lawsuit between Smith and SCDOT; (2) it was the only party entitled to bring a breach of contract action against SCDOT; (3) slander and breach of contract are separate causes of action; and (4) its breach of contract claim was not litigated during the slander action. We disagree.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984). "While the traditional use of collateral estoppel required mutuality of parties

to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008). The doctrine of collateral estoppel should not be rigidly or mechanically applied. Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998).

Carolina Renewal's absence from the previous slander lawsuit does not insulate it from issue preclusion. As far back as 1982, our supreme court held the doctrine of collateral estoppel barred the plaintiff from relitigating an issue even though the defendant was not a party, or in privity with a party, to the initial action. Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982); Irby v. Richardson, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982). In subsequent cases, our appellate courts have applied collateral estoppel against a defendant in actions in which the plaintiff was not a party, or in privity with a party, to the initial action. S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991); Beall, 281 S.C. at 372, 315 S.E.2d at 191. More recently, our supreme court has noted "mutuality is no longer a requirement of collateral estoppel." Doe v. Doe, 346 S.C. 145, 149, 551 S.E.2d 257, 259 (2001). As these decisions make clear, the identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel. Accordingly, the trial court did not err in applying collateral estoppel against Carolina Renewal even though it was not a party to the initial slander lawsuit between Smith and SCDOT.

In dispensing with the mutuality requirement, our courts have applied collateral estoppel only when the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue. See S.C. Prop. & Cas. Ins. Guar. Ass'n, 304 S.C. at 213, 403 S.E.2d at 627 ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him the opportunity to relitigate the issue.").

Although Carolina Renewal neglects to specifically address this point on appeal, it argues collateral estoppel should not prevent it from commencing a breach of contract claim because it was the only party entitled to bring the action against SCDOT. This fact is of no consequence to us on appeal. In our view, because the interests of Carolina Renewal and Smith are identical, we see no reason to find Carolina Renewal lacked a full and fair opportunity to litigate the issue of damages under the contract with SCDOT.[1] See Restatement (Second) of Judgments § 59 cmt. e (1982) (stating because the interests of closely-held corporations and their owners generally fully coincide, there is no good reason to regard them as legally distinct for purposes of collateral estoppel); see also id. § 59 (3)(b) (espousing the general rule that collateral estoppel bars a closely-held corporation from relitigating issues previously decided in an action where the owner of the corporation was a party).[2]

Next, Carolina Renewal contends collateral estoppel does not bar it from bringing a breach of contract action against SCDOT because its breach of contract claim is a separate cause of action than Smith's initial slander action. The doctrine of collateral estoppel prevents the relitigation of issues, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same. See Judy, 383 S.C. at 7, 677 S.E.2d at 217 ("Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same."). In this case, Smith chose to introduce damages flowing from the alleged breach of contract in his slander action against SCDOT. Accordingly, because the doctrine of collateral estoppel prevents the relitigation of issues, the trial court did not err in determining

[1] In addition to sharing the same interests, the fact Smith actually litigated the issue of contract damages in his slander action provides further evidence that Carolina Renewal was provided with a full and fair opportunity to litigate the issue.

[2] Our courts have relied heavily on the Restatement (Second) of Judgments in developing collateral estoppel jurisprudence. See Beall, 281 S.C. at 370, 315 S.E.2d at 190 (adopting the general rule and exceptions set forth in Sections 27, 28, and 29 of the Restatement (Second) of Judgments (1982)).

collateral estoppel barred Carolina Renewal from relitigating the issue of contract damages in its breach of contract claim.

Finally, Carolina Renewal asserts the trial court erred in determining the issue of contract damages was actually litigated during the slander action. Carolina Renewal does not address the remaining two elements of collateral estoppel. See Beall, 281 S.C. at 369 n.1, 315 S.E.2d at 189-90 n.1 (noting the party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment). Because Carolina Renewal does not argue these issues on appeal, they are considered abandoned.[3] See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating the failure to provide arguments or supporting authority for an issue renders it abandoned); State v. Wakefield, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) (noting, to be considered on appeal, all issues must be argued by the appellant in its initial brief). Accordingly, we decide only whether the issue of contract damages was actually litigated in Smith's slander lawsuit.[4]

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[3] In broad conclusion included in Carolina Renewal's appellant brief, it states "[n]one of the elements for res judicata, collateral estoppel, or issue preclusion are present in this case." This argument is too conclusory to be considered on appeal. See Muir v. C.R. Bard, Inc., 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (stating a one sentence argument is too conclusory to present any issue on appeal). This is especially true in this case, when Carolina Renewal fails altogether to cite the last two elements of collateral estoppel in its brief.

[4] The fact that the jury returned a general verdict in the slander lawsuit has no bearing on whether the issue was actually litigated during that proceeding. To the extent the general verdict would impact our analysis, it would only be in deciding whether the issue of contract damages was directly determined in the slander action or necessary to support the jury's verdict; however, as we stated above, these issues are not before the court.

Because Smith sought to recover damages from the alleged breach of contract in his slander action, we find the issue of contract damages was actually litigated in the slander lawsuit. In the slander action, Smith testified at length about damages he and his corporation sustained as a result of SCDOT's alleged breach of contract. Additionally, in Smith's complaint, he contended the defamatory statements made by Burriss caused him to suffer damage in the form of lost profits under the contract. Later, in his answer to interrogatories, Smith itemized the damages he was seeking to recover in the slander suit: loss of the contract with SCDOT in the amount of $87,000, delay on the project in the amount of $185,000, and lost profits on the project of $100,000. In Carolina Renewal's brief, it acknowledges Smith litigated the issue of contract damages in his slander suit when it states "[Smith] was allowed . . . to interject contract damages due to a third party into [his] slander cause of action . . ." See Shorb v. Shorb, 372 S.C. 623, 628 n.3, 643 S.E.2d 124, 127 n.3 (Ct. App. 2007) (holding a party is bound by a concession in his brief). Clearly, the evidence in this case reveals that Smith sought to recover damages from the alleged breach of contract in his slander lawsuit. As a result, we conclude the issue of contract damages was actually litigated in the slander action, and Carolina Renewal is collaterally estopped from relitigating the issue.

Accordingly, the decision of the circuit court is

AFFIRMED.

SHORT, J., concurs. KONDUROS, J., dissents in a separate opinion.

KONDUROS, J.: I respectfully dissent. The majority finds Smith actually litigated the issue of contract damages at the first trial. Because the trial court was considering this case at the summary judgment stage of the proceedings, I disagree. A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. For summary judgment purposes, a court must view the facts in the light most favorable to the nonmoving party.

George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Because summary judgment is a drastic remedy, a court should cautiously invoke it so it will not improperly deprive a party of a trial of the disputed factual issues. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

A party asserting the defense of collateral estoppel has the burden of proving all of the elements, including whether the issue was actually litigated. See Carrigg v. Cannon, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001) (quoting Beall v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984)) ("The party asserting collateral estoppel 'must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment.'"). Here, SCDOT had the burden of showing the issue of contract damages was actually litigated. Because the case was at the summary judgment stage of the proceedings, the trial court was looking to see if SCDOT presented any evidence that raised a genuine issue of material fact as to whether the issue of contract damages was litigated. Carolina Renewal, the nonmoving party, only needed to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. See Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (clarifying and reaffirming in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment). Despite the fact Smith owned all of the shares of Carolina Renewal, he could not have brought the cause of action for breach of contract individually because he was not a party to the contract.[5] While the first case included testimony regarding the contract, the jury was not asked to examine the terms of the contract or whether SCDOT's actions were a breach of the terms. In fact, Smith did not move to admit the contract into evidence; SCDOT did. SCDOT did not demonstrate the complaint in the first case was amended to

[5] I do not disagree with the majority that mutuality of parties is no longer a requirement for collateral estoppel. However, I do believe the fact that Smith could not have individually brought the breach of contract action is one of several factors that raised a material question of fact as to whether breach of contract damages were actually litigated.

include the breach of contract action, nor point to anywhere in the record from the first case that the parties agreed to try the breach of contract action. Additionally, the verdict in the first case was a general verdict, which made determining whether the jury decided the breach of contract issue impossible. I believe all of this amounted to at least a mere scintilla of evidence the contract damages were not litigated. Accordingly, I would reverse the trial court's grant of summary judgment.