The Supreme Court of South Carolina

RE: Service of Documents by Electronic Mail

ADMINISTRATIVE ORDER

The law firm of Nelson, Mullins, Riley and Scarborough seeks permission to experiment with the use of electronic mail (e-mail) for the service of legal documents. Because this experiment would provide valuable information regarding the feasibility of service by e-mail and use of the United States Postal Service Electronic Postmark, I grant permission to Nelson, Mullins, Riley and Scarborough, as well as other attorneys, to serve and receive documents through e-mail subject to the following conditions.

Attorneys must first agree in writing to serve and receive documents through e-mail. In such instances, service pursuant to Rule 5(b)(1), SCRCP, upon a party represented by an attorney may be effected by e-mail provided that the service has been postmarked by the United States Postal Service Electronic Postmark, as defined in S.C. Code Ann. § 26-6-20(18)(enacted July 16, 2004), and sent to the attorney's e-mail address as provided by the attorney for the purpose of receiving service of legal documents and other correspondence. When service is made via e-mail, the sender must include a description of the contents of the document(s), as well as the caption and civil action number of the case. Such service, postmarked by the United States Postal Service Electronic Postmark, shall have the same effect as service via the United States mail. Service via e-mail shall be in conformity with the requirements contained in the South Carolina Uniform Electronic Transactions Act, S.C. Code Ann. §§ 26-6-10, et seq.

Based on the success of this limited experiment with e-mail service of documents under Rule 5(b)(1), SCRCP, the experiment may be extended at a later date to service of summons and complaints. Nelson, Mullins, Riley and Scarborough, and any other attorneys who participate in this experiment, are directed to provide the Court with feedback regarding

their experience with the use of e-mail for service by February 28, 2005.

s/Jean H. Toal C.J.
Chief Justice Jean H. Toal

Columbia, South Carolina
November 15, 2004

The Supreme Court of South Carolina

In the Matter of William R. McCants, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 1, 1972, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated October 14, 2004, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of William R. McCants shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

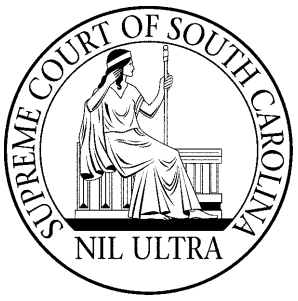
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

Justice Costa M. Pleicones not participating

Columbia, South Carolina

November 18, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45

November 22, 2004

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(Dillon, Judge John M. Milling)

2004-UP-564-The State v. Diamond Jack Harley
(Orangeburg, Judge Edward B. Cottingham)

2004-UP-565-The State v. Sakina Ferebee
(Beaufort, Judge J. Ernest Kinard, Jr.)

2004-UP-566-The State v. Thomas Mark Tucker
(Greenville, Judge Edward W. Miller)

2004-UP-567-The State v. Jeremy Richard Tisdale
(Berkeley, Judge R. Markley Dennis, Jr.)

2004-UP-568-The State v. Amy R. Workman
(Horry, Judge Steven H. John)

2004-UP-569-The State v. Earnest Pressley
(Aiken, Judge William P. Keesley)

2004-UP-570-The State v. Jonathon M. Johnson
(Orangeburg, Judge Edward B. Cottingham)

2004-UP-571-The State v. Donald Mathis
(Greenville, Judge John W. Kittredge)

2004-UP-572-The State v. Rodolfo A. Salinas
(Spartanburg, Judge J. Derham Cole)

2004-UP-573-The State v. Daniel Snider
(Anderson, Judge J.C. Buddy Nicholson, Jr.)

2004-UP-574-The State v. Jeffery Allen Vaughn
(Greenville, Judge Edward W. Miller)

2004-UP-575-Louise Wellington, as GAL for Johnny Lee Sanders v. Roberta Floyd, individually, and as administrator of Manor House of Olanta and Manor House of Olanta
(Florence, Judge B. Hicks Harwell, Jr.)

2004-UP-576-The State v. James Holmes, Jr.
(Georgetown, Judge Paula H. Thomas)

2004-UP-577-The State v. Bruce Franklin Mathis
(Spartanburg, Judge Larry R. Patterson)

2004-UP-578-David E. Steele v. Clara M. Steele
(Lancaster, Judge Walter B. Brown, Jr.)

2004-UP-579-South Carolina Farm Bureau Mutual Ins. Co. v. Steven P. Moore, Tracey Lee Moore, Becky T. Smith and Barry Smith
(Oconee, Judge Alexander S. Macaulay)

2004-UP-580-The State v. Sarah Lee Washington
(Laurens, Judge James W. Johnson, Jr.)

2004-UP-581-The State v. Latorey J. Green
(Sumter, Judge Howard P. King)

2004-UP-582-Donald C. Bedford v. Mercury Finance Company of South Carolina and Travelers Rest Cars-Trucks, LLC
(Greenville, Judge Larry R. Patterson)

2004-UP-583-The State v. Ronell R. Brown
(Charleston, Judge A. Victor Rawl)

2004-UP-584-The State v. Kozales John Fulmore
(Georgetown, Judge John L. Breeden)

2004-UP-585-The State v. Wanda Kay Pruitt
(Richland, Judge G. Thomas Cooper, Jr.)

2004-UP-586-The State v. Devin Jamaal Kershaw
(Richland, Judge Reginald I. Lloyd)

2004-UP-587-The State v. Randy Marchant
(Dorchester, Judge Diane Schafer Goodstein)

PETITIONS FOR REHEARING

3864-State v. Weaver	Denied 11/18/04
3865-DuRant v. SCDHEC et al.	Pending

3871-Cannon v. SCDPPS	Pending
3877-B&A Development v. Georgetown	Pending
3878-State v. Frey	Pending
3879-Doe v. Marion	Pending
3880-Lingard v. Carolina By-Products	Pending
3882-Nelson v. Charleston Cty. Parks	Pending
3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2004-UP-439-State v. Bennett	Pending
2004-UP-465-State v. Duncan	Pending
2004-UP-468-State v. Holley	Denied 11/18/04
2004-UP-472-State v. Jones	Denied 11/18/04
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-489-Exide Corp. et al. v. Bush's Recycling	Pending
2004-UP-491-State v. Clark	Pending
2004-UP-492-State v. Burns	Pending
2004-UP-496-Skinner v. Trident Medical	Denied 11/18/04
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending

2004-UP-506-Passaloukas et al v. Bensch	Pending
2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al. (5)	Pending
2004-UP-522-Crockett v. Carolina First Bank	Pending
2004-UP-524-State v. Tention	Denied 11/18/04
2004-UP-526-Boland v. Boland	Pending
2004-UP-529-Vallentine v. Vallentine	Pending
2004-UP-532-Barnes v. Auto Pro	Pending
2004-UP-533-Harrington v. Hopewell Health	Pending
2004-UP-539-Murray v. Murray	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-546-Reaves v. Reaves	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3676-Avant v. Willowglen Academy	Pending
3680-Townsend v. Townsend	Pending

3683-Cox v. BellSouth	Pending
3684-State v. Sanders	Pending
3690-State v. Bryant	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3714-State v. Burgess	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3717-Palmetto Homes v. Bradley et al.	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3724-State v. Pagan	Pending
3728-State v. Rayfield	Pending

3729-Vogt v. Murraywood Swim	Pending
3730-State v. Anderson	Pending
3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3743-Kennedy v. Griffin	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending
3753-Deloitte & Touche, LLP v. Unisys Corp.	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending

3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending
3784-State v. Miller	Pending
3786-Hardin v. SCDOT	Pending
3787-State v. Horton	Pending
3789-Upchurch v. Upchurch	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending
3800-Ex parte Beard: Watkins v. Newsome	Pending
3802-Roberson v. Roberson	Pending
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending

3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending
3835-State v. Bowie	Pending
3841-Stone v. Traylor Brothers	Pending
3847-Sponar v. SCDPS	Pending
3843-Therrell v. Jerry's Inc.	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending
3851-Shapemasters Golf Course Builders v. Shapemasters, Inc.	Pending
3852-Holroyd v. Requa	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-515-State v. Glenn	Pending

2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston’s Auto Service	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-719-SCDSS v. Holden	Pending

2003-UP-723-Derrick v. Holiday Kamper et al.	Pending	
2003-UP-735-Svetlik Construction v. Zimmerman	Granted	11/17/04
2003-UP-736-State v. Ward	Pending	
2003-UP-751-Samuel v. Brown	Pending	
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending	
2003-UP-757-State v. Johnson	Pending	
2003-UP-758-Ward v. Ward	Pending	
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending	
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending	
2004-UP-011-Baird Pacific West v. Blue Water	Pending	
2004-UP-012-Meredith v. Stoudemayer et al.	Pending	
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending	
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending	
2004-UP-050-Lindsey v. Spartan Roofing	Pending	
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending	
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending	
2004-UP-098-Smoak v. McCullough	Pending	
2004-UP-100-Westbury v. Dorchester Co. et al.	Pending	
2004-UP-110-Page v. Page	Pending	
2004-UP-119-Williams v. Pioneer Machinery	Pending	
2004-UP-142-State v. Morman	Pending	

2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-215-State v. Jones	Pending
2004-UP-216-Arthurs v. Brown	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-237-In the interest of B., Justin	Pending
2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-256-State v. Settles	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-306-State v. Lopez	Pending
2004-UP-319-Bennett v. State of S. C. et al.	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending
2004-UP-344-Dunham v. Coffey	Pending

2004-UP-346-State v. Brinson	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending
2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-410-State v. White	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep’t of Probation	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Nickie White, Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25896
Heard October 7, 2004 – Filed November 15, 2004

AFFIRMED AS MODIFIED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin; and Solicitor Warren B. Giese, all of Columbia, for Petitioner-Respondent.

Katherine Carruth Link, of West Columbia; and South Carolina Office of Appellate Defense, both of Columbia, for Respondent-Petitioner.

JUSTICE BURNETT: This matter is before the Court on both parties' petitions for a writ of certiorari seeking review of the Court of Appeals' decision in State v. White, 353 S.C. 566, 578 S.E.2d 728 (Ct. App. 2003). We affirm as modified.

FACTUAL BACKGROUND

Following a jury trial, Respondent/Petitioner Nickie White (White) was convicted of first-degree criminal sexual conduct (CSC) and kidnapping. White was sentenced to consecutive prison terms of thirty years for the criminal sexual conduct and ten years for kidnapping. The Court of Appeals affirmed White's kidnapping conviction, but reversed White's first-degree CSC conviction, holding the circuit court erred in refusing to charge assault and battery of a high and aggravated nature (ABHAN) as a lesser-included offense of CSC. The Court of Appeals also concluded the trial court did not err in refusing to charge simple assault as a lesser included offense of CSC and that any error in admitting the testimony of the State's expert on post-traumatic stress disorder and sexual abuse was harmless. Id. at 575-76, 578 S.E.2d at 733.

The events giving rise to White's conviction occurred in the early morning hours of August 1, 1998, after White and the victim left a club in Columbia where the victim was employed. On several previous occasions, the victim and White conversed while the victim worked. On the night of July 31, 1998, White was again a customer in the club. White and the victim talked and danced. When the victim needed to go for change during her shift, she asked White to accompany her. While the two were out, they took photographs together, kissed, and held hands.

White and the victim returned to the club and the victim accepted White's invitation to breakfast. Soon thereafter, the victim testified she became tired and frustrated because she had not made much money that night. She therefore declined White's breakfast invitation. Despite her fatigue and frustration, the victim agreed to drive White to his grandmother's

house where he resided because he had no ride home. When they arrived, White went inside to check on his grandmother and then returned to the car where the victim was waiting. At this point, White and the victim offered very different accounts of the events that followed.

The victim testified White asked her to take him to the store to buy a soda. The victim further testified that White pulled a knife on her, held it to her throat, and threatened to kill her if she did not do as he said. White then directed the victim to Earlewood Park where he ordered her to park the car. When the victim attempted to escape, White ran her down and dragged her into the woods. White punched the victim, raped her, and took one of her rings. White began choking the victim, and a struggle ensued for the knife. The victim testified she retrieved the knife and began swinging it back and forth in White's direction, injuring White. White then grabbed the victim and began choking her again. The victim threw the knife into the woods and grabbed White's genitals. The two continued to struggle and White suddenly walked off. Shortly after the attack, the victim encountered two men in the park who took her to the hospital.

White's account differed. According to White, after going to the store for a soda, the victim asked him to go to Earlewood Park to watch the sunrise. White testified he brought along a butcher knife to protect the two because the area has a history of drug-related violence. Once White and the victim arrived at the park, White stated the victim began "coming on" to him. The victim began kissing him and the two engaged in what White contended was consensual sex. White testified he ended the sexual encounter because he began thinking of his girlfriend. According to White, the victim became so angry that she grabbed White's knife and stabbed him. In self-defense, he hit her in the eye.

White testified he initially lied to law enforcement officers when he said he had been robbed by five males dressed in camouflage because he was scared and in shock.

ISSUES

I. Did the Court of Appeals err in concluding White was entitled to an ABHAN charge?

II. Did the Court of Appeals err in affirming the trial court's refusal to charge the jury on simple assault and battery as a lesser-included offense of first-degree CSC?

III. Did the Court of Appeals err in affirming the trial court's admission of expert testimony on post-traumatic stress disorder and sexual abuse?

I.

The State argues the Court of Appeals erred in holding White was entitled to a charge on ABHAN as a lesser included offense of first-degree CSC. We disagree.

ABHAN is a lesser included offense of first degree CSC. State v. Primus, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002). The law to be charged is determined by the evidence presented at trial. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense. Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999). Conversely, a trial judge does not err by refusing to charge a lesser included offense where there is no evidence tending to show the defendant was guilty only of the lesser offense. State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976).

The Court of Appeals did not err in concluding the trial judge should have charged the jury on ABHAN and reversing White's CSC conviction. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence). Both the victim's and White's testimony support a charge of ABHAN. ABHAN is "an unlawful act of violent injury

accompanied by circumstances of aggravation." Primus, 349 S.C. at 580, 564 S.E.2d at 105. "'Circumstances of aggravation' is an element of ABHAN." Id. "Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority." Id. at 580-81, 564 S.E.2d at 105-106.

The victim's testimony that prior to the commission of the CSC, White dragged her into the woods while threatening her with the knife and punched her in the eye supports a charge of ABHAN because it was contemporaneous with the CSC. White's testimony that he and the victim engaged in consensual sex, the victim stabbed him, and he hit the victim in the eye, is evidence from which the jury could infer White committed ABHAN rather than CSC. Cf. State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003) (concluding the defendant, in prosecution for CSC, was not entitled to jury instruction on ABHAN where the defendant did not testify and there was no evidence presented at trial to support the defense's assertion that the sex was consensual). In other words, there was evidence from which the jury could have concluded the sex was consensual and that the battery occurred after the sexual encounter. Therefore, the Court of Appeals did not err in holding White was entitled to an ABHAN charge and reversing White's first degree CSC charge.

II.

White argues the Court of Appeals erred in affirming the trial court's refusal to charge simple assault and battery as a lesser included offense of first-degree criminal sexual conduct. We disagree, although we modify the Court of Appeals' analysis.

The Court of Appeals concluded this case is outside the realm of simple assault and battery because the parties are of opposite sexes. An example of a circumstance of aggravation includes difference in gender. Primus, 349 S.C. at 580, 564 S.E.2d at 105. Simple assault and battery is an

unlawful act of violent injury to another, *unaccompanied by any circumstances of aggravation*. State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999) (emphasis added). Therefore, the Court of Appeals determined that a simple assault and battery charge was not proper because a circumstance of aggravation existed in this factual scenario.

The Court of Appeals' holding appears to establish a bright line rule that in all cases of assault and battery involving persons of different genders, any assault must be one of a high and aggravated nature. A difference in gender, like any other aggravating circumstance, is a factor for the court to consider in determining if the evidence warrants a jury charge on simple assault. A simple assault and battery may occur between a man and a woman, depending on the degree of violence and the circumstances attending the attack.[1] See e.g., State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963) (concluding that resistance to lawful arrest, an aggravating factor, may warrant a charge on simple assault and battery depending on the facts of the case). Every assault and battery, however slight, upon a member of the opposite sex does not become assault and battery of a high and aggravated nature because of the very fact the attack was upon one of the opposite sex. A difference in gender is a factor to be considered, together with the other circumstances of the attack, in determining the gravity of the assault and battery upon the person.

Although, a difference in gender alone is not dispositive on whether the jury should be charged with simple assault and battery, we believe under the facts of this case, the trial judge properly denied White's request for a simple assault and battery charge.

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[1] See State v. Shea, 226 S.C. 501, 505-07, 85 S.E.2d 858, 859-60 (1995) (trial court erred in not charging jury on simple assault and battery where man was indicted for assault with intent to ravish and assault and battery of high and aggravated nature against female); State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002), cert. denied, Nov. 21, 2002 (male defendant convicted of three counts of simple assault and battery under indictments for criminal sexual assault with his niece); State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

III.

White contends the Court of Appeals erred in concluding the trial court properly allowed Cole Badger, a psychotherapist who counseled the victim and qualified as an expert in post-traumatic stress disorder and assessment and treatment of sexual abuse, to testify. We disagree.

First, White argues Badger's testimony in this case was outside the scope of the exception for rape trauma evidence carved out by State .v Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). In Schumpert, we held that both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect. Id. at 506, 435 S.E.2d at 862. White argues that Schumpert only applies in cases in which there is a child victim. Because the victim in the present case was an adult when the incident occurred, Schumpert is inapplicable. We disagree.

Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior. Nevertheless, the importance of rape trauma testimony in the case of a child victim does not negate the relevance of rape trauma evidence where the victim is an adult. The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). This is true whether the victim is an adult or child. See State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982) (concluding in prosecution for rape in which defendant raised defense of consent, psychiatrist's testimony that twenty-one year old victim had been suffering from rape trauma was relevant).

Second, White argues the prejudicial effect of the expert testimony outweighed its probative value. Specifically, White argues Badger should not have been allowed to testify the victim's symptoms were consistent with those of a recent trauma sufferer. We disagree. Badger's

testimony is consistent with the probative purpose of admitting rape trauma evidence, i.e., to refute the defendant's contention that the sex was consensual and to prove that a sexual offense occurred.

Furthermore, we agree with the Court of Appeals that Badger's testimony was cumulative. Even assuming the trial judge erred in admitting the testimony, reversal is not warranted when evidence erroneously admitted is merely cumulative. See Rule 403, SCRE. At trial Badger testified that the victim's symptoms were consistent with someone who had suffered trauma and had been raped.[2] A nurse who examined the victim testified that the victim was "upset and appeared frightened, disheveled; she was crying, visible shaken." Additionally, the nurse testified the victim's physical and mental state was consistent with what the nurse was told happened to the victim. Dr. Jenkins testified that the victim was "quite tearful; she was very agitated" and that the victim had suffered trauma.

Finally, White argues that Badger improperly testified she believed the victim. We conclude White opened the door to this testimony by cross-examining Badger as to whether she had cases in which she did not believe the alleged victim. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (one who opens the door to evidence cannot complain of its admission).

For the foregoing reasons, we affirm as modified the Court of Appeals' decision.

AFFIRMED AS MODIFIED.

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

[2] For example, Badger testified that the victim had nightmares, could not concentrate, and was distrustful of others.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Municipal Association of South Carolina, Plaintiff,

v.

AT&T Communications of the Southern States, Inc., Defendant.

Opinion No. 25897
Heard October 5, 2004 – Filed November 22, 2004

CERTIFIED QUESTION ANSWERED

Robert Erving Stepp, Elizabeth Van Doren Gray, and Robert E. Tyson, Jr., all of Sowell, Gray, Stepp & Laffitte, L.L.C., of Columbia, for Plaintiff.

Belton Townsend Zeigler, of Columbia; and James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, for Defendant

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PER CURIAM: Pursuant to Rule 228, SCACR, we accepted the following question on certification from the United States District Court for the District of South Carolina: "Does South Carolina law allow municipalities to impose by ordinance a 5% per month penalty for the late

payment of business license taxes?" We hold South Carolina law allows municipalities to impose such a penalty by ordinance.

BACKGROUND FACTS[1]

The plaintiff Municipal Association of South Carolina (MASC) is a non-profit organization composed of 229 municipalities in South Carolina.[2] In 1999, the General Assembly enacted the South Carolina Telecommunications Act of 1999 (Act), codified at S.C. Code Ann. § 58-9-2200, et. seq. (Supp. 2003). Pursuant to this Act, municipalities can impose a business license tax on telecommunications companies doing business within a municipality. Id. The amount of the tax is based upon the gross income from retail telecommunications services that either originate or terminate within the municipality and is charged to a service address located within the municipality. Id. Between 1999 and 2003, the business tax was not to exceed 3/10 of one percent of the gross income for the preceding year. Id. The tax is due January 1st and considered delinquent if not paid by January 31st. Most of the state's municipalities have authorized the MASC to collect the taxes from the telecommunications businesses and the MASC is to receive 4% of what it collects.

On March 2, 2000, defendant AT&T Communications of Southern States, Inc., (AT&T) paid its telecommunications business taxes for the year 1999 in the amount of $737,686.65. On June 18, 2001, AT&T reported additional gross income for the tax year 1999 and paid $1,025,937.65 in additional business license taxes. AT&T contends MASC refused to accept this payment for nearly six (6) months. In any event, AT&T eventually paid the additional taxes and now the MASC seeks a penalty of $872,047.00.

Additionally, on February 28, 2002, AT&T paid its year 2001 taxes which were due on January 31, 2002. The MASC is seeking a late payment

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[1]The facts are based on the factual findings in the district court's certification order. See Rule 228, SCACR.

[2] Apparently, almost every municipality in South Carolina is a member.

penalty on the 2001 taxes in the amount of $73,560.70 and requesting a statutory audit because the MASC contends that AT&T actually owes more for 2001.

DISCUSSION

This certified question revolves around the powers granted to municipalities. Section 5-7-30 lists the powers conferred upon municipalities. Specifically, this section provides that a municipality:

> may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including . . . levy a business license tax on gross income . . . . The municipal governing body may fix fines and penalties for the violation of municipal ordinances and regulations not exceeding five hundred dollars or imprisonment not exceeding thirty days, or both.

S.C. Code Ann. § 5-7-30 (2004). Additionally, "responsibilities granted local government subdivisions by [the] Constitution and by law shall include those fairly implied and not prohibited by [the] Constitution." S.C. Const. art. VIII, § 17. Furthermore, § 5-7-10 states that "[t]he powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities." S.C. Code Ann. § 5-7-10 (2004).

> Determining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain

> whether the ordinance is inconsistent with the Constitution or general law of this State. . . .

Hospitality Ass'n v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116-7 (1995).

Clearly, the municipalities have the power to enact these ordinances. See S.C. Code Ann. § 58-9-2200 et. seq. The issue is whether these ordinances are inconsistent with state law. "[I]n order for there to be a conflict between a state statute and a municipal ordinance 'both must contain either express or implied conditions which are inconsistent or irreconcilable with each other. . . . If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.'" The Town of Hilton Head v. Fine Liquors, 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990)(quoting McAbee v. Southern Ry. Co., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)).

Furthermore, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The language must also be read in a sense which "harmonizes with its subject matter and accords with its general purpose." Id. (citations omitted).

Section 5-7-30 specifically provides for a $500 maximum fine and/or imprisonment for thirty (30) days for a violation of a municipality's ordinance. The fine is not explicitly designated as either civil or criminal. MASC contends the reference is to only a criminal penalty and that the power to impose a civil penalty is implied. AT&T contends the $500 limit applies to both civil and criminal penalties.

Giving the words of § 5-7-30 their ordinary meaning and harmonizing the language with its subject matter, we conclude the term "fine" in 5-7-30 applies only to criminal fines. By including the reference to a maximum term of imprisonment, the General Assembly obviously was contemplating a maximum criminal fine. See 36A C.J.S. Fines § 9 (2004)("A statute

providing that on a conviction the party guilty of violating it shall be fined or imprisoned or both ordinarily contemplates a criminal proceeding only.") Furthermore, merely because a criminal remedy has been specifically authorized does not mean the General Assembly meant this to be the exclusive manner by which municipalities could enforce ordinances. As noted above, the powers of a municipality are to be liberally construed and include those fairly implied and not prohibited by the Constitution. S.C. Const. art. VIII, § 17; S.C. Code Ann. § 5-7-10. The power of the municipalities to impose a civil fine for a violation of its ordinances is fairly implied and not prohibited. Therefore, in conclusion, we find these ordinances are not inconsistent with state law. Accordingly, we answer the certified question affirmatively: South Carolina law allows municipalities to impose by ordinance a 5% per month penalty for the late payment of business license taxes.

We also note that although the issues of reasonableness and constitutionality of such a fine are apparently at issue in this case, we are limited to answering only the certified question before us. Therefore, we specifically express no view as to the reasonableness or constitutionality of the fine imposed.

QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of H. Brent Fortson, Respondent.

Opinion No. 25898
Submitted October 26, 2004 – Filed November 22, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

R. Davis Howser, of Howser Newman & Besley, LLC, and Elizabeth Van Doren Gray, of Sowell Gray Stepp & Laffitte, LLC, both of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a sixty (60) day suspension from the practice of law. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a sixty (60) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent engaged in a business relationship with South Carolina Real Estate Services, LLC, (RES), a company managed by Cathy Pittman, daughter of Anna Knox (Knox), and Attorney Support, Inc., (ASI), a company owned and managed by Knox. These two companies provided services to assist attorneys in the closing of real estate transactions.

Neither Knox nor Pittman were employees of respondent or his law firm during the period relevant to the Agreement. Neither Knox nor Pittman have ever been admitted to the practice of law. At no time relevant to the facts in the Agreement were any persons employed by ASI or RES licensed to practice law. Respondent had no interest in either ASI or RES and paid them as independent contractors for their services on a case-by-case basis.

The functions provided by RES and ASI included communication with lenders, realtors, buyers and sellers, title abstract searches, the preparation and review of legal documents for closings, attendance at closings, issuance of title insurance, the receipt and disbursement of funds for the transaction, and completion of follow up tasks, including but not limited to recording documents in the public records. In connection with the handling of the funds for real estate closings for respondent, ASI provided an "escrow service." All of these functions took place at the offices of RES and/or ASI with the exception of the actual closings which usually took place at respondent's office. Almost all U.S. mail, facsimiles, and other communications and deliveries related to these functions were directed to the offices of RES and/or ASI, as were almost all telephonic communications concerning real estate closings by respondent.

In real estate closings, RES and/or ASI utilized computer generated stationary with respondent's law office letterhead. Use of respondent's letterhead in this fashion was with respondent's knowledge and consent. By using respondent's letterhead and through other means which were known to respondent and to which respondent

consented, Knox represented herself as and caused others to believe that she was an employee of respondent or respondent's law firm when, in fact, she was not respondent's employee during the period relevant to the Agreement.

In completing the functions described above, neither RES nor ASI's owners or employees were supervised by a licensed attorney. Respondent did not supervise the work of either RES or ASI, except to review the closing documents and title abstract prior to closings. Generally, all communications concerning ASI's services were directly between respondent and Knox and any services needed from RES were obtained by Knox. Likewise, most communications with lenders and parties to the real estate transactions were handled by Knox, not respondent.

Respondent caused or permitted all funds for these real estate transactions assisted by RES and ASI to be deposited or wired into the ASI "Real Estate Account" which was maintained by ASI at its office. Respondent directed funds being transferred by wire to be wired by lenders directly to the ASI account managed by Knox at ASI's office. When respondent received checks made payable to his order or the order of his law firm, respondent endorsed the checks and delivered them to Knox. ASI's bank account was not an IOLTA account and it was solely controlled by ASI owner and manager Knox. Bank statements and cancelled checks were sent directly to ASI. Knox had exclusive signatory authority over this bank account and controlled all aspects of it, including deposits, disbursements, possession of checks and deposit slips, and the receipt of monthly bank statements, cancelled checks, and other documents propagated by the bank concerning account activity, all of which was maintained by and in custody and control of Knox at ASI's office. With the exception of a review of the ledger accounts for each closing prepared by Knox, which respondent represents he performed, respondent never inspected or audited the ASI account used by Knox to deposit and thereafter disburse the proceeds of respondent's real estate closings handled by ASI and RES.

The arrangement between respondent and ASI (utilizing the services of RES) was in effect for approximately four years. Either during or after each of the numerous transactions involving RES/ASI, respondent signed the HUD-1 Settlement Statement attesting to the representation printed on the Settlement Statement that respondent certified the funds itemized were an "accurate account of the funds which were received and have been or will be disbursed by the undersigned . . ." (emphasis added) or words of similar import or effect. The term "undersigned" on each of these HUD-1 Settlement Statements refers to respondent. In fact, respondent made no disbursements in connection with the RES/ASI assisted real estate transactions and, instead, entrusted the disbursements to be made by Knox from ASI's bank account, the checks and records of which were maintained by Knox at ASI's office. Respondent estimates he consummated approximately 1051 real estate closings by using the services of ASI and/or RES under the foregoing arrangement with Knox making disbursement of the proceeds from the ASI bank account controlled by Knox.

In or around February 2004, respondent learned from Knox's attorney that approximately twelve mortgage payoffs related to real estate closings for respondent's clients handed by ASI and RES had not been paid. Thereafter, respondent made inquiries to Knox about these open and unpaid mortgages which should have been paid in full out of the proceeds of the closings. When confronted, Knox acknowledged to respondent that she had misappropriated funds from the ASI account related to closings for respondent's clients. Knox then produced a document itemizing the transactions in which there were shortages and the amounts thereof. From the documentation submitted in support of the Agreement, it appears the total amount of funds from respondent's clients misappropriated by Knox was approximately $1,151,075.04. These misappropriated monies were funds that had been deposited in the ASI real estate account from closings ASI handled for respondent. These missing funds represent monies allocated for payoffs of mortgages from twelve of respondent's clients. Each of the HUD-1 Settlement Statements from the twelve closings from which money was appropriated bears respondent's signature as

"Settlement Agent." One million one hundred fifty one thousand seventy five dollars and four cents remains missing.

After learning of Knox's misappropriation, respondent immediately filed a self-report with Disciplinary Counsel and with his errors and omissions carrier and subsequently paid all amounts due on the mortgages. Knox was indicted and subsequently pled guilty to the misappropriation of $1,151,075.04. Knox admitted to perpetrating an ongoing scheme of retaining mortgage payoffs from respondent's closings over a period of approximately four years. It is now known to respondent that Knox had been regularly misappropriating funds from closings she handled for respondent and was replacing monies previously misappropriated with monies from subsequent closings until her scheme became known.

Respondent did not at any time relevant to the foregoing advise any of his clients of any limitations on his representation in connection with real estate closings. He did not advise his clients that unsupervised non-lawyers were entrusted with the disbursement and accounting of all closing funds, as well as the preparation and completion of closing documents and recording of the same.

Before Knox's misappropriation scheme was discovered, respondent became concerned about liability related to his arrangement with Knox due to certain problems that arose with closings using ASI and/or RES services. These problems were unrelated to and not indicative of Knox's misappropriations. Thereafter, respondent required Knox to present him with evidence of errors and omission insurance policies related to the services being provided. Respondent now recognizes that ASI/RES' insurance policies covered only errors and omissions and that the policies did not provide coverage for misappropriation.

During the period of respondent's foregoing arrangement with RES/ASI, respondent maintained the closing documents but did not maintain the related disbursement records as required by Rule 417, SCACR. Furthermore, during this period, respondent failed to

reconcile or even inspect ASI's bank account used for deposits and disbursements of the funds of respondent's clients as required by Rule 417, SCACR. Additionally, respondent never inspected or audited the "Real Estate Account" of ASI. As a result, respondent failed to safekeep the funds of his clients and others and, in so doing, assisted Knox in the unauthorized practice of law.

Respondent now recognizes that allowing non-employees to have access to and control over money which belongs to clients and others and was entrusted to respondent as a result of real estate closings constituted misconduct regardless of whether there were shortages in the "escrow service" account provided by ASI. Respondent now recognizes and acknowledges that the use of an "escrow service" as provided by Knox constitutes lawyer misconduct, regardless of whether the funds were missing and whether the recordkeeping requirements of Rule 417, SCACR, were conducted by respondent.

To ODC's best knowledge and belief, respondent fully cooperated with ODC's inquiries into this matter.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2(c) (lawyer may limit objectives of representation with client consent after consultation); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter); Rule 1.15 (lawyer shall safeguard property of client; lawyer shall maintain complete records of account funds); Rule 5.3 (lawyer shall make reasonable efforts to ensure firm has in effect measures giving reasonable assurance conduct of non-lawyer retained by lawyer is compatible with professional obligations of lawyer; lawyer shall be responsible for conduct of non-lawyer retained by the lawyer if that conduct would be a violation of the Rules of Professional Conduct if engaged in by lawyer and lawyer ratifies the conduct); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the unauthorized

practice of law); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits he failed to comply with the recordkeeping provisions of Rule 417, SCACR. Finally, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of Greenville County, and on behalf of all others similarly situated, Respondent,

v.

Greenville County, a Political Subdivision of the State of South Carolina, Dozier Brooks, Scott Case, C. Wade Cleveland, Bob Cook, Joseph Dill, Lottie Gibson, Allen "Bunk" Johnson, Mark C. Kingsbury, Xanthene Norris, Stephen Selby, and Dana Sullivan, Paul B. Wickensimer in their official capacity as Greenville County Council Members, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 25899
Heard June 8, 2004 – Filed November 22, 2004

REVERSED

Thomas H. Coker, Jr., Boyd B. Nicholson, Jr., and Joel M. Bondurant, Jr., all of Haynsworth Sinker Boyd, PA, of Greenville, for Petitioners.

James G. Carpenter and Jennifer J. Miller, both of The Carpenter Law Firm, PC, of Greenville, for Respondent.

JUSTICE PLEICONES: We granted certiorari to consider a Court of Appeals' decision reversing the circuit court's dismissal as moot of two suits brought by respondent (Sloan).[1] Sloan v. Greenville County, Op. No. 2002-UP-598 (S.C. Ct. App. filed October 1, 2002). We reverse.

FACTS

Sloan brought this action against petitioners (collectively 'County') seeking a declaration that County had violated its procurement ordinance in contracting a 1998 road construction project and a 1999 family court renovation project. The ordinance permits the County to choose between several bidding methods when awarding these contracts, and requires there be a written "determination for the method of source selection utilized." Sloan challenges the adequacy of the written determinations in these two projects. Both projects were completed before the suits were heard.

The circuit court dismissed the road suit on the ground of mootness, rejecting Sloan's contention that the "public importance" exception to mootness should be applied. The family court renovation suit was also dismissed as moot and the "public importance" argument was similarly rejected.

[1] The cases were combined for purposes of this appeal.

The family court case and the 1998 road case were heard together at the trial level and the orders of dismissal were consolidated for appeal. The Court of Appeals reversed the orders dismissing the suits. We granted County's petition for a writ of certiorari.

ISSUE

Whether the Court of Appeals erred in reversing the circuit court's dismissal of Sloan's suits as moot?

ANALYSIS

This Court has recognized a "public importance" exception to mootness holding that "an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001)(internal citations omitted). The determination whether a particular suit raises "questions of imperative and manifest urgency" must be decided on an individual basis. In this case, the Court of Appeals focused not on the standard for invoking this exception ("questions of imperative and manifest urgency"), but instead on the label applied to it ("matter of important public interest"). In seeking to define important public interest for purposes of applying this exception, the Court of Appeals relied upon one of its decisions which held that, for purposes of determining taxpayer standing, "the expenditure of public funds pursuant to a competitive bidding statute is of immense public importance." Sloan v. School Dist. Of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000). Relying upon this ruling, the court concluded "the competitive sealed bidding process is a question of public importance, both in the context of standing and in the context of [County's compliance with the procurement ordinance's requirement] of the written determination." Sloan v. Greenville County, *supra*.

The Court of Appeals applied an incorrect standard, substituting "public importance" for "imperative and manifest urgency." Further, the court erred in adopting a categorical exception to the mootness doctrine for cases questioning the competitive sealed bidding process. Such an approach

is inconsistent with the limited nature of the exception for questions of "imperative and manifest urgency."

Sloan would have the courts declare whether written source selection determinations made by County in awarding a 1998 road construction project and a 1999 family court renovation project were adequate. Assuming without deciding that County's compliance with its procurement ordinance is an issue of public importance for purposes of invoking this exception to the mootness doctrine, we must determine whether the questions posed involve matters of "imperative and manifest urgency."

Since these actions were commenced, the Court of Appeals has issued two opinions addressing the adequacy of the County's written determinations under the procurement ordinance. See Sloan v. Greenville County, Op. No. 2004-UP-277 (S.C. Ct. App. filed April 22, 2004) (written determinations used in 2001-2002 road projects); Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (2003) (2000 and 2001 road projects and 1999 forensics lab renovation). These two opinions provide County the judicial guidance in drafting the determinations that Sloan is seeking in the present cases. Further, the County ordinance has been amended and now requires an independent monitor to oversee the procurement of design-build services, and requires public notice and an opportunity to be heard when the project cost exceeds $5 million. In light of these developments, we hold there is no imperative or manifest urgency in obtaining an advisory opinion on the application of an obsolete procurement ordinance to these completed projects.

CONCLUSION

The Court of Appeals' opinion, which reversed the circuit court's dismissal of these suits as moot, is

REVERSED.

WALLER and BURNETT, JJ., concur. MOORE, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE MOORE (dissenting): I respectfully dissent from the majority opinion because I believe the Court of Appeals properly reversed the circuit court's dismissal of two suits brought by respondent (Sloan). I would affirm as modified the Court of Appeals' opinion and find that Sloan's suits are not moot and that Sloan has standing to bring the suits in circuit court.

Mootness

An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001), *cert. denied*, 535 U.S. 926 (2002). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. *Id.* A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. *Id.* This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief. *Id.*

An exception to the mootness doctrine is that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest. Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947). The Court of Appeals found, pursuant to Ashmore, that this case falls into the public importance exception to the mootness doctrine and that a ruling on the merits of Sloan's suits would provide future guidance to petitioner.

The majority, relying on Curtis v. State, *supra*, finds the Court of Appeals applied the incorrect standard for determining whether a case falls into the public importance exception to the mootness doctrine. The majority states "the Court of Appeals focused not on the standard for invoking this exception ("questions of imperative and manifest urgency"), but instead on the label applied to it ("matter of important public interest")."

This Court, in Curtis, stated that one exception to the mootness doctrine is that: "an appellate court may decide questions *of imperative and manifest urgency to establish a rule for future conduct in matters* of important public

interest." Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (emphasis added). However, I do not believe Curtis, via the language italicized above, imposed an additional requirement to the public importance exception to the mootness doctrine. To read Curtis to impose a requirement that a question must be of "imperative and manifest urgency" to meet the public importance exception is against the jurisprudence of this state. *See* Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951) (questions of public interest should be decided for future guidance, however abstract or moot they may have become in the immediate contest); Ashmore v. Greater Greenville Dist., *supra* (same). I would hold that questions of public interest should be decided for future guidance without a requirement that there be some urgency to the matter.

Accordingly, the Court of Appeals correctly held that this case falls squarely within the public interest exception. As the Court of Appeals has noted in a similar case, an important public interest exists in the stewardship of public funds and a strong need exists to provide guidance for future procurement decisions. Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (Sloan 2003). The inability to provide any effective relief in a case should not be a barrier to the court's consideration of a question of exceptional public interest. *Id.*

Because a question of important public interest is involved, I would hold the Court of Appeals properly reversed the circuit court's decision to dismiss the suits as moot.

Standing

Although the Court of Appeals did not address the issue whether Sloan had standing to bring the suits against petitioners, I would now address this issue.

To have standing to institute an action, one must have a personal stake in the subject matter of the lawsuit. Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 532 S.E.2d 876 (2000). This Court has consistently held that a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can

show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained. Joytime Distribs. & Amusement Co., Inc. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999), *cert. denied*, 529 U.S. 1087 (2000). Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature that is common to all members of the public. *Id.*

The general rule is that a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer. Crews v. Beattie, 197 S.C. 32, 14 S.E.2d 351 (1941). The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke a judicial determination of the issue. *Id.* For a plaintiff to have taxpayer standing, the party must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of his fellow taxpayers. Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003). *See also* Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance).

Sloan has standing because the question presented is of such substantial public importance as to warrant a resolution for future guidance. *See*, *e.g.* Sloan v. School Dist. Of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000). The public interest involved is the prevention of the unlawful expenditure of money raised by taxation.

With specific regard to procurement of services for public works projects, the Court of Appeals has found:

> The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to maintain the public's trust and confidence in governmental

> management of public funds. The integrity of the competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed ... without showing that the municipality suffered any alleged injury."

Sloan 2003, 356 S.C. at 550-551, 590 S.E.2d at 348-349 (citation and quotation omitted).

The Court of Appeals' reasoning in Sloan 2000 and Sloan 2003 compels the same result in the instant case. Here, Sloan has an interest as a taxpayer in how public funds were spent. The projects required the expenditure of millions of taxpayer dollars and this burden was borne exclusively by the taxpaying citizens of Greenville County. Sloan, therefore, has a material interest in whether the County followed the procurement procedures set out in the county code.

As stated in Sloan 2003, the issue in the present case is of sufficient public importance to confer standing. Resolution of the issues in this case will likely have an impact on government practices beyond the confines of the case itself. Greenville County and other public entities must be accountable under the laws that govern how they spend public money.

For these reasons, Sloan has standing to pursue these suits in the circuit court. Therefore, I would affirm as modified the opinion of the Court of Appeals.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina, Respondent,

v.

Roshamel Broaddus Appellant.

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

Opinion No. 3890
Submitted September 15, 2004 – Filed November 15, 2004

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Edgar L. Clements, III, of Florence, for Respondent.

BEATTY, J.: Roshamel Broaddus appeals his convictions for murder and possession of a firearm during the commission of a violent crime. He argues the trial judge erred in admitting evidence of drug use and drug dealing as res gestae of the crimes.[1] We affirm.[2]

FACTS

During the early morning hours of August 7, 1999, the body of David Christopher Briggs was found in a vacant lot in Florence. The victim had multiple gunshot wounds. Although neighbors heard gunshots during the night, no one witnessed the shooting. An autopsy later revealed the victim had been shot at least seventeen times, which caused him to bleed to death.

After receiving information concerning a red Grand Am frequenting drug areas, narcotics officers interviewed Dennis Rhodes, a confidential informant and the owner of the vehicle. Rhodes told them that he had reason to believe that someone had been killed in his car. He stated that, on the morning of the murder, he loaned his car to Broaddus. According to Rhodes, the interior of the vehicle was covered in blood and had bullet holes when

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[1] Pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), Broaddus's appellate counsel filed a brief along with a petition to be relieved, stating his examination of the record indicated the appeal was without merit. Broaddus filed a separate pro se response. Following our Anders review, this court ordered the parties to brief the following issue:

> Whether the trial court erred in admitting evidence of the alleged drug usage and dealing as res gestae of the crime?

This issue is now our sole appellate consideration.

[2] Because oral argument would not aid the court in resolving the issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

Broaddus returned it. Subsequently, the investigating officers impounded and searched Rhodes's vehicle. As part of the continuing investigation, SLED analysis of the blood evidence confirmed a DNA match with the victim. Broaddus was ultimately apprehended in New York where he was hospitalized as a result of another shooting incident. A Florence County grand jury later indicted Broaddus for murder and possession of a weapon during the commission of a violent crime.

At trial, the State called Dennis Rhodes as a witness. Prior to Rhodes's testimony, Broaddus's counsel moved to exclude any mention of whether Broaddus was dealing drugs on the night in question. Specifically, counsel argued the evidence should not be admitted as part of the res gestae of the charged crimes. He further contended the evidence would be far more prejudicial than probative and should be excluded under Rule 403 of the South Carolina Rules of Evidence. The judge admitted the evidence, finding Rhodes could describe the circumstances of the night of the murder in order to give a full description of the events that occurred that night, including an explanation of Rhodes's involvement with Broaddus. The judge concluded the testimony in question was part of the res gestae of the crimes.

Rhodes testified on the night of the murder he went to Tony Pickett's home where he met several acquaintances including Broaddus. According to Rhodes, everyone was drinking and doing drugs that were supplied by Broaddus. At one point during the evening, Broaddus asked Rhodes if he could borrow his car. Rhodes loaned his car to Broaddus in exchange for cash or crack cocaine because Broaddus stated he needed to make some phone calls and "some deliveries." Rhodes believed Broaddus was going to make drug deliveries because he observed the supply of drugs in Broaddus's hand. Broaddus borrowed the car around 2:30 a.m. and returned it to Rhodes at approximately 6:00 a.m. When Rhodes opened the door to the vehicle, he noticed blood and gunshot holes in the interior. Rhodes testified that Broaddus apologized for the condition of the vehicle and explained that his cousin had been shot and he had taken him to the hospital. Broaddus then gave Rhodes crack cocaine while he and Pickett cleaned the vehicle. The next day, Rhodes found a bullet slug, as well as hair and scalp tissue on the passenger side of the vehicle.

The State offered evidence regarding its theory about what might have precipitated the shooting. J.C. Newsome testified he sold Broaddus a CD player a week prior to the incident. When Broaddus inquired about the CD player, Newsome informed him that the victim had it. Newsome took Broaddus to the motel where the victim was staying, but purposefully brought him to the wrong room when he discovered that Broaddus had a gun and threatened to kill the victim. Kelvin Lucas testified he went to a bar with the victim on the night of the shooting. During the evening, the victim left the bar but returned within a short period of time. Lucas testified the victim seemed upset. Around 4:30 a.m., the victim told Lucas that he had "something to go take care of" and left the bar. Lucas testified that he observed the victim get into a car with Broaddus.

The jury convicted Broaddus of murder and possession of a weapon during the commission of a violent crime. The judge sentenced him to forty years imprisonment for murder and a concurrent, five-year term for possession of a weapon during the commission of a violent crime. Broaddus appeals.

DISCUSSION

Broaddus asserts the trial judge erred in admitting evidence of drug use and drug dealing as res gestae of the crimes. He contends the evidence was not necessary for the presentation of the State's case given the presence of drugs did nothing to further the explanation for the blood and bullet holes that were discovered in the borrowed vehicle. He further argues the evidence of drug dealing and drug use did not establish a motive for the murder. Although we agree with Broaddus that the admission of the evidence was improper, we find any error in its admission was harmless.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial judge's ruling is based

on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"The rationale underlying the res gestae theory is that evidence of other criminal conduct that occurs contemporaneously with or is part and parcel of the crime charged is considered part of the res gestae of that offense." State v. Williams, 321 S.C. 455, 462, 469 S.E.2d 49, 53 (1996). "The res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Under res gestae, evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Id. at 512-13, 514 S.E.2d at 582-83 (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)).

Our appellate courts have found evidence of prior drug use to be inadmissible as part of the res gestae where the record does not support any relationship between the charged crime and the drug use. See, e.g., State v. Hough, 325 S.C. 88, 92-94, 480 S.E.2d 77, 79-80 (1997) (finding co-defendant's testimony regarding prior crack cocaine use did not form a part of the res gestae of burglary and grand larceny where there was no evidence

defendant and co-defendant had smoked crack cocaine immediately prior to the burglary or that the prior acts were "so linked together in point of time and circumstances" as to be required for a full presentation of the State's case); State v. Smith, 309 S.C. 442, 446-47, 424 S.E.2d 496, 498-99 (1992) (holding evidence of defendant's prior drug use should have been excluded where it was unrelated to the crimes of murder and armed robbery and was not contemporaneous with the victim's murder); State v. Bolden, 303 S.C. 41, 43, 398 S.E.2d 494, 494-95 (1990) (concluding evidence that defendant was a social user of crack cocaine should have been excluded where evidence was "not essential to a full presentation of the State's case, nor was it so intimately connected with the crimes charged that its introduction was appropriate to complete the story of the crime").

If, however, the evidence of drug use is "inextricably intertwined" with the crime at issue, our appellate courts have found it to be admissible. See, e.g., State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (concluding trial judge properly admitted evidence of defendant's cocaine use prior to the robbery and murder where cocaine use, which precipitated the decision to commit the robbery and murder, was in close "temporal proximity" to the crimes, the cocaine use was part of the environment of the crimes and was inextricably intertwined with the crimes); State v. Williams, 321 S.C. 455, 461-63, 469 S.E.2d 49, 53-54 (1996) (finding evidence of crack cocaine sale between defendant and victim several hours prior to the murder was a part of the res gestae of the crime where evidence of earlier sale was necessary to show why the victim sought out the defendant and to explain the specific circumstances surrounding the encounter); State v. Gagum, 328 S.C. 560, 564-65, 492 S.E.2d 822, 823-24 (Ct. App. 1997) (holding, in case involving strong-arm robbery stemming from a purse snatching, evidence of defendant's offer of drugs to his captors to obtain his release was admissible where the offering of the drugs "'was so intimately connected with the crime charged that its introduction was appropriate to complete the story of the crime'" (quoting Bolden, 303 S.C. at 43, 398 S.E.2d at 495)).

In this case the testimony regarding Broaddus's drug use and drug dealing "was not essential to a full presentation of the State's case, nor was it

so intimately connected with the crimes charged that its introduction was appropriate to complete the story of the crime." Bolden, 303 S.C. at 43, 398 S.E.2d at 495. The testimony presented established that Broaddus threatened to kill the victim because he stole the CD player that Broaddus purchased from Newsome. Lucas testified he observed the victim get into a car with Broaddus shortly before the murder. Rhodes testified that when Broaddus returned the vehicle it was covered in blood and had bullet holes. The decedent's blood was positively matched to the evidence found in Rhodes's vehicle. Thus, evidence of drug use and drug dealing was not necessary for the State's presentation of its case. Furthermore, the drug evidence was not inextricably intertwined with the crimes charged given there was no evidence that Broaddus and the victim were involved in any type of drug transaction. Because the testimony did not form a part of the res gestae of the crimes, the trial judge erred in admitting the evidence. Additionally, even assuming the testimony was relevant, its probative value was outweighed by its unfair prejudice. See Bolden, 303 S.C. at 43, 398 S.E.2d at 495 (holding even if testimony under the res gestae theory is relevant, its probative value must be weighed against any unfair prejudice); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

However, any error in the admission of the evidence was harmless. "Error is harmless where it could not reasonably have affected the result of the trial." State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003), cert. denied (Apr. 22, 2004). When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, this court should not set aside a conviction because of errors not affecting the result. Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002). Newsome testified that Broaddus threatened to kill the victim shortly before the murder. Lucas testified that he witnessed the victim get into a vehicle with Broaddus several hours before the shooting. Additionally, witnesses who were present when Broaddus returned Rhodes's automobile testified concerning the condition of the car and the presence of blood in the car. The DNA from the blood in the car was a positive match to the victim.

Furthermore, there is evidence that Broaddus absconded to New York after the incident. See State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (stating flight is "at least some evidence" of defendant's guilt).

Furthermore, the drug evidence is cumulative to other unobjected to testimony. Specifically, Van Purvis, who was present at Pickett's home, testified that Broaddus provided the crack cocaine and intended to pay Rhodes with crack cocaine to borrow his automobile. Pickett also testified that Rhodes would be paid with crack cocaine for lending his car to Broaddus. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (stating that any error in admission of evidence cumulative to other unobjected-to evidence is harmless); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence.").

CONCLUSION

We find the testimony regarding drug use and drug dealing was not admissible as part of the res gestae of the charged crimes. We hold, however, that any error in its admission was harmless. Based on the foregoing, Broaddus's convictions and sentences are

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia E. Deidun, Appellant,

v.

Richard C. Deidun, Respondent.

Appeal From York County
Robert E. Guess, Family Court Judge

Opinion No. 3891
Heard September 15, 2004 – Filed November 22, 2004

AFFIRMED

Daniel D. D'Agostino, of York, for Appellant.

Lucy London McDow, of Rock Hill, for Respondent.

BEATTY, J.: In this domestic matter, Patricia E. Deidun (Wife) appeals the family court's final order, arguing the court erred in: (1) defining a car as nonmarital property; (2) distributing the marital assets and debts; (3) failing to award adequate alimony; and (4) failing to award adequate attorney's fees. We affirm.

FACTS

Wife and Richard C. Deidun (Husband) were married on April 23, 1977, and separated on December 17, 1999, when Husband left the marital home. The parties had a son during the marriage, born October 27, 1981. Husband worked throughout the marriage, except for a seven-week period in 1999 when he suffered from depression. Wife also worked either part-time or full-time jobs throughout the marriage, with the exception of two years after the birth of their son. Wife was the primary party responsible for caring for the parties' son, cleaning, cooking, buying the family's food and clothes, and handling the family's finances.

The parties lived in Michigan after they were married. In 1988, Husband accepted a position in Charlotte, North Carolina, and the family moved there. Husband's North Carolina position paid him substantially less than his former Michigan position. The parties soon accumulated nearly $33,000 in credit card debt, and Wife did not tell Husband about the debt. Husband discovered the marital debt in 1993, and he took control over the finances. The parties borrowed $28,000 from Wife's father to pay off a portion of the debt. Two years later, Husband repaid Wife's father for the loan, paid off all of the parties' other credit card debts, and reduced the family to one Wachovia credit card which they both used. At that time, Wife resumed responsibility over the family's finances.

The parties lived a comfortable lifestyle. They took vacations each year and enjoyed riding motorcycles. Husband used money inherited from his father to establish Putnam IRA accounts for himself and Wife. In 1996, the parties sold their Charlotte home, clearing nearly $80,000 in equity from the sale. The couple built a 3,400 square foot home in Fort Mill, South

Carolina, for $253,000. The parties also took out a $25,000 line of credit on their new home and used $19,000 to purchase a second motorcycle.

In 1999, Husband suffered from depression and he took leave from work. While recovering, he cleaned up his old motorcycle, sold it, and gave $9,200 to Wife to pay on the line of credit used to buy the new motorcycle. He was informed by Wife that there was still $25,000 owing on the line of credit. Because the parties only used $19,000 on the line of credit to purchase the new motorcycle and they had been paying on the line of credit for several years, Husband was surprised. When he investigated the parties' financial status, he learned that the balance on the line of credit was actually $31,000, not $25,000 as Wife had told him. He also learned that Wife had withdrawn and spent nearly $27,000 from her Putnam IRA account without disclosing it to him, and Wife had incurred nearly $7,500 in credit card debt without his knowledge. Wife had also opened a Truliant credit union line of credit, with a balance of $7,218, that Husband was not aware of. The parties eventually separated in December 1999 when Husband left the marital home.

After the parties separated in December 1999, they agreed to sell the marital home and Wife decided to build a new $172,000 home for herself and the parties' son. Wife obtained several credit cards and charged nearly $19,000 before the parties entered into a consent order in March 2000. The March 6, 2000 temporary consent agreement provided that Husband would pay: child support for the parties' seventeen-year old son; $1,000 a month in alimony to Wife; all the marital bills until Wife moved from the marital home; $16,300 to pay off the balance due on Wife's car; and $75,000 to Wife to assist in closing on her new home. Husband liquidated his Putnam IRA account, subject to a substantial early withdrawal tax penalty, and gave Wife $75,000 to put towards her new home and $16,300 to pay off the balance owed on her car. Wife used the funds to put $43,000 down on her new home and to pay off some of the credit card debt. The parties sold their home in September 2000 for $286,000.

At some point, Husband started a relationship with another woman. Husband, his paramour, and the paramour's children eventually moved to California when Husband accepted a job there in 2000. Wife filed a

summons and complaint on September 18, 2000, seeking a divorce based on Husband's adultery. On November 7, 2000, a second consent order was filed memorializing the parties' agreement that Husband could have $75,000 from the sale of the parties' house, with Husband's attorney holding the remaining funds in trust. A third consent order was filed on December 13, 2000, in which Wife signed a quit-claim deed to any home Husband purchased in California, a community property state. Husband voluntarily paid his son's college tuition and purchased a car for his son.

This action was tried on July 11, 2001. After hearing testimony from Wife and Husband, the family court granted Wife a divorce based on Husband's adultery. The court also found that Wife's failure to handle the family finances responsibly and failure to inform Husband about the status of their finances or her large expenditures amounted to a form of misconduct that was a contributing factor to the breakup of the marriage. The court found Husband's Corvette was not marital property and ordered the marital assets be split with 65% going to Husband and 35% to Wife. The court also divided the marital debt, awarded Wife $1,200 per month in alimony, and awarded Wife $2,570 in attorney's fees. Finally, the court ordered a qualified domestic relations order to divide the marital portions of Husband's retirement accounts on a 50/50 basis.

After Wife filed a motion to reconsider, the family court issued a supplemental order, finding that: (1) Wife was not fiscally responsible and would likely spend beyond her means, regardless of the size of award she were to be given by the family court; (2) Husband voluntarily paid for the son's college expenses; and (3) Wife's expenses cited to support her claim for additional alimony appeared to be inflated by debt service on additional borrowing and appeared excessive in light of Wife's receipt of $75,000 from Husband during their separation. The court noted that its original order actually failed to allocate marital assets 65/35 in favor of Husband, so the court ordered that Husband's attorney distribute the entire $10,240 in funds remaining from the sale of the parties' home to Wife. The court refused to alter the original order further. Although the court intended to divide the non-pension assets on a 65/35 basis, the distribution after the supplemental order amounted to an approximately 59/41 allocation.

Wife timely appealed the family court's order. Husband filed a motion before this court to remand the matter when he learned that his taxes had been miscalculated and he owed an additional $10,002.60 early withdrawal penalty on the Putnam IRA account he cashed in to pay Wife. This court granted the motion to remand on February 20, 2003, and Husband filed a motion for relief from judgment before the family court pursuant to Rule 60, SCRCP.[1] The family court indicated at the hearing that it would deny Husband's motion, and the court refused to: grant him relief from judgment; reopen the case; consider the additional $10,002.60 tax penalty as marital debt; or redistribute the marital assets and debts. However, the May 9, 2003 written order granted Husband's motion to the extent that the additional $10,002.60 would be considered marital debt and Husband would be responsible for the debt. Wife appeals both the supplemental order and the order on Husband's Rule 60 motion.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find the facts in accordance with its view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither is the court required to ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

[1] It is unclear when Husband filed this motion in family court because the copy of this document contained in the record is not dated.

LAW/ANALYSIS

I. NONMARITAL PROPERTY

Wife argues Husband's Corvette was transmuted into marital property during the marriage, and thus the family court erred in determining that it was nonmarital property. Alternatively, Wife asserts that she was entitled to special equity from the increase in value of the Corvette during the marriage. We disagree.

Property acquired prior to the marriage is generally considered nonmarital. S.C. Code Ann. § 20-7-473(2) (Supp. 2003). Although nonmarital property is generally not subject to equitable distribution, the other spouse may be entitled to a special equity in the property. S.C. Code Ann. § 20-7-473(5) (Supp. 2003). A spouse obtains an equitable interest in improvements to property to which he or she has contributed, even if the property is nonmarital. Johnson v. Johnson, 296 S.C. 289, 299, 372 S.E.2d 107, 113 (Ct. App. 1988).

Nonmarital property may be transmuted into marital property. In determining whether property has been transmuted, courts must consider whether the property: (1) "becomes so commingled with marital property as to be untraceable;" (2) is titled jointly; or (3) "is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property." Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "Transmutation is a matter of intent to be gleaned from the facts of each case." Id. The burden is on the spouse claiming transmutation to produce objective evidence that the parties considered the property to be marital during the marriage. Id.

It is undisputed that Husband purchased his 1973 Corvette when it was new for $5,900, and he paid off the balance owing on the car a year before the parties married. Wife testified the Corvette was Husband's "prized possession," and Husband described it as his "toy" and "weekend pleasure vehicle." With the exception of an eighteen-month period when it was

necessary for Husband to drive the car on a daily basis, the car was not regularly used. While the parties lived in Michigan, the Corvette was stored and not insured during the winter months every year. Husband primarily drove the Corvette, although Wife occasionally drove it. During the marriage, Husband maintained the vehicle and made improvements to it including installing new calipers, a stainless steel exhaust system, and new wheels, for a total cost of $1,500. At the time of the final hearing, the Corvette had increased in value to $15,000. The family court specifically held that the Corvette was the nonmarital property of Husband.

Despite Wife's argument that the car was at times used during the marriage by both parties, the evidence indicates the car was more of a pleasure vehicle and not necessary for transportation for the parties. Although the Corvette was maintained and insured during the marriage from the parties' joint account, to which both parties contributed, nothing indicates the parties' intentions that the Corvette change from nonmarital to marital property. Because this car was not used for the benefit of the marriage, we find the car was not transmuted and agree with the family court that the Corvette was Husband's separate, nonmarital property.

Further, there is no evidence in the record to support Wife's argument that she is entitled to special equity from the increase in value of the Corvette. Other than the money from the parties' joint account, Wife made no other contribution to the maintenance or improvements to the Corvette. The evidence in the record indicates that, other than routine maintenance, the cost of improvements was only $1,500. Accordingly, the evidence does not support Wife's argument that she is entitled to special equity in the vehicle.

II. EQUITABLE DISTRIBUTION

Wife argues the distribution of the parties' assets and debts was not fair and equitable because the family court did not adequately consider the statutory factors and erred in finding she was guilty of economic misconduct. Wife also asserts the family court erred in considering additional evidence concerning tax liabilities pursuant to a Rule 60, SCRCP motion. We disagree.

A. Fairness of the Distribution

Wife argues the family court erred in: (1) finding she committed "economic misconduct" which led to the dissolution of the marriage; (2) awarding a 59/41 distribution; and (3) failing to adequately consider all the statutory factors in dividing the martial assets and debts. We disagree.

The apportionment of marital property will not be disturbed on appeal absent an abuse of discretion. Bungener v. Bungener, 291 S.C. 247, 251, 353 S.E.2d 147, 150 (Ct. App. 1987). Section 20-7-472 lists fifteen factors for the court to consider in equitably apportioning a marital estate. S.C. Code Ann. § 20-7-472 (Supp. 2003); Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002). On appeal, this court looks to the overall fairness of the apportionment. Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). If the end result is equitable, it is irrelevant that the appellate court would have arrived at a different apportionment. Id.

Wife incurred $33,000 in credit card debt without informing Husband prior to 1993, when Husband took control of the finances. After Wife regained responsibility for the family finances and without Husband's knowledge, she increased the parties' $25,000 line of credit to $31,000; withdrew nearly $27,000 from her Putnam IRA; incurred $7,500 in credit card debt; and opened a new line of credit with a balance of $7,218. Wife admitted at trial that she hid her expenditures, the parties' growing debt, and her withdrawal from her Putnam IRA account from Husband. Wife claimed she neglected to inform Husband because he had a stressful job and he did not want to be bothered with the financial details. Wife claimed she always spent the money on family necessities, including clothing, food, and other household debt. Wife incurred additional credit card debt between the parties' separation in December 1999 and the March 2000 temporary consent order. Wife testified that she incurred those debts to pay for household expenses, including nearly $2,000 in attorney's fees and nearly $5,000 in Christmas gifts for their son, including ski equipment and a $3,100 musical instrument. Husband testified that Wife's financial mismanagement led to the breakup of the marriage.

Citing McDavid v. McDavid, 333 S.C. 490, 511 S.E.2d 365 (1999), Wife complains that the family court erred in finding her guilty of economic misconduct and in considering the economic misconduct in the equitable distribution. In McDavid, the husband used $24,13.50 in marital funds to support his failing business during the marriage without informing the wife. The family court found the husband's actions constituted marital misconduct, and the court used that amount in adjusting downward the husband's share of the marital assets. The supreme court affirmed this court's finding that the husband's imprudent business decisions did not constitute marital misconduct:

> In accordance with [other jurisdictions], we hold poor business decisions, in and of themselves, do not warrant a finding of marital "misconduct," and that there must be some evidence of willful misconduct, bad faith, intention to dissipate marital assets, or the like, before a court may alter the equitable distribution award for such misconduct.

McDavid, 333 S.C. at 496, 511 S.E.2d at 368 (emphasis added).

We find McDavid may be distinguished from the present case. Although there is nothing in the record to indicate that Wife acted with any bad faith in her spending habits, we believe McDavid is more applicable to cases involving business expenditures. Wife's depletion of marital funds and increase of the marital debt in the present case were not to support a failing business. Accordingly, we find McDavid inapplicable in the present case and the family court's consideration of Wife's failure to appropriately manage the family finances was not error.

Further, we find the evidence in the record supports the court's findings that Wife's willful habit of spending irresponsibly was one factor that led to the breakup of the marriage. After Wife incurred substantial marital debt and Husband paid it off, she again incurred substantial debt and depleted funds from a marital IRA account, without informing Husband. She admitted that she hid the mounting debts, expenditures, and a withdrawal from the IRA

from Husband. Other than Wife's testimony that she spent the money on the family, there is nothing in the record to show actually what the money was spent on. Wife's intentional, reckless spending habits, and the associated debt, placed significant stress on the parties' marriage and led to the breakup of the marriage. Her spending amounted to mismanagement of the family finances and to economic misconduct.

Finally, we find the family court adequately considered the statutory factors, including Wife's financial misconduct, in awarding a 59/41 division of the non-pension marital assets in favor of Husband. A family court must consider several factors in equitably dividing marital property, including: (1) the length of the marriage and the ages of the parties; (2) the martial misconduct of either party; (3) the value of the marital property; (4) the income and earning potential of each spouse; (5) each party's emotional and physical health; (6) the need of a spouse for training to reach his or her earning potential; (7) each party's nonmarital property; (8) retirement benefits; (9) awards of alimony; (10) whether the marital home should be awarded to one spouse; (11) the tax consequences of a particular distribution; (12) the existence of support obligations from prior marriage; (13) liens or encumbrances on marital property and any debt; (14) child custody arrangements; and (15) any other relevant factor the trial court enumerates in the order. S.C. Code Ann. § 20-7-472 (Supp. 2003).

At the time of the final hearing, the parties had been married twenty-two years and their only child was over the age of eighteen. Neither party had a college education, although Husband's specialized skills made him highly marketable in his field. Wife was forty-five years old, employed to her potential, earned approximately $2,300 per month, and was in relatively good health. Husband was forty-nine years old, employed to his potential, earned approximately $81,212 per year, and was in relatively good health. Wife had $110,980.79 in non-pension marital assets in her possession, and Husband had $175,495.96 in non-pension marital assets in his possession. Husband earned pension benefits at two of his jobs; one of the retirement accounts was earned entirely during the marriage and 80% of the other account was earned during the marriage. The marital debts included a $34,967 tax penalty for Husband's early withdrawal from his Putnam IRA;

$7,155.86 from Wife's Truliant line of credit; $8,767.18 on Wife's Shade Platinum credit card; $10,117.87 on Wife's MBNA credit card; a $16,149.56 lien on Wife's car; and $11,609 in tax liability from Wife's early withdrawal from her Putnam IRA.

The evidence indicates that the family court adequately considered all the statutory factors in equitably dividing the marital assets and debts. In addition to considering the above factors, the court considered Husband's adultery, Wife's non-economic contributions to the marriage, and Wife's economic misconduct. With the exception of the tax liability incurred when Wife withdrew funds from her Putnam IRA, of which Husband was ordered to pay 65%, the court ordered each party be responsible for their own debt. Out of a total marital debt of $88,766.47, Wife was ordered to pay $46,253.62 or 52%. In the supplemental order, the court awarded Wife $120,220.79 of the total $296,716.75 in non-pension marital assets, or 41%. Additionally, the court granted Wife 50% of the marital portions of Husband's retirement accounts when they vested. Further, the parties admitted at the oral argument of this case that considering the pension award would raise Wife's percentage of the marital estate above 41%.

Although the parties in the present case had a long marriage and each party contributed financially to the marriage, we find, based on the factors considered by the family court, that the actual distribution of assets and debts was equitable in this case.

B. Post-trial Evidence

Wife asserts that, upon remand from this court, the family court erred in "reopening the case and accepting additional evidence" regarding the tax penalty from the early withdrawal of Husband's Putnam IRA account. We disagree.

A circuit court may relieve a party from a final judgment pursuant to Rule 60 (b)(1), SCRCP, where a party shows "the judgment or order was induced by mistake, inadvertence, surprise, or excusable neglect." Hillman v. Pinion ex. rel Estate of Hillman, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct.

App. 2001). Relief from judgment under Rule 60, SCRCP, rests within the sound discretion of the trial court, and the court's findings will not be disturbed on appeal absent an abuse of discretion. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989).

During the final hearing, Husband presented two un-filed tax returns prepared by his accountant. One showed his estimated taxes had he not cashed out his Putnam IRA. The second tax return showed he owed $34,967 as an early withdrawal penalty for cashing out the Putnam IRA. The family court determined the early withdrawal penalty was a marital debt and ordered Husband to pay the entire $34,967.

After this court remanded the appeal to the family court, a hearing was held on Husband's Rule 60, SCRCP, motion for relief from judgment. Husband alleged that his accountant had underestimated the tax penalty for the early withdrawal from the Putnam IRA account, and he learned after the final divorce hearing that he owed an additional $9,132 plus $870 in interest. He alleged the family court should consider this amount to be marital debt and then recalculate the debt. The family court indicated at the hearing that it was not willing to alter the facts and it was denying the motion to reopen the case and consider the additional penalty. However, the court held in the written order that: the additional taxes constituted newly-discovered evidence; the prior evidence regarding the miscalculated tax penalty was submitted as a result of mistake, inadvertence, or excusable neglect; and the additional tax penalty was marital debt of which Husband would be solely responsible. The family court's consideration of the additional taxes as marital debt and award of them to Husband lowered Wife's award of marital debts from 52% to 47%.

Although Wife complains that the family court committed an error of law in granting Husband's Rule 60, SCRCP, motion and considering the additional debt, we find no abuse of discretion. The court found that Husband's reliance on his accountant's figures was justified and the miscalculation was the result of mistake or excusable neglect. Further, the consideration and award of the additional debt did not harm the Wife insofar as she was not required to pay any of the additional debt. Accordingly, we

find no error with the family court's order granting Husband's motion and awarding responsibility for the additional debt to Husband.

III. ALIMONY

Wife argues the family court erred in only awarding her $1,200 a month in alimony. We disagree.

"An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). "Alimony is a substitute for the support that is normally incident to the marital relationship." McElveen v. McElveen, 332 S.C. 583, 599, 506 S.E.2d 1, 9 (Ct. App. 1998). The purpose of alimony is to place the supported spouse in the position he or she enjoyed during the marriage. Id. However, alimony should not "serve as a disincentive for spouses to improve their employment potential or to dissuade them from providing, to the extent possible, for their own support." Id.

Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and non-marital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2003).

At the final divorce hearing, Wife submitted a financial declaration showing expenses for herself and the parties' grown son of nearly $4,000 a month. Included in the expenses was a monthly payment on a $27,274 second mortgage on Wife's new home; payment on a $9,278 line of credit; and payments on two or more credit cards. Also included as an expense was a $375 monthly car payment. Wife only earned $2,300 in monthly wages.

By contrast, Husband's financial declaration indicated he earned nearly $82,000 a year.

In the final divorce decree, the family court considered the statutory factors for alimony. In reviewing Wife's expenses, the court specifically held that it would not consider her expenses related to servicing debt in calculating alimony and further found that her expenses might be inflated. Reviewing all the factors, the court awarded Wife $1,200 in alimony. In the supplemental order, the court refused to increase the alimony, stating Wife's monthly expenses "appear to be inflated by debt service on additional borrowing, for a second mortgage and credit card expenditures, which appeared to be excessive" in light of the substantial cash payout given to Wife by Husband. The court also noted that Wife "is not fiscally responsible and is likely to spend beyond her means, regardless of the size of award she receives from this court."

The evidence supports the family court's award. Both parties were working to their potential and neither suffered from ill health. Husband earned substantially more than Wife, and the family court found him guilty of adultery. Although Wife had large expenses, the expenses can predominantly be attributed to credit card debt and debt on a second mortgage. Wife's past spending habits is evidence of her lack of fiscal responsibility. Considering these factors, we find the $1,200 a month alimony award is appropriate.

IV. ATTORNEY'S FEES

Wife argues the family court erred in only awarding her $2,570 in attorney's fees. We disagree.

The family court may order payment of attorney's fees to a party pursuant to South Carolina Code Ann. § 20-3-130(H) (Supp. 2003). Whether to award attorney's fees is a matter within the sound discretion of the trial court, and the award will not be reversed on appeal absent an abuse of discretion. Bakala v. Bakala, 352 S.C. 612, 633-34, 576 S.E.2d 156, 167 (2003). The family court should consider: the parties' ability to pay their own fee; the beneficial results obtained by counsel; the financial conditions

of the parties; and the effect of the fee on each parties' standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). To determine the amount of an award of attorney's fees, the court should consider: the nature, extent, and difficulty of the services rendered; the time necessarily devoted to the case; counsel's professional standing; the contingency of compensation; the beneficial results obtained; and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Wife consulted several attorneys immediately following the parties' separation. She paid fees for representation during the consent agreements totaling nearly $5,000. Wife testified that she charged $2,000 of these fees to her credit card, and the debt was distributed by the court as marital debt. She also incurred $990 in private investigator fees. After filing the underlying action for divorce, Wife paid her current counsel $1,500 as a retainer fee. Wife's counsel submitted an affidavit for attorney's fees to the family court showing that the retainer fee had been spent and Wife owed an additional $2,540.75. Wife requested the family court to award her $11,560 in attorney's fees. After considering the Glasscock factors, the court awarded her $2,570 in attorney's fees.

The amount of fees awarded to Wife is supported by the record. Although Wife spent several thousands of dollars in fees prior to the filing of the divorce action, the record shows she merely consulted some attorneys and the other attorneys only represented her in consent agreements. Further, the $2,000 in credit card debt Wife used to pay legal expenses was counted as marital debt and equitably distributed. The family court did not abuse its discretion in awarding Wife the amount of attorney's fees that remained due to her final attorney.

CONCLUSION

The family court correctly held that Husband's Corvette was nonmarital property. The evidence supports the family court's findings that Wife was guilty of economic misconduct that led to the dissolution of the marriage. The overall distribution of the marital assets was fair, and the court

did not abuse its discretion in granting Husband's Rule 60, SCRCP, motion to consider and distribute the additional tax penalty. Finally, we find no error with the court's award of alimony or attorney's fees. Accordingly, the order of the family court is

AFFIRMED.

STILWELL, and SHORT, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ernest Steele, Appellant,

v.

Stephen Benjamin, Director of Department of Probation, Parole and Pardon Services, Respondent.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3892
Submitted September 15, 2004 – Filed November 22, 2004

AFFIRMED

Ernest Steele, of Bennettsville, pro se for Appellant.

John Benjamin Aplin, and Tommy Evans, Jr., South Carolina Department of Probation, Parole, and Pardon, of Columbia; for Respondent.

BEATTY, J.: Ernest Steele appeals the circuit court's denial of his petition for a writ of mandamus against Stephen Benjamin, Director of the South Carolina Department of Probation, Parole, and Pardon Services (the Department). We affirm.[1]

FACTS

Steele was convicted of murder in 1967 and sentenced to life imprisonment. At the time of his conviction, the law provided that a person was entitled to review for parole after serving one-third of his sentence. See 1962 Code § 55-611 (Supp. 1966) (noting that the Parole Board may parole a prisoner serving a thirty year to life sentence if he has served at least ten years); 1962 Code § 55-611.1 (1962) (providing that a prisoner is entitled to review for parole after he has served one-third of his sentence). The law did not specify how often an inmate who was denied parole would receive review thereafter.

Steele was paroled in 1978. Steele's parole was revoked in May 1987 for convictions in Tennessee for Possession with Intent to Resell drugs and driving under the influence.[2] Steele was again granted parole one year later in July 1988. Steele violated his parole and it was revoked on February 9, 1994, due to another conviction for Possession with Intent to Resell Heroin. Steele was denied parole when he next appeared before the Parole Board on May 24, 2000. He was informed that his next review by the Parole Board would be two years later, on August 12, 2002.

Steele filed an action in circuit court for a writ of mandamus on December 4, 2000. Steele alleged that he was eligible for annual parole review when he first became eligible for parole and that application of the

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

[2] In its brief, the Department alleges that Steele's parole was revoked in 1985. However, a verification of Steele's case history is included in the record. In that document, the Department of Corrections verified that Steele re-entered the Department of Corrections in 1987.

statutorily required two-year review enacted in 1986 constituted an impermissible ex post facto application of law. He requested the circuit court mandate the Department to apply the annual review in place at the time of his first parole. The Department moved to dismiss the action, or, alternatively, for summary judgment. The Department argued: (1) Steele had not met the requirements to acquire a writ of mandamus; (2) he was only entitled to parole review every two years; and (3) no ex post facto violation had occurred.

A hearing was held in the matter on February 27, 2003. After Steele submitted Erwin v. State, Op. No. 93-MO-286 (S.C.S.Ct. filed Aug. 20, 1993),[3] the circuit court requested the Department to consider whether granting Steele annual parole review would be a viable option. In a letter, the Department noted that Erwin was a memorandum opinion. The Department informed the circuit court that: (1) Erwin had no precedential value; (2) because no law existed at the time of Steele's conviction regarding the timing of parole review after a denial of parole, the Department's internal policy of review every two years controlled; (3) Steele failed to exhaust his administrative remedies when he failed to seek review of the Parole Board's decision through the Administrative Law Judge Division (ALJD); and (4) if the Department allowed Steele annual review, it would also have to allow annual review to the 3,000 other inmates similarly situated, which would strain an "already diminishing budget." In support of its position, the Department attached to its letter an undated, untitled copy of a document, stating the document was a copy of the Department's parole investigation policies at the time of Steele's conviction. The document stated that inmates serving a thirty-year sentence or greater who were denied parole would have a subsequent review for parole after twenty-four months.

[3] In Erwin v. State, Op. No. 93-MO-286 (S.C.S.Ct. filed Aug. 20, 1993), the appellant pled guilty in 1960, and the Department attempted to apply to him the biannual parole review from S.C. Code Ann. § 24-21-645 (Supp. 1989). The court held the PCR court erred in finding that Erwin was not suffering an ex post facto violation from the application of the biannual review law enacted decades after his guilty plea. Erwin, at 2.

After a subsequent hearing in the matter was held on June 2, 2003, the circuit court issued an order denying Steele's request for mandamus.[4] The court found that in allowing Steele parole review every two years instead of every year, the Department was applying the "law/rule/regulation in effect at the time Mr. Steele was sentenced." Thus, the court found no violation of the ex post facto clause. The court did not address whether Steele should have exhausted administrative remedies. Steele appeals.

STANDARD OF REVIEW

"Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion." Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 179, 519 S.E.2d 567, 570 (1999). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). An appellate court will not disturb the factual findings of the trial court on a mandamus petition if the trial court's findings are supported by any reasonable evidence. Charleston County Sch. Dist. at 179-180, 519 S.E.2d at 570.

LAW/ANALYSIS

The Department points out that Steele failed to exhaust his administrative remedies, and thus, Steele did not meet all the requirements for a writ of mandamus.[5] Steele, however, argues the circuit court had

[4] The record does not contain a transcript of either the February 27, 2003 or the June 2, 2003 hearings.

[5] Although the circuit court did not address whether Steele failed to exhaust his administrative remedies, the Department, as the respondent in this matter, points to other sustaining grounds found in the record. I'on, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

jurisdiction over the mandamus proceedings. Thus, as an initial matter, we address whether the ALJD had jurisdiction to hear Steele's claim that the Department violated the ex post facto clause when it denied him annual review of parole eligibility.

The question of whether an inmate may seek review of the Department's and the Department of Correction's final decisions under the South Carolina Administrative Procedures Act (APA) was answered by our supreme court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The court held:

> [A]n inmate may seek review of Department's final decision in an administrative matter under the APA. Placing review of these cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing, and judicial review. It also will provide an orderly and consistent framework for resolving such matters.

Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750. The court emphasized that not all APA provisions apply to the internal prison disciplinary or decision-making process: "'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.'" Id. (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972)). The court also said that review of non-collateral or administrative matters, although limited in scope, must be provided in some form, and the APA is the most obvious and practical solution. Id. at 373, 527 S.E.2d at 752.

Ex post facto claims are non-collateral matters. Jernigan v. State, 340 S.C. 256, 260, 531 S.E.2d 507, 509 (2000). In Jernigan, the appellant, like Steele, argued that the change from annual parole eligibility review to biannual review violated the ex post facto clause of the federal and state constitutions. Jernigan brought his claim in a PCR application in the circuit court. Our supreme court held that Jernigan's ex post facto claim was non-collateral and had not received an APA review. The court held: "Accordingly, as a non-collateral matter, petitioner's claim should be

remanded to the appropriate agency to allow it to make a final decision on petitioner's claim." Id.

In Sullivan v. South Carolina Department of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2003), our supreme court held that the only way that an ALJD can obtain subject matter jurisdiction is that the claim must implicate a state created "liberty interest sufficient to trigger procedural due process guarantees." Sullivan, 355 S.C. at 443, 586 S.E.2d at 127 (citing Wolff v. McDonnell, 418 U.S. 539, 557 (1972); Furtick v. S.C. Dep't of Probation, Parole, & Pardon Servs., 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003); and Al-Shabazz, 338 S.C. at 382, 527 S.E.2d at 757)). Sullivan seems to imply that a quantitative analysis of the liberty interest must be conducted.

The requirement of a liberty interest as pronounced in Sullivan is not new. It was recognized in Al-Shabazz, postulated in Jernigan (citing Al-Shabazz), and directly addressed in Furtick. However, the quantification of the liberty interest was central in Sullivan, yet, like some constitutional issues, it remained nebulous. Sullivan cited Furtick as an example of a sufficient liberty interest required to seek due process in the ALJD. Furtick found "the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process." Furtick, 352 S.C. at 598, 576 S.E.2d at 149.

The use of the word *permanent* in Sullivan and Furtick does not mean that there must be a permanent denial of parole eligibility before a sufficient liberty interest is involved. It is merely one of the ways that a sufficient liberty interest may be involved. We must be mindful of the facts in Furtick. Furtick actually had been permanently denied parole eligibility. Sullivan recognizes that Furtick established that an inmate has a right to a ALJD review of an agency's final decision denying parole eligibility, but an inmate does not have a right to a review of a denial of parole. The distinction is that the review or consideration for parole is a right granted by statute whereas parole is only a privilege.

In the present case, Steele is not appealing the denial of parole; he is appealing the Parole Board's change in the time frame in which it will review

parole. The question then becomes whether Steele's claim raises a sufficient liberty interest to trigger due process requirements. Jernigan is factually similar to the present case. Jernigan, like Steele, alleged that the change from annual parole eligibility review to biannual review violated the ex post facto clause. The Jernigan court held that the change from annual parole eligibility review to biannual review produces a sufficient risk of prolonging incarceration by one year and increasing the measure of punishment attached to the covered crimes. It is axiomatic that any period of incarceration implicates a sufficient liberty interest to trigger due process requirements.

Accordingly, Steele's claim was appropriate for disposition under the APA and should have been reviewed by the ALJD. Because he failed to exhaust his administrative remedies, Steele's petition for a writ of mandamus was appropriately denied.

CONCLUSION

Steele's complaint that the Department's application of biannual parole review to him constituted an ex post facto violation, potentially lengthening the period of his incarceration by one year, implicated a liberty interest. Thus, Steele should have exhausted his administrative remedies by bringing this action pursuant to the APA. Because he failed to pursue this matter through administrative means, his petition for a writ of mandamus was appropriately dismissed.

Accordingly, the circuit court's dismissal of this action is

AFFIRMED.[6]

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[6] Because we decide this issue on the additional sustaining ground that Steele failed to exhaust his administrative remedies, we decline to address Steele's ex post facto claim. See I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."); Rule 220 (c), SCACR ("The appellate court may

STILWELL, and SHORT, JJ., concur.

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affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolyn Songer Austin, Appellant,

v.

Board of Zoning Appeals, Town of Hilton Head Island, South Carolina; W.J. Enterprises, Inc.; H.D.S. Builders, L.L.C.; Barbara M. Loebig, and National Bank of Commerce, Respondents.

Appeal From Beaufort County
Thomas Kemmerlin, Master in Equity and Special Circuit Court Judge

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Opinion No. 3893
Submitted October 1, 2004 – Filed November 22, 2004

AFFIRMED

Mark Weston Hardee of Columbia, Matthew A. Gess of Beaufort, and Robert E. Austin, Jr., of Leesburg, Florida, for Appellant.

Drew A. Laughlin and Gregory Milam Alford, both of Hilton Head Island, for Respondents.

KITTREDGE, J.: This is an appeal from a decision of the Town of Hilton Head Island to grant a building permit. The Town's Board of Zoning Appeals upheld the issuance of the permit, and, on appeal, the circuit court affirmed the Board's decision. We also affirm.

FACTS AND PROCEDURAL HISTORY

In September 2002, the Town of Hilton Head Island issued a building permit for the construction of a single-family home on Lot 18 at the corner of Dune Lane and Jacana Street within the Town's corporate limits. The permit was approved for a structure that was set back twenty feet from Dune Lane and ten feet from Jacana Street. Carolyn Songer Austin, a neighboring property owner, believed the ten-foot setback on the Jacana Street side of Lot 18 was improper, and that the new home should be set back at least twenty feet from Jacana Street. She subsequently filed an application with the Town's Board of Zoning Appeals seeking rescission of that permit.

As part of the permitting process, the Town must ensure the proposed home site is designed with the appropriate setback distances from the street and neighboring property. These setback requirements are designed to preserve the aesthetic character of the surrounding neighborhood. As a general rule, the Town's Land Management Ordinance provides that single-family homes must be set back at least twenty feet from the street, but notes:

> For all corner lots, the 20 ft. adjacent street setback may be reduced to 10 ft. on the side of the residence. The 20 ft. adjacent street setback shall apply to the street having the highest number of average daily vehicle traffic (ADT) as determined by the Administrator. If both streets have equal ADT, the property owner may choose which street to apply the 20 ft. adjacent street setback.

In this case, it was determined there was no evidence that either Dune Lane or Jacana Street had higher average daily traffic, so the decision as to which street to apply the ten-foot setback was left to the property owner.

Austin disagreed. She claimed Jacana Street—not Dune Lane—had more daily vehicle traffic, thereby requiring the new home on Lot 18 be set back twenty feet from Jacana Street rather than Dune Lane. The Town's Planning Department examined the matter and determined "[t]here is no evidence that indicates that Jacana Street has a higher traffic volume than Dune Lane," and therefore concluded "the application of a ten-foot setback to [the Jacana Street] side of the property is correct." After conducting a hearing, the Board accepted the Planning Department determination and informed Austin by letter that her request to rescind the building permit had been denied.

Austin appealed the Board's decision to the circuit court. Several months after filing her petition, Austin filed two motions with the circuit court that are relevant to the present appeal: first, she filed a motion to amend her petition to add two new grounds; and, second, she moved to supplement the record on appeal to include an additional plat depicting Lot 18 and the surrounding property. The circuit court denied both of these motions and ultimately affirmed the Board's decision. This appeal followed.

STANDARD OF REVIEW

On appeal, we apply the same standard of review as the circuit court below: the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6-29-840(A) (Supp. 2003); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct. App. 2001). In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. Id. Furthermore, "[a] court will refrain from substituting its judgment for

that of the reviewing body, even if it disagrees with the decision." Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Id.

LAW/ANALYSIS

Austin raises five issues on appeal: She claims (1) the Board failed to set out its final decision in writing as required by statute; (2) the circuit court applied the wrong standard of review; (3) the circuit court improperly denied the motion to amend the petition for appeal; (4) the circuit court improperly denied the motion to supplement the record on appeal; and (5) the Board lacked subject matter jurisdiction to issue its decision.

1. The Board's Final Decision

Austin first argues the circuit court erred in finding the Board's decision to deny her application was properly issued in writing as required by statute. We disagree.

South Carolina Code section 6-29-800 requires that "[a]ll final decisions and orders of the board must be in writing" and that "[a]ll findings of fact and conclusions of law must be separately stated . . . ." S.C. Code Ann. § 6-29-800(F) (Supp. 2003). In the present case, the Board informed Austin of its decision by letter dated December 9, 2002, from the Town's Deputy Planning Director, David L. Recor. In relevant part, the letter advised Austin:

> Pursuant to testimony in this matter, the Board of Zoning Appeals concluded and made the following written findings:
>
> 1. There is no evidence that indicates that Jacana Street has a higher traffic volume than Dune Lane and therefore it was correct

> for the Department of Building and Fire Codes to issue a building permit with a ten (10) foot setback on the Jacana Street side of the affected property.
>
> The vote on the motion to uphold the administrative determination was 5-1 and therefore the appeal request was denied.

Austin contends this letter does not satisfy the statutory requirement that the Board's decision be in writing with findings of fact and conclusions of law separately stated. We find no reversible error. Though the statute does not specify the form the writing must take, it is well-settled that courts reviewing the decisions of zoning boards and other administrative agencies may look to written documents as well as records of proceedings as sufficient formats for final decisions. For example, in Vulcan Materials Co. v. Greenville County Board of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), this court upheld a circuit court finding that a transcript of a zoning board hearing constituted a sufficient final written decision. On the question of whether the transcript alone could satisfy the statutory requirement of a written decision, the court opined that "[g]enerally, the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case." Id. at 494, 536 S.E.2d at 899; cf. Massey v. City of Greenville Bd. of Zoning Adjustments, 341 S.C. 193, 201, 532 S.E.2d 885, 889 (Ct. App. 2000) (considering use of transcript but rejecting in part because it was virtually indecipherable).

In the present case, the evidence considered by the Board is clearly laid out in the transcript of the hearing. Reading this transcript together with the December 9, 2002, letter, therefore, provides sufficient basis for a reviewing court to determine whether the decision was supported by the facts of the case.

Our decision today, however, should not be interpreted as an indication that state and municipal agencies need not follow the

mandate of section 6-29-800 and other statutory provisions requiring fully formed written final decisions. In the present case, the issue raised by Austin to the Board was limited to the narrow factual question of determining which of the two streets had a higher average traffic volume. While an exhaustive written decision may not be warranted when a narrow issue may be addressed succinctly by the Board, further detail will surely be required in more complicated cases. Indeed, thorough written findings and determinations eliminate potential confusion and ensure the will of the Board is accurately transmitted to the affected parties and reviewing courts.

2. Standard of Review

Austin next argues the circuit court applied the wrong standard of review. We disagree.

South Carolina Code section 6-29-840 prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board. In pertinent part, the statute provides: "The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840 (Supp. 2003). It is well-settled that "the factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992) (emphasis added) (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)). In the present case, the circuit court articulated the standard of review in different terms, stating: "Factual findings of the zoning board of adjustment must be affirmed by the circuit court if there is any evidence to support them and if they are not influenced by an error of law." (emphasis added).

This variance in language is likely the result of confusion that arose after the Legislature enacted an entirely new statutory scheme for local planning and zoning in 1994 in which the standard of review as

set out under section 6-29-840 was adopted.[1] Prior to the enactment of the new statute, the standard of review was phrased as an "any evidence" standard—identical to that articulated by the circuit court in the present case. As quoted above, the current statute clearly phrases the proper standard of review as a "no evidence" standard. Austin argues the failure of the circuit court to couch the standard of review in the precise language of section 6-29-840 is a fatal error requiring reversal. This argument is without merit.

We discern no material difference between the standard of review articulated by the circuit court and the standard prescribed by section 6-29-840. Looking carefully at the way the sentences are phrased in the court order and the statute reveals that the distinction between them, if any, is purely linguistic. The circuit court phrases the standard positively: The "findings . . . must be affirmed . . . if there is any evidence to support them." (emphasis added). On the other hand, section 6-29-840, by reference to the common law standard for reviewing a jury's findings of fact, adopts a standard of review generally phrased in the negative: The "findings . . . will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports" them. (emphasis added). When these sentences are read as a whole, therefore, it is clear there is no meaningful difference in the quantum of proof required under the standard formulated by the circuit court and the standard prescribed under the statute.

We have confronted this issue before in Vulcan Materials Co. v. Greenville County Board of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000). In that case as in the present one, the court was asked to determine whether the circuit court applied the correct standard of review for an appeal of a zoning board decision when the lower court set out the standard using the "any evidence" language

[1] See 1994 S.C. Acts 4010 (enacting the South Carolina Local Government Comprehensive Planning and Enabling Act of 1994). All local planning programs were required to be in conformity with the Act within five years of its enactment. 1994 S.C. Acts 4036.

rather than the "no evidence" language. After detailing the history of the enactment of the new statute and the confusion it has caused regarding the proper standard of review, the court reached the same conclusion we do today:

> We have repeatedly held that the old statute, § 6-7-780, imposed an "any evidence" standard of review . . . . The new statute, § 6-29-840, is also very deferential to a board's findings of fact as it equates them to a jury's findings. . . . The distinction, if any, between an "any evidence" and a "no evidence" standard is of little importance to the instant action . . . .

Id. at 488, 536 S.E.2d at 896.

We therefore find the standards of review set out by the circuit court and prescribed under section 6-29-840 are functionally equivalent. Austin's argument to the contrary is unpersuasive.

3. Motion to Amend

Austin next argues the circuit court erred in denying her motion to amend the petition to state additional grounds for her appeal. We disagree.

The procedures governing appeals of Board decisions to the circuit court are prescribed by statute. Section 6-29-820 requires that the aggrieved party must file a written petition with the clerk of court "setting forth plainly, fully, and distinctly why the decision is contrary to law." Furthermore, this petition "must be filed within thirty days after the decision of the board is mailed." S.C. Code Ann. § 6-29-820 (Supp. 2003). The statute makes no provision for amendment of the grounds set forth in the petition.

Austin, however, argues the circuit court should have freely allowed amendments to the petition. Analogizing to the lenient notice

pleading regime of our Rules of Civil Procedure, Austin asserts that parties should have the same latitude to amend petitions appealing a Board decision as they would when seeking to amend any pleading in a civil trial court. This argument misapprehends the function of the circuit court in this case. When reviewing a Board decision, the circuit court sits as an appellate court. Its review is strictly limited to the facts and arguments raised to the Board below. Indeed, the circuit court is expressly forbidden from considering any new facts. See S.C. Code Ann. § 6-29-840(A) (providing the circuit court "may not take additional evidence"). This is a stark contrast to the circuit court's role in its original jurisdiction as a fact finder. There, the Rules of Civil Procedure recognize the reality of the pre-trial and trial process that facts uncovered during the course of ongoing discovery and presentation of evidence necessitate that amendments to initial pleadings be freely allowed in order to conform to newly garnered facts. See, e.g., Rule 15, SCRCP (providing that leave to amend pleadings "shall be freely given when justice so requires and does not prejudice any other party"). Therefore, it would be error for the circuit court to adhere to the rules designed to govern the conduct of civil trial litigation when sitting in its appellate capacity.

Our supreme court reached a similar conclusion in Smith v. South Carolina Department of Social Services, 284 S.C. 469, 327 S.E.2d 348 (1985). In that case, the appellant filed a petition in the circuit court for review of a final decision issued in a contested case before DSS. As in the present case, the procedure for seeking judicial review of the DSS decision was governed by statute mandating the petition for appeal be filed within 30 days of the Department's decision. Id. at 471, 327 S.E.2d at 349. The circuit court dismissed the appeal because the petition failed to specify an error, and it refused to consider the appellant's motion to amend the petition after the thirty day filing period had expired. Id. In upholding the circuit court's decision, the supreme court rejected the appellant's argument that her motion to amend should have been freely granted, opining: "The appellant contends that the circuit judge erred in failing to consider her Motion to Amend. She relies on the policy of liberally allowing amendments to pleadings. We disagree. This policy does not apply to

amendments made after expiration of the thirty-day statutory period for filing the appeal." Id.

Accordingly, we find the circuit court correctly refused Austin's request to amend the petition after the expiration of 30-day period for filing the appeal.

4. Motion to Supplement the Record

Austin next argues the circuit court erred by denying her motion to supplement the record with an additional plat. We disagree.

As noted in the discussion above, the scope of review for a circuit court reviewing the decision of the Board is strictly proscribed by statute. Section 6-29-840 states:

> The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing.

S.C. Code Ann. § 6-29-840(A) (Supp. 2003).

Austin maintains the plat was admitted into evidence at the hearing before the Board, but that the Board, nevertheless, failed to include the plat in the record on appeal.[2] In support of her argument that the plat was considered by the Board, Austin draws our attention to the transcript of the Board hearing where the plat in question was mentioned. Specifically, a zoning board member asked a member of the Town's Planning Staff whether she provided the Board a copy of a plat she had just referenced in describing the setback requirements in

[2] The Board is responsible for preparing and filing the record on appeal. See S.C. Code Ann. § 6-29-830 (Supp. 2003).

the area surrounding Lot 18. The staff member replied that the plat had not been given to the Board. After canvassing the entire transcript of the hearing, we cannot discern from this fleeting reference sufficient indication that the additional plat was introduced into the record or that the zoning board relied upon it. Moreover, we are bolstered in this view by the fact that another plat depicting the area surrounding Lot 18 was expressly relied upon by the Board and included in the record on appeal.

The circuit court, therefore, did not abuse its discretion in refusing to supplement the record based solely on the briefest mention of an additional plat during the Board hearing.

5. Subject Matter Jurisdiction

Finally, we address Austin's argument that the Board was without subject matter jurisdiction to uphold the issuance of the building permit. We find this claim is without merit.

Austin asserts that the Board's action upholding the building permit effectively "altered" Jacana Street, an action Austin maintains was in excess of the Board's statutorily prescribed authority.[3] This allegation stems from some questions raised at the Board hearing concerning whether the portion of Jacana Street that dead-ends into a pedestrian beach access had been classified as a "street" or "park." Homes built on private property abutting areas set aside as "parks" under the Town's Land Management Ordinance need only be set back a minimum of five feet rather than the ten and twenty feet setback distances applicable for streets.

[3] Specifically, the Board has the authority "to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance." S.C. Code Ann. § 6-29-800(A)(1) (Supp. 2003).

In this case, the issue of whether the Board "classified," "altered," or otherwise viewed any part of Jacana Street as a park is of no consequence to any issue raised in her appeal. Austin invoked the jurisdiction of the Board to address the narrow question of whether the Town erred in issuing the building permit based on her contention that Jacana Street had a higher average daily traffic volume than Dune Lane. The Board's ruling only answered this question and did not in any way touch upon whether a portion of Jacana Street was classified as a park, for the Board authorized—consistent with the application—a ten-foot setback along Jacana Street, not a five-foot setback.[4]

This issue, and the confusion from which it arises, illustrates the Legislature's wisdom in requiring that boards of zoning appeals reduce their findings and conclusions to writing. Had the Board in this case prepared a detailed order or memorandum outlining its decision, the extent and effect of the Board's action would not be called into question. Nevertheless, we find the Board's decision to uphold the building permit did not exceed the bounds of its statutory authority.

CONCLUSION

For the foregoing reasons, the order of the circuit court upholding the decision of the Board of Zoning Appeals to permit a twenty-foot setback along Dune Lane and a ten-foot setback along Jacana Street is

AFFIRMED.

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

[4] We emphasize that the application for a building permit on Lot 18 sought a twenty-foot setback along Dune Lane and a ten-foot setback along Jacana Street. That is the precise relief approved by the Town Administrator and upheld by the Board. There is nothing in the record to suggest that the proposed residence for Lot 18 is subject to a five-foot setback along Jacana Street.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Myers, Appellant,

v.

National States Insurance Company, Respondent.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 3894
Submitted October 1, 2004 – Filed November 22, 2004

AFFIRMED

Clinch H. Belser, Jr., and Michael J. Polk, both of Columbia, for Appellant.

Robert C. Brown, of Columbia, for Respondent.

WILLIAMS, J.: This action originated after an insurance company denied a beneficiary's claim for proceeds from a life insurance policy. The beneficiary sued the insurance company for breach of contract and moved in limine to exclude evidence regarding the decedent's medical condition. The

trial court denied the motion and found for the insurance company. We affirm.

FACTS

The facts of this case are not in dispute. On August 19, 1996, Carolyn Myers Metz ("Decedent") applied for and received a life insurance policy from National States Insurance Company ("Insurance Company"). In August 1998, her policy lapsed due to nonpayment. In October 1998, Decedent applied for, and was granted, reinstatement of the policy. On July 28, 1999, Decedent passed away. When Patricia Myers ("Beneficiary") made a claim for the proceeds of the policy, her claim was denied and the premium payments were refunded.

Insurance Company rescinded the policy based on alleged misrepresentations made in the reinstatement application. In her application for reinstatement (which references the original application in the policy), Decedent indicated that there had been no change in her health from that noted on her original policy. In her original application, Decedent did not indicate that she had any of the listed problems. The Insurance Company asserted that had it known Decedent's medical condition at the time of her reapplication, it would not have approved the application and thus, would not have reinstated coverage. Insurance Company based its ability to rescind on the incontestability clause in the policy.

In denying Beneficiary's claim, Insurance Company mentioned in its letter to Beneficiary that when the policy was reinstated, the incontestability clause was reinstated as well. The insurance policy provides for a limited period during which Insurance Company can contest the policy. The provision states:

> INCONTESTABILITY. We cannot contest this policy, except for nonpayment of premium, after it has been in force during the lifetime of the insured for a period of two years from the Policy Date.

Beneficiary brought a breach of contract action against Insurance Company. The trial court heard arguments as to Beneficiary's motion in limine, which sought to keep evidence of Decedent's medical condition from being considered based on the notion that the incontestability period had run. Insurance Company argued that the incontestability period started over upon reinstatement. In its final order, the trial court denied the motion and considered evidence of Decedent's medical condition. Based on that medical evidence, the court declared the policy null and void. We affirm.

STANDARD OF REVIEW

"Generally, an action on a life insurance policy is a legal action involving a question of contract law." Estate of Revis by Revis v. Revis, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997). "In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law." Key Corporate Capital, Inc. v. County of Beaufort, 360 S.C. 513, 516, 602 S.E.2d 104, 106 (Ct. App. 2004) (citation omitted). In addition, the trial court's findings of fact will not be disturbed unless the record contains no supporting evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Beneficiary argues that the motion in limine to exclude evidence of Decedent's medical condition should have been granted based on the running of the incontestability period. We disagree.

Insurance policies are subject to the rules of contract construction. B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Courts must give policy language its plain, ordinary, and popular meaning. Id. When the contract is unambiguous, clear, and explicit, it must be construed according to the terms used by the parties. Id.

Beneficiary argues the rules of reinstatement do not allow revival of the contestability period because reinstating an insurance policy does not create a new contract. Beneficiary is correct that the reinstatement of an insurance

policy does not create a new contract of insurance. However, in Murray v. Metropolitan Life Ins. Co., 193 S.C. 368, 373, 8 S.E.2d 314, 316 (1940), our Supreme Court held that reinstatement is "a contract by virtue of which the policy already issued, under the conditions prescribed therein, is revived or restored after its lapse." Id. (emphasis added). No new contract is created, rather the conditions of the policy remain the terms of the contract. The terms of this contract provide for reinstatement subject to evidence of insurability and for a contestability period of two years from the policy date.[1]

Beneficiary contends that reviving the period of incontestability modifies the terms of and/or adds a new term to the contract. This is simply not the case. As stated in Murray, the parties remain subject to the same conditions prescribed in the original policy. 193 S.C. at 373, 8 S.E.2d at 316.

Beneficiary also argues that the policy is ambiguous. The terms of the policy are the same as those required by Section 38-63-220 of the South Carolina Code. Subsection (d) mandates that life insurance policies include:

> a provision that the policy and any rider or supplemental benefits attached to the policy are incontestable as to the truth of the application for insurance and to the representations of the insured individual after they have been in force during the lifetime of the insured for a period of two years from their date of issue.

S.C. Code Ann. § 38-63-220 (d) (2002).

Furthermore, subsection (j) states (in pertinent part) that individual life insurance policies must include:

> a provision that the policy may be reinstated at any time within three years after the date of default in the payment of the premium . . . upon evidence of insurability satisfactory to the insurer and the payment of all overdue premiums and payment . . . .

[1] Specifically, the policy provides that: "Reinstatement will be subject to: (a) evidence of insurability satisfactory to us; (b) payment of overdue premiums with interest at the rate of 6 % per year."

S.C. Code Ann. § 38-63-220 (j) (2002).

We do not find the language ambiguous. It clearly provides for a period of contestability for two years from the date of issue and reinstatement subject to evidence of insurability.

Nor do we find the terms of the policy, which were taken directly from the South Carolina Code, ambiguous. The policy clearly provides for reinstatement "subject to evidence of insurability satisfactory to [the Insurance Company]" and for a period of contestability "during the lifetime of the insured for a period of two years from the Policy Date." The original application specifically mentions the "Incontestability Provision," and the reinstatement application references the original application in the policy. Based on the terms used by the parties, reinstatement of the policy is subject to evidence of insurability satisfactory to Insurance Company and a two year period of contestability.

Finally, Beneficiary contends that the period of contestability begins on the original policy date, and does not start over upon reinstatement. However, a review of South Carolina law reveals that the contestability period begins anew on reinstatement. See Murray, 193 S.C. at 370-71, 378, 8 S.E.2d at 315, 318; Ward v. New York Life Ins. Co., 129 S.C. 121, 123 S.E. 820 (1924); P. G. Guthrie, Annotation, Insurance: Incontestable Clause As Affected By Reinstatement of Policy, 23 A.L.R.3d 743, 748 (1969).

Although the reinstatement application does not in and of itself restart the incontestability period, in this case it references the original application, which specifically mentions the "Incontestability Provision." Thus, by its own terms, the policy provides for a period of contestability and requires evidence of insurability satisfactory to the insurer.

CONCLUSION

Based on the plain meaning of the policy, Insurance Company had two years from the date of reinstatement to contest the policy. Because Decedent

passed away before the expiration of that period, Insurance Company could contest the representations she made in her reinstatement application. The trial court could consider medical evidence related to those representations. Accordingly, the motion in limine was properly denied. Therefore, the decision of the trial court is

AFFIRMED.

GOOLSBY AND ANDERSON, JJ., concur.