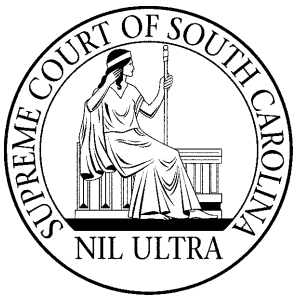


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 47**

**December 6, 2004**

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

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

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In the Matter of Richard A. Blackmon, Respondent.

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Opinion No. 25903
Submitted November 9, 2004 – Filed December 6, 2004

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# PUBLIC REPRIMAND

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

Richard A. Blackmon, of Sumter, pro se.

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**PER CURIAM:** The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either a public reprimand or definite suspension not to exceed thirty (30) days. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

## FACTS

In March 1998, complainant retained an attorney to represent her in a child support and custody action. Following that attorney's suspension from the practice of law, complainant consulted with respondent about assuming representation. Respondent agreed to accept the case in October

1998. The action filed by the original attorney was administratively stricken from the roster in November 1998.

Respondent obtained an order restoring the case to the roster and requested a hearing. The hearing was scheduled for October 1999, but the matter was continued because respondent was required to appear in another court. Respondent filed amended pleadings in November 1999, adding claims for divorce and equitable distribution.

Other than an attempt to serve the defendant with the amended pleadings, respondent took no action for nearly sixteen months. Respondent did not file for a new hearing until March 2001. By that time, however, the case had been administratively stricken from the roster for a second time.

Respondent did not communicate with complainant from November 1999 until June 2002. Respondent took no further action on complainant's behalf until he received notice of the grievance in June 2002. He subsequently had the case restored to the roster and secured a hearing date. Prior to the hearing, complainant contacted respondent and informed him that all issues with her husband had been resolved and that she wanted her case dismissed. Respondent has now completed the case and has neither charged nor accepted a fee.

Respondent is a solo practitioner. He acknowledges he did not have adequate case management and calendaring systems and procedures in place at the time of his representation of complainant. Respondent represents that he has since completed a thorough review and assessment of his office management practices with attorney Steedley Bogan who has assisted him in updating and improving the processes through which his cases are handled. Respondent represents that he is now taking steps to ensure, to the best of his ability, that similar problems will not occur in the future.

## LAW

Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement,

Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct). Respondent admits that by his misconduct he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); and 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Misconduct).

## CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

**PUBLIC REPRIMAND.**

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

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

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Joseph Glover, Emily Gaillard, Jewell G. Dangerfield, John S. Templeton, Charles Huff, Appellants,

v.

County of Charleston, County of Charleston Planning Commission, William Miller, in his individual and official capacity, Michelle Loy in her official Capacity as a member of the Charleston County Planning Commission, Defendants,

of whom County of Charleston, County of Charleston Planning Commission are the, Respondents.

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Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

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Opinion No. 25904
Heard October 7, 2004 – Filed December 6, 2004

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**AFFIRMED**

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Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, PA, of Charleston, for Appellants.

Joseph Dawson, III, and Bernard E. Ferrara, of North Charleston, for Respondents.

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**JUSTICE WALLER:** Appellants,[1] property owners in Charleston County, brought this action alleging the County's newly implemented Unified Development Ordinance (UDO) effectively re-zoned their property, depriving them of due process and equal protection, and resulting in a taking of their property without just compensation. The trial court granted summary judgment to respondents (collectively County). We affirm.

## FACTS

In 1994, the General Assembly passed the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 requiring local governments to develop a comprehensive planning plan. S.C. Code Ann. § 6-9-310 through § 6-29-1200 (2004). Pursuant to the act, Charleston County formed a Joint Planning Policy Committee which, between 1997-1998, held fifteen advertised public meetings to solicit input on the development of the Charleston County Comprehensive Plan (Plan). In conjunction with adoption of the Plan,[2] County referred a Unified Development Ordinance (UDO) to the newly created Charleston County Planning Commission for review.

The Planning Commission recommended several amendments to the UDO. Thereafter, County Council advertised in the local newspaper and held numerous public hearings between June and November 2000. As a result of the hearings, Council approved various amendments to the UDO in February 2001. In November 2001, after three additional public hearings and 40,000 notices were sent to property owners, Council adopted the UDO by Ordinance No. 1202.

In November 2000, prior to adoption of Ordinance No. 1202, appellants filed a complaint challenging the **proposed** UDO. The complaint sought an

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[1] Joseph Glover died during the pendency of this appeal. His estate was never substituted as a party such that neither he, nor his sister Emily Gaillard, no longer have any interest in this case.

[2] The Plan was adopted by Ordinance No. 1095 in April 1999.

injunction and alleged the proposed UDO would "reclassify" every parcel of real estate in the unincorporated areas of the county. Appellants maintained the alleged "reclassification" was accomplished without conspicuous notice which they contended was required by S.C. Code Ann. § 6-9-760 (2004). The complaint further alleged due process and equal protection violations, and that the UDO effected an unconstitutional taking of their property.[3]

Both sides moved for summary judgment. After a hearing, Judge Rawl granted summary judgment to County.

## ISSUE

Did the circuit court err in granting summary judgment to County?

## STANDARD OF REVIEW

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id. The opposing party may not rest upon mere allegations, but must respond with specific facts showing a genuine issue. City of Columbia v. Town of Irmo, 316 S.C. 193, 447 S.E.2d 855 (1994).

[3] According to the parties and the circuit court's order, Judge Lockemy granted a temporary injunction in July 2001; however, the court stayed the order for ninety days in order for the County to either adopt the ordinance or stop enforcing the UDO. Before the order was signed, appellants withdrew their motion for a preliminary injunction, and the court rescinded its prior order. County then adopted the ordinance on November 20, 2001.

## DISCUSSION

### a. Lack of notice

Initially, Appellants assert they were denied due process because they were not provided with conspicuous notice as required by S.C. Code Ann. § 6-29-760 (2004), which provides, in pertinent part:

> **Before enacting or amending any zoning regulations** or maps, the governing authority or the planning commission, if authorized by the governing authority, shall hold a public hearing on it, which must be advertised and conducted according to lawfully prescribed procedures. If no established procedures exist, then **at least fifteen days' notice of the time and place of the public hearing must be given in a newspaper** of general circulation in the municipality or county. **In cases involving rezoning, conspicuous notice shall be posted on or adjacent to the property affected**, with at least one such notice being visible from each public thoroughfare that abuts the property. (emphasis supplied).

We find County's adoption of the UDO was merely the enactment of an ordinance, such that the newspaper publication was sufficient. Contrary to appellants' contention, this simply was not a rezoning. Accordingly, "conspicuous" notice by posting was not required. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (when terms of statute are clear and unambiguous, court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation).

Appellants' reliance upon the Court of Appeals' opinion in Brown v. County of Charleston, 303 S.C. 245, 399 S.E.2d 784 (Ct. App. 1990) is misplaced. In Brown, the Court of Appeals dealt with the effect of a zoning amendment which changed the plaintiff's right to operate an outdoor gun range from a use of right to a use which required a permit. The Court of Appeals noted it was uncontested that the **manner** of notice in that case, i.e.,

newspaper publication, complied with the statutory requirements concerning time, place, and manner. 303 S.C. at 247, 399 S.E.2d at 785. The Court went on to hold, however, that the published newspaper advertisement lacked sufficient specificity to warn the plaintiff he could be affected by the amendments. Accordingly, finding no evidence the plaintiff had either constructive or actual notice of the character of the action posed, the Court of Appeals found the amendment void.

Brown is simply inapposite. Appellants here have not challenged the **sufficiency** of the notice published in the newspaper. On the contrary, they claim only that they were entitled to "conspicuous notice" via posting. Further, it is patent that each of the plaintiffs had **actual** notice of the proposed UDO, as evidenced by the fact that they brought suit in November **2000**, they attended public hearings on the matter, and at least one appellant, Glover, received one of the 40,000 mailed notices concerning the UDO. We find appellants' actual notice sufficient. Accordingly, the trial court properly found no due process or equal protection violations resulted from the alleged lack of notice.

### b. Unconstitutional Taking

Appellants next assert the trial court improperly granted summary judgment on their takings claims. We disagree.

If a land-use regulation substantially advances legitimate government interests and does not deny the owner of all economically viable use of his land, it does not constitute a taking. Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 305-06, 534 S.E.2d 270, 274, cert. denied, 531 U.S. 1029 (2000). Regulatory delay does not normally give rise to a temporary taking claim. First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987). "Similarly, although a property owner who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking." Sea Cabins v. City of North Myrtle Beach, 345 S.C. 418, 36, 548 S.E.2d 595, 604 (2001). Moreover, a zoning classification is not unconstitutional simply because a developer is

deprived of a more profitable use of his property. Bear Enterprises v. County of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995).

We find no evidence of a taking in this case. Appellants simply have not demonstrated that they were, even temporarily, denied all economically viable use of their land. Appellants' complaint alleges only that they can not sell their property for fair market value, and that the ordinance severely restricts subdivision. It is patent appellants have not been denied all economically viable use of their land, such that the trial court properly granted summary judgment on their takings claim. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002) (summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law).

**c. Equal Protection/Wealth based classification**

Appellants next assert County divided all of the citizens in the unincorporated areas of Charleston into unlawful racial groups, in violation of equal protection. This argument was first raised at the summary judgment hearing, and was quite different from the allegations of their complaint, which essentially alleged it was an equal protection violation to treat people in unincorporated areas differently than those in corporate limits, and that the ordinance required those people in unincorporated areas to spend exorbitant sums to comply with the UDO. Further, the circuit court did not specifically rule on appellants' assertions concerning the "settlement areas." Accordingly, this argument is not preserved for review. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000) (equal protection argument not preserved for review where lower court did not address it and appellant did not raise it in motion to reconsider).

Moreover, there is simply no evidence in the record bearing out appellants' assertions that the ordinance is based upon impermissible race or wealth-based classifications. We find summary judgment was properly granted.

The judgment below is

**AFFIRMED.**

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

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

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In re: Estate of Roberta Maybank Prioleau and Estate of William F. Prioleau.

Ms. Elizabeth deRosset Prioleau, Petitioner,

v.

Mr. William F. Prioleau, Jr., Mary Wesley, Mrs. Roberta Maybank Prioleau Moran, Ms. Gabrielle Wesley, Ms. Alicia Wells Wesley, Russell W. Templeton, as Guardian ad Litem for Ms. Caroline deRosset Wesley, a minor child, for Ms. Virginia Maybank Prioleau, a minor child, and for Mr. William Fripp Prioleau, III, a minor child, Carlos Gibbons, as Guardian ad Litem for Ms. Roberta Maybank Moran, a minor child, and William Barry Prioleau Moran, a minor child, and the class of grandchildren unborn at the deaths of Roberta Maybank Prioleau and William F. Prioleau, Respondents,

of whom Russell W. Templeton, as Guardian ad Litem for Ms. Caroline deRosset Wesley, a

minor child, for Ms. Virginia Maybank Prioleau, a minor child, and for Mr. William Fripp Prioleau, III, a minor child are Appellants,

and Carlos Gibbons, as Guardian ad Litem for Ms. Roberta Maybank Moran, a minor child, and William Barry Prioleau Moran, a minor child, and for the class of grandchildren unborn at the deaths of Roberta Maybank Prioleau and William F. Prioleau are Respondents.

AND

Ms. Mary Prioleau Wesley, Petitioner,

Mr. William F. Prioleau, Jr., Ms. Elizabeth DeRosset Prioleau, Mrs. Roberta Maybank Prioleau Moran, Ms. Gabrielle Wesley, Ms. Alicia Wells Wesley, Russell W. Templeton, as Guardian ad Litem for Ms. Caroline deRosset Wesley, a minor child, for Ms. Virginia Maybank Prioleau, a minor child, and for Mr. William Fripp

v.

Prioleau, III, a minor child, Carlos Gibbons, as Guardian ad Litem for Ms. Roberta Maybank Moran, a minor child, for William Barry Prioleau Moran, a minor child, and the class of grandchildren unborn at the deaths of Roberta Maybank Prioleau and William F. Prioleau, Respondents,

of whom Russell W. Templeton, as Guardian ad Litem for Ms. Caroline deRosset Wesley, a minor child, for Ms. Virginia Maybank Prioleau, a minor child, and for Mr. William Fripp Prioleau, III, a minor child are Appellants,

and Carlos Gibbons, as Guardian ad Litem for Ms. Roberta Maybank Moran, a minor child, William Barry Prioleau Moran, a minor child, and for the class of grandchildren unborn at the deaths of Roberta Maybank Prioleau and William F. Prioleau are Respondents.

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Appeal From Richland County
Angela K. Crawford, Probate Judge

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Opinion No. 25905
Heard October 20, 2004 – Filed December 6, 2004

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**REVERSED**

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Russell W. Templeton, of Columbia, for Appellants.

Carlos W. Gibbons, Jr., of Ormand, Ashley & Gibbons; Deborah Harrison Sheffield, of Law Offices of Deborah Harrison Sheffield, P.A.; Gabrielle Wesley; Alicia Wells Wesley; and Kenneth B. Wingate and Paul D. Kent, both of Sweeny, Wingate & Barrow, all of Columbia; and Robert M. Kunes and Virginia D. Meeks, both of Evans, Carter, Kunes & Bennett, P.A, of Charleston, for Respondents.

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**JUSTICE WALLER:** The appellants appeal the probate court's order interpreting the meaning of language in two wills. We reverse.

## FACTS

This probate action involves the construction of an identical clause in the wills of William F. Prioleau (William) and Roberta Maybank Prioleau (Roberta). Roberta died on September 24, 1995, and William died on January 27, 1997. In each of their wills, the Prioleaus provided that a share of his/her estate was to be given to their "then-living grandchildren."

Specifically, Roberta divided her residual estate into two shares: Share A was to go to William if he survived her and was drafted in a manner to take advantage of the maximum tax deduction in a marital share; and Share B was to be divided into five equal shares with one share going to each of the couple's four children and one share to the couple's "then-living grandchildren." Further, Share B was to be held and administered as the Prioleau Family Trust until distribution which was to occur after the deaths of both Roberta and William. William's will, executed after the death of

Roberta, has a similar provision with Shares A-1 and B-1. It is unclear to whom Share A-1 was to be given.[1] Apparently, as a result of the failure of Share A-1 in William's will, the entire residual estate is now to pass as Share B-1 to the couple's children and the "then-living grandchildren."

Elizabeth Prioleau (Elizabeth) is co-personal representative along with her brother William F. Prioleau, Jr. (Will) for their father William's estate.[2] Subsequent to William's death, two grandchildren were born -- one on August 17, 1998, and the other on July 7, 2000.[3] After the second grandchild was born, Elizabeth petitioned the probate court for an order regarding the phrase "then–living grandchildren." The probate court appointed two guardians ad litem, one for the grandchildren born after William's death and the other for those grandchildren living at William's death.

Looking at extrinsic evidence, the probate court held that the phrase "then-living grandchildren" in the wills created a latent ambiguity as to whether it refers to those grandchildren living at the death of William or the date of distribution. Then the probate court, looking at extrinsic evidence,

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[1] Although Roberta had obtained legal advice in drafting her will, apparently William used Roberta's will as a guide in drafting his own will. Roberta died before William executed his will and he had not remarried. Therefore, he could not take advantage of a marital deduction as Roberta had done in her will with Share A.

[2] Will was the successor personal representative for Roberta's estate and after William's death, he assumed the personal representative role for her estate.

[3] Only one of William and Roberta's children does not have any children, Elizabeth. The other three children of William and Roberta have a total of seven children: Mary Prioleau Wesley has three children; William Prioleau has two children; and Roberta Prioleau Moran has two children, both born after William's death. The issue of Elizabeth's standing was raised below but is not an issue on appeal. Furthermore, Elizabeth contended below that she was seeking an interpretation of the phrase "then-living grandchildren" so that she could fulfill her obligations as co-personal representative.

interpreted the phrase to include those grandchildren living at the time of distribution.

## ISSUE

What does the phrase "then-living grandchildren" mean in the Prioleaus' wills?

## DISCUSSION

There are two possible interpretations of the phrase "then-living grandchildren" in the Prioleaus' wills: 1) the grandchildren living when the testators died; or 2) the grandchildren living when the estate is distributed at some point in the future. Relying on extrinsic evidence, the probate court agreed with the respondents and held the phrase created a latent ambiguity. Then she determined that Roberta and William intended to include all of their grandchildren living at distribution. The appellants contend the phrase refers to the grandchildren living when the testators died.

It is elementary that a testator's intention, as expressed in his will, governs the construction of it if not in conflict with law or public policy and intent is to be ascertained upon consideration of the entire will. Gist v. Brown, 236 S.C. 31, 113 S.E.2d 75 (1960). In construing the provisions of a will, every effort must be made to determine the intentions of the testator and carry out such intentions. Citizens & S. Nat'l Bank v. Cleveland, 200 S.C. 373, 20 S.E.2d 811 (1942). Further, the court must always first look to the language of the will itself. Pate v. Ford, 297 S.C. 294, 299, 376 S.E.2d 775, 778 (1989). The court "must give the words contained in the document their ordinary and plain meaning unless it is clear the testator intended a different sense or such meaning would lead to an inconsistency with the testator's declared intention." Bob Jones Univ. v. Strandell, 344 S.C. 224, 230, 543 S.E.2d 251, 254 (Ct. App. 2001).

Ambiguities may be patent or latent. "[T]he distinction being that in the former case the uncertainty is one which arises upon the words of the . . . instrument as looked at in themselves, and before any attempt is made to

apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the . . . instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe." In re Estate of Fabian, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997) (citing Jennings v. Talbert, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907)). A court may admit extrinsic evidence to determine whether a latent ambiguity exists. Id. at 353, 483 S.E.2d at 476. Once the court finds a latent ambiguity, extrinsic evidence is also permitted to help the court determine the testator's intent. Id.

After looking at both of the wills in their entirety and the extrinsic evidence, we hold the phrase is not ambiguous. Roberta's will provides: "Upon the death of the survivor of my said husband or me, my trustees shall divide and distribute this Trust as then constituted as follows: . . . (e) One-fifth (1/5) to be divided among my then-living grandchildren in equal shares." (emphasis added). Likewise, William's will provides: "Upon my death, my Trustees shall divide and distribute this Trust as then constituted as follows . . . (e) one-fifth (1/5) to be divided among my then-living grandchildren in equal shares." (emphasis added). Thus, the shares were to be divided and distribution was to take place upon the death of William as he survived Roberta. We also note that both wills provided for distribution of the income from the Trust "[c]ommencing with the date of [] death . . ." The wills themselves do not support a finding of ambiguity.

Furthermore, the extrinsic evidence also does not support such a finding. Specifically, the probate court noted that Roberta and William were generous, gave to charity, and placed a great deal of importance on family. The probate court then noted that inclusion of the grandchildren in the will "in and of itself was evidence of the importance of family" to Roberta and William. Further, the probate court held that based upon all of the testimony and evidence of intent before the court and the fact that the assets have not yet been distributed and the trust has not been funded, the phrase "then living grandchildren" includes those living at the time of the funding and distribution of the trust.

However, there is no specific testimony in the record regarding the intent of Roberta and/or William to include after born grandchildren. There was opinion testimony that had Roberta and William known of the two grandchildren born after his death, they would have wanted all of their grandchildren to have been included.[4] However, this is not evidence that they intended in drafting their wills and referring to "then-living grandchildren" to mean those grandchildren living at the time of distribution. See Estate of Toland, 434 A.2d 1192, 1194 (1981) (holding the duty of the court is not to determine what the testator might or should have said in light of subsequent events but, rather, the actual meaning of the words used).

In conclusion, the phrase is not ambiguous. The class of "then-living grandchildren" closed at William's death excluding any after-born grandchildren.

**REVERSED.**

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

[4]Even under the respondents' view, it is possible that one or more grandchildren might be born in the future and be excluded if born after distribution.

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

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In the Interest of Jeremiah W., a minor under the age of seventeen, Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Florence County
Mary E. Buchan, Family Court Judge

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Opinion No. 25906
Heard November 3, 2004 – Filed December 6, 2004

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**AFFIRMED IN PART, REVERSED IN PART**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia, and Edgar Lewis Clements, III, of Florence, for petitioner.

Assistant Appellate Defender Robert M. Dudek, of S.C. Office of Appellate Defense, of Columbia, for respondent.

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**JUSTICE MOORE:** The family court adjudicated respondent delinquent on charges of threatening a public official and breach of peace. He was committed to the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first birthday. The Court of Appeals reversed. *In re* Jeremiah W., 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003). We now affirm in part and reverse in part.

## ISSUES

I. Did the Court of Appeals err by finding a directed verdict should have been entered on the charge of breach of peace?

II. Did the Court of Appeals err by finding a directed verdict should have been entered on the charge of threatening a public official?

## DISCUSSION

### I

Respondent was arrested after an encounter with Officer Mickey Cooke, who was working off-duty as a security officer for Magnolia Trace Apartments. As Officer Cooke and another officer, Gloria Howard, were sitting at the front of the complex, respondent walked by from inside the complex. Officer Cooke testified Officer Howard informed him she thought respondent had already been given a trespassing warning. Officer Cooke stated he then attempted to call respondent over to the car, but respondent answered by saying, "Fuck you, man. I ain't got to come over there" and continued to walk on. Officer Cooke stated he got out of his car and intercepted respondent. When Officer Cooke reached him, respondent pulled his pants up and said, "What?" with his arms bowed out in a backward position. At the time, there were several people standing in front of the complex about thirty to forty feet away. Officer Cooke testified he then told respondent he was placing him under arrest for breach of peace for being loud and boisterous and using profanity in public.

A majority of the Court of Appeals found respondent's conduct did not constitute a breach of peace and, therefore, that his arrest was illegal. We find the Court of Appeals properly held the trial court should have granted a directed verdict in respondent's favor on the breach of peace charge. *See* State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991) (First Amendment protects a significant amount of verbal criticism and challenge directed at police officers; State may not punish a person for voicing an objection to a police officer where no fighting words are used); State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967) (breach of peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence); State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996) (although breach of peace includes acts likely to produce violence in others, actual violence is not an element of breach of peace).

**II**

The State argues the Court of Appeals erred by finding a directed verdict should have been entered on the charge of threatening a public official.[1]

Officer Cooke placed respondent, who was handcuffed, into the back of the patrol car. During the ride, respondent refused to answer Officer Cooke's questions and used profanity. He also leaned forward through the opening of the plexi-glass separating the front from the rear of the patrol car and yelled

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[1]S.C. Code Ann. § 16-3-1040(A) (2003), the statute pursuant to which respondent was charged, provides:

> It is unlawful for a person knowingly and wilfully to . . . convey to a public official . . . any verbal . . . communication which contains a threat to take the life of or to inflict bodily harm upon the public official . . . if the threat is directly related to the public official's . . . professional responsibilities.

at the officer. After Officer Cooke told respondent to sit back, Officer Cooke testified respondent made a gesture as if he was going to spit at Officer Cooke. The officer then sprayed the back seat with pepper spray. At the time of the spraying, Officer Cooke testified respondent stated he had a gun, and he was "going to come blow my 'f-ing' head off."

The Court of Appeals, after finding respondent was unlawfully arrested on the charge of breach of peace; found that the charge for threatening a public official was not a new and distinct crime. The Court of Appeals, finding State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) distinguishable, found that the actions that led to respondent's charge for threatening a public official were part of a continuous flow of action and conduct emanating directly from his unlawful arrest for breach of peace. As a result, the court reversed respondent's conviction on the threat charge.

In State v. Nelson, *supra*, an officer attempted to stop Nelson, who was driving at the time, to inquire about a previous altercation Nelson had with a person in the community. During the attempted stop, the officer flashed his lights in order to get Nelson's attention. However, Nelson did not respond but allegedly rolled through a stop sign and began speeding. The officer then decided to stop Nelson for running a stop sign and speeding through a residential neighborhood. This Court stated, "even assuming [the officer's] initial attempt to stop [Nelson] was unlawful, [Nelson's] acts of running the stop sign and speeding through the neighborhood constituted new and distinct crimes for which [the officer] had probable cause to stop [Nelson]." Nelson, 336 S.C. at 194, 519 S.E.2d at 790.

In Nelson, we held that new and distinct criminal acts do not qualify as "fruit of the poisonous tree"[2] merely because such acts were causally connected to police misconduct. We stated, "'There is a strong policy reason

[2]The "fruit of the poisonous tree" doctrine holds that evidence which is produced by or directly derived from an illegal search is generally inadmissible against the defendant because of its original taint, though knowledge of facts gained independently of the original and tainted search is admissible. Wong Sun v. United States, 371 U.S. 471 (1963).

for holding that a new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent grounds for arrest.'" *Id.* at 194, 519 S.E.2d at 790 (quoting United States v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997)).

The question, therefore, is whether respondent's threat to Officer Cooke constituted a new and distinct crime that provided independent grounds for his arrest. While the Court of Appeals believed respondent was merely challenging the officer's ability to arrest him, the language used by respondent in the police car went further and constituted a new and distinct offense of threatening a public official. The language used by respondent did not challenge the officer's authority to arrest him, but was a willful communication "which contain[ed] a threat to take the life of or to inflict bodily harm upon [Officer Cooke]. . .; [a threat which was] directly related to [Officer Cooke's] . . . professional responsibilities." S.C. Code Ann. § 16-3-1040(A) (2003).

Simply because respondent's threat was causally connected to police misconduct does not therefore mean that the threat qualifies as "fruit of the poisonous tree." *See* Nelson, *supra*. While it is true the second offense would not have arisen but for the unlawful arrest for the first offense, as stated in Nelson, there is a strong policy reason for holding that a new and distinct crime, even if triggered by an unlawful arrest, is a sufficient intervening event to provide independent grounds for arrest. *See* United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) (if suspect's response to illegal stop is itself a new and distinct crime, then police constitutionally may arrest suspect for that crime); United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982), *cert. denied*, 461 U.S. 933 (1983) (same).

Accordingly, the Court of Appeals erred by finding respondent's threat to Officer Cooke, although made after he was unlawfully arrested for breach of peace, was not a new and distinct crime for which he could be arrested. *Accord* United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992) (although police entered suspect's home illegally, suspect commenced new illegal activity when he aimed semi-automatic rifle at police); State v. Windus, 86 P.3d 384 (Ariz. App. 2004) (although officers unlawfully entered

defendant's yard, officers did not exploit their unlawful entry to provoke defendant's new, distinct criminal conduct consisting of an aggravated assault and resisting arrest); Clark v. United States, 755 A.2d 1026 (D.C. 2000) (even if defendant was under unlawful arrest when he threatened police officer with bodily harm, evidence of that crime would not be suppressed as "fruit of the poisonous tree," as the commission of the threat was an intervening act that purged any taint associated with the unlawful arrest); State v. Miskimins, 435 N.W.2d 217 (S.D. 1989) (where defendant's response to unlawful action by police is itself a new, distinct criminal act, there are sound policy reasons for not suppressing this evidence).

## CONCLUSION

We affirm the Court of Appeals' decision finding the trial court should have granted a directed verdict on the charge of breach of peace. However, we reverse the Court of Appeals' decision finding the trial court should have granted a directed verdict on the charge of threatening a public official. Therefore, the Court of Appeals' decision is

**AFFIRMED IN PART, REVERSED IN PART.**

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

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

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The State, Respondent,

v.

John Richard Wood, Appellant.

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Appeal From Greenville County
John W. Kittredge, Circuit Court Judge

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Opinion No. 25907
Heard October 5, 2004 – Filed December 6, 2004

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**AFFIRMED**

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Assistant Appellate Defender Robert M. Dudek, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia, and Robert M. Ariail, of Greenville, for respondent.

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**JUSTICE MOORE:** Appellant was charged with the murder of a Highway Patrol officer and the possession of a weapon during the commission of a violent crime. The jury found appellant guilty as charged and he was sentenced to death. We affirm.

## FACTS

Trooper Eric Nicholson, while patrolling I-85 in the Greenville area, called to inform the dispatcher that he was going to stop a moped. After Nicholson activated his lights and siren, appellant, who was riding the moped, did not immediately stop. Two other troopers subsequently heard Nicholson scream on the radio and they rushed to the scene whereupon they found Nicholson had been shot five times. The driver's side window of Nicholson's car was completely shattered. Both of his pistols were secured in their holsters. Eight shell casings were found at the scene.

There were several eyewitnesses to Nicholson's murder. Witnesses recalled seeing a moped being followed by a trooper with activated lights and siren. The moped took the off-ramp to leave I-85 and then took a right down a frontage road. As the two vehicles got on the frontage road, the trooper sped up to get beside the moped and then veered to the left to stop at an angle against a raised median in order to block the moped's progress. The moped came to a stop close to the driver's side window.

Immediately upon stopping, appellant stood up over the moped and raised his arm towards the driver's side window of Trooper Nicholson's car. Some witnesses saw a weapon in appellant's hand and heard gunshots. After firing several shots in the driver's side window of Nicholson's car, appellant backed the moped up, turned it around, and fled at a high rate of speed.

After the shooting, some concerned citizens (the Wheelers) chased appellant. Appellant entered a parking lot and then jumped into the passenger's seat of a Jeep, driven by a woman. The Wheelers subsequently called in the tag number to police.

Once law enforcement officers began chasing the Jeep, appellant opened fire on the pursuing officers. One officer was struck in the face by a bullet fragment. He survived the injury. After subsequently hijacking a truck, appellant was eventually stopped and taken into custody.

The jury convicted appellant of murder and possession of a weapon during the commission of a violent crime and sentenced him to death.

## ISSUES

I. Did the trial court err by excusing a juror for cause?

II. Did the trial court err by refusing to instruct the jury on the law of voluntary manslaughter?

III. Did the trial court err by finding S.C. Code Ann. § 16-3-20 (2003) constitutional although it mandates that a defendant has to waive jury sentencing if he pleads guilty?

IV. Was the trial court without subject matter jurisdiction to sentence appellant to death where the murder indictment did not allege an aggravating circumstance?

## DISCUSSION

### I. Juror Qualification

Appellant argues the trial court erred by excusing potential juror Smith, a black female, for cause.

During voir dire by the trial court, Smith stated she could carefully consider the law and find appellant either guilty or not guilty. However, she stated she could not, under any circumstances, impose the death penalty. Further, she stated that her firm view on the death penalty was that there is

not any crime or situation where the death penalty would be appropriate. She classified herself as someone who would always vote for life imprisonment.

Defense counsel then conducted voir dire of Smith. The following occurred:

> Defense counsel: And you agree with me, I would suspect, that the jury in a case . . . should be made up of a cross section of the community?
>
> Smith: Yes, sir.
>
> Defense counsel: You should have young people, old people, black people and white people, rich people, poor people, protestants, catholics. In other words, the jury should be a cross section of everyone. Do you agree with that?
>
> Smith: Yes, sir.
>
> . . .
>
> Defense counsel: If you were on a jury and you had participated in the conviction of this person and then you had heard evidence from the prosecution where he is requesting that you impose the death penalty, and you have heard . . . information from the defendant, when he says, "I would prefer that you give me a life sentence," would you take into consideration the request of the prosecution and give meaningful consideration to the imposition of the death penalty in any case?
>
> Smith: Yes, sir.
>
> Defense counsel: You would?
>
> Smith: I will.
>
> . . .

Defense counsel: Could you vote for the death penalty if you thought it was the proper penalty under those circumstances?

Smith: Yes, sir.

The trial court then questioned Smith:

Court: Ms. Smith, what happened – five, ten minutes ago before [defense counsel] got up, why did you tell me that you would never give the death penalty and all of a sudden we're ready to give it? What happened?

Smith: Well, in different situations. It, to me, just all depends. I don't know.

Court: Well, earlier you were so adamant to me. . . . I asked you if there was any situation, anything that would warrant the death penalty, and you cut me off. No way. And now I'm talking to a different person. What happened?

Smith: I have no idea.

The State then questioned Smith:

The State: . . . based on [defense counsel's] appeal to you to serve on this jury to make it demographically and racially balanced and all of that, is that what led you to change your statement as to you felt that you could impose the death penalty?

Smith: Yes, sir.

The trial court then found Smith was not qualified to be a juror. The court stated that Smith acknowledged the only reason she changed her testimony was because she felt a duty to be on the jury. The court further stated, "To suggest that she can come in here and take that type of pandering examination and the light bulb goes off that she as a black must serve on this

jury so she can vote for life imprisonment, I'm not going to permit something so utterly transparent."

Appellant argues the trial court erred by disqualifying Smith as a prospective juror.

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Council, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050 (1999). *See also* State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), *cert. denied*, 513 U.S. 831 (1994) (citing S.C. Code Ann. § 16-3- 20(E) (2003)) (in capital case, juror may not be excluded for her attitude against capital punishment unless it would render juror unable to return a verdict according to law).

When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. *Id.* The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. *Id.* On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, *cert. denied*, 498 U.S. 881 (1990).

When reviewing the entire voir dire of Smith, it is apparent the trial court did not err by disqualifying Smith as a prospective juror. Initially, Smith was adamant she could not vote for the death penalty in any situation. However, after questioning from defense counsel, Smith changed her mind and stated she could consider the death penalty and could vote for that punishment. When the trial court asked Smith what changed her mind, she said she had no idea. However, when the State asked Smith if defense counsel's appeal to her to serve on the jury to make it demographically and racially balanced led her to change her statement so that she could impose the death penalty, Smith answered yes.

From the trial court's comments, it is clear the trial court felt Smith should be excluded for her views on capital punishment because they would prevent or substantially impair the performance of her duties as a juror. *See* State v. Council, *supra*. The court, when determining Smith to be disqualified, was in the best position to view Smith's demeanor. *See* Wainwright v. Witt, 469 U.S. 412 (1985) (there will be situations where trial court is left with definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror). The trial court had a reasonable basis to conclude that Smith could not faithfully carry out her duty under the law. We hold the evidence supports the trial court's decision finding Smith disqualified from jury service. *See* State v. Council, *supra* (determination of whether juror is qualified to serve on death penalty case is within sole discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence).

## II. Voluntary Manslaughter Charge

Appellant argues the trial court erred by refusing to charge voluntary manslaughter to the jury. Appellant requested a voluntary manslaughter charge based on the fact that Trooper Nicholson conducted an aggressive stop whereby the moped had no other direction to go than to hit the patrol vehicle, the curb, or the bushes. Counsel argued appellant could reasonably have feared for his safety. The trial court denied the request on the basis there was no legal provocation.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997). Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. *Id.* Where there are no actions by the deceased to constitute legal provocation, a charge on voluntary manslaughter is not required. *Id.* The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence. *Id.*

In State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), Linder fled from an officer. Linder alleged that the officer bumped his motorcycle with his patrol car, thereby knocking him to the ground. Linder alleged the officer then began to fire on him and that he reached for his weapon and returned the fire. We held that, based on Linder's version of events, he was entitled to a voluntary manslaughter charge.

In Linder, we stated that a lawful arrest or detention in a lawful manner by an officer will not constitute an adequate provocation for heat of passion reducing the grade of the homicide to manslaughter. This is precisely the situation in the present case. There is no evidence that Trooper Nicholson acted in an unlawful manner in discharging his duties. There is no evidence, as there was in Linder, that Trooper Nicholson bumped appellant's moped or that he fired upon appellant before appellant shot him multiple times.

Accordingly, because there was no evidence of sufficient legal provocation, appellant was not entitled to a voluntary manslaughter charge.

III. Constitutionality of S.C. Code Ann. § 16-3-20 (2003)

Appellant asserts Ring v. Arizona, 536 U.S. 584 (2002), renders unconstitutional the requirement in S.C. Code Ann. § 16-3-20(B) (2003) that the sentencing proceeding be held before the judge when a defendant pleads guilty to murder.

As we recently stated in State v. Downs, S.C. Op. No. 25884(Sup. Ct. filed October 25, 2004) (Shearouse Adv. Sh. No. 42 at 54), the capital-sentencing procedure invalidated in Ring does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. § 13-703(C) (2001) (amended 2002); Ring, 536 U.S. at 597. In South Carolina, conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. § 16-3-20(B) (2003); Sheppard v. State, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004). As we noted in Downs, Ring did not

involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. *See*, *e.g.*, Leone v. Indiana, 797 N.E.2d 743, 749-50 (Ind. 2003); Colwell v. Nevada, 59 P.3d 463, 473-74 (Nev. 2003); Illinois v. Altom, 788 N.E.2d 55, 61 (Ill. App. 2003), *app. denied*, 792 N.E.2d 308 (Ill. 2003). Therefore, appellant's argument is without merit.

## IV. Subject Matter Jurisdiction

Appellant argues the trial court lacked subject matter jurisdiction to sentence him to death because the murder indictment did not allege an aggravating circumstance.[1] He argues that Ring v. Arizona, 536 U.S. 584 (2002), holds that aggravating factors are elements of the offense of capital murder that must be charged in the indictment.

We recently addressed this issue in State v. Downs, S.C. Op. No. 25884 (Sup. Ct. filed October 25, 2004) (Shearouse Adv. Sh. No. 42 at 54). In Downs, we held that South Carolina law, rather than federal law, governs indictments for state law crimes. Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder. S.C. Code Ann. § 17-19-30 (2003); State v. Butler, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982).[2] The aggravating circumstances listed in S.C.

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[1]The indictment charging appellant with murder states:

> That JOHN RICHARD WOOD did in Greenville County, on or about the 6th day of December, 2000, unlawfully and with malice aforethought kill Eric Nicholson by means of shooting him, and that Eric Nicholson died as a proximate result thereof. This is in violation of § 16-3-10 of the South Carolina Code of Laws (1976) as amended.

[2]*Overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder. *See* Butler, 277 S.C. at 456-67, 290 S.E.2d at 3-4. Therefore, the indictment in the instant case is valid.

## PROPORTIONALITY REVIEW

Under State law, S.C.Code Ann. § 16-3-25(C)(3) (1985) requires this Court to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied*, 529 U.S. 1025 (2000); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), *cert. denied*, 503 U.S. 993 (1992); State v. South, 285 S.C. 529, 331 S.E.2d 775, *cert. denied*, 474 U.S. 888 (1985). Further, after reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the evidence. See S.C. Code Ann. § 16-3-25 (2003). Accordingly, appellant's sentence is not disproportionate under State law.

**AFFIRMED.**

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

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

**The State,** **Respondent,**

**v.**

**Johnny Phillip Sweat,** **Appellant.**

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**Appeal From Charleston County**
**Deadra L. Jefferson, Circuit Court Judge**

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**Opinion No. 3898**
**Heard November 9, 2004 – Filed December 6, 2004**

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**AFFIRMED**

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**Assistant Appellate Defender Aileen P. Clare, for Appellant.**

**Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Deputy Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.**

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**ANDERSON, J.:** Johnny Phillip Sweat (Sweat) appeals his convictions of first-degree burglary, assault and battery with intent to kill, and three counts of assault of a high and aggravated nature. Sweat contends the trial judge erred in admitting evidence of a prior bad act of domestic abuse. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

Robin Sweat (Robin) and Sweat lived together for approximately nine years and had two children together. Although they had participated in a marriage ceremony, Robin discovered that Sweat was still married to a previous wife, and, therefore, Robin and Sweat were not legally married. She reported Sweat for criminal domestic violence in October of 2001 (the October incident). While he was in jail for that offense, she moved in with her brother, Chris Hasty, and became romantically involved with Bobby Blake (Blake). The incident giving rise to the convictions at issue on appeal took place on December 11, 2001—eleven days after Sweat was released from jail for the October incident.

Sweat invaded a home occupied by Robin; Robin's brother, Chris Hasty; Robin's boyfriend, Blake; Hasty's roommate, John Greene; a friend, Deon Dent; and two children: Robin's oldest son, Robert; and Deon's nephew. Sweat, brandishing a knife, forced his way through the front door. Robin and Blake were in a bedroom and the others were in the living room. Sweat began yelling and continued waving the knife. Robin and Blake emerged from the bedroom to investigate the commotion. Sweat became more upset when he saw Robin and Blake. Robin, Blake, Hasty, and Greene retreated to a back bedroom, and Blake held the door shut as Sweat attempted to enter. Sweat eventually opened the door enough to insert his arm—with knife in hand—into the room. He continued to swipe with the knife and severely cut Blake on the hand.

Unable to breach the bedroom from the inside, Sweat exited the house and attempted to enter the bedroom through an outside window. He broke the window, but was unable to fully enter the room because the headboard of a waterbed was blocking the window. He returned inside the house, again

trying to breach the back bedroom. Unsuccessful, Sweat finally left. He was apprehended the next day.

At trial, the State introduced Robin's testimony—first in camera, and then in the presence of the jury—of the incident of domestic violence that took place in October of 2001. Robin, Sweat, and Sweat's brother and sister-in-law were together when Sweat directed Robin to take off her shirt and show his brother her breasts. When Robin refused, Sweat began yelling and calling her a "fat bitch." He attempted to physically pull off her shirt, and in the ensuing struggle, Robin's arm was bruised.

A few days later, Robin reported the October incident to the authorities. She explained at trial that she desired to end the relationship and saw the incident as her opportunity to escape. Sweat was arrested for criminal domestic violence. He spent forty-five days in jail, but was released after Robin signed a statement that the October event did not actually happen. At trial, Robin averred that she copied the statement at the request of her sister-in-law and acquiesced in signing it because "I was out of the situation. And that's all I was worried about, was getting out."

Additionally, Robin gave a general account of the authoritarian and imperious personality of Sweat, which consisted of: (1) dictating when and what she could eat; (2) hanging up or breaking the telephone if she stayed on too long; (3) compelling her to drink alcoholic beverages; and (4) forcing her to have sex.

Defense counsel moved to exclude evidence of prior episodes of domestic violence on the grounds that it was impermissible character evidence. The State argued that the prior evidence was admissible to show motive and intent. Sweat objected that: (1) the evidence was irrelevant; (2) it could not be shown by clear and convincing evidence; and (3) its prejudicial effect substantially outweighed its probative value. After an in camera review, the trial judge ruled evidence of the October incident was admissible to show motive and intent and to provide a full picture of the events leading up to the night of the attack. However, the trial judge disallowed other instances of domestic violence because she found them irrelevant and unfairly prejudicial.

On appeal, Sweat argues admission of the October incident was error. We disagree and affirm.

## LAW/ANALYSIS

### I. Rule 404(b), SCRE/Lyle

Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged. State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), our supreme court articulated the exceptions to this general rule excluding bad character evidence. Evidence of prior bad acts is admissible when it tends to establish (1) motive; (2) intent; (3) absence of mistake; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with commission of the present crime. Lyle at 416, 118 S.E. at 807; State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004); see also Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003) (explaining that Rule 404(b), SCRE, the modern expression of the Lyle rule, excludes evidence of other crimes, wrongs, or acts offered to prove character of person in order to show action in conformity therewith; the rule creates an exception when testimony is offered to show motive, identity, existence of common scheme or plan, absence of mistake or accident, or intent).

"In State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), the Supreme Court articulated the appropriate standard of review on appeal in determining the admissibility of bad act evidence: 'In criminal cases, the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973).'" State v. Humphries, 346 S.C. 435, 448, 551 S.E.2d 286, 293 (Ct. App. 2001) (Anderson, concurring) rev'd on other grounds, 354 S.C. 87, 579 S.E.2d 613 (2003); see also State v. Tutton, 354 S.C. 319, 327, 580 S.E.2d

186, 190 (Ct. App. 2003) (determining whether trial judge properly admitted evidence under common scheme or plan exception to Lyle is a "question of law.").

### A. Motive and Intent

At the conclusion of Robin's in camera testimony, the trial judge ruled the October incident was admissible under both the motive and intent exceptions of Rule 404(b) and Lyle. In reaching her decision to admit evidence of the October incident, the trial judge stated:

> But I do perceive that it is logically relevant and that . . . the State is entitled to give a full snapshot of what happened.
>
> I do not think you can isolate out—this is the incident that started the continuum and does show his intent in going there that evening and his motive in going there that evening.
>
> Which is . . . according to the State's theory . . . . that she was his property and that he was going there to get his property. . . .

We agree that both motive and intent can be inferred from the prior bad act. Following the October assault, Robin reported Sweat's conduct and Sweat spend forty-five days in jail. He was released eleven days before the December incident occurred. Robin became involved with Blake and refused to resume her relationship with Sweat. Within days, Sweat perpetrated the December 11 attack. Thus, the October incident and Sweat's time in jail relate to his actions on December 11, 2001.

The State had to prove malice as an element of assault and battery with intent to kill (ABIK). See State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (2003) ("ABIK is an unlawful act of violent nature to the person of another with malice aforethought, either express or implied."). "Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." Danny R. Collins, South Carolina Evidence 319 (2d ed. 2000). "State of mind is an

issue any time malice or willfulness is an element of the crime." Id. Therefore, the October incident was properly admitted.

In State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (abrogating the doctrine of in favorem vitae), the defendant was convicted of rape. Our supreme court found evidence the defendant had previously stolen the victim's watch was properly admissible under the motive exception to Lyle. The victim had testified against the defendant for stealing the watch. The defendant allegedly said to the victim on the night of the rape, "'It's me and I have come to kill you. I have planned it every single day since you put me on the chaingang for stealing your watch.'" Thomas, 248 S.C. at 576, 151 S.E.2d at 857. In affirming the admission of the prior bad act, the court concluded:

> We think that all of the evidence here, which only incidentally tended to prove the commission of other crimes, by appellant is governed by exceptions to the general rule, and that such was, therefore, admissible. . . . The evidence with respect to the prior crime, the theft of [the victim's] watch, was restricted to the minimum requirements of the case and tended directly and fairly to prove not only the identity of the appellant, but his motive as well.

Id. at 583, 151 S.E.2d 861.

State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) dealt, in part, with the motive exception to Lyle in the context of murder. The defendant claimed the trial court erred by allowing evidence of prior ill will between he and the defendant. The supreme court disagreed:

> The prosecution elicited testimony concerning a verbal altercation between the victim and the appellant three days prior to the killing. In a non-responsive answer, the witness additionally indicated that there had been prior bad blood between the two. Upon objection and motion from defense counsel for a mistrial, the trial judge ordered the remark

concerning bad blood stricken from the record and instructed the jury to disregard the comment. The motion for a mistrial was denied. The appellant now asserts these rulings were trial error and entitled him to relief. We do not agree.

> **Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime.** 40 C.J.S., Homicide, Section 228.
>
> The challenged evidence tends to show motive on the part of the accused and is not so remote in time as to negate its probative value.

Id. at 296, 270 S.E.2d at 128 (emphasis added).

Thomas and Plyler lend further support to the trial judge's decision in this case. From the October incident, the jury could have inferred both (1) motive—that Sweat was driven by anger over Robin causing him to go to jail and terminating their relationship, and that he intended to "get his property"; and (2) intent—that Sweat maliciously sought to inflict harm upon Robin and Blake. Therefore, we find the trial judge did not commit error by allowing the October incident under the motive and intent exceptions of Lyle and Rule 404(b), SCRE.

**B. Relevance**

Sweat contends that even if the October incident fits under the motive and intent exceptions, it should have been excluded because it was irrelevant. We disagree.

For evidence to be admissible, it must be relevant. Rules 401 & 402, SCRE; State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000); see also State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004)

(stating bad act must logically relate to the crime with which the defendant has been charged). Evidence which assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved. State v. Hamilton, 344 S.C. 344, 354, 543 S.E.2d 586, 591 (Ct. App. 2001).

Evidence is admissible if "logically relevant" to establish a material fact or element of the crime; it need not be "necessary" to the State's case in order to be admitted. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). If the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected. State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000).

Determination of relevancy is largely within the discretion of the trial judge. State v. Jeffcoat, 279 S.C. 167, 170, 303 S.E.2d 855, 857 (1983); Hamilton at 353, 543 S.E.2d at 591. The trial judge must have wide discretion on innumerable questions of relevancy before her, and her decision should be reversed only for abuse of that discretion. State v. Anderson, 253 S.C. 168, 182, 169 S.E.2d 706, 712 (1969).

The October incident was relevant as it suggested motive and intent and tended to make the State's version of the case more probable. While not strictly necessary to the State's case, it was logically related to why Sweat went to the house that night and to his intentions once there. We find the trial

judge did not abuse her discretion by concluding the October incident was relevant to the event that took place on December 11, 2001.

### C. Standard of Proof for Prior Bad Acts

If not the subject of a conviction, a prior bad act must first be established by clear and convincing evidence. State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989); State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004). In State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), the South Carolina Supreme Court elucidated:

> [W]e do not review a trial judge's ruling on the admissibility of other bad acts by determining de novo whether the evidence rises to the level of clear and convincing. If there is **any evidence** to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal.

Id. at 6, 545 S.E.2d 829 (emphasis added); accord Pagan, 357 S.C. at 143, 591 S.E.2d at 652; State v. King, 349 S.C. 142, 155, 561 S.E.2d 640, 646 (Ct. App. 2002).

The record contains ample evidence to satisfy the "any evidence" standard articulated in Wilson. The trial judge conducted an extensive in camera review and was satisfied the standard was met. Robin testified the incident occurred. Sweat was arrested for criminal domestic violence and served jail time because of the incident. Additionally, Blake declared at trial that he saw the bruises on Robin's arm. Thus, evidence exists to support the trial judge's finding that the October incident took place. See State v. Beck, 342 S.C. 129, 536 S.E.2d 629 (2000) (finding prior bad act established by clear and convincing evidence where witness testified defendant robbed her); cf. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (finding trial judge erred in admitting testimony that child abuse victim had previously been treated for injuries where State failed to offer **any proof** the injuries were inflicted by defendant). We find no error.

### D. Probative Value/Unfair Prejudice

Even though the relevant evidence is clear and convincing and falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). Unfair prejudice means "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); see also State v. Bright, 323 S.C. 221, 226, 473 S.E.2d 851, 854 (Ct. App. 1996) ("Unfair prejudice from the introduction of evidence occurs when it has an undue tendency to induce a decision on an improper basis."). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (2003); see also State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004) (noting the supreme court reviews rulings balancing whether the probative value of evidence was substantially outweighed by its prejudicial effect pursuant to the abuse of discretion standard and gives great deference to the trial judge's decision). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001).

As to the October incident, the trial judge ruled: ". . . I do not find that its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." We agree. Testimony of the October incident was highly probative. It tended to show motive and intent, and it completed the State's theory of the case. Sweat testified that: (1) Robin called him multiple times a day; (2) he had filed a complaint against her; (3) she invited him to the house on December 11, 2001 to sign papers giving him temporary custody of their children; (4) Greene tried to slam the door in his face; (5) Blake initiated an attack on him and swung a stick at him; (6) Greene

threatened him with a knife, which he took away and swung to fend off Greene and Blake; and (7) he never went inside the house. Consequently, the facts surrounding the December 11, 2001 occurrence were vigorously contested. Evidence of the October event was therefore probative in that it gave the jury the necessary background to explain why Sweat may have gone to the house that night and what his intentions may have been. While the prior act of domestic violence had some prejudicial effect on Sweat, we do not believe it was so prejudicial to "suggest a decision on an improper basis, such as an emotional one." See State v. Cheesboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001).

Sweat, citing State v. DuBose, 288 S.C. 226, 341 S.E.2d 785 (1986), argues even if the evidence was otherwise admissible, it lost its probative value by becoming too far removed from the event in question. In Dubose, the defendant was convicted of manufacturing and trafficking marijuana. He was arrested in 1984 after a pilot for SLED observed patches of marijuana growing on the defendant's father's farm. The State was allowed to admit aerial photographs taken of the DuBose farmland during 1981-1983. The supreme court, finding admission of these photographs was error, held: "Here there is a total failure of proof that DuBose grew marijuana in the fields shown in the aerial photographs from 1981 to 1983." Id. at 230, 341 S.E.2d at 787.

We disagree with Sweat that the October incident was too remote in time from the December crime to have probative value. To the contrary, the incident occurred two months before the December attack, and Sweat was released from jail for the October incident a mere eleven days before the December attack. DuBose, by contrast, dealt with evidence dating back several years. Furthermore, unlike DuBose, the short passage of time in this case does not call into question the efficacy of the evidence admitted. Whereas the DuBose court found "a total failure of proof" that DuBose was responsible for the marijuana in the photographs, the trial judge in this case found clear and convincing evidence that the October incident took place.

Sweat cites State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) to support his contention the October incident was too remote to have probative value. In King, the defendant was found guilty of murdering his father-in-

law who reportedly kept up to $1,800 in his wallet. His wallet was not found at the crime scene. The State introduced evidence that the defendant: (1) often needed money; (2) regularly pawned household items; (3) stole cash from his wife's purse; (4) forged checks on her bank account; and (5) used her ATM card without permission. Id. at 511, 514 S.E.2d at 582. The supreme court reversed his conviction based on the admission of this evidence of prior bad acts:

> The remote thefts were not admissible under any theory. This evidence shows appellant's bad character and his propensity to commit crimes. These are inadmissible purposes. The temporal connection between these petty thefts and the charged crimes is too attenuated for admissibility under the res gestae theory or under Lyle. Thus the trial judge erred in admitting evidence of the remote thefts.

Id. at 513, 514 S.E.2d at 583. We find King distinguishable from the case at bar. First, the prior bad act in this case is more probative than the thefts in King; it bears a closer temporal and logical connection to the crime charged. In King, the State was allowed to admit evidence of a series of unrelated thefts that began over a year before the murder. In this case, the trial judge disallowed evidence of a string of instances of prior domestic violence. She allowed only the October incident precisely because it was so close in time and so factually related to the attack. See State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682 (2000) ("The temporal attenuation between the making of this statement is of no consequence in assessing its admissibility. The four month lapse is at most a matter bearing on the weight of the evidence, which was for the jury to determine.").

Further, the only logical connection between the prior thefts and the murder in King was the inference that defendant often needed money, often stole to get it, and therefore might have murdered his father-in-law to obtain money. In other words, its introduction primarily tended to show his propensity to do wrong. Here, the October incident suggests **why** Sweat perpetrated the crimes on December 11—there is a cause and effect relationship between the two events. Thus, while in King the murder did not occur **because of** the prior thefts, the evidence here tends to show the

December attack did occur **because of** the October incident and its consequences to Sweat. Concomitantly, Sweat's intervening jail time is a critical temporal nexus between the October and December incidents. Therefore, the October incident is appreciably more probative than the prior thefts in King.

Second, the October incident is less damaging than the thefts in King. The King court stressed that "[h]ere, all the evidence was circumstantial. . . . the evidence was not overwhelming. The admission of the remote thefts was too prejudicial to be held harmless." Id. at 514, 514 S.E.2d at 583. By contrast, overwhelming evidence placed Sweat at the house on the night of December 11, 2001. And by Sweat's own admission, he inflicted the knife injury upon Blake.

Third, our courts have not established a bright-line rule for determining when evidence loses its probative value due to passage of time. Indubitably, we have established no such rule due to the fact-intensive nature inherent in a Rule 403 analysis. The determination of prejudice depends upon the unique circumstances of each case. See Wilson, 345 S.C. at 80, 545 S.E.2d at 7. Accordingly, the trial judge is given broad discretion in making the Rule 403 determination. See Myers, 359 S.C. at 48, 596 S.E.2d at 492. Under the facts of this case, we agree that the short passage of time did not diminish the probative value of the October incident. Thus, we find the trial judge did not abuse her broad discretion in concluding the probative value of this evidence outweighed its prejudicial effect.

## II. Res Gestae

"Under the res gestae theory, 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. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004) (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)); see also State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003) (holding evidence of prior burglary was "necessary and relevant for a full presentation of the case."); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002) (finding evidence of

burglary occurring the same night as the burglary for which defendant was convicted "was necessary for a full presentation of the case without fragmentation."). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. Owens, 346 S.C. 637, 552 S.E.2d 745.

Our supreme court, in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), explained the theory of res gestae:

> One of the accepted bases for the admissibility of evidence of other crimes arises 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 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (alterations in original)).

We find the October incident was properly admitted to "complete the story of the crime on trial." The prior act of domestic abuse gave Robin the opportunity to escape her relationship with Sweat. As a result, she moved out, and he spent time in jail. Sweat was upset, and eleven days after his release, these crimes occurred. The October abuse, and the events that followed, provided the fact finder with an appropriate context in which to place the December 11 attack. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The res gestae theory recognizes that 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.").

## CONCLUSION

We hold evidence of the October incident was properly admitted to show motive and intent. The evidence tended to make Sweat's motive and intent more probable, and, therefore, was relevant. The record adequately supports the trial judge's finding the incident was proved by clear and convincing evidence. Furthermore, the incident was highly probative and not so prejudicial to Sweat to suggest a verdict based on an improper basis. Finally, the incident was correctly admitted, pursuant to res gestae, to complete the story of the crime on trial. Accordingly, the convictions and sentences of Sweat are

**AFFIRMED**.

**STILWELL and SHORT, JJ., concur.**

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

James P. Truluck, Jr., Ethel N. King, Bobbie Jean Truluck, Hazel Ann Simril Childers, Mark Davis Simril, Bryan Scott Simril, Michael Andrew Simril, J.S. Bourne as Personal Representative of the Estate of Elizabeth Ashford, and J.S. Bourne Individually, Petitioners,

of whom James P. Truluck, Jr., Ethel N. King, Bobbie Jean Truluck, Hazel Ann Simril Childers, Mark Davis Simril, Bryan Scott Simril and Michael Andrew Simril are Respondents,

and J.S. Bourne as Personal Representative of the Estate of Elizabeth Ashford, and J.S. Bourne, Individually is Appellant,

v.

Carol S. Snyder as Personal Representative of the Estate of Mason D. Nesmith, and Carol S. Snyder Individually, Respondent.

James P. Truluck, Jr., Ethel N. King, Bobbie Jean Truluck, Hazel Ann Simril Childers, Mark Davis Simril, Bryan Scott Simril, Michael Andrew Simril, J.S. Bourne as Personal Representative of the Estate of Elizabeth Ashford, and J.S. Bourne Individually, Petitioners,

of whom James P. Truluck, Jr., Ethel N. King, Bobbie Jean Truluck, Hazel Ann Simril Childers, Mark Davis Simril, Bryan Scott Simril and Michael Andrew Simril are Respondents,

and J.S. Bourne as Personal Representative of the Estate of Elizabeth Ashford, and J.S. Bourne, Individually is Appellant,

v.

Carol S. Snyder as Personal Representative of the Estate of Mason D. Nesmith, and Carol S. Snyder Individually, Respondent.

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Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 3899
Heard October 12, 2004 – Filed December 6, 2004

## REVERSED AND REMANDED

Ronald Stewart Gaynor, of Pawleys Island and William S. Duncan, of Georgetown, for Appellant.

Marian Dawn Nettles, of Lake City and Otis A. Jeffcoat, III, of Myrtle Beach, for Respondent.

**GOOLSBY, J.:** These combined appeals involve a demand for a jury trial in a will contest. The probate court denied the demand as well as a motion to remove the case to the circuit court. The circuit court affirmed. We reverse and remand.

## FACTS AND PROCEDURAL HISTORY

Mason D. Nesmith died on April 26, 1999. On April 28, 1999, the probate court granted an application from Carol S. Snyder for informal probate of a will that was executed by Nesmith on April 1, 1999. In this will, Nesmith devised all his property to Snyder and Elizabeth Ashford. He also named Snyder as the personal representative of his estate.

On June 9, 1999, James P. Truluck, Jr., commenced a proceeding in the probate court to contest the will on the ground of undue influence and lack of testamentary capacity. On June 15, 1999, an amended summons was filed naming Truluck, Ethel N. King, Bobbie Jean Truluck, Hazel Ann Simril Childers, Mark Davis Simril, Bryan Scott Simril, and Michael Andrew Simril as petitioners and Snyder and Ashford as respondents.

Although she participated in some discovery requests, Ashford did not file any responsive pleadings in the will contest. Ashford died testate on July 29, 2000. Her will named J.S. Bourne as the personal representative of her estate as well as her primary beneficiary.

On November 8, 2000, Bourne, individually and as personal representative of Elizabeth Ashford's estate, was substituted as a respondent in the contest concerning Nesmith's will.[1] Bourne answered the petition on December 5, 2000.

On April 12, 2001, Bourne was dismissed by oral order of the probate court as a respondent pursuant to Rule 41, SCRCP, and granted leave to intervene as a petitioner. Although Bourne had submitted a petition under Rule 24(c), SCRCP, alleging numerous causes of action, the probate court permitted him to intervene as a petitioner only on his causes of action for lack of testamentary capacity, undue influence, and termination of appointment.[2]

On April 20, 2001, Bourne filed a summons and petition alleging the three causes of action permitted by the probate court in its oral order. Unlike either the petition Bourne had proffered when he moved to intervene as a petitioner or the petition approved by the probate court, the petition that Bourne filed on behalf of himself and Ashford's estate included a demand for a jury trial. In her answer, dated May 29, 2001, Snyder objected to the jury trial demand and timely moved to strike the pertinent language in the petition.

On June 18, 2001, the probate court held a hearing on Snyder's motion to strike. On June 22, 2001, after the hearing on Snyder's motion to strike and while the matter was still under advisement, Snyder amended her answer to raise for the first time two affirmative defenses, i.e., (1) the statute of limitations under South Carolina Code section 62-3-108,[3] and (2) lack of

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[1] Bourne and the estate of Elizabeth Ashford will be referred to collectively as "Bourne."

[2] See Rule 24(c), SCRCP (requiring that the motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought"). The pleading Bourne submitted under this rule alleged, in addition to assertions of undue influence and lack of testamentary capacity, causes of action for mistake as to the nature of the document, mistake in the document, and fraudulent or reckless inducement.

[3] See S.C. Code Ann. § 62-3-108(3) (1987 and Supp. 2003) ("[A] proceeding to contest an informally probated will and to secure appointment of the

standing as to Bourne. On June 27, 2001, Bourne moved under South Carolina Code section 62-1-302[4] for removal of the proceedings to the circuit court.

The probate court filed a written order on July 12, 2001, granting Snyder's motion. In the order, the probate court found that all parties had waived the right to a jury trial and that no additional issues of fact or law were created by Bourne's petition.

On July 19, 2001, Snyder moved for summary judgment on the ground of the statute of limitations.

On November 1, 2001, the probate court issued orders denying (1) Bourne's motion for reconsideration on the issue of his right to a jury trial, (2) Bourne's motion to remove the case to the circuit court, and (3) Snyder's summary judgment motion. On October 2, 2002, the circuit court affirmed the probate court's decisions regarding Bourne's rights to a jury trial and removal of the case. Bourne's motion for reconsideration was denied May 12, 2003.

## LAW/ANALYSIS

1. We address first Snyder's contention that the order issued by the probate court denying removal to the circuit court was not appealable. Snyder contends the order was not a "final order, sentence, or decree of a probate court" under South Carolina Code section 62-1-308(a)[5] and therefore could not be appealed to the circuit court. We disagree. Inasmuch as the probate

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person with legal priority for appointment in the event the contest is successful may be commenced within the later of eight months from the informal probate or one year from the decedent's death.).

[4] See id. § 62-1-302(c) (stating circumstances under which probate court matters are removed to the circuit court).

[5] See id. § 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate court and considering himself injured by it may appeal to the circuit court in the same county.").

court's denial of Bourne's motion to have the case considered by a jury in the circuit court impacted the mode of trial, it constituted a final order for the purpose of filing an appeal.[6]

2. The probate court found that all parties, including Bourne, had waived the right to have the case removed to the circuit court. Bourne argues this was error. We agree.

The South Carolina Probate Code provides that "actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value," "must be removed to the circuit court" for a trial de novo "on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed."[7]

We agree with Bourne that his request for removal was timely. Section 62-1-302 requires only that a motion for removal be made "not later than ten days following the date on which all responsive pleadings must be filed."[8] In the present case, on June 22, 2001, the court had accepted without incident Snyder's amended answer to Bourne's petition. Because Bourne's motion for removal was dated June 27, 2001, it fell within the time limit imposed by the South Carolina Probate Code.[9]

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[6] See Foggie v. CSX Transp., 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."); Satcher v. Satcher, 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002) ("Orders affecting the mode of trial affect substantial rights protected by statute and must, therefore, be immediately appealed.").

[7] S.C. Code Ann. § 62-1-302(c)(5) (1987 and Supp. 2003) (emphasis added).

[8] Id. § 62-1-302(c).

[9] See Hiers v. Mullens, 310 S.C. 63, 66, 425 S.E.2d 57, 59 (Ct. App. 1992) (holding a removal motion made more than ten days after the date of the original answer became timely upon the granting of the defendant's motion to amend her answer).

3. We further agree with Bourne that the probate court erred in holding (1) because the pleading that he filed included a jury trial demand, it violated both Rule 24(c), SCRCP, and the oral order granting him leave to intervene; and (2) Bourne was not entitled to a jury trial because he had waived this right.

Pleadings are governed by Part III of the South Carolina Rules of Civil Procedure, which includes Rules 7 through 16. None of these rules include any requirements concerning jury trials or otherwise suggest that a jury trial demand is part of a pleading. The procedure for demanding a jury trial appears in Rule 38, SCRCP, which is included in Part VI, entitled "Trials." Under Rule 38, the only circumstance constituting a waiver of this right is a party's failure "to serve a demand as required by this rule and to file it as required by Rule 5(d)."[10]

Rule 38(b) allows such a demand to be "endorsed upon a pleading of the party."[11] The rule also allows a jury trial demand to be included in a separate document served up to ten days after the last pleading pertinent to the issue on which a jury trial is warranted.[12]

We agree with Bourne that an "endorsement," such as that allowed by Rule 38, is not a part of the pleading itself; therefore, including a jury trial demand in his petition did not violate Rule 24(c) or exceed what the probate court allowed when it granted him leave to intervene. Had Bourne demanded a jury trial in a separate document, he would not have "altered" the pleading authorized by the probate court. There is no logical distinction between this method and the use of an endorsement on the face of the pleading to communicate a demand for a jury trial.

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[10] Rule 38(d), SCRCP.

[11] Id. Rule 38(b).

[12] Id.

The probate court further concluded that all parties had waived their rights to a jury trial in this matter. Specifically, as to Bourne, the probate court noted that Ashford never filed any responsive pleadings or demanded a trial by jury at any time before she died and that the responsive pleading initially filed by Bourne on behalf of himself and Ashford's estate failed to include such a demand. We disagree with this reasoning.

The Probate Code further provides that "[t]he right to trial by jury exists in, but is not limited to, formal proceedings in favor of the probate of a will or contesting the probate of a will."[13] Rule 38 of the South Carolina Rules of Civil Procedure likewise recognizes the fundamental importance of the right to a jury trial in a civil action.[14] Paragraph (b) of the rule further instructs any party demanding a jury trial on a particular issue to make this demand known "by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue" and provides that a jury trial demand "may be endorsed upon a pleading of the party."[15]

In this case, Bourne was dismissed from the litigation pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure. This rule expressly provides that "[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . ."[16] Interpretations of the federal counterpart to this rule, which is essentially the same as the South Carolina version,[17] have suggested that a dismissal under circumstances such

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[13] S.C. Code Ann. § 62-1-306(a) (Supp. 2003) (emphasis added).

[14] See Rule 38(a), SCRCP ("The right of trial by jury . . . as given by a statute of South Carolina shall be preserved to the parties inviolate.").

[15] Id. Rule 38(b).

[16] Id. Rule 41(a)(1).

[17] See id. Rule 41 historical notes ("This Rule 41 is the same as the Federal Rule, except that it requires service as well as filing the notice of voluntary dismissal by plaintiff if taken before answer or motion to dismiss is served.").

as those presented here has the effect of nullifying the prior pleadings of the party requesting the dismissal.[18] Based on this reasoning, we hold that Bourne's earlier participation as a defendant in this litigation did not compromise his right to demand a jury trial when he intervened as a petitioner in the case. Because the jury trial demand was contemporaneous with Bourne's petition to challenge the probate of Nesmith's will on the grounds of undue influence and lack of testamentary capacity, it was timely under Rule 38.[19]

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[18] See Sandstrom v. ChemLawn Corp., 904 F.2d 83, 86 (1st Cir. 1990) (holding that a corporate defendant was not bound by a representation in a prior dismissed action between the same parties that it would concede personal jurisdiction and stating that "[a]bsent explicit conditions to the contrary . . . a voluntary dismissal under Fed.R.Civ.P. 41(a) wipes the slate clean, making any future lawsuit based on the same claim an entirely new lawsuit unrelated to the earlier (dismissed) action"); James F. Flanagan, South Carolina Civil Procedure 348 (2d ed. 1996) ("Voluntary dismissals under Rule 41(a) are not on the merits, unless otherwise stated in the order."); Wright & Miller, Federal Practice & Procedure 2d § 2367, at 321 (1995) ("A voluntary dismissal without prejudice leaves the situation as if the action had never been filed.") (emphasis added); 35B C.J.S. Federal Civil Procedure § 775, at 41 (1960) (stating that a dismissal under Rule 41(a)(1), FRCP, unless otherwise stated in the notice of dismissal or stipulation, is without prejudice unless the party requesting dismissal has previously dismissed an action based on the same claim).

[19] Although Snyder unsuccessfully moved for summary judgment on the ground that Bourne's petition was untimely, the denial of her motion does not prevent her from raising this defense on remand. See Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict.").

**REVERSED AND REMANDED.**

**ANDERSON and WILLIAMS, JJ., concur.**

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

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**The State,** **Respondent,**

**v.**

**John Richard Wood,** **Appellant.**

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**Appeal From Anderson County**
**John W. Kittredge, Circuit Court Judge**

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**Opinion No. 3900**
**Heard November 9, 2004 – Filed December 6, 2004**

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**AFFIRMED**

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

**Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Special Assistant Attorney General Amie L. Clifford, all of Columbia; and Solicitor Druanne D. White, of Anderson, for Respondent.**

**ANDERSON, J.:** In this criminal case, John Richard Wood argues the trial court erred by admitting evidence Wood shot and killed a state trooper shortly before committing the crimes involved in this appeal. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

Wood was indicted for criminal conspiracy, failure to stop when signaled by a law enforcement vehicle, resisting arrest with a deadly weapon, armed robbery, two counts of possession of a firearm or knife during commission of or attempt to commit a violent crime, four counts of assault with intent to kill, and three counts of assault and battery with intent to kill.

Immediately prior to the beginning of trial and outside the presence of the jury, the State moved for permission to introduce evidence at trial that Wood fatally shot a state trooper. The shooting occurred one to two hours before Wood committed the acts for which he was charged in the instant case. The evidence consisted of the testimony of Terry and Debra Wheeler and a 911 telephone call. The Wheelers witnessed a traffic stop, heard shots, and then saw a red moped weaving in and out of traffic. They followed the moped and saw Wood abandon the moped and get into a Jeep. The Wheelers followed the Jeep long enough to view the license plate number and made a 911 call with information about Wood and the Jeep. Based in part on the Wheelers' information, police officers attempted to apprehend Wood. Wood failed to stop when signaled by a law enforcement vehicle. A high-speed chase ensued during which Wood shot at police officers.

Wood objected to the admission of the evidence on the ground it was irrelevant under Rule 401, SCRE, and, even if relevant, unduly prejudicial under Rule 403, SCRE. The State argued the evidence was admissible as part of the res gestae and to show motive, existence of common scheme or plan, identity, absence of mistake or accident, and intent under Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

The trial judge found: "It's my judgment that the evidence from Greenville which the State seeks to admit is probably admissible as part of the res gestae and also under 404(b) as to the issue of intent." The judge further ruled:

> However, based on the arguments that have been presented, I'm going to approach this matter cautiously and limit the State's use of the so-called Greenville evidence, at least initially. The State certainly should not be foreclosed from explaining to the jury some limited basis of what precipitated the stop or attempted stop in Anderson County.
>
> At this time I will permit the State's witnesses to testify to observing, perhaps hearing **an incident** in Greenville involving an individual on a motorcycle or moped, however it is described, and that as a result an individual in the vehicle was followed, eventually to the rear of the Greenville Gymnastics Center, where the individual was picked up by a female in a jeep. Testimony would then permit the actual following of the jeep and reporting the tag number of the jeep to 911.
>
> Anderson law enforcement would then be permitted to explain the fact that officers were alerted to the fact and looking for a jeep with a specific tag number which was registered to an individual, who can be identified, to an Anderson address as a result of **an incident** in Greenville.
>
> At least initially, I want to proceed on the basis that there will not be a reference to the shooting death of a state trooper in Greenville. And I fully recognize in restricting the State in this regard, that events may develop during the course of the trial. For example, if the issue of identity becomes a bonafide issue, there may be issues of defenses which are raised. There may be requests for lesser-included offenses. And the list goes on. Any of which may well require a broadening of the admissibility of the Greenville evidence.
>
> But at least initially, I'm going to restrict the State to the parameters I have outlined. If there's any need for clarification of that, I'll be glad to respond.

(Emphasis added).

In response to the judge's ruling, the Solicitor stated: "Your Honor, so in other words, we will not be playing the 911 tape where they say, we heard shots. We're just going to say **an incident**. Is that right? I've got, I think, all my witnesses in here. I just want to clarify it for everybody before we begin the testimony." (Emphasis added). The judge declared: "Yes, that's correct." Reference to the murder of the state trooper was prohibited. The shooting was referred to as an "incident" throughout the trial.

The jury found Wood guilty of criminal conspiracy, failure to stop when signaled by a law enforcement vehicle, resisting arrest with a deadly weapon, armed robbery, two counts of possession of a firearm or knife during commission of or attempt to commit a violent crime, five counts of assault with intent to kill, one count of assault and battery with intent to kill, and one count of assault and battery of a high and aggravated nature. He received a sentence of 138 years imprisonment.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Mattison, 352 S.C. at 583, 575 S.E.2d at 855.

If there is any evidence to support the admission of bad act evidence, the trial court's ruling will not be disturbed on appeal. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004).

## LAW/ANALYSIS

Wood argues the trial court "erred by refusing to exclude evidence about a Greenville 'incident' since it was not necessary to the jury's consideration of the Anderson County charges. Even if the Greenville incident was relevant, its probative value was substantially outweighed by its prejudicial effect under Rule 403, SCRE, and it should have been excluded on that basis." We disagree.

### I. Issue Preservation

Initially, we address whether this issue is preserved for review. Wood made a motion in limine to suppress evidence relating to the murder of the state trooper, but failed to make an objection when the evidence was actually presented.

In most cases, making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). Thus, the moving party must make a contemporaneous objection when the evidence is introduced. Id.; see also State v. Mitchell, 330 S.C. 189, 193 n.3, 498 S.E.2d 642, 644 n.3 (1998) ("We have consistently held a ruling in limine is not final, and unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.") (citation omitted); State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988) ("We caution Bench and Bar that these pre-trial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence.").

"However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." Forrester, 343 S.C. at 642, 541 S.E.2d at 840. This court expounded:

> Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.

State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (footnote omitted); see also State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997) (noting the general rule that a court's ruling on in limine motion is not a final decision, but applying State v. Mueller and holding that where objection is made during trial and there are no intervening witnesses before the disputed testimony, the decision is final and the objection need not be renewed).

In the case sub judice, the State presented the Wheelers' testimony at the beginning of trial, immediately after the judge ruled on the issue. Therefore, the motion was not a motion in limine but a final ruling. Consequently, the issue may be reviewed on appeal because Wood was not required to make an objection when the evidence was admitted. See King, 349 S.C. at 149, 561 S.E.2d at 643.

## II. Res Gestae

Evidence of bad acts or other crimes may be admitted under the res gestae theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises 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."

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)). The res gestae theory recognizes that 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. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997). Even if the evidence is relevant under this theory, prior to admission the trial judge should determine whether its probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

The evidence was properly admitted under the res gestae theory. See Adams, 322 S.C. at 122, 470 S.E.2d at 370-71. Admission of the testimony was necessary and relevant to a full presentation of the evidence in this case. The "incident" provided the context and motivation for the crimes at issue. The testimony regarding the "incident" was relevant to show the complete, whole, unfragmented story regarding Wood's crimes. See State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). The Wheelers' testimony elucidates both the reason police pursued the Jeep and the reason Wood shot at, harmed, and threatened the officers who attempted to apprehend him.

Furthermore, the crimes were temporally related. The shooting took place only two hours before the occurrence at issue. The two crimes comprise part of the same episode. The crimes are so concatenated as to be inextricably intertwined. See Adams, 322 S.C. at 122, 470 S.E.2d at 371 ("The use of the cocaine here was inextricably intertwined with the robbery and murder. Under these circumstances, such evidence was properly admitted as part of the res gestae of the crime."). Indubitably, the murder of a state trooper was part of the res gestae of the second crimes because it explains why Wood evaded capture at all costs. Moreover, the probative value of the evidence outweighed its prejudicial effect. See Owens, 346 S.C. at 653, 552 S.E.2d at 753.

Because we dispose of this issue under a res gestae analysis, we do **NOT** reach the Lyle/Rule 404(b) argument.

## CONCLUSION

The trial judge engaged in a cathartic evidentiary ruling by **NOT** referring to a "murder of a highway patrolman," but in a pristine and salutary etymological endeavor, utilizing the term "incident." The testimony describing the "incident" is admissible under the res gestae theory. Accordingly, the convictions and sentences of Wood are

**AFFIRMED.**

**STILWELL and SHORT, JJ., concur.**

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

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**Diane Q. Brown,** **Appellant,**

**v.**

**George C. Brown,** **Respondent.**

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**Appeal From Spartanburg County**
**James F. Fraley, Jr., Family Court Judge**

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**Opinion No. 3901**
**Heard November 9, 2004 – Filed December 6, 2004**

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**AFFIRMED**

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**Thomas M. Neal, III, of Columbia, for Appellant.**

**James C. Cothran, Jr., of Spartanburg, for Respondent.**

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**ANDERSON, J.:** In this family court action, Diane Q. Brown (Mother) appeals the family court order awarding custody of the couples' three children to George C. Brown (Father). We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

Father and Mother were married on December 16, 1991 and have three children, Melissa Rene, born December 17, 1991, and twins, Nicholas George and Natalie Rae, born June 10, 1995. The parties separated on October 30, 2000, and Mother initiated divorce proceedings on the ground of adultery. Father did not contest the divorce. The parties reached an agreement settling all property and financial matters. The only contested issues before the family court were custody of the minor children, attorney's fees, and detective fees. On appeal, the only contested issue is custody of the minor children. The family court awarded custody of the three minor children to Father, who, by the time of trial, had moved in with his parents.

## STANDARD OF REVIEW

"In appeals from the family court, the court of appeals has jurisdiction to find the facts in accordance with its view of the preponderance of the evidence." Emery v. Smith, Op. No. 3870 (S.C. Ct. App. Filed Sep. 27, 2004) (Shearouse Adv. Sh. No. 38 at 56) (citing Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992)); Upchurch v. Upchurch, 359 S.C. 254, 257-58, 597 S.E.2d 819, 821 (Ct. App. 2004). Although this Court may find facts in accordance with our own view of the preponderance of the evidence, we are not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. See Woodall v. Woodall, 322 S.C. 7, 471 S.E.2d 154 (1996); Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). In particular, an appellate court "should be reluctant to substitute its own evaluation of the evidence on child custody for that of the trial court." Woodall at 10, 471 S.E.2d at 157. Our broad scope of review does not relieve appellant of her burden to convince this Court the family court committed error. Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979).

## ISSUES

I. Did the family court err in awarding custody of the minor children to Father?

II. Did the family court err by failing to adequately consider the preferences of the minor children?

III. Did the family court award de facto custody to the paternal grandparents?

## LAW/ANALYSIS

### I. Custody of the Minor Children

Mother first argues the family court erred in awarding custody of the minor children to Father. We disagree.

The paramount and controlling factor in every custody dispute is the best interests of the children. Shirley v. Shirley, 342 S.C. 324, 330, 536 S.E.2d 427, 430 (Ct. App. 2000); Paparella v. Paparella, 340 S.C. 186, 189, 531 S.E.2d 297, 299 (Ct. App. 2000). Custody decisions are left largely to the discretion of the trial court. Shirley at 330, 536 S.E.2d at 430.

In Shirley, we articulated the South Carolina rule governing custody cases:

> In all child custody controversies, the controlling considerations are the child's welfare and best interests. In reaching a determination as to custody, the family court should consider how the custody decision will impact all areas of the child's life, including physical, psychological, spiritual, educational, familial, emotional, and recreational aspects. Additionally, the court must

> assess each party's character, fitness, and attitude as they impact the child.

342 S.C. at 330, 536 S.E.2d at 430 (citations omitted); see also Pirayesh v. Pirayesh, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004) ("When determining to whom custody shall be awarded, the court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration."); Bragg v. Bragg, 347 S.C. 16, 22, 553 S.E.2d 251, 254 (Ct. App. 2001) (providing the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision of child custody can be weighed).

"The relative fitness of parents is an important issue in custody litigation. . . . Fitness decisions normally turn on either of two considerations; whether either parent has been the primary caretaker, or whether either parent has engaged in conduct which would affect the welfare of the child." Roy T. Stuckey, Marital Litigation in South Carolina 433 (3rd ed. 2001). "Although there is no rule of law requiring custody be awarded to the primary caretaker, there is an assumption that custody will be awarded to the primary caretaker." Patel v. Patel, 359 S.C. 515, 527, 599 S.E.2d 114, 120 (2004) (citation omitted).

> In South Carolina, in custody matters, the father and mother are in parity as to entitlement to the custody of a child. When analyzing the right to custody as between a father and mother, equanimity is mandated. We place our approbation upon the rule that in South Carolina, there is no preference given to the father or mother in regard to the custody of the child. The parents stand in perfect equipoise as the custody analysis begins.

Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001). Additionally, child custody is not granted to a party as reward or withheld as punishment. Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975); Clear v. Clear, 331 S.C. 186, 191, 500 S.E.2d 790, 792 (Ct. App. 1998).

Morality of a parent is a proper factor for consideration in determining custody of children. Davenport at 527, 220 S.E.2d at 230. However, the effect of a parent's morality is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child. Id.

Recognizing this was a "close custody case," the family court noted that "both parties love the children and the children clearly love both parents, and have a close relationship with both." The court order states that "both parties were the primary caretakers of the children[.]" The court did not find Mother unfit, but concluded custody with Father was in the children's best interest.

Specifically, the family court found the children have had excessive tardies at school and held Mother to be the significant factor causing the children's tardies. This finding is supported by the testimony of Marlene Cordoso, a school employee, who testified that most of the children's tardiness occurred when Mother brought the children to school. She further averred Mother was late on occasion when it was her responsibility to pick up the children from the after-school care program. Moreover, Ms. Cordoso stated Mother failed to pick up a sick child from school after agreeing to do so.

Other personnel at the school testified Mother sometimes would bring the children to school without their lunches. This did not occur when Father brought their lunches. The school employees further averred the children were better groomed and properly clothed in winter months when in the care of Father as opposed to Mother.

Nancy Hogsed, a babysitter for the children, corroborated the testimony of Ms. Cordoso. According to Ms. Hogsed, Mother frequently was late and would fail to pick up the children at the requisite time. Additionally, Mother was often late to or absent from the children's birthday parties, award functions, and sporting events. Mother lost her job at the hospital for excessive tardiness and absenteeism.

Furthermore, several witnesses offered testimony of Mother's poor temperament. The witnesses stated Mother loses her temper with her daughter Melissa and cursed at the child. Mitzi Kirsch, a realtor who listed the marital residence, testified to a "screaming rampage" and verbal abuse inflicted on her by Mother while Ms. Kirsch was attempting to sell the marital residence. The relationship became so difficult that Ms. Kirsch withdrew the listing of the home.

Although Father admittedly engaged in an adulterous relationship, he professed the amoret had ended and he was currently attending church. The amalgamation of witness testimony reveals Father: (1) was active in raising the children; (2) often cooked meals; (3) helped with school work; (4) took the children to church; and (5) attended the children's recreational events. Consequently, ample evidence exists to support the trial judge's conclusion, "Husband has the preferable temperament for dealing with the children."

To support her position, Mother proffers the improvement the children made in school while they were in her care. She contends that since the parties' separation, the children have been late less and have improved their grades, and, therefore, the family court erred by awarding custody to Father. However, we find the family court properly weighed the factors and exercised discretion in awarding custody with Father. The family court balanced the adulterous indiscretions of Father against the shortcomings of Mother in deciding to award custody to Father. There is substantial evidence in the record to support the award of custody to Father, including: (1) Mother's inability consistently to have the children to school on time; (2) her inattentiveness to the children's lives; and (3) her poor temperament around the children.

The family court considered how the custody decision would impact the children's lives and assessed each parties' attributes. It determined the well-being of the children was best served by an award of custody to Father. We find the family court properly analyzed this custody situation pursuant to the statutes and case law of this state and did not abuse its discretion in awarding custody to Father.

## II. Children's Preferences

Mother contends the family court erred in failing to consider the preferences of the minor children. We disagree.

"In determining the best interests of the child, the court must consider the child's reasonable preference for custody. The court shall place weight upon the preference based upon the child's age, experience, maturity, judgment, and ability to express a preference." S.C. Code Ann. § 20-7-1515 (Supp. 2003); see also Moorhead v. Scott, 259 S.C. 580, 585, 193 S.E.2d 510, 513 (1972) (holding the wishes of a child of any age may be considered under all the circumstances, but the weight given to those wishes must be dominated by what is best for the welfare of the children). The significance to be attached to the wishes of children in a custody dispute depends upon the age of the children and the attendant circumstances. See Smith v. Smith, 261 S.C. 81, 85, 198 S.E.2d 271, 274 (1973). The child's preference will be given little weight where the wishes of the child are influenced by the permissive attitude of the preferred parent. Id. at 86, 198 S.E.2d at 274.

The trial judge is not required to take testimony from the children where (1) counsel fails to request that the judge take the testimony and (2) the children's guardian ad litem testifies as to the children's preferences. See Perry v. Perry, 315 S.C. 373, 375, 433 S.E.2d 911, 912 (Ct. App. 1993); see also Dodge v. Dodge, 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998) (finding the court's decision not to interview an eleven-year-old child was not an abuse of discretion).

The twins were approximately six years old at the time of trial, and Melissa was approximately ten. Although the guardian ad litem recommended custody be awarded to Father, he asseverated: "[A]ll three children stated they had a preference to live with their mother." The guardian explained:

> The reasoning for Nicholas and Natalie is just—I don't think they are really mature enough to really tell me why they wanted to live

> with her. Melissa, I think, is more connected, based on my conversations with her, is more connected. She wants to stay in the neighborhood with the children she has grown up with all these years. But, of course, that's not going to happen.

Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 173 (1970), the leading South Carolina case on children's preferences, dealt with the custody dispute over a sixteen-year-old boy. Our supreme court reversed the family court's award of custody to the mother, holding:

> Ordinarily, the wishes of a child of this boy's age, intelligence and experience, although probably not controlling, Ex parte Reynolds, 73 S.C. 296, 53 S.E. 490 (1906), are entitled to great weight in awarding his custody as between estranged parents. Annot., 4 A.L.R.3d 1396, 1434 (1965). The court made no finding of fact tending to offset this important factor in awarding custody, and the record before us is bare of any evidence tending to do so. Absent any evidence tending to establish that the best interest of the boy would be served by awarding his custody to the mother, the court erred in failing to allow him to live with the parent of his choice.

Id. at 557-58, 176 S.E.2d at 174.

Moorhead v. Scott, 259 S.C. 580, 193 S.E.2d 510 (1972), involved a change of custody action by a father attempting to obtain custody of his children, ages eight, eleven, and twelve. Id. at 582, 193 S.E.2d at 512. The family court awarded a change of custody to the father based on its finding of a substantial change of conditions and the children's preference to live with their father. Id. at 584, 193 S.E.2d at 512. In reversing, the supreme court noted the difference in weight to be given a child's preference based upon their age and elucidated that the children's best interests—not the children's preference—is the cardinal determination in custody decisions:

> Our Court has given little significance to the wishes of a six year old child. Poliakolff v. Poliakoff, 221 S.C. 391, 70 S.E.2d

> 625 (1952). On the other hand, our Court has given great weight to the wishes of a child sixteen years of age. Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 173 (1970). It is clear that the wishes of a child of any age may be considered under all the circumstances, but the weight given to those wishes must be dominated by what is best for the welfare of the children.

Id. at 585, 193 S.E.2d at 513.

In summation, South Carolina law requires the family court to consider a child's reasonable preference for custody. However, the weight given to the child's preference depends upon the child's age, experience, maturity, judgment, and ability to express a preference. And a determination of the best interests of the child is paramount to the child's preference.

Although the six-year-old twins expressed a preference for Mother, we find Poliakolff and Morehead counsel that minimal weight should be given the preference of such young children. Ten-year-old Melissa's wishes should be given more weight because she is older. However, even the weight given the preference of a ten-year-old does not rise to the level of "great weight" that should be given the desires of a sixteen-year-old. See Bolding v. Bolding, 278 S.C. 129, 293 S.E.2d 699 (1982) (reversing change of custody of eleven-year-old because "Father failed in his burden of establishing a change of condition sufficient to warrant a transfer of custody, as the only change alleged or proved involved the wishes of the eleven-year-old child."); see also Roy T. Stuckey, Marital Litigation in South Carolina 454 (3rd ed. 2001) ("Judging from the handful of South Carolina cases on children's preferences, it appears that somewhere between 12 and 14 may well be the ages at which the wishes of the child should be given serious consideration."); Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114 (2004) (upholding award of custody of thirteen-year-old daughter to the mother where daughter expressed "definite desire" to live with mother).

Moreover, the preference of any child is merely a factor in the analysis—it is not determinative. The family court, cognizant of the children's wishes, considered the factors in this custody decision and

reasonably concluded it was in their best interests to be with Father. We find no abuse of discretion.

## III. De Facto Custody

Mother argues the custody award to Father was actually a de facto custody award to the children's paternal grandparents. She claims the grant of custody was error because (1) the grandparents were not parties to the action, and (2) even if the grandparents had been parties to the action, Mother would have to have been adjudged unfit under Moore v. Moore, 300 S.C. 75, 386 S.E.2d 456 (1989) in order for custody to go to the grandparents. We find this argument without merit.

The family court considered the work schedules of both parties in its analysis and found:

> Although husband's third shift job and his living with his parents would, normally be a negative factor against his receiving custody, the Court believes that this negative factor is not significant. The children have a close relationship with their paternal grandparents. The paternal grandparents have often times assisted the parents in caring for the children . . . . This living arrangement will actually assist the husband in caring for the children since the grandparents will be home with the children while he is working third shift.

This Court expressly rejects the principle entitled "de facto" custody. Factually, "de facto" custody, even if recognized, is not presented or proven in this case. Apodictically, custody was awarded to Father, not the grandparents. The family court merely factored the paternal grandparents into the custody analysis. Mother cites no law supporting her theory of de facto custody, and we refuse to erect a rule that would punish a parent solely because he or she chooses to live with his or her parents.

Further, we find Moore inapposite as that case addressed the rebuttable presumption that "it is in the best interest of any child to be in the custody of

its biological parent." 300 S.C. at 79, 386 S.E.2d at 458 (citing Kay v. Rowland, 285 S.C. 516, 331 S.E.2d 781 (1985); Cook v. Cobb, 271 S.C. 136, 345 S.E.2d 612 (1978)). The case at bar deals with a custody dispute between the two parents, not between a parent and a third party. Concomitantly, the court did not need to find Mother unfit to award custody to Father. We find granting custody to the Father, partially because of the assistance available from the paternal grandparents, was not tantamount to de facto custody and did not constitute an abuse of discretion.

## CONCLUSION

Accordingly, the decision of the family court awarding custody to Father is hereby

**AFFIRMED.**

**STILWELL and SHORT, JJ., concur.**

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

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Marty K. Cole and Tracy S. Cole, as co-administrators of the Estate of Kyle Austin Cole, and Tracy S. and Marty K. Cole, individually, Appellants,

v.

Pratibha P. Raut, M.D., and Dr. Raut & Associates, P.A., Respondents.

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Appeal From Chester County
Paul E. Short, Jr., Circuit Court Judge

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Opinion No. 3902
Heard October 12, 2004 – Filed December 6, 2004

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**AFFIRMED**

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Charles L. Henshaw, Jr., of Columbia, for Appellants.

Robert H. Hood, Hugh W. Buyck, Roy P. Maybank and Deborah Sheffield, all of Charleston, for Respondents.

**KITTREDGE, J.:** In this medical negligence action, Marty and Tracy Cole appeal a general defense verdict for Dr. Pratibha P. Raut and her medical practice. The Coles argue the circuit court erred in charging the jury on the defense of assumption of risk. We affirm pursuant to the "two issue" rule.

## FACTS/PROCEDURAL BACKGROUND

The Coles brought this action individually and on behalf of their son, Kyle, who was born on February 22, 1997. The Coles alleged medical negligence against Dr. Raut and her medical practice. The complaint essentially asserted that Dr. Raut failed to deliver Kyle in a timely manner by Cesarean section (C-section) birth, and failed to timely respond to warning signs that Kyle was suffering from the effects of oxygen distress prior to birth. Dr. Raut and her practice denied negligence, and asserted various defenses, including contributory negligence.

Dr. Raut and her practice sought to amend their pleadings at trial to include assumption of risk as a separate, affirmative defense. Initially, the court ruled that the "comparative fault affirmative defense covered assumption of the risk." When Dr. Raut and her practice renewed their motion, the court elected to reserve its ruling on the motion until the close of evidence. After all evidence was presented, the court struck the comparative negligence defense raised by Dr. Raut and her practice. However, over the Coles' objection, the court elected to charge the jury on the affirmative defense of assumption of risk.[1]

[1] We recognize that in South Carolina the doctrine of assumption of risk was largely subsumed by the law of comparative negligence in Davenport v. Cotton Hope Plantation, 333 S.C. 71, 508 S.E.2d 565 (1998). However, the cause of action in this present case arose in February 1997, prior to Davenport.

At trial, both parties provided expert testimony regarding the various issues stemming from the care rendered by Dr. Raut in the delivery process, including Dr. Raut's timing in ordering a C-section.[2] Predictably, the Coles presented expert testimony that Dr. Raut deviated from the standard of care which resulted in injury, and Dr. Raut presented expert testimony that she did not deviate from the applicable standard of care while providing prenatal care to Mrs. Cole or in the delivery of her child. A jury issue was therefore presented on the malpractice - negligence claim.

The court instructed the jury that the Coles were entitled to prevail if the jury found Dr. Raut was negligent "in at least one or more of the ways alleged … [and that] the defendants' negligence was the proximate cause of the plaintiff's injuries." When later charging the jury on the assumption of risk affirmative defense, the court stated:

> I charge you, if you find that the plaintiff freely and voluntarily exposed herself to a known danger and understood and appreciated the danger, then in such circumstance your verdict would be for the defendant. However, I charge you, on the other hand, if you find that the plaintiff's injuries and negligence were the result of the defendant's negligence, then in such circumstance your verdict would be for the plaintiff.

The jury returned a general defense verdict. Judgment was entered for Dr. Raut and her medical practice. The Coles appeal.

## DISCUSSION

The Coles argue the circuit court erred in instructing the jury on the assumption of risk defense, contending the defense is inapplicable to the facts

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[2] Mrs. Cole was admitted to the hospital on February 21, 1997. The labor period was prolonged, and the record contains a detailed history of the labor process. We need not discuss this factual background in light of our disposition of this appeal.

of the case. We do not reach this issue, however, because the jury returned a general verdict for the defense, and that verdict is independently supported by the unchallenged submission of the negligence claim to the jury.[3] This principle is generally referred to as the "two issue" rule. The rule is based on the principle that reversal is inappropriate where no error is found as to one of the issues that may independently support the jury's verdict. See Anderson v. South Carolina Dep't of Highways & Pub. Transp., 317 S.C. 280, 282, 454 S.E.2d 353, 355 (Ct.App. 1995) ("If a verdict is susceptible of two constructions, one of which will uphold it and the other which will defeat it, the one which will uphold it is preferred"). Moreover, a general verdict is presumptively valid. See Gold Kist, Inc. v. Citizens & Southern Nat'l Bank of South Carolina, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct.App. 1985) ("The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict").

Because the present case involved both an issue of negligence—properly submitted to the jury—and the challenged defense of assumption of risk, we are bound to affirm the defense verdict if the verdict may be sustained on the negligence claim. See Id. ("[W]here a jury returns a general verdict in a case involving two or more issues or defenses and its verdict is supported as to at least one issue or defense, the verdict will not be reversed"). The Coles concede the negligence claim involved disputed issues of fact and was properly submitted to the jury. The general defense verdict may therefore be sustained on the negligence claim. See Anderson, 317 S.C. at 282, 454 S.E.2d at 355 (Applying the "two-issue" rule where case submitted to jury on only one cause of action, negligence, and only one defense, contributory negligence).

## CONCLUSION

Since the general defense verdict may be sustained on the negligence cause of action, the judgment of the circuit court is

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[3] While Dr. Raut objected to the general verdict form, the Coles did not.

**AFFIRMED.**

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