# The Supreme Court of South Carolina

In the Matter of Michael J. Hansen, Petitioner.

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ORDER

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The records in the office of the Clerk of the Supreme Court show that on November 21, 1994, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated November 15, 2004, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/Jean H. Toal C.J.

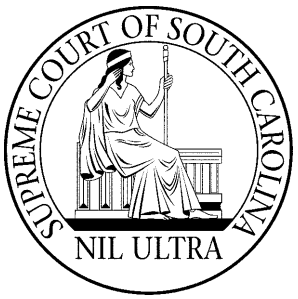
s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
December 15, 2004




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 49**

**December 20, 2004**

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

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

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In the Matter of Charleston
Municipal Court Judge
Arthur C. McFarland, Respondent.

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Opinion No. 25912
Submitted November 30, 2004 – Filed December 20, 2004

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**PUBLIC REPRIMAND**

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Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for The Office of Disciplinary Counsel.

Coming B. Gibbs, Jr., of Charleston, for respondent.

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**PER CURIAM:** In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a public reprimand. The facts as set forth in the agreement are as follows.

## FACTS

While serving as a part-time municipal judge for the City of Charleston, respondent also engaged in the practice of law. In his legal capacity, respondent undertook to represent a client, accepted a fee, and

filed a lawsuit on the client's behalf. After further investigation, respondent concluded the client's claim lacked merit, but failed to advise the client and never sought to dismiss the lawsuit. Respondent failed to advise the client of receipt of a summary judgment motion and failed to respond to the motion. Without consulting the client, respondent failed to comply with discovery requests and failed to comply with two federal court orders directing respondent to comply with the discovery requests. Moreover, although he met with the client approximately seven times after the summary judgment motion had been granted, respondent never told his client his case had been dismissed. Finally, respondent failed to timely return the client's file after the client terminated representation and requested the file's return.

The client filed a complaint with the Commission on Lawyer Conduct. ODC requested respondent respond to the complaint. Respondent failed to respond; ODC sent a "Treacy" letter in which ODC pointed out that respondent's failure to respond to the complaint would constitute lawyer misconduct. See In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent failed to respond to the second request from ODC.

ODC then served respondent with a Notice of Full Investigation. See Rule 19, RJDE, Rule 502, SCACR. Respondent failed to respond to the Notice of Full Investigation. ODC then had the South Carolina Law Enforcement Division serve a subpoena on respondent directing that he appear at a specific time and place for an on-the-record and under oath interview and to bring documents with him for inspection. Respondent failed to appear as directed, but did contact ODC and reschedule the interview. Respondent subsequently appeared for the rescheduled interview and provided ODC with the subpoenaed documents.

As a result of the above misconduct, respondent was publicly reprimanded in his capacity as a lawyer. In the Matter of McFarland, 301 S.C. 101, 600 S.E.2d 537 (2004). This reprimand constituted the fourth time respondent had been disciplined for professional misconduct as a lawyer.

## LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 4(A)(2) (judge shall conduct all extra-judicial activities so that they do not demean the judicial office). By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR (it shall be ground for discipline for judge to violate the Code of Judicial Conduct). In addition, he has violated Rule 7(a)(2), RJDE, Rule 502, SCACR (it shall be ground for discipline for judge to willfully fail to appear personally as directed, willfully fail to comply with a subpoena, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response or appearance).

## CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Accordingly, respondent is hereby reprimanded for his misconduct.

**PUBLIC REPRIMAND.**

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

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

---

Loren John Murphy, Petitioner,

v.

NationsBank, N.A., Respondent.

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Appeal From Spartanburg County
John C. Hayes, III, Special Circuit Court Judge

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Opinion No. 25913
Heard November 4, 2004 – Filed December 20, 2004

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**REVERSED**

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James J. Raman, of Spartanburg, for Petitioner.

Donald E. Rothwell and Scott Louis Hood, both of Irmo, for Respondent.

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**JUSTICE WALLER:** We granted a writ of certiorari to review the Court of Appeals' decision in Murphy v. NationsBank, N.A., 354 S.C. 495, 581 S.E.2d 849 (Ct. App. 2000). The Court of Appeals held that a party to an action is not entitled to mileage and a witness fee for attending a deposition. We reverse.

## FACTS

Petitioner, Murphy, filed suit against Respondent, NationsBank (Bank), alleging Bank had filed a negative credit report against him. During

discovery, Bank noticed Murphy's deposition. Counsel notified Bank that Murphy expected a witness fee of $25.00 plus mileage. NationsBank filed a motion to enforce discovery and, after a hearing, Judge Hayes ordered Murphy to appear at the deposition without being paid a witness fee and/or mileage. Murphy appealed to the Court of Appeals which affirmed the trial court's ruling that Murphy was not entitled to the fee and mileage.

## ISSUE

Is a party to an action entitled to a witness fee and mileage for attending a deposition?

## DISCUSSION

In Perry v. Minit Saver Food Stores, 255 S.C. 42, 177 S.E.2d 4 (1970), this Court answered the precise question before us. There, we held the word "witness," as used in Circuit Court Practice Rule 87, included a party such that the plaintiff was entitled to a witness fee and mileage. We stated, "[w]e are of the view that there is no ambiguity whatever in Rule 87 as to the meaning of the word 'witness' . . . and that the word 'witness' was intended to mean all witnesses whose depositions are taken pursuant to the rule, whether or not the witness, perchance, be a party. The word 'witness' is used at various other places in Rule 87 to denote all witnesses, including parties, without making any distinction between witnesses who happen to be parties and those who are not." 255 S.C. at 45, 177 S.E.2d at 5.

Circuit Court Rule 87 was repealed and replaced with Rule 30(a)(2), SCRCP, effective July 1, 1985. The pertinent provision of Rule 30(a)(2) provides, "[a] witness attending any deposition held pursuant to these rules shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same, $25.00 per day, and mileage for going from and returning to his place of residence, in the same amounts as provided by law for official travel of state officers and employees."

The Court of Appeals held that, because other sections of Rule 30(a)(2) differentiate between a witness and a party, the section pertaining to payment

of a **witness** fee was just that, requiring payments only to witnesses, but not parties. The Court of Appeals noted that portions of Rule 30(a)(2) set forth certain limitations on depositions, to wit:

> A witness (**excluding a party**) may be compelled to attend only in the county in which he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. The second paragraph states: 'The deposition of any **party or witness** may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown.

354 S.C. at 496-497, 581 S.E.2d at 849-850 (emphasis in original). Because the first paragraph of the rule deals with witnesses and excludes parties, and the second paragraph deals with **both** witnesses and parties, the Court of Appeals concluded that the third paragraph, dealing with payment of **witness** fees, applied only to witnesses and not to parties. Id. at 497, 581 S.E.2d at 850. This holding is in direct conflict with this Court's opinion in Perry, holding that for purposes of the rule requiring payment of a witness fee, a party is a witness as well as a party.

Moreover, the Court of Appeals overlooked the fact that former Circuit Court Rule 87, upon which this Court relied in Perry, contained the **identical** provisions as Rule 30(a)(2). Rule 87(A) specifically stated that "[a] witness (excluding a party) may be compelled to attend only in the county in which he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the Court." The rule went on to state that, "[t]he deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the Court for good cause shown." We nonetheless held in Perry that a party witness is entitled to mileage and a witness fee. Accordingly, the Court of Appeals erred in holding Perry inapplicable to this case.

We hold a party to an action who is required to attend a deposition is entitled to a witness fee and mileage pursuant to Rule 30(A)(2). The Court of Appeals' opinion is reversed.

**REVERSED**.

**MOORE, A.C.J., PLEICONES, J., and Acting Justices Edward B. Cottingham and Donna S. Strom, concur.**

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

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Earnest E. Vaughn, Petitioner,

v.

State of South Carolina, Respondent.

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ON WRIT OF CERTIORARI

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Appeal From Anderson County
John M. Milling, Circuit Court Judge

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Opinion No. 25914
Submitted October 20, 2004 – Filed December 20, 2004

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**REVERSED AND REMANDED**

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Assistant Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, for Respondent.

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**JUSTICE WALLER:** We granted the petitioner's petition to review the denial of relief in this post-conviction relief (PCR) action. The PCR court found trial counsel was not ineffective for failing to object to the solicitor's closing argument. We reverse and remand.

## FACTS

At approximately 3:00 a.m. on April 10, 1997, Deputy Reggie Widener ("Officer Widener") was parked in a high crime area. He noticed a car circle the area twice. The petitioner's girlfriend was driving the car and the petitioner was the passenger. After Officer Widener approached the patrol car, the vehicle drove away at a faster rate of speed. Officer Widener followed the car which parked in the driveway of a completely dark house.

After driving around the block, Officer Widener saw the petitioner on the front porch with the petitioner's girlfriend in the car, and he noticed the house was still dark. Because there had been many complaints about burglaries in the neighborhood, Officer Widener and back-up Officer Reid approached the petitioner and his girlfriend and asked the petitioner for identification and why he was at the house. Officer Widener then asked the petitioner for permission to pat him down for guns which the petitioner granted. The petitioner testified that he informed Officer Widener that he had several knives and a marijuana joint in his pocket. Officer Widener testified that the petitioner did not admit to possessing any drugs prior to the search. During the pat down, Officer Widener testified he felt some knives. While removing the knives from the petitioner's pocket, Officer Widener testified he discovered a bag of marijuana.

Officer Widener arrested the petitioner and then conducted a search incident to the arrest. Officer Widener testified that during this search he found an empty cigarette pack which contained thirteen small bags of methamphetamines in the petitioner's coat pocket. At trial, the petitioner admitted he possessed marijuana. However, he denied ever possessing any methamphetamines.

The petitioner was convicted of possession of marijuana and possession with intent to distribute (PWID) crank and sentenced to one year and fined $1,000 for the possession charge and sentenced to twenty years and fined $100,000 for the PWID crank charge. The petitioner timely filed an application for PCR raising, inter alia, the claim that his trial counsel was ineffective for failing to object to the solicitor's closing argument. Following a hearing, the PCR court denied the petitioner relief and dismissed the petitioner's PCR application. The petitioner filed a motion to reconsider which the PCR judge also denied.

## ISSUE

Was trial counsel ineffective for failing to object to the solicitor's closing argument stating what uncalled witnesses would have testified to?

## DISCUSSION

"[A] PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The petitioner contends trial counsel was ineffective for failing to object to the solicitor's closing argument stating what uncalled witnesses would have testified to and vouching for Officer Widener, the State's only eyewitness to testify at trial.

During closing arguments, the petitioner's trial counsel stated:

> What I would like you all to remember, who else we didn't hear from that was there. There was another officer there, Mr. Reid. Obviously he didn't see anything because he is not here.
>
> There was a ride along in the car with Mr. Widener. She's not here obviously because she didn't see anything. Eddie testified he didn't see any methamphetamines out there at the trailer. Ivy Roussos was out there. She didn't see any. The only person that saw any methamphetamines out there that night, April 10th, was Officer Widener. . . .
>
> They had the evidence man, the SLED guy, and I think an expert on - - one of the drug agents here. But nobody else. They had three people at the scene who testified. Just Officer Widener, he [sic] the only one that saw that out at the scene. That's just one thing I want you to think about. The government has the burden of proof. The government must prove their case.
>
> And in this case, with all the other people that were there, they rely solely on this one man, that one man that says he saw the drugs out there. Where did they come from? I don't know. I don't have a clue. I wasn't there that night. I do know that there were five people there. Three with the police officer, with the sheriff's department, the ride along, Widener and Reid, Eddie and Ivy. Now, out of all those people, only one person saw drugs out there. I want you all to think about that.

(emphasis added).

The solicitor then gave her closing statement and stated:

The defense attorney wants to know why I didn't call the other witnesses to this case. When I get a case I interview everybody who is involved. I ask them, I don't prompt them, I say what did you observe? I take notes on it. I'm a minimalist when it comes to trying a case. Your time is valuable, the Judge's time is valuable, the clerk's time is valuable, my time is valuable. If everybody is going to say the same thing, there are no differences, then I'm not going to make them come up here and testify. That's duplicative testimony.

And in fact, if everybody takes the stand and says the very same thing, the defense attorney can object to it. We have a rule of evidence that says you cannot put in duplicative testimony. Now, he says if those people had seen meth, they would have been here. Let me put it to you this way, the defense attorney has the power of subpoena. He can have any single person he wants to here to testify.

I don't know if he talked to the first officer, but I do know that he subpoenaed the ride along and has talked to her. We called this case to trial previously, and she was up here, and they discussed it with her. Don't you think if she was going to say, I didn't see any meth, she would have taken the stand. He could have subpoenaed her and put her up there, but he didn't.

The reason I didn't put them up there is because they're going to say the very same thing that my officer did. . . . Now apparently what we're going for here is that the officer planted those drugs. I will be the first person to admit that there are officers who

> will take the stand and lie. That is the reality of life. Everyone who takes an oath does not tell the truth. I have to my knowledge never put someone up there that would do that. . . .
>
> The officer had no reason to lie, and it is not necessary for me to bring other people here to corroborate his testimony when they're going to say the same thing. But if they weren't going to say the same thing, I would guarantee you that the defense would have had them on the stand because they can subpoena whoever they like.

The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Furthermore, a prosecutor cannot vouch for a witness' credibility. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony. Id.

Although it would have been improper for the solicitor to vouch for Officer Widener, or initiate an argument about the testimony of the absent witnesses, the situation is entirely different when the defendant opens the door to the subject. United States v. Robinson, 485 U.S. 25 (1988)(holding solicitor's closing argument that defendant "could have taken the stand and explained it to you" did not violate defendant's Fifth Amendment right against self-incrimination because prosecutor's reference to defendant's opportunity to testify was fair response to claim made by defendant in closing argument that government had not allowed defendant to explain his side of story). Conduct that would otherwise be improper may be excused under the "invited reply" doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense. As explained in United States v. Young, 470 U.S. 1, 13 (1985), the idea of an invited

response is used not to excuse improper comments, but to determine their effect on the trial as a whole.

Once a defendant opens the door, the relevant question in determining if a defendant's rights were violated is whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). In Darden v. Wainwright, 477 U.S. 168, 182 (1986), the United States Supreme Court held that comments by a solicitor failed to meet the test set out in Donnelly, because 1) the comment was an "invited response" to defense counsel's argument, 2) the evidence against the defendant was overwhelming, and 3) the trial court instructed the jury several times that its decision was to be made on the basis of evidence alone and the arguments of counsel were not evidence. See also State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987).

Here, if not for the lack of evidence, we might agree that the solicitor was merely responding to the petitioner's argument.[1] The petitioner's trial counsel argued that the State had failed to call witnesses who would testify that there were no methamphetamines found on the petitioner that night. Thus, the petitioner "opened the door" to some response from the solicitor. But See State v. Engel, 592 A.2d 572 (N.J. Sup. Ct. 1991)(holding prosecutor did not express personal belief as to defendant's guilt or improperly vouch for credibility of police investigators when, in response to defense counsel's lengthy summation characterizing State's case as a "big lie," he defended integrity of investigation and prosecutor's remarks, taken in context, did not unfairly prejudice defendants.) Furthermore, here, the trial court instructed the jury that they were to consider only the testimony that they heard at trial.

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[1]The petitioner argues that the State cannot assert trial strategy as a valid reason for failure to object to the solicitor's comments citing Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002). While at the PCR hearing, trial strategy was raised, on appeal the State does not argue this as a ground to affirm.

However, other than Officer's Widener's testimony, there was no other evidence that the petitioner possessed the methamphetamines. While the petitioner's argument may have invited some response, the solicitor's response was unfair and prejudiced the petitioner, in light of the lack of evidence of his guilt on the PWID charge. See State v. McFadden, 318 S.C. 404, 415, 458 S.E.2d 61, 68 (1995) (holding that given the ample other evidence of guilt in the record, the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process).

Furthermore, we note that approximately fifteen minutes after beginning deliberations, the jury sent the trial judge a question. The jury wanted to see the "testimony" of the other officer, or more correctly the dispatcher, Poulsom, who had been riding with Officer Widener. However, Poulsom did not testify at trial. The trial judge instructed the jury that they were to consider only the testimony and evidence received during the trial.[2] While the trial judge correctly instructed the jury to consider only the evidence received during the trial, the jurors were obviously concerned with the witnesses who did not testify and the arguments about them probably only added to their concern.

We find the solicitor's comments prejudiced the petitioner and trial counsel was ineffective for failing to object.[3] Accordingly, the PCR court erred in denying him relief.

**REVERSED AND REMANDED.**

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

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[2] Poulsom testified at the PCR hearing that she really did not recall the arrest in any detail.

[3] In deciding the prejudice prong in this PCR action, the Court is to examine the same factors as those analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt. Edmond v. State, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000).

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

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Jennie Willis, as guardian ad litem for Thomas Willis, a minor under the age of fourteen years, Appellant,

v.

Donald S. Wu, M.D., and Donald S. Wu., M.D., P.A., Respondents.

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Appeal From Marion County
B. Hicks Harwell, Circuit Court Judge

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Opinion No. 25915
Heard November 4, 2004 – Filed December 20, 2004

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**AFFIRMED**

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O. Fayrell Furr, Jr. and Karolan F. Ohanesian, both of Furr, Henshaw & Ohanesian, of Myrtle Beach, and Glenn V. Ohanesian of Ohanesian & Ohanesian, of Myrtle Beach, for Appellant.

Stephen Brown, John Hamilton Smith, and D. Jay Davis, Jr., all of Young, Clement, Rivers & Tisdale, of Charleston, for Respondents.

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**JUSTICE BURNETT:** In this appeal, we are asked to decide the novel issue of whether South Carolina will recognize a common law cause of action for "wrongful life" brought by or on behalf of a child born with severe congenital defects. This case was certified for review from the Court of Appeals pursuant to Rule 204(b), SCACR. We decline to recognize such a cause of action.

## FACTUAL AND PROCEDURAL BACKGROUND

Jennie Willis (Mother), in her capacity as guardian ad litem for her minor son, Thomas Willis (Child), brought a "wrongful life" action on behalf of Child against Donald S. Wu (Physician). Child alleges, because Physician failed to adequately and timely diagnose his condition by prenatal testing and inform Mother the results, Mother was denied the opportunity to decide whether to terminate the pregnancy while legally allowed to do so. See S.C. Code Ann. §§ 44-41-10 to -85 (2002) (prohibiting abortions after the twenty-fourth week of gestation unless two unrelated physicians certify in writing it is necessary to preserve the life or health of the mother).

Specifically, Child alleges Physician was negligent in failing to timely perform or comprehend the significance of ultrasound examinations which indicated the presence of hydrocephalus in the fetus, a congenital defect that in Child's case had devastating consequences. Child's medical experts testified Physician and his ultrasound technician failed to diagnose Child's condition and inform Mother in time for her to decide whether to terminate the pregnancy.

Child was born with maximal hydrocephalus, a condition in which the cerebral hemispheres of his brain are missing. Those areas of the brain control thinking, motor control, the ability to speak and move voluntarily, and the ability to interact with others. A CT scan of Child's head at birth showed a very large head filled with fluid, with brain tissue seen only in the frontal and temporal lobes and a brain

stem. Physicians placed a shunt in Child's head at birth to drain the fluid and prevent his head from growing larger.

Mother is the primary caregiver for Child, who is now eight years old. Child receives various forms of therapy at home and school. He will never be able to care for himself independently. His physical condition and mental abilities are about the same as they were at the age of a few months.

The circuit court granted Physician's motion for summary judgment on the wrongful life action, ruling South Carolina does not recognize it. Child appeals.

## ISSUE

Does South Carolina recognize a common law cause of action for "wrongful life" brought by or on behalf of a child born with a congenital defect?

## STANDARD OF REVIEW

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2003), and S.C. Code Ann § 14-8-200 (Supp. 2003)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same).

## LAW AND ANALYSIS

Child urges we recognize a wrongful life action because there are times when it is better that a child not be born; such cases can be resolved within existing principles of medical malpractice law as they pertain to an unborn child or infant; damages, including extraordinary expenses related to the defective condition and actual damages for the child's pain, suffering, and emotional distress, are ascertainable; and the action should be recognized in a world where people may prepare "living wills" rejecting medical care in certain circumstances, and capital punishment is allowed under the law.

Physician argues we should reject the action, as most states have done, because courts and juries are incapable of awarding damages, which would require weighing an impaired existence against non-existence; the theory amounts to a repudiation of the value and sanctity of human life; and being born is not a legally cognizable injury.

At the outset, it is important to set forth basic definitions of the terms "wrongful life," "wrongful birth," and "wrongful pregnancy." The terms are used to describe a variety of cases arising under different factual circumstances, and courts have recognized the terms are somewhat misleading and not always used in a consistent manner. E.g., Hester v. Dwivedi, 733 N.E.2d 1161, 1163 (Ohio 2000) (recognizing "overreliance on terms such as 'wrongful life' or 'wrongful birth' creates the risk of confusion in applying principles of

tort law to actual cases, and may compound or complicate resolution of the case"); Reed v. Campagnolo, 630 A.2d 1145, 1150 (Md. 1993) (explaining the term "wrongful life" is not instructive, as any wrongfulness is in the negligence of the physician, not the life of the child; any harm is not the birth itself, but the effect of the defendant's alleged negligence resulting in the denial of the parent's right to decide whether to bear a child with a genetic or other defect); Lininger by Lininger v. Eisenbaum, 764 P.2d 1202, 1204 n.2 (Colo. 1988) (en banc) ("use of the terms 'wrongful life' and 'wrongful birth' more often serves to obscure the issues than to elucidate them; unfortunately the labels are so entrenched in normal usage that it is difficult to entirely abstain from their use"); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 695 (Ill. 1987) ("Because the courts and the commentators have been less than precise in their utilization of these terms, the legal and theoretical distinctions between the torts often have been blurred. Hence, thoughtful analysis of the validity of wrongful birth and wrongful life as emerging legal concepts requires, in the first instance, a clear understanding of the alleged wrong upon which the cause of action is predicated."). Regardless, the terms have become embedded in the law since the mid-1970s and most courts appear to endorse the following definitions:

A "wrongful life" action is brought by or on behalf of the child himself. The child alleges, because of the defendant's negligence, his parents either decided to conceive him ignorant of the risk of an impairment or birth defect, or were deprived of information during gestation that would have prompted them to terminate the pregnancy. The child alleges, but for the defendant's negligence, he would not have been born. The birth defect or impairment itself occurred naturally, i.e., it was not directly caused by an act or omission of the defendant health care provider.

A "wrongful birth" action is brought by the parent of a child born with an impairment or birth defect. The parent alleges that the negligence of those charged with prenatal testing or genetic counseling deprived them of the right to make a timely decision regarding whether to terminate a pregnancy because of the likelihood

their child would be born physically or mentally impaired. The birth defect or impairment itself occurred naturally, i.e., it was not directly caused by an act or omission of the defendant health care provider.

A "wrongful pregnancy" or "wrongful contraception" action is brought by the parent of a healthy but unplanned child, seeking damages from a health care provider who allegedly was negligent in performing a sterilization procedure or abortion, or from a pharmacist or pharmaceutical manufacturer who allegedly was negligent in dispensing or manufacturing a contraceptive prescription or device. Kush v. Lloyd, 616 So.2d 415, 417 nn. 2 and 3 (Fla. 1992); Walker by Pizano v. Mart, 790 P.2d 735, 737-38 (Ariz. 1990); Lininger, 764 P.2d at 1204; Bruggeman by Bruggeman v. Schimke, 718 P.2d 635, 638 (Kan. 1986); Turpin v. Sortini, 643 P.2d 954, 957 (Cal. 1982) (en banc); Gregory G. Sarno, Tort Liability for Wrongfully Causing One to Be Born, 83 A.L.R.3d 15 (1978); James Bopp, Jr., et al., The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts, 27 Duq. L. Rev. 461, 464-65 (1989) (explaining why courts should refuse to recognize either action); Mark Strasser, Wrongful Life, Wrongful Birth, Wrongful Death and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?, 64 Mo. L. Rev. 29, 30-31 (1999) (explaining why courts should recognize wrongful life actions); Anthony Jackson, Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England, 17 Loy. L.A. Intl. & Comp. L. Rev. 535 (1995) (analyzing the reasoning of courts rejecting wrongful life action and arguing only the child, not parents, should be allowed to recover damages when disabilities are so severe as to outweigh the benefits of being alive); Thomas K. Foutz, Student Author, "Wrongful Life": The Right Not to be Born, 54 Tul. L. Rev. 480 (1980); 62A Am.Jur.2d Prenatal Injuries; Wrongful Life §§ 89 to 98 (1990).

While wrongful life and wrongful birth actions often arise and are discussed simultaneously, the legitimacy of only the wrongful life action is before us.[1]

A. CURRENT SOUTH CAROLINA LAW

In a negligence action against a physician or other health care provider in which medical malpractice is alleged, plaintiff generally must demonstrate a duty is owed because a physician-patient relationship existed, physician failed to exercise the degree of care and skill which ordinarily is employed by the profession under similar conditions and like circumstances, physician's failure proximately caused harm or injury to plaintiff, and plaintiff suffered damages as a result of the harm or injury. See, e.g. Pearson v. Bridges, 344 S.C. 366, 544 S.E.2d 617 (2001); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997); Roberts v. Hunter, 310 S.C. 364, 426 S.E.2d 797 (1993); Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990); Fields v. Regional Medical Center of Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003); Daves v. Cleary, 355 S.C. 216, 584 S.E.2d 423 (Ct. App. 2003). Thus, the analysis in a medical malpractice action tracks the familiar duty-breach-causation-damages analysis employed in a typical tort action.

It is well established in South Carolina that a viable fetus harmed in utero by the act or omission of another, including a physician or other health care provider, may seek damages from the negligent tortfeasor. See Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993) (affirming jury verdict for parents and child in medical malpractice action brought against physician who negligently performed an amniocentesis and harmed infant while he was in the womb, and injured infant was later born alive); Crosby v. Glasscock

[1] Mother also brought a "wrongful birth" action on her own behalf in which she seeks damages from Physician in connection with Child's condition. Whether to recognize a cause of action for wrongful birth is not before us, and we express no opinion on it.

Trucking Co., 340 S.C. 626, 532 S.E.2d 856 (2000) (nonviable fetus may not maintain wrongful death action where fetus was stillborn after a vehicle wreck); West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958) (same); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964) (unborn child, a viable fetus, is capable of suffering legal wrong and may maintain action for wrongful death where mother and fetus perished in vehicle wreck); Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960) (unborn child, a viable fetus, may maintain wrongful death action where vehicle wreck resulted in premature birth and infant died four hours later).

This authority, however, provides minimal guidance in the present case. Wrongful life and wrongful birth actions differ from a typical medical malpractice action because the negligent act or omission of the health care provider did not actually cause the impairment or defective condition. Instead, the impairment or defective condition occurred and the health care provider failed to predict or diagnose it, resulting in the birth of a child with a congenital defect. See Walker v. Rinck, 604 N.E.2d 591, 594 (Ind. 1992) (distinguishing cases in which the defendant's alleged negligence actually caused an abnormality in a fetus or infant who otherwise would have been born normal from cases alleging wrongful life or wrongful birth actions); Procanik v. Procanik v. Cillo, 478 A.2d 755, 760 (N.J. 1984) (same); Taylor v. Kurapati, 600 N.W.2d 670, 674-75 (Mich. App. 1999) (same).[2]

In Phillips v. U.S., 508 F. Supp. 537 (D.S.C. 1980), the court predicted this Court would not adopt a wrongful life action. The district court rejected the notion, as expressed by other courts, that

[2] This result may be different if medical knowledge were such that a fetus could be treated prior to birth to cure or alleviate Child's congenital defect. Such a case would resemble prenatal injury cases similar to those just described. See Phillips, 508 F. Supp. at 543 n.12 (recognizing this distinction). Child does not claim any such prenatal treatment or cure was available in his case.

damages were too difficult to ascertain because of the Hobson's choice between non-existence and an existence with a defective condition. The court also rejected the notion that causation was a problem, noting plaintiff's argument was not that physician caused the defect, but his failure to predict or diagnose it deprived his parents of the opportunity to decide whether to terminate the pregnancy.

The Phillips court considered but largely discounted other reasons for rejecting the action, such as an increase in litigation, the perceived difficulty in proving it, that such a decision is better left to the legislature, and that the unfathomable theological or philosophical nature of the issue remove it from the realm of justiciability. Instead, the Phillips court rejected a wrongful life action primarily because recognizing it would violate the fundamental public policy of preserving the sanctity and preciousness of human life. Phillips, 508 F. Supp. at 542-44.

B. ARGUMENTS AGAINST A WRONGFUL LIFE ACTION

Twenty-seven states, by judicial opinion, statute, or both, have either refused to recognize or limited a wrongful life action.[3]

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[3] Nineteen states have rejected a wrongful life action by judicial opinion. Elliott v. Brown, 361 So.2d 546 (Ala. 1978) (serious congenital deformities); Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. 1990) (rubella syndrome marked by cerebral palsy, deafness, and cardiac abnormalities); Lininger by Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988) (en banc) (hereditary blindness); Garrison v. Medical Center of Delaware, Inc., 581 A.2d 288 (Del. 1990) (Down Syndrome); Kush v. Lloyd, 616 So.2d 415 (Fla. 1992) (genetic abnormality); Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990) (Down Syndrome); Gale v. Obstetrics & Gynecology Group of Atlanta, P.C., 445 S.E.2d 366 (Ga. App. 1994) (Down Syndrome); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (hemophilia); Bruggeman by Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986) (multiple congenital abnormalities); Grubbs

continued . . .

ex rel. Grubbs v. Barbourville Family Health Center, 120 S.W.3d 682 (Ky. 2003) (spina bifida and hydrocephalus); Kassama v. Magat, 792 A.2d 1102 (Md. 2002) (Down Syndrome); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990) (severe birth defect relating to skin); Greco v. U.S., 893 P.2d 345 (Nev. 1995) (spina bifida, hydrocephalus, paraplegia); Smith v. Cote, 513 A.2d 341 (N.H. 1986) (rubella syndrome marked by impaired hearing, impaired vision, cardiac abnormalities, and motor retardation); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) (Down Syndrome); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985) (Down Syndrome); Hester v. Dwivedi, 733 N.E.2d 1161 (Ohio 2000) (spina bifida and other defects); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) (muscular dystrophy); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985) (birth defects); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975) (rubella syndrome marked by retardation and physical abnormalities).

Three states have rejected a wrongful life action by judicial opinion as well as limited statutes which prohibit such actions to the extent the issue of abortion is implicated. Blake v. Cruz, 698 P.2d 315 (Idaho 1984) (rubella syndrome marked by defects in hearing, vision, heart malfunctions, and decreased motor skills); Idaho Code § 5-334 (statute enacted in 1985 prohibits lawsuits in which claim is that, but for act or omission of another, a person would have been aborted); Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991) (healthy baby born as result of rape to profoundly retarded mother who was unable to care for him); Ind. Code Ann. § 34-12-1-1 (under statute enacted in 1987, person may not maintain cause of action or receive an award of damages on the person's behalf based on the claim that but for the negligent conduct of another, the person would have been aborted); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988) (Down Syndrome); Mo. Rev. Stat. Ann. § 188.130 (statute enacted in 1986 prohibits wrongful birth or wrongful life actions which claim that, but for negligence, person would have been aborted).

continued . . .

Three states, discussed below, have allowed such a cause of action. Twenty-one jurisdictions, including South Carolina, have not addressed the issue.

Most courts refusing to recognize a wrongful life action have done so primarily for two reasons. First, these courts reason being born is not a legally cognizable injury, regardless of the severity of the defective condition afflicting the infant or child. Such courts believe it is asking too much to expect any court or jury to weigh the fact of being born with a defective condition against the fact of not being born at all, i.e., non-existence. Therefore, it is legally and logically

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Pennsylvania has rejected wrongful life actions by judicial opinion and by a statute generally barring such actions. Ellis v. Sherman, 515 A.2d 1327 (Pa. 1986) (severe congenital defects) 42 Pa. Consol. Stat. Ann. § 8305 (statute enacted in 1988 generally prohibits wrongful life and wrongful birth actions). Michigan has prohibited wrongful life actions by statute. Mich. Comp. Laws Ann. § 600.2971 (statute enacted in 2001 generally prohibits wrongful life and wrongful birth actions).

Minnesota, North Dakota, and Utah have prohibited wrongful life actions by statute, at least to the extent the issue of abortion is implicated. Minn. Stat. § 145.424 (statute enacted in 1982 prohibits wrongful birth or wrongful life actions which claim that, but for negligence, person would have been aborted); N.D. Cent. Code § 32-03-43 (statute enacted in 1985 prohibits wrongful life action in which person claims on own behalf that, but for act or omission of another, person would have been aborted); Utah Code Ann. § 78-11-24 (statute enacted in 1983 prohibits actions in which it is claimed on behalf of a person that, but for act or omission of another, person would have been aborted). But see Molloy v. Meier, 679 N.W.2d 711 (Minn. 2004) (illustrating that a wrongful pregnancy action brought by parent who alleges, not that she would have had abortion, but that she would not have conceived child, remains viable despite statute).

impossible to calculate damages allegedly suffered by the child. E.g., Elliott v. Brown, 361 So.2d 546, 548 (Ala. 1978); Walker by Pizano v. Mart, 790 P.2d 735, 740 (Ariz. 1990); Lininger by Lininger v. Eisenbaum, 764 P.2d 1202, 1209-10 (Colo. 1988 (en banc); Garrison v. Medical Center of Delaware, Inc., 581 A.2d 288, 293-94 (Del. 1990); Kush v. Lloyd, 616 So.2d 415, 423 (Fla. 1992); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 697-700 (Ill. 1987); Cowe by Cowe v. Forum Group, Inc., 575 N.E.2d 630, 634-35 (Ind. 1991); Bruggeman by Bruggeman v. Schimke, 718 P.2d 635, 639-42 (Kan. 1986); Grubbs ex rel. Grubbs v. Barbourville Family Health Center, 120 S.W.3d 682, 689 (Ky. 2003); Kassama v. Magat, 792 A.2d 1102, 1114-24 (Md. 2002); Wilson v. Kuenzi, 751 S.W.2d 741, 742 (Mo. 1988); Greco v. U.S., 893 P.2d 345, 347-48 (Nev. 1995); Smith v. Cote, 513 A.2d 341, 352-55 (N.H. 1986); Azzolino v. Dingfelder, 337 S.E.2d 528, 532-33 (N.C. 1985); Nelson v. Krusen, 678 S.W.2d 918, 924-25 (Tex. 1984).

The reasoning of these courts often is expressed along the following lines:

> This judicial reticence [to recognize a wrongful life action] stems partially from the fact that the theory amounts to a repudiation of the value of human life. The contention of wrongful life plaintiffs is not that they should not have been born without defects, but rather, that they should not have been born at all. The essence of such claims is that the child's very life is "wrongful."
>
> We . . . decline to adopt the doctrine which would recognize such a cause of action. Basic to our culture is the precept that life is precious. As a society therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious. The fact that Dessie Blake will live in a severely disabled condition is unquestionably a tragedy; nevertheless, we agree with the New Jersey Supreme Court

> in that life – whether experienced with or without a major physical handicap – is more precious than non-life. Thus, because Dessie Blake has suffered no legally cognizable wrong by being born, she has no cause of action.
>
> Even if we were to hold that wrongful life were a legally cognizable injury in Idaho, the impossibility of measuring damages would in any event preclude recognition of the cause of action. . . . The primary purpose of tort law is that of compensating plaintiffs for the injuries they have suffered wrongfully at the hands of others. As such, damages are ordinarily computed by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. In the case of a claim predicated upon wrongful life, such a computation would require the trier of fact to measure the difference in value between life in an impaired condition and the utter void of nonexistence. Such an endeavor, however, is literally impossible. As Chief Justice Weintraub noted, man, who knows nothing of death or nothingness, simply cannot affix a price tag to non-life.

Blake v. Cruz, 698 P.2d 315, 321-22 (Idaho 1984) (citations and quotes omitted).

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored,

> assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?

Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978).

The second reason some courts reject a wrongful life action is that the physician did not actually cause the congenital impairment or defect, which would make it improper under established tort principles to hold the physician liable for alleged damages. E.g. Walker, 790 P.2d at 740; Lininger, 764 P.2d at 1212; Garrison, 581 A.2d at 293; Azzolino, 337 S.E.2d at 536.

Some courts rejecting both wrongful life and wrongful birth actions have concluded the decision on whether to adopt such a cause of action is better left to the legislature. E.g. Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 560 (Ga. 1990); Gale v. Obstetrics & Gynecology Group of Atlanta, P.C., 445 S.E.2d 366 (Ga. App. 1994); Siemieniec, 512 N.E.2d at 702; Cowe, 575 N.E.2d at 635; Azzolino, 337 S.E.2d at 537.

C. ARGUMENTS IN FAVOR OF A WRONGFUL LIFE ACTION

Three states – California, New Jersey, and Washington – have recognized a wrongful life action by judicial opinion.[4]

In Turpin v. Sortini, 643 P.2d 954 (Cal. 1982), the child plaintiff alleged physician was negligent in failing to diagnose a

[4] Maine, which allows a wrongful birth action by judicial opinion, arguably has authorized both wrongful life and wrongful birth actions by statute. See 24 Me. Rev. Stat. Ann. § 2931 (limiting damages for birth of healthy, unplanned child to wrongful pregnancy cases and establishing recoverable damages for birth of unhealthy child born as a result of professional negligence); Thibeault v. Larson, 666 A.2d 112 (Me. 1995).

hereditary ailment that had afflicted her older sister, depriving her of the "fundamental right of a child to be born as a whole, functional human being without total deafness." Id. at 960. The California Supreme Court questioned the validity of a key rationale used by many other courts to reject a wrongful life action.

> Although it is easy to understand and to endorse these decisions' desire to affirm the worth and sanctity of less-than-perfect life, we question whether these considerations alone provide a sound basis for rejecting the child's tort action. To begin with, it is hard to see how an award of damages to a severely handicapped or suffering child would "disavow" the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.
>
> Moreover, while our society and our legal system unquestionably place the highest value on all human life, we do not think that it is accurate to suggest that this state's public policy establishes – as a matter of law – that under all circumstances "impaired life" is "preferable" to "nonlife." . . .
>
> In this case, in which the plaintiff's only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all. Other wrongful life cases, however, have involved children with much more serious, debilitating and painful conditions, and the academic literature refers to still other, extremely severe hereditary diseases. Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.

Id. at 961-63.

The Turpin court held the child plaintiff could not recover general damages, in part endorsing the reasoning of courts which have concluded it is impossible to award damages because what the "plaintiff has 'lost' is not life without pain and suffering, but rather the unknowable status of never having been born." Id. at 964. However, the court further held the child plaintiff could recover extraordinary expenses necessary to treat the defective condition. Id. at 965. See also Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 494-97 (Wash. 1983) (en banc) (agreeing with Turpin and holding child may maintain a wrongful life action to recover extraordinary expenses to be incurred during child's lifetime as result of child's congenital defect); Procanik by Procanik v. Cillo, 478 A.2d 755 (N.J. 1984) (child may maintain wrongful life action to recover extraordinary medical expenses related to his defective condition, where parents were unable to bring a wrongful birth action, which previously had been recognized in that state, because their claim was barred by the statute of limitations).

D. THE PRESENT CASE

We agree with Physician a wrongful life action does not present an ordinary tort case and it is difficult, if not impossible, to apply a traditional duty-breach-causation-damages analysis to it. We acknowledge, as many courts have done, the formidable theological and philosophical issues surrounding such an action.

We assume, for the sake of argument, Physician owed a duty to Child in utero and breached his duty, proximately causing Child to be born with a severe congenital defect. A purported lack of causation is not fatal to the case because Child is not asserting physician caused the defect, but rather Physician's failure to predict or diagnose defect deprived mother of the opportunity to decide whether to legally terminate the pregnancy. See Phillips, 508 F. Supp. at 542.

We embrace the reasoning espoused by a majority of courts rejecting a wrongful life cause of action, and conclude that being born

with a naturally occurring defect or impairment does not constitute a legally cognizable injury in such an action.

We recognize the extremely severe nature of Child's impairment. It is difficult even to begin to describe the nature of Child's loss within the dry confines of a judicial opinion. Nevertheless, we find untenable Child's argument that a child who already has been born should have the chance to prove it would have been better if he had never have been born at all.

In deciding whether to render a verdict in Child's favor or what damages, if any, to award in a case brought by Child, a jury necessarily would face an imponderable question: Is a severely impaired life so much worse than no life at all that Child is entitled to damages? The minority of courts allowing a wrongful life action have not focused on this question. Our civil justice system places inestimable faith in the ability of jurors to reach a fair and just result under the law, but even a jury collectively imbued with the wisdom of Solomon would be unable to weigh the fact of being born with a defective condition against the fact of not being born at all, i.e., non-existence. It is simply beyond the human experience. Perhaps, as the court mused in Phillips, "scientific and technological advances, together with the changes in moral attitudes that often accompany such advances, may eventually provide a new perspective from which to analyze this position." Phillips, 508 F. Supp. at 543. Nevertheless, we find it persuasive in the instant case and we decline to recognize a cause of action for wrongful life brought by or on behalf of a child born with a congenital defect.

## CONCLUSION

We decline to recognize a common law cause of action for wrongful life brought by or on behalf of a child with a congenital defect.

**AFFIRMED.**

**MOORE, A.C.J., WALLER, J., and Acting Justice Edward B. Cottingham, concur. PLEICONES, J., concurring in result only.**

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

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The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

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

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Opinion No. 25916
Heard November 16, 2004 – Filed December 20, 2004

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**REVERSED**

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Acting Chief Attorney Joseph L. Savitz, III, 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 Derrick K. McFarland, all of Columbia, and Robert M. Ariail, of Greenville, for Respondent.

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**JUSTICE WALLER**: Appellant, Freddie Eugene Owens, was convicted of murder, armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery; he was sentenced to

death. This Court affirmed the murder and armed robbery convictions,[1] but remanded the matter to the circuit court for a new sentencing proceeding due to counsel's inability to fully investigate a statement made by Owens the day before his sentencing proceeding.[2] State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). At resentencing, Owens elected a bench trial. After a hearing, the trial judge sentenced him to death.

## FACTS[3]

At the resentencing proceeding, Owens indicated to the trial court that he did not wish to testify. The court advised Owens that if he had a jury trial, the jury would be required to unanimously agree on a sentence of death, repeatedly telling him that it only took one vote to get a sentence of life. The court went on to advise Owens as follows:

> I want to tell you that it's not uncommon, and I've had it happen, where a potential juror will come in and lie to me about getting on the jury. Some of those individuals will come in and lie to me about getting on the jury. Some of those individuals will claim to support the death penalty in hopes of getting on the jury. Yes [sic], in reality such a juror is opposed to the death penalty and would never vote for the death penalty. And they, when they're selected and the time comes, they refuse to vote for the death penalty and will only vote for life. That's happened. . . .

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[1] The possession of a weapon during commission of a violent crime conviction was vacated pursuant to S.C. Code Ann. § 16-23-490(A) (Supp.2000) (five-year sentence does not apply in cases where death penalty or life sentence without parole is imposed for violent crime).

[2] On January 15, 1999, the day Owens was convicted of the murder in question, he was taken back to his jail cell for the night to allow the statutory 24-hour waiting period before his sentencing. That evening, Owens' cellmate, Christopher Lee, was brutally murdered in his cell; Owens confessed to the murder and gave a very incriminating statement to police. Owens I, 346 S.C. at 655-657, 552 S.E.2d at 754-755.

[3] The charges in this case stem from the November 1, 1997, armed robbery of a Speedway convenience store and the fatal shooting of the store's clerk, Irene Graves.

Owens then indicated his belief that the opposite could also happen, to which the trial judge responded, "I guess in theory there's a chance for that to happen. I can tell you what I have described to you is more common, and in fact, has happened. And I just leave it at that. It has actually happened. And I'm just being as honest with you as I can."

After a bench trial, Owens was sentenced to death. He now appeals.

## ISSUE

Do the trial court's comments concerning Owens' waiver of his right to a jury trial constitute reversible error?

## DISCUSSION

Owens asserts the trial court's comments concerning capital sentencing juries were fundamentally erroneous, requiring reversal. We agree.

In State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985), the defendant argued the trial court had coerced him into testifying by advising him that, if he did not testify, the jury would hold it against him. 286 S.C. at 558, 335 S.E.2d at 543. Although the trial judge advised Gunter he would instruct the jury that it could not hold his failure to testify against him, Gunter was repeatedly told that the jury was nonetheless likely to do so. Id. On appeal, this Court held that although a trial judge should establish the voluntariness of a defendant's decision not to testify, "[t]his inquiry must be limited in scope, and it is impermissible for the judge to express his opinion, although the opinion may be based upon his experience and best judgment. . . . How a jury may or may not view a defendant's decision not to testify is not an appropriate subject for comment by the court." 286 S.C. at 559, 335 S.E.2d at 543. We found the trial court's comments constituted reversible error.

Thereafter, this Court decided State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406

S.E.2d 315 (1991). In Pierce, the trial judge had similarly instructed criminal defendants that if they failed to testify, the jury would use it against them. Notably, however, the defendant in Pierce had already made up his mind not to testify, and did not change his decision after the trial court's comments. The state argued that, because Pierce had elected not to testify, he had not been influenced by the trial court's erroneous comments, such that there was no prejudice. We rejected the state's contention, stating, "[a]lthough Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce." Pierce, 289 S.C. at 434, 346 S.E.2d at 710. The facts in Cooper are virtually identical to Pierce. See Cooper 291 S.C. at 336-337, 353 S.E.2d at 443.

Subsequently, in Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990), we granted a writ of habeas corpus based upon identical comments. There, although we specifically noted that neither of the defendants in Cooper or Pierce had been swayed by the trial court's comments, we nonetheless declined to find harmless error, stating that "[in Pierce and Cooper], [w]e rejected the suggestion that these types of comments could **ever** constitute harmless error, noting, '[t]he comments by the judge were erroneous, improper and contrary to South Carolina law.'" Butler, 302 S.C. at 467, 397 S.E.2d at 87 (emphasis added).

As in those cases, the comments here were improper and contrary to South Carolina law. Although the trial court must strive to ensure that a criminal defendant's waiver of the right of a jury trial is knowing and voluntary, the court should never inject its personal opinion into that decision. The comments here impermissibly did so. Accordingly, Owens' sentence is reversed and the matter remanded for a new sentencing proceeding.

**REVERSED AND REMANDED.**

**TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice A. Victor Rawl, concur.**

# The Supreme Court of South Carolina

In the Matter of Cletus K. Okpalaeke, Respondent.

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ORDER

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

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

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

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina
December 14, 2004

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

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The State, Respondent,

v.

Christopher L. James, Appellant.

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

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Opinion No. 3906
Heard October 13, 2004 – Filed December 20, 2004

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**REVERSED**

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Acting Chief Appellate Defender Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

**BEATTY, J.:** Christopher James appeals his convictions for possession with intent to distribute crack cocaine and possession with intent to distribute crack cocaine within proximity of a school. He contends the trial court erred in denying his motion for a directed verdict given the State

failed to produce substantial circumstantial evidence of the intent element. We reverse.

## FACTS

On April 15, 2000, Corporal Tony Taylor, employed with the Johnston Police Department, was patrolling the town when he observed James holding an open container of beer. Because James was in violation of the town's open container ordinance, Taylor stopped his vehicle and approached James. Taylor then instructed James to put his hands on the patrol car so that he could conduct a pat down for weapons. During the pat down, Taylor felt something in James's left front pocket. When questioned about the object, Taylor responded, "Oh, that's my rag." As James pulled the rag out of his pocket, Taylor observed two small "zip-lock" bags fall to the ground. According to Taylor, one bag was empty and the other bag contained what he believed to be eight to ten rocks of crack cocaine. A struggle ensued when both James and Taylor reached for the bags. James then broke free and absconded with the bag containing the substance. Unable to apprehend James at that time, Taylor returned to the scene and retrieved the empty bag. Drug analysis of the bag revealed that it contained crack cocaine; however, there was no weight assigned to the substance because it was essentially residue. The second bag was never recovered.

An Edgefield County grand jury indicted James for resisting arrest, possession with intent to distribute crack cocaine, and possession with intent to distribute crack cocaine within proximity of a school.

At trial, Taylor recounted the incident for the jury. He also testified extensively as to why James was charged with possession with intent to distribute as opposed to simple possession of crack cocaine. For several reasons, Taylor believed James intended to sell the crack cocaine rather than use it for his personal consumption. Taylor testified that dealers normally carry a large number of crack cocaine rocks in a single bag. He also stated that a dealer usually sells an entire bag of crack cocaine before selling from other bags. In contrast, Taylor claimed that a crack cocaine addict normally

carries only one rock of crack cocaine. Additionally, he testified an addict has a distinct, unhealthy physical appearance. Because James appeared in good health, had an empty bag containing crack cocaine residue, and a bag full of what appeared to be crack cocaine rocks, Taylor concluded that James intended to sell the crack cocaine.

James did not testify at trial. Two witnesses testified on James's behalf. Naomi Coppinger, the mother of James's children, testified that James was employed and supported his family. Shelby Still, an acquaintance of James, testified she witnessed from her doorway the incident involving James and Taylor. Although Still corroborated most of Taylor's account of the incident, she testified that she did not see any bags of drugs fall out of James's pocket when he pulled out the rag. She also characterized the area as "drug-infested," and acknowledged that bags containing drugs may have been on the ground.

The jury convicted James of resisting arrest, possession with intent to distribute crack cocaine, and possession with intent to distribute crack cocaine within proximity of a school. The trial court sentenced James to time served for the resisting arrest charge and ten years imprisonment for each of the drug charges. The sentences were to be served concurrently. James appeals.

## DISCUSSION

James argues the trial court erred in denying his motion for a directed verdict as to the drug charges. He contends the State failed to produce substantial circumstantial evidence that he possessed crack cocaine with intent to distribute. In conjunction with this contention, James asserts the court's failure to direct a verdict violated his Fourteenth Amendment right to due process because the evidence was not sufficient to convince a rational trier of fact that he was guilty beyond a reasonable doubt.

At trial, James moved for a directed verdict after the State rested and at the close of the evidence. In each of these motions, James argued there was

insufficient evidence to support the elements of the possession with intent to distribute charges. The court denied these motions. Although the court acknowledged there was no evidence as to the weight of the crack cocaine, it found the State had presented circumstantial evidence to support the charges.

In ruling on a motion for directed verdict in a criminal case, a trial court must view the evidence in the light most favorable to the State. State v. Buckmon, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). The trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). Furthermore, the court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

When reviewing a denial of a directed verdict, this court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000).

Section 44-53-375(B) of the South Carolina Code "creates a permissive inference that possession of more than one gram of crack cocaine constitutes possession with intent to distribute. However, a conviction of possession with intent to distribute does not hinge upon the amount involved. Furthermore, the statute does not mandate a reverse inference or presumption for amounts less than one gram." State v. Robinson, 344 S.C. 220, 223, 543 S.E.2d 249, 250 (Ct. App. 2001) (citations omitted); S.C. Code Ann. § 44-53-375(B) (2002). Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute. Matthews v. State, 300 S.C. 238, 239, 387 S.E.2d 258, 259 (1990).

As a threshold matter, the State asserts James did not properly preserve this issue for appellate review. Specifically, the State contends James did not explicitly argue the State failed to produce "substantial circumstantial evidence that he possessed cocaine with intent to distribute."

We agree with the State's assertion with respect to James's Fourteenth Amendment argument. At trial, James moved to exclude the crack cocaine evidence on the ground the weapons pat down and subsequent seizure of the drugs violated his Fourteenth Amendment right to due process. In a separate and subsequent argument, James moved for a directed verdict without referencing the Fourteenth Amendment. Even if James's post-verdict motion could be construed to encompass a Fourteenth Amendment challenge regarding the sufficiency of the evidence, such an argument was untimely and did not preserve the argument for our review. See Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 865, 866 (2001) (stating issues not raised and ruled upon in the trial court will not be considered on appeal); State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (recognizing party may not argue one ground at trial and another on appeal); State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999) ("[I]ssues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.").

Despite the failure to preserve the Fourteenth Amendment issue, we find James properly raised the sufficiency of the evidence argument to the trial court. Although James did not use the term "substantial circumstantial evidence" in his motion for a directed verdict, he argued there was insufficient evidence to support the elements of the charge of possession with intent to distribute. Moreover, it is apparent from the trial court's ruling that this ground was the basis for the motion. Significantly, the court informed the parties that it would instruct the jury "that they have to find the intent to distribute has been proven by the State beyond a reasonable doubt, and there would be a lesser included offense of possession of crack cocaine." Thus, we find the argument is properly before this court. Cf. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding argument that defendant was entitled to a directed verdict on the ground the State failed to establish the corpus deliciti of DUI was preserved even though the defendant

did not use the exact words where the ground for the motion was apparent from a review of the record).

We now analyze the merits of James's appeal. Clearly, the evidence was sufficient to prove James possessed crack cocaine. The State contends it proved the intent to distribute element based on Officer Taylor's testimony. James was observed in an area known for "high crime" and "high-narcotics trafficking." He had in his possession one "zip-lock" bag bulging with what appeared to be eight to ten crack cocaine rocks and one empty "zip-lock" bag that tested positive for crack cocaine residue. Officer Taylor testified dealers normally carry a large number of crack cocaine rocks and sell from one "zip-lock" bag before selling from other bags. In contrast, a crack cocaine addict usually carries only one rock of crack. Furthermore, unlike an addict, James appeared healthy. Based on these characteristics, Officer Taylor believed James intended to sell the crack cocaine because he fit the profile of a drug dealer as opposed to a drug user or addict.

Viewing the evidence in the light most favorable to the State, as we are required to do, we find this evidence was insufficient to submit to the jury the possession with intent to distribute charges. In doing so, we must distinguish the instant case from two recent decisions of this court, Cherry and Robinson, which at least facially appear to be dispositive. State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001) (en banc), aff'd in result, Op. No. 25902 (S.C. Sup. Ct. filed Nov. 29, 2004) (Shearouse Adv. Sh. No. 46 at 24), and State v. Robinson, 344 S.C. 220, 543 S.E.2d 249 (Ct. App. 2001).

In Cherry, the defendant was a passenger in a vehicle stopped for a traffic violation. When an officer searched Cherry for weapons, he discovered a small bag containing approximately eight rocks of crack cocaine in his watch pocket. He also seized $322 in cash from Cherry. Cherry was convicted of possession with intent to distribute crack cocaine. As one of the issues raised on appeal, Cherry challenged the trial court's failure to grant his motion for a directed verdict. Because there was no evidence that he intended to distribute the crack cocaine, Cherry asserted the charge should not have been submitted to the jury. This court, in a divided en banc decision, affirmed Cherry's conviction. Viewing the evidence in the light

most favorable to the State without weighing it, the majority opinion found the following evidence justified the trial court's decision to deny Cherry's motion for a directed verdict: (1) Cherry was arrested in high crime area known for violence and drug activity; (2) Cherry had in his possession a small bag containing eight rocks of crack cocaine; (3) he had no drug paraphernalia with him indicating the crack cocaine was for his personal consumption; (4) he had $322 in cash, in mostly twenty dollar bills; and (5) a single rock of crack cocaine typically sold for twenty dollars. Cherry, 348 S.C. at 285, 559 S.E.2d at 299.

In Robinson, law enforcement observed Robinson enter a business that was the focal point of a six-month drug investigation. When Robinson left the establishment, an officer approached him. Robinson charged the officer and threw his hand up in the air. The officer saw a black plastic bag fly from Robinson's hand. The bag contained seven rocks of crack cocaine with an assigned weight of 0.9 grams. As a result, Robinson was charged with possession with intent to distribute crack cocaine and a related proximity charge. Because the amount of crack cocaine was less than the statutory amount triggering the permissible inference of intent to distribute, the State relied solely on expert testimony from officers regarding the distinction between a drug dealer and a user of crack cocaine. The officers testified that a user would normally not have more than one or two rocks in his possession. Additionally, one officer testified that he would expect that a dealer would have crack cocaine packaged as it was by Robinson. Based on this testimony, we found there was sufficient evidence of Robinson's intent to distribute to withstand a motion for a directed verdict. Robinson, 344 S.C. at 224, 543 S.E.2d at 250.

Analyzing the facts of this case, we conclude the indicia of intent relied upon by the State is considerably weaker than that presented in either Cherry or Robinson and, thus, insufficient to support the charged offenses. Although James was observed in a "high-narcotics trafficking" area, he was initially detained for an open container violation in an area near his home. In contrast to Robinson, there was no testimony that James was engaged in a drug transaction or that he was under surveillance for dealing drugs. There was, however, testimony that James was employed and supported his family.

Furthermore, unlike the defendant in Cherry, James did not have large amounts of cash, but instead, only had $37 on his person. As to the amount of crack cocaine possessed by James, the evidence was speculative. The "bulging" bag of crack cocaine, which the State primarily relied on to establish the intent element, was never recovered for evidentiary testing as in Robinson and Cherry. Officer Taylor also was not entirely clear as to how many rocks, of what he believed to be crack cocaine, were contained in the bag. He admitted that he only saw the bag briefly on the ground before the struggle ensued with James. Finally, James's healthy appearance was not conclusive as to whether he was a drug dealer. Instead, it could also have raised the inference that he was not a long-term user of crack cocaine. Based on the foregoing, we find the entirely circumstantial evidence in this case was not substantial and merely raised a suspicion that James intended to distribute crack cocaine. Therefore, we hold the trial judge erred in failing to direct a verdict on the possession with intent to distribute crack cocaine charge as well as the related proximity charge.

Accordingly, James's convictions and sentences are

**REVERSED.**[1]

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[1] We recognize that our supreme court has recently ruled that when a conviction is reversed due to insufficient evidence, an appellate court may remand the case for sentencing on the lesser-included offense. We, however, choose not to do so in this case given the State has not made such a request. Moreover, although the trial court indicated it would charge the jury on the lesser-included offense of possession of crack cocaine, the court's charge to the jury was not included as part of the record on appeal. Thus, it is unclear whether the jury considered the lesser-included offense. See State v. Brown, 360 S.C. 581, 597-98, 602 S.E.2d 392, 401 (2004) (holding that when a conviction is reversed due to insufficient evidence, an appellate court will consider remanding a case for sentencing on a lesser-included offense only when: (1) the evidence adduced at trial fails to support one or more elements of the crime of which appellant was convicted; (2) the jury was explicitly instructed it could find the defendant guilty of the lesser-included offense and was properly instructed on the elements of that offense; (3) the record on

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

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appeal contains sufficient evidence supporting each element of the lesser-included offense; (4) the State seeks a sentencing remand on appeal; (5) the defendant will not be unduly or unfairly prejudiced; and (6) the Court is convinced justice will be served by such a result after carefully considering the record as well as the interests and concerns of the both the defendant and the victim of the crime).

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

Rose M. Pack and Joseph B. Pack, III as Co-Personal Representatives of the Estate of Tracy B. Pack, deceased, Appellants,

v.

Associated Marine Institutes, Inc.; Rimini Marine Institute, Inc.; The South Carolina Department of Juvenile Justice; Tyrone Smalls; Barney Gadson; Rodney Morrow; Thaddeus Chestnut; and John Zeigler, Defendants,

of whom Associated Marine Institutes, Inc.; Rimini Marine Institute, Inc.; Tyrone Smalls; Barney Gadson; Rodney Morrow; Thaddeus Chestnut; and John Zeigler are the, Respondents.

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Appeal From Clarendon County
Thomas W. Cooper, Jr., Circuit Court Judge

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Opinion No. 3907
Heard September 15, 2004 – Filed December 20, 2004

**AFFIRMED**

William H. Johnson, of Manning, for Appellants.

Thomas C. Salane, of Columbia, for Respondents.

**STILWELL, J:** Rose M. Pack and Joseph B. Pack, III, as co-personal representatives of the Estate of Tracy B. Pack (the Estate), appeal the circuit court's order granting partial summary judgment to Associated Marine Institutes, Inc. (AMI), Rimini Marine Institute, Inc. (RMI), and four Rimini employees. We affirm.

## FACTS AND PROCEDURAL HISTORY

In August 1999, juveniles Jon Smart and Stephen Hutto were in the custody of the South Carolina Department of Juvenile Justice (DJJ). They boarded at RMI, a residential rehabilitation facility for juveniles in the custody of DJJ.[1]

Prior to Smart's placement at RMI, DJJ screened him under its eligibility guidelines, classified him as a non-violent offender, and determined he was fit for placement at RMI although Smart's DJJ record indicated he had a history of substance abuse that included becoming intoxicated from inhaling paint and gasoline fumes, a practice commonly called "huffing." Barney Gadson, RMI's Director of Operations, testified he had reviewed Smart's DJJ records, and was aware that Smart had a problem

[1] RMI operates the facility pursuant to a contract between its parent, AMI, and DJJ. RMI was responsible for the day-to-day operation of the facility. AMI is a charitable corporation organized under the laws of Florida specializing in the operation of residential and day programs for troubled youth.

with becoming violent after huffing. Gadson and Smart's team leader, Robert McCray, tested Smart to determine if his purported huffing addiction was true by making gasoline accessible to him. After Smart attempted to steal the gas, he received counseling and RMI employees took precautions to restrict his access to fuel kept on campus. On August 11, 1999, Smart huffed gas he stole from a generator while on work furlough. When his counselor, Thaddeus Chestnut, confronted him about the odor of gasoline on his person, Smart denied huffing and claimed he smelled of gas from working on the generator.

The following day, Tracy Pack obtained permission from RMI to have Smart and Hutto leave the RMI campus to work at his chicken houses. Pack was a former employee of RMI who allowed juveniles from the Rimini facility to work off-campus with him at his family's nearby poultry farm and boat landing. Once there, Smart became intoxicated by huffing gasoline he had secretly funneled from Pack's truck. Smart subsequently bludgeoned Pack to death. Smart and Hutto then stole Pack's truck and went on a crime spree before police apprehended them.

The Estate brought survival and wrongful death actions against AMI and RMI, arguing AMI failed to properly monitor RMI. It further alleged that RMI was negligent in its supervision of Smart and Hutto, and should have discovered and warned Pack of the boys' violent propensities.

AMI and RMI made a motion for partial summary judgment, arguing they were entitled to statutory limitations on liability under S.C. Code Ann. § 33-56-180 (Supp. 2003), because both corporations qualified as charitable organizations. The circuit court agreed, and partially granted their motions.

The Estate then filed a complaint in United States District Court alleging DJJ, AMI, and RMI violated Tracy Pack's civil rights pursuant to 42 U.S.C. § 1983. It also amended its complaints in state court, adding nine RMI employees and DJJ as defendants.

The parties later agreed to voluntarily dismiss the federal action without prejudice. Consequently, the Estate reasserted its federal civil rights

claims against all defendants in state court. Following discovery, the Estate voluntarily dismissed all claims against four of the employees.[2] The circuit court also granted DJJ's motion for summary judgment. The remaining defendants, including AMI, RMI and four RMI employees, each filed motions for summary judgment on all causes of action.

The circuit court denied summary judgment to AMI and RMI on the Estate's wrongful death and survival claims. However, it granted summary judgment in favor of individual RMI employees on both negligence claims, finding they were entitled to qualified immunity pursuant to S.C. Code Ann. § 33-56-180. The court also granted all defendants summary judgment on the Estate's federal civil rights cause of action, finding "that even if an unconstitutional 'custom or practice' can be shown by the [Estate] in this case, the 'deliberate indifference' standard cannot be met." To support its conclusion, the court relied on White v. Chambliss, 112 F.3d 731, 737 (4th Cir. 1997), which held "[a] claim of deliberate indifference, unlike one of negligence, implies at a minimum that the defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice."

The Estate filed a motion to amend the judgment, requesting the trial court rule on its claim that application of the "state created danger" doctrine supported a finding RMI violated 42 U.S.C. § 1983. The circuit court denied the motion, finding the evidence failed to prove RMI created the danger that led to Tracy Pack's death. It also stated "[e]ven if the Court determined that Tracy Pack has a substantive due process right to be protected by the defendants, the absence of deliberate indifference prevents § 1983 from being an available remedy."

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[2] A fifth employee, Thaddeus Chestnut, was named as a defendant and was served by publication. We find no evidence in the record that Chestnut filed an answer or motion for summary judgment. The trial court's order granting summary judgment to "RMI Employees" does not refer to any specific individual. Therefore, Chestnut's status in this case is unclear to this court.

## STANDARD OF REVIEW

When we review an order granting summary judgment, the court of appeals applies the same standard that governs the circuit courts pursuant to Rule 56, SCRCP. Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002). In making our determination whether any triable issues of fact exist, we will view the evidence and all reasonable inferences from it in the light most favorable to the non-moving party. Id.

## DISCUSSION

### I. Claims Against Individual RMI Employees

The Estate contends the circuit court erred by granting summary judgment in favor of individual RMI employees on its wrongful death and survival claims, arguing evidence in the record created numerous genuine issues of material fact whether four of the employees acted in a grossly negligent manner. We disagree.

S.C. Code Ann. § 33-56-180(A) (Supp. 2003) states, in relevant part:

> An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by the claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, wilful, or grossly negligent manner[.]

Here, the circuit court's unappealed finding that AMI and RMI qualified as charitable organizations is the law of the case. In re: Morrison, 321 S.C. 370, 371, 468 S.E.2d 651, 653 (1996) (stating an unappealed ruling is the law

of the case). Moreover, the Estate does not allege on appeal that RMI employees were either reckless or willful. Thus, pursuant to section 33-56-180(A), the Estate is statutorily barred from recovering against an individual RMI employee on its wrongful death and survival claims unless it can show the employee acted in a grossly negligent manner.

Section 33-56-180 does not define what it means to act in a grossly negligent manner. However, our supreme court has defined gross negligence in the context of liability by a government entity to mean

> the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. It is the failure to exercise slight care. Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances.

Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003) (internal citations omitted).[3] "Additionally, while gross negligence ordinarily is a mixed question of law and fact when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).

[3] The Estate argues each sentence of the Jinks standard is an independent definition of gross negligence. It also asserts this court's definition of gross negligence as "a conscious failure to exercise due care" in Jackson v. S.C. Dep't of Corrs., 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989) constitutes a fourth meaning to permit a finding of gross negligence even when there is evidence a defendant exercised slight care. We disagree and read the definition in Jinks as a single, comprehensive standard for proving gross negligence requiring a determination whether a defendant exercised at least slight care.

The Estate makes numerous allegations of gross negligence against individual RMI employees arguing evidence contained in the record creates genuine issues of material fact sufficient to overcome summary judgment. We disagree.

The trial court granted summary judgment after determining RMI employees acted with at least slight care in carrying out their duties. On appeal, the Estate's argument is essentially that the employees were grossly negligent because they failed to do more to address Smart's behavior problems or prevent Smart and Hutto from participating in off-campus work furloughs on Pack's farm. The fact that more might have been done does not negate a finding that RMI employees exercised at least slight care. See Etheredge, 341 S.C. at 311-12, 534 S.E.2d at 277-78 (holding that where defendant had no knowledge of animosity between students, and principal and security monitored hallways, the fact that school district might have done more did not negate the fact it exercised slight care for purposes of determining whether gross negligence exception to Tort Claims Act was applicable).

Viewing the evidence in the light most favorable to the Estate, we agree with the trial court's conclusion that individual RMI employees exercised at least slight care in their supervision and control of Smart and Hutto. As such, we conclude there are no genuine issues of material fact that would prevent the award of summary judgment.

## II. Federal Civil Rights Claims Against AMI and RMI

The Estate contends that AMI and RMI displayed deliberate indifference for Pack's safety, and thus the circuit court erred in granting summary judgment on its 42 U.S.C. § 1983 claims. We disagree.

An unappealled ruling of the circuit court determined that AMI and RMI qualify as state actors. Therefore, both corporations may be liable for violating Tracy Pack's civil rights if the Estate can show each had knowledge of an unconstitutional custom or practice, and failed, as a matter of specific intent or deliberate indifference, to correct or stop it. See Spell v. McDaniel,

824 F.2d 1380, 1391 (4th Cir 1987) (holding a municipality is at fault for allowing a widespread unconstitutional practice or custom to continue if (1) responsible policymakers have actual or constructive knowledge of its existence, and (2) it fails thereafter, as a matter of specific intent or deliberate indifference, to correct or stop the practice).

To support its § 1983 claims against the corporations, the Estate reasserts essentially the same allegations it relied on as evidence of individual employees' gross negligence.[4] We note that even had the Estate proven individual RMI employees acted in a grossly negligent manner, they cannot predicate their 1983 claim on the employees' behavior alone. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692-94 (1978) (holding a state actor cannot be held liable under Section 1983 on a respondeat superior theory). Unless the Estate can show AMI and RMI acted with deliberate indifference in monitoring Smart and permitting the work furloughs to continue and the practices made Pack's murder "almost bound to happen," its constitutional claim fails as a matter of law. See Spell, 824 F.2d at 1390 (holding a plaintiff must prove the failure to correct or stop the offending practice must make the specific violation "almost bound to happen, sooner or later" rather than merely "likely to happen in the long run" to sustain a section 1983 claim); see also Jensen v. Conrad, 570 F.Supp. 114, 122 (D.S.C. 1983) ("In defining the concept of deliberate indifference, it is important to recognize that although it is closely associated with gross negligence, there is a significant distinction. In essence, gross negligence is the breach of reasonable standards of conduct posing obvious dangers to others while deliberate indifference involves a knowing lack of regard or concern for the safety of others.") (internal citation omitted).

[4] The contention is (1) the practice of permitting off-campus work furloughs without adequate supervision, (2) failure to train and instruct employees on the internal policy requiring supervision, and (3) failing to respond to knowledge of Smart's huffing addiction and his behavioral history, all directly resulted in the unconstitutional deprivation of Tracy Pack's right to life.

RMI accepted Smart only after DJJ screened him under its eligibility guidelines, classified him as a non-violent offender, and determined he was fit for placement. RMI's staff monitored Smart's huffing addiction and took appropriate steps to counsel him and restrict his access to gasoline on campus. Prior to the murder, Smart and Hutto had participated in work furloughs without incident and had regularly worked with Tracy Pack at the poultry farm. Although he later admitted to stealing gas and huffing while at the farm and boat landing, Smart acknowledged he did so secretly and lied to his counselors when questioned about the odor of gas on his person. On the day of his murder, Tracy Pack himself specifically requested Smart and Hutto for work furlough on his farm. Viewing the evidence in the light most favorable to the Estate, we cannot say AMI and RMI knowingly disregarded Tracy Pack's safety or that their decision to continue the practice of work furloughs made Pack's murder almost bound to happen. Absent a showing of such deliberate indifference, the Estate's section 1983 claims fail.

The Estate also raises section 1983 claims against RMI based on an alleged failure to train employees to follow an internal guideline governing the supervision of juveniles. Assuming the Estate's allegations of a failure to train are true, it still must show AMI and RMI acted with deliberate indifference to survive section 1983 scrutiny. Since we have determined the Estate failed to make such a showing, we find this argument unpersuasive.

Finally, the Estate contends a theory of liability referred to as the "state created danger" doctrine supports 1983 liability arguing AMI and RMI created the danger that led to Pack's death by not taking affirmative action to end off-campus work furloughs. The Estate urges us to adopt a four-part test created by the United States Court of Appeals for the Third Circuit, which is used to prove a due process violation under the doctrine. See Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996) (establishing a four-part test for proving a section 1983 claim under the "state created danger" doctrine). We decline to do so.

Our state supreme court has not adopted the four-part Kneipp test nor, insofar as we can tell, has it ever recognized or even discussed the "state created danger" doctrine in relation to a section 1983 action. We prefer,

instead, to be guided by the analysis employed by the Fourth Circuit Court of Appeals in a case similar to Kneipp and to the one at bar. In addressing the issue of whether a plaintiff may claim liability under 42 U.S.C. § 1983 based on an affirmative duty theory, the court, in Pinder v. Johnson, 54 F.3d 1169, 1174 (4th Cir. 1995) recognized:

> the Due Process Clause of the Fourteenth Amendment does not require governmental actors to affirmatively protect life, liberty, or property against intrusion by private third parties. Instead, the Due Process Clause works only as a negative prohibition on state action. 'Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.'

To support its conclusion, the court quoted DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196-97 (1989), wherein the Supreme Court of the United States held:

> [i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

The affirmative duty of protection rejected by the United States Supreme Court in DeShaney and the Fourth Circuit in Pinder is precisely the duty the Estate relies on in this case. The Estate argues RMI and AMI could have, and thus should have, acted to prevent Smart and Hutto's crimes. However, DeShaney makes clear that no affirmative duty exists in these circumstances.

## CONCLUSION

Viewing the evidence in the light most favorable to the Estate, we find RMI employees exercised at least slight care in the performance of their duties and are entitled to qualified immunity from liability pursuant to S.C. Code Ann. section 33-56-180 (Supp. 2003). Because the Estate failed to prove AMI and RMI acted with deliberate indifference in maintaining the practice of off-campus work furloughs, training their employees, and addressing Smart's huffing addiction, its federal civil rights claims predicated on those allegations must fail. Finally, we conclude AMI and RMI's alleged failure to protect Pack against the violent acts of Smart and Hutto does not constitute a violation of the Due Process Clause. Therefore the circuit court's grant of summary judgment is

**AFFIRMED.**

**BEATTY and SHORT, JJ., concur.**

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

Katherine Elliott, Appellant,

v.

S.C. Department of Transportation and State Accident Fund, Respondents.

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Appeal From Georgetown County
Paula H. Thomas, Circuit Court Judge

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Opinion No. 3908
Heard September 15, 2004 – Filed December 20, 2004

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**REVERSED AND REMANDED**

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Malcolm M. Crosland, Jr., of Charleston, for Appellant.

Samuel Thompson Brunson, of Florence, for Respondents.

**STILWELL, J.:** Katherine Elliott appeals the circuit court's order affirming the workers' compensation commission's decision to calculate her

average weekly wage without including her earned salary increase. We reverse and remand.[1]

## FACTS

Elliott was employed by the South Carolina Department of Transportation as a Trade Specialist II, earning an annual salary of $19,253. After she obtained her commercial driver's license, she earned a five percent salary increase that was effective September 17, 2000. On September 28, 2000, Elliott was injured in a work-related activity.

Elliott filed for workers' compensation benefits, arguing her five percent pay increase constituted an "exceptional reason" for departing from the standard method used to calculate the compensation rate. The standard calculation is based upon a claimant's fifty-two weeks of earnings immediately preceding the date of injury. The single commissioner utilized the standard method to establish Elliott's rate of compensation, excluding her wage increase. The majority of the full commission affirmed. However, in a dissenting opinion, one of the commissioners concluded Elliott's salary increase was extraordinary, and fairness required its inclusion in calculating her average weekly wage to more appropriately reflect her future earning capacity. The circuit court affirmed the decision of the majority of the full commission.

## DISCUSSION

Elliott contends the circuit court erred as a matter of law by affirming the decision of the full commission, arguing her five percent salary increase qualifies as an "exceptional reason" to recalculate her average weekly wage to most nearly approximate the amount she would have been earning but for her injury. We agree.

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[1] Neither respondent filed a brief. Accordingly, we review the appeal based on the record and appellant's arguments. See Rule 208, SCACR ("Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper.").

The Administrative Procedures Act governs our review of the decisions of the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). We will not weigh the evidence or substitute our judgment for that of the full commission on questions of fact. However, we may reverse or modify the commission's decision when a claimant's substantial rights are prejudiced because of an error of law. S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003).

Although the parties agreed to stipulated facts before the full commission, there is nothing in the record to suggest they stipulated whether Elliott's pay increase qualified as an "exceptional reason" to depart from the standard wage calculation employed by the single commissioner. We also recognize the full commission acting as fact-finder found Elliott's average weekly wage did not include her pay increase. However, their finding is not dispositive. The determination of whether Elliott's raise constitutes an "exceptional reason" for purposes of applying the standard wage calculation method provided by the Workers' Compensation Act is a question of law.

S.C. Code Ann. § 42-1-40 (Supp. 2003) provides in relevant part:

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of injury, . . .
>
> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

The Worker's Compensation Act is remedial legislation enacted to protect the worker. Therefore, the statute is given a broad construction in order to accomplish that end. Booth v. Midland Trane Heating & Air Conditioning, 289 S.C. 251, 254, 379 S.E.2d 730, 731 (Ct. App. 1989). "The

statute provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002). Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. Disability reaches into the future, not the past; loss as a result of the injury must be thought of in terms of its impact on probable future earnings. Bennett v. Gary Smith Builders, 271 S.C. 94, 98-99, 245 S.E.2d 129, 131 (1978).

Elliott earned her pay increase by voluntarily pursuing special certification and licensing. The additional pay was a merit-based reward given in recognition of her efforts to obtain a commercial driver's license, and was not merely a standard cost-of-living increase or step increase based on longevity of service. In addition, the raise was not speculative, but was an established, guaranteed amount already in place at the time of the accident. While the increase in pay is small, the amount of the raise is not the factor that determines whether it is an exceptional reason for recalculating the average weekly wage. The inclusion of the increase in salary will, in the words of the statute, "most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40 (Supp. 2003).

We therefore conclude Elliott's earned pay increase qualifies as an "exceptional reason" to recalculate her average weekly wage. Accordingly, we reverse the decision of the circuit court and remand this case to the full commission with directions to recalculate Elliott's average weekly wage including the five percent pay raise.

**REVERSED and REMANDED.**

**BEATTY and SHORT, JJ., concur.**

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

City of Florence, Appellant,

v.

George Washington Jordan, III, Respondent.

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

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Opinion No. 3909
Submitted October 1, 2004 – Filed December 20, 2004

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**REVERSED**

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Kimberly Veronica Barr, of Florence, for Appellant.

David Michael Ballenger, of Florence, for Respondent.

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**KITTREDGE, J.:** In this appeal, we must decide whether an individual charged with DUI was adequately informed in writing of his implied consent rights before submitting to a breath analysis test. The municipal court found the accused was not sufficiently informed and excluded the test results because the law enforcement officer

purportedly failed to properly execute a preprinted rights advisement form. The circuit court affirmed this ruling. We reverse.

## FACTS/PROCEDURAL HISTORY

George Washington Jordan, III, was arrested by Florence City Police in June 1999 for driving under the influence. Jordan was taken to police headquarters where he was offered a breath test. A law enforcement officer presented Jordan with a preprinted "Advisement of Implied Consent Rights" form issued by SLED. This form sets forth three separate advisements: a "DUI Advisement," a "Felony DUI Advisement," and a "Zero Tolerance Advisement." The law enforcement officer executing the form must check the box next to the appropriate advisement. In this case, the officer checked the box for the standard "DUI Advisement." This advisement reads, in its entirety:

> Subject Advised/Informed in Writing: You are under arrest for Driving Under the Influence, Section 56-5-2930, South Carolina Code of Laws 1976, as amended. The arresting officer has directed that **[breath, blood, urine (CIRCLE ONE)]** samples be taken for alcohol and/or drug testing. The samples will be taken and tested according to Section 56-5-2950 and South Carolina Law Enforcement Division procedures. You do not have to take the tests or give the samples. If you are 21 years old or older and you refuse to submit to the tests or give the samples, your privilege to drive in South Carolina must be suspended or denied for at least ninety days and your refusal may be used against you in court. If you are 21 years old or older and take the tests or give the samples and have an alcohol concentration of fifteen one-hundredths of one percent or more, your privilege to drive in South Carolina must be suspended for at least thirty days. Pursuant

> to Section 56-1-286, if you are under 21 years old and refuse to submit to the tests or give the samples, your privilege to drive in South Carolina must be suspended or denied for at least six months for breath/blood refusals **[ninety days for urine refusals]** and your refusal may be used against you in court. Pursuant to Section 56-1-286, if you are under 21 years old and take the tests or give the samples and have an alcohol concentration of two one-hundredths of one percent or more, your privilege to drive in South Carolina must be suspended for at least three months. You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer must provide you affirmative assistance upon request. You have the right to request an administrative hearing within ten days of the issuance of the notice of suspension. You must enroll in an Alcohol and Drug Safety Action Program within ten days of the issuance of the notice of suspension.

(emphasis in original). The officer advising Jordan of his implied consent rights failed to indicate on the advisement form the type of test to be administered by circling or otherwise designating whether a "breath," "blood," or "urine" sample would be requested from Jordan. Jordan was given a copy of the advisement form, and he consented to a breath test. Evidence from the suppression hearing revealed that Jordan was informed a breath test would be offered.

In pre-trial proceedings, Jordan moved to exclude the results of the test, arguing the officer's failure to circle the word "breath" resulted in an incomplete advisement under South Carolina Code section 56-5-2950 (Supp. 2003), which requires the accused be advised in writing of his implied consent rights prior to the administration of a breath test.

The trial judge agreed and granted the motion to suppress. On appeal, the circuit court affirmed. This appeal followed.

## STANDARD OF REVIEW

A trial judge's decision to admit or exclude evidence is within his discretion and will not be disturbed on appeal unless an abuse of discretion occurs. Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002). An abuse of discretion occurs when the judge's decision is controlled by an error of law or is without evidentiary support. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

## LAW/ANALYSIS

The City of Florence argues the failure to circle the word "breath" on the SLED form did not constitute an incomplete advisement of Jordan's implied consent rights under South Carolina Code section 56-5-2950. We agree.

Section 56-5-2950 mandates that all persons arrested for DUI must be advised of their implied consent rights in writing before any breath test or other type of test is conducted. The statute explicitly sets forth the essential content of the advisement as follows:

> No tests may be administered or samples obtained unless the person has been informed in writing that:
>
> (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least ninety days if he refuses to submit to the tests and that his refusal may be used against him in court;
>
> (2) his privilege to drive must be suspended for at least thirty days if he takes the tests or gives

> the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
>
> (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
>
> (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
>
> (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

S.C. Code Ann. § 56-5-2950(a). The statute further provides SLED "must administer the provisions of this subsection and must make regulations necessary to carry out its provisions." Id.

In determining whether Jordan was adequately advised in writing of his implied consent rights under section 56-5-2950, we are guided by the express legislative intent as discerned from the plain language of the statute. See State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002). Reading section 56-5-2950, it is beyond dispute that each of the implied consent rights enumerated in the statute was explicitly addressed in the SLED advisement form presented to Jordan. Nowhere among the rights listed in section 56-5-2950 does it provide the accused a right to be explicitly advised in writing what specific type of test is being requested—be it blood, breath, urine, or any other test. Nor, under the language of the statute, does the accused have to be advised in writing that only one particular test is being requested to the express exclusion of any other test. Indeed, the implied consent rights provided under section 56-5-2950(a) inform the accused that he may refuse any test and refuse to give any samples.

The supposed violation in the present case, therefore, is not connected to the implied consent rights set forth in section 56-5-

2950(a) as contended by Jordan. The violation, if indeed one exists, stems solely from a failure to comply with SLED procedures. The question remaining before us, therefore, is whether or under what circumstances DUI test results should be found inadmissible due to a failure by law enforcement to adhere to any of the various technical or procedural requirements prescribed by the statute or promulgated by SLED through its statutory authority.

The leading case on this point is State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002). In Huntley, a defendant charged with DUI sought to suppress his breath test results on the grounds the breathalyzer operator did not strictly comply with the statutory guidelines governing the administration of breath tests. Specifically, the defendant claimed the operator used a 0.10 simulator test solution rather than the prescribed 0.08 solution. Id. at 4, 562 S.E.2d at 473. In ruling that suppression of the test results was not warranted, the supreme court focused on whether the failure to comply with the statute affected the reliability of the evidence. The court explicitly found the operator's error did not impact the accuracy and reliability of the results—concluding "[t]here is no question the breathalyzer machine was operating properly and its results were reliable." Id. at 6, 562 S.E.2d at 474.

Shortly after the Huntley decision, the Legislature amended section 56-5-2950 to provide additional guidance to our trial courts on when to exclude test results due to the failure to comply with the statute's mandates or SLED regulations. Subsection (e) was added to the statute in 2003, which provides:

> The failure to follow any of these policies, procedures, and regulations [promulgated by SLED], or the provisions of this section, shall result in the exclusion from evidence any tests results, if the trial judge or hearing officer finds that such failure materially affected the

> accuracy or reliability of the tests results or the fairness of the testing procedure.[1]

§ 56-5-2950(e) (emphasis added).

As does Huntley, subsection (e) makes clear that the decision to admit or exclude test results under section 56-5-2950 should not turn solely on whether the prescribed procedures were followed with the most exacting compliance. Instead, the question should be whether the violation thwarted the clear policy objectives underlying the statute—that is, to ensure suspects are informed of their rights to refuse any test and, if consent is obtained, to ensure the tests are conducted in an accurate, reliable, and fair manner.

In this case, neglecting to circle the word "breath" on the SLED form has no bearing on the accuracy or reliability of the breath test results, and Jordan does not contend otherwise; nor does the failure in any way impact upon the fairness of the testing procedure. The purpose of the SLED form is not to serve as the exclusive source of information regarding the arrest and testing procedures provided to a person accused or suspected of driving under the influence. Rather, it is designed to serve the limited—but critically important—function of advising the accused in writing of his right to refuse any test and inform him of the possible consequences arising from his decision to refuse or proceed with any test. The failure to satisfy the specific technical requirement at issue in this case—a requirement that is beyond the scope of the statutory mandate of section 56-5-2950(a)—cannot, therefore, render the advisement in the present case incomplete.

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[1] Subsection (e) was added to section 56-5-2950 by the 2003 amendment to the statute. See Act No. 61, 2003 S.C. Acts 689. Though this amendment occurred after the trial of this case, subsection (e) is remedial in nature and, as such, is applied retroactively. See South Carolina Dep't of Revenue v. Rosemary Coin Machs., Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000) (noting that "statutes that are remedial or procedural in nature are generally held to operate retrospectively").

In reaching this conclusion, we do not intend to excuse the law enforcement officer's failure to execute the Implied Consent Rights Advisement form with the care and attention the seriousness of the occasion demanded. Nor do we intend to diminish the critical role of SLED in prescribing the necessary procedures to ensure the rights of all criminal suspects are protected and the will of the Legislature is followed. Our decision today is limited to determining whether Jordan was adequately informed in writing of his implied consent rights under section 56-5-2950. On that narrow question we must answer in the affirmative.

## CONCLUSION

Because the failure to circle the word "breath" on the SLED form did not render the implied consent rights advisement incomplete or violate the implied consent statute, we find the trial court improperly suppressed evidence of Jordan's breath test results. Accordingly, the judgment of the circuit court is reversed, and the matter is remanded to the Florence Municipal Court for trial.

**REVERSED AND REMANDED.**

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

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

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The State, Respondent,

v.

Alvis Alphonso Guillebeaux, Appellant.

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

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Opinion No. 3910
Heard October 12, 2004 – Filed December 20, 2004

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**AFFIRMED**

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Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott. Senior Assistant Attorney General Harold M. Coombs, Jr. all of Columbia; and Solicitor William Townes Jones, of Greenwood, for Respondent.

**BEATTY, J.:** Alvis Alphonso Guillebeaux appeals his convictions for distribution of crack cocaine and distribution of crack cocaine near a school, arguing the trial judge should have granted his motion for a new trial because a juror concealed a social relationship with a witness. We affirm.

## FACTS

In a controlled buy organized by the Abbeville County Sheriff's Office, confidential informant Brent Smith purchased crack cocaine from an unknown black male later identified as Guillebeaux. Guillebeaux was indicted on charges of distribution of crack cocaine and distribution of crack cocaine near a school or playground.

Smith was the State's chief witness at trial. During jury selection, the judge identified Guillebeaux and other potential witnesses, including Smith. The judge asked the panel members whether they had "any type of personal, business or social relationship either with the defendant, Mr. Guillebeaux or any of the potential witnesses." None of the members of the jury panel responded. The panel was also asked, among other things, if any of them "for whatever reason could not give both the state and the defendant a fair and impartial trial." No one responded. Both Guillebeaux and the State exhausted their peremptory strikes, and Juror Catherine Gray ("Juror") was seated without challenge. Guillebeaux was convicted as charged and sentenced to a total term of twenty-two years imprisonment.

After Guillebeaux's trial, Jessie Johnson, Juror's brother, approached Guillebeaux's counsel claiming Juror had a social relationship with Smith. At a post-trial hearing, Johnson testified that he and Smith used to smoke crack together. Johnson stated that Juror's father and Smith's father were friends, Juror went to high school with Smith, Juror knew Smith from frequenting Smith's family's filling station, and Juror would speak to Smith when she came to visit Johnson.

Juror testified at the hearing that she knew who Smith was but had not had any conversations with him beyond saying "hi" in passing on the street. She denied attending high school with him but acknowledged that she went to high school with Smith's brother. She stated she was aware of what kind of car Smith drove because he worked at his brother's filling station, which is across the street from her hairdresser.

Guillebeaux moved for a new trial based on Juror's failure to disclose the alleged social relationship. Guillebeaux argued Juror's failure to inform them that she knew Smith prevented Guillebeaux from determining whether he would exercise a peremptory strike against her. The trial judge found Juror had not misled the court and the motion was denied. This appeal follows.

## LAW/ANALYSIS

Guillebeaux argues the trial judge abused his discretion in denying the motion for a new trial because Juror's failure to disclose the social relationship with Smith precluded Guillebeaux from exercising his peremptory strikes against her.[1] We disagree.

The denial of a motion for a new trial will be disturbed on appeal only upon a showing of an abuse of discretion. State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69 (Ct. App. 2000). "Where a new trial motion is based upon allegations that a juror gave misleading and incomplete answers on voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion." Id. at 163, 539 S.E.2d at 69-70; State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998).

When allegations arise concerning a juror's failure to reveal information in response to voir dire questions, courts look to whether the concealment was intentional and consider the nature of the information

[1] As the State points out, Guillebeaux's issue on appeal refers to a motion for mistrial instead of a motion for a new trial. A motion for a mistrial is substantively different from a motion for a new trial. State v. Johnson, 248 S.C. 153, 160, 149 S.E.2d 348, 351 (1966) ("It thus appears that a mistrial and a new trial are not the same thing in name or effect."). However, the substance of the appellate argument focuses on the failure of the trial judge to grant a new trial in this situation. Because Guillebeaux's motion for a new trial was properly preserved at the trial level and the substance of his appellate argument focuses on the trial judge's failure to grant a new trial, we will treat the references to "mistrial" in his appellate brief as a scrivener's error and address his appeal with reference to a new trial.

concealed. State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001). A new trial is warranted if the court finds: (1) the juror intentionally concealed the information; and (2) "the concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Id. However, a determination that a juror did not intentionally conceal the information ends the court's inquiry. State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 377-78 (2004).

Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a "fact intensive determination that must be made on a case-by-case basis." Sparkman, 358 S.C. at 496, 596 S.E.2d at 377. Intentional concealment occurs "when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Id. Concealment is considered unintentional where the voir dire question posed is ambiguous or incomprehensible to the average juror or where "the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Id. Although it may be inferred that a juror is not impartial if she fails to disclose a relationship without justification, such an inference may not be drawn where there is information to the contrary or the failure to disclose is innocent. State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002).

This court has recently addressed the failure of a juror to reveal a relationship with a witness. State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004). In Galbreath, potential jurors were asked during voir dire if they were close personal friends or business associates with any of the witnesses. A seated juror did not respond to this question, despite information that the juror knew the victim's mother and that the juror's brother-in-law rented land from someone in the victim's extended family. This court found no intentional concealment where the juror accurately answered the specific question posed and the alleged relationships did not amount to close personal friends or business associates. Galbreath, 359 S.C. at 403-04, 597 S.E.2d at 847-48; see Sparkman, 358 S.C. at 498-97, 596 S.E.2d at 376-77 (finding no intentional concealment where the judge asked on voir dire whether anyone had been the victim of a "serious crime" and

seated juror did not immediately recall that he had been a crime victim forty years earlier and was not sure if the crime amounted to a "serious" one).

Although the trial judge asked a more general question regarding relationships in the present case, we find Juror did not intentionally conceal information. Juror was not asked during voir dire if she knew any of the witnesses, she was asked if she had any type of social relationship with Smith. Juror's knowledge of who Smith was and the rare exchange of greetings with him in her community did not constitute a "social relationship." Juror answered the questions posed to her during voir dire honestly, her failure to reveal her knowledge of Smith was a reasonable response to the question posed, and her failure to respond did not amount to intentional concealment. Further, Juror indicated during voir dire that she knew of no reason she could not be impartial to both the defense and the State and there is no evidence to the contrary. As we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of Guillebeaux's peremptory strikes. Sparkman, 358 S.C. at 497, 596 S.E.2d at 377-78. Based on this evidence, we find the trial judge did not abuse his discretion in denying the motion for a new trial.

## CONCLUSION

Because the Juror did not intentionally conceal information in response to voir dire questions, the trial judge did not abuse his discretion in denying Guillebeaux's motion for a new trial. Accordingly, his convictions are

**AFFIRMED.**

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

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

Daniel Miles Stoddard, Appellant,

v.

Selena Joanna Riddle, Respondent.

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Appeal From Greenville County
Stephen S. Bartlett, Family Court Judge

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Opinion No. 3911
Submitted November 1, 2004 – Filed December 20, 2004

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**AFFIRMED**

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Laura Anne Filler, of Chesnee, for Appellant.

Oscar W. Bannister, of Greenville, for Respondent.

**WILLIAMS, J.:** Daniel Stoddard (Husband) appeals a family court order determining it did not have subject matter jurisdiction to modify a property settlement agreement between him and his former wife, Selena Riddle (Wife). We affirm.[1]

## FACTS

Following an eight-year marriage, Husband and Wife were divorced in 1980. The divorce decree incorporated a property settlement agreement,

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

which, by the agreement's own terms, was not merged into the court's final order. In regard to alimony, the agreement stated the following:

> Husband shall pay directly to the Wife the sum of Two Hundred Twenty-Five and no/100 ($225.00) Dollars per month . . . the payment of such amounts herein provided shall not in any manner be modified by the Court, and shall not terminate until her death or remarriage.

Since 1983, Wife has cohabitated with another man. The two openly hold themselves out to the public as an amorous couple. Throughout their relationship, they have owned joint property and held joint mortgages. The two often travel and dine out together, and their luxurious home was the subject of a life and style article in the Greenville News. They have never, however, participated in a marriage ceremony, and it is undisputed that the couple is not married under common law.

In 2002, Husband brought an action seeking the termination of his alimony obligation to Wife on the ground that Wife's cohabitating relationship is tantamount to marriage. The family court determined it did not have subject matter jurisdiction to modify the settlement agreement. This appeal followed.

## STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find facts in accordance with our own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). Questions concerning alimony, however, rest within the sound discretion of the family court judge, whose conclusions will not be disturbed absent a showing of abuse of discretion. Bryson v. Bryson, 347 S.C. 221, 224, 553 S.E.2d 493, 495 (Ct. App. 2001); Bannen v.Bannen, 286 S.C. 24, 26, 331 S.E.2d 379, 380 (Ct. App. 1985). An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support. Bryson, 347 S.C. at 224, 553 S.E.2d at 495;

McKnight v. McKnight, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984).

## LAW / ANALYSIS

Husband argues the family court erred in determining it lacked subject matter jurisdiction to interpret his alimony obligations under the property settlement agreement. We disagree.

Prior to 1983, it was the law of this state that the family court lacked jurisdiction to interpret, enforce, or modify a separation agreement "incorporated but not merged" into a divorce decree. Moseley v. Mosier, 279 S.C. 348, 352, 306 S.E.2d 624, 626 (1983); Bryant v. Varat, 278 S.C. 77, 77, 292 S.E.2d 298, 299 (1982); Kelly v. Edwards, 276 S.C. 368, 370, 278 S.E.2d 773, 774 (1981). In 1983, hoping to lessen the legal import of "words of art" such as "ratified," "approved," "incorporated," and "merged," the supreme court decided Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983). In Moseley, the court held jurisdiction for all domestic matters, whether by decree or by agreement, vested in the family court. Id. at 353, 306 S.E.2d at 627. Following Moseley, all settlement agreements, once approved, were modifiable by the court and enforceable by contempt, unless the agreement unambiguously denied the family court jurisdiction. Id.

The holding of Moseley, however, was expressly limited to those divorce decrees entered after the decision. Id. When faced with a pre-Moseley separation agreement that is "incorporated but not merged" into the divorce decree, the family court's jurisdiction remains restricted to its pre-Moseley boundaries, and the agreement is enforceable only by resort to ordinary contract remedies. See Peterson v. Peterson, 333 S.C. 538, 541-543, 510 S.E.2d 426, 427-428 (Ct. App. 1998). Because the settlement agreement at issue in this case was entered into prior to Moseley and "incorporated but not merged" into the divorce decree, the family court properly found it lacked jurisdiction.[2]

[2] Husband argues that, even if the family court lacks jurisdiction to *modify* or *enforce* a pre-Moseley agreement, it may still *interpret* the agreement. We

Furthermore, the agreement in the case at bar states, "the payment of such amounts herein provided shall not in any manner be modified by the court." Although recent case law and statutory amendments alter the family court's analysis of cohabitation as a ground for alimony termination when modification is allowed,[3] the parties may still agree to deny the family court the authority to modify alimony. See S.C. Code Ann. § 20-3-130(G) (Supp. 2003) ("The parties may agree in writing if properly approved by the court to make the payment of alimony as set forth [in this statute] nonmodifiable and not subject to subsequent modification by the court."); Moseley, 279 S.C. at 353, 306 S.E.2d at 627 ("The parties may specifically agree that the amount of alimony may not ever be modified by the court . . . ."). In the recent case of Degenhart v. Burriss, 360 S.C. 497, 602 S.E.2d 96 (Ct. App. 2004), this court determined that language strikingly similar to that employed in this settlement agreement denied the family court the authority to modify alimony in any manner. The family court, therefore, would lack jurisdiction to modify alimony payments here even if the agreement was entered into following the Moseley decision.

For the foregoing reasons, the family court's order is

**AFFIRMED.**

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

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find no merit in this semantic distinction. Pre-Moseley, the family court lacked jurisdiction to enforce, modify *or interpret* settlement agreements like the one at issue. See Kelly v. Edwards, 276 S.C. 368, 370, 278 S.E.2d 773, 774 (1981) ("[O]nly the interpretation of the [settlement agreement] was in issue, therefore, the family court was without subject matter jurisdiction to determine contractual obligations."(emphasis added)).

[3] See S.C. Code Ann. § 20-3-150 (Supp. 2003); Bryson, 347 S.C. at 224-25, 553 S.E.2d at 494 (Ct. App. 2001).

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

The State, Respondent,

v.

Charles Brown, Appellant.

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

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Opinion No. 3912
Heard October 13, 2004 – Filed December 20, 2004

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**REVERSED AND REMANDED**

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James Arthur Brown, Jr., of Beaufort, for Appellant.

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., all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for Respondent.

**BEATTY, J.:** Charles Brown appeals his conviction for distribution of cocaine. He argues the trial judge erred in refusing to charge the jury the defense of entrapment. We reverse and remand for a new trial.

## FACTS

On March 13, 2002, SLED Agent William Kimble met with a paid confidential informant, Harold David Anderson, to conduct a controlled

purchase of cocaine from Charles Brown in Beaufort. Anderson was subject to pending criminal charges in Georgia and had aspirations of attending the Georgia Police Academy. The operation was initiated by SLED as a result of a discussion with the Georgia Bureau of Investigations, the organization for which Anderson primarily worked. Although several officers with the narcotics division of the Beaufort County Sheriff's Department assisted in the operation, they had no prior knowledge of any alleged drug dealing by Brown. At the time of the incident, Anderson and Brown had casually known each other for about a year. Anderson spoke with Brown several times by telephone during the day of the controlled buy to arrange the deal.

As a result of the telephone conversations, Kimble and Anderson drove together to Brown's place of employment. Brown met with them inside but did not conduct the requested transaction. Instead, he asked Anderson and Kimble to wait forty minutes to an hour so that he could retrieve the drugs. Brown called after that time and the group agreed to meet at Burger King. Because Brown refused to deal directly with Kimble, Kimble gave Anderson $200 in marked cash to complete the transaction. When Anderson got into the car with Brown, he gave Brown the money in exchange for 3.16 grams of cocaine. Subsequently, Brown was arrested and indicted for distribution of cocaine.

At trial, Brown's counsel moved for a directed verdict and requested a charge of entrapment after the close of the evidence. Counsel argued that law enforcement in Beaufort County was not familiar with Brown until the Georgia Bureau of Investigations prompted the drug operation. Counsel further asserted the State failed to present evidence that Brown was a drug dealer. The judge denied the motion and the request to charge. Because Brown failed to testify or present evidence to support the affirmative defense of entrapment, the judge found Brown was not entitled to the requested charge.[1] The judge further ruled there was no evidence in the record to support the defense.

[1] The record reflects the judge was initially inclined to give the charge of entrapment until the Solicitor alluded that the predisposition element of the offense of entrapment was satisfied by Brown's prior drug dealing.

The jury convicted Brown of distribution of cocaine. The trial judge sentenced him to nine years imprisonment. Brown appeals.

## DISCUSSION

Brown asserts the trial judge erred in declining to instruct the jury regarding the defense of entrapment. He contends the evidence supporting his entrapment defense was presented through cross-examination of the State's witnesses and based on the State's evidence. We agree.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). "The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). If there is any evidence to support a jury charge, the trial judge should grant the request. State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001), cert. denied, 534 U.S. 977 (2001). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000), cert. denied, 531 U.S. 946 (2000).

"The affirmative defense of entrapment is available where there is the 'conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer.'" State v. Johnson, 295 S.C. 215, 216, 367 S.E.2d 700, 701 (1988) (quoting State v. Jacobs, 238 S.C. 234, 244, 119 S.E.2d 735, 740 (1961)). "It is a well settled principle of law that the defense of entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence." Johnson, 295 S.C. at 217, 367 S.E.2d at 701. Thus, the entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. Matthews v. United States, 485 U.S. 58, 63

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However, there is no evidence contained in the record indicating that Brown had a drug dealing history.

(1988). The United States Supreme Court explained the rationale underlying the defense of entrapment as follows:

> When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

Sorrells v. United States, 287 U.S. 435, 445 (1932).

"One pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, which he would not otherwise have committed." Johnson, 295 S.C. at 217, 367 S.E.2d at 701; Babb v. State, 240 S.C. 235, 237, 125 S.E.2d 467, 467 (1962), cert. denied, 375 U.S. 979 (1964) ("Entrapment is an affirmative defense to the crime charged and imposes upon the accused the burden of showing that he was induced to commit the act for which he is being prosecuted."). "[T]he defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." United States v. Sligh, 142 F.3d 761, 762 (4th Cir. 1998) (citations omitted). "A defendant is not entitled to an entrapment instruction unless he can meet this initial burden of producing some evidence of government inducement." Id. at 762-63. Thus, "[t]he court may find as a matter of law that no entrapment existed, when there is no evidence in the record that, if believed by the jury, would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready and willing to commit it." United States v. Osborne, 935 F.2d 32, 38 (4th Cir. 1991).

As a threshold matter, Brown's decision not to testify or call witnesses did not automatically preclude him from receiving the requested charge on entrapment. The United States Supreme Court has ruled that it is not necessary for a defendant to testify or present any evidence to invoke the defense of entrapment. Sherman v. United States, 356 U.S. 369, 373

(1958). In Sherman, the defense called no witnesses. The Court concluded from the evidence that entrapment was established as a matter of law. In so holding, the Court stated that it was "not choosing between conflicting witnesses, nor judging credibility . . . We reach our conclusion from the undisputed testimony of the prosecution's witnesses." Id. (emphasis added). Therefore, the trial judge erred, as a matter of law, when he denied the charge on the ground Brown did not testify, call witnesses, or present any evidence other than through the prosecution witnesses.

The question then becomes whether there was sufficient evidence to support the affirmative defense of entrapment. In analyzing this issue, we must consider Brown's version of the facts as true. See United States v. Trejo, 136 F.3d 826, 827 (D.C. Cir. 1998) ("In determining whether an entrapment defense is warranted, the court considers appellant's version of the facts to be true."). Because the question of entrapment is generally one for the jury, an appellate court reviews the trial court's decision not to give an entrapment instruction de novo. United States v. Singh, 54 F.3d 1182, 1189 (4th Cir. 1995) ("The district court's decision not to give an entrapment instruction is a question of law which we review *de novo*.").

In terms of inducement, there was evidence to suggest that law enforcement instigated the drug transaction. Anderson, a friend of Brown's and a paid confidential informant, initiated the meeting by calling Brown several times the day of the transaction. Brown chose only to deal with Anderson and specifically refused to sell to Kimble. Because Anderson was subject to pending criminal charges and had aspirations of attending the Georgia Police Academy, he had the incentive to set up the drug deal. SLED Agent Kimble testified that he intended to give Anderson a favorable recommendation to the Georgia Bureau of Investigations in exchange for his cooperation.

There is also evidence that indicates Brown's lack of predisposition to commit the offense of distribution of cocaine. The State's witnesses acknowledged that Brown was a retired Army first sergeant who was honorably discharged. Brown was also gainfully employed and declined to conduct the transaction at his place of business. The cocaine was not readily accessible to Brown given Anderson and Kimble had to wait

approximately an hour and a half between the time of the request and the actual sale. At the time of his arrest, Brown did not have any other drugs in his possession. Nor did he have a significant amount of cash other than the $200 in marked money. Furthermore, aside from the controlled buy, SLED agents and officers with the Beaufort County Sheriff's Department had not previously purchased drugs from Brown nor did they have any knowledge that Brown had engaged in drug activity. Moreover, there was no evidence of any prior drug transactions between Anderson and Brown. When Brown gave a statement to investigating officers, he denied being a drug dealer and claimed that he made the sale for a friend. Brown also made this same comment to Anderson on the day of the sale.

Based on our review of the record, we find there was evidence to support the presentation of the defense of entrapment to the jury. See Sorrells, 287 U.S. at 440-41 (finding trial judge erred in refusing to submit issue of entrapment to the jury in trial for possession and sale of intoxicating liquor where: prohibition agent befriended defendant; agent made repeated requests to defendant for liquor; defendant did not have liquor in his immediate possession at the time of the request; there was no evidence that defendant ever possessed or sold liquor prior to the transaction in question; the defendant was gainfully employed; and there was testimony the defendant possessed "good character"); see also Johnson, 295 S.C. at 217, 367 S.E.2d at 701 ("The issue of whether or not the defense of entrapment has been established is ordinarily a question of fact for a jury unless there is undisputed evidence and only one reasonable conclusion can be reached."); cf. State v. Cooper, 302 S.C. 184, 186, 394 S.E.2d 717, 718 (Ct. App. 1990) (holding, in case involving convictions for criminal conspiracy and distribution of crack cocaine, defendant was not entitled to a jury instruction on entrapment where defendant engaged in the illegal activity "because of her own preexisting readiness to do so and not because of incessant demands made upon her by the undercover agent" or close personal relationship given defendant was an admitted purchaser and regular user of crack cocaine, participated in the drug buy to share in the purchase, and received a portion of the crack cocaine). Accordingly, the judge erred in declining to charge the law of entrapment. Because entrapment was Brown's only defense, the prejudice from this error was significant and, thus, warrants a new trial.

## CONCLUSION

We find the evidence presented was sufficient to entitle Brown to the requested charge of entrapment. The judge's refusal to instruct the jury on this defense constituted error and warrants a new trial. Accordingly, Brown's conviction is

**REVERSED AND REMANDED.**

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