The Supreme Court of South Carolina

In the Matter of Calvin Baker, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1980, 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, dated December 2, 2010, 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 Calvin Baker, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 16, 2010

The Supreme Court of South Carolina

In the Matter of Cara Harding, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 12, 1991, 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, dated December 2, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 16, 2010

The Supreme Court of South Carolina

In the Matter of Linda Lemel Hoseman, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 1989, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated November 19, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 16, 2010

The Supreme Court of South Carolina

In the Matter of Lamar
Frederick Proctor, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 6, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated November 23, 2010, 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 Calvin Baker, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 16, 2010

The Supreme Court of South Carolina

In the Matter of Katherine E.
Mims Schroeder, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 5, 1982, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 7, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Katherine E. Mims Schroeder shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

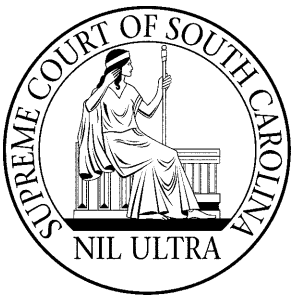
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 16, 2010



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 50
December 20, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

EXTENSION TO FILE PETITION – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

26859 – Matrix Financial Services v. Louis M. Frazer (Kundinger)	Pending
26878 – The Linda McCompany v. James G. Shore	Pending
26882 – Anthony Grazia v. SC State Plastering	Pending
26891 – In the Matter of Michael Evans	Pending
26895 – Alexander's Land v. M&M&K Corp	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2010-UP-529-Sharon Graham v. Nelson Graham
(Darlington, Judge Roger E. Henderson)

2010-UP-530-Bhaveshkumar R. Patel v. Nayana D. Patel
(Dorchester, Judge Nancy Chapman McLin)

2010-UP-531-J. Scott Kunst v. Mike Parham and Judy Parham
(Greenville, Judge Doyet A. Early, III)

2010-UP-532-State v. Jimmy Williams
(Horry, Judge Edward B. Cottingham)

2010-UP-533-Carlton E. Cantrell v. Aiken County et al.
(Aiken, Judge Doyet A. Early, III)

2010-UP-534-Catherine Panas v. Richard Panas and Gallina Fielder
(York, Judge Henry T. Woods)

2010-UP-535-The Fenollol Group, Inc. v. Beasley Jo Banister et al.
(Fairfield, Judge Brooks P. Goldsmith)

2010-UP-536-Virginia Mappus v. S.C. Department of Health and Environmental Control
(Administrative Law Judge Ralph K. Anderson, III)

PETITIONS FOR REHEARING

4705-Hudson v. Lancaster Conv.	Pending
4732-Fletcher v. MUSC	Pending
4750-Cullen v. McNeal	Pending
4752-Farmer v. Florence County	Pending
4753-Ware v. Ware	Pending
4756-Neeltec Ent. v. Long	Pending
4757-Graves v. Horry-Georgetown	Pending

4758-State v. W. Moses Pending

4760-State v. S. Geer Pending

4761-Coake v. Burt Pending

2010-UP-391-State v. J. Frazier Pending

2010-UP-427-State v. S. Barnes Pending

2010-UP-437-State v. T. Johnson Pending

2010-UP-443-MIA Funding LLC v. Sizer Pending

2010-UP-450-Riley v. Osmose Pending

2010-UP-456-Moore v. SCDC Pending

2010-UP-474-Lindsey v. SCDC (2) Pending

2010-UP-489-Johnson v. Mozingo Pending

2010-UP-491-State v. G. Scott Pending

2010-UP-494-State v. Nathaniel Bradley Pending

2010-UP-495-Sowell v. Todd Pending

2010-UP-503-State v. W. McLaughlin Pending

2010-UP-504-Paul v. SCDOT Pending

2010-UP-507-Cue-McNeil v. Watt Pending

2010-UP-515-McMillan v. St. Eugene Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page Pending

4370-Spence v. Wingate Pending

4474-Stringer v. State Farm Pending

4480-Christal Moore v. The Barony House	Pending
4510-State v. Hicks, Hoss	Pending
4526-State v. B. Cope	Pending
4529-State v. J. Tapp	Pending
4548-Jones v. Enterprise	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending
4600-Divine v. Robbins	Pending
4605-Auto-Owners v. Rhodes	Pending
4607-Duncan v. Ford Motor	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending
4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending

4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending
4622-Carolina Renewal v. SCDOT	Pending
4631-Stringer v. State Farm	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4639-In the interest of Walter M.	Pending
4640-Normandy Corp. v. SCDOT	Pending
4641-State v. F. Evans	Pending
4653-Ward v. Ward	Pending
4654-Sierra Club v. SCDHEC	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4661-SCDOR v. Blue Moon	Pending
4666-Southeast Toyota v. Werner	Pending
4670-SCDC v. B. Cartrette	Pending
4672-State v. J. Porter	Pending
4673-Bailey, James v. SCDPPPS	Pending
4675-Middleton v. Eubank	Pending
4677-Moseley v. All Things Possible	Pending
4682-Farmer v. Farmer	Pending

4687-State v. D. Syllester	Pending
4688-State v. Carmack	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4696-State v. Huckabee	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4702-Peterson v. Porter	Pending
4706-Pitts v. Fink	Pending
4708-State v. Webb	Pending
4711-Jennings v. Jennings	Pending
4714-State v. P. Strickland	Pending
4716-Johnson v. Horry County	Pending
4721-Rutland (Est. of Rutland) v. SCDOT	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4728-State v. Lattimore	Pending
4737-Hutson v. SC Ports Authority	Pending
2008-UP-126-Massey v. Werner	Pending
2009-UP-199-State v. Pollard	Pending
2009-UP-265-State v. H. Williams	Pending
2009-UP-266-State v. McKenzie	Pending

2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-359-State v. P. Cleveland	Pending
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-434-State v. Ridel	Pending
2009-UP-437-State v. R. Thomas	Pending
2009-UP-524-Durden v. Durden	Pending
2009-UP-539-State v. McGee	Pending
2009-UP-540-State v. M. Sipes	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-590-Teruel v. Teruel	Pending
2009-UP-594-Hammond v. Gerald	Pending
2009-UP-596-M. Todd v. SCDPPPS	Pending
2009-UP-603-State v. M. Craig	Pending
2010-UP-080-State v. R. Sims	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-131-State v. T. Burkhart	Pending
2010-UP-138-State v. B. Johnson	Pending

2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-154-State v. J. Giles	Pending
2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos.	Pending
2010-UP-158-Ambruoso v. Lee	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-181-State v. E. Boggans	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-197-State v. D. Gilliam	Pending
2010-UP-215-Estate v. G. Medlin	Pending
2010-UP-220-State v. G. King	Pending
2010-UP-225-Novak v. Joye, Locklair & Powers	Pending
2010-UP-227-SCDSS v. Faith M.	Pending
2010-UP-228-State v. J. Campbell	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-234-In Re: Mortgage (DLJ v. Jones, Boyd)	Pending
2010-UP-238-Nexsen, David v. Driggers Marion	Pending
2010-UP-247-State v. R. Hoyt	Pending
2010-UP-251-SCDC v. I. James	Pending
2010-UP-253-State v. M. Green	Pending

2010-UP-256-State v. G. Senior	Pending
2010-UP-269-Adam C. v. Margaret B.	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-276-Ford v. South Carolina	Pending
2010-UP-281-State v. J. Moore	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-289-DiMarco v. DiMarco	Pending
2010-UP-302-McGauvran v. Dorchester County	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-317-State v. C. Lawrimore	Pending
2010-UP-330-Blackwell v. Birket	Pending
2010-UP-331-State v. Rocquemore	Pending
2010-UP-339-Goins v. State	Pending
2010-UP-340-Blackwell v. Birket (2)	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-355-Nash v. Tara Plantation	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-362-State v. Sanders	Pending
2010-UP-369-Island Preservation v. The State & DNR	Pending
2010-UP-370-State v. J. Black	Pending

2010-UP-372-State v. Z. Fowler	Pending
2010-UP-396-Floyd v. Spartanburg Dodge	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Darryl Sweetser, Individually
and on Behalf of All Others
Similarly Situated,[1] Appellant,

v.

South Carolina Department of
Insurance Reserve Fund, Respondent.

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

Opinion No. 26905
Heard November 18, 2010 – Filed December 20, 2010

AFFIRMED

David L. Hood, of Georgetown, and Mark D. Chappell and W. Hugh McAngus, Jr., both of Chappell, Smith & Arden, of Columbia, for Appellant.

Andrew F. Lindemann, of Davidson & Lindemann, of Columbia, for Respondent.

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[1] As of this juncture there is no class action.

ACTING CHIEF JUSTICE PLEICONES: Appellant was injured when his employer's vehicle in which he was riding as a passenger collided with a vehicle driven by an uninsured driver. Appellant has collected $13,520.21 in workers' compensation benefits, and has a tort suit pending against the uninsured driver. Respondent issued an automobile liability policy to employer. It provides for $15,000 in uninsured motorist (UM) coverage, but also has an offset clause for compensation benefits. Fifteen thousand dollars is the minimum coverage under the UM statute. S.C. Code Ann. § 38-77-150 (2002).

Appellant filed this declaratory judgment action seeking a determination whether his tort recovery can be offset against his compensation award if the result of that offset would be to reduce his recovery under the UM provision below $15,000. The trial court granted respondent summary judgment, holding that the policy's offset clause[2] was "valid and enforceable" even if the effect were to reduce appellant's recovery below the statutorily mandated minimum coverage. Appellant appeals. We affirm.

ISSUE

> Can a workers' compensation offset clause be applied so as to reduce an employee's recovery under an employer's automobile liability policy's UM coverage below the statutory mandatory minimum?

---

[2] Respondent's policy covers the following "limit of liability:"

> 3. Any amount payable under this insurance shall be reduced by:
>
> a. All sums paid or payable under any workers' compensation . . . law

ANALYSIS

All motor vehicles required to be registered in South Carolina must be insured. S.C. Code Ann. § 56-10-10; § 56-10-220 (2004). Pursuant to South Carolina's automobile insurance statute, "No automobile insurance policy . . . may be issued or delivered unless it contains a provision by endorsement or otherwise [providing] uninsured motorist [UM]" coverage. § 38-77-150(A).[3] However, this chapter also contains S.C. Code Ann. § 38-77-220, titled "Additional liability which automobile insurance policy need not cover," which provides:

> The automobile policy need not insure any liability under the Workers' Compensation Law nor any liability on account of bodily injury to an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of the motor vehicle nor any liability for damage to property owned by, rented to, in charge of, or transported by the insured.

This case presents the novel question whether, when an employer chooses to cover its non-domestic employee under an automobile liability policy, the employee's recovery under the policy's mandatory UM coverage can be reduced by, or offset against, the workers compensation benefits received by the employee.

When an employer has chosen to insure his non-domestic employees under his automobile liability policy, and a part of that policy has voluntary underinsured (UIM) coverage, that policy may lawfully provide for a set-off of UIM benefits against the compensation benefits received by an injured employee. Williamson v. U.S. Fire Ins. Co., 314 S.C. 215, 442 S.E.2d 587 (1994).

[3] Subject, of course, to persons who opt to be uninsured under § 56-10-510.

In Williamson, the Court was asked whether an employer's automobile liability policy which contained a workers' compensation offset provision would apply to an employee claim for UIM benefits. The Williamson opinion noted that in Ferguson v. State Farm Mut. Auto Ins. Co., 261 S.C. 96, 198 S.E.2d 522 (1973), the Court struck down a provision in an employee's own policy which purported to offset workers compensation benefits against the employee's UM recovery. In Ferguson, the Court stated:

> The public policy declared by our uninsured motorist statute imposes an obligation on insurers to provide protection to their insureds against loss caused by wrongful conduct of an uninsured motorist, and any limiting language in an insurance contract which had the effect of providing less protection than made obligatory by the statutes is contrary to public policy and is of no force and effect.

There is no mention of the predecessor to § 38-77-220 in the Ferguson decision. Appellant relies on this passage from Ferguson to argue for reversal.

Williamson distinguished Ferguson because the policy in Ferguson was the employee's own while Williamson involved the employer's policy. The Williamson opinion also states "The same statute and public policy does not operate in cases where voluntary coverage has been provided by an employer." It is not immediately clear what "same statute" or "voluntary coverage" the Williamson court is referring to here. We conclude, and appellant agreed at oral argument, that the reference to a statute is to § 38-77-220. Moreover, the reference to voluntary coverage is not to UIM coverage, but rather to the employer's voluntary decision to purchase bodily injury coverage for its non-domestic employees.

The parties make much of the fact that the predecessor to § 38-77-220 was not cited in Ferguson. We find the omission easily explainable as that statute applies only to employers who are purchasing automobile insurance

policies.[4] Section 38-77-220 first permits an automobile policy to exclude "any liability under the Workers' Compensation Law." Second, the statute permits an employer to exclude an employee, other than a "domestic," altogether from bodily injury coverage under the policy. Williamson, *supra*; see also State Farm Mut. Ins. Co. v. James, 337 S.C. 86, 522 S.E.2d 345 (Ct. App. 1999) (repeating this holding).

Section 38-77-220 can only apply to employers as only they can "insure any liability under" compensation law or have employees. Williamson also holds that one of the policies underlying § 38-77-220 is to relieve the employer of paying double premiums, one to its workers' compensation carrier and one to its automobile liability policy carrier, a policy consideration which is not applicable to employees. Read in context, and made somewhat more clear in the next paragraph of the opinion, Williamson holds not only that § 38-77-220 did not apply in Ferguson, but that also the public policy against permitting an offset against UM benefits expressed in Ferguson does not apply to employer-purchased liability policies.

Appellant also relies on the following passage from Williamson to argue that the compensation offset is only available to an employer who voluntarily purchases UIM coverage and not to the statutorily mandated UM coverage:

> As long as the employee is able to fully recover the damages sustained, we believe the better public policy is to encourage employer voluntary coverage by not exposing employers to mandatory duplicative insurance premiums and by not allowing duplicative recoveries by employees. We therefore hold that S.C. CODE ANN. § 38-77-220 (1989) allows an employer's automobile insurance carrier to offset workers' compensation benefits received by an

[4] To the extent State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) conflicts with this interpretation of § 38-77-220, it is overruled.

> employee. The offset shall be applied against the total of damages sustained once the employee has been fully compensated for the injuries.
>
> Williamson, 314 S.C. at 219, 442 S.E.2d at 589.

Read in context, the "voluntary" reference in this Williamson passage and in the passage cited earlier, is to employers who voluntarily decide to cover their non-domestic employees despite the opt-out provision of § 38-77-220 and not, as appellant would read it, to voluntary coverages such as UIM.

The public policy of this State is to encourage employers to voluntarily purchase bodily injury coverage for their employees in their automobile liability policies. Williamson, *supra*. Once such policy is bought, it will necessarily include mandatory UM coverage as required by § 38-77-150. See Antley v. Nobel Ins. Co., 350 S.C. 621, 567 S.E.2d 872 (Ct. App. 2002). If an employer opts to provide voluntary bodily injury coverage for his employees, no public policy is violated if the employer is permitted to offset the employee's recovery under the automobile policy against the employee's compensation benefits, so long as that offset does not operate so as to make the employee less than whole. Here, assuming appellant receives some recovery in his tort suit against the uninsured driver, the first $13,520.21 of that recovery will be offset against the policy, and appellant will then draw against the $15,000 in employer-provided UM coverage until his damages are paid or the policy limit is reached.[5]

CONCLUSION

The circuit court order permitting respondent to offset appellant's workers' compensation benefits against his recovery under the automobile liability policy is

[5] To the extent that Antley indicates that the Court of Appeals would reach a different result, it is overruled.

AFFIRMED.

KITTREDGE, HEARN, JJ., and Acting Justices James E. Moore and J. Ernest Kinard, concur.

The Supreme Court of South Carolina

In re: Amendments to the Rules of Professional Conduct,
Rule 407, SCACR, and the Code of Judicial Conduct, Rule 501, SCACR.

O R D E R

The Commission on Lawyer Conduct and the Commission on Judicial Conduct have proposed certain amendments to the Rules of Professional Conduct, Rule 407, SCACR, and the Code of Judicial Conduct, Rule 501, SCACR. The Commission on Lawyer Conduct proposes amending Rule 7.3(d)(3) of the Rules of Professional Conduct, Rule 407, SCACR, to update the contact information for the Commission on Lawyer Conduct. The Commission on Judicial Conduct proposes amending the Terminology section of the Code of Judicial Conduct to include a definition of "serious crime" and revising Canon 3(D) to require that judges self-report arrests for certain crimes.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby adopt the proposed amendments. These amendments shall become effective immediately. A copy of the amended rules is attached.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 16, 2010

AMENDMENTS TO RULE 407, SCACR
RULES OF PROFESSIONAL CONDUCT

RULE 7.3(d)(3)

(3) Each written or recorded solicitation must include the following statement: "ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, 1015 SUMTER STREET, SUITE 305, COLUMBIA, SOUTH CAROLINA 29201-TELEPHONE NUMBER 803-734-2037." Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

AMENDMENTS TO RULE 501, SCACR
CODE OF JUDICIAL CONDUCT

TERMINOLOGY

"Require." . . .

“Serious Crime.” Any felony; any lesser crime that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

CANON 3

D. Disciplinary Responsibilities

. . .

(4) A judge who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Judicial Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, Appellant

v.

David E. Meacher, M.D., David E. Meacher, M.D., P.A., Carolina Health Specialists, P.A. a/k/a Care First Health Specialists, and The South Carolina Medical Malpractice Liability Joint Underwriting Association, Respondents.

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4764
Heard September 15, 2010 – Filed December 15, 2010

AFFIRMED

C. Mitchell Brown, Michael J. Anzelmo, Monteith P. Todd, and Weldon R. Johnson, all of Columbia, for Appellant.

Andrew F. Lindemann and Andrew G. Melling, both of Columbia; Hutson S. Davis, Jr. and Barry L. Johnson, both of Okatie; and James Edward Bradley, of West Columbia, for Respondents.

GEATHERS, J: In this appeal of a declaratory judgment action, Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center ("Colleton"), contends the circuit court erred in holding that Colleton was not entitled to equitable indemnification for costs it incurred in defending and settling a malpractice action brought by a third party. Colleton also argues that the circuit court erred in finding against Colleton on its breach of contract claim against Carolina Health Specialists, P.A., a/k/a CareFirst Health Specialists ("CareFirst"). We affirm.

FACTS

This declaratory judgment action arises out of a medical malpractice action brought by Johnnie Grant against Colleton, David E. Meacher, M.D. ("Dr. Meacher"), David E. Meacher, M.D., P.A. ("Meacher P.A."), and CareFirst (hereinafter referred to as "the Grant action"). On March 10, 2000, Grant arrived at the emergency department at Colleton, complaining of pain and swelling in his left testicle. Grant was examined and treated by Dr. Meacher, who, according to Grant's amended complaint, diagnosed Grant with epididymitis and released him. Dr. Meacher had been assigned to work at Colleton by CareFirst, which had entered into a professional services agreement with Colleton (the "Agreement") to provide physician staffing for Colleton's emergency department.

According to Grant, he continued to experience pain and swelling in his testicle after being discharged from Colleton. He thereafter sought treatment

at the Medical University of South Carolina ("MUSC"), where he was diagnosed with testicular torsion. The MUSC physicians determined that Grant's testicle could not be repaired, and it was surgically removed.

Grant subsequently sued Colleton, Dr. Meacher, Meacher P.A., and CareFirst for medical malpractice. In his amended complaint, Grant contended that Dr. Meacher and Colleton deviated from the standard of care in failing to take appropriate diagnostic measures, in failing to request a urological consultation, in misdiagnosing his condition, in failing to rule out testicular torsion as a diagnosis, and in otherwise failing to diagnose and treat his condition properly. Additionally, Grant contended that Colleton, CareFirst, and Meacher P.A. were vicariously liable for Dr. Meacher's negligence. Colleton made demand on CareFirst to assume its defense pursuant to section four of the Agreement, but CareFirst refused. Specifically, section 4.1 of the Agreement required CareFirst to provide a defense to Colleton "for claims arising solely on the basis of vicarious liability or ostensible or apparent agency." (emphasis added).

Grant's case proceeded to trial. On the second day of trial, Grant reached a settlement with Colleton, Dr. Meacher, and Meacher P.A. for $100,000, with Colleton contributing $50,000 and Meacher contributing $50,000. The settlement agreement expressly denied any negligence or fault by any party. The settlement agreement further provided "this Release And Agreement shall not be construed as an admission of liability by any or all of the Released Parties."

Following the settlement, Colleton asked for indemnification from Respondents. They refused, and Colleton subsequently brought this declaratory judgment action against them. In its complaint, Colleton alleged, among other things, that it was entitled to equitable indemnification from Respondents for its payment of $50,000 to settle Grant's medical malpractice claim. It further alleged that CareFirst breached section 4.1 of the Agreement by failing to assume Colleton's defense in the Grant action.

Prior to the hearing on Colleton's declaratory judgment action, the parties entered into a joint stipulation of facts. At the hearing, Colleton called

only one witness: Weldon Johnson, the attorney who represented Colleton in the Grant action. The circuit court subsequently found that Colleton was not entitled to equitable indemnification and that it was not entitled to recovery under the Agreement. Colleton filed a motion to alter or amend judgment, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in holding that Colleton was not entitled to equitable indemnification?

2. In an imputed fault vicarious liability action setting, should there be a requirement on the part of the indemnitee to prove its own lack of fault?

3. Alternatively, in an imputed fault vicarious liability indemnity action setting, should proving fault on the part of the indemnitee be by way of an affirmative defense, with the burden for doing so being placed on the indemnitor?

4. Did the trial court err in denying relief on Colleton's breach of contract claim?

5. Does the nondelegable duty doctrine set forth in Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 53, 533 S.E.2d 312, 323 (2000), preclude recovery by Colleton?[1]

6. Is Colleton precluded from seeking equitable indemnification because its insurance company paid all of Colleton's settlement costs?

[1] Issues five and six listed in the Statement of Issues on Appeal are additional sustaining grounds raised by Respondents.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). Equitable indemnity is an action in equity. See Verenes v. Alvanos, 387 S.C. 11, 18 n.6, 690 S.E.2d 771, 774 n.6 (2010) (noting a cause of action for equitable indemnity is necessarily equitable in nature); Loyola Fed. Sav. Bank v. Thomasson Props., 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) (same). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." Goldman v. RBC, Inc., 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006). "However, this broad scope of review does not require the appellate court to disregard the findings made below." Id.

In contrast to equitable indemnification, "[a] breach of contract action is an action at law." Madden v. Bent Palm Invs., LLC, 386 S.C. 459, 464, 688 S.E.2d 597, 599 (Ct. App. 2010). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). Therefore, the trial court's findings will not be disturbed unless they are found to be without evidence that reasonably supports those findings. Id. at 600, 675 S.E.2d at 415.

LAW/ANALYSIS

I. Did the circuit court err in holding that Colleton was not entitled to equitable indemnification?

Colleton contends the circuit court erred in holding that it was not entitled to equitable indemnification because the circuit court erroneously concluded that the settlement of the Grant action precluded Colleton from being indemnified by Meacher. After reviewing the language of the order, we believe Colleton misconstrues the circuit court's order.

The order sets forth the requirements for equitable indemnification set forth in Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Pursuant to Vermeer, a plaintiff asserting an equitable indemnification cause of action may recover damages if he proves: (1) the indemnitor was liable for causing the plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor. Vermeer, 336 S.C. at 63, 518 S.E.2d at 307. The order then states:

> These requirements have not been met in the present case. [Colleton] settled the Grant lawsuit prior to the completion of trial. Thus, Dr. Meacher has not been legally adjudicated at fault, nor has [Colleton] been found without fault. Therefore, since there has been no finding of fault, [Colleton] is not entitled to equitable indemnification.

We believe the language of the order is ambiguous as to whether the circuit court based its decision on Colleton's failure to satisfy the Vermeer requirements or on the fact that the parties settled prior to the completion of trial.

We note that Rule 52(a) of the South Carolina Rules of Civil Procedure requires a trial court to make specific findings of fact so that the parties and the appellate court may determine the basis for the ruling. As our supreme court recently stated: "The [Rule 52] requirement for appropriately detailed findings is designed . . . to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010) (internal citations and quotations omitted).

If this were an action at law, we would remand for further factual findings. See In re Treatment and Care of Luckabaugh, 351 S.C. 122, 134, 568 S.E.2d 338, 343-44 (2002) (remanding law case for failure to comply

with Rule 52, SCRCP). However, in this equitable action we are free to make findings of fact in accordance with our own view of the preponderance of the evidence. Goldman, 369 S.C. at 465, 632 S.E.2d at 851.

In reviewing the record, we look for evidence to support a finding that Meacher was at fault, while Colleton was not at fault. See Vermeer, 336 S.C. at 63, 518 S.E.2d at 307 ("Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not."); id. ("If the second party is also at fault, he comes to court without equity and has no right to indemnity."); id. ("The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.").

We believe the preponderance of the evidence supports the conclusion that Colleton failed to meet the Vermeer requirements. Importantly, at the declaratory judgment hearing, the only witness Colleton offered was Weldon Johnson, who acted as Colleton's attorney in the Grant action. No medical experts testified on Colleton's behalf at the hearing. Although Johnson rehashed some of the testimony provided by medical experts at the truncated Grant trial,[2] the transcript of the Grant trial is not in the record and it is therefore impossible to know whether Johnson provided a full picture of what occurred at that trial. We note that the Grant trial transcript was also not admitted as evidence during the indemnification hearing before the circuit court judge.

In addition, Colleton offered no expert testimony at the declaratory judgment hearing. See Melton v. Medtronic, Inc., 389 S.C. 641, 653, 698 S.E.2d 886, 892 (2010) ("[E]xpert testimony is required in cases involving medical malpractice claims.").[3] We believe the record reflects that Colleton

[2] Johnson's testimony arguably constituted hearsay, but we note Respondents did not object when Johnson provided this testimony.

[3] Although the present case is not technically a medical malpractice case, in order to establish that Dr. Meacher was liable for Grant's damages (as

failed to meet the first and second elements of equitable indemnification. Specifically, Colleton did not conclusively establish that Dr. Meacher was liable for causing Colleton's damages. Further, Colleton failed to present any evidence that it was without fault. See Fowler v. Hunter, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) (stating in clear terms that the person "asserting an equitable indemnification cause of action" must prove the elements of indemnity, including that "the indemnitee was exonerated from any liability").

Colleton claims that the parties' stipulations were sufficient evidence for the trial court to find that Dr. Meacher was at fault and that Colleton was not at fault. In making this argument, Colleton cites the following stipulations: (1) "At the Grant trial, Dr. Mazo testified that Dr. Meacher's failure to order an ultrasound was a departure from [the] standard of care."; (2) "The only evidence introduced at the Grant trial by Plaintiff as to negligence or departure from [the] standard of care by either Defendant was limited to alleged departures by Dr. Meacher."; and (3) "At the Grant trial, Dr. Mazo testified that in his opinion, to a reasonable degree of medical certainty, the cause of the loss of a testicle by Grant was the misdiagnosis of testicular torsion by Meacher."

All of the above stipulations, however, merely discuss what occurred at the Grant trial—a trial that was terminated early because a settlement was reached. Moreover, Colleton, Dr. Meacher, and Meacher P.A. expressly denied any negligence or fault resulting from Grant's medical treatment as part of the settlement agreement. As noted above, the stipulations are not accompanied by a transcript of the Grant trial and thus provide an incomplete picture of that trial.

We believe these stipulations were akin to stipulations as to the law. Therefore, the circuit court was not required to accept these stipulations as conclusive proof that Dr. Meacher was liable for causing Grant's injuries, or as conclusive proof that Colleton was not liable. See Greenville Cnty. Fair

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mandated by Vermeer), Colleton was required to make a showing similar to that required in a medical malpractice case.

Ass'n v. Christenberry, 198 S.C. 338, 345, 17 S.E.2d 857, 859 (1941) (holding that a "stipulation as to the law" is generally not binding upon the courts); McDuffie v. McDuffie, 308 S.C. 401, 409-10, 418 S.E.2d 331, 336 (Ct. App. 1992) (holding that stipulations involving questions of law are not binding on the court).

We recognize that settlement alone does not preclude indemnification when there is sufficient evidence to support a finding of fault on the part of the indemnitor and lack of fault by the indemnitee. However, we distinguish this case from the facts of Otis Elevator, Inc. v. Hardin Construction Co., 316 S.C. 292, 450 S.E.2d 41 (1994), and Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990). In Otis Elevator, a subcontractor (Otis Elevator) settled with the plaintiff after a twelve-day trial and four hours of jury deliberation. Id. at 295, 450 S.E.2d at 43. Otis Elevator then brought a cause of action for contractual indemnification against the general contractor (Hardin Construction). Id. In the indemnification action, the jury returned with a verdict against Hardin Construction. Id. The jury also responded to a special interrogatory finding no act or omission on the part of Otis Elevator caused the plaintiff's injuries. Id. Thus, Otis Elevator was entitled to seek indemnity from Hardin Construction, because although Otis Elevator settled, there was a subsequent finding of lack of fault on Otis Elevator's part while Hardin Construction was subsequently found liable. Id. at 295-96, 450 S.E.2d at 43-44.

In Griffin, Van Norman (home seller) employed an exterminating company (exterminator) to provide a wood infestation report required by the Griffins (home buyers) before the sale of a house could be completed. Griffin, 302 S.C. at 521, 397 S.E.2d at 379. After the sale was consummated, the Griffins discovered the report was false. Id. The Griffins sued Van Norman and the exterminator. Id. at 521, 397 S.E.2d at 378-79. Both defendants settled with the Griffins, but the Van Norman's cross-claim for indemnification against the exterminator proceeded to a bench trial. Id. at 521, 397 S.E.2d at 379. The trial judge found that the loss suffered by the Griffins was occasioned "solely by the wrong of the [exterminator]" and that Van Norman had no knowledge that the report was false. Id. at 522, 397 S.E.2d at 379. Because the indemnity trial established that Van Norman was

totally innocent of wrongdoing and that the exterminator was guilty of fraud, the trial court concluded Van Norman was entitled to indemnification by the exterminator. Id. This court affirmed the trial court's ruling on appeal. Id. at 527, 397 S.E.2d at 382.

Unlike Griffin and Otis Elevator, here the circuit court made no finding of fault on Dr. Meacher's part or lack of fault on Colleton's part at the subsequent indemnification hearing. Reviewing the record, we conclude that there was insufficient evidence presented at the indemnification hearing to enable the circuit court to make any such findings of fault. Finally, even if the circuit court's order was ambiguous as to the exact basis for finding Colleton was not entitled to equitable indemnification, we can affirm for any reason appearing (or, in this case, failing to appear) in the record. See Rule 220(c), SCACR (noting "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); see also I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

There was insufficient evidence of fault on Dr. Meacher's part and lack of fault on Colleton's part presented at the medical malpractice trial prior to settlement, and insufficient evidence of fault/lack of fault at the subsequent indemnity hearing. Therefore, the Vermeer requirements were not met and the circuit court did not err in finding Colleton was not entitled to equitable indemnification.

II. Did the circuit court err by denying relief to Colleton on its breach of contract claim against CareFirst?

Colleton argues that the circuit court misconstrued its breach of contract claim against CareFirst as a contractual indemnification claim and therefore the matter should be remanded to the circuit court for a determination of whether CareFirst breached the Agreement.

The portion of the Agreement at issue, section 4.1, states in pertinent part:

> Contractor's [CareFirst's] insurance coverage shall provide Facility [Colleton] defense for claims arising solely on the basis of vicarious liability or ostensible or apparent agency, for the acts or inaction of Contractor and/or Contractor's Representatives.[4] . . . . In the event neither Contractor nor Contractor's Representatives purchase the required coverage, Facility, in addition to any other rights it may have under the terms of this Agreement or under law, shall be entitled, but not obligated, to purchase such coverage. Facility shall be entitled to immediate reimbursement from Contractor or Contractor's Representative for the cost thereof.

(emphases added).[5]

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[4] The term "Contractor's Representatives" is defined in the Agreement as "all of Contractor's [CareFirst's] employees, shareholders, partners, subcontractors, and agents providing services under this Agreement." Thus, the term would appear to include Dr. Meacher.

[5] Under section 4.1 of the Agreement, CareFirst was required to obtain insurance that would provide a defense to Colleton. Section 4.1 did not require CareFirst to obtain coverage that would indemnify Colleton. Therefore, even if CareFirst had breached section 4.1, it is questionable whether Colleton would be entitled to the $50,000 settlement amount as Colleton claims. See Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) ("The duty to defend is separate and distinct from the obligation to pay a judgment rendered against the insured.").

In its complaint, as well as in its motion to amend, Colleton alleged that CareFirst "breached" section 4.1 by failing to obtain insurance coverage that provided Colleton a defense in the Grant action. However, in its pre-trial brief, Colleton did not specifically contend that CareFirst breached the Agreement. Rather, it claimed that it was entitled to "contractual indemnification" from CareFirst under the Agreement. Moreover, at the declaratory judgment hearing, Colleton's counsel referred to its contract claim as a "contractual indemnity" claim.[6]

In its order, the circuit court reviewed section 4.1 of the Agreement and found:

> These provisions [of the Agreement] do not entitle either party to indemnification in the event of malpractice liability, but rather for the reimbursement for the costs of obtaining insurance. They merely provide the procedure of obtaining insurance and handling claims on the theory of ostensible or apparent agency, not for the indemnification for settlement of such claims, especially without a finding of fault.

Thus, we acknowledge that the circuit court construed Colleton's claim as a contractual indemnification claim rather than a breach of contract claim. However, we believe remand is not required because there was no breach of contract.

Initially, we note this issue is questionably preserved because of the nebulous manner in which Colleton presented its contract issue to the circuit court. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 58

[6] Black's Law Dictionary 837 (9th ed. 2009), defines "contractual indemnity" as "[i]ndemnity that is expressly provided for in an agreement." Black's Law Dictionary further defines "indemnity clause" as "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur." Id. at 837-38.

(2d ed. 2002) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."). However, in light of the fact that Colleton raised the breach of contract issue in both its complaint and its motion to amend, we proceed to address the issue on the merits.

As to the merits of Colleton's breach of contract claim, we do not believe CareFirst was required to provide Colleton a defense in the Grant action. The South Carolina Supreme Court has instructed that "[i]f the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend." City of Hartsville v. South Carolina Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). Therefore, "the allegations of the complaint determine the insurer's duty to defend." Id.

Although the situation here is slightly different than Hartsville, we believe CareFirst's duty to defend should be determined by reviewing Grant's complaint. In paragraph eighteen of his complaint, Grant alleged that Colleton, CareFirst, and Meacher P.A. were vicariously liable to Grant for Dr. Meacher's negligence. However, in paragraph sixteen of his complaint, Grant contended that both Dr. Meacher and Colleton deviated from the standard of care in failing to take appropriate diagnostic measures, in failing to request a urological consultation, in misdiagnosing his condition, in failing to rule out testicular torsion as a diagnosis, and in otherwise failing to diagnose and treat his condition properly. Thus, Grant's complaint alleges that Colleton was negligent in its own right. Accordingly, because the Agreement only required CareFirst to provide a defense to Colleton "for claims arising solely on the basis of vicarious liability or ostensible or apparent agency," CareFirst was not required to provide Colleton a defense at the onset of the litigation.

We recognize Grant's attorney "stipulated" during the Grant trial that his only cause of action against Colleton was a vicarious liability claim. However, the record reflects this stipulation was made as part of the settlement agreement. Thus, as of the date of the stipulation, when CareFirst arguably was required to provide a defense to Colleton, Colleton was no

longer in need of a defense. See Hartsville, 382 S.C. at 547, 677 S.E.2d at 580 (holding that insurer had a "continuing duty to defend").

Because we do not believe CareFirst breached the Agreement, it is inconsequential whether the circuit court misconstrued Colleton's breach of contract claim against CareFirst as a contractual indemnification claim. See Rule 220(c), SCACR (noting "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"). Accordingly, we decline to remand to the circuit court for further proceedings.

III. Remaining Issues on Appeal

A. Issue Preservation

Colleton contends that, in a vicarious liability indemnity setting, the indemnitee should not have to prove that it was not at fault. In other words, Colleton contends that the test set forth in Vermeer should be modified in vicarious liability cases so that the indemnitee is not required to establish its own lack of fault. Colleton further argues that in an imputed fault vicarious liability action, proving fault on the part of the indemnitee should be by way of an affirmative defense, with the burden of doing so being placed on the indemnitor.

We decline to address either of these issues as neither issue was properly preserved for appellate review. To be preserved for appellate review, an issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (citations and quotations omitted). Here, Colleton never specifically argued to the circuit court that the Vermeer test should be modified for vicarious liability cases. Accordingly, we believe neither issue was properly preserved. See Bodkin v. Bodkin, 388 S.C. 203, 219, 694 S.E.2d 230, 239 (Ct. App. 2010) (an issue is not preserved for appeal unless it was raised to and ruled upon by the trial court).

B. Additional Sustaining Grounds Raised by Respondents

The remaining issues on appeal are additional sustaining grounds raised by the Respondents, namely (1) whether the nondelegable duty doctrine set forth in Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 53, 533 S.E.2d 312, 323 (2000), precludes recovery by Colleton, and (2) whether Colleton is precluded from seeking equitable indemnification because its insurance company paid all of Colleton's settlement costs. We decline to address either of these issues because we affirm on other grounds appearing in the record on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, the decision of the lower court is

AFFIRMED.

Few, C.J., and Huff, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Darrell Burgess, Appellant.

Appeal From Lexington County
Knox McMahon, Circuit Court Judge

Opinion No. 4765
Heard May 19, 2010 – Filed December 15, 2010

AFFIRMED

Deputy Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

FEW, C.J.: Darrell Burgess was convicted of the drug-related murders of David Slice and Kim Fauscette. The trial judge sentenced Burgess to two life sentences for the murders, and five years for possession of a firearm during the commission of a violent crime. Burgess has raised two issues on appeal. First, he challenges the trial judge's decision not to remove a juror who realized after jury selection that the brother of Slice's estranged wife worked for him. Second, he argues the judge violated his constitutional right to present a complete defense by excluding evidence of third party guilt. We affirm.

I. Facts

Slice and Fauscette lived together in a "crack house" in Gaston with at least one other person. During the evening of September 5, 2005, and continuing into the following morning, Slice, Fauscette and a crack dealer named James Johnson had been talking, watching television, drinking alcohol and smoking crack in the mobile home. Before dawn on September 5, Burgess arrived unexpectedly and Fauscette allowed him inside. Burgess explained that he wrecked his car and was running from the police. Burgess did not mention that Michael Wise drove him to his house after the wreck so Burgess could get his gun and Wise was waiting outside. Burgess, Slice, Fauscette and Johnson sat around for ten or fifteen minutes while Burgess waited for Johnson to leave. Eventually, Burgess stood up and shot Slice three times and Fauscette twice, killing them both. Johnson ran away when Burgess's gun emptied. Burgess fled the scene with Wise.

II. The Decision not to Remove the Juror

After the jury was selected but before opening statements, a member of the jury notified the deputy clerk of court that "he recognized a lady in the audience."[1] The judge brought the juror into the courtroom to question him. The juror explained that after jury selection he recognized a woman in the courtroom whom he believed to be Georgette Slice. Georgette, who had not been introduced to the jury panel during voir dire, was the estranged wife of

[1] The record does not indicate whether the jury had been sworn.

David Slice, and the sister of a man the juror supervised at work. The judge asked the juror if he could still be a fair and impartial juror to both the State and the defense, to which the juror responded "yes, sir." Outside of the juror's presence, the judge asked if either side wanted additional voir dire. Burgess requested that the juror be asked whether he discussed the situation with any other members of the jury, and that the juror be removed for cause. After returning to the courtroom, the juror testified he had not discussed it with anyone in the jury room. He again testified he could be fair and impartial to both sides. The juror also testified he had not heard anything about the case and did not even know the murders occurred. Neither side requested further voir dire.

We find no error in the judge's decision not to remove the juror. First, the fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror. See State v. Jones, 298 S.C. 118, 121, 378 S.E.2d 594, 596 (1989) ("The mere fact that a person is a friend or acquaintance of the deceased does not render him incompetent as a juror."); State v. Wells, 249 S.C. 249, 259-60, 153 S.E.2d 904, 909-10 (1967) (affirming qualification of a juror who directly employed victim a year or more prior to trial); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree."). Second, the juror did not conceal any information requested during voir dire.[2] Finally, the judge acted within his discretion in finding the juror could be fair and impartial. See State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009) (describing the trial judge's broad discretion to determine whether a juror is qualified); State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007) ("A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court . . . .").

[2] The trial judge asked whether "any member of the jury panel or a member of your immediate family[,] were they close personal friends of the victims . . . ?" The record does not indicate whether the juror even knew David Slice. They were not "close personal friends." The only other relevant questions were whether the jurors "had any knowledge about the case" or had ever "heard or known anything about the case from any source whatsoever[.]"

Burgess argues, however, that the juror should have been excused based on the supreme court's reasoning in State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002). We believe Burgess misinterprets the opinion. In Stone, the State called the defendant's aunt to testify during the penalty phase of a capital trial. 350 S.C. at 448, 567 S.E.2d at 247. One of the jurors realized she knew the aunt, and the trial judge granted the State's request to remove the juror. Id. On appeal, the supreme court quoted its decision in State v. Woods:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

350 S.C. at 448, 567 S.E.2d at 247 (emphasis added) (quoting State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001)). Calling Woods "instructive," the Stone court held the removal of the juror was error because neither of the criteria listed in Woods existed. 350 S.C. at 448-49, 567 S.E.2d at 247-48. First, the court stated "[i]t is patent here that [the juror's] failure to disclose her acquaintance with [the witness] was innocent." 350 S.C. at 448, 567 S.E.2d at 247. Second, the court stated "we find her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges." 350 S.C. at 448, 567 S.E.2d at 247-48. However, either of those findings would have independently rendered the trial judge's removal of the Stone juror erroneous.

When a party contends a juror should be removed for failure to disclose information during voir dire, Stone requires the trial judge to consider the two criteria from Woods. If the judge finds both of the Woods criteria exist, the judge must remove the juror. However, if either of the criteria is absent, the judge may not remove the juror on that basis. Here, we need only look to the absence of the first criterion to affirm. As in Stone, this juror's failure to

disclose the information was innocent. Thus the removal of the juror would have been error. See Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) ("Where a juror, without justification, fails to disclose a relationship, it may be inferred . . . that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284)).

Finally, Burgess argues the trial judge applied the wrong legal standard in deciding not to remove the juror. In making this argument, Burgess focuses on one comment made by the judge immediately after he denied the motion to remove the juror: "I think I have to take jurors at their word. I can't second guess that. . . . I can't sit up here and decide that jurors won't follow the law." The State contends the argument is not preserved for appellate review. We agree.

The rules of issue preservation impose on counsel a duty to challenge a statement of law made by the trial judge which counsel believes to be erroneous.

> A litigant must object to inadequate . . . conclusions of law in order to give the trial court an opportunity to correct them. . . . While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse the failure to seek correction of an error once the complaining party becomes aware of it.

89 C.J.S. Trial § 1134 (2001). See also I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it has ruled wrongly . . . ."). Burgess's failure to challenge the judge's comment and seek clarification of the basis of his ruling leaves the issue unpreserved for two reasons.

First, we cannot determine the correct context in which to interpret the comment. Burgess argues the judge was stating the legal standard he had used in deciding not to remove the juror. The State argues, however, the comment simply indicates the judge expected the jurors to follow his

instructions on the law. See U.S. v. Olano, 507 U.S. 725, 740 (1993) (noting "the almost invariable assumption of the law that jurors follow their instructions") (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)). Second, even if he was addressing the standard for removing the juror, we cannot determine that he applied the wrong standard. The judge made the comment immediately after he ruled. In the ruling itself, however, he stated: "I would have to deny your motion based on State v. Elmore." While the comment cited by Burgess would indicate the judge used an incorrect standard, the reference to Elmore indicates he used the correct standard.[3]

If Burgess had sought correction of the alleged error at trial, we would be able to determine which issue the trial judge was addressing, and whether he was correct. Because we cannot determine either, the issue is not preserved.

III. Third Party Guilt and the Right to Present a Complete Defense

Burgess offered the testimony of five witnesses who would have testified that the victims had been threatened over their drug debts in the months leading up to the murders. On appeal he contends the trial judge's

[3] In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the defendant asked the trial court to disqualify a juror for cause because one of the assistant solicitors was the juror's daughter's closest friend. 279 S.C. at 420, 308 S.E.2d at 784. The supreme court characterized the trial judge's ruling as follows: "The trial judge re-examined [the juror] and assured himself that the juror was impartial." Id. (emphasis added). The Elmore court then cited State v. Gulledge, in which the supreme court stated: "The trial judge has the duty to assure himself that every juror is unbiased, fair and impartial." 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982) (emphasis added). Moreover, after the juror in the case before us initially testified he could be fair and impartial, the judge asked both sides if they requested any additional voir dire. If the judge felt he was bound by the juror's answer, he would have had no reason to offer further questioning.

decision not to allow their testimony before the jury violated his constitutional right to present a complete defense. We conclude the judge ruled correctly.

The United States Constitution guarantees a criminal defendant the right "to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986). This right is also guaranteed by our State constitution: "Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense . . . ." S.C. Const. art. I, § 14 (2009). See S.C. Code Ann. § 17-23-60 (2003) ("Every person accused shall, at his trial, be allowed . . . to produce witnesses and proofs in his favor . . . ."); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). In Chambers v. Mississippi, 410 U.S. 284 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302. However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." U.S. v. Scheffer, 523 U.S. 303, 308 (1998). The exclusion of witness testimony does not violate a defendant's constitutional right to present evidence so long as the evidence rules are "not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Id. (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). In this case, Burgess's argument that his right to present a defense was violated is refuted by the trial judge's correct application of the law of third party guilt to the facts of the case.

As the trial judge correctly stated, the admissibility of evidence of third party guilt is governed by the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). See State v. Cope, 385 S.C. 274, 292-93, 684 S.E.2d 177, 186-87 (Ct. App. 2009) (quoting State v. Gregory as the rule governing admissibility of evidence of third party guilt); State v. Swafford, 375 S.C. 637, 641-43, 654 S.E.2d 297, 299-300 (Ct. App. 2007) (affirming application of State v. Gregory). In Gregory, our supreme court stated:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence

> which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104-05, 16 S.E.2d at 534-35 (internal citations omitted).

The trial judge applied the Gregory standard correctly. The judge listened to each witness's testimony outside the presence of the jury and provided Burgess the opportunity to argue its admissibility. After quoting Gregory, the judge noted that some of the evidence related to events occurring more than eight months before the murders, and that even the most recent events occurred more than two weeks before. He found that none of the evidence was inconsistent with Burgess's guilt and concluded "it's mere conjecture or surmise." The exclusion of the testimony was consistent with Gregory, and within the trial judge's discretion.

Burgess argues, however, that this case is controlled by the decision of the United States Supreme Court in Holmes v. South Carolina, 547 U.S. 319 (2006). Burgess is correct that the Supreme Court concluded "the rule applied in [State v. Holmes][4] by the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" 547 U.S. at 331 (quoting Crane, 476 U.S. at 690). However, Burgess fails to understand that it was not the rule of Gregory which offended the defendant's rights. Rather, it was the "radically changed and extended" rule of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), and State v. Holmes. 547 U.S. at 328-31. In fact, the Supreme Court specifically stated that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence. 547 U.S. at 328. Holmes v. South

[4] 361 S.C. 333, 605 S.E.2d 19 (2004).

Carolina preserves Gregory as the appropriate standard for evaluating the admissibility of evidence of third party guilt. The trial judge in this case applied Gregory correctly, and there was no error.

AFFIRMED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas T. Bryant, Jr., Appellant.

Appeal From Richland County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4766
Heard November 3, 2010 – Filed December 15, 2010

REVERSED AND REMANDED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon, Jr., Solicitor Warren B. Giese, all of Columbia, for Respondent.

HUFF, J.: Thomas T. Bryant, Jr. was convicted of murder in the death of Daniel Austin. Bryant appeals, asserting the trial judge erred in (1) refusing to admit into evidence a dispatch log of a 911 call and (2) refusing to instruct the jury on the defense of habitation. We reverse and remand for a new trial.[1]

FACTUAL/PROCEDURAL BACKGROUND

The record shows Bryant is a paraplegic who is confined to a wheelchair. At the time of this incident, Bryant had been living at a Days Inn Hotel, located approximately 150 yards from the "Bottoms Up" nightclub. On the night of July 22, 1999, Bryant met Austin at the nearby nightclub. Austin, who was at the club with some other men from North Carolina, became friendly with Bryant. As the night wore on, both Bryant and Austin became intoxicated.

There is conflicting evidence on the relationship of the two men that evening and what occurred between them. An employee of the club characterized the two as being "very chummy," and observed no arguments, fighting, or violence between Bryant and Austin. According to Bryant, Austin and the two other men with Austin pressed Bryant to obtain some marijuana. Bryant told them "he did not do that" and informed them he did not know where to obtain any. At approximately 3:30 a.m. on July 23, 1999, Bryant and Austin left the nightclub. The nightclub employee testified that just before they left, Bryant had fallen from his wheelchair and the employee and Austin assisted Bryant back into the chair and helped him out the door. Austin then continued to help Bryant down the road toward the Days Inn, "pushing him along, still talking, still carrying on, having a good time." Bryant, however, testified he was attempting to leave the club by himself when Austin followed him in the parking lot and was on the back of his wheelchair, telling Bryant to let him help him.

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[1] Bryant was initially tried and convicted of Austin's murder in 2001. That conviction was reversed by the supreme court in 2006 based on the improper admission of Bryant's prior firearms convictions, and Bryant was re-tried in 2008. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). It is from his second conviction for murder that Bryant appeals.

Nellie Connell, the night auditor and desk clerk at the Days Inn, was working the night shift when in the early morning hours she observed a gentleman pushing Bryant in his wheelchair. According to Connell, the two men were laughing and talked "like two buddies." As she watched them, she saw Bryant fall out of his wheelchair when they hit a speed bump in the parking lot. The other gentleman then put Bryant back into his wheelchair.

Bryant testified he repeatedly told Austin he did not need his help. When Austin continued, Bryant stopped his chair and told Austin he did not want his help and Austin should leave him alone and let him go. Austin then pushed Bryant, causing him to almost fall from his chair. Austin and Bryant began swinging at each other and Bryant was knocked from his chair. Austin then picked Bryant up and placed him back in his wheelchair. As Bryant attempted to roll away, Austin grabbed the back of his chair and they argued again. As they rolled down the street, Bryant stopped again and told Austin to leave him alone, but Austin began cussing at Bryant, harassing him again for some drugs. Bryant stated another altercation ensued in which Bryant was again knocked from his chair, but this time Austin kicked Bryant in the face twice. Because he could not get away from Austin, Bryant finally "went along with it," and the two ended up outside Bryant's room at the Days Inn.

Bryant claimed he was scared to open the door to the room with Austin standing there because Austin had been pressing him for marijuana and they had been fighting. He attempted to stall in opening his door and Austin tried to snatch a pouch from him, which contained his room key, causing the contents of the pouch to fall to the ground. The two men cussed at each other, and Austin left, presumably to go to the front desk to obtain a room key. During this time, a gentleman named Mr. Hawkins walked through, and Bryant asked Hawkins to help him by "get[ting] somebody to call" because "they done beat me up and I feel like they're going to rob me." Bryant testified he referred to "they" because he was concerned one or two of the other men with Austin that night might be "hanging back waiting." Hawkins agreed to go to the desk and get the night clerk to call the police. Thereafter, Bryant found his key and opened the door to his room. Once he entered, but before he could shut his door, Austin came in the room behind him and shut the door. Bryant testified he did not invite Austin into his room and did not

want him in there. Bryant maintained he was scared, as Austin then stated, "I'm going to kill you," and Austin had shut the door to the room. Bryant then opened a drawer to a nightstand and pulled out a pistol. When he turned around, Austin, who was "a good six feet in the door" was coming toward him, and he shot Austin "once[,] . . . twice, maybe a few more times." According to Bryant, Austin fell, got right back up, opened the door and ran from the room. Bryant dropped his pistol on his bed, retrieved a shotgun from his dresser, rolled out of the door and saw Austin standing in the breezeway. Bryant then started shooting Austin until his shotgun was empty.

Bryant further testified, at the time he saw Austin in the breezeway, "I had done had -- I'm seeing red. I'm very angry, mad. I've been done like this -- I was done like this for no reason. And when I seen him, I started shooting him, and I just -- I just shot. I shot my shotgun 'til it was -- I believe it was empty." Bryant explained he did not know if Austin had a weapon or not, but he was concerned Austin could get his weapon, and stated, "I was scared to death." Bryant stated, after having been treated the way he was, he was not thinking and recognized, "I was just seeing red because I'd done had enough. I'd done been beat, kicked and everything over something that I didn't even do." He claimed he did not plan on killing Austin, but he did so because he was scared for his life and did not feel he had any other options at that time, as he felt Austin was going to hurt him badly or kill him. Bryant further acknowledged that he was angry and he grabbed his shotgun, and when Austin fell and then jumped up and ran, he did not know if he had hit Austin, but he was scared because he believed another person was out there besides Austin.

When the authorities arrived, Austin was lying in the breezeway bleeding from gunshot wounds, and shots were being fired from Bryant's room. After a standoff lasting approximately twenty minutes, officers heard one final, muffled pistol shot. The officers entered Bryant's room and found Bryant on the floor with a self-inflicted gunshot wound to his stomach. Bryant was transported to the hospital for treatment, but Austin died at the scene.

An autopsy showed Austin suffered from birdshot and buckshot wounds, as well as three standard bullet gunshot wounds. Two of the

standard bullets, consistent with a .32 caliber projectile, were recovered from the upper portion of the right side and just above the hip on the right side of Austin's body. The pathologist testified the most deadly or dangerous shot, and the cause of Austin's death, was the gunshot delivered to the upper portion of Austin's right side, which fractured a rib, passed through the right lung, ruptured the aorta, and passed through the left lung. He opined that after receiving this gunshot, about half of Austin's blood volume would have been immediately pouring out into his chest, his blood pressure would have dropped, he would start to lose consciousness, and within seconds he would have been on the ground. While a wound to Austin's left side, where shotgun pellets entered his left lung, would have been a dangerous wound, it was not fatal in an immediate manner as was the standard bullet wound to the right upper side of Austin's body. Had this fatal gunshot wound from the .32 caliber projectile occurred first, Austin would have been able to walk a short period of time, and it was not outside the realm of possibility that he could have run twenty feet.

Following presentation of all the evidence, the trial judge discussed the matters he intended to charge. Bryant noted he requested a charge on the defense of habitation.[2] The trial judge recognized Bryant had requested the charge but declined to include it in his instructions to the jury, noting he was charging, as part of the self-defense instruction, that a defendant had no duty

[2] Trial counsel, citing State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007), and State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923), requested the following defense of habitation charge: "A person may use deadly force to protect his home. Thus, he may use deadly force to eject a trespasser who is in his house or in the area immediately surrounding his house. For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances. Stated differently, unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger [of] sustaining serious injury or damage. Instead, the defense of habitation provides that where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser."

to retreat while on his own premises before acting in self-defense and, in addition was charging "words accompanied by hostile acts, prior difficulties, age, prior violence by the victim, threats by the victim, no other way to avoid the danger, and then no duty to retreat if on your own premises, [and] degree of force continuing until the threat of harm is ended," finding defense of habitation was going to be covered by his charge. The trial judge thereafter charged the jury as he indicated and did not include the defense of habitation charge sought by Bryant.[3] Bryant was convicted of murdering Austin and was sentenced to life imprisonment without parole. This appeal followed.

ISSUES

I. Did the trial judge err by refusing to instruct the jury on the defense of habitation because a self-defense instruction was not sufficient to cover this separate distinct defense when Bryant testified he was threatened in and around his hotel room and Bryant was entitled to this instruction under the facts of this case?

II. Did the trial judge err by refusing to admit evidence of a Richland County Sheriff's Department computer-aided dispatch record that showed the Days Inn night clerk told the dispatch operator that a man was being "pushed around and pushed out of wheelchair" because this document was admissible as a business record, and the trial judge erred by excluding this critical evidence of self-defense?

[3] While trial counsel did not thereafter except to the charge as given, the matter is still preserved for our review. See State v. Johnson, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998) (wherein our supreme court set forth the following preservation rule: "[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions.").

LAW/ANALYSIS

I. Defense of Habitation Charge

On appeal, Bryant asserts the defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection, that an instruction that the same elements required by law to establish self-defense apply to the defense of habitation with the exception of duty to retreat is an improper charge as it incorrectly implies the defense of habitation requires a defendant to establish his person or property was in danger of injury or harm, for the defense of habitation to apply a defendant need only establish a trespass has occurred and the chosen means of ejectment were reasonable, and the defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was defending himself from imminent attack on his own premises. Bryant argues evidence that Austin entered his hotel room without consent after Austin had beaten him, that Bryant asked another person to summon help, and that Austin was not a guest in his room and had threatened to kill him is evidence Bryant was acting in self-defense, as well as evidence he was attempting to eject a trespasser, therefore entitling him to a charge on the defense of habitation.

The State acknowledges the law provides as to the defense of habitation that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection, and one is permitted to use deadly force against a trespasser, with no duty to retreat before taking the life of the trespasser. However, the State asserts Bryant was not entitled to a defense of habitation charge because there was no evidence indicating that he was attempting to eject a trespasser. Specifically, the State contends there was no evidence indicating Bryant was attempting to eject Austin when he shot him in the hotel room. Rather, it maintains Bryant's testimony clearly indicates that ejecting Austin was not his concern during his assault on Austin, citing Bryant's testimony that he followed Austin out to the breezeway and that he saw red, he was very angry and mad because he had been "done like this for no reason," when he saw Austin he started shooting him, and he shot until his shotgun was empty. The State further contends, even if the trial judge erred in declining to give the requested

defense of habitation charge, the error was harmless as Bryant's guilt was conclusively proven by competent evidence at trial and no other rational conclusion could have been reached.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Gaines, 380 S.C. at 31, 667 S.E.2d at 732. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

The defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). "One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation." State v. Lee, 293 S.C. 536, 537, 362 S.E.2d 24, 25 (1987). "For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." Rye, 375 S.C. at 124, 651 S.E.2d at 323. Unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage. Id. Rather, the defense of habitation provides "where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." Id. "The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was 'defending himself from imminent attack on his own premises.'" State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001) (quoting Lee, 293 S.C. at 537 362 S.E.2d 25). Although self-defense and habitation are analogous, the defenses are not identical. Rye, 375 S.C. at 124, 651 S.E.2d at 323.

When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion. State v. Sparks, 179 S.C. 135, 137, 183 S.E. 719, 720 (1936).

> A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion.

State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923).

In the case at hand, although there is conflicting evidence as to the relationship between Austin and Bryant on the night in question, Bryant presented evidence that he was in a vulnerable position, being confined to a wheelchair, that he argued with and was assaulted by Austin and attempted to get away from Austin prior to entering his room at the hotel, that he attempted to prevent Austin from entering his room with delay tactics, that Austin was not invited in the room but managed to enter it after Bryant entered but before Bryant was able to close the door, that Austin advanced toward Bryant and threatened to kill Bryant, and that Bryant then shot Austin with his pistol while in the hotel room. Thus, there is evidence from which the jury could conclude Austin became a trespasser by forcing himself into Bryant's dwelling and that Bryant was defending himself from imminent attack on his own premises. Further, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion. Accordingly, contrary to the State's assertion, there is evidence Bryant was attempting to eject a trespasser from his dwelling such that he was entitled to a defense of habitation charge.

In arguing there was no evidence Bryant was attempting to eject a trespasser from his premises, the State points to Bryant's testimony that he was mad and angry when he followed Austin out of his room and into the

breezeway where Bryant then shot at Austin until his shotgun was empty. We recognize the law provides that the right of the occupant to expel a trespasser and to use such force as might be necessary, even to killing him, is limited to the place of his habitation and perhaps his curtilage, and the defense of habitation does not exist at the place of a homicide that is away from the habitation and away from the curtilage. Bradley, 126 S.C. at 537, 120 S.E. at 243. See also State v. Boyd, 126 S.C. 300, 302, 119 S.E. 839, 840 (1923) (holding that one on his land, adjoining a public road, if assaulted by another who is on such road, is bound to retreat before taking the life of his adversary, if there is probability of his being able to escape without losing his life or suffering grievous bodily harm, the reason of this distinction being that, under the circumstances, he would not have the right to eject his adversary from the place where the adversary had a right to be); State v. Rochester, 72 S. C. 194, 203, 51 S. E. 685, 688 (1905) (holding, if the defendant was attacked while on his own premises by the deceased, who was at that time on the public highway, or where he had a right to be, then the defendant was bound to retreat before taking the life of his adversary, if there was a probability of his being able to escape without losing his life or suffering grievous bodily harm, the reason being that under such circumstances he would not have had the right to eject his adversary from the place where he had a right to be). Had the evidence shown Bryant peaceably ejected Austin from his room and then followed Austin out to the breezeway, a place Austin was entitled to be and no longer a trespasser in Bryant's dwelling, it is unlikely that Bryant would have been entitled to a defense of habitation charge had he thereafter inflicted a fatal blow. We need not decide that point, however, as there is evidence that when Bryant fired the fatal shot, he was attempting to eject Austin as a trespasser from his dwelling. Bryant testified that he shot Austin with his pistol while Austin was present in his room, and then followed Austin out into the breezeway, leaving his pistol behind and shooting him there with his shotgun. The testimony of the pathologist who performed the autopsy on Austin indicates that the injury that caused Austin's death was inflicted by the pistol and not the shotgun. Accordingly, the fatal shot, based on this testimony, occurred while Austin was in Bryant's room and Bryant was attempting to eject him as a trespasser. Though Bryant's testimony that he thereafter followed Austin outside his room and continued to shoot Austin, at least in part out of anger, may be evidence that Bryant's goal was not, in fact, to eject Austin as a trespasser, we

find such determination is for the jury, as there was evidence adduced at trial from which the jury could find Bryant was attempting to eject a trespassing Austin from his dwelling when Bryant inflicted the fatal blow.

Further, although self-defense and defense of habitation are analogous, it is insufficient to charge only self-defense when a charge on defense of habitation is warranted. In Rye, the trial judge actually charged the jury in part on the defense of habitation, instructing that the law recognized the right of every person to defend his or her premises, "but differentiated habitation from self-defense with the sole caveat that '[a] person defending his or her home or premises . . . has no duty to retreat.'" Rye, 375 S.C. at 123, 651 S.E.2d at 323. The court found, by instructing the jury that "'[t]he same elements required by law to establish self-defense apply to the defense of habitation, with the exception of the duty to retreat,' the charges [in that case] incorrectly implied that [defense of] habitation requires a defendant to establish that his person or property was in some danger of injury or harm." Id. at 123-24, 651 S.E.2d at 323. Thus, the court in Rye determined the jury was not properly charged on the defense of habitation. Likewise, the trial judge's charge on self-defense in the case at hand was clearly insufficient to cover the law on the defense of habitation.

Finally, we believe there is no merit to the State's assertion that any error in the failure to charge the jury on the defense of habitation is harmless because of overwhelming evidence of Bryant's guilt. In making this argument, the State points to evidence that is either incorrect, in dispute, and/or irrelevant to the defense of habitation. Essentially, the arguments raised by the State in this regard are matters for the jury. At any rate, inasmuch as the trial judge effectively deprived Bryant of an entire defense, the error here cannot be harmless.

II. Exclusion of 911 Log

Because we reverse Bryant's conviction and remand for a new trial based on the failure of the trial judge to charge defense of habitation, it is unnecessary to address the second issue. See Rye, 375 S.C. at 122-23, 651 S.E.2d at 323 (noting, although appellant presented a total of eight issues for appellate review, the court, exercising its prerogative to address only those

issues necessary to resolution of a case, addressed only the refusal of the trial court to charge Rye's proposed charge on the defense of habitation). See also State v. Mekler, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008) (affirming this court's decision reversing defendant's conviction and granting a new trial based on failure to charge involuntary manslaughter, but finding it unnecessary to address an issue concerning the admission of evidence decided by this court, noting whether this issue will arise on retrial and its resolution will depend upon the evidence and testimony presented, and it will be for the trial judge's consideration).

CONCLUSION

For the foregoing reasons, we hold Bryant was entitled to a defense of habitation charge as evidence was presented to show Bryant was attempting to eject a trespasser from his premises when he inflicted the fatal blow. Accordingly, we reverse Bryant's conviction and remand for a new trial.

REVERSED AND REMANDED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Danny R. Pilgrim,	Respondent,
v.	
Billy Eaton and Rufus Revis, and S.C. Workers Compensation Uninsured Employers' Fund,	Defendants,
Of Whom Billy Eaton and Rufus Revis are	Appellants,
And S.C. Workers Compensation Uninsured Employers' Fund is also	Respondent.

Appeal From Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 4767
Heard May 19, 2010 – Filed December 15, 2010

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Thomas Bailey Smith, of Mt. Pleasant, for Appellants.

Amy V. Cofield, of Lexington; Ernest Caskey Trammell, of Anderson, for Respondents.

FEW, C.J.: This appeal presents two questions related to workers' compensation. The first is the factual question of whether Rufus Revis is the statutory employer of the claimant, Danny Pilgrim. The answer to this question determines the jurisdiction of the workers' compensation commission. The second is whether the commission committed an error of law in its method of calculating Pilgrim's average weekly wage. We affirm the commission on the first question, but reverse and remand on the second.

I. Facts and Procedural History

Danny Pilgrim worked for years as a maintenance worker at an apartment complex but lost that job in January, 2005. On January 25, 2005, Pilgrim began working for Sean Kern. Kern had contracted with Billy Eaton to provide carpenters for Eaton's unincorporated business Just Garages Plus. Pilgrim's first job assignment for Kern was to work on the roof of a garage Eaton was building for a customer.[1] On January 28, Pilgrim fell from the roof and seriously injured his back. The commission determined that Pilgrim sustained a work-related injury and awarded him temporary total disability benefits.

The commission found that both Eaton and Rufus Revis were Pilgrim's statutory employers. Revis had been the sole owner and operator of the garage business until selling an interest in it to Eaton in 2002. Revis contends that he sold the entire business to Eaton, and therefore he is insulated from workers' compensation liability. The commission found that

[1] Kern is not a party to this claim. The commission found he was not subject to liability under the Workers' Compensation Act.

Eaton and Revis continued to operate the business together as a "joint effort," and that both are liable to Pilgrim as his statutory employers. Revis appeals this finding. As to the second question, both Eaton and Revis argue the commission erred in its calculation of Pilgrim's average weekly wage. The circuit court affirmed the commission on both issues. We affirm the finding that Revis was Pilgrim's statutory employer. We reverse the determination of average weekly wage, and remand to the commission. On remand, the commission shall calculate Pilgrim's average weekly wage in compliance with section 42-1-40 of the South Carolina Code (Supp. 2009), and set the compensation rate for his benefits accordingly.

II. Statutory Employer Determination

The question of whether Revis is Pilgrim's statutory employer is considered "jurisdictional" because its answer determines the jurisdiction of the commission under the Workers' Compensation Act. See Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997). The commission's finding that Revis is a statutory employer means that Pilgrim's claim against him is subject to the exclusivity provision of the Act. See Glass, 325 S.C. at 201, 482 S.E.2d at 50, n.1.[2] As to these jurisdictional facts, an appellate court must make its own findings according to the preponderance of the evidence after a thorough review of the entire record. Glass, 325 S.C. at 202, 482 S.E.2d at 51.

The parties do not dispute that Just Garages Plus qualifies as Pilgrim's statutory employer under section 42-1-410 of the South Carolina Code

[2] The exclusivity provision of the Act is found in section 42-1-540 of the South Carolina Code (1985). The statutory employer liability of "contractors" such as Eaton and Revis is governed by section 42-1-410 (1985). When the commission determines that a "contractor" qualifies as a statutory employer pursuant to section 42-1-410, the exclusivity provision of section 42-1-540 applies to claims made against that contractor.

(1985). Eaton concedes that he is an owner[3] and operator of the business, and is thus liable for benefits as determined by the commission. We agree with the commission that Revis is also liable to Pilgrim. We find that Revis remained an owner and operator of Just Garages Plus at least until the time of Pilgrim's injury, and is therefore jointly liable with Eaton to Pilgrim as his statutory employer.

Revis was the sole owner and operator of Just Garages until 2002 when he sold an interest in the business to Eaton, and the name was changed to Just Garages Plus. Because Revis was a licensed contractor, and Eaton was not licensed, Revis was required to stay involved in the business. South Carolina law requires that contracting work, such as the work performed by Just Garages Plus, be performed only by licensed contractors. S.C. Code Ann. § 40-11-30 (2001). A person who is not a licensed contractor may not even obtain a building permit for such work. See S.C. Code Ann. § 40-11-370(A)-(B) (2001 & Supp. 2009). It would have been unlawful for any person other than Revis to do the work of Just Garages Plus. S.C. Code Ann. § 40-11-370(B) (Supp. 2009) ("It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter."). Therefore, in order for the business to function after Eaton became involved, Revis had to continue to act as the general contractor.

Moreover, Revis's financial interest in the sale to Eaton was the monthly installment payments he received from Eaton. Eaton was unable to make those payments without income from jobs for which Revis acted as the contractor and obtained the required permits. Thus, both Revis and Eaton depended on Revis's integral participation in the work of Just Garages Plus. Further, at least as late as April 2, 2003, Revis admitted he still operated the business. On that date, he signed an agreement with the commission under the name "Rufus Revis d/b/a Just Garages, Respondent." The agreement

[3] The use of the term "owner" here refers only to Eaton's status as owner of Just Garages Plus, and not to his status as a statutory employer. Eaton is a statutory employer as a "contractor" under section 42-1-410. The statute relating to the statutory employer status of an "owner" is section 42-1-400 of the South Carolina Code (1985), and is not at issue in this appeal.

states "from June 22, 2002 . . . , the Respondent was operating and continues to operate . . . ." Finally, when Revis eventually quit obtaining building permits for Just Garages Plus, Eaton stopped building garages.

Eaton, doing business as Just Garages Plus, contracted to build a garage in January, 2005. The building permit required for the job bears the name "Rufus Revis" as "Contractor." While there is some uncertainty about whether Revis actually obtained this particular permit, we find that he did.[4] Revis was therefore the general contractor for the job. S.C. Code Ann. §§ 40-11-30, 40-11-20(8)-(9) (2001). On January 28, 2005, Pilgrim fell from the roof of the garage and was injured. As the general contractor and the only person allowed under the law to "engage in construction" on that job, Revis was doing business as Just Garages Plus. We affirm the commission's decision that Revis was Pilgrim's statutory employer.

Our holding in this case has no impact on the liability of a seller of a business for workers' compensation benefits owed to employees of the business injured after the sale. On these unique facts, we hold that Revis did not sell the business. Rather, he remained one of its owners and operators. Just like Eaton, Revis was acting in his individual capacity, doing business as Just Garages Plus.

III. Average Weekly Wage Calculation

In making its award of temporary total disability benefits to Pilgrim, the commission set a compensation rate based on its calculation that Pilgrim's average weekly wage was $720. Eaton and Pilgrim appeal this calculation. As to this calculation, an appellate court may not reverse the commission's

[4] Eaton testified that Revis was the only person to obtain permits for Just Garages Plus at the time of Pilgrim's injury. Revis was equivocal on the subject. We find his testimony is evasive and not credible. At one point Revis testified he did not obtain the permit. He later testified he did not know whether he did and that he would "have to go back . . . to the courthouse and find that out." He admitted the permit "shows [his] name printed by someone."

decision unless substantial rights of the appellant have been prejudiced because the decision is affected by an error of law, or because the factual findings are clearly erroneous in view of the reliable, probative, and substantial evidence. S.C. Code Ann. § 1-23-380(5) (Supp. 2009). See Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785-86 (Ct. App. 2007).

When Pilgrim was injured on January 28, 2005, he had worked only 29.5 hours for Kern, all on the job for Eaton and Revis. He was paid for this time at the rate of $18 an hour. Other than this, neither party presented any direct evidence for the commission to use in calculating average weekly wage. The commission calculated Pilgrim's average weekly wage by multiplying $18 by a forty-hour week. We believe the commission's calculation of average weekly wage amounts to an error of law and resulted in an average weekly wage that is clearly erroneous. Because we find these errors have prejudiced substantial rights of the appellant, we reverse.

The Workers' Compensation Act defines average weekly wages precisely: "'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 the injury . . . ." S.C. Code Ann. § 42-1-40 (Supp. 2009). The section sets forth four alternative methods for the commission to use to calculate the average wage. Forrest, 373 S.C. at 308, 644 S.E.2d at 786. The primary method of calculation requires that "'[a]verage weekly wage' must be calculated by taking the total wages paid for the last four quarters . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40. The commission must use this method unless "the employment, prior to the injury, extended over a period of less than fifty-two weeks," or unless "for exceptional reasons" it would be unfair to do so. Id.[5]

[5] The "exceptional reasons" alternative, which is discussed below, is based on the following paragraph from section 42-1-40:

In this case, the record shows that Pilgrim had been working at the job for Kern for less than one week. Therefore, it was not permissible for the commission to use the primary method of calculating Pilgrim's average weekly wage. Under this circumstance, the commission is required to consider which of the alternative methods for calculating average weekly wage it will use. Each alternative is preceded by a description of the conditions under which the commission may use the alternative. Id. Before the commission may use any one of these alternatives, the commission must find, or the record must clearly show, that the necessary conditions exist.

The commission failed to comply with section 42-1-40 in two important respects. First, it failed to make any factual findings showing which of the alternatives in the section was appropriate to use for calculating Pilgrim's average weekly wage. Second, it used a method of calculation which is not permitted under any scenario.[6] The commission found:

> At the time of the accident, Claimant was earning $18 an hour. . . . The amount yields an average weekly wage of $720.00 per week and a compensation rate of $480.24. Although he worked for only a short period of time, several days, it is reasonable to conclude that is the amount he would be earning were it not for the accident.

> 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.

[6] It is conceivable that the method used by the commission could have been employed under the "exceptional reasons" alternative, but only if the commission made the requisite factual findings.

To illustrate that this calculation is an error of law, we consider each of the alternatives available under the section in light of the facts of this case. The first alternative to the primary method is to be used "[w]hen the employment . . . extended over a period of less than fifty-two weeks . . . ." Id. In such a situation, the commission must use "the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages . . . ." Id. Section 42-1-40 states that "the method . . . shall be followed, as long as results fair and just to both parties will be obtained." Id. The section also contains a requirement that this particular method be "practicable." Id.[7]

Therefore, in order for the commission to use the first alternative to the primary method, two predicate conditions must exist. First, it must be "practicable" to use the first alternative method. Second, the calculation must yield a result which is "fair and just to both parties." Ordinarily, the commission should make factual findings of these two predicate conditions. In some situations, however, it may be clear from the record that both of the two predicate conditions exist. In this case, neither of them exists.

The "practicable" requirement is not met simply because 29.5 hours of wage data cannot yield a reasonably accurate calculation of an average that is designed to be based on a year of data. The "fair and just" requirement is not met for the same reason, and because Pilgrim's own testimony establishes that the commission's calculation is clearly erroneous. On cross-examination, Pilgrim testified that he earned $29 in 2005. Assuming the $29 was earned in a week separate from the week of his injury, in which he earned $531, his average weekly wage for January 2005 would have been $280.[8] Neither side

[7] This requirement is found in the provision that the third alternative method of calculation may not be used unless the first or second methods are "impracticable." Id.

[8] Making the calculation using only two work weeks results in the highest possible average. Total January earnings of $560 divided by two weeks yields an average of $280 per week. We use this calculation merely to

offered any other direct evidence of previous or subsequent earnings. The circumstantial evidence that was offered would have reduced the calculation of Pilgrim's average weekly wage even lower. When asked how much he earned in 2004 and in 2003, Pilgrim responded "I don't know." He also testified that since at least 1997 he filed no income tax returns and he paid no social security taxes.

Because the primary and first alternative methods of calculating average weekly wage were not available to the commission, it should have considered using the second alternative method.[9] This second alternative requires the commission to consider "the average weekly amount which . . . was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community." Id. Because neither of the parties mentioned the possibility of presenting such evidence, and the commission did not inquire of its availability, we cannot determine whether this would have been the appropriate way to calculate the average weekly wage.

The final alternative for calculating average weekly wage is to be employed when "exceptional reasons" exist that make it "unfair, either to the employer or the employee," to use the alternatives set forth above. Id. In that event, section 42-1-40 provides that "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." Id. This alternative may be used by the commission when it makes factual findings that explain the "exceptional reasons" it finds the other methods are "unfair." Id. See Forrest, 373 S.C. at 308-11, 644 S.E.2d at 786-

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illustrate the commission's error, not to suggest the outcome of the calculation the commission must make on remand.

[9] Section 42-1-40 provides this method is to be used "[w]here, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section . . . ." Id.

88 (affirming the commission's use of the "exceptional reasons" alternative based on specific findings which "justified deviation from the usual statutory method of . . . computation"). In this case, the commission did not make any findings to justify using the "exceptional reasons" alternative.

Appellants contend that this appeal should be resolved based on the burden of proof. Appellants argue that Pilgrim has the burden to prove average weekly wage, and thus compensation rate. They argue the lack of sufficient evidence of wages should penalize Pilgrim. We believe, however, that the question of which side bears the burden of proof as to this specific issue is not properly before us. First, neither party raised the burden of proof to the commission; and the commission did not rule on it. Second, we need not reach the question of the burden of proof because our ruling already requires the commission to recalculate the average on remand. Third, it is not clear that there is a burden of proof on the issue of average weekly wage. We address the existence of a burden of proof on the question of average weekly wage. However, we do not answer the question.

Our courts have frequently stated that the burden of proof is on the claimant to prove facts which will bring the injury under the coverage of the Workers' Compensation Act. See, e.g., Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998); Bartley v. Allendale County Sch. Dist., 381 S.C. 262, 272, 672 S.E.2d 809, 814 (Ct. App. 2009). These cases generally place the burden on a claimant to prove the injury is compensable. For example, in Clade, the supreme court placed the burden of proof on the claimant to prove her injury arose out of the scope and course of her employment. 330 S.C. at 11, 496 S.E.2d at 857. Similarly, our courts have held that the burden of proving causation is on the claimant. See Shealy v. Algernon Blair, Inc., 250 S.C. 106, 113, 156 S.E.2d 646, 649 (1967) ("The burden of proving causation rested upon claimant.").[10] However, the Act does not place the burden of proof on the claimant as to all issues. For

[10] But see Tiller v. Nat'l. Health Care Ctr. of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) (arguably calls the burden of proof on causation into question).

example, S.C. Code Ann. § 42-9-60 (Supp. 2009) specifically places the burden on the employer when asserting the defenses of intoxication or willful injury. On jurisdictional questions, our courts have stated the burden is on the claimant, and have made statements indicating the burden of proof as to jurisdictional facts may not be on the claimant.[11] Compare Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 570, 151 S.E.2d 747, 748 (1966) ("[T]he burden of proving the relationship of employer and employee is upon the claimants."); with Chavis v. Watkins, 256 S.C. 30, 34, 180 S.E.2d 648, 650 (1971) ("The burden rested upon the [employer] to show that a change in the identity of his employer was made known to [the employee].")[12] and Shuler v. Tri-County Elec. Co-op., Inc., 385 S.C. 470, 473, 684 S.E.2d 765, 767 (2009) ("It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion."); Hill v. Eagle Motor Lines, 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007) ("In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion."). Therefore, the burden of proof may vary depending on the issue before the commission.

On the question of a burden of proof for the amount of compensation due for a compensable injury, the Workers' Compensation Act is silent, and our courts have hardly spoken. In one case, however, this court cited the regulations of the commission and stated "the claimant has the burden of proving wages earned from jobs other than the one where the accident occurred." Steele v. Self Serve, Inc., 335 S.C. 323, 327, 516 S.E.2d 674, 676 (Ct. App. 1999). The reasoning of Steele, if applicable here, would actually place the burden of proving the average weekly wage from a single employer on the employer, not the claimant. Steele cited former regulation 67-

[11] We need not decide this question either, as our factual findings on the jurisdictional facts in this case would be the same regardless of who bears the burden.

[12] The Chavis court specifically stated the issue was jurisdictional. 256 S.C. at 32, 180 S.E.2d at 649.

1603(B),[13] which required a claimant to file a completed Form 20 for "each additional job" other than the one for whom the claimant was working at the moment of injury. 335 S.C. at 327, 516 S.E.2d at 676. From the requirement of filing a completed Form 20, this court imposed the burden of proof on the claimant as to that issue. Id. As to a single employer, however, the same regulation places the requirement of filing a Form 20 on the employer: "The employer's representative shall calculate the claimant's compensation rate by completing a Form 20, Statement of Earnings of Injured Employee." S.C. Code Ann. Regs. § 67-1603 A (Supp. 2009). The regulation goes on to require that "[w]age information shall be provided by the employer." Id. § 67-1603 B. The regulation also addresses what the commission may do if the employer fails to file a proper Form 20. "Failure to file and/or serve the Form 20 as set forth above may result in . . . the commissioner . . . determining the average weekly wage and compensation rate from information in the Commission's file and statements or evidence presented at the hearing . . . ." Id. § 67-1603 G.[14] Thus, applying the reasoning of Steele, the burden of proof as to the average weekly wage would be on the employer.

The overriding goal of the Workers' Compensation Act "is to compensate workers for reductions in their earning power caused by work-related injuries . . . ." Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). This statement from Stephenson was made in the context of explaining the "economic," or "earning impairment theory" of workers' compensation law in South Carolina. 323 S.C. at 116, 473 S.E.2d at 701. The starting point for determining compensation under this earning

[13] S.C. Code Ann. Regs. § 67-1603(B) (1990). The regulation was amended in 1997, and a modified version of the same requirement now is found at S.C. Code Ann. Regs. § 67-1603 H (Supp. 2009).

[14] The commission might have applied this regulation in making its decision as to Pilgrim's average weekly wage. However, the commission's written decision says nothing about doing so, or even about the regulation. The Record on Appeal does not contain a Form 20, and there no indication as to whether a Form 20 was filed by the employer. Neither party addressed a Form 20 or this regulation in their briefs.

impairment theory is the commission's calculation of the average weekly wage under section 42-1-40. The specific goal of section 42-1-40 is for the commission to calculate an average weekly wage that is fair to both the worker and the employer. Applying an older version of the section, our supreme court stated "[t]he objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity." Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). Citing Bennett, this court has stated that section 42-1-40 "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). With these general objectives in mind, however, we note the Workers' Compensation Act sets forth a framework of statutory requirements which must be specifically followed. We hold the commission's failure to correctly apply section 42-1-40 was an error of law that prejudiced substantial rights of Appellants. We reverse the calculation of average weekly wage and remand to the commission.

On remand, the commission must determine whether to allow the parties to present additional evidence, or to make the calculation based on the evidence already in the record. The commission must then comply with section 42-1-40 of the South Carolina Code. The commission must first determine which method to use in calculating Pilgrim's average weekly wage, and make factual findings on the existence of the conditions that warrant the use of the method chosen. The commission must then apply the method to the wage data before it. If the commission makes its decision on remand pursuant to regulation 67-1603, it must make that clear in its written decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rita G. Bixby, Appellant.

Appeal From Abbeville County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4768
Heard June 16, 2010 – Filed December 17, 2010

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

FEW, C.J.: On Monday December 8, 2003, Rita Bixby's son Steven Bixby shot and killed Abbeville County Sheriff's Deputy Danny Wilson and South Carolina Magistrate's Constable Donnie Ouzts. Steven Bixby's conviction and death sentence for the two murders have been affirmed by the Supreme Court of South Carolina. State v. Steven Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010). The State charged Rita Bixby with accessory before the fact and criminal conspiracy in connection with both murders.[1] She was tried and convicted on all counts in October 2007. The trial judge sentenced her to life in prison for accessory before the murders and five years for criminal conspiracy. On appeal, she contends the trial court committed error in admitting out of court statements made by Steven Bixby. She contends some of the statements were inadmissible hearsay, others should have been excluded under Rule 403, SCRE, and each of the statements violated her right of confrontation. Finally, she contends the judge failed to give adequate instructions limiting the jury's use of the statements. We affirm.

I. Facts

The supreme court described the facts surrounding these murders in detail in its opinion affirming Steven Bixby's death sentence. See Steven Bixby, 388 S.C. at 535-40, 698 S.E.2d at 576-78. We include here only those facts helpful to understanding the issues Rita Bixby has raised in this appeal.

Rita Bixby and her husband Arthur Bixby owned property and a home adjacent to South Carolina Highway 72 in Abbeville County where the South Carolina Department of Transportation had begun work on a project to widen the roadway. On Thursday, December 4, 2003, Department superintendent Glen McCaffrey and two other Department employees had an encounter with Rita, Arthur and Steven Bixby in which the Bixbys used threats of violence to convey their opposition to anyone entering their property to do any work. McCaffrey testified:

[1] The State initially sought the death penalty against Rita Bixby. However the trial judge granted her motion to dismiss the State's notice of intent to seek the death penalty, and the supreme court affirmed. State v. Rita Bixby, 373 S.C. 74, 76, 644 S.E.2d 54, 55 (2007).

> I asked Rita Bixby, Steven Bixby, and Arthur their issue . . . and why they did not want . . . us to continue our work. . . . Rita Bixby said, repeated herself over Steven and Arthur that nobody was to come on their property and do any work. She was very aggravated, cursing. . . . Rita Bixby said that the [right of way] plans were lies; that she and her family had been waiting for this moment; that nobody was coming on their property, if they did there would be hell to pay.

McCaffrey further testified that Rita Bixby was aggravated and was pointing her finger at them. She "repeatedly" told McCaffrey and the other Department employees "there would be hell to pay" and they were "going to fight till the last breath." Department inspector Dale Williams corroborated McCaffrey's testimony about the Thursday encounter. He described the Bixbys' demeanor as "very hostile" with a "lot of cursing, loud, threatening" and testified they were "threatening to kill us for trespassing." He also testified Rita Bixby was "most definitely" in charge of the meeting. When Williams told her the Department would get the Sheriff involved, Rita and Steven Bixby "both said that they would be trespassing too and they would shoot them too." Williams testified Steven Bixby said in his mother's presence that he had "quite a few" weapons inside their house. Because McCaffrey and Williams felt threatened, they went to the sheriff's department to report the situation.

On Friday, December 5, McCaffrey called the Bixbys to inform them that the State had owned a legal right of way over their property since 1960. Rita Bixby answered the telephone and began cursing. She refused to let McCaffrey talk with Arthur Bixby and demanded that McCaffrey come to the Bixby property to show her the information "now." McCaffrey and two other Department employees went to the Bixby property. Williams refused to go because he felt threatened after listening on the speakerphone to McCaffrey's conversation with Rita Bixby. When they arrived, McCaffrey and the others had another "heated discussion" with all three Bixbys for "approximately 30 minutes to an hour in the rain." Rita Bixby again stated they had been

"waiting for this moment for a long time" and the information demonstrating the existence of the right of way "is lies." She repeatedly said "there would be hell to pay" and that they "wanted this moment." McCaffrey testified the Bixbys were cursing and shouting and that Rita and Steven Bixby were pointing fingers "right up close to our faces." When McCaffrey told the Bixbys that he went to see the sheriff's department, Rita Bixby said "the sheriff's department has no authority over them," and she continued to exclaim there "would be hell to pay" and said "they would fight till their last breath."

On Sunday, December 7, Steven Bixby stopped by a social gathering at the home of Alane Taylor. During separate conversations with Taylor and her daughter Dana Newton, Steven Bixby made numerous statements related to his family's property dispute with the Department. In addition to the two statements discussed in detail in Section II.A below, Steven Bixby's statements included the following:

- He "mentioned a dispute that had been going on between his parents and the Highway Department and Sheriff’s Department over a problem they were having with land."
- He said he "was angry at law enforcement" and "something" about "shooting law enforcement."
- He said "there was supposed to be a meeting between Department of Transportation, the Sheriff’s Department, and the Bixbys at the Bixby residence."
- He also said "tomorrow is the day," "we have the guns loaded," and "when the shooting starts I will come out alive."

Both Newton and Taylor called law enforcement after their respective conversations to report what Steven Bixby said.

On Monday, December 8, after meeting with McCaffrey, Williams and others, Deputy Wilson drove to the Bixbys' home. He parked in the Bixbys' front yard and walked to the front door. With no apparent warning, Steven

Bixby shot him through the glass panes of the front door. Steven Bixby then dragged Deputy Wilson's dead body inside and waited for other officers to arrive. While he waited he called Rita Bixby, who was at Steven Bixby's apartment, to let her know the shooting had begun. According to their apparent plan, she then notified the Governor's and Attorney General's offices that "the trouble had started." When Constable Ouzts arrived a few minutes later, Steven Bixby shot him in the back and killed him. For twelve hours after the murders, Steven Bixby and his father remained in the house exchanging gunfire with officers. During this time, other officers arrested Rita Bixby. She refused to help diffuse the standoff at her home, saying: "Why would I want to help you? I wanted to be inside with them today."

II. Issue Preservation

A. Hearsay Objection to Steven Bixby's Oral Statements

Rita Bixby argues the trial court erred in admitting the testimony of Dana Newton and Alane Taylor. During a motion in limine hearing, Rita Bixby objected to their testimony on the basis of hearsay, challenging the admissibility of the statements made by Steven Bixby. After a lengthy hearing in which not one of Steven Bixby's individual statements was brought to the attention of the trial judge, the judge denied the motion. We find that her general hearsay objection failed to preserve the issue for appellate review.

When a party makes only a general objection to the entirety of a witness's testimony on the basis that the testimony will include hearsay, without specific objections to differentiate between those statements which are inadmissible and those which are admissible, the objection to the inadmissible statements is unpreserved for review if any of the statements are admissible. See Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 523, 413 S.E.2d 31, 34 (1992) ("[W]here evidence is objected to in its entirety, some portion of which is admissible, such objection is not well taken, even though some portions of the evidence are in fact inadmissible."); see also 88 C.J.S. Trial § 229 (2001) ("A general objection to evidence . . . will not . . . avail if any part of the evidence objected to is admissible."). In this case, Rita Bixby's general hearsay challenge to the admissibility of

Newton's and Taylor's testimony is not preserved because some of the specific statements they testified to were admissible, even though other statements might have been inadmissible.

Ordinarily, it would not be necessary to address the merits of an issue after finding the issue is unpreserved for review. In this case, however, the admissibility of some of the alleged hearsay is the circumstance that renders the issue unpreserved. Therefore, we must explain that at least some of Steven Bixby's statements were not hearsay. Rita Bixby's objection and argument focused the trial court's attention on whether the statements as a group were "Statements Which Are Not Hearsay" under Rule 801(d), SCRE. She argued that the statements were inadmissible hearsay because they did not meet the definition that "[a] statement is not hearsay if . . . [t]he statement is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" under Rule 801(d)(2)(E), SCRE. However, our examination of the testimony of these two witnesses reveals that at least two statements made by Steven Bixby were not hearsay for a different reason: they were not offered to prove the truth of the matter asserted. Therefore, regardless of whether they were statements by a coconspirator under Rule 801(d)(2)(E), they were admissible because they did not meet the definition of hearsay under Rule 801(c), SCRE: "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

In order to explain that these two statements were not offered to prove their truth, and to give context to the evidentiary issues the trial judge faced, we summarize the law applicable to Rita Bixby's two charges: accessory before the fact of murder and criminal conspiracy. In order to convict Rita Bixby of accessory before the fact of murder, the State was required to prove (1) Rita Bixby advised, urged, or in some way aided Steven Bixby to commit the murders, (2) Rita Bixby was not present when the murders were committed, and (3) Steven Bixby committed the murders. Rita Bixby, 373 S.C. at 75 n.2, 644 S.E.2d at 55 n.2 (citing State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)). The third element required the State to prove Steven Bixby acted with malice. S.C. Code Ann. § 16-3-10 (2003) ("'Murder' is the killing of any person with malice aforethought . . . ."). In order to convict her of criminal conspiracy, the State was required to prove

Rita Bixby had a mutual understanding, agreement, or common intention and plan with Steven Bixby for the purpose of committing the unlawful act of murder. See State v. Sims, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) (discussing the elements of criminal conspiracy). The trial judge charged the jury in accordance with these definitions of accessory before the fact and criminal conspiracy. Specifically as to criminal conspiracy, the judge's charge included the following language:

> [T]here must be guilty knowledge and participation. . . . [I]t is not necessary that the agreement be a formal one . . . or that the agreement be stated in words between them. The agreement of a criminal conspiracy may come into being through an implied mutual understanding. . . . A conspiracy may be shown by circumstantial evidence in the conduct of the parties. . . . What is needed is proof that they intended to act together for their shared mutual benefit within the scope of the conspiracy . . . . There must be some evidence of aiding or encouragement. Additionally, conspirators are responsible for all incidental and consequential acts growing out of the general design. . . . [T]he jury must find the murder was a natural and probable consequence of the acts actually agreed upon by the defendant and any conspirators.

In this legal context, we find that Steven Bixby's statement to Dana Newton "yeah, it's that time of year to die" was not offered to prove the truth of the matter asserted, and therefore was not hearsay under Rule 801(c).[2]

[2] In order to properly analyze whether a statement is offered to prove the truth of the matter asserted, the court should first, to the extent possible, consider the words of the statement in order to determine what is asserted in the statement. The matter asserted in this statement is: early December is the time to die. Next, the court should determine whether the statement is offered "to prove the truth of the matter asserted." In this case, the State obviously had no reason to prove that the matter asserted in this rhetorical

Steven Bixby also told Newton "I will [shoot them] if they set one step on my parents' property, I'll blow their mother f****** heads off." This statement also was not offered to prove its truth. The fact that Steven Bixby made the statement showed his anger toward law enforcement, and therefore was evidence of malice regardless of whether it was a true statement. The State also offered the statement to prove Steven Bixby's state of mind during the timeframe when Rita Bixby was making statements in his presence such as "she and her family had been waiting for this moment; that nobody was coming on their property," and "there would be hell to pay" if anyone did. Thus, the State was also able to prove the first element of accessory before the fact, that she advised, urged, or in some way aided Steven Bixby to commit the murders. See Rita Bixby, 373 S.C. at 75 n.2, 644 S.E.2d at 55 n.2.

Because these two statements were not offered to prove the truth of the matter asserted, they were not hearsay under Rule 801(c). Therefore, it did not matter whether those two statements met the definition of a "statement by a coconspirator" under Rule 801(d)(2)(E). Rita Bixby's failure to make specific objections to individual statements left the issue unpreserved because her general objection did not differentiate those statements which were admissible from those which might have been inadmissible.

B. Rule 403 Objection to Steven Bixby's Written Statements

Rita Bixby contends the trial judge erred in not excluding letters Steven Bixby wrote to Alane Taylor while he was in jail awaiting trial, arguing they should have been excluded under Rule 403, SCRE. This objection also is not preserved for our review. At the beginning of the hearing on the motion in limine in which she challenged the admissibility of Steven Bixby's oral statements, counsel stated: "I think it's harmful and prejudicial and erroneous

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statement was true. Rather, the statement was offered simply to prove that Steven Bixby said it, because his doing so proved premeditation without regard to whether it was a true statement. Therefore, because the statement was not "offered in evidence to prove the truth of the matter asserted," it was not hearsay. Rule 801(c), SCRE.

for them to attempt to introduce Steven Bixby's letters against Rita Bixby." That is not a sufficient objection. Rule 403 requires the judge to balance probative value against unfair prejudice. In order to preserve a Rule 403 objection for appellate review, the objecting party must bring to the trial judge's attention the party's position on probative value and unfair prejudice. See Broom v. Se. Highway Contracting Co., 291 S.C. 93, 105, 352 S.E.2d 302, 309 (Ct. App. 1986), abrogated on other grounds by Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 331 S.C. 71, 508 S.E.2d 565 (1998) (holding objection unpreserved where insufficient to "inform the trial court of the point being urged by the objector") (quoting 88 C.J.S. Trial § 124 (1955))). Here, Rita Bixby made no argument concerning probative value, nor any suggestion that the prejudice was unfair. The fact that the evidence is "harmful and prejudicial" is not dispositive of a Rule 403 analysis. Rather, in analyzing a Rule 403 objection, the trial judge must focus on "unfair" prejudice, which is defined as "an undue tendency to suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).[3] By failing to articulate the "unfair" aspect of the alleged prejudice, Rita Bixby failed to "inform the trial court of the point being urged." Broom, 291 S.C. at 105, 352 S.E.2d at 309 (quoting 88 C.J.S. Trial § 124 (1955)). Moreover, the trial judge never ruled on any Rule 403 objection as to the letters. See State v. Russell, 345 S.C. 128, 133-34, 546 S.E.2d 202, 205 (Ct. App. 2001) (finding evidentiary argument was not preserved for review because the issue was never raised to or ruled upon by the trial judge).

III. Right of Confrontation

As to all of Steven Bixby's statements, whether oral or written, Rita Bixby contends she was denied her right of confrontation under the Sixth Amendment to the United States Constitution. We disagree. None of the statements are testimonial. See State v. Ladner, 373 S.C. 103, 112-15, 644 S.E.2d 684, 688-90 (2007) (discussing and applying general definitions of

[3] See also Old Chief v. United States, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

"testimonial"). All of the statements were made to friends not associated with law enforcement and none of the statements were related to any police questioning. See State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006) (holding statement made outside of investigatory or judicial context is nontestimonial). In Ladner, our supreme court held that the admission of a nontestimonial statement is not a Confrontation Clause violation. 373 S.C. at 115, 644 S.E.2d at 690. Therefore, Rita Bixby was not denied her right of confrontation.

IV. Limiting Instructions

Rita Bixby also argues that the trial judge's limiting instruction concerning the letters written by Steven Bixby to Dana Newton was insufficient. Bixby requested that the judge charge:

> [T]he letters by Steven Bixby can only be considered by the jury as evidence of Steven Bixby's guilt as a principal for murder of Officers Wilson and Ouzts and cannot be considered by the jurors in any way against Rita Bixby.

The judge charged the jury:

> Subject to the Court's prior rulings, letters by Steven Bixby can only be considered as evidence of Steven Bixby's guilt as a principal . . . in the murder of Danny Wilson and Donnie Ouzts.

The charge Rita Bixby requested was incorrect because the letters could properly be considered against her in the limited capacity the judge's instruction described. The State was required to prove Steven Bixby's guilt in the murders as an element of the accessory before the fact of murder charge against Rita Bixby. Thus, the trial court's limiting instruction was a correct statement of the law. See generally State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (holding "jury charge that is substantially correct and covers the law does not require reversal").

V. Conclusion

Rita Bixby's hearsay objections to the oral statements of Steven Bixby and her Rule 403 objection to his letters are not preserved for our review. The trial judge properly overruled her objections based on the right of confrontation and committed no error in giving limiting instructions.

AFFIRMED.

THOMAS and PIEPER, JJ., concur.