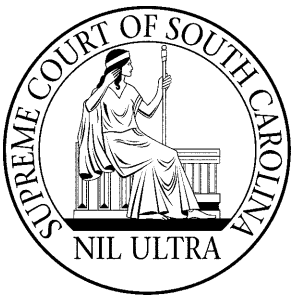

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 50
November 27, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

None

PETITIONS – UNITED STATES SUPREME COURT

27233 - Brad Keith Sigmon v. The State	Denied 11/18/2013
27252 - Town of Hollywood v. William Floyd	Pending
2013-MO-013 - In the Interest of David L.	Pending

PETITIONS FOR REHEARING

27317 - Ira Banks v. St. Matthew Baptist Church	Pending
27322 - The State v. Steven Barnes	Pending
27328 - The State v. Wesley Smith	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2013-UP-440-S.C. Department of Social Services v. Michelle G.
(Anderson, Judge Timothy H. Pogue)

2013-UP-441-Antonio Moore v. State
(York, Judge Brooks P. Goldsmith)

2013-UP-442-Jane AP Doe v. Omar Jaraki, M.D. and Halla Jaraki
(Horry, Judge Benjamin H. Culbertson)

2013-UP-443-State v. Fred Smith, III
(Cherokee, Judge Roger L. Couch)

2013-UP-444-Jane RM Doe v. Omar Jaraki and Halla Jaraki
(Horry, Judge Benjamin H. Culbertson)

2013-UP-445-Kevin Davonne Cox v. State
(Horry, Judge Benjamin H. Culbertson)

PETITIONS FOR REHEARING

5131-Lauren Proctor v. Whitlark & Whitlark	Denied 10/22/13
5167-State v. Thomas Michael Smith	Denied 11/27/13
5171-Carolyn Nicholson v. SCDSS	Pending
5175-State v. Karl Ryan Lane	Denied 11/22/13
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Denied 11/14/13
5177-State v. Leo David Lemire	Pending
5178-State v. Michael J. Hilton	Pending
5181-Henry Frampton v. S.C. Dep't of Transportation	Pending
2013-UP-189-Thomas Torrence v. SCDC	Denied 10/22/13
2013-UP-209-State v. Michael Avery Humphrey	Denied 10/22/13
2013-UP-296-Parsons v. John Wieland Homes	Pending
2013-UP-303-William Jeff Weekley v. John Lance Weekley, Jr.	Denied 09/27/13

2013-UP-317-State v. Antwan McMillan	Denied 11/22/13
2013-UP-340-Randy Griswold v. Kathryn Griswold	Denied 09/17/13
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-360-State v. David Jakes	Denied 11/12/13
2013-UP-380-Regina Johnson Taylor v. William Taylor	Pending
2013-UP-381-L. G. Elrod v. Berkeley Cty. Sheriff's Dep't	Pending
2013-UP-384-Ted Adams and Bonnie Adams v. Louis Nexsen et al.	Denied 11/21/13
2013-UP-389-Harold Mosley v. SCDC	Denied 11/22/13
2013-UP-393-State v. Robert Mondriques Jones	Denied 11/18/13
2013-UP-403-State v. Kerwin Parker	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal	Pending
4764-Walterboro Hospital v. Meacher	Pending
4779-AJG Holdings v. Dunn	Pending
4832-Crystal Pines v. Phillips	Pending
4851-Davis v. KB Home of S.C.	Pending
4872-State v. Kenneth Morris	Pending
4888-Pope v. Heritage Communities	Pending
4895-King v. International Knife	Pending
4898-Purser v. Owens	Pending
4909-North American Rescue v. Richardson	Pending

4923-Price v. Peachtree Electrical	Pending
4926-Dinkins v. Lowe's Home Centers	Denied 11/20/13
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Granted 11/06/13 (Correction)
4965-State v. Shawn Antonio Miller	Granted 11/20/13
4970-Carolina Convenience Stores et al. v. City of Spartanburg	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4982-Katie Green Buist v. Michael Scott Buist	Granted 11/20/13
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5008-Willie H. Stephens v. CSX Transportation	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending

5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5033-State v. Derrick McDonald	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5041-Carolina First Bank v. BADD	Pending
5044-State v. Gene Howard Vinson	Pending
5052-State v. Michael Donahue	Pending
5053-State v. Thomas E. Gilliland	Pending
5055-Hazel Rivera v. Warren Newton	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending
5060-State v. Larry Bradley Brayboy	Pending
5061-William Walde v. Association Ins. Co.	Pending
5062-Duke Energy v. SCDHEC	Pending
5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending

5072-Michael Cunningham v. Anderson County	Pending
5074-Kevin Baugh v. Columbia Heart Clinic	Pending
5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5078-Estate of Livingston v. Clyde Livingston	Pending
5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending
5082-Thomas Brown v. Peoplease Corp.	Pending
5084-State v. Kendrick Taylor	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5090-Independence National v. Buncombe Professional	Pending
5092-Mark Edward Vail v. State	Pending
5093-Diane Bass v. SCDSS	Pending
5095-Town of Arcadia Lakes v. SCDHEC	Pending
5097-State v. Francis Larmand	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5101-James Judy v. Ronnie Judy	Pending
5110-State v. Roger Bruce	Pending
5111-State v. Alonza Dennis	Pending
5112-Roger Walker v. Catherine Brooks	Pending
5113-Regions Bank v. Williams Owens	Pending
5116-Charles A. Hawkins v. Angela D. Hawkins	Pending
5117-Loida Colonna v. Marlboro Park (2)	Pending

5118-Gregory Smith v. D.R. Horton	Pending
5119-State v. Brian Spears	Pending
5121-State v. Jo Pradubsri	Pending
5122-Ammie McNeil v. SCDC	Pending
5125-State v. Anthony Marquese Martin	Pending
5126-A. Chakrabarti v. City of Orangeburg	Pending
5130-Brian Pulliam v. Travelers Indemnity	Pending
5131-Lauren Proctor v. Whitlark & Whitlark	Pending
5132-State v. Richard Brandon Lewis	Pending
5135-Microclean Tec. Inc. v. Envirofix, Inc.	Pending
5137-Ritter and Associates v. Buchanan Volkswagen	Pending
5139-H&H Johnson, LLC v. Old Republic National Title	Pending
5140-Bank of America v. Todd Draper	Pending
5144-Emma Hamilton v.Martin Color Fi	Pending
5148-State v. Henry Jermaine Dukes	Pending
5151-Daisy Simpson v. William Simpson	Pending
5152-Effie Turpin v. E. Lowther	Pending
5154-Edward Trimmier v. SCDLLR	Pending
5157-State v. Lexie Dial	Pending
5159-State v. Gregg Henkel	Pending
5160-State v. Ashley Eugene Moore	Pending

5161-State v. Lance Williams	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-562-State v. Tarus Henry	Pending
2012-UP-025-Judy Marie Barnes v. Charter 1 Realty et al.	Granted 11/20/13
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-098-State v. Andre Maurice Massey	Denied 11/20/13
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract	Pending

Glass, LLC, et al.

2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-332-George Tomlin v. SCDPPPS	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King v. Margie B. King	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending

2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-561-State v. Joseph Lathan Kelly	Pending
2012-UP-563-State v. Marion Bonds	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-580-State v. Kendrick Dennis	Pending
2012-UP-585-State v. Rushan Counts	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety	Pending
2012-UP-647-State v. Danny Ryant	Pending
2012-UP-654-State v. Marion Stewart	Pending

2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-007-Hoang Berry v. Stokes Import	Pending
2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending
2013-UP-014-Keller v. ING Financial Partners	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-034-Cark D. Thomas v. Bolus & Bolus	Pending
2013-UP-037-Cary Graham v. Malcolm Babb	Pending
2013-UP-056-Lippincott v. SCDEW	Pending
2013-UP-058-State v. Bobby J. Barton	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-063-State v. Jimmy Lee Sessions	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending
2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending

2013-UP-085-Brenda Peterson v. Hughie Peterson	Pending	
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending	
2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending	
2013-UP-110-State v. Demetrius Goodwin	Pending	
2013-UP-115-SCDSS v. Joy J.	Pending	
2013-UP-120-Jerome Wagner v. Robin Wagner	Pending	
2013-UP-125-Caroline LeGrande v. SCE&G	Pending	
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending	
2013-UP-133-James Dator v. State	Pending	
2013-UP-147-State v. Anthony Hackshaw	Pending	
2013-UP-154-State v. Eugene D. Patterson	Pending	
2013-UP-158-CitiFinancial v. Squire	Pending	
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al.	Pending	
2013-UP-183-R. Russell v. DHEC and State Accident Fund	Pending	
2013-UP-188-State v. Jeffrey A. Michaelson	Pending	
2013-UP-189-Thomas J. Torrence v. SCDC	Pending	
2013-UP-199-Wheeler Tillman v. Samuel Tillman	Pending	
2013-UP-206-Adam Hill v. Henrietta Norman	Pending	
2013-UP-218-Julian Ford Jr. v. SCDC	Dismissed	11/21/13
2013-UP-224-Katheryna Mulholland-Mertz v. Corie Crest	Pending	
2013-UP-232-Theresa Brown v. Janet Butcher	Pending	

2013-UP-236-State v. Timothy E. Young	Pending
2013-UP-241-Shirley Johnson v. Angela Lampley	Pending
2013-UP-247-Joseph N. Grate v. Waccamaw E. O. C. Inc.	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-267-State v. William Sosebee	Pending
2013-UP-279-MRR Sandhills v, Marlboro County	Pending
2013-UP-286-State v. David Tyre	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-294-State v. Jason Thomas Husted	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-323-In the interest of Brandon M.	Pending
2013-UP-326-State v. Gregory Wright	Pending
2013-UP-327-Roper LLC v. Harris Teeter	Pending
2013-UP-340-Randy Griswold v. Kathryn Griswold	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kevin Michael Hughes, Respondent

Appellate Case No. 2013-002121

Opinion No. 27331
Submitted October 24, 2013– Filed November 27, 2013

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Julie Kay Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Kevin Michael Hughes, of North Myrtle Beach, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent represented an estate. There were several judgment liens against the estate and no liquid assets available to pay the judgments. Respondent informed the probate court of the liens and discussed several options to raise money to pay the liens.

On October 20, 2011, Judge Deidre W. Edmonds of the Horry County Probate Court issued an Order on a Summons to Show Cause. Judge Edmonds granted an extension to file the closing documents for the estate and set the filing deadline for April 20, 2012. By letter dated April 24, 2012, the Court advised respondent that the deadline had expired and requested that he proceed with the closing of the estate or file a Motion for Extension. By letter dated May 11, 2012, Judge Edmonds sent a final request letter to respondent.

Respondent did not respond to Judge Edmonds' letters and he did not request an extension. Judge Edmonds issued a second Summons to Show Cause on June 12, 2012.

On August 8, 2012, a hearing was held on the second Summons to Show Cause. Respondent admitted he had no excuse for failing to communicate with the court and stated it was his responsibility to communicate with the court, not that of the personal representative. Respondent admitted he did not request an extension prior to the hearing on the Summons to Show Cause. Respondent informed the court that he had taken steps to raise money to pay the liens.

Judge Edmonds found respondent in willful contempt of court for failing to communicate with the court and failing to request an extension. Respondent was fined $500.00 and ordered to file for an extension within twenty-four hours of the hearing. After the hearing, respondent filed the extension request as ordered.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); and Rule 8.4 (e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand.[1] Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

[1] Respondent received letters of caution on July 22, 2002, April 16, 2004, and December 5, 2012, and an admonition on October 21, 2005.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Scott D. Reynolds, Respondent

Appellate Case No. 2013-002148

Opinion No. 27332
Submitted October 24, 2013 – Filed November 27, 2013

DEFINITE SUSPENSION

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

Scott D. Reynolds, of Charlotte, North Carolina, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed nine (9) months and to the imposition of certain conditions. We accept the Agreement and suspend respondent from the practice of law in this state for nine (9) months with conditions as hereafter stated. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent operated a solo practice primarily handling real estate matters. In November 2010, respondent's bank reported an overdraft on his law firm trust account to the Commission on Lawyer Conduct (the Commission). The resulting

investigation by ODC revealed respondent had misappropriated $3,165.00 from his trust account and that he had used those funds for personal debts and expenses. During the investigation, respondent restored the funds.

During the investigation, respondent admitted to abusing alcohol and drugs. Respondent voluntarily entered into a relationship with Lawyers Helping Lawyers and began treatment for addiction and substance abuse. Respondent acknowledged that his misappropriation arose, in part, from his substance abuse and failure to seek adequate and appropriate treatment.

On October 21, 2011, an investigative panel of the Commission accepted a deferred discipline agreement signed by respondent. In that agreement, respondent admitted to violations of the Rules of Professional Conduct and agreed to comply with certain terms and conditions for a period of two years, including compliance with a contract with Lawyers Helping Lawyers, psychological counseling, quarterly reporting to the Commission, payment of costs, and completion of the Legal Ethics and Practice Program Ethics School and Trust Account School within six months.

Respondent paid the costs and entered into a contract with Lawyers Helping Lawyers but failed to comply with the remaining terms and conditions of the deferred discipline agreement. Specifically, respondent did not submit any quarterly reports, including his affidavit of compliance, his Lawyers Helping Lawyers monitor report, or his medical treatment provider report; he did not attend the Legal Ethics and Practice Program sessions offered in December 2011 and February 2012; and, further, while his contract with Lawyers Helping Lawyers required that he abstain from use of alcohol, in January 2012, respondent resumed drinking alcohol and was arrested for driving while intoxicated. In February 2012, he moved to a residential treatment facility in Anderson, South Carolina. On April 2, 2012, he entered a seven-month, in-patient treatment program in Greenville, South Carolina. On April 13, 2012, respondent left the treatment facility and had no further contact with ODC or the Commission.

As a result of his noncompliance, ODC filed a motion to terminate the deferred discipline agreement. In July 2012, an investigative panel of the Commission denied ODC's motion to terminate and voted to extend the agreement for an additional two years.

On July 27, 2012, respondent signed a second deferred discipline agreement with the same terms, extended for an additional two years. Respondent entered into a new Lawyers Helping Lawyers contract, but failed to comply with the terms and conditions of the second deferred discipline agreement. Specifically, he did not file any of the required reports since signing the second deferred discipline agreement, although he completed the Legal Ethics and Practice Program Ethics School and Trust Account School in February 2013, he did not report his attendance to the Commission, and, at some point, he resumed the use of alcohol contrary to the terms of his contract with Lawyers Helping Lawyers.

In June 2013, an investigative panel of the Commission terminated the second deferred discipline agreement with respondent and authorized formal charges.

In June 2013, respondent entered into an eight-week in-patient program in Virginia. Respondent has now completed that program.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall hold property of clients or third persons in lawyer's possession in connection with a representation separate from lawyer's own property); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(9) (it shall be ground for discipline for lawyer to willfully fail to comply with the terms of a finally accepted deferred discipline agreement).

Conclusion

We accept the Agreement for Discipline by Consent and impose a nine (9) month suspension from the practice of law. In addition, we impose the following conditions for a period of two (2) years from the date of this opinion:

1. respondent shall enter into a new contract with Lawyers Helping Lawyers which shall include, at a minimum, a random blood test for use of drugs and alcohol each quarter at respondent's expense;

2. respondent shall fully participate in a meaningful relationship with a monitor selected by Lawyers Helping Lawyers;

3. respondent shall commit himself to abstinence and will attend meetings in a twelve-step or other appropriate program designated by, and in accordance with a regular schedule set by, Lawyers Helping Lawyers;

4. respondent shall comply with all treatment recommendations of a medical provider to address his addiction and substance abuse; and

5. respondent shall file quarterly reports with the Commission that include a statement confirming compliance with his contract from a representative of Lawyers Helping Lawyers, a statement from his monitor outlining their interactions, a statement of his diagnosis, treatment compliance, and prognosis from his medical treatment provider, and the results of at least one random blood test. The filing of these reports shall be respondent's responsibility and will be done at his expense.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William Mark Brockmeyer, Appellant.

Appellate Case No. 2011-198266

Appeal from Lexington County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27333
Heard May 15, 2013 – Filed November 27, 2013

AFFIRMED

A. Mattison Bogan and Miles E. Coleman of Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert M. Dudek, all of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Donald V. Myers of Lexington, for Respondent.

JUSTICE KITTREDGE: Appellant William Mark Brockmeyer appeals his convictions for murder and possession of a weapon during a violent crime, raising constitutional challenges to both the trial court's refusal to enforce a subpoena concerning the identity of an internet commenter and the admission of certain chain-of-custody testimony and other photographic evidence at trial. We affirm.

I.

Appellant William Mark Brockmeyer and Nicholas Rae (the victim) knew each other for seven or eight years before the shooting; the two met while working together at a tree service company, and thereafter, they both served time in the same prison facility.[1] On the night of the shooting, Brockmeyer, the victim, and several mutual friends attended a house party and then visited a bar known as Jager's Private Club in Lexington County, South Carolina. Because Jager's was a private bar, only members and their guests were permitted to enter, and every person who entered the bar was required to sign in. Among the group of friends was Gina Brakefield, who saw both Brockmeyer and the victim carrying guns—the victim had a large pellet gun and Brockmeyer carried a .380 caliber pistol.[2] According to several witnesses, Brockmeyer's demeanor at Jager's was agitated and aloof.

Upon arriving at Jager's, the group bought drinks, sat down at a table near the dance floor and began talking, dancing, and hanging out. Thereafter, the victim separated from the group and headed across the bar to challenge another patron, Amera Kabar, to a game of billiards. Although the victim claimed to be more skilled than Kabar, the victim lost four consecutive games of pool[3] and a total of

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[1] About three weeks before the shooting, the victim moved to Lexington County from Florida to live with Brockmeyer. At the time of the shooting, Brockmeyer and the victim were living together in a hotel.

[2] Brakefield also testified that, after the group arrived at Jager's and began dancing, she felt a small gun tucked in the waistband of Brockmeyer's pants and that Brockmeyer commented, "it is hard to dance with a pistol in your pants." Additionally, at least three other witnesses testified they saw the victim with a large pellet gun and Brockmeyer with a smaller pistol.

[3] Kabar admitted she "kept [the games] close to keep him wanting to play me."

three hundred dollars in wagers to Kabar.[4] According to Kabar, the victim left the pool table area to have a discussion with Brockmeyer before agreeing to the stakes for each game. During the fourth game, Brockmeyer approached the pool table and lifted his shirt to reveal the gun tucked into his waistband, threatening Kabar, "This is how we do it." However, instead of becoming frightened, Kabar dropped all pretense of unskillfulness and "ran the table," sinking all the remaining balls without giving the victim another turn. Kabar testified that by the last game of pool, the victim was intoxicated, and although he appeared disappointed, he remained polite, thanking her and congratulating her on a "great game."

After finishing the pool games, the victim, clearly intoxicated,[5] rejoined his friends at their table. The victim was helped outside by a female friend. Several people smoking outside the bar entrance saw the victim vomit and then sit down in a chair on the front porch. Brockmeyer followed the victim through the bar and watched him through the front doors of the bar. Still inside the bar, Brockmeyer pulled the gun from his waistband, despite the attempts of another female friend to stop him.

Brockmeyer walked outside and knelt in front of the victim, who was slumped over in a chair, asleep with his hands by his side. Brakefield saw Brockmeyer whisper in the victim's ear, raise his hand toward the victim's neck, and fire a shot. Brakefield screamed, ran inside the bar, and shouted for someone to call 9-1-1. Brockmeyer immediately exited the front porch and headed towards the wooded area behind the bar. The other people on the porch heard the shot and saw Brockmeyer walking towards the woods immediately afterwards. Upon realizing the victim had been shot, the witnesses left the porch, running through the bar and out the back exit before the police arrived.

Commotion ensued, both inside and outside the bar. Several patrons surrounded the victim and attempted to administer first aid. Brockmeyer reappeared several minutes later, having removed his white Sean John brand t-shirt and wearing only a tank-top undershirt. Police officers arrived shortly and began collecting evidence and interviewing witnesses. That night, Brockmeyer offered several conflicting explanations about what had happened, including that he was inside when the victim was shot, that the victim committed suicide, and that "black guys" shot the

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[4] Brockmeyer denied giving the victim three hundred dollars, claiming he gave the victim just forty dollars.

[5] The autopsy revealed the victim's blood alcohol concentration was 0.227 at the time of death.

victim. Brockmeyer was taken to the police station for questioning where he eventually admitted shooting the victim but claimed the gun went off accidentally. Brockmeyer was arrested and charged with murder and one count of possession of a weapon during the commission of a violent crime.

At trial, Brockmeyer contended the shooting was an accident—he saw the victim slumped over with the .380 pistol in his lap, and when Brockmeyer claimed he reached for the gun, a shot went off. Brockmeyer admitted possessing the gun earlier in the evening and disposing of it in the woods behind the bar after the shooting. However, Brockmeyer claimed he only temporarily held onto the .380 pistol while the victim played pool (at the victim's request) and that he was unarmed at the time he followed the victim outside. Brockmeyer contended he did not realize the victim was hurt until after he disposed of the gun, and upon hearing the victim was injured, he became very emotional because the two were close friends. One witness, Mariko Clack, testified Brockmeyer was weeping and was "really shaky and frantic" after he was told the victim had been shot.

The autopsy revealed the victim died as a result of a .380 caliber gunshot wound to the neck. The pathologist testified the gunshot wound was a "hard contact" wound, meaning the weapon was pushed firmly against the skin at the time the shot was fired—so firmly as to leave a visible a muzzle imprint.

A jury convicted Brockmeyer of murder and the weapon charge, and Brockmeyer was sentenced to an aggregate term of forty years in prison. Brockmeyer appealed, and this matter was transferred to this Court from the court of appeals pursuant to Rule 204(b), SCACR.

II.

Brockmeyer argues the trial court committed reversible error in failing to grant his motion to enforce a subpoena directed at a news media outlet. We disagree.

"[C]riminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). However, "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses.'" *United States v. Valenzuela-Bernal* 458 U.S. 858, 867 (1982). Rather, to demonstrate a Compulsory Process Clause violation, an

appellant must make some plausible showing of how the testimony of an absent witness would have been both material and favorable to his defense. *Id*.

Less than twenty-four hours after the shooting, a news article about the shooting was published on a website operated by WLTX, a local television station. The WLTX website allows users to establish an account which they may use to post comments and exchange messages on the WLTX website. The online registration process requires a person to submit his or her gender, year of birth, and zip code, and, for users who wish to access discussion forums and sharing pages, the user's name and email address are also required. The WLTX Privacy Notice, which all users had to accept, included a notification that WLTX could release user information "if required to do so by law or if, in [WLTX's] business judgment, such disclosure is reasonably necessary to comply with legal process."

The day after the shooting, someone using the pseudonym "AndTheTruth" posted the following comment on the WLTX website in response to the online article about the shooting:

> Were you there, did you see what happened, did you see the tears on his young confused face when he realized he had just accidentally killed his friend…
>
> -God makes provision for an accidental or carelessly caused death. Judge not, and ye shall not be judged:
>
> . . . .
>
> -My Heart & Prayers go out to both families & all of my friends who had to see this happen, may God be with you all…

The theory of Brockmeyer's defense was that the shooting was an accident. Brockmeyer wanted evidence supporting his claim of accident and being emotionally upset after the shooting. Brockmeyer contends the anonymous comment suggests its author had direct knowledge of the incident and supports Brockmeyer's claim of an accidental shooting. Accordingly, Brockmeyer wished to explore the possibility that the commenter might be a potential defense witness and served WLTX with a subpoena seeking the following information:

> Any and all registration information for the username "AndTheTruth" that replied on July 12, 2010 @ 1:36 AM EDT to the news article regarding William Mark Brockmeyer being charged with the shooting death of [the victim].

WLTX objected to the subpoena, arguing the commenter's identity was protected anonymous speech under the First and Fourteenth Amendments.[6] Brockmeyer acknowledged the position of WLTX in the abstract, but insisted that his constitutional right to a fair trial required disclosure of the identity of the anonymous commenter.[7]

Based on WLTX's objection, Brockmeyer thereafter filed a motion to enforce the subpoena, contending he was entitled to explore potential witnesses and present a defense by virtue of the Sixth and Fourteenth Amendments. At the pre-trial motion hearing, defense counsel explained:

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[6] "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. Const. amend. I. "'[A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.'" *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 787 (M.D. Pa. 2008) (quoting *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995)). "This is because 'the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.'" *Id.* Indeed, "[i]t is clear that speech over the internet is entitled to First Amendment protection" and that "[t]his protection extends to anonymous internet speech." *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005). While the position of WLTX has merit, the present situation was not easily resolved, for Brockmeyer's right to a fair trial was implicated, thus creating a tension between constitutional protections.

[7] Although neither of the parties addresses the issue of whether WLTX had standing to assert a First Amendment challenge on behalf of the anonymous commenter, other courts have found a news station has standing in similar circumstances. *See, e.g.*, *Enterline*, 751 F.Supp.2d at 784-86 (finding, as a matter of first impression, that a newspaper had third-party standing to assert free speech rights of individuals posting to (a or the) newspaper's online forums).

> Basically the defense, in exploring [Brockmeyer's] defense in this case, wanted to have the information about this witness so we could potentially talk to them [sic] to see if they [sic] could be a mitigating witness or a defense witness in this matter.

Brockmeyer argued his right to present an accident defense was "way more important" than any right asserted by WLTX, including the anonymous commenter's First Amendment rights. Brockmeyer contended he had no other means to procure the information sought.[8] WLTX countered that to the extent the anonymous commenter actually witnessed the shooting, his or her identity was ascertainable from other sources, given the exhaustive witness list the State provided to Brockmeyer.

In this regard, Jager's, a private bar, required each customer sign in upon entering the bar. Law enforcement obtained the sign-in list of everyone who entered the bar on the night of the shooting. At the motion hearing, defense counsel admitted the State had provided the defense with a copy of the sign-in list from the night of the shooting.

The trial judge noted the competing interests at issue— specifically, Brockmeyer's constitutionally guaranteed rights and an anonymous speaker's First Amendment right not to reveal his or her identity. However, because disclosure of the anonymous commenter's identity could potentially produce testimony only if the commenter was present at the scene, and because the defense had previously been given a list of all persons who signed in as a client at the bar on the night of the shooting, the trial court concluded that, if the information exists, it was readily available through other means. As a result, the trial judge declined to enforce the subpoena at that time.[9] However, the trial court directed the State to further assist

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[8] Brockmeyer also argued the anonymous commenter's acceptance of the terms of the WLTX Privacy Notice constituted a waiver of all privacy rights. Because the trial court did not rule on this argument, it is not preserved for appellate review and we do not reach it.

[9] We also note the trial court correctly held the commenter's privacy is not privileged under the news media shield law, finding the shield law was not applicable because the information was not source information but rather voluntary

the defense following the hearing to ascertain the identity of certain witnesses whose signatures were illegible on the bar sign-in list. The State agreed, promising to do so by the end of that day. The issue was not mentioned again.

At trial, Brockmeyer did not renew his motion to enforce the subpoena or argue to the trial judge that he still required this information. On appeal, Brockmeyer asks the Court to reverse his conviction, arguing he is constitutionally guaranteed the right to compel witnesses in his favor and that he was denied that right by the trial court's refusal to enforce his subpoena directing WLTX to disclose the anonymous commenter's registration information.

This Court has not specifically addressed whether and under what circumstances the right to anonymity must give way to other constitutionally protected interests, such as a criminal defendant's rights under the Sixth Amendment's Compulsory Process Clause. Both parties urge the Court to adopt a four-part standard for evaluating a subpoena that seeks the identity of an anonymous Internet user who is not a party to the underlying litigation:

> (1) the subpoena seeking the information was issued in good faith and not for any improper purpose,
> (2) the information sought relates to a core claim or defense,
> (3) the identifying information is directly and materially relevant to that claim or defense, and
> (4) the information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088, 1095 (W.D. Wash. 2001).[10]

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expression by an anonymous person. *See* S.C. Code § 19-11-100(A) (providing that a news reporter "has a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news.").

[10] Courts have adopted varying iterations of this test, but, for the most part, they are similar—they involve striking a balance between competing interests and require the party seeking evidence to make a showing of good faith, materiality, relevancy and unavailability from another source. *See*, *e.g.*, *2TheMart.com Inc.*, 140 F.Supp.2d at 1095 (noting the adopted test "provides a flexible framework for balancing the First Amendment rights of anonymous speakers with the right of

Although Brockmeyer presents a compelling argument for the disclosure of the commenter under the circumstances presented, we decline to reach this issue on issue preservation grounds. We have no way of properly evaluating Brockmeyer's continuing need for the information he sought to subpoena following the trial judge's instructions for the solicitor to take additional steps to assist the defense in identifying everyone at Jager's on the night of the shooting. This is so because Brockmeyer failed to renew his motion at the outset of trial. Thus, Brockmeyer has failed to provide this Court with a sufficient record on appeal to evaluate this assertion of error. *See Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the Appellant failed to include the relevant material in the record on appeal); *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (noting an appellant bears the burden of providing a sufficient record to review his assertions of error).

However, even assuming the trial court erred in not requiring disclosure of the anonymous commenter's identity, the error would not be reversible. Brockmeyer is unable to show he was prejudiced by the trial judge's denial of his motion to enforce the subpoena. More to the point, evidence of an accidental shooting and Brockmeyer's distraught state was presented. Brockmeyer testified that the shooting was an accident and that he was "in shock" afterwards. More importantly, Mariko Clack, who was among the group of friends with Brockmeyer and the victim on the night of the shooting, testified that Brockmeyer was weeping and was "really shaky and frantic" after the shooting. Thus, any error was harmless because even assuming the anonymous commenter testified to that effect, it would have been cumulative.[11] *See State v. Commander*, 396 S.C. 254, 263, 721

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civil litigants to protect their interests through the litigation discovery process"); *Cahill*, 884 A.2d at 460 (setting forth "the appropriate test by which to strike the balance" between the right to exercise free speech anonymously and the right to obtain the identity of the anonymous speaker).

[11] Assuming the anonymous commenter was present and actually witnessed the shooting, he or she would not have been able to testify that the killing "was an accident." Any testimony would have been limited to what the witness observed, with the ultimate decision of murder or accidental killing to be decided by the jury. *See* Rule 602, SCRE ("A witness may not testify to a matter unless . . . the witness

S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). In sum, the issue is not properly preserved, but in any event, any error in the trial court's refusal to enforce the subpoena would not constitute reversible error.

III.

Brockmeyer argues statements of certain non-testifying evidence custodians found in computerized chain-of-custody logs were introduced indirectly at trial in violation of the Confrontation Clause of the Sixth Amendment. Brockmeyer argues this constitutional violation invalidated the chain of custody and rendered the related evidence inadmissible. We disagree.

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" *Id*.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This procedural protection applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

In *Crawford v. Washington*, the Supreme Court unanimously found the criminal defendant's Confrontation Clause rights had been violated by the admission into evidence a tape recording of a nontestifying person's "testimonial" statement to police. 541 U.S. 36, 68-69 (2004). *Crawford* changed the law to prohibit the admission of testimonial, out-of-court statements unless two conditions are met:

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has personal knowledge of the matter."); *State v. Commander*, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011) (finding testimony in the form of a legal conclusion is generally improper); *State v. Wise*, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004) (a defendant is prohibited from directly eliciting the opinion of lay witnesses about the ultimate issue to be decided by the jury).

the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. *Id*. at 68. Although *Crawford* applies whenever "testimonial evidence is at issue," the Supreme Court emphasized that "nontestimonial" evidence is exempted from Confrontation Clause scrutiny altogether. *Id*.

Thereafter, in *Melendez-Diaz v. Massachusetts*, the Supreme Court found sworn certificates from forensic analysts, which were admitted at trial to attest that the substance seized from the criminal defendant was cocaine, were testimonial in nature and thus subject to the Confrontation Clause. 557 U.S. 305, 311 (2009). The Supreme Court noted "the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance," and held that the analysts were "witnesses" for the purposes of the Confrontation Clause and that the testimonial statements were "against" the criminally accused because they proved a fact necessary for his conviction—namely, that the substance he possessed was cocaine. *Id*. at 311-12. However, the Supreme Court also noted "[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, . . . must appear in person as part of the prosecution's case." *Id*. at 311 n.1. Although "'it is the obligation of the prosecution to establish the chain of custody,' this does not mean that everyone who laid hands on the evidence must be called." *Id*. Indeed, "'gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility.'" *Id*. (quoting *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988)).

Two years later, the Supreme Court decided *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). Bullcoming was convicted of driving under the influence. The trial court admitted in evidence a lab report indicating his blood alcohol concentration (BAC) was at "an inordinately high level." *Id*. at 2710. The lab analyst who prepared the report was not available to testify, and counsel objected to the introduction of the lab report because it violated Bullcoming's right to confront his accuser. The Supreme Court agreed, rejecting New Mexico's reliance on the business record exception to rules against hearsay, and reversed the conviction. *Id*. at 2710-13.

Concurring separately in *Bullcoming*, Justice Sotomayor emphasized that the BAC report at issue was testimonial in nature because its "'primary purpose' is evidentiary," and therefore the Sixth Amendment's Confrontation Clause was

triggered. *Id*. at 2719. Further, Justice Sotomayor noted that "in the Confrontation Clause context, business and public records 'are generally admissible *absent confrontation* because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—*they are not testimonial*.'" *Id*. at 2720 (quoting *Melendez-Diaz*, 557 U.S. at 325) (emphasis added).

In short, the Confrontation Clause analysis turns on whether the challenged out-of-court statement is testimonial. Indeed, the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (citing 2 N. Webster, An American Dictionary of the English Language (1828)); *see Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) ("We therefore limited the Confrontation Clause's reach to testimonial statements . . . ."). Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006) (citing *Crawford*, 541 U.S. at 51). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id*.

Under the primary purpose analysis required by the Confrontation Clause, where the primary purpose of an out-of-court statement is to serve as evidence or "an out-of-court substitute for trial testimony," the statement is considered testimonial. *Bullcoming*, 131 S. Ct. at 2721-23 (Sotomayor, J., concurring). However, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Michigan v. Bryant*, 131 S. Ct. at 1155; *see, e.g.*, *Melendez-Diaz*, 557 U.S. at 324 ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—*they are not testimonial*." (emphasis added)); *Davis*, 547 U.S. at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").

In determining the primary purpose of the out-of-court statement, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 131 S. Ct. at 1156. "In

making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id*. at 1155. Thus, "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status." *Melendez-Diaz*, 557 U.S. at 321 (citing Fed. R. Evid. 803(6)).

Recently, the Fourth Circuit Court of Appeals examined the Supreme Court's Confrontation Clause jurisprudence—including *Crawford*, *Melendez-Diaz*, and *Bullcoming*—and concluded "'the chain of custody is not relevant when a witness identifies the object as the actual object about which he testified.'" *United States v. Summers*, 666 F.3d 192, 201 (4th Cir. 2011) (quoting *United States v. Phillips*, 640 F.2d 87, 94 (7th Cir. 1981)). "Establishing a strict chain of custody 'is not an iron-clad requirement, and the fact of a missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material respect.'" *Id*. (quoting *United States v. Ricco*, 52 F.3d 58, 61-62 (4th Cir. 1995)). "The [trial] court's role is merely to act as a gatekeeper for the jury, and the proponent of the evidence need only make a prima facie showing of its authenticity." *Id*. (citing *United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009)).[12]

On appeal, Brockmeyer challenges the admission of certain evidentiary items on the grounds that the State failed to call to the witness stand every evidence custodian to testify about the chain of custody. Specifically, Brockmeyer challenges the admission of (1) a t-shirt Brockmeyer was wearing on the night of the shooting (State's Exhibit #25); (2) a spent shell casing recovered near the victim's body (State's Exhibit #28); (3) a magazine from a .380 semiautomatic pistol recovered at the scene (State's Exhibit # 30); (4) a Ceska .380 semiautomatic pistol discovered near the back fence of the Jager's property (State's Exhibit #48); and (5) a fired projectile and jacket recovered from the victim's body during the autopsy (State's Exhibit #53).

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[12] Although phrased in slightly different terms, we find the Fourth Circuit's analysis in *Summers* is consistent with this Court's decision in *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) (finding the State need not establish the identity of every person handling evidence items in all circumstances, but rather the appropriate standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable).

At trial, the State called Investigator Day, who testified that during the course of his investigation he collected the following from the scene: Brockmeyer's t-shirt, the spent shell casing, the pistol magazine and the .380 caliber semiautomatic pistol. Following authentication by Investigator Day, photographs of each item were admitted without objection. Thereafter, the State moved for admission of the items into evidence. Defense counsel objected to the admission of the items, arguing the State failed to lay a "sufficient chain of custody or foundation." Notably, Brockmeyer's objection to the admission of these items was based solely on the allegedly insufficient foundation—not a Confrontation Clause violation.

The trial judge overruled the objections, finding a proper foundation was laid by Investigator Day's testimony identifying each item as the item he collected. Thereafter, outside the presence of the jury, the following colloquy took place between defense counsel and the trial judge:

> The Court: I have overruled the defense objections to the chain of custody based on the State providing sufficient evidence to demonstrate a reasonable assurance that the items were the same as when collected. I do that based on State versus Hatchell[13] [sic]. . . . [I]n these various matters that you objected to, [the witness] testified that he himself collected it and testified that they were in the same condition when he put them in the sealed containers. So I have some concerns about what is the basis for your objection.
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> [Defense Counsel]: Judge, he has absolutely no idea what has happened with any of these items. Our position would be that they are fungible items. In other words, there is not a big difference—
>
> The Court: My ruling is only as to this stage, you understand. We will deal with it as we go along as to what, if anything, occurred.
>
> [Defense Counsel]: Yes, sir. Quite honestly, I think at this point if they are in, that maybe chain of custody arguments in the future are inapplicable. That's why I objected to them at this point in time. I think they would have had to gone [sic] through the chain of custody before they ultimately introduced those.

[13] *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011).

> The Court: I respectfully disagree. I will not tell the solicitor how to try his case. Obviously, he has got to finish his chain of custody. The only thing I am telling you at this time it was appropriate that these items be introduced based on his testimony. He said he found them. He did it with the same thing. Now, I assume they will offer testimony as to what occurred in the interim. We will see.

Thereafter, the State offered the testimony of Investigator Troy Crump, who testified that he was present at the autopsy and collected a fired projectile recovered from the victim's body (State's Exhibit #53). After a photograph of the projectile was admitted without objection, the State submitted the projectile itself for admission into evidence. As with the previous items, defense counsel objected to the admission of the projectile based on "insufficient foundation because of the chain of custody." Again, no Confrontation Clause objection was raised. The trial judge overruled the objection and the fired projectile was admitted.

Thereafter, to establish a foundation for later admitting forensic analyses of the items, the State further developed the chain of custody for each piece of evidence. Investigator Crump testified that the autopsy pathologist recovered the projectile, placed it in a bottle, heat-sealed the bottle inside a plastic bag, and initialed and dated the seal. Investigator Crump testified that, immediately upon the conclusion of the autopsy, he took custody of the sealed bag containing the projectile, transported it directly to the Lexington County Sheriff's Department (LCSD) facility, and stored it in a secure laboratory overnight.[14] Investigator Crump testified that, as soon as the evidence storage facility opened the following

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[14] Regarding the security of the laboratory, the State presented the testimony of Lieutenant Scottie Frier, the supervisor of the LCSD crime scene laboratory, who testified that the laboratory is secure and can be accessed only by himself, Investigator Day, Investigator Crump and seven other crime scene investigation employees. Lieutenant Frier testified he did not touch the fired projectile while it was stored overnight in the laboratory and that it is the practice of the crime lab employees not to touch or handle any evidence unless specifically involved in the investigation. Additionally, the State went so far as to present the testimony of each of the other seven LCSD crime scene investigation employees—Renee Strickland, Glen Ross, Michael Phipps, Shelby Derrick, D.I. Blackwell, and Duane Johnson—each of whom testified that they did not touch, handle, manipulate, or alter the plastic bag or fired projectile in any way while it was stored in the lab.

morning, he retrieved the projectile from the lab and gave it to an evidence custodian. Investigator Crump testified that, at the time he transferred custody to the evidence room, the plastic bag containing the projectile had not been opened, altered or manipulated.

Margaret Harmon, an LCSD evidence custodian, verified that she received the fired projectile from Investigator Crump along with various items from Investigator Day, including the t-shirt, the shell casing, the pistol and the magazine. Harmon testified that each item was sealed with tamperproof tape and that, at the time she received them, no one had opened, altered, or manipulated any of the containers.

The solicitor then asked Harmon to recite the chain of custody for each item. Referring to the LCSD chain-of-custody log, defense counsel objected to Harmon's testimony, arguing her testimony constituted inadmissible hearsay. Specifically, counsel asserted it was improper for Harmon to read from the custody logs because they were not subject to the business records exception of Rule 803(6), SCRE. Notably, as with Brockmeyer's objection to the admission of the items themselves, this objection failed to allege a Confrontation Clause violation.

The trial judge overruled Brockmeyer's hearsay objection, finding law enforcement agencies are entitled to avail themselves of the business records exception and that these chain-of-custody records were kept in the normal course of business. The trial judge concluded Harmon's testimony was admissible.

Regarding the pistol magazine, Harmon testified the item had remained in the continuous custody of the LCSD evidence facility from the time it was initially submitted by Investigator Day until it was brought to court for trial. Harmon testified that she or Candy Kyzer, another LCSD evidence custodian, released the t-shirt, the shell casing, the pistol, and the recovered projectile to Investigator Day, who transferred all four of those items to Amy Stephens of the South Carolina Law Enforcement Division (SLED) on July 14, 2010. Kyzer did not testify.

In further developing the chains of custody, the State offered the testimony of Amy Stephens, a forensic technician in the evidence control department at SLED. Referring to the SLED chain-of-custody report, Stephens testified that she accepted the t-shirt, the pistol, the shell casing, and the fired projectile from Investigator Day, and that she immediately transferred those items to the firearms evidence intake storage. Although the SLED chain-of-custody reports were not offered into

evidence, defense counsel objected to Stephens' testimony reciting the information contained the reports on the basis that it was hearsay. Additionally, for the first time, defense counsel alleged a Confrontation Clause violation under the rule set forth in *Crawford*. The trial judge asked defense counsel to clarify the objection:

> The Court: I have ruled that [Stephens] is entitled to use these records. What other—what other objection? As an example, she has used about 15 names. Are you suggesting the State needs to call in every one of those witnesses?
>
> [Defense Counsel]: No, sir. Judge, I would think that the chain of custody would be complete for our purposes as to the last person who tests it. . . . I don't have a problem if they stop with whatever forensic scientist in the end that they plan on calling to testify.

The trial judge overruled the objection, stating Stephens "is entitled to use the records, but that takes care of it," implicitly finding the testimony did not implicate the Confrontation Clause. Thereafter, the relevant chains of custody were developed as follows.

T-Shirt

Stephens testified the t-shirt was retrieved from storage by Lisa Waananen[15] on July 15, 2010, and submitted to trace evidence examiner Ila Simmons to be tested for the presence of gunshot residue (GSR). Simmons testified she recognized the t-shirt because it was marked with her laboratory identification number, the item number, her initials, and the date she performed the analysis. Simmons further testified the t-shirt was in a sealed container when she received it and that she performed particle lifts from the t-shirt and examined those for the presence of GSR.[16] Stephens testified that Simmons returned the t-shirt to the SLED storage room on August 11, 2010, where it remained until it was released to forensic technician Betty Butler on October 20, 2010, for further testing.

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[15] Lisa Waananen did not testify.

[16] Simmons' particle lift analysis (State's Exhibit #69) was admitted without objection, and the results of those tests are not the subject of this appeal.

Butler testified the t-shirt was in a properly sealed container when she received it and that it had not been tampered with. Butler testified she took DNA swabs from the t-shirt to test for possible blood or skin cells, then she re-sealed and initialed the box, and returned it to the evidence control department.[17]

Stephens confirmed that Butler returned the t-shirt to the evidence control department in a properly re-sealed container on October 25, 2010, following completion of the DNA testing, and the t-shirt was returned to Candy Kyzer of LCSD on December 1, 2010.

Pistol, Shell Casing, and Fired Projectile:

Again referring to the SLED chain-of-custody report, Stephens testified the .380 caliber pistol, the shell casing, and the fired projectile were retrieved from the evidence control department[18] for testing on July 23, 2010. Although all three items—the pistol, the shell casing, and the fired projectile—were eventually transferred to forensic scientist Michelle Eichenmiller for ballistics testing, the pistol was first transferred to Butler for DNA testing. Butler testified the package containing the pistol was properly sealed and secured when she received it and that she swabbed the pistol for traces of DNA, re-sealed and initialed the container, then transferred the pistol to Michelle Eichenmiller for ballistics testing.

Michelle Eichenmiller, a firearms analyst for SLED, testified that she received the pistol, the shell casing, and the fired projectile, and at the time of her receipt, each item was in a sealed, taped package and had not been tampered with or altered. Eichenmiller testified that through laboratory testing, she was able to determine that the projectile recovered during the autopsy and the shell casing found near the victim's body were both fired by the pistol—State's Exhibit #48. Following

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[17] At trial, the DNA swabs Butler obtained were admitted over defense counsel's objection on the basis of *Crawford*; however, Brockmeyer does not challenge the admission of this DNA evidence on appeal.

[18] Stephens' testimony indicated that she did not personally transfer the items to Eichenmiller; rather, SLED evidence technicians Nikki Perry Hughes and Doris Yarborough retrieved the items from storage and transferred them to Eichenmiller and Butler. Neither Hughes nor Yarborough testified.

Eichenmiller's examination, Stephens testified, the items were returned to the SLED evidence control department and were subsequently returned to Candy Kyzer at the LCSD.

Defense counsel objected to the testimony of both Stephens and Eichenmiller on the basis of hearsay and, for the first time, defense counsel alleged a Confrontation Clause violation under *Crawford*[19]:

> [Defense Counsel]: Judge, I would simply renew my previous objections under the chain of custody.
>
> The Court: With reference to this issue[], let me hear your specific objection.
>
> [Defense Counsel]: Under the chain of custody, under the proper foundation, and then also under Crawford versus Washington.
>
> The Court: Where is it that you allege is a deficiency in the chain of custody? . . . . I want to hear with specificity what is your objection to this particular testimony?
>
> [Defense Counsel]: Just the laying of the foundation and the chain of custody on the items that she is testifying to.
>
> The Court: You keep referring to the chain of custody. Where is it in your opinion [deficient]?
>
> [Defense Counsel]: Judge, the same things I testified [sic] to as to hearsay and the business records exception that Your Honor had ruled upon previously. I believe I am required to renew it at this point in time.

[19] Although defense counsel specifically referenced *Crawford* in objecting to Stephens' testimony, counsel never identified the particular out-of-court statement alleged to violate the Confrontation Clause. Moreover, in overruling the objection, the trial judge ruled only that Stephens' testimony did not constitute hearsay; he did not rule on the constitutional issue and counsel did not bring that omission to the trial judge's attention.

> The Court: On the business [record exception] only. Okay. My ruling on that speaks for the record.

Brockmeyer now argues that various law enforcement personnel listed within the chain-of-custody logs did not testify at trial in violation of the Confrontation Clause, thus rendering the admission of the t-shirt, the shell casing, the magazine, the .380 pistol, and the fired projectile reversible error. We reject this argument for several reasons.

We first find Brockmeyer's claim is not preserved for appellate review. Although Brockmeyer objected to the admission of the t-shirt, the shell casing, the magazine, the .380 pistol, and the fired projectile, none of Brockmeyer's initial objections alleged a Confrontation Clause violation; rather, Brockmeyer challenged only the sufficiency of the foundation for admitting each item. The issue of whether evidence is admissible under "state-law requirements regarding proof of foundational facts" is distinct from the issue of whether a defendant's Sixth Amendment confrontation right was violated. *See Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012) ("[I]f a statement is not made for 'the primary purpose of creating an out-of-court substitute for trial testimony,' its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause.'" (quoting *Bryant*, 131 S.Ct. at 1155)). Thus, on appeal, Brockmeyer may not bootstrap a Confrontation Clause objection onto his objection to the State's proof of foundational facts. Although Brockmeyer eventually raised Confrontation Clause objections, those objections were untimely as to the admission of the items themselves and do not preserve for appellate review the issue of whether that evidence was properly admitted. *See State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (finding where a defendant failed to call an alleged error to the trial judge's attention at the first opportunity to do so, the defendant is procedurally barred from raising the issue on appeal).

In any event, the challenged testimony referring to certain statements of other non-testifying evidence custodians in the chain-of-custody logs was admissible as a matter of state law and would not raise Confrontation Clause concerns. Therefore, the admission of the challenged non-fungible items was proper, notwithstanding Brockmeyer's inability to confront each custodian who handled the evidence.

"Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *In re Care & Treatment of Harvey*, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003) (citing Rule 801, SCRE). "Hearsay is not admissible unless there is an applicable exception." *Id*. at 61-62, 584 S.E.2d at 897 (citing Rule 802, SCRE). The business record exception reads, in pertinent part:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . .

Rule 803, SCRE.

At trial, Harmon testified that she was responsible for storing, tracking the physical custody, and maintaining control of all of the evidence collected by investigators and crime scene personnel. She testified that the record of who possessed each piece of evidence is referred to as a chain of custody and that the chain of custody paperwork accompanies the evidence as it is transferred. Harmon testified that, when evidence is first submitted to the LCSD facility, an evidence custodian verifies the identity of each item and ensures it is accompanied by a chain of custody form. The evidence custodian then enters the tracking information into a computer system and stores the evidence until it is released for testing or sent to court. Harmon testified that the chain of custody form is "basically . . . keeping track of who touches it and what happens to the evidence," and that the custody forms and data are maintained in the normal course of business.

Stephens testified at trial that she is a forensic technician in the SLED evidence control department and that she is responsible for logging in, packaging, and transferring evidence for forensic analysis in criminal cases. Stephens testified that it is SLED's practice to maintain electronic chain-of-custody records which document every location and person that handles or touches evidence.

We find the facts of this case demonstrate that the evidence logs were kept as business records for the purpose of identifying and storing evidentiary items. We find the trial judge properly determined the chain-of-custody reports fall within the

hearsay exception in Rule 803(6), SCRE, and that the evidence custodians' testimony about the chains of custody was admissible. Critical to admissibility of the chain-of-custody records here is their non-testimonial nature. Regarding the Confrontation Clause analysis, these chains of custody were not created "for the *sole purpose* of providing evidence against the defendant." *Melendez-Diaz*, 557 U.S. at 323. Indeed, the evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their "primary purpose" is not to constitute evidence in a criminal trial. Because we find these statements are not testimonial, they are exempt from Confrontation Clause scrutiny. *See Bullcoming*, 131 S.Ct. at 2270 (Sotomayor, J., concurring) ("[B]usiness and public records 'are generally admissible absent confrontation.'").

Having determined there was no Confrontation Clause violation, the issue of the admissibility of testimony regarding the chains of custody is purely a question of state law. In this case, the challenged evidence was unique and readily identifiable. Because the challenged evidence in this case is not fungible, unlike the cocaine in *Melendez-Diaz* or the blood sample in *Bullcoming*, here strict chains of custody are not required for admission into evidence. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741-42 (2005) ("While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition."). Rather, readily identifiable items must merely be authenticated by a showing of "evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901, SCRE (listing as acceptable methods of authentication the testimony of a witness with knowledge "that a matter is what it is claimed to be" and distinctive characteristics, such as "[a]ppearance, contents substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"). "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011).

Here, the challenged evidence was admissible upon a proper showing of identification. Before the items were admitted into evidence, Investigators Day and Crump identified each item as the item they collected, and testified that the evidence was carefully marked and preserved so that it could be identified with absolute certainty. Additionally, as to the t-shirt in particular, both Brakefield and Clack testified that Brockmeyer was wearing the t-shirt at the time of the shooting. Moreover, two photographs depicting Brockmeyer wearing the t-shirt on the night of the shooting (State's Exhibits #3 and #4) were already admitted into evidence. Accordingly, the trial court's evidentiary rulings are readily sustainable, for there is ample evidence establishing that these items were, in fact, what they were purported to be. *See Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755 (holding that although "every person handling the evidence need not be identified in all cases," the proponent of the evidence must nonetheless demonstrate "how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be"); *see also United States v. Summers*, 666 F.3d 192, 201 (4th Cir. 2011) (In determining whether real evidence is admissible, the trial judge need "only to satisfy itself that it was 'improbable that the original item had been exchanged with another or otherwise tampered with.'" (quoting *United States v. Jones*, 356 F.3d 529, 535 (4th Cir. 2004), and citing Fed. R. Evid. 901(a))).

We finally note the obvious—Brockmeyer admitted possessing the .380 pistol at the time it was fired and then throwing the gun and the magazine into the woods afterwards. Brockmeyer's self-authentication of the challenged items renders meritless his chain of custody and *Crawford* arguments. Having authenticated most of the items through his own testimony, Brockmeyer himself negates any possible prejudice by the admission of these items. *See State v. Commander*, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."); *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) ("'A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error' if the 'error was harmless beyond a reasonable doubt.'" (quoting *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994))). Accordingly, we find the trial judge's admission of the challenged items of evidence did not constitute reversible error.

IV.

Brockmeyer argues the trial court committed reversible error in admitting two photographs during his trial—specifically, a photograph of Brockmeyer and a photograph taken from the victim's cell phone. We disagree.

"'A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.'" *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (quoting *State v. Kelley*, 319 S.C. 65, 173, 460 S.E.2d 368, 370 (1997)). "The determination of relevancy and materiality of a photograph is left to the sound discretion of the trial judge." *Id*. "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *Id*.

First, Brockmeyer argues the trial court erred in admitting a photograph of him taken shortly after the shooting because it suggests a decision on an improper basis in violation of Rule 403, SCRE. During the testimony of Leslie Lawson, the owner of Jager's Bar, the State introduced a photograph of Brockmeyer wearing no shirt. Brockmeyer objected on the grounds that the picture was irrelevant. The State contended the photograph was relevant to show Brockmeyer's agitated demeanor after the shooting, as contrasted with Brockmeyer's desire to portray himself as distraught and crying. The trial court overruled Brockmeyer's objection and admitted the photograph.

As an initial matter, it is our view this matter is not preserved for appellate review because the basis of the objection at trial was relevance, but Brockmeyer argues on appeal that the probative value was substantially outweighed by the prejudicial effect under Rule 403. Because a party may not argue one ground at trial and another on appeal, this issue is not preserved for appellate review.

Nevertheless, on the merits, we find no abuse of discretion in the admission of the photograph. The photograph depicted Brockmeyer close to the time of the shooting and was relevant to his demeanor at the time. Moreover, because other witnesses testified regarding Brockmeyer's demeanor being agitated following the shooting, Brockmeyer cannot prove he was prejudiced by the admission of this photograph. *See State v. Griffin*, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000)

("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.") (citing *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996)). In this regard, it was Brockmeyer who sought to bolster his accident defense with evidence of his distraught and weeping demeanor. Surely the State is entitled to counter that evidence.

Lastly, Brockmeyer claims the trial court erred in admitting State's Exhibit #56, which is a photograph recovered from the victim's cell phone depicting the murder weapon and the victim's pellet gun side by side with the caption, "Wills gun on left my gun on righ[t]." Brockmeyer claims this photograph was offered for the truth of the matter asserted in the caption and, therefore, was inadmissible hearsay. We agree with Brockmeyer but do not find the error reversible.

The error was harmless because Brockmeyer admitted owning and possessing the .380 pistol at Jager's on the night of the shooting. Several witnesses saw Brockmeyer with the pistol and the victim with the pellet gun at Jager's on the night of the shooting, and the pellet gun was found tucked in the back of the victim's body immediately after the shooting. Additionally, Deserae Camacho, Brockmeyer's former girlfriend, testified Brockmeyer owned and frequently carried a .380 pistol and that the victim carried a "fake plastic BB gun" for protection. Thus, the caption on the photograph was cumulative to other evidence admitted at trial indicating the ownership of the guns. Because the improper admission of hearsay constitutes reversible error only when it results in prejudice, it is our view Brockmeyer has failed to show he was prejudiced, and thus, has failed to show reversible error. *See State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.").

V.

For the foregoing reasons, Brockmeyer's convictions and sentences are affirmed.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Smith, Appellant.

Appellate Case No. 2010-178386

Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 5167
Heard December 10, 2012 – Filed August 28, 2013
Withdrawn, Substituted and Refiled November 27, 2013

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., and Assistant Attorney General Julie Kate Keeney, all of Columbia, and Solicitor Barry Barnette, of Spartanburg, for Respondent.

SHORT, J.: Thomas Smith appeals his convictions for voluntary manslaughter, possession with intent to distribute marijuana within a half-mile radius of a school, and possession with intent to distribute marijuana. He argues the trial court erred in denying his motion for a directed verdict because the undisputed evidence showed he shot the victim in self-defense. We affirm.

FACTS

Around midnight on March 12, 2009, Smith and three of his friends, Rocky Hadden, Ashley Smith, and James Ervin, arranged to sell marijuana to a person they had never met before named Markee Guest (the victim), and all four rode together in a small car to meet the victim. Hadden testified he drove the car, which belonged to Ashley, and Ashley was in the passenger seat. Smith sat in the backseat on the passenger's side, and Ervin was in the backseat on the driver's side. When the group met up with the victim near an elementary school, he had another person with him they did not know named Ronald Lipscomb. It was cold outside, and there was conflicting testimony as to whether Smith invited the victim and Lipscomb to get into the back seat of the car or whether they requested to get in. Regardless, the two got into the back seat, and Smith measured the marijuana.[1] The victim or Lipscomb asked for change for a $100 bill. When Ashley responded she did not have change, Lipscomb pulled out a gun, pointed it at Smith's temple, and said to "give him everything." Hadden testified that within seconds of Lipscomb pulling the gun, he ducked his head and heard the first of multiple gunshots. After the shots were fired, Hadden said Smith got out of the car and left. Hadden did not see anything in Smith's hands and did not know he had a gun. Ervin managed to escape and run away when he saw Lipscomb pull out the gun. Lipscomb climbed out the open window. Hadden drove away with Ashley, stopped the car on Railroad Avenue, and hid the marijuana under the railroad tracks.

Officer Tracy Medley responded to a call about gunshots, and when he arrived at the scene, he found two people laying in the road. The victim was deceased, and

[1] Hadden testified Smith slid over from the passenger's side towards the driver's side when the victim and Lipscomb got into the car through the rear passenger door. Therefore, Ervin was against the rear door on the driver's side, Smith was next to him, the victim was next to Smith, and Lipscomb was against the rear door on the passenger's side.

Lipscomb was moving. The victim was missing one shoe, and Lipscomb was missing both of his shoes. Officers found four to five shell casings at the scene.[2]

That same night, Officer Matt Earls responded to a 911 call about a suspicious vehicle. When he arrived at Railroad Avenue, he observed a vehicle on the side of the road and three people outside of the vehicle. Upon approaching the vehicle, he saw a silver handgun in plain view on the floorboard behind the driver's seat.[3] He also saw one bullet hole in the sunroof and one in the back passenger-side door. Captain Mike Segina testified he found three shoes in the passenger-side rear floorboard. Detective Ronnie Anderson testified the three people present at the vehicle were Hadden, Ashley Smith, and Ervin. Detective Anderson's police dog alerted him to marijuana near the railroad tracks. Officers did not find another gun.

Officer Alex Hammond went to Smith's house to look for him and found him hiding under a bed. Smith was arrested for murder, possession with intent to distribute marijuana near a school and/or playground, and possession with intent to distribute marijuana. Detective Jonathan Blackwell testified he interviewed Smith at the police department on March 13, 2009, at 4:15 in the morning. Detective Blackwell took a verbal and written statement from Smith.[4] In the statement, Smith said:

> On March 13th of 2009, a little after midnight, myself, Thomas Michael Smith, Rocky Hadden, James Ervin "Bug", and Ashley Smith, got into Ashley's black Mitsubishi Galant to go meet somebody at Mary Bramlett. We were going there to meet this guy to sell him two ounces of marijuana. Rocky was driving the car. Ashley was in the front passenger seat. Bug [Ervin] was in the back seat behind Rocky. And, I was behind Ashley. We met two black males at the alley beside Mary Bramlett. I showed them the pot, and they said

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[2] Captain Mike Segina testified the four shell casings found at the scene, and the one found under the driver's seat, were all 9mm Rugers.

[3] Captain Segina testified the gun was a Raven Model MP-25. He also found a magazine with five 0.25 caliber rounds in it.

[4] Smith did not testify at his trial.

> they wanted it and asked to get in the car. The two black males got into the back seat. The black male sitting beside me had on a black hoodie [the victim], and the black male sitting beside him against the door was wearing a red coat [Lipscomb]. We pulled to the other end of the alley to the stop sign. I asked them if they wanted it or not. And, they said yeah and started digging in their pockets to find money. Then the guy in the red coat [Lipscomb] pulled out a gun and reached around the guy in between us [the victim] and stuck the gun against my head. He tells me – he tells me to give him my money and everything I got. I told him no, quit playing. He put the gun against my head again and he said, "I'm not joking, don't move." One of the black males grabbed me and pulled me towards them. That's when I pulled my gun out. They were still pointing the gun at me, so I started shooting. My first three shots went into the roof of the car. My last two shots I was falling out of the car, so I don't know where they went. The guy in the red [Lipscomb] jumped and started rolling around on the ground. The guy in the black coat [the victim] just sat in the back seat moaning and wouldn't get out of the car. So I walked around to the passenger side and pulled him out. I left him in the road and I jumped back into the car and we drove to Railroad Avenue to Jacob's house. When we drove to Railroad Avenue the only people in the car was me, Rocky [Hadden] and Ashley [Smith]. Bug [Ervin] got out and ran when he saw the gun. When we got to Railroad Avenue I jumped out and I ran to [left blank]. While I was running I threw the gun and the clip in two different directions. The gun was a Ruger 9mm.

Officer Blackwell testified Smith's statement was that he started firing his gun in an effort to retreat from the car on the driver's side. Captain Segina testified the gun he found in the car had five bullets in the magazine and one in the chamber. Suzanne Cromer from the State Law Enforcement Division (SLED) testified the gun was not functioning properly and did not fire every time the trigger was pulled.

A trial was held on November 16 and 17, 2010. At the close of the State's case, Smith moved for directed verdict on the charge of murder, arguing he fired his gun in self-defense. The court denied the motion with no explanation. The court instructed the jury on self-defense, in addition to the other charges. The jury found Smith guilty of voluntary manslaughter, possession with intent to distribute marijuana near a school and/or playground, and possession with intent to distribute marijuana. The court sentenced Smith to twenty-five years imprisonment for voluntary manslaughter, ten years for possession with intent to distribute marijuana near a school and/or playground, and five years for possession with intent to distribute marijuana. This appeal followed.

STANDARD OF REVIEW

In considering a directed verdict motion, the trial court is concerned with the existence of evidence rather than its weight. *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "However, when a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt." *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69.

LAW/ANALYSIS

Smith argues the trial court erred in denying his motion for directed verdict because the undisputed evidence showed he shot the victim in self-defense. Specifically, Smith asserts the following evidence supported his claim of self-defense: (1) he was one of four passengers in the backseat of a small car; (2) he fired his gun only after another passenger in the backseat, who was acting in concert with the victim, pressed a gun to his temple and ordered him not to move; and (3) he was unable to escape the vehicle. We disagree.

In *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998), our supreme court provided four elements a court should use when determining whether a person was justified in using deadly force in self-defense:

> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

In *Wiggins*, our supreme court held the trial judge properly denied a directed verdict of acquittal for murder because the State presented sufficient evidence to create a jury issue regarding whether Appellant was acting in self-defense or was guilty of voluntary manslaughter. 330 S.C. at 548, 500 S.E.2d at 495. Further, the court noted, "'[r]eversal of a conviction because of the trial court's refusing to give a directed verdict on the ground of self-defense is rare.'" *Id.* at 545, 500 S.E.2d at 493 (quoting William S. McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina* 483 (3d ed. 1996) (Supp. 1997 at 77)).

Smith argues the State did not present any evidence to prove he was at fault in bringing on the difficulty. He asserts he did not deliberately arm himself in

anticipation of a conflict that evening, and Lipscomb pulled his gun first without any provocation or act of aggression by anyone, including himself.

In *State v. Dickey*, 394 S.C. 491, 500, 716 S.E.2d 97, 101 (2011), our supreme court found the State did not produce any evidence to contradict Dickey's testimony he routinely carried his concealed weapon and did not deliberately arm himself in anticipation of a conflict that evening. Therefore, the supreme court determined the State did not carry its burden to disprove the elements of self-defense beyond a reasonable doubt, and Dickey was entitled to a directed verdict of acquittal on the ground of self-defense. *Id.* at 498-500, 716 S.E.2d at 100-01. We find *Dickey* distinguishable because Dickey was carrying his gun while performing his job as a security guard; although he was not required to carry a loaded gun by his employer, he had a valid concealed weapons permit for his gun; he was acting in good faith in removing the trespassers from the building at the request of a tenant in the course of his employment as a security guard; and Dickey was not brandishing his gun and pulled it only when the trespassers began advancing towards him in an aggressive manner.[5] *Id.* at 495-500, 716 S.E.2d at 98-102.

In contrast, in the present case, the State presented evidence Smith was not acting in good faith at the time of the shooting in that he took a gun to a drug deal and violated the law by attempting to sell illegal drugs.[6] We find going to a drug deal while armed with a deadly weapon is evidence of fault in bringing on the difficulty, which is a question of fact that must be determined by the jury. Thus, whether Smith armed himself in anticipation of a conflict was an issue for the jury. *See State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide."); *State v. Jackson*, 227 S.C. 271, 278, 87

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[5] The court noted that "[h]ad [Dickey] accompanied the ejection with threatening words or posture, a jury question may have arisen." *Id.* at 500, 716 S.E.2d at 102. "However, under these facts, we find [Dickey] was exercising his right to eject trespassers in good faith and, as a matter of law, he was without fault in bringing about the difficulty." *Id.* at 501, 716 S.E.2d at 102.

[6] We further note Smith ran away from the scene of the crime after the shooting. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 266 (2006) ("Flight from prosecution is admissible as guilt.").

S.E.2d 681, 684 (1955) ("[O]ne cannot through his own fault bring on a difficulty and then claim the right of self-defense . . . ."); *cf. State v. Slater*, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007) (holding the trial court correctly found Slater was not entitled to a self-defense charge because his actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire and ultimately the death of the victim, and any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense); *id.* at 70, 644 S.E.2d at 52-53 (stating the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge, but rejecting the position that the unlawful possession of a weapon could never constitute an unlawful activity that would preclude the assertion of self-defense).

Therefore, we find the State carried its burden to disprove the elements of self-defense beyond a reasonable doubt, and the trial judge properly denied Smith's motion for directed verdict based on self-defense. *See Wiggins*, 330 S.C. at 548, 500 S.E.2d at 495 (finding the trial judge properly denied a directed verdict of acquittal because the State presented sufficient evidence to create a jury issue regarding whether Appellant was acting in self-defense or was guilty of voluntary manslaughter); *State v. Strickland*, 389 S.C. 210, 214, 697 S.E.2d 681, 683 (Ct. App. 2010) ("If the State provides evidence sufficient to negate a defendant's claim of self-defense, a motion for directed verdict should be denied.").

CONCLUSION

Accordingly, the trial court is

AFFIRMED.

KONDUROS, J., concurs.

LOCKEMY, J., concurs in a separate opinion.

LOCKEMY, J., concurring in a separate opinion.

I concur in the majority's decision to affirm Smith's conviction. However, I do not believe a jury issue existed as to whether Smith brought on the difficulty which led to the shooting. The issue of self-defense and Smith's right to avail himself of that

defense was a matter of law, not fact. The facts in this case did not support an instruction on self-defense as a matter of law because the first element of self-defense, being without fault in bringing on the difficulty, was not present. Therefore, the trial court's denial of Smith's directed verdict motion on the ground of self-defense was not error.

To support his self-defense claim, Smith cites *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000). In *Starnes*, two shootings took place in a home where there was disputed testimony that a drug transaction was involved. 340 S.C. 316-18, 531 S.E.2d at 910-11. Our supreme court found the facts presented entitled Starnes to a self-defense charge in regard to both shootings. *Id.* at 322, 531 S.E.2d at 913. However, the facts in *Starnes* are very different from those in this case. In *Starnes*, the testimony centered on anger regarding an unpaid or late paid debt, victims bent on mischief, and a shooting to defend others. 340 S.C. 316-18, 531 S.E.2d at 910-11. The purported drug transaction was only one element, and one could argue it had dissipated as a reason for the shootings. Here, Smith willingly brought a loaded weapon to the scene solely for the purpose of furthering his efforts to conduct the illegal sale of drugs.

I believe the reasoning in *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007), is more akin to the facts of this case. In *Slater*, Slater willfully entered into an altercation in progress with a loaded weapon. 373 S.C. at 68, 644 S.E.2d at 51. After shots were fired, Slater returned fire killing the victim. *Id.* Our supreme court reversed this court and agreed with the trial court that Slater was not entitled to a self-defense charge. *Id.* at 71, 644 S.E.2d at 53. The court stated, "[a]ny act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." *Id.* at 70, 644 S.E.2d at 52 (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 332 (1999)). In other courts, this reasoning has been applied to deny the accused the right to a self-defense charge. In *United States v. Desinor*, 525 F.3d 193 (2d Cir. 2008), the Second Circuit determined the defendants were not entitled to self-defense charges for killing an unintended victim. The Second Circuit held, "[i]t has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill." *Desinor*, 525 F.3d at 198 (quoting *United States v. Thomas*, 34 F.3rd 44, 48 (2d Cir. 1994)).

At the time of the shooting, Smith was engaged in the crime of selling illegal drugs. This activity, in addition to damaging the lives of untold numbers of

people, also results in shootings and deaths on a very frequent basis. Smith's decision to bring a loaded weapon to the drug deal clearly shows his knowledge of the danger of the situation. His criminal conduct brought on the necessity to take the life of another. Smith created a situation fraught with peril. He cannot be excused for the violence that logically and tragically often occurs when engaging in such conduct, nor can he claim he did not anticipate the high probability of such violence.

Therefore, I would affirm the denial of the directed verdict motion on the ground that Smith was not entitled under the facts of this case to the defense of self-defense. The self-defense charge, although not warranted in my view, was not objected to by either party nor has it been argued to this court that it was prejudicial to Smith. Thus, Smith's conviction should be affirmed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ZAN, LLC, Appellant,

v.

Ripley Cove, LLC, W.H. Knight, Karl A. McMillan, individually and as the principal of Karl A. McMillan, Inc., St. Andrews Title & Abstract Agency, Inc., Chicago Title Ins. Co. and Charles A. Funk & Lillian M. Funk, Defendants,

Of whom Ripley Cove, LLC, W.H. Knight, Karl A. McMillan, individually and as the principal of Karl A. McMillan, Inc., and East Coast Trading Co., are the Respondents.

ZAN, LLC, Plaintiff,

v.

East Coast Trading Co., Defendant.

Appellate Case No. 2012-209606

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

Opinion No. 5183
Heard October 7, 2013 – Filed November 27, 2013

REVERSED AND REMANDED

Andrew K. Epting, Jr., and Michelle Nicole Endemann, both of Andrew K. Epting, Jr., LLC, of Charleston, for Appellant.

Stanley E. Barnett, of Smith, Bundy, Bybee, & Barnett, PC, of Mt. Pleasant, for Respondents East Coast Trading Co. and Ripley Cove, LLC, and Kerry W. Koon, of Charleston, for Respondents Karl A. McMillan and Karl A. McMillan, Inc.

PER CURIAM: ZAN, LLC (ZAN) filed these consolidated actions against Ripley Cove, LLC, W.H. Knight, Karl A. McMillan, individually and as the principal of Karl A. McMillan, Inc., W.M. Belote, East Coast Trading Company (East Coast), St. Andrews Title & Abstract Agency, Inc., Chicago Title Insurance Company, and Charles A. and Lillian M. Funk.[1] ZAN sought rescission of a contract and damages. After a bench trial, the trial judge refused to rescind the contract, but the judge awarded ZAN $10,000 in joint and several damages against Respondents. ZAN appealed. We reverse and remand.

I. BACKGROUND

Edgar Buck owns *Rookie IV*, a 61-foot boat, which has a 19.6-foot beam and requires a dock slip 20 feet in width. *Rookie IV* is valued at close to $6 million. Buck moored the boat at a slip in the busy waterway of Wappoo Cut in the Coastal Waterway, where it regularly sustained damage.

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[1] Ripley Cove, LLC, W.H. Knight, Karl A. McMillan, Karl A. McMillan, Inc., W.M. Belote, and East Coast are Respondents. The Honorable R. Markley Dennis entered an Order of Default as to Karl A. McMillan. The Honorable Deadra Jefferson entered an Order of Default as to Karl A. McMillan, Inc. McMillan and McMillan, Inc., moved for relief from default. The Honorable J.C. Nicholson, Jr., denied the motion.

Buck's daughter, Susanne Cantey, owns ZAN, and Buck has authority to act on behalf of ZAN. Susanne wanted a waterfront lot to build a home, and Buck wanted a boat slip out of the waterway for *Rookie IV*. Buck's real estate agent, Lynn Carmody, escorted Buck and Susanne to Ripley Cove to view lots. They met with McMillan, who was the real estate broker acting as the selling agent for Ripley Cove.

Buck testified McMillan represented the largest boat slip, B1, went with the lot ZAN was considering purchasing. Buck maintained that when he and Susanne toured the home lot, McMillan pointed to a boat slip near a long, floating dock. McMillan did not show Buck a plat, but he allegedly emphasized that B1 was the longest slip and went with the lot ZAN was contemplating purchasing.

In February 2005, ZAN contracted with East Coast to purchase B1 for himself and Lot 3 in Ripley Cove for Susanne. The sales contract for the lot and slip, priced at $700,000, did not specify a particular boat slip, and ZAN did not receive a plat. Susanne signed the contract on behalf of ZAN, and W.H. Knight signed on behalf of Ripley Cove. The closing was scheduled for March 5, 2005.

Buck received a copy of the plat a day or two prior to the scheduled closing date. The plat indicated the slip designated by McMillan as B1 was actually two slips, B1 and B2. Buck refused to close and told McMillian he needed a 20-foot clearance and two pilings. McMillan indicated Ripley Cove would reduce the price by $20,000, increase clearance in B1 to twenty feet, and add the pilings. The pilings were to be built between March 5th and 6th. The closing was rescheduled for April 5, 2005.

Buck viewed the slip just prior to the next scheduled closing date, and the pilings had not been installed. He went to the closing and again refused to close. McMillan allegedly represented that Ripley Cove had approved the pilings, and he would certify the pilings would be put in place with a twenty foot clearance. Dan David, the closing attorney, left the conference room, called Ripley Cove's "owners," returned and confirmed, according to Buck, an agreement to the pilings and a 20 foot clearance. David issued a letter confirming the agreement and stating there was sufficient money in escrow to pay for the pilings. The letter stated: "two piling[s] will be replaced in line with the existing pilings of the adjoining boat slips . . . ." Based on the letter, Buck agreed to close. The Master Deed provided that the slip issued with each lot was to be determined upon contract.

Buck continuously called David regarding the installation of the pilings. In June 2006, Buck received a letter from Dock and Marine, Inc., indicating it been hired to install one piling. Buck contacted Dock and Marine and informed them the contract should have been for two pilings. When the pilings were still not built, Buck contacted the permitting authority to see if a permit had been applied for and was told, "No." In 2008, Buck learned he could not have a 20-foot clearance because B2 had been sold.

Buck testified he met with the purported owner of Ripley Cove, Doc Knight. Buck testified he told Knight the pilings had to be placed inside B2 so as to provide B1 with a 20-foot clearance. According to Buck, Knight asked him where he wanted the pilings and assured Buck it would be "done." Knight denied Buck requested part of B2 and testified he understood Buck merely wanted pilings placed so B1 would be marked.

Susanne testified the plat ZAN was given prior to signing the sales contract showed only the lot. She stated McMillan indicated B1 was the slip ZAN was purchasing, and she thought it was 35 feet wide. She did not learn it was actually two slips, B1 and B2, until just prior to the first scheduled closing. Susanne acknowledged the Master Deed, recorded in August 2004, indicated the two boat slips. Carmody likewise testified McMillan represented that the entire 35-foot slip was one slip that went with the lot.

David testified it was either Knight or Michael Belote, on behalf of East Coast, that approved the letter he wrote at closing. According to David, Knight had power of attorney to act on Belote's behalf. David testified Ripley Cove was owned by East Coast and Pavilion. After the contract was signed, but before the parties closed and the deed was executed, B1 was transferred from Ripley Cove to East Coast, and B2 was transferred to Pavilion. Thus, David admitted that at the time the closing actually occurred, Ripley Cove no longer owned B1 or B2.

David also explained that all of the pilings were common elements owned by the Ripley Cove Homeowners' Association (HOA). David testified numerous projects on the dock were delayed until Ripley Cove had a permit to dredge and had completed dredging the marina, which did not occur until 2008. David testified he did not realize Buck wanted footage from B2; David thought Buck merely wanted

pilings to be built. David admitted the actual clearance in B1 was only about 18 feet.

Respondents called numerous fact witnesses to testify that the marina and pilings at Ripley Cove required permits by the State of South Carolina; the dredging of the canal required federal permitting; and the typical time to receive state and federal permits was between twelve and eighteen months, and the two-and-a-half years it took Ripley Cove to receive the permit to add pilings to B1 was longer than ordinary.[2]

McMillan testified it was the responsibility of Ripley Cove to install the pilings because at the time the sales contract was signed, it still controlled the HOA. McMillan denied he knew B2 had been sold at the time of the closing; however, he acknowledged he was aware the deal was contingent on *Rookie IV* fitting into the slip. McMillan claimed the agreement for pilings was to define the B1 boundaries, and he denied representing B1 would be widened. He admitted it would have been possible to reduce the width of B2 to add to the width of B1 if the parties had agreed upon it.

McMillan also testified *Rookie IV* was 17 feet 8 inches wide, and he believed it would fit into B1, which he claimed was 20 feet wide. He admitted that although the slip measured 20 feet in width, he did not know the clearance. McMillan acknowledged the pilings would take about eight to twelve inches each, and *Rookie IV* could not fit into the back of the slip because of power boxes in the slip. As a reply witness, Buck testified he measured the floating dock that jutted into B1. According to his measurements, the actual clearance of that part of B1 was "something short of 15 feet."

Mike Belote testified he owned East Coast, which was a part-owner of Ripley Cove. Belote confirmed he was aware of Buck's demands on the date of closing, and he approved the pilings. However, he did not realize Buck wanted part of B2.

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[2] The public notice of application for the permit was dated June 13, 2008. Ripley Cove received the permit on January 12, 2011.

Knight was the broker for the project. He confirmed stating at the closing that he would do what he could to install the pilings. He also testified he met Buck at the property after the closing to confirm where Buck wanted the pilings to be placed. Knight denied understanding that Buck wanted them placed inside B2. Knight testified the cost of installing the pilings would be approximately $2,500.

Thomas Hartnett, a real estate appraiser, valued the slip alone at $40,000 and estimated the combined value of the lot and slip at $530,000. Buck placed the lot and slip on the market for $800,000, but testified he "would be surprised if it would bring $400,000."

ZAN filed an action against the defendants on July 25, 2008, and a second action on June 2, 2009, seeking rescission of the contract and damages from East Coast and Ripley Cove. Buck alleged damages of more than $1.4 million, including the purchase price, taxes, architecture services, regime fees, interest, and insurance.

After the bench trial, the trial judge made numerous factual findings that were not appealed such as: (1) a condition of the contract was that *Rookie IV* must fit into the slip; (2) *Rookie IV* did not fit into the slip; (3) McMillan informed Buck that the Sellers owned B2 and that "it would be no problem to give Mr. Buck the 20-foot clearance he needed and [to] place the pilings in . . . B2 (the adjoining slip)"; and (4) ZAN reasonably relied upon David's letter. Thus, the judge found ZAN proved its claims.[3] However, as to ZAN's entitlement to the remedy of rescission, the trial judge found the following:

> This case presents a unique situation as there is no issue with the upland parcel the Bucks purchased with the slip. Ordinarily, if part of a contract can be performed, the damages can be fashioned so as to reflect the breach. However, in this case the Master Deed specifically forbids the separation of the upland parcel from [the]

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[3] Respondents have not appealed the factual findings or conclusions of law; accordingly, they are the law of the case. *See Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 172, 714 S.E.2d 869, 878 (2011) (noting "an unchallenged ruling, right or wrong, becomes the law of the case").

> boat slip, complicating this Court's task. The Court cannot order the return of the slip with Z[AN] keeping the upland parcel about which there is no quarrel. Rescission is an equitable remedy which I choose not to grant. Rather, I award damages in the sum of $10,000.00 for the breach of the contract and negligent misrepresentation.

This appeal followed.

II. STANDARD OF REVIEW

In an action alleging entitlement to both money damages and equitable relief, the characterization of the action as legal or equitable depends on the plaintiff's "main purpose" in bringing the action. *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645-46, 557 S.E.2d 670, 672 (2001). ZAN's "main purpose" in instituting this action was to rescind the contract; thus, the main purpose of the action was equitable in nature. *See Dixon v. Dixon*, 362 S.C. 388, 395, 608 S.E.2d 849, 852 (2005) (stating an action for rescission of a contract is an equitable action).

The appellate court reviews factual findings and legal conclusions in an equitable action de novo. *Lewis v. Lewis*, 392 S.C. 381, 387-88, 709 S.E.2d 650, 653 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Id.* at 390, 709 S.E.2d at 654-55. "However, this broad standard of review does not require the appellate court to disregard the factual findings of the trial court or ignore the fact that the trial court is in the better position to assess the credibility of the witnesses." *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011).

III. LAW/ANALYSIS

ZAN argues the trial judge erred in refusing to rescind the contract after concluding Respondents were liable in contract and tort. We agree.

Under our own view of the preponderance of the evidence, we agree with the trial judge's findings of fact. It was clear to all parties that the main purpose of the contract was to provide Buck with a slip to accommodate *Rookie IV*. ZAN refused to close at the first scheduled closing when it appeared B1 was not sufficiently wide to berth *Rookie IV*. ZAN again refused to close at the second scheduled closing until promised accommodation for *Rookie IV*. Furthermore, the testimony indicates the existing clearance in B1 could not accommodate *Rookie IV*. Next, Respondents led Buck to believe they owned B2 and would utilize B2 to enlarge B1. Finally, we agree with the trial judge that ZAN's reliance on David's letter at the closing was reasonable. We likewise agree with the trial judge's conclusion that ZAN proved its claims for breach of contract and negligent misrepresentation.

However, we respectfully disagree with the learned trial judge's conclusion that ZAN was not entitled to the remedy of rescission. The trial judge denied rescission because there was no dispute regarding the upland parcel. Because we find the slip was a fundamental and substantial purpose of the contract, we conclude ZAN was entitled to rescission despite the parties' lack of dispute regarding the upland parcel. Furthermore, rescission is not unavailable due to the restriction in the Master Deed prohibiting the separation of the lot and slip. Rather, rescission would undo the contract *in toto*, rescinding the sale of both the lot and the slip.

"Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009). Generally, equitable relief is available only where there is no adequate remedy at law. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.*

"A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract." *Brazell v. Windsor*, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) (citing *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989)). "[R]escission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." *Id.* at 517, 682 S.E.2d at 826.

We find the breach of contract in this case was substantial, fundamental, and defeated the purpose of the contract. *See Brazell*, 384 S.C. at 518, 682 S.E.2d at 827 (finding rescission may be appropriate despite the seemingly *de minimis* breach of $2,000 on a real estate contract of $550,000 and stating "real estate contracts are unique and courts should evaluate the purpose of the real estate contract and the materiality of a breach in light of these differences" in determining whether rescission is appropriate). Thus, we reverse the trial judge's refusal to rescind the contract based on the parties' lack of dispute as to the upland parcel.

We likewise reject Respondents' argument that ZAN is not entitled to rescission because it did not timely demand rescission. A party seeking rescission must "promptly and unequivocally" provide notice of the intention to demand rescission. *Davis v. Cordell*, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960). In this case, the trial judge found Knight continued to represent to Buck "[u]p to and after the summer of 2006" that pilings would be put in place. Buck received a letter in June 2006 from a contractor who had been hired to install a piling. Respondents' own witnesses testified extensively regarding the inability to alter the marina until after permitting and dredging were completed, and the public notice required to seek the permit was dated June 13, 2008. Buck testified he did not learn B2 had been sold until 2008. ZAN filed its first action in July 2008, and a second action on June 2, 2009. We find no unreasonable delay precluding ZAN from seeking rescission.

Our analysis next focuses on whether the parties can be returned to the status quo prior to the contract. "When a party elects and is granted rescission as a remedy, he is entitled to be returned to status quo ante." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004). Thus, the party is entitled to a return of the consideration paid in addition to any amount necessary to restore him to the position he occupied prior to the making of the contract. *Id.* ("A return to the status quo ante necessarily requires any party damaged to be compensated.").

However, "[i]n the absence of fraud, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *Brazell*, 384 S.C. at 517, 682 S.E.2d at 826-27 (citation omitted). "[W]hether it would be fair and equitable to rescind [a] contract is a different issue from whether Petitioners have sufficiently alleged a material breach of contract and sufficiently alleged that

rescission would allow them to be restored to the status quo." *Id. at* 519, 682 S.E.2d at 828. Because the trial judge made no findings regarding the feasibility of returning these parties to the status quo, we remand.[4]

IV. CONCLUSION

Based on the foregoing analysis, the trial judge's order is

REVERSED AND REMANDED.

SHORT, WILLIAMS, and THOMAS, JJ., concur.

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[4] Because we reverse and remand on the issue of rescission, we decline to address ZAN's argument regarding the trial judge's error in awarding only $10,000 in damages. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when disposition of prior issues is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby Baker, Employee/Claimant, Appellant,

v.

Hilton Hotels Corporation, Employer, and ACE American Insurance Company, Carrier/Defendants, Respondents.

Appellate Case No. 2011-204487

Appeal From The Workers' Compensation Commission

Opinion No. 5184
Heard September 11, 2013 – Filed November 27, 2013

AFFIRMED IN PART AND REMANDED

Luke A. Rankin, of Rankin & Rankin, PA, of Conway, for Appellant.

William Thomas Bacon, IV, of Collins & Lacy, PC, of Charleston, and Amy Lynn Neuschafer, of Collins & Lacy, PC, of Murrells Inlet, for Respondents.

LOCKEMY, J.: Bobby Baker appeals the South Carolina Workers' Compensation Commission Appellate Panel's (Appellate Panel) order, arguing the Appellate Panel erred in (1) finding he did not suffer physical brain damage, and (2) relying on *Crisp v. SouthCo. Inc.*, 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010), *rev'd*, 401 S.C. 627, 738 S.E.2d 835 (2013) (*Crisp I*). We affirm in part and remand.

FACTS/PROCEDURAL BACKGROUND

On May 6, 2008, Baker, a maintenance worker employed by Hilton Hotels Corp. (Hilton) in Horry County, sustained an injury during the course and scope of his employment when a piece of ceiling tile fell and struck him on the head. Baker lost consciousness and fell to the ground. He was initially treated at the emergency room, where he was diagnosed with a scalp laceration and a head contusion. Subsequently, on June 16, 2008, Baker visited Doctor's Care complaining of lower back and neck pain. Baker was diagnosed with "low back strain." A June 23, 2008 spinal MRI revealed Baker had degenerative disc disease and facet joint disease.

On June 26, 2008, Baker was referred to neurologist Dr. Michael McCaffrey. Dr. McCaffrey's notes reflect Baker's primary complaint was low back pain. Additionally, Dr. McCaffrey noted Baker had ringing in his ears. Dr. McCaffrey found Baker was "[o]riented to person, place, and time" with "[n]o difficulty with short or long term memory" and "[g]ood attention span and concentration." Dr. McCaffrey diagnosed Baker with "low back pain with right leg radiation" and a "closed-head injury with a left occipital laceration." Dr. McCaffrey noted Baker's laceration had completely healed and he had no residual symptoms from it.

Baker continued treatment with Dr. McCaffrey through March 11, 2009. Dr. McCaffrey's notes reflect Baker continued to complain of headaches during his treatment; however, Dr. McCaffrey's assessment of Baker's mental status did not change. Dr. McCaffrey determined Baker had reached maximum medical improvement (MMI) in March 2009. Dr. McCaffrey found Baker was totally and permanently disabled "in reference to his low back pain, neck pain, and headaches." Additionally, Dr. McCaffrey noted Baker had a Class 5 Physical Impairment (severe limitation) and a Class 1 Mental/Nervous Impairment (no limitation).

Baker was also treated by pain management physician Dr. Jason Rosenberg from September 10, 2008 through August 4, 2009. Baker's chief complaint was low back and right leg pain, however, Dr. Rosenberg also noted Baker reported headaches and ringing in his ears. Baker received pain medication for his back and leg pain, but Dr. Rosenberg's notes do not indicate any diagnosis or treatment for Baker's reported headaches. Baker was also evaluated for chronic lower back pain by Dr. Jeffrey Wilkins in September and October 2009. Baker complained of headaches, numbness, and tingling to Dr. Wilkins, however Dr. Wilkins' notes do not reflect any diagnosis or treatment for Baker's symptoms.

From November 4, 2009 to November 4, 2010, Baker was treated by pain management physician Dr. Gregory Kang. Dr. Kang diagnosed Baker with lumbar degenerative disc disease with lumbar facet syndrome. Dr. Kang's notes do not contain any mention of symptoms of physical brain damage and/or any treatment for any such symptoms. Dr. Kang's medical records state Baker showed "no signs of cognitive impairment." On June 8, 2010, Dr. Kang determined Baker had reached MMI and assigned him an 18% impairment rating to the lumbar spine.

On July 7, 2010, Baker filed a Form 50 alleging he was totally and permanently disabled as a result of injuries to his head, spine, left leg, and right leg. Baker also alleged he sustained physical brain damage as a result of the accident. Hilton and its insurance carrier, ACE American Insurance Co., (collectively, Respondents) filed a Form 51 admitting Baker suffered an injury to his back only. Respondents denied Baker was totally and permanently disabled and denied his allegation of physical brain damage.

In July 2010, Baker was referred to Dr. Robert Brabham for a psychological and vocational evaluation. Dr. Brabham noted Baker's history of academic difficulties, including his having dropped out of school after ninth grade. Dr. Brabham noted Baker stated he had been unable to handle the paperwork or financial aspects of his auto mechanics business in the past. After reviewing Baker's file, Dr. Brabham opined there were "multiple medical references . . . confirming that Mr. Baker sustained a (physical) traumatic brain injury." Dr. Brabham found Baker continued to "present classic evidence as to the continuing presence of cognitive deficits that resulted from his brain injury." Dr. Brabham diagnosed Baker with a cognitive disorder, secondary to traumatic brain injury, and opined Baker was unable to perform any "substantial gainful work activity."

Baker was subsequently evaluated by psychologist Dr. L. Randolph Waid in September 2010. Dr. Waid also noted Baker's history of academic difficulties. Dr. Waid opined that Baker was not capable of returning to work and that he was experiencing "neurocognitive impairments affecting his capacity for attention, concentration, memory, and other brain behavior functions." According to Dr. Waid, the "causal factors" for Baker's neurocognitive impairments involved the "interfering effects of chronic pain/somatic symptoms; psychological disruption; fatigue; use of a regimen of medications; and residuals of a mild traumatic brain injury." Dr. Waid opined the "primary obstacle" to Baker's ability "to return successfully to role functioning are the residuals from the orthopedic injury." Dr. Waid agreed with Dr. Brabham that Baker "is experiencing neurocognitive

impairments due to a head injury (physical brain injury) that are contributing to his overall compromise in functioning."[1]

Finally, Baker was evaluated by psychologist Dr. Robert Deysach in December 2010. Dr. Deysach found Baker had an IQ of 62 which placed him in the "mildly handicapped" range. Additionally, Dr. Deysach agreed with Dr. Waid that the "primary obstacles" to Baker's ability to return to the competitive job market are "the residuals from the orthopedic injury." Dr. Deysach noted Baker's cognitive deficits were "developmental (i.e., existing before the accident) rather than the result of physical brain damage from the accident." Dr. Deysach opined it was "reasonable to conclude that Mr. Baker did suffer an injury to the head with brief and mild post-concussive symptoms. However, the data do not appear to support the presence of an acquired brain injury nor restriction in productivity or quality of life as a result of the physical brain damage."

Baker and his wife (Mrs. Baker) both testified at a January 4, 2011 hearing before the Single Commissioner. Mrs. Baker testified Baker wasn't "the same man" he was before the accident, and he struggled with memory loss, confusion, and forgetfulness. She further testified Baker's personality changed after the accident and he became moody and withdrawn. Baker testified he suffered headaches, memory loss, and confusion following the accident, but admitted there was no discussion or treatment for any memory loss or cognitive difficulties during his first two years of treatment.

The Single Commissioner found Baker sustained a work related injury to his back which resulted in a greater than 50% loss of use of his back. Additionally, the Single Commissioner determined Baker was permanently and totally disabled as a result of his back injury and was entitled to compensation in the amount of $623.26 per week from May 5, 2008, and continuing for a period not to exceed five hundred weeks. The Single Commissioner found Baker did not suffer a physical brain injury or any resulting physical brain damage as a result of the accident and denied Baker's request for lifetime benefits.

Baker appealed the Single Commissioner's finding that he did not suffer physical brain damage to the Appellate Panel. The Appellate Panel affirmed the Single

[1] Following Dr. Waid's evaluation and approximately one-and-a-half years after he last treated Baker, Dr. McCaffrey checked "yes" in a medical questionnaire from Baker's attorney that he agreed with Dr. Waid that Baker sustained a permanent physical brain injury.

Commissioner, noting that while Dr. Deysach opined Baker sustained a head injury, the "data [did] not support a finding of physical brain damage." The Appellate Panel found that based on the greater weight of the evidence as a whole, Baker did not suffer a physical brain injury or any resulting brain damage. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the Appellate Panel. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The Appellate Panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The findings of the Appellate Panel are presumed correct and will be set aside only if unsupported by substantial evidence. *Lark*, 276 S.C. at 135, 276 S.E.2d at 306. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

LAW/ANALYSIS

I. Physical Brain Damage

Baker argues the Appellate Panel erred in finding he did not suffer physical brain damage. We remand.

In general, a person injured within the Workers' Compensation Act (the Act) may not receive compensation for a period exceeding five hundred weeks. *See* S.C. Code Ann. § 42-9-10(A) (Supp. 2012); S.C. Code Ann. Regs. 67-1101 (2012). However,

> [n]otwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any

> person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, *or who has suffered physical brain damage* is not subject to the five-hundred-week limitation and shall receive the benefits for life.

S.C. Code Ann. § 42-9-10(C) (Supp. 2012) (emphasis added). "Physical brain damage" is not statutorily defined. However, our supreme court recently clarified what is meant by "physical brain damage" under section 42-9-10(C) in *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 738 S.E.2d 835 (2013) (*Crisp II*). In *Crisp II*, the court found Crisp's argument that the mere presence of any physical brain injury or damage, regardless of degree, triggered the operation of section 42-9-10(C) was not persuasive. 401 S.C. at 641, 738 S.E.2d at 842. The court viewed

> the inclusion of 'physical brain damage,' along with quadriplegia and paraplegia, in section 42-9-10(C) as indicative of the General Assembly's intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage.

Crisp, 401 S.C. at 641-42, 738 S.E.2d at 842. The *Crisp II* court found "the severity of the injury is the lynchpin of the analysis" and interpreted "the inclusion of 'physical brain damage' among the most serious injuries within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment." *Id.* at 643, 738 S.E.2d at 843. The court stated its interpretation of the legislature's intent was "in harmony with the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable." *Id.* at 644, 738 S.E.2d at 843. Additionally, in *Sparks v. Palmetto Hardwood, Inc.*, Op. No. 27229 (S.C. Sup. Ct. filed May 22, 2013) (Shearouse Ad. Sh. No. 23 at 40), our supreme court declined to impose a requirement that physical brain damage be proven through an "objective diagnostic medium," and concluded that physical brain damage, as described in section 42-9-10(C), is damage that is permanent and severe.

Here, the Appellate Panel stated it agreed with Dr. Deysach's conclusion that although Baker "may have sustained an injury to the head with brief and mild-post

concussive symptoms, the data does not support a finding of physical brain damage." However, the Appellate Panel's finding is inconsistent with Dr. Deysach's report wherein he opined it was

> reasonable to conclude that Mr. Baker did suffer an injury to the head with brief and mild post-concussive symptoms. However, the data do not appear to support the presence of an acquired brain injury nor restriction in productivity or quality of life as a result of *the physical brain damage*.

(emphasis added). It is unclear from the Appellate Panel's order whether it misread Dr. Deysach's statement or interpreted the report in its entirety as a finding of no physical brain damage. Based on the inconsistency between Dr. Deysach's report and the Appellate Panel's physical brain damage finding, we remand to the Appellate Panel for clarification as to how it treated Dr. Deysach's report. In light of *Crisp II* and *Sparks*, the Appellate Panel should cite specific evidence to support its determination as to whether Baker sustained physical brain *damage*.

II. *Crisp I*

Baker argues the Appellate Panel erred in relying on *Crisp I*. We disagree.

The Appellate Panel cited *Crisp I* for the proposition that there must be sufficient evidence in the record to support a finding of physical brain damage. In *Crisp I*, the Single Commissioner found Crisp sustained a head injury resulting in cognitive disorders to his brain but not a physical brain injury. 390 S.C. at 343, 701 S.E.2d at 764. This holding was affirmed by the Appellate Panel but reversed by the circuit court. *Id.* The court of appeals reversed the circuit court, holding

> the record is replete with substantial evidence to support the Commission's finding that Crisp did not sustain a physical brain injury . . . . The medical records of the several physicians who treated Crisp following the accident support reversal of the circuit court's decision. The hospital's physicians did not note any symptoms commonly attendant to a physical brain injury during Crisp's treatment. The physicians who evaluated Crisp following surgery did not diagnose Crisp with a physical brain injury. In fact, [the] MRI scan did not reveal any

> abnormalities suggestive of a physical brain injury and [Dr. Kopera] specifically opined Crisp was neurologically intact.

Id. at 345, 701 S.E.2d at 765.[2]

In this case, the Appellate Panel, citing *Crisp*, found there was insufficient evidence in the record to support a finding of physical brain damage pursuant to section 42-9-10(C) because the "medical records of several physicians who treated [Baker] following the accident made no reference to a brain injury or physical brain damage." Baker contends the Appellate Panel erred in relying on *Crisp* because there was far more evidence of "traumatic brain injury" in this case than in *Crisp*. In particular, Baker argues he complained throughout his treatment of headaches, while Crisp did not.

We find the Appellate Panel did not err in citing *Crisp I*. Although *Crisp I* was reversed by the supreme court in *Crisp II*,[3] the Appellate Panel's reliance on *Crisp I* was not an error justifying reversal because the proposition for which *Crisp I* was cited was not overturned by the supreme court and remains the law of this state. Accordingly, we affirm the Appellate Panel.

CONCLUSION

We affirm the Appellate Panel's reliance on *Crisp I*. We remand to the Appellate Panel for clarification of its physical brain damage finding.

AFFIRMED IN PART AND REMANDED.

HUFF and GEATHERS, JJ., concur.

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[2] In *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 640, 738 S.E.2d 835, 841 (2013) (*Crisp II*), our supreme court noted the circuit court, court of appeals, and the parties alternatively referred to Crisp's brain injuries in terms of "physical brain injury" and "physical brain damage," despite the "marked difference in the length of time compensation may be awarded when the injury is 'physical brain damage.'"

[3] In *Crisp II*, our supreme court reversed the court of appeals and remanded to the Appellate Panel for a determination of MMI, permanency, and whether Crisp's injury constituted "physical brain damage" as contemplated by section 42-9-10(C). *Crisp II*, 401 S.C. at 640, 738 S.E.2d at 842.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hector G. Fragosa, Employee/Claimant, Appellant,

v.

Kade Construction, LLC, Employer, and Key Risk Management Services, Inc., Carrier, Respondents.

Appellate Case No. 2012-212279

Appeal From The Workers' Compensation Commission

Opinion No. 5185
Heard October 10, 2013 – Filed November 27, 2013

AFFIRMED IN PART AND REMANDED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, and Jeffrey Christopher Chandler, of Chandler Law Firm, of Myrtle Beach, for Appellant.

Michael W. Burkett and John Gabriel Coggiola, both of Willson Jones Carter & Baxley, P.A., of Columbia, for Respondents.

LOCKEMY, J.: Hector Fragosa appeals the South Carolina Workers' Compensation Commission Appellate Panel's (Appellate Panel) order, arguing the Appellate Panel erred in (1) finding he did not suffer physical brain damage, and was thus not entitled to lifetime benefits; and (2) relying on the opinion of Dr. Mark Wagner. We affirm in part and remand.

FACTS/PROCEDURAL BACKGROUND

On November 1, 2007, Fragosa, a construction worker employed by Kade Construction, LLC (Kade), sustained injuries during the course and scope of his employment when he was hit in the head with part of a construction crane and knocked off of the roof of a parking garage. Fragosa was transported by helicopter to MUSC in Charleston and remained in a coma for two weeks following the accident.

Pursuant to his MUSC discharge summary, Fragosa's diagnoses included: subdural and epidural hematomas, bilateral frontal contusions, respiratory failure, hypotension, scalp laceration, C7 and T1 spinous process fractures, right rib fractures, bilateral transverse fractures, right big toe fracture, right fifth toe fracture, skull fracture, tracheostomy, placement of endoscopic gastrostomy, and amputation of the second through fifth toes of the right foot.

Kade accepted Fragosa's claim and began providing benefits. In October 2008, Fragosa was evaluated by Dr. Mark Wagner, a clinical neuropsychologist. Dr. Wagner noted Fragosa sustained a skull fracture with acute underlying minor structural change to the brain, but his functional studies (i.e., EEGs, CTs, and MRIs) were read as "unremarkable" and demonstrated "structural resolution of the work-related injury." Dr. Wagner found Fragosa had "symptoms of mild post-concussive syndrome" and his cognitive deficits were "relatively mild." According to Dr. Wagner, Fragosa was most likely at maximum medical improvement in terms of his neurological status, and the severity of his cognitive deficits was not a major barrier to his return to work.

From October 2008 to August 2009, Fragosa was treated by neurologist Dr. George Sandoz for headaches and dizziness. Dr. Sandoz determined Fragosa had a right temporal lobe injury, but found there was "no evidence of any seizure . . . nor any evidence of any damage of the brain." Dr. Sandoz testified Fragosa had damage to his right inner ear which caused some loss of hearing and mastoiditis. Dr. Sandoz opined Fragosa suffered a traumatic brain injury and was totally and permanently disabled. According to Dr. Sandoz, Fragosa had a 46% impairment rating to the whole body. Dr. Sandoz opined Fragosa would be unable to return to gainful employment "not only because of the traumatic injury" but also because his inner ear injury would make him unsteady on his feet. Dr. Sandoz testified that while Fragosa suffered some damage and injury to the *function* of the brain, "there's no evidence of any damage on the brain that we can go and see." In a March 2011 questionnaire from Fragosa's attorney, Dr. Sandoz checked "Yes" in

response to the question of whether Fragosa suffered physical brain damage rendering him totally and permanently disabled.

In October 2010, Fragosa was evaluated by psychologist and brain injury specialist Dr. Robert Brabham. Dr. Brabham noted Fragosa continued to experience symptoms typically associated with brain injuries including headaches, dizziness, anxiety, depression, and memory loss. Dr. Brabham concluded Fragosa's "behavioral and cognitive changes have persisted . . . sufficient to conclude that the brain injuries he sustained, described as post-concussion injuries in multiple records, has resulted in continuing and severe symptoms clearly associated with a physical traumatic brain injury, the result of his on-the-job injuries." Dr. Brabham further opined "to a high degree of medical certainty . . . [Fragosa] has experienced a (Physical) Traumatic Brain Injury and must be expected to permanently remain, unable to engage in full-time gainful, competitive employment."

On March 21, 2011, Kade and its insurance carrier, Key Risk Management Services, Inc., (collectively, Respondents) filed a Form 21 seeking to terminate temporary compensation. On April 8, 2011, Fragosa filed a Form 50 alleging he was totally and permanently disabled as a result of injuries to his "brain, headaches, vision, spine, both upper extremities, left shoulder, hips, both lower extremities, right foot and psychological overlay." Fragosa also alleged he sustained physical brain damage as a result of the accident. Respondents filed a Form 51 admitting Fragosa sustained a work injury, but denying the extent of the injuries as alleged by Fragosa.

A hearing was held before the Single Commissioner on June 28, 2011. At the hearing, Fragosa alleged he was entitled to additional medical treatment as result of his accident and a finding that he was totally and permanently disabled based on the totality of his injuries. Additionally, Fragosa claimed he suffered physical brain damage pursuant to section 42-9-10(C) of the South Carolina Code (Supp. 2012) and thus, he was entitled to lifetime medical benefits. Respondents argued Fragosa was not totally and permanently disabled and they were entitled to stop payment of Fragosa's temporary benefits because he had reached MMI. Respondents also argued Fragosa did not suffer physical brain damage, and any permanent disability compensation for an alleged injury to Fragosa's brain fell under Regulation 67-1101 of the South Carolina Code of Regulations (2012) which sets forth the range of 25-250 weeks for either partial or total loss of use of the brain as a result of a work accident.

In a November 21, 2011 order, the Single Commissioner held Fragosa's multiple impairment ratings to his right leg, left arm, head and inner ear rendered him totally and permanently disabled. Additionally, the Single Commissioner found Fragosa did not suffer a physical brain injury or physical brain damage, and was not entitled to lifetime medical benefits. Fragosa appealed the Single Commissioner's findings to the Appellate Panel. Following a hearing, the Appellate Panel affirmed the Single Commissioner's order in May 2012. Fragosa appealed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the Appellate Panel. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The Appellate Panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The findings of the Appellate Panel are presumed correct and will be set aside only if unsupported by substantial evidence. *Lark*, 276 S.C. at 135, 276 S.E.2d at 306. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

LAW/ANALYSIS

I. Physical Brain Damage

Fragosa argues the Appellate Panel erred in finding he did not suffer physical brain damage and was not entitled to lifetime medical benefits. We remand.

The nexus of this case is the distinction between a physical brain *injury*, which is compensated pursuant to Regulation 67-1101,[1] and physical brain *damage*, which is compensated pursuant to section 42-9-10(C). Fragosa argues on appeal that the Appellate Panel erred in failing to find he suffered physical brain *damage* and was entitled to lifetime medical benefits. However, throughout his brief Fragosa cites examples to support his position that he suffered a brain *injury*. Respondents do not deny that Fragosa suffered a physical brain *injury*. Instead, they maintain Fragosa failed to show he suffered physical brain *damage*.

In general, a person injured within the Workers' Compensation Act (the Act) may not receive compensation for a period exceeding five hundred weeks. *See* S.C. Code Ann. § 42-9-10(A) (Supp. 2012); S.C. Code Ann. Regs. 67-1101 (2012). However,

> [n]otwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, *or who has suffered physical brain damage* is not subject to the five-hundred-week limitation and shall receive the benefits for life.

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[1] Section 42-9-30 of the South Carolina Code (Supp. 2012) provides specific recoveries for total or partial physical losses and impairments suffered by an employee to certain scheduled members including: thumbs, fingers, toes, hands, arms, feet, legs, eyes, and ears. This section further provides:

> For the total or partial loss of, or loss of use of, a member, organ, or part of the body *not covered in this section* . . . [t]he Commission, by regulation, shall prescribe the ratio which the partial loss or loss or partial loss of use of a particular member, organ, or body part bears to the whole man, basing these ratios on accepted medical standards and these ratios determine the benefits payable under this subsection.

S.C. Code Ann. § 42-9-30(22) (Supp. 2012) (emphasis added). Regulation 67-1101 provides additional examples of compensable scheduled members, including the brain. It sets forth the range of 25-250 weeks of compensation for either partial loss or loss of use of the brain. S.C. Code Ann. Regs. 67-1101 (2012).

S.C. Code Ann. § 42-9-10(C) (Supp. 2012) (emphasis added). "Physical brain damage" is not statutorily defined. However, our supreme court recently clarified what is meant by "physical brain damage" under section 42-9-10(C) in *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 738 S.E.2d 835 (2013) (*Crisp II*). In *Crisp II*, the court found Crisp's argument that the mere presence of any physical brain injury or damage, regardless of degree, triggered the operation of section 42-9-10(C) was not persuasive. 401 S.C. at 641, 738 S.E.2d at 842. The court viewed

> the inclusion of 'physical brain damage,' along with quadriplegia and paraplegia, in section 42-9-10(C) as indicative of the General Assembly's intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage.

Crisp, 401 S.C. at 641-42, 738 S.E.2d at 842. The *Crisp II* court found "the severity of the injury is the lynchpin of the analysis" and interpreted "the inclusion of 'physical brain damage' among the most serious injuries within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment." *Id.* at 643, 738 S.E.2d at 843. The court stated its interpretation of the legislature's intent was "in harmony with the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable." *Id.* at 644, 738 S.E.2d at 843. Further, the court noted the question of whether an employee has sustained either a physical brain injury or physical brain damage "gives rise to the coextensive question of what proof is required in these cases." *Id.* at 644, 738 S.E.2d at 844. In light of the testimony, the *Crisp II* court found it was "reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases." *Id.*

Additionally, in *Sparks v. Palmetto Hardwood, Inc.*, Op. No. 27229 (S.C. Sup. Ct. filed May 22, 2013) (Shearouse Ad. Sh. No. 23 at 40), our supreme court declined to impose a requirement that physical brain damage be proven through an "objective diagnostic medium," and concluded that physical brain damage, as described in section 42-9-10(C), is damage that is permanent and severe.

Here, the Appellate Panel made inconsistent findings with regard to the existence of a physical brain injury. In finding of fact #8, the Appellate Panel found Fragosa sustained a forty-six percent impairment to the whole person for a traumatic brain injury. However, in finding of fact #18, the Appellate Panel found Fragosa did not suffer a brain injury. Based on this inconsistency, we remand to the Appellate Panel for clarification. It is undisputed that Fragosa suffered severe injuries as a result of a work related accident. However, it is unclear whether the Appellate Panel found these injuries included an injury to the brain. If the Appellate Panel finds Fragosa did sustain a physical brain injury, it should, in light of *Crisp II* and *Sparks*, cite specific evidence to support its determination as to whether such injury was of sufficient severity to reach the level of physical brain damage as contemplated in section 42-9-10(C).

II. Dr. Wagner

Fragosa argues the Appellate Panel erred in relying on Dr. Wagner's report in finding Fragosa did not suffer physical brain damage. We disagree.

The Appellate Panel found:

> Dr. Mark Wagner noted that [Fragosa] sustained a skull fracture with acute underlying minor structural change to the brain, but Dr. Wagner concluded that functional studies, such as EEGs, CTs, and MRIs, were read as unremarkable 'demonstrating structural resolution of the work-related injury.' ([Fragosa]'s APA #4, pg. 655).

Fragosa contends the Appellate Panel's reliance on Dr. Wagner's statement regarding imaging studies having been read as unremarkable is legal error. He maintains Dr. Wagner never rendered an opinion, or "concluded" as the order states, that Fragosa did not suffer physical brain damage. Instead, Fragosa argues Dr. Wagner merely commented that the later imaging studies were read as unremarkable. Fragosa asserts that as a neuropsychologist, Dr. Wagner cannot interpret imaging studies.

In reply, Respondents argue Dr. Wagner simply restated the findings made by other doctors who interpreted the studies. Respondents assert Dr. Wagner's reliance on the interpretations of other doctors was proper since all of the doctors who treated Fragosa relied on the diagnostic testing to determine the proper course

of treatment despite the fact that they were not radiologists specifically trained to interpret the films themselves.

We disagree with Fragosa's assertion that the Appellate Panel found Dr. Wagner had "concluded" that Fragosa's diagnostic studies were unremarkable. Dr. Wagner did not find the studies unremarkable; he simply restated the findings made by the doctors who did interpret the studies. The radiologist who performed Fragosa's January 2008 CT found (1) no evidence of acute intracranial process and (2) healing skull fractures. The radiologist who conducted Fragosa's September 2008 MRI found (1) right mastoiditis and an (2) otherwise unremarkable MRI of the brain. Finally, Dr. Sandoz determined Fragosa's October 2008 EEG was within a wide range of normal limits with "no focal abnormality or seizure discharges" noted. As a neuropsychologist, Dr. Wagner is able to consider the diagnostic studies and findings of other doctors in the formation of his opinion. Thus, the Appellate Panel did not err in relying on the opinion of Dr. Wagner.

CONCLUSION

We affirm the Appellate Panel's reliance on the opinion of Dr. Wagner and remand for clarification regarding the existence of a physical brain injury.

AFFIRMED IN PART AND REMANDED.

HUFF and GEATHERS, JJ., concur.