OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7

February 9, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richland County Magistrate Clemon L. Stocker, Respondent.

Opinion No. 25938
Submitted January 4, 2005 – Filed February 7, 2005

PUBLIC REPRIMAND; SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Robert E. Bogan, Assistant Deputy Attorney General, both of Columbia, for The Office of Disciplinary Counsel.

Charlie J. Johnson, Jr., and John T. Mobley, both of Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into two Agreements for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In Agreement #1, respondent admits misconduct and consents to the imposition of a letter of caution, admonition, or public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept Agreement #1 and impose a public reprimand. In Agreement #2, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or a definite suspension not to exceed thirty (30) days pursuant to Rule 7(b),

RJDE, Rule 502, SCACR. We accept Agreement #2 and impose a definite suspension of thirty (30) days. The facts as set forth in the Agreements are as follows.

FACTS

AGREEMENT #1

I.

Respondent is a Richland County Magistrate. Plaintiff A filed a civil complaint in respondent's magisterial office on January 12, 2001. She alleges she was advised by the receptionist at respondent's office that trial would be in about three or four weeks and that she would be notified by mail.

Plaintiff A alleges she contacted respondent's office in mid-February and was told the defendant had been served on January 19, 2001, that a hearing would be scheduled within two weeks, and that she would receive a letter soon. Plaintiff A alleges she called respondent's office in March and left a message that was not returned. Plaintiff A alleges she called respondent's office again in April, was told respondent was busy "filling in for other judges downtown," that he would be back to his regular schedule soon, and she would hear something shortly.

On August 29, 2001, Plaintiff A complained by letter to the Chief Magistrate about respondent's failure to set the matter for trial and respondent's lack of response to her inquiries. In the letter, respondent asked to transfer the matter to another magistrate or for a refund of her $55.00 filing fee if transfer to another magistrate could not be arranged.

The Chief Magistrate contacted respondent about Plaintiff A. Respondent discovered that Plaintiff A's complaint was inadvertently marked by court staff to indicate that the defendant requested a jury trial and the complaint was thereafter placed in the jury

trial cabinet to await its turn for placement on the jury docket. Respondent also represents that, at that time, cases placed on the jury roster generally took eighteen months to reach a trial, which was the cause of the delay in Plaintiff A's case.

Respondent further explains that none of his office staff remember receiving any inquiries from Plaintiff A and that he was not made aware of Plaintiff A's communications, if any were made as she alleges. While respondent cannot confirm the representations made by Plaintiff A, for purposes of Agreement #1, they are not contested.

Plaintiff A's matter was subsequently assigned to another magistrate and has been resolved.

II.

In October 2000, Ronald L. Hall, Esquire, filed a complaint in respondent's court on behalf of Plaintiff B against Defendant B concerning a $2,250.00 check Defendant B wrote to a third party and which the third party subsequently signed over to Plaintiff B. According to the complaint, the check was returned for insufficient funds.

By January 2001, Mr. Hall had not heard anything further about the matter and contacted respondent's office by letter dated January 8, 2001, but received no response. In February 2001, Mr. Hall was informed that the file may have been misplaced in respondent's office; Mr. Hall mailed respondent another copy of the Summons and Complaint. Respondent represents to ODC that the Sheriff's Department lost the paperwork after it was sent to be served.

By letter dated March 19, 2001, respondent made further inquiry about the status of the case. Respondent executed another Summons dated March 30, 2001.

Defendant B was served on April 6, 2001, and, according to respondent's files, filed an Answer on April 30, 2001, alleging the

check was returned in error and that a replacement check was issued to Plaintiff B. Defendant B's Answer was not served on Mr. Hall.

On May 8, 2001, Mr. Hall wrote respondent stating he had been informed by his client that the matter might be set for a hearing on the merits around June 1, 2001. A bench trial was held on June 15, 2001. At the hearing, Mr. Hall was not aware that Defendant B had answered and he objected to Defendant B being allowed to contest the case on the merits. After hearing the evidence, which included that Defendant B issued a replacement check and that Plaintiff B had negotiated both checks, respondent took the matter under advisement.

In June and July, Mr. Hall inquired about when respondent would issue a ruling. Mr. Hall's letter of July 16, 2001, states: "I do note that we never received a copy of the Answer of [Defendant B]; and therefore presumed he was in default. If this is incorrect, I would appreciate receiving a copy of [Defendant B's] Answer for my file." Respondent did not answer this correspondence. Respondent states it is his recollection that Mr. Hall was shown Defendant B's Answer during the hearing on June 15, 2001.

Mr. Hall wrote respondent on August 8, 2001, stating he understood from contacts with respondent's office that respondent's busy schedule had kept him from ruling on this matter. Mr. Hall included a proposed transcript of judgment. Respondent did not answer this correspondence.

On September 10, 2001, Mr. Hall complained to Chief Magistrate Womble about respondent's handling of this case. Judge Womble contacted respondent by telephone. The same day, respondent issued a ruling in favor of Defendant B.

Mr. Hall alleged in his complaint to ODC that the ruling in favor of Defendant B appeared to be retaliation against him for complaining to the Chief Magistrate. Respondent represented to ODC that his ruling had actually been prepared in July, but had not been published, and that Judge Womble's call reminded him of the ruling.

Respondent denied his ruling was issued in retaliation for Mr. Hall's complaint.

Mr. Hall appealed respondent's ruling to the circuit court. As of March 1, 2002, respondent had not submitted a return. On March 2, 2002, Judge Manning issued an order stating respondent had thirty (30) days to submit a return or provide the tape recording of the proceedings to Mr. Hall for transcription. If the return was not prepared within thirty (30) days, the case would be remanded to the Chief Magistrate to determine whether a new trial would be necessary.

The tape of the proceedings in Magistrate's Court was unavailable. Respondent states it was re-used in the normal course of court activity.

The matter was ultimately remanded back to the Chief Magistrate. A new trial was held and judgment for Plaintiff B was entered.

Respondent explains he did not respond to Mr. Hall's correspondence because it was placed directly in the file by his staff. He has corrected his office practices to ensure that all correspondence comes to his desk before being placed in the file.

AGREEMENT #2

I.

On the evening of Saturday, April 14, 2001, Defendant C allegedly struck Victim in the head with a handgun while the Victim was visiting Defendant C's residence. The incident is alleged to have occurred in connection with Defendant C accusing Victim of having an affair with Defendant C's wife as Victim was trying to leave the premises.

Victim's Mother is a friend of respondent and his wife and attends the same church as respondent. Victim's Mother approached

respondent at church the next day about issuing a warrant for Defendant C who is respondent's third cousin. Respondent instructed Victim's Mother to come to his office the next day and apply for a warrant.

The next morning, Victim and Victim's Mother appeared at respondent's office to apply for a warrant against Defendant C. Certain paperwork necessary for issuance of the warrant was completed and respondent indicated he would issue an arrest warrant against Defendant C for assault and battery of a high and aggravated nature (ABHAN).

Respondent estimates that approximately two hours later, Defendant C appeared at respondent's office inquiring whether a warrant had been issued for his arrest. Upon being informed that a warrant was being prepared, Defendant C inquired about obtaining a warrant against Victim for trespassing and asked respondent whether Victim might drop the warrant if he paid the medical bills. Respondent declined to issue the "cross warrant" and told Defendant C he had no control over whether Victim would drop the ABHAN warrant.

Respondent reports that Victim's Mother called on Tuesday to determine whether the warrant had been issued. Respondent informed her it was still being prepared and told her Defendant C had been to the office to seek a warrant against her son for trespassing. Respondent reports that Victim's Mother said something to the effect of "hold up on the warrant" and she would call him back. Respondent further states that Victim's Mother called back the next day and said go forward with the warrant.

Victim's Mother's recollection of what appears to be the same conversation is somewhat different. She reports receiving a telephone call at her home from respondent. Based on this conversation, Victim's Mother believed respondent had talked with Defendant C prior to this phone call. Victim's Mother's recollection is that respondent indicated Defendant C may have been justified in

assaulting Victim and it is her perception that respondent might have been suggesting the warrant against Defendant C be dropped.

Respondent testified in his interview under oath that the warrant was signed on Wednesday or Thursday (April 18 or 19) and "went out" on Friday (April 20). It is customary that warrants are picked up at least once a day and usually twice a day from respondent's office by deputies assigned to the sheriff's warrant division. Victim's signature is purported to have been affixed to the typed warrant on April 16, 2001.

Sometime on Saturday or Sunday (April 21 or 22), Defendant C called respondent at home and stated he wanted to turn himself in to authorities. Defendant C sought instructions from respondent on how to do so without interfering with Defendant C's work schedule and respondent instructed Defendant C to turn himself in at the jail at 2:00 p.m. on Monday so he could attend the 4:00 p.m. bond hearing. Respondent had further conversation with Defendant C about the facts and merits of the matter.

On Monday, respondent contacted the sheriff's warrant division, advised Defendant C would turn himself in that afternoon, and said he would like to get the warrant and take it to the jail where Defendant C would turn himself in. The Sheriff's Department returned the warrant to respondent and respondent delivered it to bond court at the detention center around noon. Respondent believes this is the first time he ever retrieved a warrant from the warrant division so that someone could turn himself or herself in to authorities.

At some point later that day, respondent telephoned Magistrate Hudnell who was scheduled to hold 4:00 p.m. bond hearings. Knowing Magistrate Hudnell had set a high bond of $35,000 in another case a week earlier and wanting to be sure appropriate bond would be set in Defendant C's matter, respondent contacted Magistrate Hudnell to inform her that Defendant C would be a "walk-in" for the 4:00 p.m. bond hearing, that Defendant C was respondent's cousin, that respondent knew the Victim from church and the neighborhood, and

asked Magistrate Hudnell to "give [Defendant C] a low surety bond and ten percent." Respondent also relayed the version of the facts and circumstances underlying the warrant as given to him by Defendant C to Magistrate Hudnell. According to Magistrate Hudnell, respondent said he had also told Defendant C he probably would get a low bond. Respondent represents to ODC that it is not unusual for a magistrate who has information about a case to contact the bond court magistrate and give a bond suggestion.

Defendant C was present for the 4:00 p.m. bond hearing, but the warrant had not been served, he had not been booked into the jail, and Victim had not been contacted. Defendant C was booked into the detention center to await a bond hearing the next morning (April 24). On April 24, Magistrate Hudnell set Defendant C's bond at $7,500.00. Defendant C was able to make bond that same day. Five days later, Defendant C murdered his wife.

Respondent now recognizes and acknowledges it was outside the scope of his authority to become involved in effectuating or arranging Defendant C's arrest and that, in doing so, he was using his judicial office for the benefit of another and his conduct was indicative of bias. Respondent now recognizes and acknowledges that it was inappropriate to have had ex parte conversations with Victim's Mother once the warrant was issued, to try to influence the amount of bond set by Magistrate Hudnell, and to discuss Defendant C's version of events with Magistrate Hudnell.

II.

Respondent presided over civil proceedings where Plaintiff D was granted a judgment for $4,080.11 plus court costs against Defendant D for telephone calls Defendant D made on Plaintiff D's cell phone. Plaintiff D later came before respondent complaining Defendant D had not satisfied the judgment. Respondent told Defendant D, a dancer, to get a "regular job," and told the parties he did not want to see them in court again.

Plaintiff D later came before respondent complaining Defendant D had not satisfied the judgment. A hearing was convened. Defendant D informed the court that she had not paid the judgment, that she had enrolled in training classes, and that she would be paid while in training. Respondent concluded the hearing by stating, "Alright, well you didn't do what I asked you to do and I have no other choice. I have no choice but to cite you for contempt and send you to jail for thirty days or you can pay a $500 fine. I'm sorry, ma'am. And when you get out you are still going to owe this money. Good day."[1]

Respondent stated in his interview under oath that he held Defendant D in contempt because she failed to get a job as he ordered, not because she failed to pay the judgment. Respondent further stated in the interview that it was his intention to only leave Defendant D in jail for three or four days, but forgot about her until the Chief Magistrate called him about the matter five or six days later, after which he had Defendant D released.

Respondent now recognizes that he lacked authority to order Defendant D to get a job, that he lacked authority to hold Defendant D in contempt for failing to get a job or failing to pay a judgment, that the sentence for contempt was without legal authority, and, as a result of the foregoing, he was not faithful to the law.

III.

On June 21, 2001, Defendant E was arrested by a state trooper on charges of driving under the influence (DUI), simple possession of marijuana, and violation of the seat belt law. Defendant E is the son of the office manager for Richland County Magistrate Golie Augustus. The tickets were scheduled to be tried on July 19, 2001 before Richland County Magistrate Harold A. Cuff.

[1] ODC is informed that Defendant D was placed in custody in the presence of her child.

Court personnel report that on July 19, 2001, the trooper appeared in magistrate's court and asked to mark the DUI ticket as nolle prossed.[2] Court personnel told the trooper they could not honor the request and the trooper left the building, stating he had to go to his car. Court personnel report that, after being seen in the court parking lot with Magistrate Augustus and another person looking at the engine of a car, the trooper returned to the magistrate's office and stated Defendant E wanted a jury trial.[3]

Court personnel further report the trooper saying respondent called him "about a month ago" concerning these charges. The trooper opined that the cases would probably be transferred to Magistrate Peay and dismissed.

Respondent acknowledges discussing the pending charges with the trooper after traffic court one day. At the time, the trooper stated he planned to "take care" of all charges except the simple possession of marijuana charge. Respondent represents this contact was an inquiry about the charges and certain procedures (specifically, how someone could be charged with DUI if he blew a zero on the datamaster) and denies that any attempt was made to persuade or influence the trooper not to prosecute the charges. These discussions occurred outside the presence of Defendant E.

Respondent also acknowledges having discussed the pending charges, including the possibility of obtaining a conditional discharge, with Defendant E outside the presence of the trooper. Respondent acknowledges being at Central Court on other matters on the day Defendant E's charges were to be heard by Magistrate Cuff and approaching Magistrate Cuff to inform him that Defendant E would

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[2] During an internal affairs investigation, the trooper denied making this statement. The internal affairs investigation has been closed as "unfounded."

[3] The trooper denied having any discussion with Magistrate Augustus concerning this matter.

plead guilty to simple possession of marijuana and request a conditional discharge.

Magistrate Cuff confirmed that respondent visited him on July 19, 2001, shortly before these matters were to be heard. Magistrate Cuff reported that, during this visit, respondent stated the trooper called respondent and told him he would drop the DUI and enter a conditional discharge of the possession of marijuana case. According to Magistrate Cuff, respondent did not request or instruct him to handle the matter a certain way.

ODC is informed that the matters were ultimately assigned to a Lexington County Magistrate, that the DUI charge was nolle prossed by the trooper, the simple possession charge was conditionally discharged, and Defendant E was given a one day suspended sentence on the seat belt charge.

Respondent now recognizes and acknowledges that his ex parte conversations with Defendant E and the trooper were inappropriate and constitute judicial misconduct.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3(A) (judge's judicial duties take precedence over all of judge's other activities);

Canon 3B(2) (judge shall be faithful to the law and maintain professional competence in it); Canon 3(B)(7) (judge shall not initiate, permit, or consider ex parte communications); Canon 3B(8) (judge shall dispose of all judicial matters promptly, efficiently, and fairly); Canon 3(C)(2) (judge shall require staff to observe standard of fidelity and diligence that apply to judge); and Canon 3(E)(judge shall disqualify himself in a proceeding in which the judge's impartiality might be reasonably questioned). By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1)(it shall be ground for discipline for judge to violate Code of Judicial Conduct) and 7(a)(6) (it shall be ground for discipline for judge to consistently fail to timely issue orders, decrees, opinions or otherwise perform official duties without just cause or excuse) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We find respondent's misconduct as set forth in Agreement #1 warrants a public reprimand. We find respondent's misconduct as set forth in Agreement #2 warrants a thirty (30) day suspension from judicial duties. We therefore accept the two Agreements for Discipline by Consent and hereby publicly reprimand respondent and suspend him from his judicial duties for thirty (30) days.

PUBLIC REPRIMAND; SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of Matthew E. Davis, Respondent.

ORDER

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

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

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

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

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

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina
February 4, 2005

The Supreme Court of South Carolina

South Carolina Department of Social Services, Respondent,

v.

Melissa Downer, Frederick Downer, Sr., and Mary Jones, Defendants,

Of Whom Frederick Downer, Sr. is Appellant.

ORDER

This matter came before the family court for a permanency planning hearing pursuant to S.C. Code Ann. § 20-7-766 (Supp. 2004). The Department of Social Services (DSS) sought to have the family court adopt a permanent plan which, based on previous findings of abuse and/or neglect against appellant, appellant's failure to complete treatment goals, and his current incarceration for violation of probation relating to an earlier drug conviction, provides that (1) Appellant shall have no visitation or contact with the eight minor children until he has completed all previously ordered treatment goals and petitions the family court for a change in visitation and contact provisions; (2) Appellant shall pay Defendant Melissa Downer child

support; (3) DSS is relieved of providing services to Appellant; (4) all cases consolidated for purposes of the hearing and order shall close on December 6, 2004 unless any party files an objection to case closure prior to that date; and (5) on December 6, 2004, all appointed counsel and the children's guardian ad litem shall be relieved of further duty or obligation in this case. By order dated October 18, 2004, the family court adopted the plan with one modification that Appellant begin paying child support fourteen days after he is released from jail.

Counsel for Appellant filed a notice of appeal. He also filed a "Motion to be Relieved as Counsel or in the alternative Petition for Guidance from the Court of Whether to Proceed Under *Cauthen*".[1[1]] Therein, counsel states Appellant directed him to file an appeal from the family court order. Counsel moves to be relieved as counsel. In the alternative, he petitions for guidance as to whether a *Cauthen* affidavit would be appropriate since he is "unable to find any guiding authority on this issue."

The Court of Appeals has now submitted the case to this Court for possible certification under Rule 204(b), SCACR, to resolve the issue of

[1[1]] Counsel also filed a "Petition to Proceed In Forma Pauperis".

whether the procedure set forth in *Ex parte Cauthen*, 291 S.C. 465, 354 S.E.2d 381 (1987), to be followed when an indigent person appeals from an order terminating his parental rights, can also be used when an indigent person appeals from an order imposing other measures based on child abuse and neglect, such as in the case at hand.

We hereby certify this appeal to this Court for the sole purpose of ruling on counsel's motion and providing guidance as to whether the procedure set forth in *Cauthen* can be used in other appeals involving the removal of a child from the custody of an indigent parent based on child abuse and neglect. We deny counsel's motion to be relieved as counsel; however, we expand the procedure set forth in *Cauthen* to situations, such as the one at hand, where an indigent person appeals from an order imposing other measures short of termination of parental rights, such as removal, based on child abuse and neglect. Accordingly, counsel may follow the procedure set forth in *Cauthen*, as he has done up to this point, in perfecting this appeal. Having made this determination, we hereby transfer this appeal back to the Court of Appeals.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 2, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Collins Entertainment, Inc. f/k/a Collins Entertainment Corp., Respondent,

v.

Gary White, Gary Couillard, all individually, and d/b/a Montego Bay, Appellants.

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

Opinion No. 3935
Submitted December 1, 2004 – Filed January 31, 2005

AFFIRMED

William Gary White, III, of Columbia, for Appellants.

James B. Van Osdell and Charles B. Jordan, Jr., both of Myrtle Beach, for Respondent.

WILLIAMS, J.: Collins Entertainment, Inc. brought this breach of contract action against Gary White, Gary Couillard, both individually, and d/b/a Montego Bay (collectively Appellants) seeking to collect license fees. The trial court granted Collins a directed verdict on Appellants' counterclaims, and the jury returned a verdict in favor of Collins on its breach of contract claim. We affirm.[1]

FACTS

In 1997, Collins signed a contract with the proprietors of Montego Bay to place its video gaming machines in the establishment. Shortly before beginning operations, White and Couillard became the main partners of Montego Bay and assumed the rights and obligations under the contract. The contract provided: "Collins shall provide for all machine licenses and/or taxes the costs of which shall be divided equally (50%/50%) between Proprietor and Collins. Proprietor shall reimburse Collins for its share of such costs immediately upon demand."

Collins placed machines in Montego Bay for various periods of time. Appellants were charged a pro rata share of the license fees, but Collins never received payment. According to a Collins employee, Appellants owed $18,687.32 in licensing fees to Collins.

Collins brought the underlying breach of contract action against Appellants, seeking to collect the unpaid fees. Appellants answered and counterclaimed for breach of contract, breach of contract accompanied by a fraudulent act, unfair trade practices, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).[2] The answers did not specifically plead any affirmative defenses. Collins' complaint was amended to seek pre-judgment interest.

On March 29, 2001, Appellants filed a motion to compel discovery and served it on Collins' former legal office along with Appellants' First Request

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.
[2] 18 U.S.C.A. §§ 1961 et seq.

to Admit. Collins did not respond to the request to admit due to its service on a location at which no attorneys worked. On May 15, 2001, Appellants filed a motion to dismiss as a result of Collins' failure to respond.

On May 25, 2001, Mr. Youmans, who along with Mr. Mongilo was Collins' in-house counsel until 2000, filed a motion to be relieved as counsel and set forth an appropriate address at which he could be reached. On May 31, 2001, Appellants served a Second Request to Admit. Again, they served the former office of Collins' in-house counsel.

On June 29, 2001, Collins' new counsel filed a motion to answer the First Request to Admit. On the same date, an affidavit from Mr. Mongilo was filed with the court indicating no one practiced at the previous address. After a hearing before Judge Baxley, Collins was allowed to answer the First Request to Admit. Specifically, Judge Baxley found: "At the time [Appellants] served these requests, neither Mr. Youmans nor Mr. Mongilo, nor any other attorney operated at that office." Additionally, the court concluded: "This Court recognizes the confusion and difficulty within [Collins'] organization occasioned by the demise of video poker in South Carolina, and the resulting layoffs of the attorneys working within the company."

The court went on to find that Collins' failure to respond was unintentional and allowed Collins to respond. At no time during this hearing did Appellants make Collins or Judge Baxley aware of the Second Request to Admit. Collins did not timely respond to the request by the hearing date, and Appellants knew it was served at the same address as the first.

The first time Appellants made Collins aware of the Second Request to Admit was at the start of trial. The trial court ruled the requests were not deemed admitted for the same reason Judge Baxley ruled the First Request to Admit was not deemed admitted. He found Appellants should have made the court and Collins aware of the second set of requests and, under the specific circumstances, found the requests would not be used to admit damages.

Additionally, before trial began, the court ruled White could not operate as an attorney and serve as a witness in the case under Rule 3.7 of the Professional Rules of Conduct. The court found it would be prejudicial for him to serve as a witness regarding the contested issue of damages while serving as an attorney for Couillard.

At trial, Bill LaHart, a Collins employee, testified regarding the arrangement between Collins, Montego Bay, and Appellants. He testified the machines were placed in Montego Bay pursuant to the contract, and Appellants were charged a pro rated share of the license fee for each machine while it was in the establishment. He testified the total owed by Appellants for the machines' license fees amounted to $18,687.32.

Couillard testified the license fees were not required to be paid because of a separate agreement reached with another Collins employee named Marshall Armstrong. He testified Collins was attempting to extort money from Appellants. Additionally, he testified Appellants would have shut the machines down and given them back to Collins had they been responsible for the license fees and taxes on the machines.

Couillard testified he maintained a spreadsheet of all of his out-of-pocket expenses. The spreadsheet, however, was not presented at trial. Couillard also asserted he and White would both contribute money whenever it was needed to keep the business afloat, though he did not know the exact amount, nor did he have the checks to support his claims. At one point, however, Couillard did assert that White's contribution may have been "22, 25,000, something like that" and that his "was actually a little bit more."

Collins moved for directed verdict as to Appellants' counterclaims, alleging they failed to offer any proof of damages. The court agreed and directed a verdict on all counterclaims.

Appellants moved to amend the answer to include the affirmative defense of estoppel. Appellants attempted to argue the language used in their breach of contract with fraudulent intent claim could support a defense of estoppel. In the alternative, Appellants sought to amend to conform to the

issues raised at trial. The motion was denied. Appellants also moved for directed verdict as to Collins' breach of contract claim on the grounds Collins failed to produce documents and witnesses, the contract was illegal, and for failing to prove damages. The motion was denied.

Collins' claim for breach of contract went to the jury, which returned a verdict in the amount of $18,687.32. After post-trial motions were filed, the court entered an award in favor of Collins in the amount of $18,687.32 in actual damages, $6,758.58 in pre-judgment interest, and $14,227.65 in attorney's fees and costs. This appeal follows.

STANDARD OF REVIEW

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

"An action for breach of contract seeking money damages is an action at law." Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000). "In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

ISSUES ON APPEAL

I. Did the trial court err in refusing to deem Appellants' Second Request to Admit admitted when Collins failed to respond?

II. Did the trial court err in refusing to publish both Appellants' first and second requests to admit to the jury?

III. Did the trial court err in granting Collins' motion for directed verdict as to Appellants' counterclaims?

IV. Did the trial court err in failing to dismiss Collins' claim for breach of contract because the contract was an illegal gambling contract under S.C. Code Ann. § 32-1-40 (Supp. 2003)?

V. Did the trial court err in failing to allow Appellants to amend their answer to add the affirmative defense of estoppel?

VI. Did the trial court err in failing to find Collins' claim barred by the doctrines of laches or estoppel?

VII. Did the trial court err in prohibiting White from testifying as a witness when he was also acting as an attorney?

LAW/ANALYSIS

I & II. Request to Admit

Appellants contend the trial court erred in failing to deem their second request to admit as admitted when Collins failed to respond. Additionally, they aver the trial court erred in refusing to publish the admittances to the jury. We disagree.

Rule 36(a), SCRCP, provides: "A party may serve upon any other party a written request for the admission . . . of the truth of any matters within

the scope of Rule 26(b) . . . ." However, an admission may be withdrawn upon application to the court:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Rule 36(b), SCRCP.

In the instant case, Judge Baxley previously found Appellants' First Request to Admit was filed at an office no longer in use and this constituted a sufficient reason for refusing to deem the requests admitted and to allow Collins to file late answers. At the time of the hearing, Appellants' Second Request to Admit was outstanding and the time for Collins to file an answer had expired. Instead of informing the court and Collins of the outstanding request, Appellants waited until the beginning of trial to mention the outstanding requests to Collins and the new judge. We find Appellants cannot now complain of being prejudiced by the refusal to deem the requests admitted because they could have raised the issue before Judge Baxley. State v. Brannon, 341 S.C. 271, 275, 533 S.E.2d 345, 347 (Ct. App. 2000) ("A party cannot complain of an error induced by the party's own conduct.") (citation omitted).

Collins' attorney denied any damages existed and also denied ever seeing the request to admit. Specifically, he stated: "We don't admit the amount of his damages. If he begins on damages, Your Honor, that is highly contested as far as we're concerned." The court did not prevent Appellants from offering proof of their damages. It simply required Appellants to offer the actual proof and not rely upon the Second Request to Admit. Therefore,

Appellants were not prejudiced by the refusal to deem the requests admitted. Under the circumstances, we find the trial court properly ruled on the issue.

Appellants then sought to introduce into evidence the fact that the First Request to Admit was not answered by Collins and, therefore, was deemed admitted prior to Collins being granted the right to respond late to the request. They also sought to introduce the Second Request to Admit, asserting it had been admitted by Collins' failure to respond. We find the trial court properly refused to allow Appellants to publish to the jury Collins' failure to respond.

Appellants rely on Tuomey Regional Medical Center, Inc. v. McIntosh, 315 S.C. 189, 432 S.E.2d 485 (1993), for the holding:

> Once an answer to a Request for Admissions is amended under Rule 36, both the initial answer and the amended answer may be published to the jury. The jury may consider the initial answers as evidence, while the party who made such answers "is free to explain why it was made and [amended]."

Id. at 191, 432 S.E.2d at 487 (citing Wright & Miller, Federal Practice and Procedure: Civil § 2264 at 745 (1970) (footnotes omitted)).

In Tuomey, the requests were admitted by the party's initial answer. The admitting party, however, then sought to amend its answer asserting it inadvertently provided incorrect information. The trial court granted the amendment, but allowed both sets of answers to be submitted to the jury. Id. at 190-191, 432 S.E.2d at 486. Tuomey is not similar to the present case where the admission, which was subsequently withdrawn, arose solely from the failure to make a timely response.

In any event, the Tuomey case relied on Wright and Miller's Federal Practice and Procedure for the rule cited. The full explanation of the rule as it appears in Federal Practice and Procedure states:

> The general rule with regard to a pleading that has been withdrawn is that it can no longer be used as a conclusive judicial admission but that it is admissible in evidence at the instance of the adversary as an evidentiary admission, with the party who made the admission free to explain why it was made and withdrawn. The cases have not focused on this question as it applies to a Rule 36 admission. There would be reason to hold that an express admission, later withdrawn, should be treated in the same fashion as a pleading, but that if the court has permitted an admission through failure to make timely response to be withdrawn, the admission should pass out of the case entirely.

Wright & Miller, Federal Practice and Procedure: Civil § 2264 at 579 (1994) (footnotes omitted) (emphasis added).

We find where an admission is made solely by the failure to make a timely response, such admission being later withdrawn, the party is not allowed to publish the admission to the jury. The party may publish the late-filed response, but may not assert before the jury that the requests were previously admitted. Accordingly, we conclude the trial court properly refused to allow Appellants to publish to the jury the fact that Collins admitted the requests by failing to make a timely response.

III. Collins' Motion for Directed Verdict

Appellants maintain the trial court erred in granting Collins' motion for directed verdict on the ground that they failed to prove damages. We disagree and find the record is devoid of evidence from which the jury could calculate damages without resulting to speculation or conjecture.

First, we note Appellants only address the breach of contract claim in their discussion of evidence of damages. Accordingly, we find they have abandoned their other counterclaims against Collins. See Bell v. Bennett,

307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992) (holding an issue which is not argued in the brief is deemed abandoned on appeal); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

"In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed. . . . In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc., 303 S.C. 74, 77, 399 S.E.2d 8, 10-11 (Ct. App. 1990). "Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981).

Couillard testified he kept a spreadsheet detailing some of the expenses he and White shared as a result of their business dealings with Collins. What he did not testify to, however, was the amounts listed on the spreadsheet, nor did he present the spreadsheet into evidence. He merely stated that he and White would contribute $125 for one thing or $500 for another. Similarly, Couillard asserted he would write checks for $7,000 or $1,000 or $1,500, but never explained why he wrote the checks or how they came about as a result of Collins' breach of the contract.

Finally, Couillard testified that White's out of pocket business expenses were "about 22, 25,000, something like that," although he admitted he did not know an exact amount. According to Couillard, his contribution would have been more, but again did not offer a specific dollar amount. As before, he failed to relate any of the expenses to damages resulting from a breach of contract by Collins. He simply stated they were out-of-pocket expenses for the business, not that they were expenses related to a breach of contract.

Any calculation of damages by the jury would have been pure speculation. The Second Request to Admit was properly excluded from evidence and none of the testimony presented provided any evidence of an amount of damages attributable to any breach of contract by Collins. Accordingly, we find the trial court properly granted the directed verdict motion.

IV. Illegal Contract

Appellants contend the contract was an illegal contract under section 32-1-40 of the South Carolina Code. We disagree.

Section 32-1-40 is entitled "Notes or other securities or conveyances given to secure wagers are void." The section specifically provides:

> All notes, bills, bonds, judgments, mortgages or other securities or conveyances whatsoever given, granted, entered into or executed by any person whatsoever when the whole or any part of the consideration of such conveyances or securities shall be (a) for any money or valuable thing whatsoever won by cockfighting, horse racing or by gaming or playing at cards, dice tables, tennis, bowls, or other game whatsoever or by betting on the sides or hands of such as do game at any of the games aforesaid or any other game or games or (b) for the reimbursing or repaying any money knowingly lent or advanced at the time and place of such cockfighting, horse racing or play to any person (i) so gaming or betting as aforesaid or (ii) that shall, during such cockfighting, horse racing or play, so bet shall be utterly void, frustrate and of none effect to all intents and purposes whatsoever.

S.C. Code Ann. § 32-1-40 (1991).

This section does not apply to the contract at hand. Collins did not lend money to Appellants for the purpose of gambling, nor were securities or conveyances made using gambling proceeds. The contract provision required Appellants to pay one-half of the licensing fees due to the State of South Carolina under section 12-21-2720 of the South Carolina Code.

Additionally, enforcement of the contract does not violate public policy. While the contract was in full effect, video poker was a legal enterprise in South Carolina. The obligations, which arose as a result of operating the machines, were created when the games were legal. Enforcement of a provision requiring the payment of license fees, which were properly collected and remitted to the State of South Carolina, is not in derogation of public policy.

V. Amendment of Answer

Appellants assert the trial court erred in refusing to allow them to amend their answer to allege the affirmative defense of estoppel. We disagree.

Rule 15, SCRCP, allows for the amendment of pleadings:

> (a) Amendments. A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. . . .
>
> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may

> be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment . . . the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. Tanner v. Florence County Treasurer, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999). The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. Id. Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result. Soil & Material Eng'rs, Inc. v. Folly Assocs., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987).

Appellants assert the issue of estoppel was raised in the pleadings under the arguments for breach of contract accompanied by a fraudulent act. We disagree and find that estoppel must be affirmatively pled as a defense and cannot be bootstrapped onto another claim. See Rule 8, SCRCP; Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) (finding estoppel is an affirmative defense).

Additionally, we find the issue was not tried by consent of the parties. While Appellants contend the comments and assurances made by Marshall Armstrong form the basis of their estoppel claim and these were raised at trial, they also were the grounds of the claim for breach of contract accompanied by a fraudulent act. Collins prepared to defend the breach of contract accompanied by a fraudulent act claim and not a claim of estoppel. Accordingly, Collins sufficiently demonstrated the prejudice envisioned by Rule 15, requiring the court to deny a motion to amend. See Tanner, 336

S.C. at 559, 521 S.E.2d at 156. Accordingly, we find the trial court properly denied Appellants' motion to amend the pleadings.

VI. Laches and Estoppel

Appellants contend the trial court erred in failing to dismiss the claim as being barred by the doctrines of laches and/or estoppel. We disagree.

As we found above, Appellants failed to plead estoppel as an affirmative defense and the court properly denied their motion to include it as a defense. Additionally, laches is an affirmative defense which must be specifically pled. Rule 8(c), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. E.g., Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989). Accordingly, we find the trial court properly refused to dismiss Collins' claims under either theory.

VII. White as Attorney and Witness

Appellants also contend the trial court erred in finding White could not act as both an attorney for Couillard and as a fact witness in this case. We disagree.

Rule 3.7 of the Rules of Professional Conduct, Rule 407, SCACR, provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.

Here, White sought to act as attorney for Couillard as well as a witness regarding damages allegedly incurred as a result of Collins' breach of

contract. Collins contested the issue and denied it owed any money to White or Couillard because it denied any breach existed. Therefore, the first exception does not apply. The second exception also does not apply, as the testimony was not in regards to White's service as attorney. "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." State v. Capps, 276 S.C. 59, 65, 275 S.E.2d 872, 875 (1981) (Lewis, C.J., dissenting) (quoting Ethical Consideration 5-9 of the Code of Professional Responsibility). Accordingly, we find the trial court did not err in requiring White to choose whether to act as counsel or to be called as a witness during trial.

Finally, the court determined no substantial hardship would be caused by White acting only as a witness and Mr. Robert Rushing, White's law partner, acting as counsel for all involved. Specifically, the court found the case was continued several times due to Mr. Rushing's absence. Mr. Rushing took an active role in at least one motion hearing in addition to being involved in the trial. Thus, we find no hardship would be created if Mr. Rushing were required to take over Couillard's representation.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Rife, **Appellant,**

v.

Hitachi Construction Machinery Co., Ltd., Euclid-Hitachi Heavy Equipment, Ltd., Deere-Hitachi Construction Machinery Corporation, Hitachi Construction Machinery (America) Corporation, American Equipment Company, and Does 1-5 Inclusive, Defendants, of whom Hitachi Construction Machinery Co., Ltd. and American Equipment Company are **Respondents.**

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

Opinion No. 3936
Heard January 11, 2005 – Filed January 31, 2005

AFFIRMED

William Stuart Duncan, of Georgetown, for Appellant.

N. Ward Lambert, of Greenville, for Respondent American Equipment Company, Inc.

J. Calhoun Watson, of Columbia, for Respondent Hitachi Construction Machinery Co., Ltd.

ANDERSON, J.: In this products liability case, Richard Rife appeals the trial court's orders granting summary judgment to Hitachi Construction Machinery Co., Ltd. (Hitachi) and American Equipment Company (American Equipment). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On June 25, 1999, Rife sustained an injury while operating a 1992 Hitachi EX100 Excavator (EX100). When Rife pushed the controls of the excavator to drive off an embankment, the EX100 suddenly lurched forward and then abruptly stopped. The sudden stop ejected Rife through the front window of the operator's cab, injuring him.

When the accident occurred, Rife worked for Armand Berube d/b/a Dirty Works, Inc., a grading contractor. In March of 1998, Dirty Works purchased the used EX100 from American Equipment as-is. Berube knew the excavator was a "gray market" machine. Machinery sold on the "gray market" consists of equipment designed, manufactured, and marketed for use in a foreign country, but which is imported into the United States. Hitachi designed and manufactured the EX100 at issue solely for sale and use in Japan according to Japanese specifications that differ significantly from American specifications. Hitachi sold the EX100 in Japan to a Japanese purchaser for use in Japan. The EX100 was never intended for use in the United States.

At the time of the accident, the EX100 had no seat belt. When Hitachi manufactured the EX100, a seat belt was an available option in accordance with the Japanese safety standards.

Rife filed this action against Hitachi and American Equipment alleging (1) negligence; (2) strict liability based on a manufacturing defect; and (3) strict liability based on a failure to warn of the defect. After answering, Hitachi and American Equipment filed motions for summary judgment. The trial court granted both motions.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 602 S.E.2d 389 (2004); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004); Rule 56(c), SCRCP; see also Higgins v. Medical Univ. of South Carolina,

326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (noting that when ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall, 359 S.C. at 376, 597 S.E.2d at 183. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Ellis, 358 S.C. at 518-19, 595 S.E.2d at 822; Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins, 358 S.C. at 289, 594 S.E.2d at 561-62; Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

LAW/ANALYSIS

I. Doctrinal Analysis/Products Liability

A products liability case may be brought under several theories, including negligence, strict liability, and warranty. Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997); Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995). In a products liability action, regardless of the theory on which the plaintiff seeks recovery, he must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant. Small, 329 S.C. at 462-63, 494 S.E.2d at 842; Bragg, 319 S.C. at 539, 462 S.E.2d at 326; see also S.C. Code Ann. § 15-73-10(1) (1977) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property . . . ."). Further, liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design. Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998); Madden v. Cox, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985).

Under any products liability theory, a plaintiff must prove the product defect was the proximate cause of the injury sustained. Bray v. Marathon

Corp., 356 S.C. 111, 588 S.E.2d 93 (2003); Small, 329 S.C. at 463, 494 S.E.2d at 842; see also Livingston v. Noland Corp., 293 S.C. 521, 362 S.E.2d 16 (1987) (finding proximate cause is an element of strict liability claim); Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978) (holding proximate cause is an essential element common to the alternative theories of negligence, breach of implied warranty, and strict liability in tort); S.C. Code Ann. § 36-2-715(2)(b) (2003) (providing that consequential damages resulting from seller's breach include injury to person or property proximately resulting from any breach of warranty).

A plaintiff suing under a products liability cause of action can recover all damages that were proximately caused by the defendant's placing an unreasonably dangerous product into the stream of commerce. Small, 329 S.C. at 464, 494 S.E.2d at 843; Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992). Proximate cause requires proof of causation in fact and legal cause. Bray, 356 S.C. at 116-17, 588 S.E.2d at 95; Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Small, 329 S.C. at 463, 494 S.E.2d at 842. Legal cause is proved by establishing foreseeability. Bray, 356 S.C. at 117, 588 S.E.2d at 95; Small, 329 S.C. at 463, 494 S.E.2d at 842.

The touchstone of proximate cause in South Carolina is foreseeability. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 443 S.E.2d 392 (1994); Small, 329 S.C. at 463, 494 S.E.2d at 842. The test of foreseeability is whether some injury to another is the natural and probable consequence of the complained-of act. Id. For an act to be a proximate cause of the injury, the injury must be a foreseeable consequence of the act. Small, 329 S.C. at 463, 494 S.E.2d at 842-43. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular event which occurred. Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251 (1991); Sims v. Hall, 357 S.C. 288, 592 S.E.2d 315 (Ct. App. 2003).

Proximate cause is the efficient or direct cause of an injury. Small, 329 S.C. at 464, 494 S.E.2d at 843. Proximate cause does not mean the sole

cause. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Small, 329 S.C. at 464, 494 S.E.2d at 843. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. Sims, 357 S.C. at 299, 592 S.E.2d at 320; Small, 329 S.C. at 464, 494 S.E.2d at 843.

An intervening force may be a superseding cause that relieves an actor from liability. Small, 329 S.C. at 467, 494 S.E.2d at 844. However, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated. Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Small, 329 S.C. at 467, 494 S.E.2d at 844.

II. Summary Judgment – Hitachi Construction Machinery Co., Ltd.

Rife argues the judge erred in granting summary judgment to Hitachi. We disagree.

The trial court granted summary judgment to Hitachi on the ground that Rife's injuries were not the foreseeable consequences of Hitachi's failure to equip the EX100 with a seat belt because it was designed and manufactured solely for distribution and use in Japan.

Uncontroverted testimony indicated Hitachi intended the EX100 only for the Japanese market, sold the EX100 to a Japanese customer, and manufactured the EX100 in accordance with Japanese safety standards. The EX100 was not constructed according to United States standards and was never intended for sale in the United States. Some third party imported the EX100 into the United States and sold it on the "gray market." Black's Law Dictionary defines "gray market" as a "market in which the seller uses legal but sometimes unethical methods to avoid a manufacturer's distribution chain and thereby sell goods (esp. imported goods) at prices lower than those envisioned by the manufacturer." Black's Law Dictionary 989 (8th ed. 2004). "Gray market" products include "'goods produced abroad with authorization and payment but which are imported into unauthorized markets.'" Black's Law Dictionary 989 (quoting Ralph H. Folsom & Michael W. Gordon, International Business Transactions § 20.8 (1995)).

There is no evidence regarding how many people owned the EX100 prior to its purchase by Dirty Works or whether anyone altered the EX100 in any way. Under these facts, Hitachi could not reasonably foresee the EX100, designed for use in Japan, would injure a person in the United States. Any foreseeability link was severed when the EX100 was imported into the United States. Therefore, as a matter of law, Hitachi is not liable for Rife's injuries.

III. Summary Judgment – American Equipment Company

Rife contends the judge erred in granting summary judgment to American Equipment on Rife's theories of liability: strict liability, negligent design and manufacture, and failure to warn of a defect. We disagree.

The trial court based its decision to grant summary judgment to American Equipment on the holding of the factually similar case, Marchant v. Mitchell Distrib. Co., 270 S.C. 29, 240 S.E.2d 511 (1977). In Marchant, the plaintiff sustained an injury when a cable snapped, causing a bucket connected to a hydraulic crane's telescoping boom to fall. The plaintiff brought an action against Mitchell Distributing, the equipment distributor who sold the crane to the plaintiff's employer, alleging negligence, breach of express and/or implied warranties of merchantability and fitness for a particular purpose, and strict liability. The actions averring breach of warranty and strict liability were based on the theory that the absence of a safety attachment called an anti-blocking device rendered the crane unfit for its intended purpose and in a defective condition unreasonably dangerous to the user. Id. at 32, 240 S.E.2d at 511-12. The safety device was an available option purchasable for an additional price. The plaintiff's employer did not purchase the device. Id.

In concluding the trial court correctly granted the summary judgment motion as to Mitchell Distributing, the Marchant court explained:

> Marchant argues that his showing supports the inference that the crane, absent the optional safety device, was a defective

> product unreasonably dangerous. We think however, that the fact the crane was without the optional safety device, does not tend to prove that it was defective. Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. By a like token, a bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous.

Id. at 35-36, 240 S.E.2d at 513. The court further articulated:

> By bringing the action under section 15-73-10, Marchant has assumed the burden of presenting evidence which tends to prove that the crane was in a defective condition unreasonably dangerous, which proximately caused his injury. The fact that the injury occurred and the fact that the crane could have been more safe is not sufficient to support a finding that the crane was unreasonably dangerous.

Id. at 36, 240 S.E.2d at 514.

Rife asserts American Equipment marketed and sold the EX100 in an unreasonably dangerous condition because it lacked an optional safety device, a seat belt. Applying Marchant, we find Rife failed to present any evidence demonstrating the EX100 was unreasonably dangerous. Evidence the EX100 could have been made more safe with the installation of a seat belt is insufficient to support a finding the EX100 was defective. There is some danger incident to the use of most any product. A product can certainly cause injury if used improperly. No doubt there are products which require safety devices to eliminate dangers. This is not one of them.

In addition, we rule the trial court correctly held there was no evidence upon which a jury could conclude American Equipment was negligent in the

design or manufacture of the EX100. In Marchant, the plaintiff alleged Mitchell Distributing was negligent in marketing, selling, and/or distributing a defective crane. In upholding summary judgment in favor of Mitchell Distributing, the court declared: "It is beyond question that Mitchell had nothing to do with designing or assembling the crane." Id. at 37, 240 S.E.2d at 514. The court in Marchant determined Mitchell could not be liable on the theory of negligent design. Id. Similarly, American Equipment had no involvement in the design or manufacture of the EX100. Factually, American Equipment did not have any input regarding whether a seat belt was installed. Rife knew the EX100 did not have a seat belt prior to the accident. See Marchant, 270 S.C. at 37, 240 S.E.2d at 514 (stating that failure to give warnings was inconsequential where plaintiff admitted he knew the dangers prior to the accident at issue). In his deposition, Rife answered counsel's questions:

> Q. And between that point in time, the time of the meeting, and the day your accident occurred, between the two, did you have occasion to operate this EX-100 track hoe?
>
> A. Yes
>
> Q. Okay. And did you notice then that it did not have a seat belt?
>
> A. Yes.

The trial court did not err in granting summary judgment to American Equipment on all causes of action.

CONCLUSION

Rife's injuries were not the foreseeable consequences of Hitachi's failure to equip the EX100 with a seat belt because it was designed and manufactured in compliance with Japanese standards solely for use in Japan. Hitachi could not reasonably foresee the EX100 would injure a user in a

foreign market. Any foreseeability link or concatenation was severed when the EX100 was imported into the United States. Furthermore, the exclusion of the seat belt on the EX100 was **NOT** the proximate cause of Rife's injuries.

The absence of a seat belt does not factually or legally prove the EX100 was unreasonably dangerous. Concomitantly, the seller, American Equipment, is not liable under any products liability theory. Finally, American Equipment, a seller with absolutely no involvement in the design or manufacture of the EX100, cannot be held liable for a design or manufacturing defect.

Accordingly, the orders of the trial court granting summary judgment to Hitachi and American Equipment are

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nepolean Thompson, III, Appellant.

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

Opinion No. 3937
Submitted November 1, 2004 – Filed January 31, 2005

AFFIRMED

Trent Neuell Pruett, of Gaffney, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

KITTREDGE, J.: Nepolean Thompson appeals his convictions for drug related offenses, arguing evidence was seized under an invalid search warrant. The questions presented are (1) whether the warrant sufficiently described the person or things to be seized; (2) whether the warrant was issued based on stale information; and (3) whether the warrant authorized an unreasonable bodily intrusion. We affirm.

FACTS

Officer A.B. Phillips of the Blacksburg Police Department was assigned to the Cherokee County Metro Narcotics Task Force. In 2002, Phillips was investigating possible illegal drug activities involving Thompson. After the investigation had been ongoing for several months, Phillips received a tip from a confidential informant that the informant had seen illegal narcotics in Thompson's possession. Based on this information, Phillips prepared an affidavit and obtained a search warrant from a magistrate. The affidavit read:

> Affiant's belief is based upon information received from a confidential reliable informent [sic], who has provided information in the past that has proven true and correct and led to the arrest and conviction of those involved in illegal drug trade. This C.R.I. states that he or she has seen a quantity of crack cocaine on the above described person within the past 72 hours. Affiant's [sic] knows this C.R.I. to know crack cocaine when seen by past information received from C.R.I.

The warrant issued described the permitted search as follows:

Description of Premises (Person, Place or Thing) To Be Searched

> One, Napoleon [sic] Thompson III, aka Buster, is to be searched. A black male, DOB 5-29-79, DL number 0011405948, HGT 5-10, WGT 145lbs, address 207 E. Seven Springs St., Blacksburg SC. The search will include all clothing, shoes, hats, socks, under garments, jackets, scarfs [sic], bandannas, any vehicle and or any means of transportation that Mr. Napoleon [sic] Thompson III may be traveling in or on, and Mr. Napoleon [sic] Thompson's mouth. The search will also include any types of luggage, small or large in Mr. Thompsons [sic] poss.

Officer Phillips promptly undertook efforts to execute the warrant. The day after the warrant was issued, Phillips received information that Thompson "would be traveling down South Charleston Street [in Blacksburg] with crack cocaine and marijuana in his possession." This information was disseminated to officers in the area, and shortly thereafter, a police officer spotted Thompson's car traveling on South Charleston Street. When Officer Phillips arrived on South Charleston Street, Thompson had parked his car and entered a convenience store. When Thompson returned to his car, he was confronted by the officers. After being informed of the search warrant, Thompson stepped out of his car as instructed by the officers. Thompson then pulled two small plastic bags out of his pocket, threw them in the air, and attempted to flee. Phillips grabbed Thompson before he could get away and detained him.[1] The plastic bags

[1] Contrary to Phillips' testimony, it is clear that Thompson was under arrest when he was first detained in the convenience store parking lot. The determination of whether an individual is under arrest is measured objectively, and the subjective view of the particular officer is not controlling. See Stansbury v. California, 511 U.S. 318, 323 (1994) (opining that "[o]ur decisions make clear that the initial

Thompson had tossed away were recovered by police and held as evidence. Subsequent analysis revealed the bags contained marijuana and crack cocaine.

Thompson was taken to the police department and searched. The only additional evidence the search produced was $2,654 cash found in Thompson's wallet.

Thompson was charged with possession with intent to distribute crack cocaine and possession with intent to distribute crack cocaine within a half mile of a school. Before trial, Thompson moved to suppress the crack cocaine and the marijuana evidence. Thompson claimed the drug evidence was inadmissible because it was obtained under an invalid search warrant. Specifically, Thompson argued the warrant was void because: (1) the warrant impermissibly permitted the search of Thompson's person and was otherwise overbroad with regard to the places and things it authorized law enforcement to search; (2) the affidavit submitted to obtain the warrant recited stale information insufficient to support a finding of probable cause; and (3) the warrant permitted an unreasonable bodily intrusion or strip search of Thompson. The trial court disagreed and denied the motion. Thompson was ultimately convicted of possession of crack cocaine. This appeal followed.

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determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned"). When Thompson was detained in the parking lot, following seizure of the suspected contraband, he was so substantially deprived of his freedom of movement as to constitute a full custodial arrest. See Park v. Shiflett, 250 F.3d 843, 850 (4th Cir. 2001) (holding that "[t]he test for determining whether an individual is in custody or under arrest is whether, under the totality of the circumstances, the suspect's freedom of action is curtailed to a degree associated with formal arrest" (internal quotation marks omitted)).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). A deferential standard of review likewise applies in the context of a Fourth Amendment challenge to a trial court's fact-driven affirmation of probable cause. State v. Brockman, 339 S.C. 57, 65-66, 528 S.E.2d 661, 665-666 (2000) (holding that whether a search violated the parameters of the Fourth Amendment depends upon "a number of antecedent determinations, each of which is inherently fact-specific" and "entails an inquiry into the totality of the circumstances" and the appellate court must affirm if there is "any evidence" to support the ruling). This appeal presents both factual and legal challenges to the rulings of the trial court concerning the search warrant. Following Brockman, we adhere to the "any evidence" standard of review with respect to the factual findings of the trial court.

LAW/ANALYSIS

I. Permissible Scope of Search Authorized Under the Warrant

We first address Thompson's claim the warrant failed to describe with sufficient particularity the person, place, or thing to be searched. Though we conclude there is sufficient evidence to support the trial court's finding that some portions of the warrant are overbroad, we further concur with the trial court and find this fact does not render the entire warrant void or require suppression of the evidence seized in this case.

Under both the United States and South Carolina constitutions, search warrants may not be issued except "upon probable cause, supported by Oath or affirmation," and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Following these constitutional requirements, South Carolina Code section 17-13-140 (2003) requires a

search warrant be issued "only upon affidavit sworn to before the magistrate [or other judicial officer]" and only if the magistrate "is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist . . . ." The magistrate issuing the search warrant must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 527, 556 S.E.2d. 706, 709 (Ct. App. 2001).

The specific requirement that a search warrant particularly describe the person, place, or thing to be searched "is aimed at preventing general warrants—those authorizing 'a general, exploratory rummaging in a person's belongings.'" State v. Williams, 297 S.C. 404, 407, 377 S.E.2d 308, 310 (1989) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)). "'By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.'" Id. (quoting Maryland v. Garrison, 480 U.S. 79 (1987)).

Thompson claims the warrant issued in the present case veers from the particularity requirement in three respects. First, Thompson argues that, by permitting the search of his "person," the warrant granted law enforcement unlimited discretion to search him wherever or whenever they desired. Specifically, Thompson suggests that warrants may only authorize the search of "places" and "things," not individuals. This argument is without merit.

Though not as common as warrants for the search of places, the propriety of warrants authorizing the search of persons is well settled in the law. South Carolina Code section 17-13-140, our state statute governing the issuance and execution of search warrants, clearly authorizes the search of a person. This section provides that "[t]he

property described in this section, or any part thereof, may be seized from any place where such property may be located, or from the person, possession or control of any person who shall be found to have such property in his possession or under his control." S.C. Code Ann. § 17-13-140 (2003) (emphasis added). Indeed, the United States Supreme Court has held that warrants authorizing the search of a person are constitutional provided that "a search or seizure of a person must be supported by probable cause particularized with respect to that person." Ybarra v. Illinois, 444 U.S. 85, 91 (1979). Thus, there is no basis to conclude the search warrant was invalid because it authorized the search of Thompson's "person."

Thompson's second and third exceptions to the particularity of the warrant concern two specific items subject to possible search and seizure under the warrant. Thompson claims the language contained in the warrant authorizing the search of any transportation that he was riding in or on and any type of luggage in his possession was not supported by probable cause. We agree.

As quoted above, Phillips' affidavit stated that his belief Thompson was in possession of contraband was based on information from a confidential informant that Thompson had been seen in the past 72 hours with quantity of crack cocaine on his "person." No further information was provided in the affidavit, and Phillips testified that the only additional information he provided the magistrate was the fact that Thompson was the subject of an ongoing narcotics investigation.

There is a substantial basis to support the trial court's determination that the warrant was overbroad in its authorization to search Thompson's vehicle or luggage. The information provided to the magistrate only related to seeing crack cocaine on Thompson's person. There was no basis upon which the magistrate could conclude that probable cause existed to search any vehicle Thompson was traveling in or on or any luggage in Thompson's possession.

We now turn to the legal question posed as a result of the finding that the warrant was overly broad with respect to these specific

provisions concerning transportation and luggage. We do not believe this finding renders the search warrant invalid on the whole. A contrary conclusion would mean that the seizure of certain items, even though proper if viewed separately, must be condemned merely because the warrant was defective with respect to other items. Though this question of law has not been directly addressed by South Carolina courts in our modern jurisprudence, we believe one of our supreme court's older precedents supports the principle of "severability." Moreover, such an approach is widely recognized in Fourth Amendment jurisprudence, in both federal and state courts. In essence, overbroad portions of a search warrant may be "severed" from the portions for which probable cause is found to exist, thus permitting the admission of evidence properly obtained.

Looking first to our state's law, we do find support for the concept of severability. In Farmer v. Sellers, 89 S.C. 492, 72 S.E. 224 (1911), our supreme court found a warrant, which permitted a search to be conducted by day or night, was valid regardless of a statute prohibiting nighttime searches. In that case, no search was conducted at night, and the court determined "there is therefore no ground to allege that the statute was violated. If courts gave heed to such extremely technical objections, the law would indeed be weak in its struggle with crime." Id. at 500, 72 S.E. at 227. The supreme court in Farmer thus implicitly recognized the propriety of admitting items seized under valid provisions of a warrant supported by probable cause, despite the fact that the warrant at issue was improper in other respects.

Other states have applied the concept of severability under circumstances directly analogous to the present case. For example, in People v. Mangliano, 348 N.Y.S.2d 327 (1973), a seminal state court case addressing severability, a New York trial court reviewed the validity of a search warrant authorizing the police to search a suspect's home for illegal narcotics and associated paraphernalia as well as "records, mail, correspondence and communications used in conjunction with the sale or possession of any dangerous drugs." Id. at 330. The court found the affidavit submitted to obtain the warrant did not establish sufficient probable cause to justify the seizure of the

"records, mail, correspondence and communications" listed in the warrant. Rather than suppress all of the evidence obtained under the warrant, the court elected to redact the latter phrase from the warrant, thereby preserving from suppression all evidence seized pursuant to the valid portions of the warrant. The court concluded:

> [T]here is strong and persuasive authority in other jurisdictions to permit a severance in order to save a warrant or a search. This would seem to be supported by logic as well. If there was probable cause to issue a search warrant describing particular items to be seized, and such items are found and those items alone constitute the basis of the criminal charge, there is no reason why some additional unsupported language in the search warrant, while to be avoided, should not be severable, particularly where no items seized thereunder are included as a basis for the criminal charge.

Id. at 337; see also, e.g., State v. Noll, 343 N.W.2d 391, 396 (Wis. 1984) (concluding that "in cases involving search warrants which are partially but not wholly defective, those two interests are best accommodated by admitting those items seized pursuant to the valid parts of the warrant and suppressing those items seized under the invalid portion"); Butler v. State, 203 S.E.2d 558, 563 (Ga. App. 1973) (holding that "[w]here a search as it was actually conducted is lawful, it is not rendered invalid merely because the warrant pursuant to which it was made was overbroad or founded upon erroneous beliefs") (internal citation omitted); Aday v. Super. Ct. of Alameda County, 362 P.2d 47 (Cal. 1961) (widely acknowledged as the leading state case adopting the doctrine of severability).

We also note that many federal courts, including the Fourth Circuit Court of Appeals, have recognized and applied the theory of severability. In United States v. Jacob, 657 F.2d 49 (4th Cir. 1981), the court examined whether items to be seized under a search warrant met

the constitutional particularity requirement. The court noted that the overly broad portions of the warrant describing the items to be seized were severable from those portions that met the particularity requirement.[2] Id. at 52. Other federal circuits have also recognized and applied the severability concept. See United States v. George, 975 F.2d 72, 79 (2d Cir. 1992) (holding that evidence seized pursuant to valid portion of a search warrant may be admissible, even if part of the warrant is severed or redacted for lack of particularity or probable cause); LeBron v. Vitek, 751 F.2d 311, 312 (8th Cir. 1985) (holding that the valid portion of a warrant was severable from the invalid, over broad portion); United States v. Offices Known as 50 State Distrib. Co., 708 F.2d 1371, 1375-76 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984) (noting that "[i]f probable cause was lacking as to the search of individuals, that does not operate to render the warrant itself invalid in its entirety as a general warrant. The remedy is not a return of all items seized but selective suppression or return of the items improperly seized); United States v. Christine, 687 F.2d 749, 758 (3rd Cir. 1982) (holding that "[r]edaction of a warrant containing valid severable phrases or clauses is consistent with all five purposes of the warrant requirement"); United States v. Cook, 657 F.2d 730, 735 (5th Cir. 1981) (opining that "[w]e agree with the reasoning of the . . . majority of state courts that have considered this question and hold that in the usual case the district judge should sever the infirm portion of the search warrant from so much of the warrant as passes constitutional muster").

Furthermore, review of authoritative treatises addressing this subject further indicates the concept of severability has gained broad acceptance:

> If a search warrant is issued to search a place for several items, but it is later determined that not all of those items are described with sufficient particularity or that probable cause

[2] The court in that case, however, found the entire warrant met the particularity requirement, defeating the need for severance.

> does not exist as to all of the items described, it is often possible to sever the tainted portion of the warrant from the valid portion so that evidence found in the execution of the latter will be admissible.

2 Wayne R. LaFave et al., Criminal Procedure § 3.4(f), at 137 (2d ed. 1999); see also 79 C.J.S. Searches and Seizures § 185 (Supp. 2004) (commenting that "[w]here the description in a search warrant of the items to be seized is in part insufficiently particular or unsupported by probable cause, the warrant may sometimes be severed so as to preserve the valid portions"); 68 Am. Jur. 2d Searches and Seizures § 168 (2000) (observing that "striking from a warrant those severable phrases and clauses that are invalid for lack of probable cause and preserving those phrases and clauses that satisfy the Fourth Amendment, is consistent with the Fourth Amendment and should be used in order to avoid unnecessary social costs").

In the case at bar, we find the invalid portions of the warrant relating to the search of Thompson's vehicle and luggage are severable from the authorization relating to the search of Thompson's person. Because the portion of the warrant allowing the search of Thompson's person remains valid, and because none of the evidence sought to be suppressed was derived from the overbroad portions of the warrant, we find Thompson's request for suppression of this evidence was properly denied.

In so holding we do not mean to suggest that invalid portions of a warrant will be treated as severable under all circumstances. We are mindful of the danger that warrants might be obtained which are essentially general in character but arguably meet the particularity requirement in certain respects. We in no manner sanction wholesale seizures pursuant to questionable police practices. Our decision today is narrowly confined to those circumstances where, as here, there exists

good faith[3]—measured objectively—on the part of law enforcement and the valid portion of the warrant is amply supported by probable cause.

II. Staleness

We next address, and reject, Thompson's claim that the information contained in the affidavit supporting the warrant was stale, and therefore could not have been the basis of a finding of probable cause.

In order for an affidavit to support probable cause, "it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (internal quotation marks omitted). "An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient." Id.

There is, however, no fixed standard or formula establishing a maximum allowable interval between the date of events recited in an affidavit and the date of a search warrant. United States v. McCall, 740 F.2d 1331, 1336 (4th Cir. 1984). This court has explained that the acceptable length of time between the establishment of probable cause and the execution of the warrant depends on a variety of case-specific factors:

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[3] See United States v. Leon, 468 U.S. 897, 922 (1984) (adopting the "good faith exception" to the exclusionary rule under which admission of evidence will not be barred where the evidence was obtained by officers who "manifest[ed] objective good faith" in relying on a search warrant issued by a detached, neutral magistrate even though the warrant was ultimately found to be invalid). This good faith exception, however, may not be employed to validate a warrant that is based on an affidavit that "does not provide the magistrate with a substantial basis for determining the existence of probable cause." State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990) (quoting Leon, 468 U.S. at 915).

> While the lapse of time involved is an important consideration and may in some cases be controlling, it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought.

State v. Corns, 310 S.C. 546, 550-51, 426 S.E.2d 324, 326 (Ct. App. 1992) (quoting United States v. Steeves, 525 F.2d 33 (8th Cir.1975)).

The record in this case contains ample support for the trial court's rejection of Thompson's assertion that the circumstances providing probable cause for the search had grown stale by the time the warrant was executed. The affidavit provides that the informant had observed Thompson in possession of crack cocaine within the past 72 hours. The affidavit was sworn on the same day the magistrate issued the warrant, and Officer Phillips executed the warrant the day after it was issued. Additionally, the record reveals that the information received from the informant was not an isolated incident. Phillips testified that he informed the magistrate that Thompson was the subject of an ongoing narcotics investigation conducted during the several months prior to obtaining the warrant.

Given the continuous nature of the alleged drug activity, we find the record supports the trial court's finding that it was reasonable for the magistrate to conclude that Thompson would be found in possession of illegal substances. Although isolated sales of narcotics unquestionably occur, it is generally recognized that "narcotics conspiracies are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness." United States v. Rowell, 903 F.2d 899, 903 (2d Cir. 1990) (quotation marks and citation omitted); see also Donaldson v. State, 420 A.2d 281, 286 (Md. Ct. App. 1980) (noting that the selling of drugs, by its nature, is an ongoing activity). Considering the informant's report of Thompson's drug possession together with

Phillips' testimony that Thompson was the subject of an ongoing narcotics investigation did not suggest an isolated incident, but rather described a probable continuing course of illegal drug activity. We concur, therefore, with the trial court that the probable cause predicate, which supported the issuance of the warrant, continued to exist at the time of its execution.

III. Bodily Intrusion

Finally, we address Thompson's argument that the search warrant was invalid because it improperly authorized a bodily intrusion or a strip search. Specifically, Thompson contends the warrant's authorization to search his mouth and undergarments rendered the warrant invalid because the warrant did not set forth specific findings required to justify a bodily intrusion as required under In re Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992). We disagree.

In In re Snyder, our supreme court held that South Carolina Code section 17-13-140 (search warrant statute) provides for the involuntary submission of nontestimonial identification evidence, and the court set forth guidelines and procedures for obtaining samples of blood and saliva, along with head and pubic hair, from unarrested suspects in criminal investigations. In the present case, the search did not authorize the collection of any bodily fluids, tissue samples, or other such physical evidence for which a bodily intrusion would be required. The warrant in this case merely authorized the search of Thompson's mouth and undergarments in connection with the search of his person for illegal drugs. Therefore, the search of these areas did not rise to the level of the type of bodily intrusion contemplated under In re Snyder.

Moreover, our supreme court has held that the search of a suspect's mouth is appropriate in order to prevent a suspect's attempts to destroy evidence by swallowing it, because "he cannot consider the mouth a 'sacred orifice' in which contraband may be irretrievably concealed from the police." State v. Dupree, 319 S.C. 454, 458, 462 S.E.2d 279, 282 (1995) (quoting State v. Williams, 560 P.2d 1160, 1162 (Wash. App. 1977)). Therefore, the magistrate could properly

conclude there was a reasonable probability that the crack cocaine may be found in Thompson's mouth as part of his person.

We also note that when the police searched Thompson's undergarments he had already been placed under arrest and taken to the police department. It is well settled that, in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and is considered reasonable under the Fourth Amendment. State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980). Therefore, the validity of the warrant with regard to the search of Thompson's undergarments was of no consequence because the search conducted was a valid search incident to arrest.

CONCLUSION

We find that: (1) although portions of the search warrant issued were overbroad in certain respects, this fact does not render the warrant wholly invalid; (2) the search warrant was issued and executed in a timely manner; and (3) the warrant did not authorize an unreasonable bodily intrusion. Therefore, the trial court's denial of Thompson's motion to suppress the drug evidence is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ernest E. Yarborough, Appellant.

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

Opinion No. 3938
Heard December 13, 2004 – Filed January 31, 2005

AFFIRMED

Ernest E. Yarborough, of West Columbia, *pro se*, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Jennifer D. Evans, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General

Norman Mark Rapoport, all of Columbia; for Respondent.

HEARN, C.J.: Ernest Yarborough was convicted of obstruction of justice in 1997. He appealed, and our court remanded the issue of jury misconduct to the extent that premature deliberations were alleged. On remand, the trial court denied Yarborough's request for a new trial, finding Yarborough had not made a *prima facie* showing that premature deliberations had occurred. We affirm.

FACTS

Ernest Yarborough, an attorney, was convicted of obstruction of justice for offering an alleged victim $500 to drop charges against his client. Before being sentenced, Yarborough requested a new trial, alleging juror misconduct in two respects. First, he argued the jurors improperly discussed a compromise verdict, and second, he argued the jurors deliberated prematurely. To support these allegations, Yarborough sought to offer the testimony of juror Teresa Mobley and the affidavit of juror Keisha Foster, but the trial court refused to consider evidence of the allegations. However, the court sealed the affidavit of juror Foster for the record. Foster's affidavit suggests the jurors may have compromised on the verdict, whereby a group of jurors agreed to vote guilty on one charge in exchange for a not guilty verdict on another charge. The affidavit does not allege that any premature deliberations took place.

Yarborough was sentenced to ten years imprisonment, suspended on the service of six months, two years probation, and payment of $1,000 in costs and assessments. He appealed.

This court found the trial court committed no error in refusing to hear evidence regarding the jury's alleged discussion of a compromise verdict. State v. Yarborough, Op. No. 2000-UP-059 (Ct. App. 2000) (hereinafter "Yarborough I"). However, we found the trial court could have considered evidence of premature deliberations. Id. Specifically, our court stated:

Our supreme court recently held that "premature deliberations may affect fundamental fairness." State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). . . .

The Aldret case sets forth procedures for trial courts to use in cases where premature deliberations are alleged. If, as here, the allegations of premature deliberations are raised after the jury renders its verdict the trial court may consider juror affidavits concerning the misconduct. Aldret, 333 S.C. at 315, 509 S.E.2d at 815. Furthermore:

> If the court finds the affidavits are credible and indicate premature deliberations occurred, the court should hold an evidentiary hearing to determine whether such deliberations did in fact occur. The court may, upon the complaining party's request, "reassemble the jurors and conduct voir dire to ascertain the nature and extent of premature deliberations." If the court concludes the misconduct did not occur or did not prejudice the party alleging misconduct, the court should make adequate findings to enable a review of the decision. If the court is convinced misconduct occurred but cannot conduct an adequate inquiry because of the passage of time, the court may order a new trial.

Id. at 315-316, 509 S.E.2d at 815.

Yarborough I.

Based on that analysis, our court remanded the issue of premature jury deliberations to the trial court "for consideration pursuant to Aldret."[1] Id.

On remand, Yarborough sought to compel the testimony of two witnesses, Keisha Foster and Marcy Benson. Although they had been subpoenaed,[2] both failed to appear. Yarborough wanted Foster, the juror who previously alleged the jury had compromised on the verdict, to testify regarding the alleged premature deliberations. As to Benson, Yarborough claimed that her testimony would demonstrate that she told Foster not to participate in the case. The trial court denied the motion to compel the attendance of Foster or Benson.

Because his motion to compel was denied, Yarborough moved for a continuance to obtain affidavits from other jurors. This motion was also denied because from the time of the original motion for a new trial to the remand hearing in 2003, Yarborough did nothing to obtain jurors' affidavits. Yarborough claimed he was prevented from obtaining additional affidavits because of a letter that an Assistant Attorney General sent to the trial court judge on April 2, 1997, three days before the hearing on Yarborough's original motion for a new trial. The letter advised the trial court judge that Yarborough was contacting jurors, and asked that the judge prohibit him from doing so until the judge made a determination that that such contact was warranted. However, the trial court did not sympathize with Yarborough's purported predicament, finding that "[n]o reasonable experienced lawyer would have ceased an investigation that he believed to be appropriate based upon receipt of a copy of such a letter to the court."

[1] The trial court did not have the benefit of the Aldret opinion when ruling on Yarborough's motion for a new trial.

[2] From the affidavit of the process server, Foster may never have received the subpoena, which appears to have been discarded by the adult upon whom he had served it.

Finally, Yarborough moved for a new trial based on the allegations of premature jury deliberations, the passage of time (which resulted in a lack of witnesses' memory or availability), and fundamental fairness. The trial court denied the motion, finding that, pursuant to Aldret, Yarborough failed to present affidavits to establish a *prima facie* showing of premature deliberations. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews errors of law only and is bound by factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); State v. Cutter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003).

LAW/ANALYSIS

Yarborough appeals the trial court's denial of his motions to compel, for a continuance, and for a new trial. He also asserts the trial court erred in refusing to grant him an evidentiary hearing. We disagree with each of his assertions.

I. Evidentiary Hearing and Motion to Compel

Yarborough contends the trial court erred in refusing to compel the attendance and testimony of juror Foster pursuant to the remand. He further argues that, pursuant to Aldret, the trial court should have conducted an evidentiary hearing to determine whether premature deliberations occurred.

"A trial court . . . has inherent power to require the appearance of witnesses even as counsel for either side may require the presence and testimony of witnesses." Greenwood Lumber Co. v. Cromer, 225 S.C. 375, 383, 82 S.E.2d 527, 530 (1954). However, Aldret does not require the trial court to hear juror testimony whenever there is an allegation of premature

deliberations. 333 S.C. at 312-16, 509 S.E.2d at 813-15. According to Aldret, the trial court "may consider affidavits when inquiring into allegations of premature jury deliberations." 333 S.C. at 312-313, 509 S.E.2d at 813. Then, "[i]f the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict." Id. at 315, 509 S.E.2d at 815 (emphasis added).

In Yarborough I, we remanded the issue of premature jury deliberations and instructed the trial court to follow the procedure set forth in Aldret. Based on the record, the trial court did just that. It considered the affidavit of juror Foster, which makes no allegation of premature deliberations. Because Yarborough failed to produce any other affidavit, he made no showing to the trial court that premature deliberations occurred;[3] thus, the trial court did not err by refusing to hold an evidentiary hearing. Moreover, because an evidentiary hearing was not warranted, there was no reason to compel the appearance of juror Foster; thus the trial court did not err by refusing to grant Yarborough's motion to compel.

II. Motion for Continuance

Yarborough also contends the trial court erred in refusing to grant his motion for a continuance "after a crucial witness failed to appear." The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. State v. White, 311 S.C. 289, 293, 428 S.E.2d 740, 742 (Ct. App. 1993). Reversals of refusals of continuances "are about as rare as the proverbial hens' teeth." State v. McMilian, 349 S.C. 17, 21, 561 S.E.2d 602,

[3] Yarborough suggests State v. Covington, 343 S.C. 157, 539 S.E.2d 67 (Ct. App. 2000), supports his contention that the trial court should have compelled testimony through an evidentiary hearing. Yarborough misinterprets Covington, in which the trial court reassembled jurors and heard their testimony after the supreme court found the affidavits of two of the jurors were competent evidence and remanded the case for an evidentiary hearing. 343 S.C. at 159-60, 539 S.E.2d at 68. Here, no affidavits indicate juror misconduct in the form of premature deliberations.

604 (2002) (citation omitted) (stating this comparison, but ultimately reversing the trial court's refusal to grant a continuance). The party asking for the continuance must show due diligence was used in trying to procure the testimony of an absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief. See White, 311 S.C. at 293, 428 S.E.2d at 742-43; see also Rule 7(b), SCCrimP (explaining that a motion for continuance to procure the testimony of a witness will not be granted unless the party seeking the testimony made use of due diligence to procure the testimony).

Yarborough submits the trial court should have granted the continuance "to counter the surprise that was fostered by Juror Foster's sudden decision not to cooperate, or, to give the court time to force Juror Foster to appear and testify." Yarborough's argument fails because, as explained above, no evidentiary hearing was warranted, and therefore juror Foster was not needed to testify.[4] Thus, the trial court did not err in refusing to grant Yarborough's motion for continuance.

III. Motion for a New Trial

Finally, Yarborough argues the trial court erred in refusing to grant his motion for a new trial based on the passage of time or based on other claims of fundamental fairness. We disagree.

Generally, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion. State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69 (citing State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)).

[4] Yarborough does not argue on appeal that he needed more time to obtain more affidavits from jurors as he claimed at trial. However, that claim would also fail based on his inability to show due diligence in obtaining more affidavits.

a. Passage of Time

Again relying on Aldret, Yarborough suggests the significant amount of time that has passed since the alleged premature jury deliberations justifies a new trial. However, a new trial based on the passage of time is only warranted if the trial court "is convinced premature deliberations did, in fact, occur, but finds it impossible to conduct an adequate post-trial inquiry due to the passage of time . . . ." Aldret, 333 S.C. at 316, 509 S.E.2d at 815. The affidavit of Foster was insufficient even to support further inquiry into the matter. If the trial court did not conclude an evidentiary hearing was necessary, it clearly was not convinced any premature deliberations occurred. Therefore, the trial court did not abuse its discretion in refusing to grant Yarborough's motion for a new trial based on the passage of time.

b. Fundamental Fairness

Yarborough also asserts he was denied fundamental fairness based on discussions of his possible sentences during the deliberation. Again, he relies on the affidavit of Foster to support allegations of these discussions. He argues the trial court erred in refusing to consider this claim because this court "inferentially remanded" the issue in Yarborough I. We disagree.

In Yarborough I, we held that "[a]lthough the trial court . . . stated it could not consider the evidence concerning allegations of premature deliberations presented by the defense, the Aldret case finds such evidence may be admissible. We remand this issue to the trial court for consideration pursuant to Aldret." In no way does our remand imply that the trial court should consider any issue other than premature deliberations. Therefore, the trial court properly denied the motion for a new trial based on fundamental fairness reasons.

CONCLUSION

The trial court did not err in denying Yarborough's motion to compel, his motion for a continuance, his request for an evidentiary hearing, or his motion for a new trial. Thus, the trial court's order is

AFFIRMED.

GOOSLBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Rorey Jamar Johnson, Respondent.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 3939
Heard December 14, 2004 – Filed January 31, 2005

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Appellant.

Acting Chief Attorney Joseph L. Savitz, III, of Columbia, for Respondent.

HEARN, C.J.: After a jury convicted him of murder, Rorey Jamar Johnson was granted a new trial based on an improper reference by a State's witness to a polygraph exam. The State appeals. We affirm.

FACTS

Rorey Jamar Johnson was charged with the murder of Gregory Whitaker who was fatally shot in the upper left shoulder while sitting in a car. At trial, the State presented three witnesses who testified to having been at the scene of the shooting. The first witness to testify was Crystal Marion. She testified she was a prostitute and friend of the victim. The night of the incident she got into a car with Alton "Black" Henderson, Johnson, and a young driver she did not know. The three of them drove to see the victim to sell him some drugs. The victim was sitting alone in a car and very intoxicated. After they spoke to the victim, he got out of the car on the driver's side. The victim and Johnson discussed getting some "weed," but then the victim admitted he did not have any money and got back into his car. Marion testified she saw Johnson get into a "brown car" before she left the area.

Thereafter, when Marion returned later, she stood next to the brown car talking to Henderson and Michael Jones and heard a gunshot. Johnson then ran up to her from behind the victim's car with a pistol in his hand. She testified that she and Johnson jumped into the brown car with Henderson and Jones and left. They subsequently let her out of the car, and she stopped two police officers who took her to police headquarters to make a statement.

Marion testified she gave a statement to the police but it was not the truth. She said she lied in the first statement because she was afraid for her disabled parents. She stated she knew the victim but not Johnson. She testified that she later gave the police two more statements. While being questioned about her statements the following colloquy occurred:

> The State: And you, in fact, later on gave another written statement to the police; is that right?

> Marion: Which was based on the truth. That's right.
>
> The State: In fact, ultimately, you gave the police three statements about the incident; is that correct?
>
> Marion: Uh-huh.
>
> The State: Okay. And it was during this final interview, final statement when you told the complete truth on this matter; is that correct?
>
> Marion: Well, the second statement was the truth as well, but, therefore, they kind of made me feel like I was lying because I didn't pass the polygraph test. And the second one --

At this point, Johnson's counsel objected.

Counsel requested a mistrial due to Marion's statement that she did not pass the polygraph. He argued that the mere mention would imply to the jury that her testimony was truthful because of the implication that she had since passed a polygraph. Additionally, counsel argued that the fact she had been polygraphed could lead the jury to believe not only that her testimony she was truthful, but that the other witnesses may also have passed a polygraph before testifying. The State requested a curative charge and stated that there would be no further mention or argument relating to the results of the polygraph. The trial judge denied the motion for a mistrial and gave the following curative instruction:

> THE COURT: Ladies and Gentlemen of the jury, our United States Supreme Court and State Supreme Court have both ruled that polygraph tests are not admissible in court because they are not accepted scientifically as being accurate. So I would instruct you to disregard any – they are not reliable. So I would instruct you to disregard any reference that

> anybody has made in regard to any polygraph examinations or anything of that nature. And completely dismiss that from your mind and not let that influence you in anyway [sic]. Our United States Supreme Court has ruled in the last year or two on a new case that they were not reliable.

There was no further mention of a polygraph test.

The State presented two additional witnesses that were present at the shooting. Alton "Black" Henderson testified he saw Johnson go up to the car carrying the victim and fire a shot into the car. When Henderson was brought to the police station he made two statements. On cross-examination, he stated he told the truth in both statements but went into more detail in the second statement. He testified that when he first spoke to police he claimed he had not seen the shooting. Additionally, he admitted he did not tell the police he left with Johnson and Jones that night. On the stand, Henderson testified he saw Johnson use a large revolver to shoot the victim.

Michael Jones testified he was sitting in the brown car when he heard the gunshot. He saw Johnson coming to the car with a brown handle that looked like a gun. Johnson and Marion got in the car and left. Jones dropped Marion and Henderson off and went back to his house with Johnson. Jones testified he saw Johnson the next day and Johnson told him he had shot a man. After Jones met with the police he told them to go to his house and the gun would be there. The police did not find the gun. On cross-examination, Johnson testified he deliberately lied to the police about having the gun because he knew Johnson was coming to the house and because he wanted the police to go to his house and "catch [Johnson]." Marion, Henderson, and Jones were all initially charged with murder in connection with the shooting. At the time of the trial, Henderson and Jones had pled to lesser charges.

Detective Mark White testified about the investigation. He stated they never found a gun. When asked what the benefit of finding the gun would be, he answered, "[w]e would have been able to compare the bullet to the weapon." White was asked on cross-examination whether the projectiles

or bullets could be sent to the South Carolina Law Enforcement Division (SLED) and examined by firearms experts to determine caliber. White testified the projectile found in the console of the car was sent to SLED for analysis, but he did not recall what the caliber was.

At the close of the State's case, counsel for Johnson renewed the motion for a mistrial "based on the testimony of Ms. Marion, specifically, when she made the reference to her having failed the polygraph." The trial court denied the motion. After Johnson rested, counsel again renewed his motion for a mistrial "on the basis of Ms. Marion's comments about failing the polygraph . . . . " The trial court again denied the motion.

In the course of deliberations, the jury sent out a question indicating it might be considering accomplice liability. In discussing the question with counsel, the trial court stated, "The facts of this case are he either shot him or he didn't. There is no accomplice liability in this case. . . . Because the facts do not support accomplice liability because they've already charged the other two with accessory. So it can't be accomplice liability." The jury returned to the courtroom for an additional instruction.

The jury found Johnson guilty of murder. Johnson's counsel moved for a new trial on grounds of the denial of his motions for directed verdict and, specifically, the denial of the motion for a mistrial following Marion's reference to the polygraph test. The trial court took the motion under advisement overnight. After listening to arguments by counsel, the trial court granted the motion for a new trial. This appeal followed.

LAW/ANALYSIS

The State argues the trial court abused its discretion in granting a motion for a new trial after a conviction for murder. We disagree.

In the criminal court, the only post verdict fact-based remedy available is a motion for a new trial. State v. Taylor, 348 S.C. 152, 158, 558 S.E.2d 917, 919 (Ct. App. 2001) (citing State v. Miller, 287 S.C. 280, 285, 337 S.E.2d 883, 886 (1985) (Ness, J., concurring in part and dissenting in

part (citation omitted)). The State may appeal the grant of a new trial when it appears it is based "wholly upon an *error of law*." State v. Dasher, 278 S.C. 395, 400, 297 S.E.2d 414, 417 (1982) (emphasis in original) (finding that "[t]he trial judge did not exercise a power to grant a new trial upon the facts, but rather set aside the verdict of the jury in the face of conflicting facts and substituted his judgment for that of the jury. In doing so, he committed an error of law, from which the State had a right to appeal"). "The granting or refusal of a motion for a new trial is within the discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983) (citation omitted).

In this case, the primary evidence of Johnson's guilt was the testimony of three witnesses to the incident, and their credibility was critical to the jury's decision. Moreover, each witness gave some form of inconsistent statement to the police. The trial judge denied Johnson's initial motion for a mistrial on grounds of polygraph testimony but issued a thorough curative instruction. Thereafter, following testimony of the other witnesses, who also gave inconsistent statements, Johnson renewed his motion for a mistrial on grounds of the polygraph testimony, which was denied. However, following the guilty verdict, the trial judge granted Johnson's motion for a mistrial on grounds of the polygraph testimony, stating:

> And it was brought up that she'd given three statements, I believe it was. And the jury knew that she passed the polygraph test. I mean they didn't know whether she'd passed the test or not, but she said she didn't pass the polygraph test. Well, that was the first witness. And I didn't know what effect that was going to have on the trial anyway because I didn't know what the other witnesses – or what the evidence was. But it appears that this whole case boils down to the statements of these witnesses.
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> . . . .

> And then as it turned out, unbeknownst to the court, the Defendant did not take the witness stand. And that's his constitutional right. And of course, no comments can be made about him not taking the witness stand. But that was the problem about these polygraphs, and the inconsistent statements, and the fact that the other defendants were allowed to plea in order to testify against this Defendant to convict him.
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> But I think the polygraph just was magnified because the jury could have inferred, and I believe there's a strong likelihood that that was the case based on the intelligence and the questions of the jury, that all these witnesses had taken polygraph tests, that the State had decided to let the other people plead to what they did and put their testimony in as truth. The solicitor argued strongly that they were telling the truth. And that – the conclusion was after they stayed out and deliberated for some time that [Johnson] was the trigger-man. And I believe it all resulted from the polygraph tests and from all the evidence as a whole.

"Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." See, e.g. State v. Johnson, 334 S.C. 78, 90, 512 S.E.2d 795, 801 (1999) (citations omitted). "Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid any mention of a polygraph examination. If such is brought out in the testimony, the trial judge should be meticulous to see that no improper inference is created." State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979) (citation omitted). However, the mere mention of a polygraph test does not always automatically result in error. A curative instruction can cure any possible prejudice caused by the polygraph testimony. See Johnson, 334 S.C. at 90, 512 S.E.2d at 801.

A curative instruction given following a witness's reference to a polygraph test is not adequate where the reference is likely to impress a jury to the extent that the curative instruction does not overcome the prejudicial effect. See United States v. Tedder, 801 F.2d 1437, 1444 (4th Cir. 1986). In ruling on a motion for a new trial based on the prejudicial effect of incompetent testimony, even following a curative instruction, the trial judge must consider other testimony in the case. See State v. Singleton, 167 S.C. 543, 548, 166 S.E.2d 725, 727 (1932) (finding the trial judge did not err in refusing to grant a new trial on grounds of hearsay testimony, when other testimony warranted a conviction). The Fourth Circuit has set forth two factors to consider in reviewing whether a curative instruction or a mistrial is an appropriate response to a reference to a polygraph: "(1) whether an inference about the result of the test may be critical in assessing the witness's credibility, and (2) whether the witness's credibility is vital to the case." United States v. Brevard, 739 F.2d 180, 182 (4th Cir. 1984) (citation omitted). We find these factors helpful in reviewing the trial judge's grant of a new trial in this case.

In granting the new trial, the trial judge determined that the prejudicial effect of the polygraph testimony was not overcome by his initial curative instruction. He stated that because Marion was the first witness and mentioned her polygraph results, the jury could infer that the other witnesses also took polygraph tests and the results of those tests affected their testimony. We agree, and pursuant to the factors set forth in Brevard, we find the polygraph testimony was critical in assessing Marion's credibility, which affected the credibility of the other witnesses who also gave inconsistent statements. Further, we find Marion's credibility and the credibility of the other witnesses were vital elements in the State's case.

Accordingly, the trial judge did not abuse his discretion in granting Johnson a new trial, and the decision of the trial court is hereby

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.