The Supreme Court of South Carolina

In the Matter of Allison J. LaMantia, Deceased.

Appellate Case No. 2016-000231

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Disciplinary Counsel has filed a Petition for Appointment of Receiver in this matter. The petition is granted.

IT IS ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for Ms. LaMantia's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. LaMantia maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Ms. LaMantia's clients. Mr. Lumpkin may make disbursements from Ms. LaMantia's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. LaMantia maintained 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 Ms. LaMantia, shall serve as notice to the bank or other financial institution that the Receiver, Peyre Thomas Lumpkin, 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 the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Ms. LaMantia's mail and the authority to direct that Ms. LaMantia's mail be delivered to Mr. Lumpkin'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.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina
February 10, 2016

The Supreme Court of South Carolina

In the Matter of Sharon Smith Roach, Petitioner
Appellate Case No. 2016-000075

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
February 10, 2016

The Supreme Court of South Carolina

In the Matter of Elaine Moorer Hunter, Petitioner
Appellate Case No. 2015-002656

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

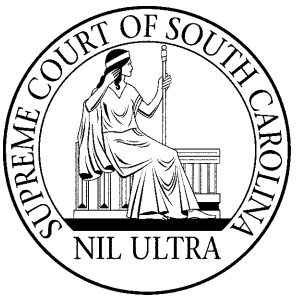
s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
February 10, 2016



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OF

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AND

COURT OF APPEALS

OF

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ADVANCE SHEET NO. 7
February 17, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Julie Maria Fitzharris, Respondent.

Appellate Case No. 2015-002587

Opinion No. 27604
Submitted January 21, 2016 – Filed February 17, 2016

DEFINITE SUSPENSION

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

Julie Maria Fitzharris, of Fitzharris Law Firm, LLC, of Charleston, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of nine (9) months with conditions. We accept the Agreement and suspend respondent from the practice of law in this state for three (3) months with conditions as stated hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

In October 2010, Client retained respondent to represent him in a negligence action for damages related to a burn he received while receiving treatment at a chiropractor's office. Respondent attempted to negotiate with the defendant's

insurance carrier but the adjuster was not interested in settling. Respondent then consulted with a chiropractor in Georgia who reviewed the case, provided an affidavit, and agreed to serve as an expert witness on Client's behalf. In September 2012, respondent filed a Notice of Intent to File Suit.

The chiropractor's insurance carrier then agreed to forgo mediation and to negotiate a settlement. Respondent believed the parties had reached an agreement to settle the case for $3,200.00 and was expecting a check. Respondent neither made a note of the date of this verbal agreement nor requested written confirmation of the settlement agreement.

In December 2014, respondent reviewed Client's file. She noted that there was no settlement check in the file but thought it was due to an administrative delay. On December 4, 2014, she delivered a check for $2,000.00 to Client and told Client the case had settled for $3,200.00 and she was advancing the $2,000.00 from her operating account. Respondent told Client she would give him the remainder of the settlement in January 2015. She apologized to Client for the time it had taken to settle the case and that she would neither take a fee nor reimburse herself for expenses. Respondent also stated the Medicare lien could take some time to resolve. At the conclusion of that meeting, respondent put Client's file in the trunk of her car and did not follow up with Client about outstanding issues. Respondent did not retrieve the file from the trunk of her car until after she received the complaint in this matter.

When she reviewed the file in June 2015, respondent realized no settlement check had been received, no settlement statement had been signed, and the Medicare lien was still outstanding. Respondent found an email from defense counsel that she had not previously read that stated the case was not settled and that it had been dismissed because the statute of limitations had expired. Respondent acknowledges she failed to calendar the case in any way and, therefore, she missed the statute of limitations.

During the pendency of Client's case, respondent had several surgeries on her back and shoulder, there were complications with almost all of the surgeries, and she was taking narcotics and muscle relaxers to alleviate the pain and muscle spasms. Respondent was, and still is, being treated for depression and anxiety in relation to her physical ailments. She acknowledges that these physical and mental health issues contributed to the problems with Client's case.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.8(h)(2) (lawyer shall not settle claim or potential claim for malpractice liability with unrepresented client unless that person is advised in writing of desirability of seeking and is given reasonable opportunity to seek advice of independent legal counsel in connection therewith); Rule 1.16(a)(2) (lawyer shall withdraw from representation when lawyer's physical or mental condition materially impairs lawyer's ability to represent client); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office contained in Rule 402(k), SCACR).

Conclusion

We accept the Agreement and suspend respondent from the practice of law for three (3) months. In addition, respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School within one year prior to filing any Petition for Reinstatement. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David B. Sample, Respondent.

Appellate Case No. 2015-002517

Opinion No. 27605
Submitted January 22, 2016 – Filed February 17, 2016

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

David B. Sample, of Rock Hill, *pro se*.

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

Facts and Law

Matter I

Client A filed a complaint against respondent with ODC. ODC mailed a Notice of Investigation to respondent on March 18, 2013, requesting a response to the

complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), on April 17, 2013, again requesting respondent's response. Respondent's response was received by ODC on April 30, 2013. Ultimately, it was determined that the allegations in the complaint were without merit.

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a) (1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter II

In February 2013, respondent was retained to represent Client B in a child custody matter. Client B paid respondent $1,000.00 of the $3,000.00 initial retainer fee quoted by respondent. Respondent informed Client B that a Guardian Ad Litem (GAL) would be required and that respondent would have a GAL in place when Client B's daughter came to visit. Respondent represents he spoke with one GAL who was unable to serve; however, respondent failed to take any further steps to secure a GAL. At times during the representation, respondent failed to adequately communicate with Client B despite repeated telephone calls, voice messages, and emails. Client B discharged respondent and retained new counsel.

On June 24, 2013, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on July 17, 2013, again requesting his response. Respondent's written response to the Notice of Investigation was received by ODC on August 23, 2013.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client);

Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 1.16(d) (upon termination of representation, lawyer shall take steps to protect client's interests); and Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter III

Client C filed a complaint against respondent with ODC. On August 1, 2013, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on August 21, 2013, again requesting his response. Respondent's written response to the Notice of Investigation was received by ODC on August 23, 2013. Ultimately, it was determined that the allegations in the complaint were without merit.

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter IV

After a finding of fact by the Resolution of Fee Disputes Board (Board), respondent was ordered to pay $2,500.00 to Clients D. Respondent failed to pay the judgment and a certificate of non-compliance was issued by the Board on July 8, 2013. Respondent paid the ordered amount on October 18, 2013.

On August 29, 2013, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on October 23, 2013, again requesting his response. Respondent's written response to the Notice of Investigation was received by ODC on October 30, 2013.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses); and Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provisions of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of Resolution of Fee Disputes Board).

Matter V

Respondent was retained to represent Client E in a malpractice action. Respondent filed a notice of intent to sue. A mandatory mediation was scheduled and respondent failed to attend the mediation or notify Client E about the mediation. Respondent represents that he did not appear at the mediation because he determined that he could not go forward with the lawsuit as respondent was unable to locate an expert witness who would support Client E's position prior to filing suit. Respondent failed to attend the mediation or notify Client E of the mediation.

On October 7, 2013, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on December 2, 2013, again requesting his response. Respondent's written response to the Notice of Investigation was received by ODC on December 9, 2013.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); and Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter VI

In May 2011, respondent was retained by Clients F to represent them in a civil action against a contractor. Respondent was paid $6,000.00 for the representation. Respondent failed to adequately communicate with Clients F despite several telephone calls, voice mail messages, and emails. On one occasion, respondent informed Clients F that he had set up a meeting with a special referee. Two days before the scheduled meeting, respondent advised Clients F that he needed to reschedule the meeting. Clients F contacted the special referee and was informed no meeting was scheduled with Clients F or respondent. On July 18, 2013, Clients F mailed respondent a certified letter terminating the representation and requesting a refund of any unused retainer. Respondent failed to respond to the letter and failed to timely refund any unused retainer.

On October 7, 2013, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on December 2, 2013, again requesting his response. Respondent's written response to the Notice of Investigation was received by ODC on December 9, 2013.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); and Rule 1.16(d) (upon termination of representation, lawyer shall take steps to protect client's interests, including

refunding any unearned fee); Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); and Rule 8.4(e) (lawyer shall not engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter VII

Respondent was retained to represent Client G in a domestic matter and was paid $630.00 for the representation. At times during the representation, respondent failed to adequately communicate with Client G regarding the status of Client G's case and failed to timely return Client G's telephone calls.

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter VIII

A Homeowners Association (HOA) retained respondent to represent it in a lawsuit against the developers of the complex. After the court ruled against the HOA, respondent was instructed to file an appeal of the decision. Respondent filed the appeal on August 20, 2012. Respondent failed to keep the HOA adequately informed regarding the status of the appeal and failed to return telephone calls made by representatives of the HOA. The HOA learned that the appeal had been dismissed after a member of the community contacted the South Carolina Court of Appeals and was informed of the dismissal. Documents from the South Carolina Court of Appeals indicate that the appeal was dismissed due to respondent's failure to serve and file the appellant's initial brief and designation of matter as required

by the SCACR and as requested by letter dated March20, 2014, from the South Carolina Court of Appeals.

On April 21, 2014, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on May 14, 2014, again requesting his response. Respondent's written response to the Notice of Investigation was received by ODC on June 9, 2014.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall abide by client's decisions concerning objective of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 3.4(c) (lawyer shall not knowingly disobey obligation under rules of tribunal); Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter IX

After a finding of fact by the Resolution of Fee Disputes Board (Board), respondent was ordered to pay $1,000.00 to Client B as stated in Matter II. Respondent failed to pay the judgment and a certificate of non-compliance was issued by the Board on April 21, 2014.

On May 14, 2014, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*,

id., on July 7, 2014, again requesting his response. Respondent failed to respond to the Notice of Investigation in spite of the *Treacy* letter. Respondent did appear for an on-the-record interview and gave testimony under oath.

Respondent paid the judgment award to Client B on March 3, 2015.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses); Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct).

Respondent also admits he has violated the following provisions of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of Resolution of Fee Disputes Board).

Matter X

Client H filed a complaint against respondent with ODC. ODC mailed a Notice of Investigation to respondent on July 18, 2014, requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on August 27, 2014, again requesting respondent's response. Respondent failed to respond to the Notice of Investigation in spite of the *Treacy* letter. Respondent did appear for an on-the-record interview and gave testimony under oath. Ultimately, it was determined that the allegations in the complaint were without merit.

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1)(it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter XI

Respondent represented Client I in a personal injury matter. During the course of the representation, Client I died and burial arrangements were entrusted to the Complainant's funeral home. By letter dated March 16, 2011, respondent agreed to protect the interest of the funeral home and pay any funeral expenses from the proceeds of the settlement. Following the settlement, respondent contacted the funeral home and attempted to negotiate the amount due to the funeral home but the funeral declined the settlement offer. Respondent represents there were not enough proceeds from the settlement to satisfy the funeral home lien, another pre-existing lien, a Medicare lien, and attorney's fees. Respondent disbursed funds to cover his attorney's fees and paid funds to the personal representative for out-of-pocket expenses related to the Estate of Client I. Respondent represents that the remaining funds are still being held in trust pending negotiation and settlement of the existing liens. Respondent further represents that the relied on South Carolina Ethics Advisory Opinion 91-10 in disbursing funds to the personal representative, but now recognizes that Rule 1.15(e), RPC, governs a lawyer's responsibility regarding the handling of disputed funds.

ODC mailed a Notice of Investigation to respondent on July 18, 2014, requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on August 27, 2014, again requesting respondent's response. Respondent failed to respond to the Notice of Investigation in spite of the *Treacy* letter. Respondent did appear for an on-the-record interview and gave testimony under oath.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(d) (lawyer shall promptly deliver to third person any funds or other property that third person entitled to receive); Rule 1.15(e) (when in course of representation lawyer is in possession of property in which two or more persons claim interests, property shall be kept separate by lawyer until dispute resolved); and Rule 8.1(b) (in connection

with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provision of the RLDE: Rule 7(a)(1)(it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter XII

After a finding of fact by the Resolution of Fee Disputes Board (Board), respondent was ordered to pay $3,750.00 to Clients F in Matter VI. Respondent failed to pay the judgment and a certificate of non-compliance was issued by the Board on June 30, 2014. Respondent paid the judgment award to Clients F on or about April 1, 2015.

ODC mailed a Notice of Investigation to respondent on August 19, 2014, requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to *In the Matter of Treacy*, *id.*, on October 1, 2014, again requesting respondent's response. Respondent failed to respond to the Notice of Investigation in spite of the *Treacy* letter. Respondent did appear for an on-the-record interview and gave testimony under oath.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses); and Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Respondent also admits he has violated the following provisions of the RLDE: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of Resolution of Fee Disputes Board).

Conclusion

We accept the Agreement and suspend respondent from the practice of law for nine (9) months.[1] In addition, we impose the following conditions provided by the parties' Agreement:

1. respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the date of this opinion;

2. respondent shall complete the Legal Ethics and Practice Program Ethics School within one (1) year prior to filing any Petition for Reinstatement; and

3. for a period of two (2) years from the date of this opinion, respondent shall submit quarterly reports from his medical treatment provider to the Commission regarding his treatment compliance; at the end of the two (2) year period, an investigative panel shall review the filings and may unilaterally extend the quarterly reporting requirements for an additional period of time if it deems it appropriate or necessary.

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

DEFINITE SUSPENSION.

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

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[1] Respondent's prior disciplinary history includes letters of caution issued in 2010 and 2012 warning respondent to adhere to some of the Rules of Professional Conduct cited in the current Agreement. *See* Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in subsequent disciplinary proceeding against lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in new proceedings).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Duke Energy Corporation, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2014-002736

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 27606
Heard November 18, 2015 – Filed February 17, 2016

AFFIRMED AS MODIFIED

Burnet Rhett Maybank, III, of Nexsen Pruet, LLC, of Columbia; Jeffrey A. Friedman, of Washington, D.C., Eric S. Tresh and Maria M. Todorova, of Atlanta, Georgia, all of Sutherland, Asbill & Brennan, LLP, all for Petitioner Duke Energy Corporation.

John Marion S. Hoefer, Tracey Colton Green, and John William Roberts, all of Willoughby & Hoefer, PA, of Columbia; and Milton Gary Kimpson, of Columbia, all for Respondent South Carolina

Department of Revenue.

CHIEF JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' decision affirming the administrative law judge's finding that the principal recovered from the sale of short-term securities was not includible in the sales factor of the multi-factor apportionment formula, and, therefore, Duke Energy was not entitled to a tax refund. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. 2014). We affirm as modified.

FACTS

The controversy in this case arises from the South Carolina Department of Revenue's ("SCDOR") computation of Duke Energy's taxable income.

Duke Energy generates and sells electricity. Because Duke Energy does business in both North Carolina and South Carolina, it must apportion its income to determine its income tax liability in South Carolina. *See* S.C. Code Ann. § 12-6-2210(B) (2014)[1] ("If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State.").

Duke Energy has a treasury department responsible for purchasing and selling securities, such as commercial paper, corporate bonds, United States Treasury bills and notes, United States money market preferred securities, loan repurchase agreements, and municipal bonds. In 2002, Duke Energy filed amended corporate tax returns with the SCDOR for the income tax years of 1978 to 2001, seeking a total refund of $126,240,645 plus interest.[2] In the amended returns, Duke Energy

[1] Section 12-6-2210(B) was enacted in 1995 and effective for all taxable years after 1995. The language of the statute applicable to years prior to § 12-6-2210(B) varies slightly, but the effect is the same. *See* S.C. Code Ann. § 12-7-250 (1976).

[2] Duke Energy requested recalculation of its tax liability for tax years 1978 to 2001. The ALC found Duke Energy's claims for tax years 1978 to 1993 were untimely, and this issue has not been appropriately preserved for review by this Court. *See* Rule 208(b)(1)(D), SCACR (stating an issue which is not argued in the

sought to include the principal recovered from the sale of short-term securities from 1978 to 1999 in the sales factor of the multi-factor apportionment formula. In its original returns, Duke Energy included only the interest or gain from those transactions.

The SCDOR denied the refund request. Duke Energy appealed the decision to the SCDOR's Office of Appeals. The Office of Appeals denied Duke Energy's refund request, finding, *inter alia*, that including recovered principal in the apportionment formula: was contrary to the SCDOR's long-standing administrative policy, would lead to an absurd result, and would misrepresent the amount of business Duke Energy does in South Carolina.

Duke Energy filed a contested case in the Administrative Law Court ("ALC"). The ALC was asked to determine whether Duke Energy, in its amended returns, properly included the principal recovered from the sale of short-term securities in the sales factor of the multi-factor apportionment formula. The parties filed cross-motions for summary judgment. Duke Energy claimed it was required by S.C. Code Ann. § 12-6-2280 (1995) to include all monies recovered from any sales in the "total sales" computation of the apportionment calculation, including the principal recovered from the sale of short-term securities. The SCDOR disagreed, and the ALC granted summary judgment to the SCDOR on this issue. Specifically, the ALC found this issue is novel in South Carolina, and adopted the reasoning of states that have found including the principal recovered from the sale of short-term investments in an apportionment formula would lead to "absurd results" by greatly distorting the calculation, and by defeating the intent and purpose of the applicable statutes.

The Court of Appeals affirmed, albeit applying a different analysis.

We granted Duke Energy's petition for a writ of certiorari to review the Court of Appeals' decision.

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brief is deemed abandoned and precludes consideration on appeal). Therefore, the law cited herein relates to tax years 1994 to 2001, unless otherwise indicated.

ISSUE

Did the Court of Appeals err in affirming the ALC's ruling that the principal recovered from the sale of short-term securities is not includable in the sales factor of the multi-factor apportionment formula?

LAW/ANALYSIS

The Court of Appeals found the ALC correctly concluded the principal recovered from the sale of short-term securities is not includable in the sales factor of the multi-factor apportionment formula, and, therefore, summary judgment in favor of the SCDOR on this issue was proper. We agree; however, we disagree with the analysis applied by the Court of Appeals. Accordingly, we affirm as modified.

Questions of statutory interpretation are questions of law, which this Court is free to decide without any deference to the tribunal below. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). The language of a tax statute must be given its plain and ordinary meaning in the absence of an ambiguity therein. *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1966) (citation omitted). However, regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly. *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Stackhouse v. Cnty. Bd. of Comm'rs for Dillon Cnty.*, 86 S.C. 419, 422, 68 S.E. 561, 562 (1910));[3] *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (citation omitted)

[3] We note there is a discrepancy between the South Carolina Reports and the South Eastern Reporter as to the proper party names in *Stackhouse*. The South Eastern Reporter reflects the case citation as "*Stackhouse v. Rowland*, 68 S.E. 561 (1910)." However, the South Carolina Reports reflects the case citation as "*Stackhouse v. Cnty. Bd. of Comm'rs for Dillon Cnty.*, 86 S.C. 419 (1910)." Because the official publication of the decisions of this Court is the South Carolina Reports, we defer to its citation as to the proper party names.

(finding statutes should not be construed so as to lead to an absurd result). If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect. *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (citing *Stackhouse*, 86 S.C. at 422, 68 S.E. at 562). In so doing, the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose. *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010)); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992)).

In South Carolina, if a taxpayer is transacting business both within and without the State, an apportionment formula determines the fraction of business conducted in South Carolina—the tax "base"—upon which the taxpayer's state income tax is calculated. S.C. Code Ann. § 12-6-2210(B) (2014). Regarding the apportionment statutes, "the statutory policy is designed to apportion to South Carolina a fraction of the taxpayer's total income *reasonably attributable* to its business activity in this State." *Emerson Elec. Co. v. S.C. Dep't of Revenue*, 395 S.C. 481, 485–86, 719 S.E.2d 650, 652 (2011) (emphasis supplied) (quoting *U.S. Steel Corp. v. S.C. Tax Comm'n*, 259 S.C. 153, 156, 191 S.E.2d 9, 10 (1972)).

The applicable apportionment formula in this case is the multi-factor formula. The multi-factor formula is a fraction, the numerator of which is the property factor, plus the payroll factor, plus twice the sales factor, and the denominator of which is four. S.C. Code Ann. § 12-6-2252 (2014).[4]

The issue presented in this case regards the calculation of the sales factor within the multi-factor apportionment statute. For the majority of the years at issue, the statute defining the sales factor provided:

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[4] Section 12-6-2252 was enacted in 2007. Its language, however, is effectively identical to the predecessor statutes that apply to this case: (1) former section 12-7-1140 (1976), which applied to tax years 1978 to 1995; and (2) former section 12-6-2250 (2000), which applied to tax years 1996 to 2001. Section 12-7-1140 was repealed and section 12-6-2250 was enacted in 1995. Section 12-6-2250 was repealed in 2007 when section 12-6-2252 was enacted.

> (A) The sales factor is a fraction in which the numerator is the *total sales* of the taxpayer in this State during the taxable year and the denominator is the *total sales* of the taxpayer everywhere during the taxable year.
>
> . . .
>
> (C) The word "sales" includes, but is not limited to:
>
> . . .
>
> (2) sales of intangible personal property and receipts from services if the entire income-producing activity is within this State. If the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the income-producing activity is performed within this State.

Section 12-6-2280[5] (emphasis supplied).

In addressing this issue, the Court of Appeals limited its analysis to the concept of "receipts," stating, "We find . . . the issue does not depend on the difference between 'gross' and 'net' receipts. Instead, the issue turns on whether the return of the principal of these investments is properly characterized as a 'receipt' in the first place." The Court of Appeals cited Webster's Dictionary to define "receipt," which is the only authority cited by the court in its analysis on this issue. The Court of Appeals concluded the profit received from the sale of short-term securities was properly considered a "receipt," but the principal of the investment was Duke

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[5] Section 12-6-2280 was enacted in 1995. The prior provision, S.C. Code Ann. § 12-7-1170 (1976), required the same calculation, and also utilized the term "total sales."

As discussed *infra*, the definition of the sales factor was changed in 2007. Prior to tax year 1996, former South Carolina Code § 12-7-1170 (1976), provided for the same calculation of the sales factor.

Energy's "own money," and, therefore, was not a "receipt," and may not be included in the apportionment formula. We find the Court of Appeals' analysis employs nomenclature that is subject to misinterpretation.

Specifically, we find the Court of Appeals' focus on the term "receipt" has the potential to generate confusion because the term is only relevant to the single-factor apportionment formula under S.C. Code Ann. § 12-6-2290 (2014), which is not at issue in this case. Rather, it is undisputed on certiorari to this Court that section 12-6-2252, the multi-factor apportionment formula, applies in this case, which uses the term "total sales." Accordingly, we find the appropriate determination is whether principal recovered from the sale of short-term securities could be included as "total sales" in the sales factor of the multi-factor formula, the relevant term under the apportionment statutes.

Whether principal recovered is includable in the total sales under the apportionment statutes is a novel issue in South Carolina. We agree with the ALC that extra-jurisdictional cases addressing this issue are instructive, and as explained *infra*, we agree with the states that have found the inclusion of principal recovered from the sale of short-term securities in an apportionment formula leads to absurd results by distorting the sales factor within the formula, and by defeating the legislative intent of the apportionment statutes.

In *American Telephone and Telegraph Co.*, AT&T claimed all receipts received upon the sale of investment paper should be included in the multi-factor allocation formula. *See Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*, 194 N.J. Super. 168, 172, 476 A.2d 800, 802 (Super. Ct. App. Div. 1984). The court disagreed, reasoning:

> It is no true reflection of the scope of AT & T's business done within and without New Jersey to allocate to the numerator or the denominator of the receipts fraction the full amount of money returned to AT & T upon the sale or redemption of investment paper. To include such receipts in the fraction would be comparable to measuring business activity by the amount of money that a taxpayer repeatedly deposited and withdrew from its own bank account. The bulk of funds flowing back to

> AT & T from investment paper was simply its own money. Whatever other justification there is for excluding such revenues from the receipts fraction, it is sufficient to say that to do otherwise produces an absurd interpretation of [the apportionment statute]. "It is axiomatic that a statute will not be construed to lead to absurd results. All rules of construction are subordinate to that obvious proposition. [Even the rule of strict construction] does not mean that a ridiculous result shall be reached because some ingenious path may be found to that end."

Id. at 172–73, 476 A.2d at 802 (quoting *State v. Provenzano*, 34 N.J. 318, 322, 169 A.2d 135, 137 (1961)); *see also, Sherwin-Williams Co. v. Ind. Dep't of State Revenue*, 673 N.E.2d 849 (Ind. T.C. 1996) (finding persuasive the Superior Court of New Jersey, Appellate Division's rationale concluding any interpretation of the apportionment statutes allowing for the inclusion of principal produced absurd results).

Similarly, in *Walgreen Arizona Drug Co.*, the appellate court was tasked with determining whether "total sales" in the sales factor of the apportionment formula included principal recovered from short-term investments. *See Walgreen Ariz. Drug Co. v. Ariz. Dep't of Revenue*, 209 Ariz. 71, 97 P.3d 896 (Ct. App. 2004). The Arizona Court of Appeals found the reinvestment of funds, for example, in inventory, reflected ongoing business activity and did not "artificially distort the sales factor as does inclusion of unadjusted gross receipts from investment and reinvestment of intangibles."[6] *Id.* at 74, 97 P.3d at 899. The Arizona court further found including the principal from the sale of investment intangibles in the apportionment statute would create a tax loophole for businesses engaged in sales within and without the state, which was neither intended by the Arizona legislature, nor required by the plain meaning. *Id.* at 77, 97 P.3d at 902. Accordingly, the court held the return of principal from the types of short term

[6] The statute in Arizona applicable at the time defined "sales" as "all gross receipts." *See* Ariz. Rev. Stat. Ann. §§ 43-1131(5), 43-1145 (1983).

investments at issue were not includable in the sales factor denominator.[7] *Id*.

We find the inclusion of principal recovered from the sale of short-term securities distorts the sales factor and does not reasonably reflect a taxpayer's business activity in this state. *See Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652 (citation omitted) ("the statutory policy [as to the apportionment formulas] is designed to apportion to South Carolina a fraction of the taxpayer's total income *reasonably attributable* to its business activity in this State."). We further find the resulting distortion leads to absurd results that could not have been intended by the General Assembly. *See Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (citation omitted) (stating courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly).

The record in this case demonstrates conclusively that a taxpayer could manipulate the sales factor by the simple expediency of a series of purchases using the same funds. As was indicated by the Court of Appeals, the following illustration elucidates why, from a common-sense standpoint, Duke Energy's position leads to absurd results. *See Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366.

Duke Energy's Assistant Treasurer and General Manager of Long Term Investments, Sherwood Love, testified by way of deposition that the short-term securities transactions at issue consisted of Duke Energy's Cash Management Group investing large sums of money "pretty much every day," which were typically left outstanding for less than thirty days. Mr. Love's deposition provided an example of a typical transaction controlled by the Cash Management Group. Specifically, the example provided: $14,982,900 was invested in a short-term instrument on August 7, 1996; the instrument was then sold eight days later on August 15, collecting $17,000 in interest; Duke Energy then immediately reinvested the approximately $15,000,000 in another short-term instrument. Under Duke Energy's theory, the transaction described yields a $15 million "sale" to be included as "total sales" in the denominator of the sales factor, as it was a "sale" outside of South Carolina. Further extrapolating under Duke Energy's theory, if the Cash Management Group had decided instead to sell the instrument on August

[7] The types of short-term investments at issue were similar to those at issue in the instant case: U.S. Treasury bonds, notes, and bills; and bank certificates of deposit.

10, immediately reinvest the money, and sell the second instrument on August 15, its "total sales" in the denominator of the sales factor during the same time period as above would be approximately $30 million in principal alone. As a more extreme example, we could assume Duke Energy sold and reinvested the $15 million on August 9, August 11, August 13, and August 15. Duke Energy's theory applied to this example would result in its "total sales" outside South Carolina for purposes of the apportionment formula being reported as approximately $60 million dollars in principal alone. Accordingly, under Duke Energy's theory, the frequency of investments made within that eight day window would dictate how large or small Duke Energy's "total sales" would be reflected in the denominator of the sales factor of the multi-factor apportionment formula. The artificial inflation of the denominator of the sales factor allows a taxpayer to significantly reduce its tax liability in South Carolina in a manner clearly inconsistent with the legislative intent and logical interpretation of the term "reasonably attributable." *See Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652 (citation omitted) ("the statutory policy [as to the apportionment formulas] is designed to apportion to South Carolina a fraction of the taxpayer's total income reasonably attributable to its business activity in this State.").

We find the potentially drastic impacts such cash management decisions have on determining a company's business activity demonstrates the absurdity that results from Duke Energy's position. Duke Energy's view would require two taxpayers, equal in all respects except for their level of investment activity, to report drastically different results in the taxable income reported through application of the multi-factor apportionment formula due solely to the difference in frequency at which the taxpayers roll over their investments. Plainly, counting the same principal that is invested and sold repeatedly as "total sales" can radically misrepresent any taxpayer's business activity.

We find this illustration further demonstrates Duke Energy's position could not have been intended by the General Assembly, and defeats the legislative intent of the apportionment statutes—to reasonably represent the proportion of business conducted within South Carolina. *See* S.C. Code Ann. § 12-6-2210(B) (2014) ("If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State."); *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (citation omitted) (finding

regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly).

Further, the General Assembly enacted S.C. Code Ann. § 12-6-2295 (2007), defining the term "sales" in the apportionment formulas, effective for taxable years after 2007. Section 12-6-2295(B) explicitly excludes from the sales factor: (1) "repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;" and (2) "the principal amount received under a repurchase agreement or other transaction properly characterized as a loan." We find the General Assembly's decision to define "sales" in § 12-6-2295, supports our finding that the legislative intent has always been to exclude such distortive calculations from the apportionment formulas. *See Stuckey v. State Budget & Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent."); *Cotty v. Yartzeff*, 309 S.C. 259, 262 n.1, 422 S.E.2d 100, 102 n.1 (1992) (citation omitted) (noting light may be shed upon the intent of the General Assembly by reference to subsequent amendments which may be interpreted as clarifying it); *see also See Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652 (citation omitted) ("the statutory policy [as to the apportionment formulas] is designed to apportion to South Carolina a fraction of the taxpayer's total income reasonably attributable to its business activity in this State.").

Accordingly, we find the inclusion of principal recovered from the sale of short-term securities produces absurd results, which could not have been intended by the General Assembly. Therefore, we affirm as modified the decision by the Court of Appeals. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. 2014).

The Court of Appeals' decision is therefore

AFFIRMED AS MODIFIED

HEARN, J., and Acting Justices James E. Moore, Robert E. Hood and G. Thomas Cooper, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donna Lynn Phillips, Petitioner.

Appellate Case No. 2015-000351

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
The Honorable D. Garrison Hill, Circuit Court Judge

Opinion No. 27607
Heard December 3, 2015 – Filed February 17, 2016

AFFIRMED AS MODIFIED

E. Charles Grose, Jr., of The Grose Law Firm, of Greenwood, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General J. Benjamin Aplin, both of Columbia, for Respondent.

JUSTICE HEARN: Donna Lynn Phillips was convicted of homicide by

child abuse and sentenced to twenty-five years' imprisonment in the death of her grandson (Child). The court of appeals affirmed her conviction. *State v. Phillips*, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014). Phillips now argues the court of appeals erred in affirming the denial of her motion for directed verdict because it considered the testimony offered by a co-defendant as well as Phillips' own testimony in its analysis. Although we agree the court of appeals erred in disregarding *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), we ultimately find the denial of Phillips' directed verdict motion was proper and we affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

On Monday, March 17, 2008, paramedics responded to a 911 call reporting a child not breathing. Upon arriving at the house, paramedics encountered Latasha Honeycutt, Child's mother, outside on the porch. After entering the home they discovered twenty-one-month-old Child lying on the floor of his bedroom "all alone, cold, not breathing, no pulse, just laying [sic] there." Child was transported to Baptist Easley Hospital and was determined to be in an opiate-induced cardiac arrest. After resuscitation, Child was taken by helicopter to Greenville Memorial Hospital. Ultimately Child was pronounced brain dead and removed from life support; the cause of his death was documented as a hydrocodone[1] overdose.

During the course of the police investigation, it was discovered that Child had been in the care of his father, Jamie Morris, and his paternal grandmother, Phillips, the weekend preceding his death. At that time, Phillips had a prescription for Tussionex[2], which contains hydrocodone and she was eventually arrested and charged with homicide by child abuse. The State proceeded to trial against Phillips, who was tried jointly with Morris, who was charged with aiding and abetting homicide by child abuse, and Honeycutt, who was likewise charged with homicide by child abuse.

At trial, the State presented the testimony of Detective Rita Burgess of the

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[1] The opiate hydrocodone is an antitussive used to treat coughs. *Physicians' Desk Reference* 3443 (64th ed. 2010).

[2] Tussionex is a prescription medication used for the relief of cough and upper respiratory symptoms. *Physicians' Desk Reference* 3443 (64th ed. 2010).

Pickens County Sheriff's Office, who interviewed and took statements from the three defendants. Honeycutt told her Child was with Morris and Phillips from the afternoon of Friday, March 14, 2008, until the evening of Sunday, March 16, 2008. She stated that when Child arrived home around 8:00 p.m. or 9:00 p.m., he was fussy and extremely sleepy; therefore, Honeycutt immediately put him to bed. She checked on him when she woke up around 8:30 a.m. or 9:00 a.m. the following morning, but he was still sleeping. She returned at 11:00 a.m., found Child unresponsive, and awoke Brandon Roper, her boyfriend who lived with her; at that point she called 911.

Phillips spoke with Detective Burgess at Greenville Memorial Hospital and told her Child had trouble sleeping and experienced "frightmares" where he would wake up fighting and crying. Phillips further stated Child had a cough and seemed congested, so Morris gave him generic Tylenol[3] on Sunday. Detective Burgess also noted that during their conversation, Phillips made "random statements" about Lortab, and that she hoped "[Child] didn't get any of her Lortab" or "she hoped [Child] did not get her sister's Lortab.[4]"

Charlie Lark, an investigative consultant in Pickens County, also testified about his interviews with Phillips and Morris. He noted that Morris informed him Phillips had a prescription for cough medication, but Morris stated he never saw Phillips medicate Child over the course of the weekend. Morris further explained Phillips kept her Tussionex in a wire-mesh pumpkin at the top of her closet. Although Phillips retrieved the medication on two occasions in Child's presence, Morris did not see Child ingest any of Phillips' medication; however, he did note that Child played with the Tussionex bottle while Phillips had it out of the pumpkin. Additionally, Lark stated Phillips informed him Child played with her "medicine bottles," but the tops were on them so she did not believe he could have ingested anything. She further stated although she was concerned she may have dropped a bottle on the floor and Child picked it up, she never witnessed him

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[3] Tylenol contains acetaminophen, which is used for the treatment of minor aches and pains, nasal congestion, headaches, and temporarily reduces fever. *Physicians' Desk Reference* 1950 (59th ed. 2005).

[4] Lortab, a combination of acetaminophen and hydrocodone, is a prescription medication for the relief of moderate to moderately severe pain. *Physicians' Desk Reference* 3240 (59th ed. 2005).

consume any medication.

Two witnesses testified as to the results from the tests performed on Child's blood and urine samples. The supervisor of the chemistry department at Baptist Easley Hospital testified about the drug screen performed on Child's urine and noted the results indicated the presence of hydromorphone, which is a metabolite of the opiate hydrocodone. Robert Foery, a forensic toxicologist, testified as to tests performed on the urine and blood taken from Child. Foery stated the tests revealed chlorpheniramine[5] and hydrocodone in the blood, as well as hydrocodone, hydromorphone, and chlorpheniramine in the urine. Foery stated hydrocodone and chlorphenaramine are both found in Tussionex. He further testified that the concentration of hydrocodone in Child's blood was 102 nanograms per milliliter and that the therapeutic range for an adult is 10 to 40 nanograms per milliliter. Foery could not opine on the dosage that was likely administered to Child, but stated he believed this could have been a repetitive dosing. Additionally, he testified the first dose would have been given some twenty-four to thirty-six hours prior to the blood being drawn at 12:30 p.m. on Monday, March 17, 2008. On cross-examination, Foery also stated that Lortab contained acetaminophen in addition to hydrocodone, and because there was no acetaminophen found in the samples, he did not believe Child ingested Lortab.

The State also presented testimony from a chemistry expert who analyzed the Tussionex bottle retrieved from Phillips' home and who opined it contained both chlorpheniramine and hydrocodone. The coroner also testified, stating he concluded Child's death was a homicide caused by an overdose of hydrocodone. Without objection, he also noted that the hydrocodone "came from the grandmother's home . . . in the form of Tussionex." He determined Tussionex caused the death because of the presence of chloropheniramine and hydrocodone in Child's bloodstream.

At the close of the State's evidence, Phillips moved for directed verdict arguing there was no evidence presented "she gave any drugs to anybody" nor was evidence presented from which a jury could conclude she did so with extreme indifference to human life. The trial court denied the motion.

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[5] Chlorpheniramine is an antihistamine. *Physicians' Desk Reference* 3443 (64th ed. 2010).

Each defendant presented a defense. Phillips testified she did not give Child any medication, stating "I was not raised that way. I would not give a child any kind of medicine that was not prescribed for them. I would never give a child anything under the age of two years old." She further stated there was no way for Child to have gotten into the pumpkin without her knowledge because it was on the top shelf out of his reach and because they never left him alone.

Honeycutt called Kayla Roper, her boyfriend's sister, in her defense, who testified as to the events of Monday, March 17, 2008. She specifically described how at Baptist Easley Hospital she was near Phillips and Morris and overheard Phillips indicate that she gave Child some cough medicine over the weekend, stating "surely to God that's not what is wrong."

At the close of the evidence, Phillips again moved for directed verdict, which was denied. The jury ultimately convicted Phillips and she was sentenced to twenty-five years' imprisonment.[6]

Phillips appealed, arguing the State failed to present substantial circumstantial evidence that she acted with extreme indifference. Prior to oral argument at the court of appeals, but subsequent to the filing of her initial brief, this Court decided *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), which adopted the waiver rule, but noted an exception to when testimony is offered by co-defendants.[7] *Id.* at 436, 752 S.E.2d at 412. Phillips' appellate counsel submitted a letter to the court listing *Hepburn* as a supplemental citation, but did not specify the proposition for which it was being cited. During oral argument, the court of appeals focused on Kayla Roper's testimony and the fact it provided direct not circumstantial evidence, ignoring that under *Hepburn*, her testimony could not

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[6] Honeycutt was acquitted. Morris was found guilty of aiding and abetting homicide by child abuse and sentenced to twelve years' imprisonment, suspended to eight years. His convictions were affirmed on appeal and he did not petition this Court for certiorari. *State v. Morris*, Op. No. 2014-UP-112 (S.C. Ct. App. filed Mar. 12, 2014).

[7] Under the waiver rule, a defendant who presents evidence in his own defense waives the right to have the court review the denial of directed verdict based solely on the evidence presented in the State's case-in-chief. *Hepburn*, 406 S.C. at 431, 753 S.E.2d at 410.

be considered in reviewing the denial of directed verdict.

Ultimately, the court of appeals affirmed her conviction. Specifically, the court found Kayla Roper's testimony provided direct evidence of child abuse therefore, relying on Phillips' testimony that she would never give medicine to Child coupled with the medical evidence of the extreme levels of hydrocodone within Child's blood, there was direct and circumstantial evidence presented of extreme indifference sufficient to withstand Phillips' directed verdict motion. *Phillips*, 411 S.C. at 134–36, 767 S.E.2d at 448–50. Phillips filed a petition for rehearing, arguing the court of appeals erred in failing to apply the waiver rule enunciated in *Hepburn* and in considering Phillips' testimony as well as evidence presented by Honeycutt. The court of appeals denied the petition. This Court granted certiorari.

ISSUE PRESENTED

Did the court of appeals err in affirming the denial of Phillips' directed verdict motion?

LAW/ ANALYSIS

Phillips argues the court of appeals failed to apply applicable precedent and therefore erred in its affirmance of the trial court's denial of her directed verdict motion. Although we agree the court of appeals should have applied *Hepburn*, we nevertheless hold sufficient evidence was presented to withstand Phillips' motion for directed verdict. We therefore affirm the court of appeals as modified, writing only to reiterate an appellate court's proper framework in analyzing the denial of directed verdict in cases where *Hepburn* is implicated.

In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight. *State v. Curtis*, 356 S.C. 622, 633 591 S.E.2d 600, 605 (2004). When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). However, the trial court must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

As we recently stated in *State v. Bennett*, "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." Op. No. 27600 (S.C. Sup. Ct. filed January 6, 2016) (Shearouse Adv. Sh. No. 1 at 19). The jury's focus is on determining whether every circumstance relied on by the State is proven beyond a reasonable doubt, and that all of the circumstances be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955). The trial court must view the evidence in the light most favorable to the State when ruling on a motion for directed verdict, and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Id.* at 329, 89 S.E.2d at 926. As we noted in *Bennett*, while "the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *Bennett*, Op. No. 27600 (S.C. Sup. Ct. filed January 6, 2016) (Shearouse Adv. Sh. No. 1 at 19).

In *Hepburn*, the appellant argued that in reviewing the propriety of the trial court's denial of her mid-trial motion for directed verdict, the appellate court should only review the evidence presented by the State in its case-in-chief. The State sought to augment the evidence presented in its case-in-chief with evidence offered by a co-defendant and with evidence offered by appellant in opposition to the co-defendant's evidence. Accordingly, the State requested we overrule the decision in *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996), wherein the court of appeals held that when a defendant presents evidence in his own defense, he waives the right to limit the appellate court's consideration of the denial of his motion for directed verdict to only the evidence presented in the State's case-in-chief. Declining the State's invitation, we expressly adopted the reasoning in *Harry* and the waiver rule propounded therein.

Consistent with the approach taken in other states, we also acknowledged in *Hepburn* the inapplicability of the waiver rule to evidence offered by a co-defendant. Thus, we held that although we adopted the waiver rule, because the co-defendant's testimony implicated appellant, and because appellant's testimony merely rebutted the testimony of the co-defendant, neither testimony could be

considered in assessing the propriety of the trial court's denial of appellant's directed verdict motion.

The State contends Phillips has not preserved her *Hepburn* argument because this precise point—that the testimony offered by a co-defendant should not be considered in reviewing a motion for directed verdict—was never squarely presented to the court of appeals. We acknowledge Phillips never specifically argued until her petition for rehearing that the review of her motion should be limited to the evidence presented in the State's case; however, this does not preclude her from arguing this now, nor, more fundamentally, can it prevent this Court from applying the proper standard of review. Phillips has consistently argued the denial of her motion for directed verdict was in error. Requesting that the Court consider *Hepburn* in its analysis is not a distinct argument, but merely adds nuance to the inquiry engaged in by the appellate court. Further, it is incumbent upon the court of appeals to apply this Court's precedent. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Simply because a party does not expressly articulate the relevance of a particular case does not excuse the court of appeals from failing to apply controlling precedent. While it may have been preferable for Phillips to make this argument during oral argument, the court of appeals should not have overlooked recent case law—especially where it was expressly cited. Moreover, the court of appeals had the opportunity to correct its error on rehearing but declined to do so. We therefore reject the State's argument that Phillips' reliance on *Hepburn* is not preserved.

Turning first to Phillips' contention that her own testimony should be excluded, we disagree and find it falls squarely within our articulation of the waiver rule in *Hepburn.* In support of her argument, Phillips asserts her testimony was a preemptive response to Honeycutt's defense. Temporally, her defense preceded Honeycutt's; we do not find her testimony can be considered responsive to Honeycutt. Accordingly, under *Hepburn*, Phillips waived her right to have this Court review the sufficiency of the State's case based solely on its case-in-chief when she chose to testify in her own defense.

However, we find it was improper for the court of appeals to consider the testimony of Kayla Roper in reviewing the denial of the directed verdict motion. The State argues *Hepburn*'s exception to the waiver rule is limited to the testimony

of a co-defendant and does not extend to other witnesses called by a co-defendant. Specifically, it contends that unlike calling a defendant, the State could have called Kayla Roper in reply and presented precisely the same testimony. We disagree. Although in the discussion of the waiver rule the Court noted the unfairness of allowing the State to use to its advantage evidence it could not otherwise elicit—testimony of a co-defendant—it also clearly stated that "[t]he rationale behind the co-defendant exception pertains to control." *Id.* at 435, 753 S.E.2d at 412. It further explained,

> Requiring the defendant to accept the consequences of his decision to challenge directly the government's case affirms the adversary process. But the decision of a co[-]defendant to testify *and produce witnesses* is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial.

Hepburn, 406 S.C. at 435, 753 S.E.2d at 412 (quoting *United States v. Belt*, 574 F.2d 1234, 1237 (5th. Cir. 1978) (emphasis added)). Thus, in *Hepburn* we grounded our holding in the notion that the defendant has no control over the testimony of a co-defendant *or his witnesses*, and it would therefore be unfair to allow the State to use that evidence to support its case. Nor do we accept the State's misplaced argument that it could have called Kayla Roper in reply; it did not and it cannot now rewrite history and rely on that testimony simply because it *could* have called her as a witness. Accordingly, we do not consider Kayla Roper's testimony presented by Honeycutt in reviewing Phillips' directed verdict motion, and it was error for the court of appeals to have done so. Today we clarify our holding in *Hepburn* that the waiver rule is inapplicable not only to testimony of a co-defendant but also to testimony *offered* by a co-defendant, as in this case, Kayla Roper's testimony.

However, considering the evidence presented in the State's case-in-chief and in Phillips' defense, we hold the trial court properly denied her motion for directed verdict. Section 16-3-85 of the South Carolina Code (2003) provides "A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . ." "[I]ndifference in the context of criminal statutes has been compared to the

conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). For purposes of this statute, "extreme indifference" has been characterized as "a mental state akin to intent characterized by a deliberate act culminating in death." *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting *Jarrell*, 350 S.C. at 98, 564 S.E.2d at 367).

We find there is direct and circumstantial evidence that, when construed in the light most favorable to the State, could allow the jury to conclude Phillips acted with extreme indifference in administering the medication that caused Child's death. The testimony indicates the administration of multiple doses of Tussionex and a concentration of at least two-and-a-half times the therapeutic amount of the drug in Child's blood. It is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous. Importantly, Phillips herself testified she would never give Child medication not prescribed to him and nor would she give any medication to a child under the age of two. There is no question that Child was in the care and custody of Phillips and her son at the time of the lethal dose; Phillips herself testified he was never alone during the weekend. Accordingly, the evidence was sufficient to allow a reasonable juror to conclude Phillips acted with extreme indifference to human life in administering the Tussionex.

CONCLUSION

We affirm as modified the court of appeals' opinion, holding that under *Hepburn*, Phillips' testimony, but not Kayla Roper's, can be considered in the Court's review of the denial of directed verdict. Because there was sufficient evidence under that standard to withstand Phillips' directed verdict motion, we affirm her conviction and sentence.

PLEICONES, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice Jean H. Toal, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin McBride, Appellant.

Appellate Case No. 2013-002391

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

Opinion No. 5381
Heard November 10, 2015 – Filed February 17, 2016

AFFIRMED

Wendy Raina Johnson Keefer, of Keefer & Keefer, LLC, Joshua Preston Stokes, of McCoy & Stokes, LLC, and Adam Owensby, of Carolina Firm, LLC, all of Charleston, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, and Solicitor Ernest Adolphus Finney, III, of Sumter, for Respondent.

SHORT, J.: Justin McBride appeals his conviction for first-degree criminal sexual conduct with a minor, arguing the following: (1) the trial court lacked subject

matter jurisdiction over McBride because he was a juvenile[1]; (2) numerous evidentiary and jury charge issues; (3) the evidence presented was insufficient to prove the required elements of the crime; and (4) the trial court erred in excluding only a portion of McBride's statement. We affirm.[2]

BACKGROUND FACTS

The victim[3] testified that on June 21, 2010, she was attending summer school. When she arrived home on the school bus, her mother was not there. The victim went to her aunt's house next door.[4] The victim testified her cousin, McBride, was home alone and let her in. The victim sat on the couch while McBride went into the kitchen. When McBride returned, the victim asked him to turn the television off. The victim testified McBride turned the television off, then "took out his manhood. And then he told [me] to jerk it. And he grabbed my hand, and put my hand on his manhood. And I jerk it away from him. And then that's when he is going to grab my head, and pull it down to make me put my mouth on it." The victim next testified she pushed McBride away from her, "[a]nd that's when the white stuff and clear stuff came out of his manhood. It was in my mouth and on my shirt. And I ran in the bathroom." The victim spit into the sink, wiped her shirt with tissue, and threw the tissue away. The victim testified she was wearing a black shirt and her "birthday pants that [her] grandmother gave [her]." According to the victim, when she returned to the living room, McBride was spraying the room with "man's perfume." The victim testified she ran to the front door, was blocked by McBride, ran to the back door, and went home.

The victim's mother was home by then and opened the door when the victim knocked. The victim originally denied anything was wrong. The mother smelled the "man's perfume" on the victim and saw a deodorant stain on the victim's shirt.

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[1] McBride was sixteen years old at the time of the alleged assault.

[2] By letter received November 5, 2005, McBride requested the court delay disposition of his case and remove counsel. McBride stated, "Elizabeth Tisdale has abandoned me and my issues . . . ." During oral argument, McBride's private counsel informed the court that Tisdale was McBride's girlfriend and not an attorney, and McBride was prepared to go forward.

[3] The victim was nine years old at the time of the assault and thirteen years old at the time of trial.

[4] McBride's mother is the victim's father's sister.

According to the victim, she had deodorant on the back of her shirt from where McBride had his arm around her neck when he forced her to touch him. The victim testified she spoke to Detective Wilma Trena Hamlet of the Kingstree Police Department and two other officers within ten to fifteen minutes of returning home.

Hamlet testified minor inconsistencies between the victim's first and second statements included which door she ran out of when exiting McBride's house. Hamlet also admitted that no deodorant was collected from McBride.

The victim's mother testified that on the day in question, when she arrived home, the victim was not there, but she arrived shortly thereafter. As the victim passed her in the entryway, the mother smelled men's cologne and saw the stain on the victim's shirt. After questioning the victim, the mother went next door and questioned McBride. She returned home and called her husband, her sister (the sister), and McBride's mother. The sister eventually called the police.

The sister testified she arrived at the victim's house after receiving the telephone call and confronted McBride after the victim told her what happened. According to the sister, McBride said he did not mean to do it, and "tr[ied] to compromise with [her]." The sister described it as McBride's confession.

At the close of the evidence, McBride moved for a directed verdict, arguing there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and circumstantial evidence. The jury convicted McBride of first degree criminal sexual conduct. This appeal follows.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the

preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

I. Subject Matter Jurisdiction

McBride argues the circuit court lacked subject matter jurisdiction to hear the case because he was sixteen at the time of the alleged crime and the case was not properly transferred to the court of general sessions. We disagree.

The State argues this issue is not preserved for our review and is a matter of personal jurisdiction, not subject matter jurisdiction. We agree. This issue was not raised to the trial court; thus, unless it involves subject matter jurisdiction, it must have been raised to and ruled upon by the trial court to be preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review); *Ex parte Cannon*, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court."). Because the circuit court has the power to hear criminal cases, we find the issue was not one of subject matter jurisdiction. *See State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (explaining issues relating to subject matter jurisdiction may be raised at any time and clarifying a court's subject matter jurisdiction is that court's power "to hear and determine cases of the general class to which the proceedings in question belong"). Thus, McBride has not preserved the issue for appellate review.

II. Evidentiary Rulings and Jury Charges

McBride argues numerous evidentiary and jury charge errors relating to the loss of the victim's clothing by the investigating police department, the admission of photographs, and the limitation of his cross-examination regarding the Department's investigation of the victim. We find no reversible errors.

A. The Victim's Shirt

McBride argues the trial court erred in limiting his ability to cross-examine witnesses regarding the victim's shirt, which law enforcement lost. Further, McBride maintains his due process rights were violated by the loss of the victim's shirt. McBride also argues the trial court erred in denying his motion for an adverse inference jury charge on the issue. We affirm.

The mother testified she bagged the victim's clothing and three days later, she took it with the victim to the victim's forensic and medical examination. The facility double-bagged the clothing, labeled the bag, and instructed the mother to deliver it to the police department, which she did later that day. The mother testified she gave it to a bald man at the department.

Lieutenant Thomas McCrea, of the Kingstree Police Department, testified the only bald employee of the department was the evidence custodian, Sergeant Grant Huckabee. McCrea testified only Huckabee and the Chief of Police had access to evidence at the department and both had left the department. McCrea testified the mother came to the department to retrieve the clothing and, at that time, McCrea's understanding based on protocol was that the clothing would have been at the South Carolina Law Enforcement Division (SLED) for testing. However, he had never seen a report indicating the clothing was sent to SLED. He admitted the department did not have the clothing, an intake sheet reporting receiving it, or an analysis from SLED, and that SLED had no record of receiving it. He also admitted other evidence in the department had been lost during Huckabee's tenure with the department.

The allegedly improper limitation of cross-examination arose during McCrea's cross-examination. McBride asked, "Do you know why Officer Huckabee left the department? . . . . Can you disclose to the court why?" The State objected on the ground of relevance, and the trial court sustained the objection. McBride made no further attempt to cross-examine McCrea regarding the lost shirt. Furthermore, McBride did not raise the due process argument arising from the limitation of cross-examination that he now raises on appeal. Thus, the issue is not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review).

McBride argues his due process rights were violated because the shirt was lost. We disagree.

Relying on *State v. Breeze*, 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008), the trial court found no due process violation because there was no bad faith by the State and no evidence the lost clothing possessed any exculpatory value. In *Breeze*, the defendant was convicted of possession of marijuana with intent to distribute. *Id.* at 542, 665 S.E.2d at 249. Prior to trial, the State informed the defendant the marijuana had been destroyed. *Id.* Breeze argued the trial court erred in finding the lost marijuana was not a due process violation and did not entitle him to an adverse inference jury charge. *Id.* at 545, 665 S.E.2d at 251. This court disagreed, finding the State did not have an absolute duty to safeguard potentially useful evidence that might vindicate a defendant. *Id.*

The court in *Breeze* stated, '"To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.'" *Id.* (quoting *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001)). The court found no bad faith by the State where the marijuana was inadvertently destroyed because the status of the case listed it as disposed and the policy of the department was to destroy drugs when a case was disposed. *Id.* at 546, 665 S.E.2d at 251; *see State v. Reaves*, 414 S.C. 118, 129, 777 S.E.2d 213, 218 (2015) (finding no bad faith despite acknowledging "deeply troubling aspects" of the police investigation, including lost clothing, jewelry, and documents). *But see Reaves*, 414 S.C. at 129, 777 S.E.2d at 218 (noting that although the defendant was disadvantaged by the lost evidence, he forcefully cross-examined the police and the trial court instructed the jury on adverse inference).

The trial court in this case likewise found McBride did not show bad faith by the State in the loss of the shirt. We agree. Appellate courts give the trial court's finding great deference on appeal and review the findings under a clearly erroneous standard. *See e.g., State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) (reviewing factual findings regarding purposeful discrimination during jury selection in a pre-trial hearing).

As to whether the shirt possessed exculpatory value, we agree with the State that "it is speculative at best that the shirt contained exculpatory value." *See Breeze* 346 S.C. at 546, 665 S.E.2d at 251-52 (finding the evidence was inculpatory rather than exculpatory because it field tested for marijuana, an officer opined it was marijuana, and an expert tested it prior to its destruction and testified it was marijuana). Because McBride failed to meet either prong necessary to establish a due process violation arising from evidence lost by the State, we find no due process violation in the lost shirt.

We also find no error by the trial court in denying McBride's request for an adverse inference jury charge. Prior to the trial court's jury charge, McBride requested the following charge:

> In evaluating a case, you may consider the lack of evidence presented by the State. Th[e]re are allegations that evidence has been lost or destroyed by the State in this case. We refer to this concept as spoliation or destruction of evidence. The State not only has the burden of proof of guilt, but it also has the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt.
>
> When evidence is lost or destroyed by a party, you may infer that the evidence that was lost or destroyed would have been adverse to that party. If you find first that evidence was spoiled or destroyed, and if you further find that the evidence could help establish the innocence of the defendant or create doubt about whether or not he is guilty, you may then consider those facts in deciding whether or not the State has met its burden of proof.

The trial court declined to instruct the jury as requested. The trial court in *Breeze* likewise denied Breeze's request to instruct the jury that an adverse inference could be drawn from the State's failure to produce the marijuana. *Id.* at 545-48, 665 S.E.2d at 251-53.

In this case, we find there was no error by the trial court in declining the charge. "In general, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial. *Id.* The requested charge in this case included an instruction that permitted the jury to "infer that the evidence that was lost or destroyed would have been adverse to that party."

Adverse inference charges are rarely permitted in criminal cases. *See Reaves*, 414 S.C. at 128 n.5, 777 S.E.2d at 218 n.5 (noting "adverse inference charge[s] based on missing evidence . . . ha[ve] been limited to civil cases in South Carolina"); *State v. Batson*, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) (entertaining "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); *id.* (stating "a charge of this proposition to a jury on . . . behalf of either the State or the defense is not warranted except under most unusual circumstances"). We find no error by the trial court in denying the request for the jury charge.

In summary, we find McBride failed to preserve the issue regarding his inability to cross-examine McCrea. We also find no due process violation by the State. Finally, we affirm the trial court's denial of McBride's request for an adverse inference jury charge.

B. Missing Photographs

McBride next argues the trial court erred in admitting two color photographs of the victim's shirt, which he did not receive prior to trial. We disagree.

During redirect examination of the victim, she testified she got a stain on her shirt after McBride pulled her head to his penis. Without the jury present, McBride moved to exclude two color photographs of the shirt the State was preparing to enter into evidence. McBride's counsel argued the documents produced by the State prior to trial were dark and illegible, but during trial, the State was attempting to introduce legible, color photographs. McBride's counsel explained he took this case on appointment after McBride's original counsel was disbarred. Trial counsel made a separate Rule 5, SCRCrimP, request and discovery motion and was never provided the color photographs. Trial counsel did not see the color photographs

until just prior to making the motion. Trial counsel acknowledged he did not believe it was an intentional act by the State; rather, he accepted it was due to a copy machine. However, trial counsel argued it "dynamically change[d]" his representation of McBride, and it "could have . . . very well have pushed us along the line to . . . see if there was anything that could have been worked out."

The solicitor informed the court that the illegible copies were given to the solicitor's office by the Kingstree Police Department, but she knew what they depicted. In the State's discovery responses, the solicitor "duplicated the pictures as they were given" to her. She also notified McBride's first counsel that there were pictures and a disk available for inspection. She stated the incident report provided to McBride referenced a white stain on the shirt. She argued, "it was incumbent upon the defense to . . . request better copies or request to be permitted to go to the Kingstree Police Department and see the photographs." The solicitor argued the State had complied with Rule 5. Finally, she informed the trial court she also received the color photographs the morning of trial.

The court weighed the extent of the State's compliance with Rule 5 with the obligation of the defense to investigate further when it received illegible photographs. Although "bother[ed] . . . immensely[,]" the court admitted the photographs, finding that the State did not violate Rule 5 and there was no prosecutorial misconduct. The court relied on the State's discovery Response 7, stating there were photographs that could be inspected.

Subject to McBride's previous objections, the State introduced the color photographs during Hamlet's testimony, and she testified the photographs depicted the victim's shirt and the discoloration on the left shoulder, which the victim claimed was McBride's deodorant. On appeal, McBride argues the trial court erred in balancing the State's compliance with Rule 5 and McBride's rights, stating the proper test for violations of Rule 5 is whether good cause has been shown.

Rule 5, SCRCrimP, governs disclosure in criminal cases. Rule 5(a)(1)(C), SCRCrimP, provides in part: "Upon request of the defendant the prosecution shall permit the defendant to inspect and copy . . . photographs . . . which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution . . . ." The decision by the trial judge regarding the admissibility of evidence for failure to

comply with disclosure rules will not be reversed absent an abuse of discretion. *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). *See State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.").

We find no reversible error in the trial court's ruling regarding McBride's motion to suppress the color photographs because the solicitor notified McBride that there were pictures and a disk available for inspection. *See State v. Newell*, 303 S.C. 471, 475-76, 401 S.E.2d 420, 423 (Ct. App. 1991) (finding the State substantially complied with Rule 5 by making its file available for inspection by the defendant); *see also State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of a motion to suppress following the late disclosure of defendant's statements where defendant "was permitted to view and copy the State's file" and defendant "never requested a continuance or recess in order to review the file").

C. Investigation of the Victim

McBride argues the trial court erred in refusing to allow him to cross-examine law enforcement witnesses regarding whether they requested the victim submit to a polygraph examination. We disagree.

During the pre-trial hearing, McBride moved to be permitted to cross-examine law enforcement regarding its ability, under section 16-3-750 of the South Carolina Code, to request a victim submit to a polygraph examination. McBride argued he was entitled to ask law enforcement officers if they took "that additional step to verify whether this was an accurate allegation." The court denied the motion. During cross-examination of Hamlet, McBride questioned her regarding section 16-3-750. The court sustained the State's objection. At the close of evidence, McBride moved for a mistrial based on the issue. The court denied the motion.

Section 16-3-750 provides as follows:

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under

> federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

S.C. Code Ann. § 16-3-750 (2015).

"The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion." *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015). "The general rule is that no mention of a polygraph test should be placed before the jury." *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). We find no error by the trial court. McBride presented no evidence challenging the credibility of the victim; thus, the statute did not apply.

D. Section 16-3-657

McBride also argued the trial court erred in charging section 16-3-657 of the South Carolina Code, maintaining the jury charge shifted the burden of proof and violated his due process rights. At the pre-trial hearing, the court found the statute was not unconstitutional or in violation of McBride's due process rights. McBride also included the issue in his motion for a mistrial, which the court denied. The court charged the jury, stating "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state."

Section 16-3-657 of the South Carolina Code provides, "The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657 (2015). "These criminal statutes generally encompass the prohibition of various forms and degrees of criminal sexual conduct, and include criminal sexual misconduct with a minor." *State v. Hill*, 394 S.C. 280, 298-300, 715 S.E.2d 368, 378-79 (Ct. App. 2011). The court in *Hill* continued:

In *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), the appellant asserted that the trial judge erred in charging section 16-3-657 to the jury because the charge constituted an impermissible comment on the facts of the case, it improperly emphasized the testimony of one witness, and it carried a strong possibility of unfairly biasing the jury against the defendant. Our supreme court noted the trial court had charged the jury that the State had the burden of proving the defendant was guilty of the charged offenses beyond a reasonable doubt, and further instructed the jurors that they were the sole and exclusive judges of the facts of the case, that the trial court was prohibited from commenting on or having an opinion about the facts of a case, and that it was the responsibility of the jury to assess the credibility of the witnesses who testified in the case. The supreme court then stated as follows:

> It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear—*not only to the*

> *judge but also to the jury*—that a defendant may be convicted solely on the basis of a victim's testimony.

The court then concluded, while a trial judge is not required to charge section 16-3-657, when the judge chooses to do so, giving the charge does not constitute reversible error when "this single instruction is not unduly emphasized and the charge as a whole comports with the law." The court determined, because the jury in that case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses, the trial judge fully and properly instructed the jury on those principles.

Here, the sole instruction the trial judge charged the jury on corroboration was as follows: "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence." Notably, the judge immediately followed that statement with, "Necessarily you must determine the credibility of witnesses who have testified in this case." The judge also included in her charge several instructions regarding the State having the burden to prove Hill guilty beyond a reasonable doubt, and further charged the jury that it was the exclusive judge of the facts and was not to infer that the trial judge had any opinion about the facts. Thus, this jury was thoroughly instructed on the State's burden of proof and the jury's duty to find facts and judge credibility of witnesses, as well as admonished not to infer that the trial judge had any opinion about the facts. Accordingly, the single instruction on "no corroboration," was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the "no corroboration" charge.

Id. at 298-99, 715 S.E.2d at 378-79 (internal citations omitted). Like the court in *Hill*, the trial court in this case instructed the jury on "no corroboration" in a one-sentence charge, stating, "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state." The jury charge as a whole included numerous references to the State's burden of proof and notified the jury that it was the judge of witness credibility. Like the court in *Hill*, we find no error in the "no corroboration" charge.

In summary, we find no reversible errors in McBride's allegations of numerous evidentiary and jury charge errors.

III. Directed Verdict

McBride argues the trial court erred in denying his motion for a directed verdict. We disagree.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this court must find the case was properly submitted to the jury. *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 273 (2002).

At the close of the evidence, McBride argued there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and circumstantial evidence. Our own review of the victim's testimony indicates the victim testified to penetration. We find no merit in this issue and affirm.

IV. Admission of McBride's Statement

McBride argues the trial court erred in admitting his statement to Hamlet. We disagree.

Prior to trial, the court held a *Jackson v. Denno*[5] hearing to determine the admissibility of a statement McBride made to Hamlet, the investigator for the Kingstree Police Department. McBride moved to strike the initial portion of his statement. The court suppressed "that one particular statement and not anything else. . . ."

On appeal, McBride argues the circuit court erred in suppressing only a portion of the statement. This issue is not preserved for our review. *See State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (finding when "the appellant obtained the only relief he sought, this court has no issue to decide"); *State v. Parris*, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide.").

CONCLUSION

For the foregoing reasons, McBride's conviction is

AFFIRMED.

GEATHERS and LOCKEMY, JJ., concur.

[5] 378 U.S. 368 (1964).