OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

March 26, 2001

ADVANCE SHEET NO. 11

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Spencer Leonard McHoney, Appellant.

Appeal From Berkeley County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25264
Heard January 11, 2001 - Filed March 19, 2001

AFFIRMED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia, and Solicitor David P. Schwacke, of North Charleston, for respondent.

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

CHIEF JUSTICE TOAL: Spencer Leonard McHoney ("McHoney") appeals his murder conviction and his life imprisonment sentence. We affirm.

FACTS/PROCEDURAL BACKGROUND

On November 15, 1995, Violet White's ("Victim") parents went to her home and found her with her throat slashed and with numerous stab wounds in her abdomen. Her parents rushed her to the hospital where Helen Nelson ("Nelson"), a nurse on duty, attended to her. Nelson testified that when the victim was removed from her parent's vehicle, the victim's head fell back "like a PEZ toy," and the width of the cut on her neck was wide enough to "lay her arm in it."

Nelson talked to the victim while the physicians were trying to stabilize her for transfer to another trauma center. Although the victim was unable to speak, she was able to nod in response to questions by Nelson. Nelson asked the victim if she knew who stabbed her, and the victim nodded yes. Nelson asked her if her family knew the attacker, and the victim again nodded her head yes. When asked if her attacker lived in her neighborhood, the victim nodded yes. However, the victim shook her head no when Nelson asked if her boyfriend was the attacker.

At the suggestion of the physician, Nelson recited the alphabet and asked the victim to nod her head when she reached the attacker's initials. When Nelson got to the letter "S", the victim nodded. Nelson began the alphabet again and when she got to the letter "P", victim nodded. Nelson asked the victim if "SP" were the initials of her attacker and she shook her head no. The victim nodded her head when Nelson asked her if she was attempting to spell her attacker's name. Nelson questioned the victim in this manner for approximately thirty to forty minutes.

When the intensive care helicopter arrived, Nelson told the victim she was going to a hospital where she would get the "best care from the best doctors."

Nelson then assured the victim she would be fine. In response to Nelson's statement, the victim looked at her, shook her head no, and closed her eyes. The victim lost consciousness before the flight, and she died two weeks later without regaining consciousness.

The doctor who performed the autopsy testified the victim was stabbed seven times in her abdomen and had a four inch long incised wound across her neck. The victim died from aspirating blood as a result of her injuries.

McHoney was quickly associated with the murder. McHoney, whose first name begins with "SP", was a known crack addict the police had previously used as an informer. Another crack addict testified he saw McHoney driving the victim's car around the time of her murder. On November 17, 1995, McHoney fully confessed to police that he robbed and violently murdered the victim to get money for crack.

In January 1996, McHoney was indicted for the victim's murder. The State provided McHoney its notice of intention to seek the death penalty relying on the aggravating circumstances of criminal sexual conduct, physical torture, armed robbery, and larceny with a deadly weapon. The case proceeded to trial on April 28, 1997. In May 1997, the jury found McHoney guilty of murder accompanied by all aggravating circumstances except criminal sexual conduct. McHoney was sentenced to life imprisonment.

On July 21, 1998, McHoney's counsel filed an *Anders* brief that raised the following two issues:

I. Did the trial judge err by allowing into evidence, as a dying declaration, the victim's identification of "SP" as her killer?

II. Did the trial judge err by excluding evidence McHoney passed a polygraph test when questioned about the victim's death?

McHoney sent the Court a *pro se* brief raising the following four additional issues:

III. Did the trial judge err by denying McHoney's directed verdict motion, where the State failed to introduce any substantial evidence he was guilty of the victim's murder?

IV. Did the trial judge err by instructing the jury they could not acquit McHoney unless "[t]here is a real possibility that he is not guilty," because this instruction diluted the State's burden of proving guilt beyond a reasonable doubt?

V. Did the trial judge err by allowing the solicitor to ask a leading question of a key State's witness, which improperly bolstered the credibility of that witness?

VI. Did the trial judge err by rejecting the jury's request to visit the location where a key State's witness testified he saw McHoney driving the victim's car?

On July 17, 2000, we denied McHoney's attorney's petition to be relieved as counsel, and directed him to brief all six issues.

LAW/ANALYSIS

I. Dying Declaration

McHoney argues the trial judge erred by admitting the victim's identification of "SP" as her killer under the dying declaration exception to the hearsay rule, Rule 804(b)(2), SCRE, because there was no evidence the victim believed her death was imminent, and the victim did not die until two weeks after making the statements. We disagree.

Hearsay is not admissible unless it fits within an exception to the hearsay rule. Rule 802, SCRE. The State sought to introduce the victim's identification of "SP" as her killer under the dying declaration exception. Rule 804(b)(2), SCRE. A statement made under the belief of impending death is not excluded by the hearsay rule if the declarant is unavailable as a witness in a prosecution for homicide, the statement is made by a declarant while believing the

declarant's death is imminent, and the statement concerned the causes or circumstances of what the declarant believed to be impending death. Rule 804(b)(2), SCRE; *see also* 29A AM. JUR. 2D *Evidence* § 829 (Supp. 2000) ("In a homicide prosecution, the dying declaration must bear on the fact of the homicide and the person by whom it was committed. Such statements must be made voluntarily and in good faith. In addition, such statement must be made under a sense of impending death.").

McHoney argues there was no evidence the victim believed her death was imminent at the time of her declaration. According to defense counsel:

> If this nurse who has been taking care of me and talking to me says I am going to be fine and I am getting the best medical treatment possible, then exactly the opposite would have been understood by the declarant. So it would not qualify as a dying declaration.

The medical personnel who attended the victim assured her she would be "fine." However, the victim shook her head no in response to the assurances, indicating she was aware of her impending death.

A declarant does not have to express, in direct terms, his awareness of his condition for his statement to be admissible as a dying declaration. The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration. *See Louisiana v. Bell*, 721 So. 2d 38 (La. Ct. App. 5th Cir. 1998); *Louisiana v. Nicholson*, 703 So. 2d 173 (La. Ct. App. 4th Cir. 1997); *Louisiana v. Matthews*, 679 So. 2d 977 (La. Ct. App. 4th Cir. 1996). Repeated questioning by the declarant concerning whether he is going to live, a less than reassuring answer, the nature of the wound, and the declarant's critical condition are circumstances that indicate the declarant's awareness of approaching death. *Charles v. Texas*, 955 S.W.2d 400 (Tex. Ct. App. 1997).[1]

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[1]*See, e.g., Illinois v. Georgakapoulos*, 708 N.E.2d 1196 (Ill. App. Ct. 1st Dir. 1999) (holding the belief in the imminence of death may be demonstrated by the declarant's own statement or from circumstantial evidence, such as the nature of the wounds or statements made in his

In fact, a declarant can be aware of imminent death even when he is assured he will not die and will be fine. *See id.* at 404 (holding evidence was sufficient for trial court to infer victim believed her death was imminent where victim had severe burns all over her body, she asked if she was going to die, and the officer replied negatively to reassure her and to prevent shock).

Furthermore, the length of time the declarant lives after making the dying declaration is immaterial. The focus is on the declarant's state of mind when the statement is made, not on the eventual outcome of the declarant's injuries. *See State v. Hall*, 134 S.C. 361, 133 S.E. 24 (1926).[2] In *State v. Hall*, we held a dying declaration was properly admitted when the declaration was made shortly after the injury, and the declarant died 33 days later. We held it was the jury's duty to pass upon the credibility of the dying declaration, and the length of time

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presence); *Louisiana v. Lucas*, 762 So.2d 717 (La. Ct. App. 1st Cir. 2000) (finding the magnitude of the victim's gunshot wound, the victim's knowledge he was going into surgery, his obvious pain, and his "serious" tone of voice provided enough evidence to infer victim was aware of his imminent death).

[2]*See also North Carolina v. Hamlette*, 276 S.E.2d 338 (N.C. 1981) (holding the fact victim lingered for several days after his communication to police officer that defendant was the man who shot him did not render statement inadmissible as a dying declaration); *North Carolina v. Stevens*, 243 S.E.2d 771 (N.C. 1978) (the fact victim survived one week longer than doctors told him he might live did not render victim's dying declaration inadmissible); *Thomas v. Arkansas*, 973 S.W.2d 1 (Ark. Ct. App. 1998) (holding under the dying declaration exception, it is declarant's belief in nearness of death when he makes the statement, not the swiftness with which death actually ensues, that is most important); *Charles v. Texas*, 955 S.W.2d 400 (Tex. Ct. App. 1997) (holding length of time declarant lives after making dying declaration is immaterial in determining if statement is dying declaration for purposes of hearsay exception); *Herrera v. Texas*, 682 S.W.2d 313 (Tex. Crim. App. 1984) (length of time declarant lives after making dying declaration is immaterial to dying declaration exception).

between the declaration and death is just one factor to be considered. *Id.* at 361, 133 S.E. at 26.

In the instant matter, the fact the victim died two weeks after her injury does not indicate the victim did not believe her death was imminent, where she shook her head when told she would be fine, and where she never regained consciousness after she made the declaration. Therefore, we find the trial judge properly admitted the victim's identification of "SP" as her killer under Rule 804(b)(2), SCRE.

Although we find the victim's statement was a valid dying declarations, her statement also satisfies the excited utterance exception to the hearsay rule. Rule 803(2), SCRE. An excited utterance is a statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition. Rule 803(2), SCRE. "The basis for the excited utterance exception to the hearsay rule is that the perceived event produces nervous excitement, making fabrication of the statements about the event unlikely." 29A AM. JUR. 2D § 865 (1994). An excited utterance expresses the real belief of the speaker because the utterance is made under the immediate and uncontrolled domination of the senses, rather than under reason and reflection. *Id.*

In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances. *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999). In this case, the victim was rushed to the hospital and immediately bombarded by medical personnel. When the victim arrived at the hospital, she was still under the continuing stress of being stabbed seven times in the abdomen and having her throat slit. There was no time for the victim to reflect on the event, so her statement is inherently reliable. *See id.* (the rationale behind the excited utterance exception is the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication). Therefore, because her statement was made under the continuing stress of the attack, it is admissible as an excited utterance. Rule

803(2), SCRE.[3]

II. Polygraph Results

McHoney argues the trial judge erred by excluding evidence he passed a polygraph test when questioned about the victim's death. We disagree.

The police administered a polygraph test the day after the victim's murder. The polygraph examiner asked McHoney whether he stabbed the victim or knew who did. He answered "no" to both questions, and the polygraph examiner, who was an expert in interrogation and body language, concluded McHoney was telling the truth.

At the start of the trial, the State objected to the admission of the polygraph results based on their unreliability. The trial judge agreed and excluded the evidence pursuant to *State v. Wright*, 322 S.C. 253, 471 S.E.2d 700 (1996). McHoney did not present any evidence concerning the reliability of polygraph examinations.

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[3]The totality of the circumstances indicate the victim was under the stress of the startling event of being violently attacked, even though she did not make her statements until asked by the nurse at the hospital. The victim did not make her statements contemporaneously with her attack simply because her throat was cut and she could not speak. Therefore, the time lapse between the attack and her statements is immaterial because she communicated with the nurse at the first opportunity. *See Webb v. Lane*, 922 F.2d 390 (7th Cir. 1991) (statements made up to two hours after victim had been shot six times in the chest and abdomen, in which he identified assailant, were admissible under excited utterance exception to the hearsay rule); *State v. Harrison*, 298 S.C. 333, 380 S.E.2d 818 (1989) (allowing as res gestae the statements of an attempted sexual assault victim to an officer at the hospital upon first opportunity to tell what occurred to her); *State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978) (noting that a time interval of over one hour, and up to eleven hours, did not necessarily eliminate a statement as part of the res gestae).

We recently addressed the admissibility of polygraph examinations in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). We held that the results of polygraph examinations are generally inadmissible because the reliability of the test is questionable. *Id.* at 23, 515 S.E.2d at 519; *see also Wright, supra*; *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). Furthermore, the United States Supreme Court recently held that a *per se* rule against the admission of polygraph evidence does not violate a defendant's right to present relevant evidence in his defense as guaranteed by the United States Constitution. *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998). According to the United States Supreme Court, "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." *Id.*, 118 S. Ct. at 1265.

However, in light of the adoption of the SCRE, we held in *Council* that the admissibility of polygraph evidence should be analyzed pursuant to Rules 702 and 402, SCRE and the factors outlined in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979). Under Rule 702, SCRE, the trial judge must find: (1) the scientific evidence will assist the trier of fact; (2) the expert witness is qualified; and (3) the underlying science is reliable.[4] The trial judge should determine the reliability of the underlying science by using the *Jones* factors: the publication of peer review of the technique; prior application of the method to the type of evidence involved in the case; the quality control procedures used to ensure reliability; and the consistency of the method with recognized scientific laws and procedures. *Council, supra.* Further, if the evidence is admissible under Rule 702, SCRE, the trial judge must determine if its probative value is

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[4]Rule 702, SCRE, states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

outweighed by its prejudicial effect under Rule 403, SCRE.

As we indicated in *Council*, at the time of McHoney's 1997 trial, polygraph examinations were generally not admissible because of their unreliability. Therefore, the trial judge did not abuse his discretion by excluding the polygraph results. Furthermore, even under a *Council* analysis, McHoney did not meet his burden of proof under Rule 702, SCRE because he did not present any evidence that polygraphs were inherently reliable, the polygraph was reliable and properly conducted in this case, or that the *Jones* factors were met.

III. Directed Verdict Motion

McHoney argues the trial judge erred by denying his directed verdict motion because the State failed to introduce substantial evidence he was guilty of murder. Specifically, McHoney contends the State presented evidence that was totally unreliable. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Brown*, 103 S.C. 437, 88 S.E. 21 (1916). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000). 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. Burdette*, 335 S.C. 34, 515 S.E.2d 525 (1999); *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilty of the accused, we must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 529 S.E.2d 526 (2000).

McHoney argues the State's case was based on unreliable evidence. However, in ruling on a directed verdict motion, the trial judge is concerned with the existence of the evidence, not its weight. *Mitchell, supra*; *State v. Williams*, 303 S.C. 274, 400 S.E.2d 131 (1991). We find the State presented enough evidence to survive a directed verdict motion.

Viewing the evidence in a light most favorable to the State, there was evidence that reasonably tended to prove McHoney's guilt. The victim's dying declaration tended to inculpate McHoney. McHoney gave a full confession two days after the crime where he admitted to choking the victim, stomping on her neck, stabbing her repeatedly in the abdomen until the knife bent, using another knife to slit the victim's throat, and stabbing the victim in the chest with the second knife until it bent. Furthermore, a witness saw McHoney driving the victim's car around the time of the crime.

IV. Reasonable Doubt Instruction

McHoney contends the trial judge gave an erroneous reasonable doubt instruction. He contends it was error to instruct the jury they could not acquit unless "there is a real possibility that he is not guilty" because the instruction diluted the State's burden of proving guilt beyond a reasonable doubt. We disagree.

The trial judge gave the following reasonable doubt instruction, in relevant part:

> So the burden of proof then is upon the state to establish by evidence to your satisfaction the guilt beyond a reasonable doubt of the defendant here on trial. Now, what is a reasonable doubt in the law? A reasonable doubt is a doubt that would cause a reasonable person to hesitate to act. As I told you, the state has the burden of proving the defendant guilty beyond a reasonable doubt. . . .
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. . . . If based upon your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find him guilty. *If on the other hand you think there is a real possibility that he is not guilty, you must give him the benefit of that doubt and find him not guilty.* (emphasis added).

We specifically approved a similar reasonable doubt instruction in *State*

v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996). As we stated in *Darby*, "[c]ourts specifically addressing whether the 'real possibility' language lessens the government's burden of proof have held it does not in the context of the preceding language requiring that the juror be 'firmly convinced' of the defendant's guilt." *Id.* at 116, 477 S.E.2d at 711 (citations omitted). We also found there is nothing in this language to suggest the defendant bears the burden of proof. *Id.* Furthermore, the "real possibility" language is found in the proposed jury instruction developed by the Federal Judicial Center, and was cited with approval in Justice Ginsberg's concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). *Id.* at n.1. Finally, we approved the use of the "real possibility" language in *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), and the Court of Appeals approved the language in *State v. Lowery*, 332 S.C. 261, 503 S.E.2d 794 (Ct. App. 1998).

V. Leading Question

McHoney argues the trial judge erred by allowing the solicitor to ask a leading question of a key witness, which improperly bolstered the credibility of that witness. We disagree.

On redirect examination of the State's witness, who testified he saw McHoney driving the victim's car, the solicitor asked, "[Y]ou don't know – you are not – are you connected closely with either side of this case, either the victim or the defendant?" The witness answered, "The defendant are [sic] my family. I am not related to the victim." Both McHoney and the State agree defense counsel did not object to the question or the answer. Therefore, the issue is not preserved because a contemporaneous objection is required to preserve issues for direct appellate review. *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999). The question was also cumulative to other evidence because the witness had previously testified he was related to McHoney.

"A leading question is one which suggests to the witness the desired answer. . . . In order to require reversal, appellant must show an abuse of discretion resulting in prejudice." *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559, 563 (1979). The contested question provided the witness with a choice of answers and did not require a "yes" or "no" response. Further, no prejudice was

demonstrated because the question was cumulative.

VI. Visiting the Crime Scene

McHoney asserts the trial judge erred by denying the juror's request to visit the "41 Quick Stop," a location where a State's witness testified he saw McHoney driving the victim's car around the time of the murder. We disagree.

Jury views are controlled by S.C. Code Ann. § 14-7-1320 (1976), which provides:

> The jury in any case may, *at the request of either party*, be taken to view the place or premises in question or any property, matter or thing relating to the controversy between the parties when it appears to the court that such view is necessary to a just decision, if the party making the motion advances a sum sufficient to pay the actual expenses of the jury and the officers who attend them in taking the view, which shall be afterwards taxed like other legal costs if the party who advanced them prevails in the suit.

A jury view of a scene is a matter within the discretion of the trial judge. *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) (citations omitted). The trial judge's decision will not be reversed absent an abuse of discretion. *Id.*

During jury deliberations in this matter, the jury sent a message to the trial judge asking: "Will it be possible to visit the 41 Quick Stop at nighttime?" The trial judge declined the request, informing the jury they must decide the case based on the evidence presented. Similarly, in *Gossett v. State*, 300 S.C. 473, 388 S.E.2d 804 (1990), the jury sent a note to the trial judge asking if they could view the scene of the crime. We found the trial judge was correct in denying the jury's visit to the crime situs because section 14-7-1320 mandates that a *party* make a motion before a jury view is allowed. *Id.* at 477, 388 S.E.2d at 806.

Based on our opinion in *Gossett, supra*, the trial judge was correct in denying the jury view of the crime situs. However, even assuming a proper

motion was made, a jury view was not necessary for the jury to make a just decision. The jury wanted to view the scene at night because they were concerned the State's witness did not have enough light to clearly identify McHoney. However, a jury view of the scene was unnecessary because: (1) a photograph of the scene was admitted into evidence indicating a street light was in the vicinity of the scene; and (2) the witness testified he had enough light to recognize McHoney.

CONCLUSION

Based on the foregoing, we **AFFIRM** the conviction and sentence of the trial court.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cullum Mechanical Construction, Inc., Plaintiff,

v.

South Carolina Baptist Hospital, a/k/a Baptist Medical Center, Jenkins, Hancock & Sides Architects and Planners, Inc., Miller-Sharpe, Inc., John M. Miller, Donald R. Sharpe, and General Accident Insurance Company of America, Defendants.

and

Fairfield Flooring, Inc., Plaintiff,

v.

South Carolina Baptist Hospital, a/k/a Baptist Medical Center, Miller-Sharpe, Inc., John M. Miller, Donald R. Sharpe, and General Accident Insurance Company of America, Defendants.

and

Ross Wallcovering Co., Inc., Plaintiff,

v.

South Carolina Baptist Hospital, a/k/a Baptist Medical Center, Miller-Sharpe, Inc., John M. Miller, Donald R. Sharpe, and General Accident Insurance Company of America, Defendants.

and

Spratlin Electric Co., Inc., Plaintiff,

v.

South Carolina Baptist Hospital, a/k/a Baptist Medical Center, Miller-Sharpe, Inc., John M. Miller, Donald R. Sharpe, and General Accident Insurance Company of America, Defendants.

and

Sumter Lumber Company, Inc., Plaintiff,

v.

South Carolina Baptist Hospital, a/k/a Baptist Medical Center, Miller-Sharpe, Inc., John M. Miller, Donald R. Sharpe, and General Accident Insurance Company of America, Defendants.

and

Palmetto Automatic Sprinkler Co, Inc., Plaintiff,

v.

South Carolina Baptist Hospital, a/k/a Baptist Medical Center, Miller-Sharpe, Inc., John M. Miller, Donald R. Sharpe, and General Accident Insurance Company of America, Defendants.

and

Columbia Glass, Inc., Plaintiff,

v.

South Carolina Baptist Hospital, a/k/a Baptist Medical Center, Miller-Sharpe, Inc., John M.

Miller, Donald R. Sharpe, and General Accident Insurance Company of America, Defendants.

of whom Cullum Mechanical Construction, Inc., Fairfield Floorings, Inc., Ross Wallcovering Co., Inc., Spratlin Electric Co., Inc., Palmetto Sprinkler Co., Inc., and Columbia Glass, Inc., are, Petitioners,

and

Jenkins, Hancock & Sides Architects and Planners, Inc., and the General Accident Insurance Company of America, are Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 25265
Heard December 6, 2000 - Filed March 26, 2001

REVERSED

Daniel T. Brailsford and J. Kershaw Spong, of Robinson, McFadden & Moore, P.C., of Columbia, for petitioner.

R. Davis Howser and Andrew E. Haselden, of Howser, Newman & Besley, L.L.C., of Columbia, for respondent Jenkins, Hancock & Sides Architects and Planners, Inc.

D. Cravens Ravenel, of Baker, Ravenel & Bender, of Columbia; and John V. Burch, of Bovis, Kyle & Burch, of Atlanta, Georgia, for respondent General Accident Insurance Company of America.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision finding that respondent (Architect) did not owe a duty of reasonable care to petitioner (Cullum). Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 336 S.C. 423, 520 S.E.2d 809 (Ct. App. 1999). We reverse.

FACTS

Cullum, a subcontractor, filed an action against South Carolina Baptist Hospital, a/k/a Baptist Medical Center (Owner), Architect, Miller-Sharpe, Inc. (General Contractor) and its principals, and General Accident Insurance Company of America (Surety) seeking $426,728.87 for unpaid goods and services on a project to perform construction on certain floors of the Medical Center. While other subcontractors filed similar suits, only Cullum sued Architect on the theory that Architect owed a duty to use reasonable care in

the administration of contractual provisions that were designed to ensure payment to subcontractors.

In September 1992, Owner and Architect contracted to conduct renovations in the Medical Center. Architect prepared a Project Manual for potential contractors to use in submitting bids. After entering a successful bid, General Contractor and Owner executed an agreement on June 10, 1993.

Before bidding on the subcontractual work for General Contractor, Cullum had several individuals review the Project Manual. Cullum's responsibilities, after its bid was accepted, were to perform heating, ventilation, air conditioning, and plumbing work on the project.

Architect's responsibilities under its contract with Owner included reviewing General Contractor's payment applications, certifying the amounts due General Contractor,[1] and determining whether Owner and General Contractor had performed according to the requirements of their contract upon written request of either party. Owner was responsible for giving prompt written notice to Architect if Owner became aware of any fault or defect in the project or nonconformance with the contract documents.

Under General Contractor's contract with Owner, Architect had the ability to withhold the certification of payments if General Contractor failed to properly pay subcontractors.

General Contractor was required to post a performance and payment bond, which would be delivered to Owner at or prior to delivery of the signed

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[1] Architect's issuance of a certificate of payment constituted "a representation that [General] Contractor [was] entitled to payment in the amount certified." However, the issuance of the certificate of payment was not a representation that Architect had "ascertained how or for what purpose [General] Contractor [had] used money previously paid on account of the Contract Sum."

agreement between Owner and General Contractor. The payment bond would ensure payment to those who provided labor or materials to the project. However, General Contractor did not deliver the bond as required. Despite General Contractor's failure to provide a bond, Owner and General Contractor entered into their contract.

General Contractor's responsibilities also included promptly paying Cullum, and other subcontractors, upon receipt of payment from Owner and, upon request, furnishing a copy of the bond. Further, General Contractor had to submit to Architect with each payment application satisfactory evidence that all indebtedness connected with the part of the work for which application for payment was made had been paid, and submit "a properly executed subcontractor waiver of lien . . . for the previously paid application for payment, stating [the] amounts paid." However, General Contractor never attached the lien waivers to the payment applications.

While the construction project was proceeding, General Contractor was dilatory in making payments to Cullum. Before Cullum executed its contract with General Contractor, Cullum wrote General Contractor stating, although Cullum had billed $442,065.60, no payments had yet been received. Cullum and Architect also engaged in a telephone conversation in which Cullum informed Architect it and other subcontractors were not being paid. Cullum asked Architect if General Contractor was bonded, and Architect responded that it did not know.

On November 10, 1993, Cullum finally executed its contract with General Contractor. The cover letter stated that while some payments had been untimely made, $127,712.70 was still outstanding. Cullum requested in the letter that General Contractor give Cullum the name of the bonding company on the project. However, the name was never given. Cullum stated that it was unaware that General Contractor had not submitted a payment bond until after the job was completed.

When other subcontractors began to complain about nonpayment, Architect, in response to Owner's inquiry, requested a copy of General

Contractor's payment bond. General Contractor submitted a "General Agreement of Indemnity," which did not comply with the contract terms because it was not a payment bond. However, Owner stated that it believed the "General Agreement of Indemnity" indicated a bond existed. Architect never recommended to Owner that Owner should terminate General Contractor because General Contractor had not provided a payment bond. Architect stated that it simply passed the information received from General Contractor to Owner.

Although Architect knew there was not a payment bond and that subcontractors were not being paid, Architect continued to certify payments and reduced the amount Owner retained[2] from the payments from ten percent to five percent.[3]

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[2] "Retainage" is the percentage General Contractor and Owner agreed to withhold from each pay request to be paid at the end of the project, or as negotiated through the course of the project. Retainage served to assure General Contractor's completion of the work and to satisfy subcontractors' and suppliers' lien claims.

[3] Under the supplementary conditions to Architect and Owner's contract, Architect had the ability to reduce the amount of retainage withheld from the payments to General Contractor. The condition stated the following:

> If the manner of completion of the Work and its progress are and remain satisfactory to the Architect, and in the absence of other good and sufficient reasons, for each category of Work shown to be 50 percent or more complete in the application of Payment, the Architect may, without reduction of previous retainage, and on presentation by [General] Contractor of the written consent of surety, certify any remaining progress payments for each category of Work to be paid in full.

After the project was completed and Cullum had not been fully paid by General Contractor, Cullum sued Architect. Architect's motion for summary judgment was granted, and the trial court found that Architect did not owe a duty to Cullum. Cullum appealed the order to the Court of Appeals, which affirmed. Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., supra. We granted a writ of certiorari to review the Court of Appeals' decision.

ISSUE

May an architect owe a duty to ensure a general contractor pays its subcontractors?

DISCUSSION

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment is not appropriate, however, when further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000) (citing Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may

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(Emphasis added). Further, the contract between General Contractor and Owner stated that the retainage would be reduced to five percent when fifty percent of the work was completed, if approved by Owner and Architect.

In the American Institute of Architects' Guide for Supplementary Conditions, the guide for this retainage section cautions that, "[n]o reduction in retainage should be authorized unless consent of surety has been furnished by the Contractor."

be drawn from the evidence in the light most favorable to the non-moving party. Id. (citing Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988)).

"A breach of a duty arising independently of any contract duties between the parties . . . may support a tort action." Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (citation omitted). "When . . . there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action." Id. (citations omitted).

In Tommy L. Griffin, we found that where there is a special relationship between the design professional and the contractor, the design professional may owe a duty to the contractor. Id. at 53-55, 463 S.E.2d at 87-88. We expressed that there was "no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties." Id. at 55, 463 S.E.2d at 89 (citing Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990); State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986)). Further, we noted that whether the design professional owes a duty depends on the facts and circumstances of each case. Id. at 55-56, 463 S.E.2d at 89.

Generally, an architect does not have a duty to assure payment to subcontractors; however, special conditions in these contract documents may have given rise to a special relationship with subcontractors, and therefore a duty of care. We find it is a factual issue whether these circumstances give rise to a special relationship between Architect and Cullum, which would give rise to a duty on the part of Architect.[4] See Tommy L. Griffin, supra.

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[4] In addition to determining whether a duty existed in this case, the jury must still determine whether Cullum will prevail on the other elements

We believe further inquiry into the facts of the case is desirable to clarify the application of the law. See Brockbank v. Best Capital Corp., supra. Accordingly, we find that the trial court erred by granting Architect's motion for summary judgment.

REVERSED.

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

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of negligence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Robert B. Carter, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Paul M. Burch, Circuit Court Judge

Opinion No. 25266
Heard February 6, 2001 - Filed March 26, 2001

AFFIRMED

C. Rauch Wise, of Greenwood, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy General Robert E. Bogan, and Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor J. Gregory Hembree,

of Conway, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' unpublished opinion affirming petitioner's convictions for first degree burglary, kidnaping, first degree criminal sexual conduct, possession of a weapon during the commission of a violent crime, and unlawful use of a telephone.[1] Petitioner claims the State failed to establish a sufficient chain of custody for the admission of a blood sample used to match his DNA with evidence found at the scene. We affirm.

FACTS

Victim lived alone in the owner's apartment of a small motel in Myrtle Beach. She testified that about 5:30 a.m. on December 3, 1994, she awoke to find a man on top of her in her bed. He put a pillowcase over her head and threatened to kill her while holding a cold metal instrument under her jaw that she thought was a gun. After giving her a choice between fellatio or intercourse, the assailant put his penis in Victim's mouth under the pillowcase. When he became dissatisfied with her performance, he masturbated into her mouth and insisted she swallow the semen. He then tied her up and left the apartment.

After freeing herself, Victim found a pocket-knife on her living room floor which she gave to police along with the pillowcase and the clothing she was wearing at the time of the assault. She did not see her assailant's face and could give police no identification.

About six weeks later, on the afternoon of January 14, 1995, Victim

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[1]Petitioner was sentenced to life for burglary, thirty years concurrent for kidnaping, thirty years consecutive for criminal sexual conduct, and consecutive terms of five and ten years respectively on the weapon and telephone charges.

received a telephone call from an unidentified male who asked her, "Have you woken up with any [penises] in your mouth lately?" Victim recognized the voice as that of her assailant. She received a similar call ten days later in the early morning hours of January 24. On February 1, she received a third call that she recorded. She also traced the caller's telephone number.

When Victim took this information to police, she listened to the recording with Detective Starr. Detective Starr told her the call came from a phone booth outside a nearby motel, the Lighthouse, and asked if she knew anyone living there. Victim recalled that petitioner, whom she knew because she was friendly with his parents,[2] was living at the Lighthouse. She then identified the voice on the tape as petitioner's.

At trial, the State introduced the testimony of two police officers who saw petitioner in the vicinity of the phone booth outside the Lighthouse at approximately the time the third phone call was made. In addition, the State's expert testified that semen[3] was found on the pillowcase given to police which matched petitioner's DNA as indicated by the blood sample taken from him before trial.

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[2]Victim testified petitioner's parents had lived at her motel for about a year until the August before the attack and petitioner had stayed with them for part of that time. She had given petitioner's father a key to her apartment on one occasion when she went out of town. This key was never definitively linked to petitioner, however. Victim's apartment showed no signs of forced entry after the attack.

[3]Expert testimony indicated there were actually two stains on the pillowcase that were tested. The smaller stain was semen identified by the presence of a male-specific protein, P-30, and the other, larger stain was a mixed semen and saliva stain. Both stains matched petitioner's DNA. As part of the defense case, petitioner's expert testified he tested only the larger stain and it was not conclusively semen. He admitted the stain, whatever it was, did match petitioner's DNA.

Petitioner's blood sample was drawn pursuant to a consent order requiring him to submit to blood and saliva sampling. Petitioner was escorted by police to the hospital where Dr. Proctor supervised the taking of blood and saliva samples which he testified were placed in a kit supplied by SLED. This kit was a cardboard box that had styrofoam containers in it to hold the glass tubes of blood. Dr. Proctor sealed the kit with a type of security tape that cannot be pulled off without leaving obvious signs of tampering.

Deputy Johnson, who witnessed the sampling,[4] transported the taped kit to the Myrtle Beach Police Department and gave it to Detective Baker who gave it to the evidence custodian, Doug Britton. Officer Lail picked up the kit from Britton and transported it to SLED for testing. The kit was still taped when Lail gave it to SLED agent McKay.

Inexplicably, when Agent McKay opened the kit, it contained only the two tubes of petitioner's blood and no saliva sample. McKay broke down the kit and put the tubes of blood in a heat-sealed pouch with an I.D. bar code on it and placed the pouch in a secure refrigerator.

SLED analyst Reinhart retrieved the sealed pouch from the refrigerator for preliminary testing. Reinhart was able to determine petitioner was a non-secretor [5] from his blood. The saliva sample was not needed.[6] Because petitioner's status as a non-secretor was consistent with the semen on the

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[4]Deputy Johnson's contemporaneous notes also indicated saliva samples were taken at the hospital. Under cross-examination by the Solicitor, however, Deputy Johnson capitulated and stated he did not remember whether saliva was taken or not.

[5]An individual's status as a non-secretor means blood type cannot be determined from other bodily fluids.

[6]Saliva samples are used as a back-up only if it is not possible to determine secretor status from the subject's blood.

pillowcase, Reinhart forwarded the blood samples to SLED analyst Lambert for further analysis. Lambert made the DNA match.

Petitioner objected that the chain of custody for his blood sample, which provided the necessary evidence for the DNA match, was defective. He argued the fact that the kit did not contain a saliva sample when it was broken open by SLED agent McKay indicated a break in the chain of custody. The trial judge found there was nothing to indicate the integrity of the blood samples themselves had been compromised and admitted the evidence.

The Court of Appeals held the issue of the missing saliva sample went to the weight of the evidence and not its admissibility since the State established a continuous chain of custody.[7]

ISSUE

Did the State prove a sufficient chain of custody for the admission of petitioner's blood sample?

DISCUSSION

The State must prove a chain of custody for a blood sample from the time it is drawn until it is tested. State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997). A complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the

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[7]The Court of Appeals further held there was no evidence the "independently sealed" blood samples were compromised. We find no evidence in the record indicating the tubes of blood were independently sealed. Both Dr. Proctor and the technician who actually drew the blood testified only that the tubes were labeled and placed in the kit and the entire kit was then sealed.

human body to the final custodian by whom it is analyzed. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992); Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992); State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977) (*citing* Benton v. Pulliam, 232 S.C. 26, 100 S.E.2d 534 (1957)). Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete. State v. Williams, 301 S.C. 369, 393 S.E.2d 181 (1990).

In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the blood was not established at least as far as practicable. *See* State v. Cribb, *supra*; Raino v. Goodyear, *supra*; State v. Williams, *supra*; Benton v. Pulliam, *supra*; *see also* State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997). On the other hand, where the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence. *See, e.g.*, State v. Smith, *supra* (storage of blood in arresting officer's home). In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility. *See* Ex parte: Williams, 548 So.2d 518 (Ala. 1989); State v. Stevenson, 523 S.E.2d 734 (N.C. Ct. App. 1999).

Applying this rule to the case at hand, we find no missing link in the chain of custody. Since all custodians of the blood testified, petitioner had the opportunity to cross-examine each of them regarding care of the blood. Each custodian testified he or she did not alter the evidence in any way and that the security tape was unbroken. The evidence that a saliva sample was placed in the kit simply contradicts the State's evidence negating tampering, thereby creating a factual issue. In sum, we find the evidence of a discrepancy in the contents of the kit does not render the blood sample inadmissible but goes only to its weight as credible evidence.[8]

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[8]At oral argument before this Court, counsel argued the absence of the saliva sample was circumstantial evidence that SLED agents planted

AFFIRMED.

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

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petitioner's saliva on the pillowcase as part of the mixed semen and saliva stain and then matched it to the DNA from his blood sample. See footnote 4, *supra*. While we find this novel argument intriguing, we note the presence of two stains on the pillowcase, one of which was clearly identified as semen and which matched petitioner's DNA in addition to the DNA found in the mixed semen and saliva stain. In any event, counsel's argument goes only to the weight of the pillowcase stains as evidence and not the admissibility of the blood sample.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Melanie J. Gilfillin, Respondent,

v.

Eugene A. Gilfillin, II as Personal Representative of the Estate of James M. Gilfillin, Jr., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
W. Frank Rogers, Jr., Family Court Judge

Opinion No. 25267
Heard June 20, 2000 - Filed March 26, 2001

REVERSED

David H. Wilkins, Timothy E. Madden and Joseph M. Ramseur, Jr., all of Wilkins & Madden, P.A., of Greenville, for petitioner.

Gwendolynn W. Barrett, of Barrett & Mackenzie, LLC, of Greenville, for respondent.

CHIEF JUSTICE TOAL: James Gilfillin ("Husband") was granted a divorce from his wife Melanie Gilfillin ("Wife"). Part of the family court's order required Husband to establish a $300,000 alimony trust to secure periodic alimony payments to Wife in the event he predeceased her. Husband appealed and the Court of Appeals affirmed, but also modified the order so that Husband could meet his obligation by securing life insurance. *See Gilfillin v. Gilfillin*, 334 S.C. 213, 512 S.E.2d 534 (Ct. App. 1999). Husband has appealed. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Husband and Wife were married for over fourteen years and had one child. During the marriage, Husband worked for his family's insurance business while Wife primarily stayed at home and raised their son. Wife worked only occasionally as a substitute schoolteacher. Two years prior to their separation, Husband inherited a stock portfolio worth over $4.8 million and began taking steps to retire. Husband was 58 years old at the time of the divorce and Wife was 46 years old.

Wife suffers from schizoaffective disorder and her condition had an enormous impact on the marriage. Husband testified that Wife's illness led her to believe that he was engaged in numerous adulterous affairs. At the hearing, Wife introduced no evidence that Husband had committed adultery. While her condition is treatable, Wife often failed to take her medication. These lapses in medication resulted in a need for hospitalization. During the marriage, Wife was hospitalized on at least six occasions. These hospital stays ranged from a few days to several months.

On January 7, 1994, Wife changed the locks on their marital residence and left a note stating, "On the advice of my psychiatrist we are to stay away from each other. I have moved most of your clothes from the bedroom and your toiletries over to 12 Ashley Avenue. My attorney has a call into your attorney." As a result, Husband moved out of the marital residence. Wife then filed an action for separate maintenance and support. Husband sought a divorce based on desertion.

Under their equitable distribution settlement, Wife received marital assets

valued at $121,395, including the marital home. Husband received $28,678 in marital assets and each party retained their respective nonmarital assets. Among the nonmarital assets Husband retained was his valuable stock portfolio.

While the family court granted Husband a divorce on the ground of desertion, he was ordered to pay $3,200 a month in periodic alimony. The court denied Wife's request for lump sum alimony. The family court also required Husband to establish a trust with $300,000 in cash or liquid securities to provide Wife with security for the payment of alimony in the event he predeceased her. Husband was to be the income beneficiary of the trust during his lifetime. After his death, Wife would be entitled to the interest and dividends and could invade the corpus of the trust as necessary to receive an amount equal to the periodic alimony payments. Upon Wife's death, the remaining corpus of the trust was to pass to a beneficiary designated by Husband.

Husband appealed the family court's order establishing the alimony trust. Initially, the Court of Appeals upheld the family court order in an unpublished opinion. Husband's petition for a rehearing *en banc* was denied. The Court of Appeals then published an opinion modifying the family court order so that Husband could purchase life insurance *in lieu* of creating the alimony trust. Husband appealed the Court of Appeals' decision. During the pendency of the current appeal, Husband died unexpectedly. The issues before the Court are:

I. Did the family court have the authority to require a payor spouse to establish an alimony trust to secure the payment of periodic alimony beyond the payor spouse's death?

II. If the family court did have the authority to create the alimony trust, was it proper to require Husband to fund the trust at an amount greater than his share of the equitable division?

III. Did the Court of Appeals err in amending the family court order to allow Husband to maintain life insurance for payment of periodic alimony beyond his death as an alternative to the alimony trust?

LAW/ANALYSIS

I. The Family Court's Authority to Establish an Alimony Trust Securing Periodic Alimony Beyond the Payor Spouse's Death

Husband argues the family court did not have the authority to establish an alimony trust to secure payment of periodic alimony beyond his death. We agree.

At common law, the obligation to pay periodic alimony ended at death. *See McCune v. McCune*, 284 S.C. 452, 327 S.E.2d 340 (1985). Before 1990, a family court did not have the authority to require a payor spouse to secure the payment of periodic alimony beyond the payor spouse's lifetime. *See Hardin v. Hardin*, 294 S.C. 402, 365 S.E.2d 34 (Ct. App. 1987). In *Hardin*, the Court of Appeals found a family court needed both statutory authority and a finding of special circumstances before it could require a payor spouse to secure periodic alimony beyond his death by means of life insurance. *Id.* Several subsequent cases also struck down family court orders attempting to secure periodic alimony payment beyond the life of the payor spouse. *See, e.g., Ferguson v. Ferguson*, 300 S.C. 1, 386 S.E.2d 267 (Ct. App. 1989); *Hickman v. Hickman*, 294 S.C. 486, 366 S.E.2d 21 (Ct. App. 1988).

In 1990, the Legislature amended S.C. Code Ann. § 20-3-130 (Supp. 1999). Section 20-3-130(B)(1) now codifies the common law rule that periodic alimony terminates at death. That section also states that a family court has the power to order "[p]eriodic alimony to be paid but terminating . . . upon the death of either spouse (except as secured in subsection (D)." *Id.* (emphasis added). Therefore, a family court can require payments of periodic alimony beyond the death of the payor spouse only when that alimony is "as secured in subsection (D)."

Subsection 20-3-130(D) states:

> In making an award of alimony or separate maintenance and support, the court may make provision for security for the payment of the support including, but not limited to, requiring the posting of money, property, and bonds and may require a spouse, with due consideration of the cost of premiums, insurance plans carried by the parties during marriage, insurability of the payor spouse, the

> probable economic condition of the supported spouse upon the death of the payor spouse, and any other factors the court may deem relevant, to carry and maintain life insurance so as to assure support of a spouse beyond the death of the payor spouse.

The Court of Appeals held the phrase "but not limited to" gave the family court the authority to require Husband to create the alimony trust to secure payment of periodic alimony beyond his death.

Husband argues that subsection 20-3-130(D) has two purposes: (1) it allows the family court to secure payments of alimony during the lifetime of the payor spouse by requiring the posting of money, property, and bonds; and (2) the section also creates the statutory authority *Hardin* found the family court lacked to require a payor spouse to obtain life insurance to secure payment of periodic alimony beyond the payor's death. Husband's contention is that the phrase "but not limited to" only modifies the first portion of the section listing how the family court may secure payment of alimony during the lifetime of the payor spouse. Husband argues that the only method sanctioned by the Legislature for securing payment of periodic alimony beyond the life of the payor spouse is life insurance. We agree with Husband.

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the Legislature. *See Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing any rules of statutory interpretation and this Court has no right to look for or impose another meaning. *See Paschal v. State of South Carolina Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995). Where a statute is ambiguous, however, we must construe the terms of the statute. *See Lester v. South Carolina Workers' Compensation Comm'n*, 334 S.C. 557, 514 S.E.2d 751 (1999). We find the language of section 20-3-130 is ambiguous on its face because it is unclear whether the Legislature meant the phrase "but not limited to" to modify only the ways to secure payment of support during the payor's lifetime or whether the phrase is also meant to modify the later discussion about securing payment after the payor's death through life insurance. Since the plain language of the statute does not reveal one clear meaning, we will apply the rules of statutory interpretation to ascertain the intent of the General Assembly.

Since subsection 20-3-130(D) is in derogation of the common law rule that periodic alimony terminates at the death of the payor spouse, the statute will be strictly construed. "Statutes in derogation of the common law are to be strictly construed." *South Carolina Dep't. of Social Services v. Wheaton*, 323 S.C. 299, 474 S.E.2d 156 (Ct. App. 1996). We will not extend the application of the statute beyond the clear legislative intent. *Id.* In the current case, the statute is ambiguous and we find no clear legislative intent supporting the use of devices other than life insurance to secure payment of periodic alimony beyond the death of the payor spouse.

Allowing family courts to invent new methods of securing the payment of periodic alimony beyond the death of the payor spouse would be a dramatic change to the law of alimony. Until 1990, South Carolina had no sanctioned method for securing the payment of such alimony beyond death and attempts to do so were routinely struck down. *See Ferguson v. Ferguson*, 300 S.C. 1, 386 S.E.2d 267 (Ct. App. 1989); *Hickman v. Hickman*, 294 S.C. 486, 366 S.E.2d 21 (Ct. App. 1988); *Hardin v. Hardin*, 294 S.C. 402, 365 S.E.2d 34 (Ct. App. 1987). With the enactment of subsection 20-3-130(D), the Legislature provided that life insurance could be used to secure such payment whenever the family court made factual findings concerning five factors favored requiring such insurance. Consistent with our rule of statutory construction that statutes in derogation of the common law are strictly construed, subsection 20-3-130(D) is limited to allowing life insurance, the only specifically endorsed method of securing periodic alimony, as the only method for securing payments beyond the life of the payor spouse.

Our ruling also guarantees consistency between subsection 20-3-130(B)(1) and the language "but not limited to" in subsection 20-3-130(D). "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). Subsection 20-3-130(B)(1) codifies the common law rule that periodic alimony terminates at the death of either spouse except when the alimony is secured as discussed in subsection (D). As the Court of Appeals interpreted the phrase "but not limited to," a family court would not be limited by any restrictions in subsection (D) when securing payment of periodic alimony.

Under the Court of Appeals' interpretation, a family court would be free

to invent new methods, such as this alimony trust, for securing payment of periodic alimony after the death of the payor spouse. While the use of life insurance is restricted in subsection (D) for use only after the family court makes comprehensive review of five distinct issues, the Court of Appeals interpretation would require no review of any specific factors whenever a family court creates a new method for securing alimony. Such an unrestricted approach and dramatic change of the common law is not supported by the statute.

II. Remaining Issues

Since the family court did not have the authority to create the alimony trust, we need not address Husband's argument that the court erred in funding the trust with his nonmarital property. In addition, both parties have agreed that Husband's argument concerning the Court of Appeals' modification of the family court order is moot in light of Husband's death.

In her brief to this Court, Wife argues that if the alimony trust is held improper, she should be awarded the $300,000 as lump sum alimony. However, the trial court rejected Wife's request for lump sum alimony and she did not appeal that decision. As a result, the issue of lump sum alimony is not properly before this Court. Furthermore, Wife's right to receive alimony terminated with Husband's death so that any remand on the issue of lump sum alimony would be improper.

CONCLUSION

Based on the foregoing, we **REVERSE** the Court of Appeals.

WALLER, BURNETT and PLEICONES, JJ., concur. MOORE, J., dissenting in a separate opinion.

JUSTICE MOORE (dissenting): I respectfully dissent. I would hold the family court had statutory authority to order Husband to set up an alimony trust. Even if the family court did not have the authority, as the majority holds, I would remand the case for the family court to reconsider an award of lump sum alimony.

I agree with the majority's conclusion that § 20-3-130(D) is ambiguous and thus the intent of the legislature needs to be ascertained in interpreting this code section. Gilstrap v. South Carolina Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992)(if statute is ambiguous, primary rule of construction is to ascertain and give effect to legislature's intent). However, I disagree with the majority as to what the legislature intended when it amended § 20-3-130.[1]

In a strikingly similar case, the New Jersey Supreme Court held that a like statute does authorize the creation of a trust to secure the payment of alimony because the legislature intended to protect the former spouse. Jocobitti v. Jacobitti, 135 N.J. 571, 641 A.2d 535 (1994). In Jacobitti, the family court ordered a husband to create the same type of trust as ordered in the current case. The ninety-year-old husband was worth six to nine million dollars. The wife, who was nineteen years younger than her husband, had multiple sclerosis and was totally dependant on her ex-husband. The wife was awarded $75,000 in the equitable division of the marital property following the dissolution of their sixteen-year marriage. The court held the ninety-year old-husband, if insurable at all, would have to pay exorbitant premiums so that life insurance was not a viable option. The court held a trust accomplishes the legislature's intent and was a form of self-insurance. Id. at 540. The court concluded the trust simply replaces the statutory exception for life insurance. *See also* McCarthy v. McCarthy, 319 N.J. Super. 138, 725 A.2d 32 (1999)("Jocobitti trust" is simply substitute for life insurance).

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[1]I do not think § 20-3-130 is in derogation of the common law as the majority holds. In Hardin v. Hardin, 294 S.C. 402, 365 S.E.2d 34, 36 (Ct. App. 1987), the court held "absent special circumstances or specific statutory authority, both of which are lacking here, the Family Court does not have the inherent power to require a supporting spouse to obtain or maintain, solely as an incident of periodic support, a life insurance policy naming the dependent spouse as beneficiary ..." (emphasis added). This case and those following it do not prohibit ordering life insurance to secure alimony if there are special circumstances or statutory authority.

Here, the family court found that "[t]he alternative of the purchase of life insurance [was] too expensive due to the Husband's age" and, based primarily on that finding, determined that the appropriate method to provide security would be through the creation of the trust. The family court found several factors that would warrant continuation of spousal support in the event Husband predeceased Wife. First, there was the twelve-year age difference between the parties and the longer life expectancy accorded to Wife by the life expectancy tables set forth in S.C. Code Ann. § 19-1-150 (1985), making it reasonably foreseeable that Wife would survive Husband by more than fourteen years. In addition, Wife's history of mental problems, which have resulted in significant medical expenses and her inability to maintain gainful employment, supports the family court's finding that cessation of alimony payments due to Husband's death would leave her destitute. Given these facts, I would hold the family court acted within its discretion in determining there were special circumstances supporting the deviation from the normal rule that alimony payments would cease upon the death of either party. The family court then found that requiring Husband to obtain life insurance would be too expensive due to Husband's age and further Husband did not at that time have any life insurance under which he could designate Wife as the beneficiary. It was under these circumstances that the family court ordered Husband to create a trust to provide security for Wife. I find it inequitable that Wife will now receive nothing.

Furthermore, had the family court known that the majority would hold he did not have the authority to order the creation of the trust, I believe he would have ordered Husband to obtain life insurance or awarded lump sum alimony.[2] The family court was attempting to be equitable to both parties by not requiring Husband to obtain life insurance as it would be too expensive. I note Husband had a net worth of $4.9 million and requiring him to obtain life insurance or pay lump sum alimony would not bankrupt him. The majority's decision, however,

[2]Special circumstances justifying a lump sum award include the need to continue support after the death of the supporting spouse. *See* McCune v. McCune, 284 S.C. 452, 327 S.E.2d 340 (1985); Hendricks v. Hendricks, 285 S.C. 591, 330 S.E.2d 553 (Ct.App.1985).

will leave Wife destitute.[3]

Assuming the majority is correct in its holding that the family court does not have the statutory authority to order a trust, in my opinion, the family court should now reconsider Wife's request for lump sum alimony. This case presents a situation similar to that in Fort v. Fort, 270 S.C. 255, 241 S.E.2d 891 (1978). There the wife sought a divorce, alimony, and equitable distribution. The husband counterclaimed for a divorce. The master denied both parties' claims for a divorce, but granted the wife use of the marital home. The husband excepted to the ruling, the wife did not. The circuit court reversed the ruling and granted husband a divorce but did not address the wife's request for alimony or property division. In ruling on the wife's contention that she was entitled to consideration by the trial court of her request for alimony, we said:

> After the husband excepted to the master's report, the wife might have conditionally excepted, submitting that if the judge found that the husband was entitled to a divorce, he should order alimony and a property settlement. We are not prepared to say she should have anticipated the ruling and that her failure to file conditional exceptions should bar her from having the issues considered. The issues were definitely raised in her pleadings and in her prayer for relief.

270 S.C. at 260, 241 S.E.2d 894. In Reaves v. Reaves, 262 S.C. 499, 206 S.E.2d

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[3]As to the second issue raised on appeal, Husband contends the family court does not have jurisdiction to apportion non-marital property. Husband received approximately $29,000 in marital assets in equitable distribution and he was ordered to pay Wife $3,200 per month in periodic alimony. However, requiring Husband to fund a trust to secure the payment of periodic alimony is not apportioning non-marital property. Within one year, Husband therefore would be using non-marital assets to pay the periodic alimony. Alimony is not limited to a spouses's share of the equitable distribution. Further, the family court did not order any specific proeprty to be transferred to fund the trust. *Cf.* Thornton v. Thornton, 328 S.C. 96, 492 S.E.2d 86 (1997)(family court had no authority to transfer specific property as security for alimony).

405 (1974), the trial court granted the husband a divorce on the ground of desertion and denied the wife's request for alimony. On appeal we reversed and remanded for consideration of alimony. We held:

> The denial of any alimony to the wife was predicated at least in part, upon the court's finding that the husband was entitled to a divorce on the ground of desertion. In view of our holding that the husband was not so entitled, the situation is now substantially different. Whether, under this circumstance and all other pertinent circumstances, the wife is now entitled to any support or alimony, is a matter which has not actually been passed upon by the court below and one which we are reluctant to consider initially in the present state of the record. Such issue, or question, is therefore left open for such further proceedings thereabout as the parties hereto might deem appropriate. . . .

Id. at 407. *See also* Timms v. Timms, 290 S.C. 133, 348 S.E.2d 386 (Ct. App. 1986)(citing Reaves). Similarly, here Wife did not appeal the denial of her request for lump sum alimony as she was awarded permanent periodic alimony secured by the trust. In my opinion, whether Wife is entitled to an award of lump sum alimony now should be a matter for the family court to reconsider. Furthermore, I strongly disagree with the majority's conclusion that the right for Wife to receive lump sum alimony terminated upon Husband's death. Unlike an award of periodic alimony which terminates upon the payor's death, an award of lump sum alimony does not. Accordingly, I would affirm the Court of Appeals in result or, at least, remand for the family court to reconsider an award of lump sum alimony.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael O'Donnell Edens, Respondent.

Opinion No. 25268
Submitted February 27, 2001 - Filed March 26, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Susan M. Johnston, and Michael S. Pauley, all of Columbia, for the Office of Disciplinary Counsel.

Russell W. Templeton, of Columbia, for respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement and issue a public reprimand. The facts as admitted in the agreement are as follows.

Facts

Respondent represented a client in a real estate closing in 1993.

In 1999, the client discovered two mortgage refinance transactions that were executed at closings subsequent to the 1993 purchase of the property. The client had no knowledge of the transactions and was not present at their closings. However, the relevant documents bore the client's name and were notarized by respondent and respondent's office manager. The client's wife had forged the client's name on the documents executed at the closings.

In respondent's initial response to disciplinary counsel, respondent indicated that he and the client were present at the closings of the transactions. Respondent subsequently learned from the client's wife that neither he nor the client were present at the closing. As a result of his failure to properly supervise the transaction, respondent inadvertently assisted the client's wife in improper conduct by not actually witnessing the client's signature and by not ensuring that the client's signature was genuine.

Respondent also admits that he was not always present for real estate closings involving refinancing, home equity loans, or second mortgages and that he instead allowed his office manager to conduct refinancing closings in his absence. However, respondent did review the documents related to a few of these closings before the expiration of relevant time periods and required clients to return to his office to sign corrections.

Law

As a result of his conduct, respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (a lawyer shall consult with the client as to the means by which representation is to be pursued); Rule 5.3 (a lawyer shall be responsible for the conduct of a non-lawyer assistant); Rule 5.5 (a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). In addition, respondent has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct) and

Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute).

Conclusion

We agree with the finding of improper conduct and find that a public reprimand is the appropriate sanction. Accordingly, respondent is hereby publicly reprimanded for the conduct detailed above.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Maria Reichmanis, Respondent.

Opinion No. 25269
Submitted February 13, 2001 - Filed March 26, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Susan M. Johnston, and Deborah S. McKeown, all of Columbia, for the Office of Disciplinary Counsel.

Maria Reichmanis, pro se, of Aiken.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a sanction of an admonition or a public reprimand. We accept the Agreement and impose a public reprimand. The facts as admitted in the Agreement are as follows.

Facts

I. Patent Matters

Respondent was retained by two clients to obtain patents from the United States Patent and Trademark Office (PTO). The first client paid respondent an $800 fee. On behalf of the client, respondent performed research and drafted an amended patent application, which was filed with the PTO in April 1997. Respondent communicated with her client in April and May 1997, regarding the status of the application, but then took no further action on the application until early 1999 when she was contacted by the client's spouse regarding the status of the matter. Respondent sent a status letter to the PTO in March 1999, which was copied to the client. Since that time, respondent has taken no further action nor communicated with the client regarding the application. The client, as well as another patent attorney hired by the client, attempted to communicate with respondent on several occasions, but respondent failed to respond to their inquiries.

The second client paid respondent a $2,295 fee. Respondent met with the client and thereafter prepared a patent application, which was filed on June 4, 1996. Respondent communicated with the client on several occasions in June and July 1996, but took no further action in the case until October 1998, when she received a phone call from the patent examiner. The examiner asked why respondent had not responded to the PTO's "Office Action," which had been sent to respondent. Respondent claimed she never received the "Office Action." The examiner faxed the document to respondent, who claims she immediately wrote a letter advising the client of the "Office Action" and requested the client contact respondent if the client wished to pursue the matter. However, respondent cannot present any documentation to support her claim that she communicated with the client regarding the "Office Action." Respondent did not respond to the "Office Action" and has taken no further action in this case. The client attempted to communicate with respondent, but respondent failed to answer the inquiries.

II. Failure to Respond to Disciplinary Counsel

Respondent failed to respond to Disciplinary Counsel's initial inquiries, Treacy[1] letters, or Notices of Full Investigation regarding both client matters. After several phone calls to respondent's office and home, respondent contacted Disciplinary Counsel, but she could provide no legitimate reason for her failure to respond to the inquiries. Disciplinary Counsel ultimately subpoenaed respondent pursuant to Rule 19(c)(4), RLDE, in order to obtain a response in these matters.

Law

By her conduct, respondent has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(violating the Rules of Professional Conduct); Rule 7(a)(3)(failing to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6)(violating the oath of office taken upon admission to practice law in this state).

Respondent has also violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 8.1 (failing to respond to a lawful demand for information regarding a disciplinary matter); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

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[1] Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

Conclusion

Respondent acknowledges her misconduct, and has not been previously sanctioned for misconduct. We accept the Agreement for Discipline by Consent and reprimand respondent for her conduct in these matters.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gregg F. Jones, Respondent.

Opinion No. 25270
Submitted February 27, 2001 - Filed March 26, 201

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Assistant Attorney General Tracey C. Greene, both of Columbia, for the Office of Disciplinary Counsel.

Gregg F. Jones, pro se, of Williamston.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a sanction of a public reprimand or a definite suspension for up to sixty (60) days. We accept the Agreement and impose a public reprimand. The facts as admitted in the Agreement are as follows.

Facts

Respondent was originally hired to effectuate the transfer of one-half of a marital residence from a husband to his wife, pursuant to a divorce decree. The wife was to receive full ownership of the property, and the husband was to continue to pay the outstanding mortgage on the residence. Respondent, as the closing attorney, represented the wife.

The residence was sold, leased, and transferred numerous times between 1994 and 1999. Respondent was the closing attorney in all of these transactions. All of the parties to these various transactions were aware that the residence was subject to an outstanding mortgage that was being paid by the husband of respondent's original client. In order to avoid putting the husband on notice that the wife had sold the residence, thereby running the risk that the husband would stop paying the mortgage payments, respondent agreed to refrain from recording any of the deeds that resulted from these transactions.

Respondent also intentionally omitted any mention of the outstanding mortgage when one of the subsequent owners of the residence retained him to assist in refinancing the residence through the U.S. Department of Housing and Urban Development.

Finally, respondent brought suit against the husband of his original client when the husband stopped making mortgage payments on the residence. Respondent prepared, and the husband signed, a consent order representing that the wife had paid the balance on the mortgage when, in fact, one of the other purchasers of the property had paid the balance owed.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule

1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Respondent has also violated the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct).

Conclusion

Respondent acknowledges his misconduct, and has not been previously sanctioned for misconduct. We accept the Agreement for Discipline by Consent and reprimand respondent for his conduct in these matters.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alvin Pinckney and Silas Knight, Plaintiffs,

v.

Catherine C. Warren; Andrana Jenkins; Gilda Graham; Benjamin Fripp; Lorraine Lewis; James Pinckney, Jr. a/k/a Scrappy Pinckney; D & S Development; Vivian Braswell; Ethel Dixon Redd; Harvey Dixon, Jr.; Betty Dixon Haynes; Madeline "Bunches" Miller; Harvey Pinckney; Mary Ervin Pinckney, a person *non compos mentis*; Charlotte Turner; Maude Adams; Charles Davis; Benjamin Mood, Jr.; Mildred M. Sloss; Oliver Mood; Bryant Lucas Mood; Dwayne F. Mood; Bonita Mood; Maria R. Young; Helen Jefferson; Isaac Jefferson; Rebecca J. Murdix; Linda M.

Hanton; Juanita J. Green; Alvin Jefferson; Lylene Jefferson; Miriam J. Harris; Maxine J. Freeman; Benjamin Jefferson; Lucy J. Bellinger; Maude Jefferson; Matthew Green; Charles Green; George Pugh; Walter D. Pugh and Jamie Mae P. Wilson, if they or any of them be alive, and John Doe and Mary Roe, Adults, and Richard Roe and James Roe, infants, persons under disability or incompetent, if any, including those persons who might be in the Military Service, within the meaning of Title 50 United States Code, commonly referred to as the Soldiers and Sailors Relief Act of 1940, fictitious names designating the unknown heirs, devisees, distributees, issue, executors, administrators, successors, or assigns of the above named Defendants, if they or

any of them be dead, also Lark Collins; Becky Rivers Collins a/k/a Binky Rivers Collins; Phillip Collins a/k/a Fullard Collins; Susie Collins Pinckney; Carrie Collins Knight a/k/a Carrie Collins Knight Pinckney; Lawrence Rivers; Lizzie Rivers Bryant a/k/a Elizabeth Rivers Bryant; Agnes Rivers Pugh; Agnes Collins a/k/a Agnes Jenkins; Jake Pinckney; James Leonard Pinckney; Bernice Fripp; Edward Knight; Paul Knight; Clarence Knight; Marie Knight Dixon a/k/a Miriam Knight Dixon; Harvey Dixon; Lillian Bryant Leasayers; Gertrude Bryant Moughn; Lethonia Bryant Mood; Benjamin Mood, Sr.; Lucas Mood; Maggie Rivers Jefferson a/k/a Maggie Rivers Jefferson Green; Walter Jefferson, Jr.; Lloyd Jefferson; James Franklin Pugh, deceased, and also all other persons

unknown, claiming any
right, title, estate in or
lien upon the real estate
described in the
Complaint herein, Defendants,

of whom Benjamin Fripp
and Lorraine Lewis are, Respondents,

and

D & S Development is Appellant.

Appeal From Charleston County
Roger M. Young, Master-in-Equity

Opinion No. 25271
Heard January 23, 2001 - Filed March 26, 2001

AFFIRMED

Philip G. Clarke, III, of Bleecker & Clarke, LLC, of Charleston, for appellant.

Robert D. Fogel, of Legare, Hare & Smith, of Charleston, for respondents.

CHIEF JUSTICE TOAL: D&S Development ("D&S") appeals the Master-in-Equity's decision that it does not have an interest in the property sold to it by James L. Pinckney, Jr. (a/k/a "Scrappy Pinckney"). The Master

found Scrappy Pinckney did not have a valid interest in the property he sold to D&S because he was illegitimate and, therefore, not his father's heir at law. We affirm the decision of the Master.

FACTUAL/PROCEDURAL BACKGROUND

Scrappy Pinckney was born on April 19, 1927. He is the son of James Leonard Pinckney and Maggie Richardson. In 1954, James Leonard Pinckney died intestate, leaving an estate that included approximately ten acres of land located in both Charleston and Berkeley County. Scrappy Pinckney's interest in this property is premised on his alleged status as an heir at law of his father. If he is James Leonard Pinckney's heir at law, he is one of the many heirs of Lark Collins, the original owner of the property.

The Collins family, the Respondents in this matter, acknowledge that Scrappy Pinckney is a lineal descendant of Lark Collins and the son of James Leonard Pinckney. However, the Collins family asserts that Scrappy Pinckney is not an heir at law who could inherit a property interest from his father because he was illegitimate.

In 1975, Donald Barkowitz and Sam Craven formed D&S, a general partnership, to purchase Scrappy Pinckney's property interest. D&S paid $775.00 for Scrappy Pinckney's partial interest in the property. A quit-claim deed was signed on April 14, 1975, and recorded on April 15, 1975. D&S has paid the *ad valorem* taxes on the property since the conveyance in 1975.

All parties to this action recognize that Scrappy Pinckney validly executed a conveyance of his interest, if any, to D&S. However, according to the Collins family, Scrappy Pinckney did not have a valid property interest to transfer to D&S because he is not James Leonard Pinckney's heir at law.

On October 25, 1989, the Collins family filed a declaratory judgment action in Charleston County to quiet title to real property, obtain a decree establishing the family history of Lark Collins, identify the owners of the property, and determine each owner's interest in the property. On October 26,

1989, the Collins family filed an identical action in Berkeley County. Both Complaints allege the conveyance to D&S was ineffective because Scrappy Pinckney was illegitimate, and, therefore, not an heir at law of James Leonard Pinckney.

The two actions were consolidated and referred to the Honorable Louis E. Condon, the Master-in-Equity for Charleston County, for entry of a final order with direct appeal to this Court. D&S and Scrappy Pinckney filed a joint Answer to the consolidated actions on May 7, 1991. The Answer admitted the facts contained in the Complaint and alleged an effective conveyance to D&S.

On November 25, 1991, the Master established the family history of Lark Collins. The Master confirmed Scrappy Pinckney was a lineal descendant of Lark Collins, but reserved the question of Scrappy Pinckney and D&S's rights in the property.

On February 22, 1999, this matter was tried before the Honorable Roger M. Young, Master-in-Equity for Charleston County, to determine the extent of D&S's interest in the property. On March 11, 1999, the Master denied D&S's claim and found Scrappy Pinckney's claimed property interest, which he sold to D&S, should be awarded to Lorraine Lewis and the heirs of Bernice Pinckney Fripp, members of the Collins family. On June 8, 1999, D&S filed a Rule 59(e), SCRCP Motion, which was denied. D&S appealed the Master's decision.

The following issues are before this Court on appeal:

I. Did the Master err by requiring that Scrappy Pinckney's paternity, though admitted by the parties, be established by court order or by instrument signed by James Leonard Pinckney, Scrappy Pinckney's father?

II. Did the Master err in disregarding the plain language of Scrappy Pinckney's birth certificate by finding his parents were not married at the time of his birth?

LAW/ANALYSIS

In an appeal from an action in equity, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995). However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses. *Dorchester County Dep't of Soc. Servs. v. Miller*, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996). Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings. *Id.*

I. Scrappy Pinckney's Legitimacy

D&S argues the Master erred by finding Scrappy Pinckney did not have a property interest because he was not James Leonard Pinckney's heir at law. D&S argues that where all parties to an action admit the paternity of an illegitimate child by the father, the *Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988) requirement that paternity must be conclusively established by either a court order issued prior to the father's death or by an instrument signed by the father acknowledging paternity does not apply. We disagree. First, we will address whether Maggie Richardson and James Leonard Pinckney were married at the time of Scrappy Pinckney's birth in 1927. Next, we will discuss whether Scrappy Pinckney could inherit from his father as an heir at law under South Carolina law.

A. Maggie Richardson and James Leonard Pinckney's Marital Status

In this case, there is no single trial exhibit or witness that conclusively establishes Scrappy Pinckney's legitimacy. The Master found Scrappy's parents were not married at the time of his birth based on the testimony of Lorraine Lewis and Silas Knight, two of Scrappy Pinckney's family members. We agree with the Master's findings.

Lorraine Lewis' testimony is the most convincing evidence of James Leonard Pinckney and Maggie Richardson's marital status. Lorraine Lewis, Scrappy Pinckney's aunt, lived in the same home with Scrappy Pinckney for many years. She testified that Scrappy Pinckney's mother, Maggie Richardson, lived with her parents for a period of time preceding and subsequent to his birth. According to Lorraine Lewis, it was the practice of her parents not to allow any of their children, if unmarried, to sleep with a member of the opposite sex in their home. She claims that when Maggie Richardson stayed with her family, her parents made Maggie Richardson sleep in the bedroom, while James Leonard Pinckney would sleep on the couch. According to Lorraine Lewis and Silas Knight, James Leonard Pinckney and Maggie Richardson were never married. Furthermore, there was no evidence presented by any of the witnesses that Maggie Richardson and James Leonard Pinckney were known to live together, either as husband and wife or otherwise.

Also presented as evidence of Scrappy Pinckney's illegitimacy were three statements from the Probate Courts of Charleston, Berkeley, and Dorchester Counties. Each county reviewed their marriage records through 1927 and found no record of a marriage license between James Leonard Pinckney and Maggie Richardson. The absence of a marriage license does not prove the absence of a valid marriage, particularly when only three South Carolina counties were searched. The Master acknowledges that "[w]hile the absence of a license does not render the marriage illegal, the Court would note that the absence of a piece of evidence that would ordinarily be available can be considered as evidence of the non-existence of the fact or facts that such a document would otherwise attest to." The Master found the absence of a marriage license further substantiated the testimony of Lorraine Lewis and Silas Knight that Scrappy Pinckney's parents were not married at the time of his birth. The other evidence of Scrappy Pinckney's illegitimacy was Maggie Richardson's funeral bulletin. Her obituary lists all of her surviving family members, which included two daughters, two sons-in-law, two grandsons, three sisters, several nieces, nephews, and cousins. The obituary did not acknowledge a marriage between Maggie Richardson and James Leonard Pinckney, and did not acknowledge Scrappy Pinckney as Maggie Richardson's son.

As evidence of James Leonard Pinckney and Maggie Richardson's marital status, D&S presented a copy of Scrappy Pinckney's birth certificate and two hearsay statements by acquaintances who believed James Leonard Pinckney and Maggie Richardson were married. The birth certificate identifies Scrappy Pinckney's father as "James Pinckney" and his mother as "Maggie Pinckney." According to D&S, the names on the birth certificate indicate Scrappy Pinckney's parents were married at the time of his birth because his father and the mother have the same last name. However, the birth certificate was only signed by the midwife, it was not signed by either James Leonard Pinckney or Maggie Richardson. The Master did not find the birth certificate persuasive proof of legitimacy based on the Court of Appeals' recent decision in *Freeman v. Freeman*, 323 S.C. 95, 473 S.E.2d 467 (Ct. App. 1996) (holding a birth certificate is not conclusive proof of paternity under the *Mitchell* test) (see discussion below).

The Master found the testimony of Scrappy Pinckney's family members, Lorraine Lewis and Silas Knight, more persuasive than the evidence presented by D&S. Lorraine Lewis and Silas Knight provided direct testimony concerning Maggie Richardson and James Leonard Pinckney's marital status. Both family members knew Scrappy Pinckney well and lived close to him all of his life. We agree with the Master that the family member's direct testimony, in conjunction with the absence of a marriage license and the obituary, indicates Scrappy Pinckney's parents were not married when he was born in 1927.

B. Scrappy Pinckney's Right to Inherit

In 1954, when James Leonard Pinckney died intestate, illegitimate children could not inherit from their fathers in South Carolina because they were not regarded as their father's heirs at law. *See* S.C. Code Ann. § 21-3-30 (1976).[1] In 1977, the United States Supreme Court in *Trimble v. Gordon*, 430

[1]Under current statutory law, even if a child is illegitimate, he can inherit from his father's estate if:

U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), held an Illinois statute that denied an illegitimate child inheritance from its father was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because of its disparate treatment of legitimate and illegitimate heirs. In *Wilson v. Jones*, 281 S.C. 231, 314 S.E.2d 341 (1984), this Court adopted the rule enunciated in *Trimble* and held it should be applied prospectively only because retroactive application would "disrupt the orderly process of probate." *Id.* at 232, 314 S.E.2d at 343. Therefore, only those illegitimate children whose fathers died after April 26, 1977, the date of the *Trimble* decision, could inherit from their father's estates. *Id.*

In 1988, this Court in *Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988) modified *Wilson* to allow limited retroactive application of *Trimble* where certain factors are met. Changes in the law are usually prospective, not retroactive. However, the Court was persuaded by the West Virginia Supreme Court who addressed the same issue and found that "retroactivity may be extended . . . in a way that justly and fairly reconciles the constitutional interests in equality recognized in the new rule of law with reliance and finality interests

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> (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (ii) the paternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a personal representative of his estate and, if after his death, by clear and convincing proof, except that the paternity established under this subitem (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

S.C. Code. Ann. § 62-2-109 (Supp. 2000).

founded upon the former law." *Williamson v. Gane*, 345 S.E.2d 318, 320 (W. Va. 1986). The Court modified *Wilson* to allow retroactive application of the *Trimble* decision in the limited circumstances where the following conditions are met: (1) innocent persons will not be adversely affected because of their detrimental reliance on the old inheritance rules; (2) the paternity of the child had been conclusively established either by court order or decree issued prior to the death of the father or by an instrument signed by the father acknowledging paternity; and (3) the estate administration is subject to further resolution. *Mitchell*, 297 S.C. at 51, 374 S.E.2d at 683.

In *Mitchell*, a father died intestate leaving as heirs at law two adopted daughters. His son petitioned the lower court for the partition of his father's estate property on the ground he was his father's illegitimate son. *Id.* at 49, 374 S.E.2d at 682. The Court found paternity was undisputed because of the testimony of several family members, the physical resemblance between father and son, and most importantly, a deed signed and recorded by the father that specifically acknowledged the parent-child relationship. *Id.* at 49, 372 S.E.2d at 682. The Court found the deed satisfied the paternity requirement because it was an instrument signed by the father acknowledging paternity. Because all three *Mitchell* factors were satisfied, this Court allowed the illegitimate son to recover from his father's estate even though the father died prior to the *Trimble* decision.

The Court of Appeals further addressed the retroactive application of *Trimble* in *Freeman, supra*. The Court of Appeals held that despite persuasive evidence of paternity, *Mitchell* requires that paternity be conclusively established by either a court order issued prior to the father's death or by an instrument signed by the father acknowledging paternity. In *Freeman*, the child could not meet the strict requirements of *Mitchell*, but she could produce a birth certificate with her biological father's name on it. *Id.* at 103, 473 S.E.2d at 472. The Court of Appeals adhered to the strict requirements of *Mitchell*, held the birth certificate did not conclusively establish paternity, and found the child was not her father's heir at law. *Id.* The only difference between the instant case and *Freeman* is that paternity is not contested by the family. However, *Freeman* demonstrates a birth certificate cannot be used in lieu of the specific documents required by *Mitchell*.

In the instant matter, the first and third *Mitchell* requirements are satisfied because there is no evidence an innocent person would be adversely affected by detrimentally relying on the old inheritance laws, and there is no evidence James Leonard Pinckney's estate was probated. The insurmountable problem Scrappy Pinckney confronts is the second *Mitchell* factor -- the conclusive proof of paternity. While no party challenges Scrappy Pinckney is James Leonard Pinckney's son, there is no evidence of a court order establishing paternity or of an instrument signed by James Leonard Pinckney acknowledging Scrappy Pinckney's paternity prior to his death. While the record contains persuasive evidence Scrappy Pinckney was James Leonard Pinckney's son, *Mitchell* prevents Scrappy Pinckney from inheriting from James Leonard Pinckney because *Trimble* can have retroactive effect in South Carolina only if all three *Mitchell* factors are satisfied.

We find the rules in *Mitchell* and *Freeman* control in this case even though the family members did not contest paternity. Public policy demands the strict adherence to the *Mitchell* requirements. Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where proof of paternity must be established by either a court order issued prior to the father's death or by an instrument signed by the father. *See Lalli v.Lalli*, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 502 (1978) (holding public policy supports a rule where paternity must be established by an order of filiation issued during the putative father's lifetime for an illegitimate child to recover as an heir at law). Furthermore, if we adopted the rule D&S advocates, we would create a great uncertainty for title abstractors because an action seeking to add heirs could be brought at any time. A purchaser would have to bring a quiet title action every time he purchases property in order to ensure good title.

Unfortunately, under this rule, some children will not inherit from their biological fathers simply because they do not possess the specific documents required by *Mitchell*. However, in addressing a similar paternity requirement in New York, the United States Supreme Court in *Lalli* found that certain children will not be able to inherit from their biological fathers even though their paternity is not disputed. While this may be unfortunate, the United States Supreme Court found the strict paternity requirement was necessary, as a matter of public policy, to prevents spurious claims. *Id.*

We find the *Mitchell* requirements promote stability and prevent both fraudulent challenges to, and fraudulent assertions of, paternity. We, therefore, uphold the *Mitchell* rule and find that Scrappy Pinckney cannot inherit as James Leonard Pinckney's heir at law.

II. Birth Certificate

D&S argues the Master disregarded the plain language of Scrappy Pinckney's birth certificate when he found Scrappy Pinckney's parents were not married at the time of his birth. We disagree.

The Master, who was in the best position to judge the credibility of the witnesses and the evidence, found Lorraine Lewis and Silas Knight's testimony more persuasive than the birth certificate. First, the birth certificate was contradicted by every piece of direct testimony in the record. Second, the Court of Appeals recently held in *Freeman* that in order for *Trimble* to have retroactive effect, paternity must be conclusively established by the specific documents required in *Mitchell*. *Freeman*, *supra*. Finally, birth certificates, unlike marriage licenses, are not intended or designed to constitute proof of a marriage.

CONCLUSION

We find Scrappy Pinckney is not James Leonard Pinckney's heir at law under South Carolina law. We, therefore, **AFFIRM** the decision of the Master, which awarded Scrappy Pinckney's claimed property interest to Lorraine Lewis and the heirs of Bernice Pinckney Fripp.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

June P. Andrade,

Appellant,

v.

Jimmy Johnson, Sea Island Air, Inc., and South Carolina Electric & Gas Co., Inc., Defendants,

of whom South Carolina Electric & Gas Co., Inc., is

Respondent.

Appeal From Beaufort County
Howard P. King, Circuit Court Judge

Opinion No. 3321
Heard September 12, 2000 - Filed March 19, 2001

AFFIRMED IN PART AND
REVERSED IN PART

J. Brent Kiker and Anne S. Douds, both of Kiker & Douds, of Beaufort, for appellant.

A. Parker Barnes, Jr., and David S. Black, both of A. Parker Barnes, Jr. & Associates, of Beaufort, for respondent.

STILWELL, J.: In this action alleging negligence, violation of the South Carolina Unfair and Deceptive Trade Practices Act (UTPA), fraud, and breach of contract, June Andrade appeals the trial court's order which: (1) dismissed her action against South Carolina Electric & Gas which was based on its vicarious or derivative liability due to the negligence of the installer; (2) held SCE&G exempt from the UTPA; and (3) directed a verdict against her on the negligence claims against SCE&G. We affirm in part and reverse in part.

FACTS

In the fall of 1994, June Andrade decided to replace the existing heating, ventilation, and air conditioning (HVAC) system in her Beaufort townhouse and selected two installers from the phone book from which to request estimates. One of these installers was Sea Island Air, which attracted Andrade with its advertisement proclaiming it to be an SCE&G Quality Dealer.

After Andrade contacted Sea Island, its president, Jimmy Johnson, visited her at home. Johnson emphasized his SCE&G Quality Dealer designation and described himself as "the biggest dealer in the area." Johnson extolled the virtues of the Quality Dealer program and SCE&G's financing program that was only available to purchasers who used a Quality Dealer as their installer.

While Johnson was preparing an estimate for the proposed work, Andrade went to an SCE&G office and obtained a brochure which explained the Great Appliance Trade-Up Program. The brochure explained that to qualify for a special rebate or credit toward the monthly bill, a customer must:

> Be an electric customer of SCE&G on rates 1, 7, 8 or 9.
>
> Purchase one of the high-efficiency units . . . and have it installed by an SCE&G Quality Dealer. SCE&G-certified Quality Dealers are the only contractors whose installation work qualifies for rebates in our Great Appliance Trade-Up Program, as well as for special energy rates for the SCE&G Good Cents or Rate 7 homes. Call your local heating and air conditioning contractors to find out

if they are certified Quality Dealers. Or call SCE&G for a list of participating dealers in your area.

Andrade testified the brochure "confirmed everything that Mr. Johnson had told me, that the only way that I could get into this program sponsored by SCE&G was to go through a Quality Dealer and he was a Quality Dealer."

Andrade agreed to have two new HVAC systems installed in her home and experienced difficulty almost immediately. She was initially disappointed when what she described as five or six teenage boys arrived on January 17, 1995 to install the new systems because Johnson had assured her he had a "highly professional team" working for him. These workers used both her bathroom and telephone without permission, played radios loudly and, according to Andrade, "it was just like a party atmosphere." After Andrade complained, an older, more professional crew arrived the following day.

The new crew worked for approximately two days, did not complete the installation, and disappeared. Andrade continued to complain to Johnson and SCE&G, but received little if any satisfaction or response to her entreaties from either.

Finally, a crew returned, worked sporadically for a week, and concluded their work on February 28, 1995. Andrade immediately observed difficulties with the operation of the system and informed Johnson of the deficiencies. However, she did sign the financing forms authorizing SCE&G to pay Sea Island for the work. She testified she signed the forms even though the systems were not operating properly because Johnson was "very intimidating."

Andrade was forced to buy electric heaters to warm her house for the balance of the winter. At Andrade's request, the Beaufort codes department inspected the installation and listed approximately fifteen code violations committed by Sea Island. Andrade also arranged to have the head of the local SCE&G Quality Dealer program inspect the installation. When this proved unproductive, Andrade saw the general manager of SCE&G's Beaufort office and asked him to intervene with Johnson and Sea Island to remedy the problems.

When all else failed, Andrade was forced to hire another contractor to remove and replace the systems installed by Sea Island, and to file this suit.

Prior to trial, Andrade settled with Johnson and executed a covenant not to sue in his favor. The covenant expressly reserved any and all claims Andrade had against SCE&G. The court granted summary judgment to SCE&G on Andrade's UTPA claim and on her claims based on SCE&G's vicarious or derivative liability. The court directed a verdict in SCE&G's favor on Andrade's remaining causes of action alleging independent negligence and misrepresentation.

LAW/ANALYSIS

I. Effect of Covenant Not to Sue

Andrade first argues the court erred in finding the covenant not to sue released both Jimmy Johnson and SCE&G, therefore granting summary judgment to SCE&G. We disagree.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; see Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App. 1999). In determining whether any triable issue of fact exists such as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

In the covenant Andrade agreed to "never institute any action or suit at law or in equity against covenantee, nor . . . in any way aid in the institution or prosecution of any claim . . . for damages . . . or compensation . . . arising out of the installation of two Rheem Air Conditioner systems in [Andrade's] home . . ."

However, in the same document Andrade also reserved "all rights of action, claims, and demands against any and all persons other than [Johnson], including but not limited to South Carolina Electric & Gas Co., Inc. and/or SCANA Corp."

A covenant not to sue is an agreement not to sue to enforce a right existing at the time of the making of the agreement. See Wade v. Berkeley County, 339 S.C. 513, 520, 529 S.E.2d 743, 747 (Ct. App. 2000). A covenant not to sue is not a release. Id. The common law rule governing releases until relatively recently was that the release of one tortfeasor automatically released all joint tortfeasors. The rule, and the reason for the advent of a covenant not to sue, has been explained as follows:

> At the base of this rule was the theory that there could be but one compensation for the joint wrong. If the injured party was paid by one of the wrongdoers for the injury he had suffered, each wrongdoer being responsible for the whole damage, his cause of action was satisfied in exchange for a release, and he could not proceed against the others. Thus a release of one joint wrongdoer released all. But when the consideration received for the release was not full compensation for the injury, the purpose for the harsh rule did not exist. To allow for this, the covenant not to sue was developed.

Ackerman v. Travelers Indem. Co., 318 S.C. 137, 146-47, 456 S.E.2d 408, 413 (Ct. App. 1995) (quoting James W. Logan, Jr., Insurance—Covenant Not to Sue, 21 S.C. L. Rev. 282 (1969)).

Our supreme court in Bartholomew v. McCartha changed the common law rule. 255 S.C. 489, 491-92, 179 S.E.2d 912, 913-14 (1971). The court held unless it was the intention of the parties, or the plaintiff had received full compensation amounting to a satisfaction, the release of one tortfeasor did not release others who wrongfully contributed to the plaintiff's injuries. Id. at 492, 179 S.E.2d at 914.

This principle was codified in the South Carolina Contribution Among Tortfeasors Act (UCATA).[1]

Andrade argues this provision prohibits the release of SCE&G and urges this court to expand the definition of tortfeasor under the UCATA to include vicariously liable parties. We decline to do so.

Other jurisdictions are divided as to whether a covenant not to sue a primarily liable party while reserving rights against a secondarily liable party preserves causes of action against the latter. See generally Vitauts M. Gulbis, Annotation, Release of, or Covenant Not to Sue, One Primarily Liable for Tort, But Expressly Reserving Rights Against One Secondarily Liable, as Bar to Recovery Against Latter. 24 ALR 4th 547, 552 (1983).

Courts that hold a covenant not to sue a primarily liable party discharges the secondarily liable party have generally fallen into one of the following categories: (1) courts that find the agreement discharges the primary liability and

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[1] S.C. Code Ann. §§ 15-38-10 to -70 (Supp. 2000). Section 15-38-50 provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (emphasis added).

thus extinguishes the secondary liability;[2] (2) courts that find the secondarily liable party's right to indemnification renders the covenant illusory;[3] and (3) courts that hold the secondarily liable party is not a true tortfeasor.[4]

While some of the cases on this subject deal with covenants not to sue and others with releases, this distinction should not be the determining factor in the end result. The most important factor is the type of liability and the relationship inter se of the various allegedly liable parties rather than the type of document used to discharge liability. It must be determined whether the liability arises only vicariously because of the negligence of another party or whether the parties are true joint tortfeasors, both being independently negligent toward the third party.

In Craven v. Lawson, the Tennessee Supreme Court concluded that the UCATA is not applicable to cases involving indemnity resulting from vicarious liability. 534 S.W.2d 653, 656 (Tenn. 1976). The court concluded the UCATA did not apply to situations involving vicarious liability such as that between master and servant. The court recognized "the right of the master or principal to obtain indemnity from the servant or agent in a derivative liability situation. Where the right of full indemnity exists between persons liable in tort, no right of contribution exists." Id. at 656 (emphasis added) (citation omitted). Both the

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[2] See, e.g., Simpson v. Townsley, 283 F.2d 743 (10th Cir. 1960) (holding exoneration of primary liability removed basis for imputation of negligence).

[3] See, e.g., Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625 (Utah 1972) (finding covenant would not serve its purpose because of master's right to indemnity).

[4] See, e.g., Bacon v. United States, 321 F.2d 880 (8th Cir. 1963) (stating secondarily liable employer was not a true joint tortfeasor and thus, covenant not to sue employee released employer).

Tennessee and South Carolina versions of the UCATA specifically preserve the common law rule relating to indemnity.[5]

However, there is division even among jurisdictions that have adopted the UCATA. Some jurisdictions have construed the act's definition of "tortfeasor" to include parties that are liable vicariously and have then applied other provisions of the act to prevent the release of the secondarily liable party. See generally Yates v. New South Pizza, Ltd., 412 S.E.2d 666 (N.C. 1992) (holding plaintiff could maintain action against employer based on respondeat superior after executing covenant not to sue in favor of negligent employee pursuant to North Carolina's UCATA statute).

Indemnity has been defined as "[a] contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." Black's Law Dictionary 769 (6th ed. 1990) (emphasis added). In contrast, "contribution" is defined as the:

> [r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear. Under principle of 'contribution,' a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.

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[5] South Carolina law provides:

> This chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

S.C. Code Ann. § 15-38-20(F) (Supp. 2000).

Id. at 328.

In South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to pay, but rather may shift the entire loss to the servant or agent actively responsible, and may recover in full from the servant. See Sky City Stores v. Gregg Sec. Servs., 276 S.C. 556, 558, 280 S.E.2d 807, 808 (1981); Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971); Johnson v. Atlantic Coast Line R. Co., 142 S.C. 125, 141, 140 S.E. 443, 448 (1927); Bell v. Clinton Oil Mill, 129 S.C. 242, 256-57, 124 S.E. 7, 12 (1924); Humphries v. Whitlock Combing Co., 309 S.C. 356, 359-60, 422 S.E.2d 154, 156-57 (Ct. App. 1992); South Carolina Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 186, 348 S.E.2d 617, 625-26 (Ct. App. 1986).

When Andrade issued a covenant not to sue in Johnson's favor, any claims she had against him were terminated. Thus, SCE&G's derivative liability based upon Johnson's conduct was extinguished. Were we to find the covenant released Johnson but not SCE&G, it would necessarily follow that SCE&G could seek indemnification from Johnson and recover the entire amount of any verdict against it from him. This would effectively strip the covenant not to sue of any real meaning and result in what the court in Nelson v. Gillette described as a "corrosive circle of indemnity." 571 N.W.2d 332, 339 (N.D. 1997).

The right of contribution exists only in situations involving joint tortfeasors. See Vermeer, 336 S.C at 64, 518 S.E.2d at 307 ("Under South Carolina law, there can be no indemnity among mere joint tortfeasors.") (emphasis added). The corollary of this proposition is that the right of indemnity exists only in vicarious liability situations, and there is no right to contribution between such parties. See Craven, 534 S.W.2d at 656 ("Where the right of full indemnity exists between persons liable in tort, no right of contribution exists."); see also § 15-38-20(F). Thus, the UCATA controls only in situations involving joint tortfeasors.

Just as the Tennessee version of the UCATA statute discussed in Craven, South Carolina law does not change the common law of indemnity. See §15-38-20(F). The common law of this state provides that a covenant not to sue an

employee operates as an acquittal of the employer who is only derivatively liable. "[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under respondeat superior, if given to the servant responsible." Seaboard Air Line R.R. v. Coastal Distrib., 273 F. Supp. 340, 343 (D.S.C. 1967); see Wade, 339 S.C. at 520, 528 S.E.2d at 747 (stating "'a covenant not to sue is . . . merely an agreement not to enforce an existing cause of action, and, although it may operate as a release between the parties to the agreement, it will not release a claim against joint obligors or joint tort-feasors'") (quoting 76 C.J.S. Release § 4 (1994)).

We hold the covenant not to sue issued in favor of Johnson, the agent, released SCE&G, the vicariously liable principal. In conclusion, we note even were we to expand the definition of tortfeasor as North Carolina has done, we find the UCATA simply is not applicable to cases involving indemnity. Consequently, contribution cases cited by Andrade in support of her argument are inapposite to the facts of this case. Thus, we affirm the grant of summary judgment to SCE&G on this issue.

II. Unfair and Deceptive Trade Practices Act

Andrade next argues the trial court erred in finding SCE&G was exempt from the UTPA, S.C. Code Ann. §§ 39-5-10 to -160 (1985 & Supp. 2000), and in subsequently granting SCE&G's motion for summary judgment on this cause of action. We agree.

The UTPA declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." S.C. Code Ann. § 39-5-20(a) (1985). Trade and commerce includes "the advertising, offering for sale, sale or distribution of any services . . . ." S.C. Code Ann. § 39-5-10(b) (1985).

Section 39-5-40 governs exemptions from the act and states in part:

Nothing in this article shall apply to:

> (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.

S.C. Code Ann. § 39-5-40 (1985). This section has been interpreted to exempt actions or transactions allowed or authorized by regulatory agencies or by other statutes. Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996); see Ward v. Dick Dyer & Assocs., 304 S.C. 152, 156, 403 S.E.2d 310, 312 (1991) (stating only those activities that are specifically authorized by a regulation or another statute are exempt from the UTPA); Carr v. United Van Lines, Inc., 289 S.C. 194, 199, 345 S.E.2d 734, 737 (Ct. App. 1986) (holding transaction involved was exempt under the UTPA because the action was authorized under regulations and tariffs administered by the Interstate Commerce Commission); Trident Neuro-Imaging Lab. v. Blue Cross & Blue Shield of South Carolina, Inc., 568 F. Supp. 1474, 1483 (D.S.C. 1983) (concluding Blue Cross was exempt under the UTPA because the South Carolina Commission on Insurance specifically approved Blue Cross' exclusion of coverage on physician-owned CAT scans).

In support of its summary judgment motion based on its alleged exemption under the UTPA, SCE&G presented a copy of the June 7, 1993 order from the South Carolina Public Service Commission approving SCE&G's application for a rate increase. The order indicates the PSC is required by section 58-37-20 of the South Carolina Energy Conservation and Efficiency Act of 1992 to encourage utilities to invest in cost-effective energy-efficient technologies and energy conservation programs.

Andrade argues that in regard to the Quality Dealer Program, "[t]he PSC Order did not specifically authorize the program . . ." We agree. We find the thrust of the PSC's order deals primarily with SCE&G's rate structure. The order does not specifically authorize, regulate, or describe how the Quality Dealer Program should be designed or implemented. In fact, the words "Quality Dealer Program" are not specifically mentioned anywhere in the PSC's lengthy order.

The order does discuss expenses allocated to SCE&G's demand-side management programs which are "designed to either reduce energy demand (kw), reduce energy usage (kwh) or to shift usage to non-peak periods, increasing efficiency, thereby reducing SCE&G's requirements to build new capacity." SCE&G's Great Appliance Trade-Up program is one such demand-side management program.[6] However, in the supplemental stipulation of the PSC staff and SCE&G, the Quality Dealer Program is not listed as one of SCE&G's demand-side management programs.

Even if the PSC's order can be construed as authorizing the program, it falls far short of providing any regulatory control over its creation or implementation. Thus, while the PSC noted Quality Dealers would install the air conditioners, it neither defined what a Quality Dealer was nor placed criteria upon the selection of Quality Dealers.

SCE&G submitted an affidavit from David Butler, General Counsel for the PSC, in support of its motion for summary judgment. Butler stated the PSC would investigate any complaint filed regarding the Quality Dealer Program and take the appropriate action. However, this investigation would be based on: (1) the PSC's general power to supervise and regulate the rates of public utilities

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[6] The evidence shows SCE&G considered the Quality Dealer Program a separate program from the Great Appliance Trade-up Program because it had a separate agreement with its Quality Dealers, as well as descriptions of the program. For example, in the Great Appliance Trade-Up Program Training Guidelines for Quality Dealers, SCE&G provided the following guidelines for its Quality Dealers:

Receiving Training Credit

1. Quality Dealers must install Heat Pumps which meet the 1993 GATU Program guidelines.

2. Installations must meet the Quality Dealer Program guidelines (emphasis added).

under S.C. Code Ann. § 58-3-140 (Supp. 2000), and (2) the required compliance of electric utilities with the PSC's orders pursuant to S.C. Code Ann. § 58-27-40 (1977). It apparently would not take place pursuant to any preauthorized plan of regulating or controlling the Quality Dealer Program. These sections cited by SCE&G and the PSC's order are broad grants of authority and too general for us to conclude as a matter of law that the Quality Dealer Program was specifically authorized by an agency or by a statute to such an extent that it should be exempt from the provisions of the UTPA.

In Taylor, the court found that a medical laboratory's conduct in billing for numerous medically unwarranted tests was not exempt under the UTPA. 324 S.C. at 218, 479 S.E.2d. at 44. Similarly, we find the PSC's order indicating that SCE&G was directed to create a program encouraging energy conservation and efficiency does not exempt SCE&G's conduct in allegedly failing to oversee its Quality Dealer Program, a program it created pursuant to general statutory and regulatory directions. In the final analysis, SCE&G had discretion in creating the Quality Dealer Program and in determining the qualifications for and criteria of those selected as Quality Dealers thereunder. We therefore reverse the grant of summary judgment in favor of SCE&G on this issue.

III. Directed Verdict on Negligence

Andrade contends the trial court erred in granting SCE&G a directed verdict on her negligence cause of action. We agree.

"When this court reviews a grant of directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-prevailing party." Davis v. Tripp, 338 S.C. 226, 238, 525 S.E.2d 528, 534 (Ct. App. 1999). "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." Id. (quoting Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998)).

"The elements for a cause of action for the tort of negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty."

Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (2000). To maintain a negligence action, the defendant must owe a legal duty of care to the plaintiff. Id. Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." Id. (quoting Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977)). "The existence of a duty owed is a question of law for the courts." Washington v. Lexington County Jail, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

As the court in Hubbard stated, "an affirmative legal duty to act may be created by statute, contract, relationship, status, property interest, or some other special circumstance." 339 S.C. at 589, 529 S.E.2d at 552 (emphasis added).

Andrade argues the court erred in holding SCE&G did not owe her a duty under the Quality Dealer Program. Viewing the record in the light most favorable to Andrade, we agree. The evidence[7] raises the inference SCE&G owed a duty of care to Andrade to ensure the proper installation of her HVAC systems.

SCE&G's Quality Dealer Program Guidelines stated "SCE&G's HVAC Quality Dealer Program is designed to encourage proper installation of high efficiency heating and cooling systems. The program incorporates high standards of system design, installation, and maintenance." (emphasis added).

Under the agreement between SCE&G and its Quality Dealers, the Quality Dealers agreed to meet and adhere to all installation requirements, mediation procedures, and to abide by the inspection policy. In turn, SCE&G agreed to promote high efficiency HVAC equipment and quality HVAC installations to its customers.

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[7] Andrade's brief discusses evidence proffered but not admitted at trial. The depositions discussed during argument to the trial court are not included in the record. Consequently, we have not considered such evidence in our deliberations.

The program agreement further contained a long list of installation requirements that must be met by each Quality Dealer.[8] The agreement also required Quality Dealers to have certain credentials, provide prompt service to all customers, and to participate in yearly training provided by SCE&G. The agreement further committed SCE&G to a specific procedure involving mediation toward the handling of customer complaints which set forth specific requirements for certain action to be taken and concluded that discrepancies were expected to be corrected within thirty days after their report.

We conclude the Quality Dealer Agreement provides evidence of a contractual duty undertaken by SCE&G to oversee the proper installation of HVAC systems and to address customer complaints regarding improper installation. Viewing the evidence in the light most favorable to Andrade, we find the trial court committed reversible error in granting SCE&G a directed verdict on Andrade's negligence claim.

For the foregoing reasons, the judgment of the trial court is hereby

AFFIRMED IN PART AND REVERSED IN PART.

HOWARD and SHULER, JJ., concur.

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[8] Andrade testified fifteen code violations occurred as a result of Sea Island's faulty installation of her HVAC systems. In the SCE&G-Quality Dealer agreement, SCE&G instructed the Quality Dealers to "[s]elect and install systems and accessory equipment in accordance with all local, state and national codes." (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

General Equipment & Supply Company, Inc.
Respondent,

v.

Keller Rigging & Construction, SC, Inc., and Fidelity and Deposit Company of Maryland,

Appellants.

Appeal From Aiken County
Robert A. Smoak, Jr., Master-in-Equity

Opinion No. 3322
Submitted February 5, 2001 - Filed March 19, 2001

REVERSED AND REMANDED

Jeffrey R. Moorehead, of Aiken, for appellants.

Lydia A. Eloff, of Robinson, McFadden & Moore, of Columbia, for respondent.

HOWARD, J. : Keller Rigging & Construction ("Keller") and Fidelity and Deposit Company of Maryland ("Fidelity") appeal the Master-in-Equity's denial of their motion to compel arbitration. We reverse.

FACTS

On August 25, 1999, General Equipment & Supply Company, Inc. ("General Equipment") brought this mechanic's lien foreclosure action against Keller and Bridgestone Firestone, Inc. ("Bridgestone"). General Equipment alleged Keller failed to pay for the lease of certain rental equipment and supplies and sought judgment in the amount of the unpaid lease.

On September 30, 1999, Keller and Bridgestone filed an answer denying General Equipment's allegations. Keller also filed a Bond and Release of Mechanic's lien at the Aiken County RMC. On November 12, 1999, the parties entered into a Consent Order substituting a bonding company, Fidelity, for defendant Bridgestone.

On January 11, 2000, the parties entered into a Consent Order of Reference referring this case to a Master-in-Equity. Following this Order of Reference, both sides produced and answered standard interrogatories and requests for production.

On March 31, 2000, two weeks prior to the scheduled trial, Keller and Fidelity filed a notice of motion and motion to compel arbitration.[1] On April 12, 2000, the Master-in-Equity heard Keller and Fidelity's motion and issued an order denying the motion. This appeal follows.

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[1]General Equipment does not dispute that its agreement with Keller contains a valid arbitration clause that comports with the requirements of S.C. Code section 15-49-10(a).

DISCUSSION

Keller and Fidelity argue the Master erred in denying their motion to compel arbitration. Keller and Fidelity assert that they did not waive their right to arbitration and that General Equipment would not have been prejudiced by an enforcement of the Arbitration Clause. We agree.

It is generally held that the right to enforce an arbitration clause may be waived. Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622,624 (Ct. App. 1992). In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Hyload, Inc., 308 S.C. at 280, 417 S.E.2d at 624. Furthermore, it is the policy of this state to favor arbitration of disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995).

In reviewing a circuit court's decision regarding a motion to stay an action pending arbitration, the determination of whether a party "waived its right to arbitrate is a legal conclusion subject to de novo review." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664, 521 S.E.2d 749,753 (Ct. App. 1999). However, the circuit court's "factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." Id. at 665, 512 S.E.2d at 753.

The party seeking to establish waiver has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration. Sentry Eng'g & Constr., 287 S.C. at 351, 338 S.E.2d at 634. General Equipment argues there was sufficient evidence which reasonably supported the Master's finding that General Equipment would be unduly burdened if the Arbitration Clause was enforced. The record, however, contains no evidence which demonstrates prejudice to General Equipment.

In denying Keller's motion, the Master relied on Liberty Builders, and the fact that Keller consented to the referral of the case to the Master-in-Equity

eighty days prior to filing its motion to compel arbitration. Despite Keller's consent to the referral, the burden of showing prejudice from Keller's delay in demanding arbitration remains with General Equipment. Id. Mere inconvenience is not sufficient to establish prejudice. See id.

The present case is distinguishable from the case relied on by the Master. In Liberty Builders v. Horton, Liberty, the party seeking arbitration pursued active litigation against the Hortons for two and one-half years and availed itself of the circuit court's assistance on forty separate occasions. The court held that "Liberty waived its right to enforce the arbitration clause by submitting the dispute to the court and availing itself of that system for two and one-half years." Liberty Builders, 336 S.C. at 668, 521 S.E.2d at 754. The court further found that Liberty's delay in requesting arbitration prejudiced the Hortons by subjecting them to lengthy litigation and extensive attorney fees. Id. at 666, 521 S.E.2d 753.

In the present case, the parties were involved in litigation for less than eight months. The litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories. Prior to the filing of the motion to compel arbitration, the parties availed themselves of the circuit court's assistance twice. The parties consented to an order substituting the defendant and an order referring the action to the Master-in-Equity, both of which are standard procedures in cases of this type. In essence, neither party availed itself of the circuit court's assistance in such a manner as to cause a lengthy delay or cause either party to incur significant attorney's fees. Furthermore, Keller's motion to compel arbitration was filed within a reasonable time after the commencement of the action.

CONCLUSION

The record does not support the factual findings of the Master that General Equipment was prejudiced by the delay in arbitration. Keller and Fidelity did not waive their right to arbitration, and were entitled to have the Arbitration Clause enforced. Therefore, we hold the Master erred in denying Keller and Fidelity's motion to compel arbitration.

The order of the trial court is

REVERSED and REMANDED.

CONNOR and HUFF JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Magistrate Mary B. Holmes,

Respondent,

v.

Firetag Bonding Service,

Appellant.

Appeal From Charleston County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3323
Submitted January 3, 2001 - Filed March 26, 2001

AFFIRMED

Philip L. Firetag, of Charleston, pro se.

Deputy County Attorney Thomas E. Lynn, of Charleston Heights, for respondent.

PER CURIAM: Firetag Bonding Service appeals the forfeiture of $525 secured by an appearance recognizance given by Firetag to guarantee the

appearance of Alvin L. Gardner to answer charges in magistrate's court for driving under suspension and for transporting in a motor vehicle alcoholic liquors in an open container. The terms of the appearance recognizance, among other things, required Gardner to appear before the magistrate on August 16, 1999 "AND/OR NEXT ENSUING TERM." Gardner did not appear—neither on August 16, 1999, nor on October 18, 1999, the date for which the magistrate rescheduled the case after Gardner initially failed to appear. After Gardner also failed to appear on October 18, 1999, the magistrate tried him in his absence, found him guilty of both offenses, and issued a bench warrant for his arrest. On December 22, 1999, the magistrate ordered the amount of the appearance recognizance forfeited. Firetag appealed the forfeiture to the circuit court. The latter affirmed the magistrate.

The dispositive issue concerns a stamped notation inserted by Firetag on the back of the appearance recognizance. The notation reads: "NOTICE: NO CONTINUANCE WITHOUT PRIOR CONSENT FROM BONDING COMPANY." Firetag argues the notation constituted a binding term within the appearance recognizance and therefore it could not be held to guarantee Gardner's appearance before the magistrate beyond August 16, 1999, unless the magistrate notified Firetag of the continuance of Gardner's case and Firetag approved of the continuance. Here, Firetag claims: (1) the magistrate failed to notify it that Gardner's case had been continued, and (2) it never approved the continuance of Gardner's case to the October date.

We affirm the judgment below.[1]

In South Carolina, the conditions of an appearance recognizance, including when a defendant must appear in court to answer the charge or

[1] Because oral argument would not aid the court in resolving the issues on appeal and because the amount involved in this case does not exceed $1,000, we decide this case without oral argument pursuant to Rule 215, SCACR.

charges, are fixed by law.[2] The applicable statute provides in pertinent part:

> Every appearance recognizance or appearance bond will be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what shall be enjoined by the court, and not to depart the State, and be of good behavior toward all the citizens thereof . . . .[3]

As is readily apparent, nothing in this section authorizes a surety, such as Firetag, to set the conditions of an appearance recognizance regarding when and where the defendant must appear. "What" a defendant must "do and receive," i.e., the conditions of the appearance recognizance, are those things "enjoined by the court," not the surety. The stamped notation on the back of the appearance recognizance at issue that seeks to limit the magistrate's authority to continue the defendant's case constitutes, therefore, an unauthorized condition. As such, the notation is nothing more than mere surplusage and in no way affects the validity of the appearance recognizance itself.[4]

Indeed, Gardner's failure to appear on August 16, 1999, was alone a sufficient basis for the magistrate to forfeit the amount of the appearance recognizance,[5] notwithstanding the stamped notation. Gardner's failure to

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[2] See 8 C.J.S. Bail § 98, at 122 (1988) ("The . . . recognizance should contain such conditions as are required by law, and such as are fixed by the order of the court.").

[3] S.C. Code Ann. § 17-15-20 (1976) (emphasis added).

[4] See 8 C.J.S. Bail § 100, at 124 (characterizing unauthorized conditions in a bond or recognizance as "mere surplusage," but also stating that such conditions do not undermine the validity of the instrument).

[5] Cf. State v. Holloway, 262 S.C. 552, 556, 206 S.E.2d 822, 824 (1974) (stating that when an accused is required to appear before a court on a specified date or the next term of court, "the accused was under a legal duty to appear in

appear did not require the magistrate to continue the case and thus afford both Gardner and Firetag a second chance to avoid forfeiture.

Firetag raises several other issues not otherwise embraced within the question discussed; however, we do not address them and affirm pursuant to Rule 220(b)(2), SCACR.[6]

AFFIRMED.

GOOLSBY, ANDERSON, and STILWELL, JJ., concur.

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accordance with the conditions of the bond, without further notice to him or . . . his surety").

[6] See Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (holding issues not raised to and ruled on by the trial court are not preserved for appeal); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (holding a "one-sentence argument is too conclusory to present any issue on appeal"); Williams v. Leventis, 290 S.C. 386, 390, 350 S.E.2d 520, 523 (Ct. App. 1986) (holding an "argument [that] is embraced in a single sentence on the last page of [appellant's] brief [and] not supported by any authority whatever . . . may be viewed as effectively abandoned"); Nolas Trading Co., Inc. v. South Carolina Dep't of Health & Envtl. Control, 289 S.C. 345, 345 S.E.2d 507 (Ct. App. 1986) (stating the function of appellate courts is to decide actual controversies injuriously affecting the rights of some party to the litigation).