OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

November 5, 2001

ADVANCE SHEET NO. 38

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Rick's Amusement, Inc., B&B Amusement, Tripp's Amusement Company, Fascination of S.C., Britt's Inc. d/b/a Tripp's Convenience, Crenshaw Technology, Inc., Southern Amusements, Ballard Amusements, Inc., Wilkinson Fuel Company d/b/a Nu-Way Marketing, Greenwood Music Co., Inc., McDonalds Amusements, Inc., Cherokee Trail, Sonoco Amusements, and JSW Amusement, and all those similarly situated,

Plaintiffs,

of whom Rick's Amusements, Inc., B&B Amusement, Tripp's Amusement Company, Fascination of S.C., Britt's Inc. d/b/a Tripp's Convenience,

Crenshaw Technology, Inc., Southern Amusements, Ballard Amusements, Inc., Wilkinson Fuel Company d/b/a Nu-Way Marketing, Greenwood Music Co., Inc., McDonalds Amusements, Inc., Cherokee Trail, Sonoco Amusements, and JSW Amusement are — Appellants,

v.

State of South Carolina, — Respondent.

and

Leslie Mart, Inc., and all those similarly situated, — Plaintiffs,

of whom Leslie Mart, Inc., is — Appellant,

v.

State of South Carolina, — Respondent.

O R D E R

PER CURIAM: Appellants filed a Petition for Rehearing. The Court grants the Petition, dispenses with oral argument, and orders Opinion No. 25359, filed September 10, 2001, withdrawn and the following opinion substituted.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E.C. Burnett, III J.

Columbia, South Carolina

November 5, 2001

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Rick's Amusement, Inc., B&B Amusement, Tripp's Amusement Company, Fascination of S.C., Britt's Inc. d/b/a Tripp's Convenience, Crenshaw Technology, Inc., Southern Amusements, Ballard Amusements, Inc., Wilkinson Fuel Company d/b/a Nu-Way Marketing, Greenwood Music Co., Inc., McDonalds Amusements, Inc., Cherokee Trail, Sonoco Amusements, and JSW Amusement, and all those similarly situated,

Plaintiffs,

of whom Rick's Amusements, Inc., B&B Amusement, Tripp's Amusement Company, Fascination of S.C., Britt's Inc. d/b/a Tripp's Convenience,

Crenshaw Technology, Inc., Southern Amusements, Ballard Amusements, Inc., Wilkinson Fuel Company d/b/a Nu-Way Marketing, Greenwood Music Co., Inc., McDonalds Amusements, Inc., Cherokee Trail, Sonoco Amusements, and JSW Amusement are — Appellants,

v.

State of South Carolina, — Respondent.

AND

Leslie Mart, Inc., and all those similarly situated, — Plaintiff,

of whom Leslie Mart, Inc., is — Appellant,

v.

State of South Carolina, — Respondent.

Appeal From Richland County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 25359
Heard June 6, 2001 - Refiled November 5, 2001

AFFIRMED

A. Camden Lewis and Ariail E. King of Lewis Babcock & Hawkins, L.L.P., and Richard A. Harpootlian of Richard A. Harpootlian, P.A., of Columbia, for appellants.

Ronald K. Wray, II, and Denise L. Bessellieu, of Gallivan, White & Boyd, P.A., of Greenville, and Nathan Kaminiski, Jr., and Christie N. Barrett, of Office of Attorney General, of Columbia, for respondent.

JUSTICE BURNETT: Appellants, owners of video gaming machines and operators of commercial establishments providing video gaming machines, appeal the circuit court's order granting Respondent State of South Carolina's (the State's) Rule 12(b)(6), SCRCP, motion to dismiss. We affirm.

BACKGROUND

In July 1993, the legislature enacted South Carolina Code Ann. § 12-21-2806 (2000) (local option law) which permitted counties to hold a referendum to determine whether non-machine cash payouts for video gaming should become illegal. As a result of the referendum held in

November 1994, twelve counties voted in favor of making payouts illegal. Two years later, the local option law was struck down as unconstitutional special legislation. Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996).

Appellants brought these actions against the State to recover losses allegedly incurred by the local option law and the resulting cash payout ban.[1] Appellants claimed they entered into contracts for the placement of video gaming machines prior to enactment of the local option law and that the law illegally "revoked and/or impounded [their] contracts," constituting a taking without just compensation and an unconstitutional impairment of their contracts.[2]

Relying exclusively on Mibbs, Inc. v. South Carolina Dep't of Revenue, 337 S.C. 601, 524 S.E.2d 626 (1999), the trial judge determined because future regulations were foreseeable in the highly regulated video poker industry, appellants failed to state a takings claim or contract impairment. The trial judge granted the State's Rule 12(b)(6), SCRCP, motion to dismiss.

ISSUES

I. Did the trial judge err by granting the State's motion to dismiss appellants' takings claim without conducting the three-prong Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), test?

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[1]Appellants are located in the twelve counties where cash payouts were banned.

[2]Appellant Leslie Mart asserted its contract provided for a term beginning on December 6, 1991, with an automatic renewal of another five year term after the first five years. The other appellants asserted they "entered into valid, enforceable contracts . . . prior to the enactment or notice of the provisions of Section 12-21-2806."

II. Did the trial judge err by granting the State's motion to dismiss appellants' impairment of contract claim?

DISCUSSION

I. Takings Claim

Appellants argue the trial judge erred by failing to evaluate their takings claim under the standard three-prong takings analysis rather than simply ruling highly regulated industries are precluded from establishing a takings claim. Appellants rely solely on Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998). We disagree.

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." Economic regulation may effect a taking. Eastern Enterprises v. Apfel, 524 U.S. 498 (1998); see Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (regulation may result in a taking if it goes "too far."). In determining whether governmental regulation violates the Takings Clause, the Court will consider (1) the economic impact of the regulation, (2) its interference with "distinct" investment-backed expectations, and (3) the character of the governmental action. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). More recent cases describe the second factor as the degree of interference with "reasonable" investment-backed expectations. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993); Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270, cert. denied ___ U.S.___, 121 S.Ct. 606, 148 L.Ed.2d 518 (2000).

In Maritrans, Inc. v. United States, supra, the plaintiffs claimed the federal Oil Pollution Act of 1990 "took" their tankers by requiring them to be retrofitted with double hulls to continue operation or to be phased out

of service. The government argued the plaintiffs did not have a property interest for purposes of the Fifth Amendment because the shipping industry is heavily regulated and, because plaintiffs could have anticipated the requirement of double hulls, they had no reasonable investment-backed expectations.

The Federal Claims Court explained the Federal Circuit has adopted a two-tier analysis for takings claims. Initially, the Court "must determine whether the proscribed activity is a 'stick' in the plaintiff's bundle of property rights." Id. at 793 citing M&J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995). If the Court finds affirmatively, it then considers the three factors set forth in Penn Central.

The Maritrans Court discussed Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1993),[3] which involved the federal government's revocation of import permits for certain assault weapons after the plaintiff had signed contracts with a foreign government to purchase the weapons for resale in this country. The plaintiff claimed its investment-backed reliance on the permits constituted a compensable property interest under the Fifth Amendment. The federal circuit disagreed.

The Maritrans Court noted Mitchell Arms' analysis concerned whether the interest affected was "totally dependent" upon the government's regulatory power or "inherent" in the plaintiff's ownership rights. Mitchell Arms found the "expectation of selling the assault rifles in domestic commerce - - the interest affected in this case - - was not inherent in its ownership of the rifles. Rather, it was totally *dependent* upon the import permits issued by the ATF." Maritrans , supra at 795, citing Mitchell Arms, supra at 217. Accordingly, the Maritrans Court concluded the heavily regulated nature of an industry does not preclude a cognizable Fifth Amendment property interest. It stated:

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[3]The Court relied in part on Mitchell Arms in Mibbs, Inc. v. South Carolina Dep't of Revenue, supra.

> We cannot find support for the proposition that the mere presence of regulation precludes analysis of the three familiar *Penn Central* factors at the second tier of analysis mentioned by *M & J Coal*.
>
> Establishing a taking claim in certain spheres of activity may be difficult. But we are not aware of a blanket no-takings rule with respect to regulated industries; or that one may never prevail on a takings claim if participating in a heavily regulated industry. Certainly we cannot accept the Government's argument that because the industry in which Maritrans participates is regulated, we should end the inquiry at the first tier of analysis. The Government's argument in this respect is without merit.

Maritrans, Inc. v. United States, supra, at 797.

Ultimately, the Maritrans Court determined that, although the shipping industry is heavily regulated, the plaintiff's right to ownership of its vessels existed independently of the government's regulatory scheme. Accordingly, Maritrans had a property interest in its tankers which could be compensable under the Fifth Amendment.

We agree with appellants that a plaintiff who operates in an heavily regulated industry is not prohibited from establishing the existence of a property interest protected by the Fifth Amendment. The threshold inquiry is whether the property interest affected is inherent in the plaintiff's ownership rights or completely dependent upon regulatory licensing. Mibbs, Inc. v. South Carolina Dep't of Revenue, supra; see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992), citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (the range of interests protected by the Fifth Amendment is defined by "existing rules or understandings that stem from an independent source such as state law."). If the property interest is inherent in the plaintiff's ownership rights, then the Court determines whether a compensatory taking has occurred.

Here, appellants claim the invalid local option law "revoked and/or impounded [their] contracts" for the placement of video gaming machines, thereby constituting a taking. We disagree.

The local option law did not "revoke or impound" appellants' contracts which they entered on the assumption cash payouts would continue to be legal. Appellants' rights to continued cash payouts were completely dependent upon regulatory licensing rather than inherent in appellants' right to own or possess video gaming machines. Mibbs, Inc. v. South Carolina Dep't of Revenue, supra. Moreover, their rights to operate video gaming machines were completely dependent upon the regulatory licensing scheme rather than inherent in their right to own or possess the machines. See § 12-21-28-8(7) (Supp. 1995) (recognizing licensing required for operation of coin-operated devices). Appellants' interest in the contracts did not constitute a property interest which could be compensable as a taking. Accordingly, the trial judge did not err by failing to reach the Penn Central factors.

II. Impairment of Contract Claim

Appellants assert the trial judge erred by dismissing their Contract Clause claim. They claim that, in spite of the high degree of regulation of the video poker industry, they could not have foreseen an *illegal* ban on cash payouts. Further, appellants argue that, unlike the video poker operator in Mibbs, supra, they entered into contracts before the enactment or notice provisions of the local option law.

Both the United States and South Carolina Constitutions prohibit the State from passing laws which impair the obligations of contracts. See U.S. Const. art. I, § 10; S.C. Const. art. I, § 4. A three-step analysis is applied to determine whether a law violates the federal and state Contract Clauses. Ken Moorhead Oil Co. v. Federated Mutual Ins. Co., 323 S.C. 532, 476 S.E.2d 481 (1996). Initially, the Court must determine whether the state law has operated as a substantial impairment of a contractual relationship. If

the regulation does constitute a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. Lastly, once a legitimate public purpose has been identified, the Court determines whether the adjustment of contractual rights is based upon reasonable conditions and is of a character appropriate to the public purpose. Mibbs v. South Carolina Dep't of Revenue, supra.

In Mibbs, the Court addressed this same Contract Clause issue - whether a video poker operator could foresee the passage of the invalid local option law. We held where there is a Contract Clause claim, the threshold inquiry is whether the State law has operated as a substantial impairment of the reasonable expectations of the parties. Id. The validity of the regulation is irrelevant to this initial determination. Id.

Further, the Mibbs Court noted Martin v. Condon, supra, struck down the ban on cash payouts because it did not apply statewide, not because the ban was substantively invalid. Id. Presumably, the legislature could have banned cash payouts for coin-operated video gaming machines if it did so on a statewide basis.[4]

Finally, the fact that appellants entered into contracts for the placement of video gaming machines before the legislature enacted the local option law is an insignificant distinction from Mibbs. In Mibbs, the Court acknowledged there is "no substantial impairment of a contract where the subject of the contract is a highly regulated business whose history makes further regulation foreseeable." Id. S.C. at 608, S.E.2d at 629. It concluded the video poker industry was highly regulated and, therefore, further regulation regarding cash payouts was foreseeable. Although recognizing the operator had entered into contracts after enactment of the local option law, Mibbs was nonetheless decided on the basis of the high degree of regulation in the video gaming industry.

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[4]At oral argument, appellants conceded the legislature could have banned video gaming altogether.

Appellants assert our decision today will affect the reliability of contracts entered into by participants in other highly regulated fields like banking and insurance. We disagree. Throughout the late 1980s and early 1990s, the same time period during which appellants entered into their contracts, lawmakers repeatedly introduced legislation specifically aimed at eliminating nonmachine cash payouts.[5] In this unique environment, appellants could not have reasonably expected that no regulation would interfere with their anticipated cash payouts. Our ruling does not affect the certainty of contracts in highly regulated fields.

As previously determined in Mibbs, the trial judge properly dismissed the impairment of contract claim because appellants could not have reasonably expected cash payouts for coin-operated video gaming machines to remain legal when they entered into the contracts.

AFFIRMED.

TOAL, C.J., MOORE, J., and Acting Justices C. Victor, Pyle, Jr., and Thomas L. Hughston, Jr., concur.

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[5]See, e.g, H.R.3823, 108th Leg., 2d Sess. (1989) (bill to repeal S.C. Code Ann. § 16-19-60; H.R. 2867, 108th Leg., 2d Sess. (1989) (bill to make it unlawful to have or to operate a machine for playing games which utilizes a deck of cards); H.R.3104, 109th Leg. 1st Sess. (1991) (bill to repeal § 16-19-60).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anand B. Patel, Petitioner,

v.

Nalini Raja Patel, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dillon County
Haskell T. Abbott, III, Family Court Judge

Opinion No. 25371
Heard August 7, 2001 - Filed October 31, 2001

REMANDED

Robert L. Widener, McNair Law Firm, of Columbia; and John O. McDougall and Michael W. Self, of McDougall & Self, of Sumter, for petitioner.

Harvey L. Golden and J. Michael Taylor, of Golden, Taylor & Potterfield, of Columbia, for

respondent.

CHIEF JUSTICE TOAL: Anand B. Patel ("Husband") was granted certiorari to review the Court of Appeals' unpublished decision in *Patel v. Patel*, Op. No. 2000-UP-653 (S.C. Ct. App. filed October 26, 2000).

FACTUAL/ PROCEDURAL BACKGROUND

On July 7, 1980, Husband and Nalini Raja Patel ("Wife") were married after a short engagement in Vancouver, British Columbia. Shortly thereafter, the parties moved to Chilliwack, where Husband worked as a pharmacist. The parties returned to Vancouver in 1982 and purchased a pharmacy. By this time, Wife had received her work permit, which took about two years to process, and began working in the pharmacy as a cashier or stock person. Wife worked in the pharmacy from approximately 9:00 a.m. to 6:00 p.m. She was never paid a salary.

Husband and Wife moved to Dillon, South Carolina in 1986, when Husband purchased a Days Inn Hotel. The parties lived on the premises as resident owners. Shortly after moving, their first child, Anish, was born on November 27, 1986. Husband and Wife had two more children, Ria, born on June 21, 1990, and Ashoo, born on June 22, 1992. Wife worked in the hotel with Husband until Ria was born. However, Wife did not receive a salary.

The parties lived a modest lifestyle. Although the hotel business supplied a $15,000 a month income, the parties lived in a two bedroom "apartment" at the hotel. Wife slept with the three children in one bedroom, and Husband slept in the other. Their modest lifestyle allowed the parties to acquire a $2.6 million dollar marital estate.

Husband and Wife separated in October 1995. Husband then initiated this action against Wife. Pursuant to the Temporary Order issued by the family court, Husband was awarded temporary possession of the marital "quarters" at the hotel, but was required to provide suitable accommodations for Wife outside the hotel. Husband purchased a house for Wife for approximately $75, 000. The

Order also awarded Husband and Wife alternating temporary custody of the children.

A final divorce decree was issued on October 23, 1997. Under the terms of the divorce decree (1) Husband was awarded custody of the three children and child support; (2) the marital property was divided 65% to the Husband and 35% to the Wife; (3) Wife's request for alimony was denied; (4) Wife was ordered to pay $41,920.94 towards Husband's attorney's fees and costs; and (5) Wife was ordered to pay 14% of the fees and costs associated with the Guardian *Ad Litem* ("GAL").

Wife filed a Notice of Appeal on June 16, 1998. Two weeks later, Wife received a letter from Husband stating he intended to relocate with the children to Southern California. Wife filed a motion with the Court of Appeals to prevent Husband from moving with the children during the appeal. The Court of Appeals issued an Order, dated July 31, 1998, which remanded the issue to the trial court for consideration. The matter was heard on August 19, 1998, in front of the same judge who presided over the divorce proceedings. On August 25, 1998, the judge issued a ruling allowing Husband to relocate with the children to California. Husband moved with the children to California around September 6, 1998. On September 22, 1998, the judge issued a written order allowing the children to relocate. Wife filed a petition for supersedeas with the Court of Appeals. On October 20, 1998, the Court of Appeals issued an order directing Husband to return the children to South Carolina. However, after oral argument before a three-judge panel, the Court of Appeals vacated its prior order of October 20, 1998, and denied Wife's petition for supersedeas.

The Court of Appeals consolidated Wife's appeal from both the divorce decree and the Order allowing the children's removal from South Carolina. On October 26, 2000, the Court of Appeals issued an unpublished decision in which it (1) reversed the family court's custody award to Husband and ordered him to return the children to South Carolina; (2) reversed the denial of alimony to Wife and remanded the issue of her entitlement to alimony to the trial court; (3) reversed the award of attorney's fees to Husband; and (4) affirmed the equitable division award of 65% of the marital property to Husband and 35% to Wife.

Both Husband and Wife petitioned for certiorari. This Court granted Husband's petition on the issues of custody and alimony, and the issues before this Court are:

I. Did the Court of Appeals err in reversing the family court's custody decision, thereby awarding custody of the parties' children to Wife?

II. Did the Court of Appeals err in reversing the family court's denial of alimony to Wife?

LAW/ ANALYSIS

I. Child Custody

Husband argues the Court of Appeals erred in reversing the decision of the family court and granting custody of the three children to Wife. We find Wife did not receive a fair hearing on child custody, and remand this case to the family court for a new hearing on child custody.

In a custody case, the best interest of the child is the controlling factor. *Ingold v. Ingold*, 304 S.C. 316, 404 S.E.2d 35 (Ct. App. 1991). The family court considers several factors in determining the best interest of the child, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and the children); and the age, health, and sex of the children. *See* Roy T. Stuckey & F. Glenn Smith, *Marital Litigation in South Carolina* 446 (1997). When determining to whom custody shall be awarded, all the conflicting rules and presumptions should be weighed together with all the circumstances of the particular case, and all relevant factors must be taken into consideration. *Woodall v. Woodall*, 322 S.C. 7, 471 S.E.2d 154 (1996); *Ford v. Ford*, 242 S.C. 344, 130 S.E.2d 916 (1963).

The family court appointed a non-lawyer Guardian *Ad Litem* (GAL) in February of 1996 to review this case. The GAL testified at the final hearing in May of 1997, after having 15 months to review the case. As stated by the family court in its final divorce decree filed in October 1997, the GAL had "a

substantial amount of personal involvement" in this case. However, the GAL's actions in this case give rise to concern. For example, the GAL did not keep notes of her observations during her investigation and failed to produce a written report. In addition, the GAL contacted Husband's counsel 19 times, but never contacted Wife's counsel. The GAL stated she had "some" telephone contact with Wife, but spoke on the phone with Husband "very frequent[ly]." After an incident with Wife, the GAL testified she did not feel comfortable enough to meet with Wife, and did not visit her from July 14 to October 21, 1996. During the time she did not feel comfortable meeting with Wife, she continued to meet with the children while in Husband's care. Furthermore, the GAL listened to a phone conversation between Husband and Wife without Wife's knowledge. The GAL also taped a conversation with Anish concerning an incident that happened while they were in Wife's custody. Finally, the GAL testified that "she was taken aback" by Wife's request that she be removed from the case. In sum, the GAL did not conduct an objective, balanced investigation. She did not afford each party a balanced opportunity to interact with her. Her method of evaluation created a high potential for bias towards Husband.

The record reveals the psychiatrist as well as the family court relied on the GAL's findings and testimony when deciding custody should be awarded to Husband. In fact, the family court explicitly stated it placed "a great deal of reliance" on the GAL's report when deciding the custody issue.

After reviewing the testimony from the family court, we find Wife was not afforded a fair hearing due to the performance of the GAL appointed in this case. Furthermore, since the custody question was hotly contested, with no clear choice for custodial parent apparent from the testimony in the record, we cannot find the admission of the GAL's recommendation was harmless error. Therefore, we find the GAL's actions and inactions so tainted the decision of the family court in this case, as to deny Wife due process. U.S. CONST. amend. XIV; *South Carolina Dep't of Soc. Serv. v. Beeks*, 325 S.C. 423, 481 S.E.2d 703 (1997) (recognizing the importance of due process in a child custody case).

A guardian *ad litem*, as the later phrase suggests, is a guardian for litigation. Traditionally, GALs were lawyers appointed by the court to appear in a lawsuit on behalf of a minor or incompetent. Over time, the role of the

guardian was defined by statute as well as by common law. Lay persons as well as lawyers were appointed by the court in cases to protect those the court or legislature deemed could not protect themselves. For example, GALs were appointed in cases of abuse and neglect, and in cases involving an incompetent person. The legislature has enacted some statutes regarding GALs. In the context of children, the legislature has enacted S.C. Code Ann. § 20-7-121 (Supp. 2000) (creating a GAL program for children in abuse and neglect proceedings); Section 2-7-1570 (mandating the appointment of a GAL for children involved in a termination of parental rights proceeding); Section 20-7-952 (requiring a GAL in a paternity action); and Section 20-7-1732 (requiring the appointment of a GAL for children involved in an adoption proceeding).

Over time, it has become the custom in this state, and many others, for the family court to appoint GALs in private custody disputes. The GAL functions as a representative of the court, appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view. *Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (1997); *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). Standard setting for GALs in this "new" role has been very ad hoc. The legislature has set standards for a GAL appointed in abuse and neglect cases.[1]

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[1]S.C. Code Ann. § 20-7-122 (Supp. 2000) provides

> The responsibilities and duties of a guardian ad litem are to:
>
> (1) represent the best interest of the child;
>
> (2) advocate for the welfare and rights of a child involved in an abuse or neglect proceeding;
>
> (3) conduct an independent assessment of the facts, the needs of the child, and the available resources within the family and community to meet those needs;
>
> (4) maintain accurate, written case records;

However, there has been no comprehensive or coherent approach for the setting of standards for the use of GALs in private custody disputes. The judicial, legislative, and executive branches need to take a broader look at GALs who function in this capacity.[2]

While a more complete approach is being examined by the three branches of government, this Court will set forth some base line standards. In connection with developing a recommendation to the family court, a GAL shall: (1) conduct an *independent, balanced, and impartial* investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case; (2) advocate for the child's best interests by making specific and clear recommendations, when necessary, for evaluation, services, and treatment for the child and the child's family; (3) attend all court hearings and provide accurate, current information directly to the court; (4) maintain a complete file with notes rather than relying upon court files; and (5) present to the court and

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> (5) provide the family court with a written report, consistent with the rules of evidence and the rules of court, which includes without limitation evaluation and assessment of the issues brought before the court and recommendations for the case plan, the wishes of the child, if appropriate, and subsequent disposition of the case;
>
> (6) monitor compliance with the orders of the family court and to make motions necessary to enforce the orders of the court or seek judicial review;
>
> (7) protect and promote the best interest of the child until formally relieved of the responsibility by the family court.

[2]In July 2001, Senator Glenn McConnell, President Pro Tempore of the South Carolina Senate announced the formation of a task force to make recommendations regarding the use of GALs. To date, this task force has conducted several public hearings throughout the state.

all other parties clear and comprehensive written reports, including but not limited to a final report regarding the child's best interest, which includes conclusions and recommendations and the facts upon which the reports are based. In consideration for their services, GALs should receive reasonable compensation.

In conclusion, because the evidence in this case does not clearly weigh in favor of either Husband or Wife as custodial parent, the untrustworthy opinion of the GAL denied Wife a fair hearing on the custody issue. Accordingly, we remand the case for a new custody hearing.[3]

II. Alimony

Husband argues the Court of Appeals erred in reversing the family court's denial of alimony to Wife. We disagree.

The family court denied Wife's request for alimony. The court reasoned there was no need for alimony based on the following findings: (1) Wife was awarded 35% of the marital estate ($913,278), which should provide her with approximately $5,000 in living expenses per month; (2) Husband was granted custody of the children; (3) the parties had a modest standard of living during the marriage; and (4) although Wife had only a 12th grade education and had no work experience during the 15 year marriage other than working in the family business without pay and caring for the minor children, the equitable division would provide Wife with adequate monthly income so that Wife's need to become employed was "questionable."

The Court of Appeals reversed the decision of the family court and remanded for a determination of an alimony award. The Court of Appeals found Wife's lack of appropriate education, her unsalaried work in both family businesses, her role as a homemaker, and the fact the parties lived well below

[3]The children in this case have been through a tremendous ordeal, and this Court hopes a final determination of custody can be made in a reasonable time. This Court's order is not an expression of preference for one party over the other as the custodial parent for the minor children.

their means entitled her to alimony. After considering all the factors provided in S.C. Code Ann. § 20-3-130(c) (Supp. 2000), we agree with the Court of Appeals.

Section 20-3-130(c) sets forth thirteen factors to be considered in arriving at an award of alimony: (1) the duration of the marriage and the ages of the parties at the time of the marriage and separation; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse and the need for additional education; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated income of each spouse; (8) the marital and nonmarital properties of the parties; (9) the custody of any children; (10) marital misconduct or fault; (11) the tax consequences of the award; (12) the existence of support obligations to a former spouse; and (13) other factors the court considers relevant.

The family court discussed the duration of the marriage, the ages of the parties, the physical and emotional condition of each spouse, the standard of living established during the marriage, the custody of the children, the lack of marital misconduct by either party, and the tax consequences. However, the family court overlooked several important factors when it denied Wife's request for alimony: (1) Wife's lack of employment history and earning potential; (2) her educational needs to obtain adequate employment; (3) her sacrifice of a salaried job to work in the family business; and (4) her role as a primary caretaker for the children and the marital home for more than 15 years. Furthermore, it was inappropriate to hold Wife to the "standard of living enjoyed during the marriage" when Husband refused to improve the quality of the living quarters and lifestyle even though there were funds to do so. Husband deliberately chose to keep his family in a two bedroom hotel apartment, made Wife and three children share a bedroom, and refused to allow them to move into a home. Husband's deliberate choice to allow his family to live well below their means in inadequate housing should not be used against Wife in determining the monthly income she would need to maintain the standard of living she enjoyed during the marriage. The family court should look at all the fruits of the marriage in determining whether alimony is appropriate.

Without alimony, Wife, who has no employment history because she was a homemaker allowing her husband to pursue a career and has considerable less education than Husband; will be required to live substantially below the standard of living Husband will enjoy. *See McMurtrey v. McMurtrey*, 272 S.C. 118, 249 S.E.2d 503 (1978), *Eagerton v. Eagerton*, 265 S.C. 90, 217 S.E.2d 146 (1975) (taking into account the net wealth of the paying spouse); *See also* 27B C.J.S. *Divorce* § 369 (1986) ("Permanent alimony is awarded on considerations of equity and public policy. The responsibility of the court is to provide a just and equitable adjustment of the economic resources of the parties so that they can reconstruct their lives, by attempting to insure that the parties separate on as equal a basis as possible.").

Based on the foregoing, we find the Court of Appeals correctly reversed the family court's decision to deny alimony to Wife. Accordingly, we remand the case to the family court for a determination of alimony.

CONCLUSION

Based on the foregoing reasons, we **REMAND** this case to the family court for a new custody hearing and for a determination of alimony.

MOORE, WALLER and BURNETT, JJ, and Acting Justice Alison Renee Lee, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dirk J. Kitchel, Respondent.

Opinion No. 25372
Heard September 27, 2001 - Filed November 5, 2001

DEFINITE SUSPENSION

Cameron L. Marshall, of Charleston, for respondent.

Attorney General Charles M. Condon and Assistant Attorney General Tracey C. Green, both of Columbia, for the Office of Disciplinary Counsel.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct (the Commission) filed formal charges against Respondent Dirk J. Kitchel. Respondent did not respond by way of answer or motion to the charges. The subpanel granted the Commission's motion to hold respondent in default and deemed respondent's failure to respond to the formal charges an admission of the factual allegations. The subpanel's order notified respondent he could present mitigating evidence at the hearing.

Respondent appeared at the hearing before the subpanel. He admitted he did not timely respond to the two complaints filed against him. Respondent further admitted he did not timely respond to the Notice of Full Investigation.

The subpanel made the following findings of fact.

Matter I

1. In February 1998, Wife retained respondent to handle a no-fault divorce. Although Wife had already prepared the complaint, respondent failed to timely file the divorce petition.

2. Subsequently, Husband filed a complaint against Wife. Respondent did not respond to Wife's attempts to contact him. Consequently, Wife filed a pro se answer to the complaint.

3. The day before the hearing, respondent notified Wife of the hearing, even though respondent received notice of the hearing two weeks earlier. Wife was out-of-state and unable to attend the hearing.

4. Respondent attended the hearing. He did not ensure the property distribution was resolved at the hearing.

5. Although aware personal property had not been delivered from Husband to Wife, respondent did not correct the finding in the final order that all property had been divided to the satisfaction of the parties.

6. Respondent failed to forward a copy of the final divorce decree to Wife.

7. Respondent did not properly respond to Wife's inquiries or

provide her with her file as requested.

Matter II

1. On February 1, 1999, the Court suspended respondent from the practice of law for failure to pay bar dues. On May 4, 1999, the Court suspended respondent from the practice of law for failure to comply with CLE requirements.

2. The Court lifted the suspension for CLE non-compliance in June 1999 but did not lift the suspension for failure to pay bar dues until August 23, 1999. During the time which respondent was suspended for failure to pay bar dues, he represented Wife and other clients.

Matter III

1. Respondent failed to respond to the initial notice of Wife's complaint and to the subsequent letter by disciplinary counsel sent pursuant to In re Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

2. Respondent failed to timely respond to the Notice of Full Investigation. He responded only after contacted by an Attorney to Assist Disciplinary Counsel.

Matter IV

1. Respondent was retained to represent Client to obtain a bond reduction. Respondent appeared on Client's behalf at two bond reduction hearings.

2. Client's Sister (Sister) filed a complaint against respondent in

October 1999.[1]

3. Respondent failed to respond to the initial notice of Sister's complaint and to the subsequent letter by Disciplinary Counsel sent pursuant to In re Treacy, id.

Other Matters

1. On two occasions in 2000 respondent submitted two checks to the CLE Commission. Both checks were returned for insufficient funds.

2. A bank closed an account maintained by respondent because he failed to satisfy the bank's advance of funds in payment of a check drawn on respondent's account.

The subpanel determined respondent committed misconduct in violation of the following: 1) Rule 7(a) (1), RLDE, Rule 413, SCACR, by violating the Rules of Professional Conduct, Rule 407, SCACR; 2) Rule 7(a) (3), RLDE, Rule 413, SCACR, by failing to respond to a lawful demand for a response from a disciplinary authority; 3) Rule 1.1, RPC, Rule 407, SCACR, by failing to provide competent representation; 4) Rule 1.2, RPC, Rule 407, SCACR, by failing to consult with a client and failing to abide by a client's wishes; 5) Rule 1.3, RPC, Rule 407, SCACR, by failing to diligently represent a client; 6) Rule 1.4, RPC, Rule 407, SCACR, by failing to properly communicate with a client; 7) Rule 1.15, RPC, Rule 407, SCACR, by failing to safekeep a client's property; 8) Rule 5.5, RPC, Rule 407, SCACR, by engaging in the unauthorized practice of law; 9) Rule 8.1(b), RPC, Rule 407, SCACR, by failing to respond to a demand for information from a disciplinary authority; and 10) Rule 8.4 (a), RPC, Rule 407, SCACR, by violating the Rules of Professional Conduct.

[1]As noted by disciplinary counsel at the subpanel hearing, there was no evidence of misconduct in the underlying complaint.

The subpanel recommended respondent be suspended from the practice of law for 90 days, participate in a law office management program, and pay the costs of the proceeding. The panel adopted the subpanel's report.

Because respondent failed to answer the formal charges against him, he is deemed to have admitted the factual allegations in the document. Rule 24(a), RLDE, Rule 413, SCACR. Accordingly, the only issue before the Court is the appropriate sanction. Matter of Thornton, 327 S.C. 193, 489 S.E.2d 198 (1997).

In the past, the Court has imposed a range of discipline for similar misconduct. In re Reichmanis, Op. No. 25269 (S.C. Sup. Ct. filed March 26, 2001) (Shearouse Adv. Sh. No. 11 at 55) (neglect of patent applications and failure to respond to disciplinary counsel warranted public reprimand); In re Strait, 343 S.C. 312, 540 S.E.2d 460 (2000) (misconduct including, among others, failing to act diligently, failing to return client telephone calls, failing to inform client of dismissal of case, failing to return client materials upon request, and failing to timely respond to correspondence from disciplinary counsel warranted six month and one day suspension); In re Blackmon, 344 S.C. 83, 543 S.E.2d 559 (2001) (failure to communicate properly with clients on two occasions, neglect to ensure that client received a court order in a timely fashion and failure to properly explain order to client warranted public reprimand); In re Hall, 341 S.C. 98, 533 S.E.2d 588 (2000) (neglect of legal matters, practicing law while under suspension, and failure to respond to disciplinary authority warranted disbarment); In re Meeder, 327 S.C. 169, 488 S.E.2d 875 (1997) (engaging in practice of law while under suspension, coupled with failure to provide competent representation, act with reasonable diligence and promptness in representing client, keep client reasonably informed about status of matter and promptly comply with reasonable requests for information, explain matter to extent reasonably necessary to permit client to make informed decisions regarding representation, or cooperate with disciplinary investigation warranted disbarment).

Under the circumstances of this case, we deem a sixty day suspension from the practice of law the appropriate sanction. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of this Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR (duties following disbarment or suspension). Respondent shall also pay costs of $189.89 associated with this proceeding. Costs shall be remitted to the Office of Disciplinary Counsel within thirty days of the date of this opinion.

In addition, respondent shall participate in a law office management assistance program (LOMAP), substantially similar to the LOMAP previously provided by the South Carolina Bar, and meet the following conditions: 1) within thirty days of his suspension, respondent shall contract with a private attorney to implement the program; 2) respondent shall submit the name of the private attorney to disciplinary counsel and obtain disciplinary counsel's written approval of the selected private attorney; 3) respondent shall participate in the program until the private attorney certifies to disciplinary counsel that respondent has completed the program; 4) respondent is responsible for all costs associated with the program; and 5) failure to complete the program may be an independent basis for imposition of further sanction.

DEFINITE SUSPENSION.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nan Mayer, Cindy Coleman and Joe Holland,

Appellants,

v.

M. S. Bailey & Son, Bankers, now by acquisition and merger, Anchor Financial Corporation, d/b/a Anchor Bank,

Respondent.

Appeal From Laurens County
John W. Kittredge, Circuit Court Judge

Opinion No. 3399
Heard October 1, 2001 - Filed November 5, 2001

AFFIRMED

Robert C. Wilson, Jr., of Greenville, for appellants.

Robert L. Widener and Benjamin E. Nicholson, V, both of McNair Law Firm, of Columbia, for respondent.

PER CURIAM: Nan Mayer, Cindy Coleman, and Joe Holland appeal the trial court's order granting summary judgment to M. S. Bailey & Son, Bankers. We affirm.

FACTS/PROCEDURAL BACKGROUND

In the early 1970s, Joe S. Holland ("Mr. Holland") established his estate plan through the creation of the Joe S. Holland Family Trust and the corresponding execution of his last will and testament. Mr. Holland's estate plan included three trusts, Trust A, the Insurance Trust, and Trust B, for which M. S. Bailey & Son, Bankers ("Bankers") was named trustee.[1] Trust A and the Insurance Trust were designed to pay Mrs. Holland all the income and, in the trustee's discretion, any principal from the trusts necessary for her "medical care, comfortable maintenance, and welfare" during her lifetime. Upon Mrs. Holland's death, subject to her exercising a power of appointment, the remaining principal was to pass to Mr. Holland's three children, the Appellants. Mr. Holland died on November 13, 1988, and was survived by his wife and three children. Trust A had initial assets of $4,432.88 and the Insurance Trust had initial contributions of $126,873.86.[2]

Sometime prior to 1993, Nan Mayer contacted an attorney and the Laurens County Probate Judge regarding the perceived waste of trust assets in the form of distributions to her alcoholic mother. Appellants, however, took no further action to complain of waste or the management of the trusts at that time.

During its tenure as trustee, Bankers sent Mrs. Holland and Appellants quarterly and year end statements.[3] Appellants do not dispute that these statements were forwarded to them. The trial judge found:

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[1] Only Trust A and the Insurance Trust are subjects of this action, Trust B being satisfactorily distributed to Appellants in 1991.

[2] The trial judge considered these trusts together, finding "[a]lthough [Appellants'] Complaint [filed November 5, 1999] references only one trust, it appears that they consider Trust A and the Insurance Trust jointly as one."

[3] These statements are not included in the record. Instead, the information regarding these statements comes from the trial court's order granting summary judgment.

> Each statement received by the [Appellants] detailed the status of each Trust of "Income Cash" and "Principal Cash." Each withdrawal from each trust account was also outlined in the statements. The final statement sent to [Appellants] for Trust A is dated January 31, 1994 and reflects under the "Review of Assets" section a zero balance for "Total Cash" and "Grand Total," a "Total Market Value" of zero, "Income Cash" of zero, and "Principal Cash" of zero. This account was closed by [Bankers] and therefore this trust terminated on January 10, 1994.
>
> Likewise, the Insurance Trust account's final statement dated September 30, 1993 reflects a zero balance of Total Cash, Grand Total, and Total Market Value. It shows zero for the Ending Balance of Income Cash and Principal Cash. This account was closed by [Bankers] and this trust terminated on September 15, 1993.

On November 5, 1995, Nan Mayer sent a letter to Bankers inquiring about the status of the trust accounts. By letter of November 27, 1995, Bankers responded:[4]

> I regret the delay in responding to your letter of November 5, 1995. However, as you might recall, three different trusts were brought into being by your father's death, and it has taken this length of time to retrieve the data on each of these from our archives. In the will of Mr. Holland, two trusts designated Trust "A" and Trust "B" were established. Trust "A" was for the benefit of Mrs. Holland and Trust "B" was for the benefit of Mr. Holland's mother. Trust "B" was to be distributed to you and your brother and sister at the death of your grandmother. This Trust "B" was distributed in this manner and closed October 31, 1991. There was a third trust that became operational at the death of Mr. Holland called an Insurance

[4] The letter is not included in the record on appeal. The text, republished in full, is from the trial judge's order.

> Trust. Both Trust "A" and the Insurance Trust had as their terms that you and your brother and sister were to receive any principal remaining in these trusts at the death of your mother, if she had not directed any different distribution by her last will. The terms, however, further stipulated that the principal of both of these trusts could be used for your "mother's medical care, comfortable maintenance, and welfare". During the period after your father's death, your mother's expenses amounted to more than the income available to her and income from both trusts had to be supplemented by distributions from the principal of both trusts in the manner prescribed in the legal documents setting up the trusts initially. This resulted, over time, in the depletion of all of the assets in these trusts.
>
> Trust "A" established under the will of Mr. Holland was closed January 10, 1994, and the Insurance Trust was closed September 15, 1993. I have enclosed a copy of the final report of each of these trusts which reflect their final expenditures.

Mrs. Holland died February 28, 1997. Thereafter, in February 1998, Appellants filed a complaint against Bankers in the court of common pleas. This action was eventually dismissed without prejudice in October of 1999 for lack of jurisdiction. Appellants next filed the same complaint in the probate court on November 5, 1999, alleging causes of action for: (1) breach of contract in implementing the trusts and estate plan; (2) breach of contract accompanied by a fraudulent act as to Appellants as third-party beneficiaries of the trusts; (3) breach of fiduciary duty to the Appellants as third-party beneficiaries; and (4) violation of the South Carolina Unfair Trade Practices Act.[5]

On December 14, 1999, Bankers filed a motion for summary judgment asserting as a complete defense to Appellants' complaint the statutes of limitation in Title 62 and Title 15 of the South Carolina Code. The trial judge granted summary judgment for Bankers on all causes of action. This appeal followed.

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[5] S.C. Code Ann. §§ 39-5-10 to 39-5-560 (1985 & Supp. 2000).

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, ___ S.C. ___, 548 S.E.2d 868,874 (2001) (citing Bankers Trust of S.C. v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976)). Even if there is no dispute as to evidentiary facts, summary judgment is not appropriate where there is a dispute as to a conclusion to be drawn from those facts and to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). However, 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; Mosteller v. County of Lexington, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999). In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

DISCUSSION

Appellants contend that in their action the general statute of limitations under S.C. Code Ann. § 15-3-530 (Supp. 2000) is preempted by the Probate Code statute of limitations. We agree that actions concerning the administration of trust accounts fall squarely within the Probate Code statute of limitations. See S.C. Code Ann. § 62-1-302(a)(3) (Supp. 2000). Appellants further argue their action was timely filed because, as contingent remaindermen of the trust accounts, they did not have a justiciable interest, and thus no standing to initiate a suit against Bankers until their interests became fully vested upon the death of Mrs. Holland, the life tenant of the trusts. We disagree.

The probate court, "except as otherwise specifically provided. . . has exclusive original jurisdiction over all subject matter related to. . . trusts, inter vivos or testamentary, including the appointment of successor trustees." S.C. Code Ann. § 62-1-302(a)(3) (Supp. 2000). Further, the probate court "has exclusive original jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts . . . . administration and distribution of

trust, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts. . . ." S.C. Code Ann. § 62-7-201(a) (Supp. 2000) (emphasis added). Under the code, an "'interested person' includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate. . . ." S.C. Code Ann. § 62-1-201(20) (1987). A "'beneficiary,' as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent . . ." S.C. Code Ann. § 62-1-201(2) (1987) (emphasis added). Inasmuch as the Probate Code affords contingent remaindermen standing to pursue actions involving "alleged misconduct of a fiduciary, in connection with the creation, administration and depletion of trusts," we hold that as a minimum the Appellants had both standing and justiciable rights that a court of equity could protect. See S.C. Code Ann. §§ 62-7-201(a), 62-1-201(2) & (20) (1987 and Supp. 2000).

The administration of trust accounts is controlled by Article 7 of the Probate Code. See S.C. Code Ann. §§ 62-7-101 through -709 (1987 & Supp. 2000). The code establishes either a one or three year statute of limitations, depending on the extent of disclosure, within which a beneficiary is required to initiate a lawsuit against the trustee for mismanagement of the trust accounts:

> Unless previously barred by adjudication, consent, or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within one year after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after three years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally. . . .

S.C. Code Ann. § 62-7-307 (1987) (emphasis added).

Here, Appellants received a final accounting stating the Insurance Trust was valued at zero and that Bankers considered the trust relationship terminated by letter dated September 30, 1993. Likewise, Appellants received a final accounting and termination statement concerning Trust A by letter dated January 31, 1994. Appellants do not claim they never received these notices; rather, they argue the documents were insufficient to commence the one year statute of limitations period. We disagree.

According to the trial judge's description of these documents, the quarterly and year-end statements "detailed the status of each Trust" and the final statements showed the balance as zero. Generally, a trust can only exist if it has a beneficiary and it is funded. Restatement (Second) of Trusts § 66 (1959). Although a trust does not terminate or lapse merely by reason of the alleged misconduct or violation of the trust by the trustee, see Johnson v. Thornton, 264 S.C. 252, 259, 214 S.E.2d 124, 128 (1975), clearly a trust is deemed terminated for the purpose of calculating the limitations period when the trust is depleted. Therefore, the limitations period for Appellants' action alleging mismanagement of the trust accounts accrued no later than one year after their receipt of the final accountings of the trusts. Appellants, however, failed to commence their action until November 4, 1999.

Moreover, Appellants failed to timely file their action after the receipt of the letter from Bankers in November 1995. This letter clearly satisfies both the one year and three year contingencies under the Probate Code. It explained the depletion of the accounts and that Mrs. Holland's expenses were more than the income of the trusts, thus necessitating an invasion of the principal. This letter expressed the Bank's contrition for its delay after receipt of Nan Mayer's letter of inquiry because the necessary documents had to be retrieved from the archives. Thus, by the November letter, Appellants were given a final accounting of the trusts, and inferentially informed of the availability and location of the trust records for review. Under this provision, Appellants were required to initiate their action no later than the end of November 1998. Nevertheless, they did not file their action in the probate court until November 4, 1999. Therefore, their action was not timely filed.

The Appellants also argue that under the common law of South Carolina,

the Statute of Limitations did not begin to run against them as remaindermen until the death of their mother, inasmuch as they did not possess a justiciable right until that time. They assert that "the gravamen of the causes of action asserted by [them] is founded upon the Bank's alleged misconduct as a fiduciary, in connection with the creation, administration, and depletion of trusts." They then argue that the Probate Code provides the exclusive remedy for resolving such disputes. Having conceded the Probate Code governs this action, they may not now argue the non-expiration of the general statute of limitations under the common law. Moreover, and in any event, upon the death of their mother, the Appellants were no longer contingent remaindermen. We have been furnished no reason why the one year statute of limitations in the Probate Code did not run prior to the institution of Appellants' lawsuit.

Finally, as to Appellants' causes of action for breach of contract and unfair trade practices, the trial court implicitly dismissed them when it granted summary judgment and there has been no appeal from the trial court's order based on that dismissal. See First Union National Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.")

Accordingly, the order of the trial court is

AFFIRMED.

HEARN, C.J., CURETON and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eric L. Young, Sr., Individually, and as Personal Representative of the Estate of Mabellean Young and Eric L. Young, Jr.,

Respondents,

v.

Harvey L. Cooler and South Carolina Farm Bureau Mutual Insurance Company as Underinsured-Motorist-Coverage Insurer,

Defendants,

of whom South Carolina Farm Bureau Mutual Insurance Company as Underinsured-Motorist-Coverage Insurer is

Appellant.

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

Opinion No. 3400
Submitted October 1, 2001 - Filed November 5, 2001

REVERSED

George H. O'Kelley, Jr., of Beaufort; and Robert J. Thomas, of Rogers, Townsend & Thomas, of Columbia, for appellant.

Dragana Davidovic, of Beaufort, for respondents.

HEARN, C.J.: South Carolina Farm Bureau Mutual Insurance Company (Farm Bureau), as the underinsured motorist carrier, appeals a circuit court order enforcing an alleged settlement agreement between itself and Eric L. Young, Sr. and Eric L. Young, Jr. (the Youngs). We reverse.

FACTS

This case arose from a car accident between Harvey L. Cooler and the Youngs. Allstate Insurance Company (Allstate) provided primary liability coverage for Cooler, and Farm Bureau provided the Youngs' underinsured motorist (UIM) coverage.

Cooler's counsel indicated to Farm Bureau in written correspondence and answers to interrogatories that Cooler's applicable policy limits were $15,000/$30,000. The Youngs' attorney also informed Farm Bureau's attorney that Cooler's applicable policy limits were $15,000/$30,000, and that the case could be settled for the Youngs' policy limits because Cooler's liability limits were significantly lower than the Youngs' damages.

On the day before trial, Farm Bureau's attorney informed the Youngs' attorney that Farm Bureau would pay $7,000 for Eric Young, Jr.'s claim and $8,000 for Eric Young, Sr.'s claim ($15,000 total). His letter stated "this would be paid regardless of the outcome of your settlement negotiations or trial" and further stated that he would order the drafts and prepare a UIM release. No evidence in the record indicates that the Youngs' counsel accepted

any perceived offer made by Farm Bureau.

Later that afternoon, Cooler's attorney discovered he was mistaken and that Allstate's coverage limits were $50,000/$100,000 instead of $15,000/$30,000. He informed Farm Bureau's attorney of the mistake, who then contacted the Youngs' attorney and verbally withdrew the $15,000 offer. On the morning of trial, he sent a fax indicating that Farm Bureau withdrew its offer because he was "misinformed and did not have the correct facts" regarding Allstate's coverage limits.

The case proceeded to trial resulting in a jury verdict of $20,000 for Eric Young, Sr. and $15,000 for Eric Young, Jr. The trial judge subsequently granted the Youngs' motion to enforce the alleged settlement between themselves and Farm Bureau. This appeal followed.

LAW/ANALYSIS

Farm Bureau argues the trial judge erred in enforcing the alleged settlement agreement. We agree.

An agreement between counsel affecting the proceedings in an action is not binding unless a consent order or written stipulation is signed by counsel and entered in the record or the agreement is made in open court and noted for the record. Rule 43(k), SCRCP. This rule applies to settlement agreements. Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995). In Ashfort, the court held that the purpose of rules like Rule 43(k) is to prevent disputes concerning the existence and terms of agreements and to relieve the court of the necessity of determining such disputes. Id. at 495, 458 S.E.2d at 535 (quoting 83 C.J.S. Stipulations § 4 (1953)); see also Reed v. Associated Investors of Edisto Island, Inc., 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct. App. 2000).

The requirements of Rule 43(k) were not met here. The record contains no evidence of a consent order, written stipulation, or agreement made

in open court and noted on the record.

The Youngs argue that the letter from Farm Bureau's attorney confirmed the settlement and how it would be executed. We disagree. The letter is more in the nature of an offer or preliminary settlement negotiations than an agreement. In it, Farm Bureau's attorney said that he had been able to convince his client to pay $7,000 for Eric Young, Sr. and $8,000 for Eric Young, Jr. Furthermore, he indicated he would "go ahead and order the drafts and prepare a UIM release." This language indicates that the letter was not intended to be the final written documentation of any agreement, but instead that further paperwork was needed to finalize an agreement.

The trial judge's order references the Youngs' intent to enforce the agreement pursuant to 43(k) and that they intended to be bound regardless of the trial outcome. However, even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met. In Widewater Square Associates v. Opening Break of America, Inc., 319 S.C. 243, 344, 460 S.E.2d 396, 396 (1995), the parties told the judge they reached a settlement and the judge signed a form order indicating a settlement had been reached. On appeal, the court held, "Even if we were to find that the form order at issue here reflected a settlement, such settlement would not be enforceable since it is neither admitted by respondents nor has it been executed." Id. at 245, 460 S.E.2d at 397. Here, Farm Bureau objected to the Youngs' motion to enforce the purported settlement. Thus, the trial judge erred in granting the motion.

We need not reach the question of whether the agreement is subject to rescission based on mutual mistake because we do not find an enforceable agreement. Contracts may be rescinded based upon mutual mistake of fact upon which the contract is based. Truck South, Inc. v. Patel, 339 S.C. 40, 50, 528 S.E.2d 424, 429 (2000). The mistake must be common to both parties and cause each to do what neither intended. Id.

In the present case, there was a mutual mistake because both parties

believed the primary carrier had limits of $15,000/$30,000. The trial judge found in his order that "all parties were laboring under the mistaken belief that the Defendant's primary coverage was only $15,000/$30,000." Furthermore, both parties acted based on these limits. The Youngs' attorney indicated this in a letter to Farm Bureau's attorney stating: "[t]aking into consideration that the liability policy limit is so low, the above-referenced case can be settled with the Youngs' underinsurance carrier for the Young's policy limit." Moreover, the UIM carrier's withdrawal of its offer on learning the correct policy limits shows it based its offer on the incorrect information. Thus, if an agreement had existed, we believe it would have been subject to recission.

Accordingly, the trial court's enforcement of the settlement agreement is

REVERSED.

CURETON and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alexandra McPherson Eubank,

Respondent,

v.

Perry Huston Eubank, II,

Appellant.

Appeal From Charleston County
Jack A. Landis, Family Court Judge

Opinion No. 3401
Heard October 2, 2001 - Filed November 5, 2001

REVERSED AND REMANDED

Robert N. Rosen and Donald B. Clark, both of Rosen, Rosen & Hagood, of Charleston, for appellant.

Cynthia B. Castengera, of Columbia, for respondent.

HEARN, C.J.: Perry Huston Eubank, II (Husband) appeals from a family court order denying his request to modify or terminate his alimony obligation to Alexandra McPherson Eubank (Wife) because of changed circumstances. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

The parties divorced on November 12, 1991. In its decree, the family court approved and adopted the parties' separation agreement, including the following language:

> [T]he Wife's present support needs are $1,100 per month from the Husband. . . .[T]he parties agree that for six years following the entering into of this agreement, the Wife's alimony shall be paid by the Husband's assignment of his one-half interest in two notes payable to the parties from Precision Tune. . . . Beginning January 1, 1998, if the wife is still living and has not remarried the Husband shall resume the direct payment to the Wife of alimony in the amount of $1,100 per month. . . . **The parties further agree that should Precision Tune ever default on its payment of these notes or due to any other change of circumstances, either party may petition the Court for modification.**

(emphasis added).

Precision Tune made payments on the notes for approximately eighteen months and then defaulted in April 1993. Wife contacted Husband about the default, and he discovered the franchise was bankrupt. Wife then filed a "Motion for Clarification of Terms of Spousal Support in Final Order and Decree of Divorce." In her motion and supporting affidavit, Wife alleged she

had not received support payments since the default and asked the family court to order Husband to pay her $1,100 per month in alimony.

In December 1995, the family court heard Wife's motion. Neither party attended the hearing, but both were represented by counsel. The family court issued an Amended Temporary Order on April 11, 1996, providing in its entirety as follows:

> This matter came before me on post trial motion. Attorneys for the parties presented an agreement when the case was called. I have reviewed the agreement and find it fair to all involved.
>
> It is, therefore,
>
> Ordered that beginning January 1, 1996, the [Husband] shall pay the [Wife] the sum of $600.00 per month in spousal support on the first of each month. This sum shall be paid without prejudice to either parties [sic]. It is further
>
> Ordered that the parties shall attempt to negotiate a settlement of all of the issues which need resolution within thirty days of the issuance of this order. If an agreement is not reached within that time period, either party may, by summons and complaint, initiate an action to resolve all remaining issues, including but not limited to, the issue of how much, if any, spousal support is past due to [Wife].
>
> This Amended Order issues because of a clerical error in the prior Temporary Order.

In 1999, Wife commenced this action seeking an order holding Husband in contempt for failure to make alimony payments and an award of attorney fees and costs.[1] Husband answered and counterclaimed for a reduction or termination of his alimony obligation, prospectively and retrospectively, based on changed circumstances. Specifically, Husband asserts he is entitled to relief from his alimony obligation due to substantial inheritances received by Wife after the Final Order and Amended Temporary order were issued and his own diminished financial circumstances.

The family court found Husband in contempt for failure to pay alimony, established his alimony arrearage at $18,277.24, and awarded Wife $5,000 in attorney fees and costs. The family court further found husband's alimony obligation to be $600 per month as set in the Amended Temporary Order and declined to modify or terminate this amount. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App. 1999). The question of whether to increase or decrease support due to changed circumstances is within the sound discretion of the family court and such conclusions will not be disturbed on appeal absent an abuse of discretion. Brunner v. Brunner, 296 S.C. 60, 64, 370 S.E.2d 614, 617 (Ct. App. 1988). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

[1] Wife also alleged husband failed to make court ordered child support payments; however, the court's ultimate decision regarding Husband's child support arrearage and prospective obligation is not at issue in this appeal.

DISCUSSION

Husband argues the family court erred in concluding that a downward modification or termination of his alimony obligation is unwarranted. We agree.

An award of periodic alimony may be modified pursuant to South Carolina Code Annotated section 20-3-170 (1985). That statute provides:

> Whenever [a spouse] . . . has been required to make his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments. . . .

To justify modification or termination of an alimony award, the changes in circumstances must be substantial or material. Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997).

Here, Wife's net worth greatly exceeded Husband's at the time of the final hearing due to post-divorce inheritances. On the deaths of her mother in 1994 and her aunt in 1996, Wife received substantial assets. Wife testified she received a $100,000 distribution from her mother's estate "within a month or so after her death." Later, Wife received additional disbursements, including a $350,000 distribution from her aunt's estate in 1996. The parties stipulated that Wife's estimated net worth at the time of trial was approximately $1.3 million, including: (1) a home with an estimated fair market value of $700,000; (2) securities valued at $329,800; (3) "other property" valued at $163,000; and (4) $61,000 in savings. According to her financial declaration, Wife receives an average monthly income ranging from $2,196.78 to $2,496.00 in dividends

and interest and rents of $300. At the time of trial, Husband's assets totaled approximately $13,500, and he earned an annual income of $60,000.

In determining Wife's post-divorce inheritances did not entitle Husband to a reduction or termination of his alimony obligation, the family court reasoned that at the time of the Amended Temporary Order, "[Wife] had already received the substantial real property she now owns and had already received personal property in cash from her mother. Husband was aware at the time of the 1996 agreement of the majority of the substantial inheritance now possessed by [Wife]."

Our own review of the record and applicable case law convinces us the family court erred in limiting its consideration of changed circumstances to events occurring after 1996.[2] The Amended Temporary Order was simply that,

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[2] Wife asserts Husband failed to properly preserve this issue through a post-trial motion made pursuant to Rule 59(e), SCRCP. We disagree. Both parties entered evidence at trial, without objection, regarding their respective financial circumstances both before and after the 1996 order, and the family court made specific findings regarding the effect of the order on the viability of Husband's counterclaim. Thus, the issue was raised to and ruled on by the family court. The "raised to and ruled on" rule of error preservation requires only a ruling, not necessarily a favorable one. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.").

Wife further asserts the issue is not properly presented on appeal because it is not set forth in the statement of the issues on appeal. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Husband's statement of the issues on appeal includes the following language, "Wife's Inheritance of Over One Million Dollars Constituted A Substantial and Material Change of Circumstances Warranting The Termination Of Husband's Alimony

a temporary agreement reached in contemplation of further negotiations and/or judicial proceedings. Because the parties did not intend for the 1996 order to serve as a final adjudication of their rights and responsibilities, we hold the family court erred in treating it as such for purposes of determining whether Husband was entitled to modification or termination of his support obligation. We believe the family court should have considered changes in the parties' circumstances occurring after the 1991 divorce decree.

Wife argues Husband is not entitled to a reduction or termination of his alimony obligation because he knew that her family had substantial assets and she would eventually receive an inheritance. We disagree. "Generally, changes in circumstances within the contemplation of the parties at the time the decree was entered do not provide a basis for modifying either an alimony allowance or a child support award." Calvert v. Calvert, 287 S.C. 130, 139, 336 S.E.2d 884, 889 (Ct. App. 1985). However, in applying this general rule, the family court should look not only at whether the parties contemplated the change, but also "most importantly whether the amount of alimony in the original decree reflects the expectation of that future occurrence." Sharps v. Sharps, 342 S.C. 71, 78, 535 S.E.2d 913, 917 (2000).

Here, even if Husband knew before the parties' divorce that Wife would likely receive an inheritance on the deaths of her mother and aunt, the parties could not have ascertained the amount of Wife's inheritances or when she would receive them. The parties' settlement agreement as approved by the family court clearly states that the alimony award is modifiable. The only mention of family property is contained in a separate paragraph in which the parties waive all interest in "trusts established by each parties' [sic] family." Here, Husband has never claimed an interest in Wife's family trusts, but has rather asserted that Wife's inheritance has resulted in a change of circumstances sufficient to merit a reconsideration of her alimony award. Accordingly, we find that the original decree does not reflect the expectation of Wife's inheritance and

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Obligation." We hold this statement when read in conjunction with Husband's argument adequately raised the issue.

that the family court should have considered it in making his determination on Husband's counterclaim for reduction or termination of alimony.

We further agree with Husband that the family court erred in finding *sua sponte* that Husband was not entitled to a modification of his alimony obligation due to the doctrine of unclean hands.[3] The family court found that although Husband's income had decreased, Husband changed jobs several times, remarried, and could invest $433.33 per month into his retirement account. Based on these findings, the family court concluded Husband's precarious financial status was due to his own actions and "[i]t would be inequitable to grant [modification of Husband's alimony obligation] inasmuch as [Husband] comes before the court with unclean hands."

In our view, this finding is dicta and not an additional sustaining ground for the court's decision as urged by Wife. Moreover, we find the family court's legal reasoning unsound on this issue. The relevant inquiry before the court was whether there had been a material change in either party's financial circumstances. Even if Husband's own actions or inactions resulted in his financial misfortune, section 20-3-170 requires consideration of changes in both parties' economic circumstances. Thus, the family court was statutorily obliged to consider Wife's changed circumstances as well. Accordingly, we reverse and remand this matter for the family court to determine any modification or termination of Husband's alimony obligation.[4]

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[3] Wife at no point raised this equitable defense.

[4] Husband also asserts the family court should have considered Wife's earning capacity as a licensed professional counselor in determining her need for continued support. Because we find the family court erred in failing to modify or terminate Husband's support obligation, we need not address whether this particular factor compounded the error. On remand, the family court should consider Wife's earning capacity in assessing the parties' changed circumstances.

Finally, Husband asserts the family court erred in failing to award him attorney fees and costs on his counterclaim.[5] In light of our disposition on the alimony issue, we remand this issue for reconsideration. See Sexton v. Sexton, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney fees for reconsideration where the substantive results achieved by trial counsel were reversed on appeal).[6]

For the above reasons, we reverse the family court's order and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CURETON and HOWARD, JJ., concur.

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[5] With respect to Wife's contention this argument is not preserved, we find Husband raised this issue in his answer and at the hearing and the trial judge ruled against him. Thus, no Rule 59(e), SCRCP, motion was necessary to preserve the issue.

[6] The award of attorney fees to Wife in the contempt action was not appealed. It is therefore the law of the case and must be affirmed. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (holding an unchallenged ruling right or wrong is the law of the case and requires affirmance).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Donald Ray Wimbush,

Appellant.

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

Opinion No. 3402
Submitted October 1, 2001 - Filed November 5, 2001

AFFIRMED

Chief Attorney Daniel T. Stacey, of S.C. Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Assistant Attorney General S. Creighton Waters; and Solicitor C. Kelly Jackson, of Sumter, for Respondent.

CURETON, J.: Donald Ray Wimbush was convicted of two counts of murder and one count of possession of a weapon during the commission of a violent crime. Wimbush appeals, arguing the trial court erred in failing to grant a directed verdict and in allowing the testimony of a State's witness. We affirm.[1]

FACTS

This is a circumstantial evidence case. The evidence, viewed in the light most favorable to the State, is as follows. The two victims, Elijah Hunt and Kevin White, were found shot to death at the T&T nightclub by a passerby around noon on November 17, 1995. When the police arrived at the scene they found Hunt on the floor near a door entering the pool table area and Kevin White lying on the floor near the pool table. Police recovered ten beer cans in the pool table area. Seven empty beer cans were found on the table near White, two opened beer cans were on a chair in the pool table area next to White, and one unopened can was on the floor. A black Nike cap was found lying on top of White's left arm. A Dallas Cowboys blue knit cap was found near White's body. The door to the premises was unlocked, but the keys were found at the scene.

A SLED expert in fingerprint analysis tested forty-four latent fingerprints taken from the ten beer cans and found six prints matched the appellant Wimbush and three matched the victim Hunt. A ballistics expert found that Hunt was shot with a .357 magnum or a .38 caliber handgun. The bullet fragments taken from White were unsuitable for identification.

Peggy Nelson, Hunt's niece, stated she ran the T&T nightclub and that she closed it between 8:00 p.m. and 8:30 p.m. on November 16, 1995 because they

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

had no customers. She lived five doors down from the club on Pelfrey Road, and Hunt had been living with her for about a month. Nelson stated that before she left the club, she locked the doors and cleaned up, throwing away all the beer cans she could find. Nelson stated she was certain she had picked up every can that was in plain view.

Nelson testified the last time she saw her uncle alive was when he was standing in her kitchen sometime between 12:30 a.m. and 1:30 a.m. in the early morning hours of November 17th. Nelson stated Hunt had access to the keys to the T&T nightclub, which were found at the scene, because he would sometimes go down to the club in the afternoon to get a fire started in order to warm the building before she arrived. She noted Wimbush had previously been to the club, but she could not recall how often.

Daphne Nelson called Hunt, her uncle, at her mother's (Nelson's) house and spoke to him for about five minutes around 12:30 a.m. on November 17th. Hunt was to bring her daughter's clothes over to her home, but Hunt never made it to her house.

Wadell Mack stated he saw the victim Kevin White with Wimbush around 11:00 p.m. on November 16, 1995, when White and Wimbush were standing in the road in front of his home. Wadell confirmed he sold Wimbush a .357 magnum handgun for $100 in April of 1995.

Travis Mack, whose sister was dating White, testified he saw Wimbush and White together, on the night of November 16, 1995, while they were all standing around a fire in his yard, and he noticed Wimbush was carrying a .357 handgun. According to Mack, the next time he saw Wimbush was around 3:30 a.m. on the morning of November 17th when Wimbush came over and asked White to go with him to get a drink. Mack stated White refused at first, telling Wimbush, "I'm not f***ing with you." Wimbush left the room and came back, telling White he had some liquor. White then dressed and left with Wimbush. Before he left, White told Mack that he "was going to Elijah's [Hunt's] house to get a beer" and that he would "be right back." However, White never returned home, and Mack never saw Wimbush again.

Mack stated when Wimbush left he was wearing blue jeans, a black Nike cap, and a FILA jacket. Mack positively identified the hat retrieved at the scene as being the one Wimbush was wearing when he left with White. Mack stated White was wearing a Dallas Cowboys blue knit cap with a star on the front.

Around 6:00 a.m. on November 17th, Wimbush arrived at Victoria Delay's house. Delay had met Wimbush before but they were not friends. Delay testified that when she opened the door, "He [Wimbush] said he didn't want to hurt anybody. He just needed a ride home, because his girlfriend had left him back there in the projects." Delay told Wimbush to wait in her car while she got ready for work, and he came back to her door twice, at one point asking her if she had any company at her home. When she came out to leave, Wimbush was gone. As she drove down the street, Delay saw Wimbush walking and gave him a ride to his girlfriend's house. Wimbush told Delay that he needed to go home to get some sleep. Wadell Mack, who left for work each morning at 6:30 a.m., confirmed that he saw Wimbush walking along the road around 6:35 a.m. on November 17, 1995.

Mary Mack, who at the time of the murders had been Wimbush's girlfriend for a year and a half, testified that Wimbush arrived at her home around 6:45 a.m. on November 17th. Mary had given Wimbush a ride out to "the country," as she called it, the evening before. Wimbush told Mary that he had just talked to his mother and that he needed a ride to the bus station so he could go to New York because his sister was sick. Mary dropped Wimbush off at the bus station but did not see him enter. Wimbush told her he would be back the following Thursday in order to go to a wedding they had planned to attend together on Saturday. However, Wimbush did not return, and Mary never heard from him again until nearly a year later when he was in the Sumter County Jail. Notably, Wimbush's mother and the purportedly sick sister did attend the wedding on Saturday as scheduled.

After the State rested, Wimbush moved for a directed verdict. The trial court denied the motion, finding there was sufficient circumstantial evidence

presented to create a question of fact for the jury as to Wimbush's guilt.[2] The jury convicted Wimbush of two counts of murder and one count of possession of a weapon during the commission of a violent crime. He received concurrent sentences of life in prison on each murder conviction and five years for possession of a weapon. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict Motion

Wimbush first contends the trial court erred in denying his motion for a directed verdict because the State failed to present substantial circumstantial evidence of his guilt. We disagree.

In State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001), our supreme court recently reiterated the standard for reviewing the denial of a directed verdict motion:

> 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 guilt 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).

Id. at 97, 544 S.E.2d at 36.

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[2] Wimbush did not testify and presented no evidence at trial.

Viewing the evidence in the light most favorable to the State, we find the State presented substantial circumstantial evidence to survive a motion for directed verdict. Witnesses testified that Wimbush had purchased a .357 handgun and that he had this gun with him shortly before the murders. The police confirmed that at least one of the victims was shot with a .357 handgun or a .38 pistol. Further, Wimbush was last seen with White around 3:30 a.m. the morning of November 17th, when he reluctantly left with Wimbush to get some beer from Hunt. The door to the T&T nightclub was unlocked, not broken, and Hunt was known to have access to the keys, which were also found at the scene.

There was also physical evidence placing Wimbush at the scene of the murders because his fingerprints were found on several of the beer cans located in open view near the bodies. In addition, a black Nike cap lying on top of White's body was positively identified as belonging to Wimbush and as being the hat Wimbush was wearing when he left with White shortly before the murders.

There were also inconsistent statements and evidence of flight from which inferences of guilty knowledge or intent may be drawn. Wimbush asked someone he hardly knew, Delay, for a ride around 6:00 a.m., saying he wasn't there to "hurt" anybody, and telling her he wanted to go home to sleep. However, his subsequent statement to his girlfriend only minutes later was that he had just spoken to his mother and had to leave town immediately. Further, his action in immediately leaving town the morning of the murders without contacting his girlfriend until nearly a year later is inconsistent with his statement that he would be returning the following week to attend a wedding. Cf., e.g., State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (reversing the Court of Appeals and finding a directed verdict was properly denied by the trial court in a case involving possession of crack cocaine with intent to distribute, stating although no drugs were found in the defendant's possession when he was caught, evidence of the defendant's flight was "at least some evidence of guilt" that should have been considered by the reviewing court); State v. Scott, 330 S.C. 125, 131, 497 S.E.2d 735, 738 (Ct. App. 1998) (holding the defendant's failure to return to his employer's premises after a

routine audit "is, in essence, evidence of flight, which can be considered evidence of guilty knowledge and intent").

We find the evidence, though circumstantial, was sufficient to present a question of fact for the jury's determination as to Wimbush's guilt. Accordingly, we find the trial court correctly denied Wimbush's motion for a directed verdict.

II. Testimony of State's Witness

Wimbush next asserts he is entitled to a reversal because the trial court allowed a State's witness to testify that he saw Wimbush and one of the victims selling drugs prior to the murders. We disagree.

The first witness at trial, Wadell Mack, testified that he last saw Wimbush with Kevin White when they were standing in the street in front of his (Wadell's) house selling drugs around 11:00 p.m. on November 16, 1995. Defense counsel objected to Mack's statement that Wimbush was selling drugs, stating, "I don't know where this is going." Upon questioning, counsel stated, "[M]y client is not accused of selling drugs." When the trial court again asked for the specific grounds for his objection, counsel did not offer anything further, and the court overruled the objection. After this brief reference, the questioning of the witness proceeded with no further testimony on this point, nor further objection from the defense.

On appeal, Wimbush contends the trial court committed reversible error in allowing the testimony that he was selling drugs. Wimbush asserts "[t]he evidence was inadmissible under any theory permitting character evidence pursuant to Rule 404, SCRE [and] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)." We find this issue is not preserved for our review as Wimbush did not articulate the grounds for objection that he now argues on appeal. State v. Gardner, 332 S.C. 389, 393-94, 505 S.E.2d 338, 340 (1998) (precluding issued from appellate review where appellant objected but failed to articulate any meaningful grounds for the trial court's consideration); State v. Hamilton, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) ("In order to preserve for

review an alleged error, the objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.").

Although Wimbush contends, citing Rule 103(a)(1), SCRE, his objection was apparent from the context so that no specific objection was necessary, we do not agree, observing the trial court was not aware of the specific grounds for his objection.[3] Despite repeated requests by the trial judge, defense counsel

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[3] Q. [ ] Let me ask you this, on November 16th, did you see him [Wimbush]?
A. Yeah, about 11 o'clock.
Q. At night or during the day?
A. I saw him a little bit during the day. And the last time I saw him was about 11 o'clock that night.
Q. 11 o'clock that night. Tell us where you saw him, who he was with, and what he was doing.
A. Well to him it's a day, they were selling drugs. And they stayed at the road for cars to come through. And they be out there all time of night. And my wife is---

MR. SPIGNER: Your Honor, I object. I don't know where this is going.

THE COURT: What's the objection? Just give me the grounds.

MR. SPIGNER: Your Honor, the defendant hasn't----

THE COURT: Just give me grounds, Mr. Spigner.

MR. SPIGNER: He's mentioned him selling drugs. I mean, my client is not accused of selling drugs.

THE COURT: You still haven't given me the grounds for your objection, Mr. Spigner.

MR. SPIGNER: Your Honor, I mean . . . .

THE COURT: Objection is overruled. Proceed. [Emphasis added.]

failed to mention the words 'prior bad acts', 'Rule 404', 'State v. Lyle', or 'character evidence'. Further, Wimbush makes no argument on appeal that defense counsel was prohibited from making an appropriate objection. Rather, the transcript indicates defense counsel's statements trailed off and he failed to answer the trial court's final inquiry regarding the grounds for his objection.[4] Accordingly, we find no ground for reversal in this regard.

CONCLUSION

For the foregoing reasons, the conviction and sentence of Wimbush is

AFFIRMED.

HEARN, C.J. and HOWARD, J., concur.

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[4] The Court Reporter Manual published in 2000 by South Carolina Court Administration contains provisions governing the body of the transcript of record. This section instructs court reporters to indicate a trial participant's change of thought and start of a new sentence with two hyphens (--), and the interruption of a participant with three hyphens (---). In contrast, it states, "If a participant does not complete a sentence but was not interrupted, this should be indicated by three periods (. . .)." Court Reporter Manual, State of South Carolina § XV(D)(5) at 25 (2000)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James C. Christy,

Appellant/Respondent,

v.

Vida L. Christy,

Respondent/Appellant.

Appeal From Charleston County
John T. Black, Family Court Judge
F.P. Segars-Andrews, Family Court Judge
H.T. Abbott, III, Family Court Judge
Alvin C. Biggs, Family Court Judge

Opinion No. 3403
Heard October 4, 2001 - Filed November 5, 2001

VACATED AND REMANDED

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, of Charleston, for appellant/respondent.

Robert N. Rosen, of Rosen, Rosen & Hagood, of

Charleston, for respondent/appellant.

CURETON, J.: This domestic cross-appeal concerns the ability of a successor judge to sign a final order when a different judge presided at trial but became disabled before filing findings of fact and conclusions of law. See Rule 63, SCRCP. We vacate the orders on appeal and remand the action to the family court.

Procedural Background

James Christy (the husband) and Vida Christy (the wife) were divorced by order of the family court dated August 2, 1989. Pursuant to the divorce decree, the wife was awarded $2,500 per month in alimony. On appeal, the alimony was reduced by this court to $1,750 per month terminable on the death or remarriage of the wife. Later, these parties again appeared before this court to litigate the effective date for the reduction of the alimony.

The husband filed this third action in June of 1997 requesting termination or reduction of alimony based on the wife's alleged "long-term, monogamous relationship with a paramour, which is tantamount to a common law marriage" and changes in his own financial circumstances. The wife answered and counterclaimed seeking an increase in alimony.

The Honorable Tommy B. Edwards bifurcated the issues. The issue of termination of alimony based on the wife's alleged common law marriage was tried first on September 16, 17, 25, 26, and November 4 of 1996 by the Honorable John T. Black. At the conclusion of the trial, Judge Black made no oral factual or legal findings on the record. However, according to Mr. Rosen, the wife's attorney, Judge Black stated in a side bar conference that he was not going to terminate the wife's alimony.

On July 3, 1997, Mr. Rosen sent Judge Black a proposed order containing findings of fact and conclusions of law. A copy of the proposed order was sent to the husband's counsel, Mr. Goldstein. Mr. Goldstein objected in writing to certain portions of the proposed order in a letter dated July 15, 1997. Mr. Rosen's legal assistant made Mr. Goldstein's requested changes pursuant to

Judge Black's telephonic instructions to the assistant. On August 26, 1997, the assistant sent the revised order to Judge Black and Mr. Goldstein. Months thereafter, Judge Black suffered a stroke without having signed any order.

The husband filed a notice of appeal from the unsigned order. This court dismissed the action because there was no signed order. The husband filed a petition for a writ of mandamus in the supreme court requesting the court take the action in its original jurisdiction. The supreme court denied the petition.

The Honorable F.P. Segars-Andrews succeeded Judge Black as the presiding judge in this action. The husband filed a motion for a new trial pursuant to Rule 63, SCRCP. On January 14, 1998, Judge Segars-Andrews denied the motion finding Judge Black made:

> findings of fact and conclusions of law in this case. Therefore, Rule 63 applies. While Judge Black's findings of fact and conclusions of law were not "filed," as Rule 63 literally requires, no case presented to the Court by either party interpreting Rule 63 requires such a filing or even defines what constitutes filing in this context.

Judge Segars-Andrews also found the husband should be equitably estopped from obtaining a new trial due to his request to the clerk of court for a trial date for the second portion of the bifurcated trial. Judge Segars-Andrews further concluded "a review of the transcript is not necessary in this matter and . . . the order may be signed by the successor judge without any further proceedings." Also on January 14, 1998, Judge Segars-Andrews signed the wife's original proposed order, without the husband's requested changes, refusing to terminate alimony.[1] On June 15, 1998, the wife filed a motion, pursuant to Rule 60(a), SCRCP, to correct clerical errors on the ground the wrong final order was submitted to Judge Segars-Andrews. The husband objected on the ground the

[1] The order also included the issues surrounding Judge Black's disability.

motion was filed in an attempt "to make the final order less assailable on appeal." Judge Segars-Andrews denied the motion.

The second portion of the case was heard by the Honorable Alvin C. Biggs on January 14, 15, and February 10, 1998. On April 6, 1998, Judge Biggs dismissed the husband's request for termination or modification of alimony based on a financial change of circumstances. Judge Biggs also dismissed the wife's counterclaim for an increase in alimony and awarded the wife costs. In a separate order dated June 30, 1998, Judge Biggs awarded the wife attorney fees and costs totaling $100,761.44.

Both parties appealed. The husband filed a motion in this court to remand to reconstruct the record or, in the alternative, for a new trial. As to the motion to remand, the husband argued that because the court reporter's tapes for one of the dates of trial were lost, the action should be remanded for reconstruction of the record or to take new testimony. As to the motion for a new trial, the husband cited Rule 63 and argued "the conduct of the case has been plagued with severe irregularities" entitling him to a new trial.[2] By order dated November 30, 1998, this court remanded for the sole purpose of supplying the missing testimony. Both parties appeal.

Law/Analysis

The husband argues Judge Segars-Andrews erred in failing to order a new trial and in signing the proposed order under Rule 63, SCRCP. Rule 63 provides:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court

[2] The husband argues on appeal that either the original proposed order was unsolicited or it was the result of ex parte communications between Judge Black and Mr. Rosen.

> under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

This rule is identical to the pre-1991 federal Rule 63 except it makes allowances for our circuit court system.[3] It supplements South Carolina Code Section 14-5-370, which permits the judge of an adjoining circuit to act if there is a circuit without a resident judge, and no other special or regular judge is presiding therein, and applies to South Carolina family courts. S.C. Code Ann. § 14-5-370 (1977); Rule 2, SCRFC; Rule 81, SCRCP.

There are no reported South Carolina cases applying Rule 63, SCRCP, under facts similar to those presented in this case. Cf. Charleston County Dep't of Soc. Servs. v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995)

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[3] Federal Rule 63 was amended in 1991. The revised federal Rule 63, unlike the prior rule, is not limited to cases in which a judge's disability manifests itself after completion of the trial or hearing. All that is required is that the trial or hearing shall have commenced. Case law interpreted the pre-1991 Rule 63 to limit a successor judge to preside only after the trial was completed. The amendment expanded Rule 63 to allow a successor judge to complete an incomplete trial. See Canseco v. United States, 97 F.3d 1224, 1225-26 (9th Cir. 1996) (discussing the 1991 amendment). The revised rule also permits a successor judge to proceed with a trial "upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." Rule 63, Fed. R. Civ. P. In a hearing without a jury, the revised rule provides that the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed . . . . The successor judge may also recall any other witness." Id.

(discussing the authority of a successor judge to rule on a motion for reconsideration where the previous trial judge signed and filed an order). Accordingly, we look to other jurisdictions and the federal courts for interpretation of the pre-1991 federal rule. See Gardner v. Newsome Chevrolet-Buick, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.").

Rule 63 does not explicitly address instances where, as here, the presiding judge becomes disabled before he files his findings of fact and conclusions of law. See H. Lightsey, Jr. & J. Flanagan, South Carolina Civil Procedure 499 (2d ed. 1996) ("The disability of a judge prior to [accepting a verdict or filing findings of fact and conclusions of law] is not governed by the rule. . . ."). Federal courts, however, have read into the pre-1991 Rule 63 the negative inference that if the presiding judge in a civil case dies or becomes disabled before the rendering of a verdict or before the judge issues his findings of fact and conclusions of law, a successor judge must retry the case. See Townsend v. Gray Line Bus Co., 767 F.2d 11, 17-18 (1st Cir. 1985); Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 713 (6th Cir. 1977); Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1325-26 (11th Cir. 1988). "The federal cases which have been found construing federal Rule 63 . . . are unanimous in their holding that a trial de novo is required where the trial judge dies [or becomes disabled] before signing findings and conclusions or a jury verdict [is] returned." Estate of Ed Cassity, 656 P.2d 1023, 1024 (Utah 1982).

In Girard Trust Bank v. Easton, the North Carolina Court of Appeals interpreted North Carolina's Rule 63.[4] Girard, 182 S.E.2d 645, 646 (N.C. Ct. App. 1971). The trial judge in Girard issued an oral ruling in favor of the plaintiff at the conclusion of the bench trial and directed the plaintiff's counsel to submit a proposed order containing appropriate findings of fact and conclusions of law. The judge then died without having signed the proposed order. The court concluded the oral ruling and directive did not constitute

[4] The rule considered by the North Carolina Court of Appeals is identical to South Carolina's rule.

sufficient findings of fact to proceed under Rule 63. Id. at 645-46.

Even if we construe Judge Black's directive to draft a proposed order as his findings of fact and conclusions of law, these findings and conclusions were neither signed nor filed before the onset of his disability, as required by Rule 63. Judge Black remained free to adopt or reject any or all of the findings of fact and conclusions of law contained in the proposed order. See Bowman v. Richland Mem'l Hosp., 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) ("An order is not final until it is written and entered by the clerk of court. Until an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly.") (citations omitted). Thus, Judge Black did not, prior to his disability, make findings of fact and conclusions of law sufficient to allow Judge Segars-Andrews to conclude the case by simply signing a proposed order that he had instructed be modified.

Judge Segars-Andrews relied in part on Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82 (5th Cir. 1989) and The Del-Mar-Va, 56 F. Supp. 743 (D. Va. 1944). The successor judges in these cases did not strictly comply with the requirement in Rule 63 that findings of fact and conclusions of law be filed by the presiding judges prior to their disabilities. We find these cases distinguishable from the case at hand.

In Rex Oil, the case was tried before a judge of the United States District Court for the Southern District of Texas over two days in April, 1987. Rex Oil, 873 F.2d at 83. The judge "gave a fairly extensive oral exposition of his perceptions about the case[,] . . . stated his intention to enter final judgment in favor of Rex/Empire[, and] . . . related his basic reasoning for entering such a judgment." Id. at 85. The judge also indicated he intended to file extensive findings and conclusions. Eight months later, before a final judgment was entered, the judge passed away. A successor judge entered judgment pursuant to Rule 63. Id.

In affirming the successor judge's conclusion that a new trial was not required under Rule 63, the Fifth Circuit Court of Appeals agreed that a

successor judge acquires discretionary authority to grant or deny a new trial only after a final verdict is returned or findings of fact or conclusions of law are filed. The court concluded, however, that the judge's oral pronouncements, on the record, constituted sufficient findings of fact and conclusions of law. Id. at 87-88.

In The Del-Mar-Va, Judge Way held a three-day trial in July of 1943. At the conclusion of the evidence and oral arguments, Judge Way, on the record, orally decided the fault of the parties. He then requested the parties[5] brief the issue of a defense raised by one of the parties. Briefs were filed and on September 14, 1943, Judge Way, supplementing his oral decision, filed an "informal memorandum" determining the ultimate fault of the parties and holding each liable for half of the damages. On September 16, 1943, counsel for The Del-Mar-Va submitted proposed findings of fact and conclusions of law in accordance with Judge Way's oral rulings. At the request of the United States, Judge Way decided to allow another witness to testify and the parties to reargue the issues. The Del-Mar-Va, 56 F. Supp. at 744-47.

Counsel for The Del-Mar-Va died prior to the new hearing. Judge Way restated his decision to permit new testimony. The Del-Mar-Va submitted a memorandum opposing entry of the proposed order. Judge Way died soon thereafter without considering the memo or signing the proposed order. Id. at 747.

The successor judge first concluded the United States was not entitled, on the merits, to reopen the case to add the omitted witness's testimony, and that in any event, the testimony would merely be cumulative evidence. Thus, he denied the motion to reopen the case. Id. at 749-51. He then concluded Judge Way's informal memorandum "embodied specific findings on all the material facts in the cases, and set out adequate conclusions on all the important questions of law involved therein." Id. at 748. The successor judge then designated Judge Way's informal findings of fact and conclusions of law as his

[5] The Del-Mar-Va and the United States.

own. Id. at 751.

In both Rex Oil and The Del-Mar-Va, although not filed, extensive findings of fact and conclusions of law were made on the record. In this action, although Judge Black allegedly indicated in a side-bar conference that he would not terminate the wife's alimony, he made no findings of fact to support the decision. Thus, we find reliance on Rex Oil and The Del-Mar-Va is misplaced.

Two exceptions have developed to the general operation of Rule 63. First, if all parties consent, a successor judge may make findings of fact and conclusions of law based on the trial transcript. Second, the successor judge may consider the trial transcript as akin to "supporting affidavits" for summary judgment purposes and render judgment if no credibility determinations are required. Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir. 1988). Absent consent of the parties, a successor judge cannot make credibility determinations. Id.; see also Whalen v. Ford Motor Credit Co., 684 F.2d 272, 274 (4th Cir. 1982) (finding Rule 63 communicates a positive prohibition on substitution of a judge prior to verdict where all parties have not stipulated their consent).

This case does not fall within one of these exceptions. The parties did not consent to allow Judge Segars-Andrews to make findings of fact and conclusions of law based on the trial transcript. In fact, Judge Segars-Andrews specifically declined to review the transcript and make her own findings of fact and conclusions of law. Both exceptions require the successor judge to review the transcript. As this was not done, neither exception applies.

Accordingly, we are constrained to hold that Judge Segars-Andrews, in applying Rule 63, erred in concluding it was not necessary for her to review the transcript of the record before entering a final order. The order, in conflict with the law interpreting Rule 63, necessarily relies on credibility determinations which are prohibited by a successor judge unless the parties stipulate to the record and consent to have the successor judge make determinations based on

a review of the transcript. Therefore, we vacate Judge Segars-Andrews' order and remand to the family court.

Further, in light of our disposition as to Judge Segars-Andrews' order, we also vacate Judge Biggs' order addressing the second portion of the bifurcated trial. To the extent Judge Biggs relied on the findings contained in Judge Segars-Andrews' order in reaching his decision, the issue of whether the alimony award should be adjusted based on changed circumstances must be revisited. Further, Judge Biggs' order determines the award of attorney fees to the wife from both portions of the trial.

Accordingly, the orders of the family court are vacated and the case remanded to the family court.[6] We note, however, the parties may avoid a new trial by consenting on remand to a final order by the family court after review of the trial transcript.

VACATED AND REMANDED.

GOOLSBY and HUFF, JJ., concur.

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[6] In light of our disposition discussed herein, we need not address the parties' remaining issues on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Charles M. "Rickey" Stuckey, Jr.,

Appellant.

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 3404
Heard September 5, 2001 - Filed November 5, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia;

and Solicitor Jay E. Hodge, Jr., of Darlington, for respondent.

STILWELL, J.: In this consolidated appeal, Charles "Rickey" Stuckey, Jeffery Walls, Martin McIntosh, and Leroy Staton appeal their convictions for murder, kidnapping, first degree criminal sexual conduct (CSC), and criminal conspiracy, and Alfonzo Staton appeals his convictions for murder, kidnapping, and criminal conspiracy. Each appellant challenges the trial court's denial of his severance and directed verdict motions. Additionally, McIntosh argues the trial court erred in allowing the prosecutor to improperly comment on his silence during police questioning. In this opinion, we affirm the trial court's decision to try appellants jointly and affirm its denial of Stuckey's directed verdict motions.[1]

FACTUAL/PROCEDURAL HISTORY

Stuckey and his co-appellants were each indicted on charges of murder, kidnapping, first degree CSC, and criminal conspiracy. Appellants were tried jointly with Robert Graham, who was indicted for the same charges with the exception of murder.[2] The State presented the following evidence at trial.

State's Case

On the evening of November 12, 1994, Victim's sister picked her up to go shopping. Victim's car was inoperable, and she had hired Ringo Pearson to

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[1] We address the severance issue as it applies to all appellants in this opinion. Each of Stuckey's co-appellant's other issues are addressed in separate opinions.

[2] A number of other people were charged in connection with these crimes, including Ringo Pearson. Some of the other people charged, including certain State witnesses, pled guilty to various offenses.

repair it. Victim and Pearson were outside Victim's home talking when the sister arrived. Sister brought Victim home an hour or so later. The two were supposed to talk on the telephone at 10:00 p.m., but Victim never called and Sister's calls went unanswered. Victim's family attempted unsuccessfully to reach her throughout the evening, and after Victim failed to attend a planned event the next day, Sister called the police and filed a missing person's report.

Police discovered Victim's body floating in a creek near Burnt Factory Road on November 24, 1994. Her wrists and ankles were bound together behind her back with duct tape. With the exception of her forehead, part of her chin, and a small area at the tip of her nose, her face was entirely covered with duct tape which was wrapped around her head. Her pants were pulled down below her knees. Her body was bloated and in a state of decomposition. A preliminary identification was made based on the clothing Victim was last seen wearing, but the condition of the body prevented further visual identification. Police used fingerprints and palm prints to positively identify the body.

Doctor Sandra Conradi, who performed Victim's autopsy, concluded the cause of death was asphyxiation caused by encasement of Victim's head with duct tape. Victim could not breathe enough to remain alive despite a small opening in the duct tape near the tip of her nose because the tape was applied to her face so tightly that it severely compressed her nose. Doctor Conradi opined Victim died within minutes of having her face bound with duct tape, but could not completely rule out the possibility that she drowned because drowning is a difficult diagnosis to eliminate. Doctor Conradi testified she believed Victim died before she was placed in the creek, but did not offer any opinion as to how long she had been dead at that time. She did conclude, however, that Victim died several days before her autopsy and may have died as early as November 12. Doctor Conradi found no seminal fluid or injury in the genital area but explained the water and decomposition may have affected those findings.

The investigation led police to an abandoned house where Stuckey formerly lived. There officers discovered duct tape, Victim's prescription safety eyeglasses, and an earring matching one found on her body.

Officers approached Jeffery Walls' brother, Sam, asking him about duct tape. Sam told them he had a partial roll of duct tape underneath his car seat and, at their request, turned it over to them. At trial, Sam explained he obtained the tape from his mother's home, where Jeffery lived, to use on some electrical wires in the car. He testified that at the time of Victim's disappearance, Pearson was performing body work on his car. On cross-examination, however, Sam stated he did not take the tape out of his mother's home until after Pearson finished working on his car in late October or early November.

John Barron, a SLED expert in trace evidence analysis, testified the duct tape Sam Walls provided was identical in structure and composition to the tape removed from Victim's body and the tape discovered at the abandoned house. Upon further investigation, Barron discovered the tape was manufactured by an English company which does not directly market or sell it in the United States. The company sells the tape primarily in England, exporting only one percent of the total production to other European countries.

Dwayne Sloan's Testimony

Dwayne Sloan testified he spent the evening of November 11 and the morning of November 12 with his brother, Lee, and Ringo Pearson, Jeffery Walls, and Alfonzo Staton. Sloan left the group on the afternoon of the 12th to go to work at Burger King. He arrived early for his 4:00 p.m. shift. During Sloan's break, Jeffery Walls, Pearson, and Alfonzo came to the Burger King, Walls and Pearson arriving together and Alfonzo by himself. The group stood outside and talked for a few minutes. When Pearson decided to leave, Sloan and Alfonzo asked him where he and Walls were going. Pearson responded he was

"going to get [Victim[3]] to suck his d**k." Pearson and Walls then left together and Alfonzo left alone five or ten minutes later.

Sloan also testified that during a trip to North Carolina on November 29, Pearson confessed to killing Victim. On the trip, Pearson asked Sloan and Alfonzo whether the police had questioned either of them about a murder. When they both said they had not been questioned, Pearson stated the police did not have enough evidence to prove he committed the crime. He then recounted to them the following events: He and Victim, whose car he had worked on, had pulled alongside a dirt road and began having sex in the back seat. When Victim pulled away, Pearson slapped her and yelled at her. When she continued to resist, he tied her hands behind her back. Despite her pleas, Pearson drove down Burnt Factory Road and pushed her in the water.

Jeffrey Graham's Testimony

Jeffrey Graham testified about a visit Leroy Staton and Pearson made to the home he shared with his sister and father in November 1994. They wanted to see Jeffrey's sister and spoke with her in another room. Afterward, they invited Jeffrey to a party. In a statement to police, Jeffrey said Leroy and Pearson said somebody had a woman at the party and Leroy asked if he wanted to ride with them and "get a piece."[4] Jeffrey told Leroy and Pearson he was not going to the party. At a federal grand jury proceeding, Jeffrey explained when he was invited to come "get a piece," he understood that "they had a woman that everybody was going to do something [to]."

Jeffrey and Stuckey worked at a garage for Stuckey's dad, Mack Stuckey. Jeffrey told police that the day after he was invited to the party, he overheard Stuckey tell Mack and Joe Stuckey at the garage, "I want that bitch out of my

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[3] Pearson referred to Victim by her first name.

[4] Jeffrey denied telling police that Leroy invited him to "get a piece," but admitted the comments were included in his statement.

trailer." Mike Spears and Leroy were also there. Martin McIntosh was also present, but Jeffrey did not believe Martin could hear the conversation because he was outside at the time. The same day, Jeffrey rode with his cousin, Robert Graham ("Graham"), to the trailer where Graham and Stuckey lived. Jeffrey did not go inside, but saw Stuckey, Leroy, Alfonzo, and others in the yard drinking.

Danny Davis' Testimony

Danny Davis testified he went to a cookout at Graham and Stuckey's. Leroy, Stuckey, Graham, and others were present. When he went inside to get a beer he saw Victim lying on the couch. Her ankles and mouth were taped and her wrists were taped behind her back. He then returned to the cookout. When asked why he did not say anything about the woman to the others, Davis replied: "Because I didn't know what to think. I didn't know if it was a game or what was going on." After the food was cooked, Davis went home some seventy-five yards away while the others remained.

Davis returned to the trailer about dusk at Stuckey's invitation. Leroy, Alfonzo, Walls, McIntosh, and Pearson were at the party. Leroy, Stuckey, and Graham were inside the trailer. When he went to the bathroom, Davis saw Victim in the bedroom. She was on the bed and tied up in the same manner as before. About thirty minutes after Davis arrived, he and Robert Ransom, who also lived nearby and is disabled, asked Pearson for a ride home. Ransom and Davis were told to get in Pearson's car. Pearson and Stuckey then came from around the trailer with Victim, whose mouth, legs, and hands were still taped, and put her in the car. Walls also got in the car, and the group left. Instead of taking Ransom and Davis home, Pearson drove to an old abandoned house in the country where Stuckey previously lived. Stuckey and Pearson carried Victim onto the porch and placed her on a couch which they then carried inside the house. Ransom and Davis were then driven home.

The next evening, Davis met Stuckey and Pearson at Ransom's home. Stuckey said "we've got that girl and we've got to do something with her or all

of us are going to be in trouble." Ransom asked if Stuckey and Pearson would take him and Davis to get something to drink, and they agreed. Pearson left to get his car and returned a few minutes later with Leroy and Alfonzo. Stuckey, Davis, and Ransom got in the car and Pearson drove to an abandoned house. McIntosh and Walls were standing outside the house. Stuckey and Pearson went inside and brought Victim out. Her ankles were taped as before, but Davis noticed that instead of tape over only her mouth, "just about her whole head was taped up." Stuckey and Pearson "tote[d]" her to the car and placed her in the back seat with Ransom, Davis, Alfonzo, and Leroy. Walls also climbed in the back seat, and Pearson, Stuckey, and McIntosh sat in the front seat.

Davis testified Victim fell over on Ransom when she was placed in the car. Ransom asked Davis to pull her off him and Stuckey responded, "Bobby, you don't have to worry about her bothering you because she's already dead."[5] With everyone in the car, they drove to Burnt Factory Road. When they arrived at the creek, Victim was thrown in the water. Davis did not see who threw her in the water; he just heard a big splash.

Bobby Ransom's Testimony

Bobby Ransom testified Davis and Stuckey invited him to the cookout and pushed him to the trailer in his wheelchair. Graham, Pearson, Walls, Alfonzo, Leroy, and Betty Lou Caulder were outside the trailer cooking, drinking alcohol, and smoking marijuana and crack cocaine. When Ransom approached the others, Stuckey asked if he wanted to see "that 'ol gal" they had inside the trailer. Caulder and Stuckey helped Ransom into the trailer, where he saw Victim on the couch opposite the front door, bound with tape on her face and hands. She was alive and her eyes were open. Ransom recalled, "then I spoke up and told them that they needed to move that girl laying on that couch like that. And I was implicating it to Ricky Stuckey, but there was three or four in

[5] Davis testified at a prior hearing that Victim was not moving or breathing in the car.

there like I named while ago." Stuckey asked for and received help to move Victim to the back of the trailer.

Ransom eventually went home but returned later, at Stuckey and Davis' invitation, for a party. In addition to Davis and Stuckey, he saw Leroy, McIntosh, Walls, Pearson, Graham, and Caulder there. He was asked if he wanted to see Victim again. Several of the others helped him to the bedroom door. He saw Victim on the bed, bound as before. Then someone in the group touched Ransom and asked if he wanted "some," indicating he could have sex with her. Ransom began "shaking and bouncing" and asked to be taken back to his wheelchair.

Ransom returned to the party and later asked if someone could give him a ride home. When asked why he wanted to go home, he said "because everybody here is going to be in trouble with that girl there like that." He was then told to get in Pearson's car. Stuckey and some others were talking when Ransom added that Victim should never have been brought to the trailer and repeated his belief that all of the partygoers were going to be in trouble. He overheard Stuckey and two others talking about taking Victim to a house where Stuckey formerly lived. Davis agreed to go with Ransom to help him back inside his home and the two got in the car. Then two men walked Victim out of the trailer and put her in the car. Pearson, Stuckey, and Walls got in the car. Instead of taking Ransom home, they drove to an abandoned house where two of them placed Victim on a couch on the porch and carried her inside. Pearson, Stuckey, Walls, and Davis left her there alive, took Ransom home, and returned to the party.

The next night, Davis, Pearson, and Stuckey came to Ransom's home. Stuckey mentioned they still had Victim. Ransom suggested they turn her loose out in the country somewhere, maybe on Burnt Factory Road. Stuckey asked what they were going to do about her and then asked Pearson to go get the car. Ransom told Stuckey and Davis he thought they "were in a mess." Stuckey asked Ransom and Davis to ride with him and they got in the car with Pearson, who was driving, Alfonzo, and Leroy.

Pearson drove the group to the abandoned house where Victim was left the evening before. Ransom saw Walls and McIntosh coming out of the house onto the porch as they arrived. Some of the men got out of the car, had a discussion on the steps, and went inside the house. They emerged shortly thereafter, "toting" Victim, and put her in the backseat between Ransom and Davis. Everyone else got in the car and someone said they should go to Burnt Factory Road. Ransom would not look at Victim but at one point became agitated and exclaimed, "someone get this bitch from crying all over on me; I can't take it." Some of the others laughed at Ransom when Stuckey repeated his request. Stuckey told Davis to move Victim's head off Ransom, and he did. At trial, Ransom testified he thought at the time she was crying and talking. In retrospect he believed she was not, but that he "was just out of it."

Pearson drove them to a bridge by the creek. When they stopped, someone said "everybody get out." Ransom was the last one out, getting out of the car only after someone dragged Victim out by her feet. As he pulled himself up out of the car, he saw something hitting the water. He looked to see where everybody was and then realized it must have been Victim in the water.

Jerry Ward's Testimony

Finally, the State called Jerry Ward, who was in jail with Pearson and several of his co-defendants while they awaited trial. Ward testified he overheard Walls and Pearson arguing over which one of them had sex with Victim first. Stuckey, on the other hand, claimed he did not have sex with her but said he watched while Pearson did. When asked whether Stuckey and Walls ever told him how Victim "got tied up," Ward stated they told him that after Victim was taken to the abandoned house they returned with Pearson, who went inside and taped Victim up while they waited outside in the car. They said Pearson taped her up because she was making noises. Eventually, Victim's face was taped up, although Ward did not know when.[6]

[6] Ward's testimony is also unclear as to who taped Victim's face.

After the State rested, appellants and Graham moved for directed verdicts. The trial court denied each directed verdict motion.

Defense Cases

Stuckey called his girlfriend, Myra Bennett, who testified she never saw any girl tied up at his trailer. Stuckey testified he spent every day or every other night with Bennett in November of 1994. He further testified he and Pearson did not "hang out" after a falling out they had in late 1993 or early 1994. Stuckey admitted to having a cookout at his trailer. He denied having a girl taped up inside, however, and claimed he did not hear about Victim's murder until Pearson's arrest. Martin McIntosh, Leroy Staton, and Robert Graham also testified and offered witnesses in their defense. Jeffery Walls and Alfonzo Staton presented no evidence.

The jury found Leroy, Stuckey, Walls, and McIntosh guilty as charged; Alfonzo not guilty of CSC but guilty on the remaining charges; and Graham guilty only of criminal conspiracy. The trial court sentenced each to life imprisonment for murder and five concurrent years for conspiracy. Graham also received a five year sentence for conspiracy. Each appellant convicted of CSC received a consecutive thirty year sentence. Because each appellant was convicted and sentenced for murder, the trial court declined to impose any sentence for the kidnapping conviction in compliance with South Carolina Code Ann. § 16-3-910 (Supp. 2000). This appeal follows.

LAW/ANALYSIS

Appellants argue the trial court abused its discretion in refusing their requests for separate trials. We find no error.

I. Severance

Motions for severance are addressed to the discretion of the trial court. State v. Nichols, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). "A severance

should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, Op. No. 25348 (S.C. Sup. Ct. filed Aug. 27, 2001) (Shearouse Adv. Sh. No. 31 at 39, 42) (emphasis removed). "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." Id. "An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." Id. (citing People v. Greenberger, 68 Cal. Rptr. 2d 61, 86 (Cal. App. 1997)); see also State v. Dennis, 337 S.C. 275, 281-82, 523 S.E.2d 173, 176 (1999) (the denial of a severance motion will not be reversed absent an abuse of discretion and a showing of resulting prejudice). Furthermore, as murder co-defendants, appellants were not entitled to separate trials by right. State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998).

First, we reject the argument asserted by several of the appellants that the joint trial resulted in a "spill-over effect" from evidence admitted against other co-defendants. Because the State alleged the men conspired and acted in concert to commit the substantive crimes charged, all of the State's evidence admitted in their joint trial would have been admissible against each of them if they had been granted separate trials. See State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993) (noting the State is granted great latitude in introducing circumstantial evidence of a conspiracy from its commencement to its conclusion and that substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the conspiracy's existence, object, and scope); State v. Mikell, 257 S.C. 315, 324, 185 S.E.2d 814, 817-18 (1971) (acts and statements of a co-conspirator made in furtherance and during a conspiracy are admissible to prove the existence of a conspiracy); Rule 801(d)(2)(E), SCRE (statements of a co-conspirator during the course of and in furtherance of the conspiracy are by definition not hearsay). Indeed, had the court granted the motions, the result would have been multiple presentations of the State's entire case, including the lengthy testimony of the two primary witnesses, Davis and Ransom.

Appellants also contend their joint trial caused confusion and permitted the jury to consider the guilt of each individual in a vague way. Essentially, appellants argue the jury could not distinguish between the individual defendants in reaching its numerous verdicts. However, the trial court repeatedly instructed the jury to consider the evidence separately as to each defendant. Our supreme court has previously held such cautionary instructions "may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." State v. Dennis, 337 S.C. at 280, 523 S.E.2d at 176; see also State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973) (holding trial court's cautionary instructions to the jury in a joint trial "protected the rights of each individual appellant . . . ."). The jury obviously followed these instructions, as its return of twenty guilty verdicts and three not guilty verdicts demonstrates it was able to make the very distinctions appellants claim impossible.

In summary, no appellant points to a specific trial right which was violated by the joint trial. The appellants have also failed to demonstrate their joint trial prevented the jury from making a reliable judgment on any one defendant's guilt. Thus, because none of the appellants have shown that a separate trial would have resulted in a more favorable result, we affirm the trial court's decision to proceed with a joint trial.

II. Directed Verdict

Stuckey contends the trial court erred in refusing to grant a directed verdict in his favor on each of the charges against him. As to the substantive charges, Stuckey does not dispute that these crimes occurred, but rather that the State failed to establish his legal culpability in them. We disagree.

In ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not with its weight. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). The court should grant the motion if the evidence "merely raises a suspicion that the accused is guilty." State v. Ballington, 346 S.C. 262, ___, 551 S.E.2d 280, 285 (Ct. App. 2001),

petition for cert. filed (Sept. 21, 2001); see also State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). However, the court should deny the motion and submit the case to the jury if there is "any direct evidence or substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly or logically deduced." Fennell, 340 S.C. at 270, 531 S.E.2d at 514. On review of the denial of a motion for a directed verdict, this court must view the evidence in the light most favorable to the State and if there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the accused's guilt, we must find the trial court properly submitted the case to the jury. Id.

Viewing the evidence in the light most favorable to the State, and without passing on its weight, we find no error in the trial court's decision to submit Stuckey's entire case to the jury.[7]

A. Kidnapping

Kidnapping occurs when a person unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away any other person by any means without authority of the law. S.C. Code Ann. § 16-3-910 (Supp. 2000). Kidnapping is a continuing offense, which "commences when one is wrongfully deprived of freedom and continues until freedom is restored." State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999).

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[7] Stuckey and his co-defendants challenged Davis' and Ransom's credibility as well as the accuracy of their accounts. The appellants, including Stuckey, have maintained this challenge to this court. Because we consider only the existence of evidence in reviewing the denial of a directed verdict, however, witness credibility is not a proper inquiry for our consideration. Id. (upon review of the denial of a directed verdict, the appellate court must consider the existence of evidence rather than its weight); State v. Scott, 330 S.C. 125, 131 n.4, 497 S.E.2d 735, 738 n.4 (Ct. App. 1998) (on appeal from the denial of a directed verdict, issues of witness credibility are solely for the jury, not the appellate court).

Although the evidence presented does not establish whether Stuckey participated in Victim's initial seizure or confinement, the State offered ample evidence that he participated in her ongoing kidnapping, which lasted until the time of her death. State v. Jefferies, 316 S.C. 13, 23 n.12, 446 S.E.2d 427, 433 n.12 (1994) (noting "'kidnapping is a continuing offense as long as the kidnapped person is deprived of his freedom'") (citation omitted). Ward, Stuckey's fellow inmate, testified Stuckey admitted watching Pearson have sex with Victim while she was kidnapped. At some point after she was initially abducted, Victim was taken to Stuckey's trailer, where she was held bound and gagged. Stuckey held a cookout and party while she was held there and invited Ransom to come inside and look at her. When Ransom expressed concern about her being on the couch directly across from the front door, Stuckey instructed others to move her to the bedroom, which was better hidden from view. Davis testified Stuckey, along with Pearson, moved her from the trailer to the abandoned house, where she was left. While in jail awaiting trial, Stuckey and Walls admitted to Ward they later returned to the house with Pearson and waited while he taped Victim up some more to prevent her from making noises. Finally, Stuckey returned to the house with the others and, together with Pearson, personally went inside and retrieved Victim. They then laid her in the car and drove her to the creek.

Though it is contradicted by other evidence, Ransom's statement about Victim crying on him during the car ride to the creek constitutes direct evidence she was alive during at least part of that journey.[8]

Because this evidence reasonably tends to prove Stuckey actively participated in Victim's ongoing kidnapping, the trial court properly denied his directed verdict motion on this charge.

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[8] Direct evidence is "evidence based on actual knowledge and proves a fact without inference or presumption." State v. Salisbury, 343 S.C. 520, 524 n.1, 541 S.E.2d 247, 248-49 n.1 (2001). Circumstantial evidence "immediately establishes collateral facts from which the main fact may be inferred, and is typically characterized by inference or presumption." Id.

First Degree Criminal Sexual Conduct

Any person who commits a sexual battery upon a victim is guilty of criminal sexual conduct if one or more of the following circumstances are present:

(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

(c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

S.C. Code Ann. § 16-3-652(1) (Supp. 2000).

The evidence also supports the trial court's refusal to grant Stuckey a directed verdict on the CSC charge. According to Ward's testimony, Stuckey admitted he watched Pearson sexually assault Victim while she was kidnapped. Stuckey held a party at his home where Victim was being held and at least once invited Ransom to come look at her. Later, he either invited Ransom to have sex with her or stood by as others did. The evidence reveals Stuckey orchestrated or at minimum permitted others to hold Victim at his home as a sex-slave to partygoers and friends. Although the State presented no evidence Stuckey personally sexually assaulted Victim, the trial court properly submitted this charge to the jury because the State introduced sufficient evidence he either aided and abetted others in sexually assaulting Victim or that he joined with

others to commit the same. See State v. Burdette, 335 S.C. 34, 45, 515 S.E.2d 525, 531 (1999) (holding that any person, who aids, abets, and encourages another in and is present during the commission of a crime is guilty as a principal); S.C. Code Ann. § 16-1-40 (Supp. 2000) ("A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and upon conviction, must be punished in the manner prescribed for the punishment of the principal felon."); State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999) (holding that under the "hand of one, the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.").

Murder

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (1985). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

The State also presented sufficient evidence to allow Stuckey's murder charge to go to the jury. Stuckey told others at the garage he wanted "that bitch" out of his trailer. The evening after he and Pearson took Victim, alive, to the abandoned house, Stuckey told Ransom and Davis that they still had Victim and needed to do something with her or they were all "going to be in trouble." When they returned to the house that evening, Pearson and Stuckey went inside. When they brought her out, her face was completely bound with duct tape. Stuckey's statement to Ransom that he did not have to worry about Victim bothering him because she was already dead indicates he knew she could not breathe with the duct tape applied so tightly to her face. The evidence concerning Stuckey's actions and words constitutes substantial evidence that he participated in Victim's murder, combined with others to murder her, or aided and abetted one or more persons in murdering her. See Burdette, 335 S.C. at 45, 515 S.E.2d at 531(aiding and abetting); Langley, 334 S.C. at 548, 515 S.E.2d at

101 (hand of one, the hand of all). The trial court properly denied Stuckey's motion for a directed verdict on this charge.

Criminal Conspiracy

Conspiracy is the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (Supp. 2000); see also State v. Gunn, 313 S.C. 124, 133-34, 437 S.E.2d 75, 80 (1993). The gravamen of conspiracy is an agreement or combination. Id. at 134, 437 S.E.2d at 80. However, a formal agreement is not necessary to establish a conspiracy, as the conspiracy may be proven by "circumstantial evidence and the conduct of the parties." State v. Bultron, 318 S.C. 323, 334, 457 S.E.2d 616, 622 (Ct. App. 1995); see State v. Mouzon, 321 S.C. 27, 32, 467 S.E.2d 122, 125 (Ct. App. 1995) (the substantive crimes themselves constitute circumstantial evidence of the existence, scope, and object of the conspiracy). "'What is needed is proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged.'" Gunn, 313 S.C. at 134, 437 S.E.2d at 80-81 (quoting United States v. Evans, 970 F.2d 663 (10th Cir. 1992)).

The evidence of Stuckey's participation in these substantive crimes with Pearson, the other appellants, and others, combined with his own words about Victim, are more than sufficient evidence of his guilt on the conspiracy charge. State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993) (conspiracy does not require overt acts but may be proven by overt acts done in furtherance of the conspiracy, including commission of the substantive crimes).

CONCLUSION

The trial court did not abuse its discretion in refusing to grant appellants' motions for separate trials. The court also properly refused to grant Stuckey's directed verdict motions. Accordingly, his convictions are

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.